THE

LAW OF CREEDS

IN SCOTLAND

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A TREATISE

ON

THE LEGAL RELATION OF CHURCHES IN SCOTLAND
ESTABLISHED AND NOT ESTABLISHED, TO
THEIR DOCTRINAL CONFESSIONS

BY

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PREFACE.

THIS is not a book of Church law, but of the civil law of Scotland; and of that law only in so far as it affects or controls Churches in the matter of their creed. Yet the subject is not a small or poor one. Hitherto Churches have made much of their doctrines, and Scottish Churches above others. And law has had much to do with both.

Exactly three hundred years have passed since the Reformed Church was acknowledged by the nation in 1567; and our immobility in respect of doctrine during these centuries has been the subject of much unreasonable self-complacency, and much undeserved reproach. But the past is past. That an absolute immobility is to reign in the future, is what few wise men desire, and what no man, whether wise or foolish, expects. And if we are now entering upon a period of flux and change, it may be a useful thing for theologians, or for those who believe in a higher guidance than that of theology, to have in an accessible form the legal facts and doc-

trines — statutes, principles, and precedents — which limit or regulate from without the power of reconstruction.

That the law of Scotland has had much to do with the Creed of the Established Church is well known; and the first part of the volume is devoted to this subject. That it has, or may have, a very serious bearing upon the connection even of Non-established Churches with their creeds, has been less generally considered; and the latter half of this publication is believed to be the first attempt to present this difficult subject in one view. The Author thought that it might be appropriate to consider these cognate questions together; and in executing his task he has found that to do so is even necessary. The second part of the volume would be unintelligible without the historical foundation of the first; and the first part would be incomplete without the deeper questions touched upon in the second.

On both sides, it is hoped that the mere compilation may be found useful to lawyers and the public. To each chapter is added an Appendix—of Statutes, Acts of Assembly, Articles of Faith, Legal Decisions, Judges' Speeches, and illustrative documents generally. By these even an unprofessional reader may test most of the statements in the text; and lawyers will be able to study the points more at large in the authorised Reports quoted or referred to. An Index of Subjects, of Statutes, and of Cases is added.

In presenting the book to his profession, the Author trusts that its many imperfections of treatment may be atoned for by the endeavour to collect into one view some useful but scattered law, and by the honest desire to lay bare important questions with which the Judges and the Bar of Scotland must yet have to deal. But the subject branches on both sides into theology and history, regions in which he feels himself even more deficient than in the matter of law. To the many accomplished students of Scottish history he has to apologise for too recent an acquaintance with a field now so admirably laboured. In theology every legal writer is compelled to deal with a subject of inexhaustible freshness and life in a merely verbal way, and to handle the heart of things without tenderness, and therefore without truth. But it would have been desirable that one approaching a science of so majestic a range should at least have had some scientific acquaintance with it, or some special training. Failing this, all that can be done is to put the necessary questions, and leave it to theologians to answer them.

In the prosecution of his work the Author has received courtesies and kindnesses from so many quarters that the amount of his indebtedness must prevent any detailed or discriminating acknowledgment of it. He hopes to remember what he does not record. But among divines he must expressly return thanks to Principal Candlish, Dean Ramsay,

and Mr Charteris; who, while none of them is responsible for any position or statement contained in the book, have in different ways laid the Author under great obligations.

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LAW OF CREEDS IN SCOTLAND.

CHAPTER I.

THE SCOTTISH CONFESSION. 1560 AND 1567.

THERE are many reasons why the legal relation of Scottish Churches to their creeds should be looked at, in the first instance, historically.

The creed of the Established Church at present is the Confession of Faith, originally compiled by the Assembly of Divines which met at Westminster in 1643; and the legal connection between them may be said chiefly to depend upon two Acts of King William and Queen Mary, one of which ratifies it as the public Confession of the Church, while the other appoints that its ministers and preachers shall subscribe it as the confession of their faith. But the administration of the creed, which is thus made the standard of doctrine, is left in the hands of the Church by a long series of legislative acts and judicial interpretations, which extend from the Reformation to the present day, and the more important of which are closely connected with historical changes and revolutions. All questions, therefore, as to the limits and civil effects of this administrative power will be best approached by a know-

ledge of the historical process which subjects the Church to its present conditions; and especially of the successive Acts of Parliament as to religion, which hold a place of undisputed precedence in our Statute-book, earlier even than the date of the first recognition of the Church—now exactly three hundred years ago.

But the Confession framed at Westminster was not the original creed of the Scottish Church. Our native creed is the Scottish Confession, which appears in the creeds of the Reformation, of date 1560, when it was drawn up by John Knox and his compeers. And the Westminster Confession, which only became the law of the land by the statute of 1690, was made the law of the Church forty-three years earlier, by an Act of Assembly—an Act, too, by which the Confession was adopted under certain explanations and conditions, which the statute presently binding the Church has rejected or ignored. These circumstances remind us that our subject has a close connection with that three hundred years' debate between statesmen and men of the Church, on the point of ecclesiastical independence, which forms so great a part of the history of Scotland. And before we arrive at the second portion of our volume, and inquire into the legal relations of Churches not established to the creeds which they have voluntarily taken up, we shall be called upon to consider whether the attitude of the historical Church party in times past throws any light upon their present relation to their creed, now that the final decision of 1843 has rooted them out of the Establishment. The matter will be found so doubtful as to need all the historical illustration it can receive. The question how far the Established Church is tied to its creed, is a simple and easy one compared with the question how far the Free Church or the United Presbyterian Church is so tied. Nor is the question peculiar to those Presbyterian bodies which, with or without Voluntaryism, claim to stand on the ground of Church independence mapped out for them by Andrew

Melville, and whose leaders, after the bitter controversy of the earlier part of this century, are now, in the irony of Providence, negotiating for incorporation. It applies specially to bodies such as the Scottish Episcopal Church, and to all who cherish the idea of Church authority and jurisdiction. How far, at common law, can they vary their creed? The question comes up when civil rights are involved; and the tenures of churches and the execution of trusts make it necessary for law to give an answer. The rule of law is, that the property shall follow the principles to which it is devoted, and the Court will prevent its being diverted:—but what if one of these principles be that the Church shall have a right to *change* its principles or improve its creed? In humbly collecting and collating the series of judicial decisions on this point, and in afterwards indicating what the authoritative documents of the non-Established Scotch Churches are, it will be found an advantage to have first gone over the ancient ground where almost all of these bodies find a common origin. And if the Established Church is relieved from this most embarrassing legal question by the narrow limits of its legislative power, the difficulty is only transferred to the higher platform of the Legislature. The Treaty of Union in 1707, confirming the Revolution Settlement in favour of Presbytery and the Confession of Faith, stipulates with the most solemn reiteration that its provisions shall remain and continue unalterable, and that their being observed "without any alteration thereof or derogation thereto, in any sort for ever," shall be a fundamental and essential condition of the Union: a provision which raises at once the whole question of the right of one generation to bind its successors in matters of religion, and reveals another of the constitutional questions surrounding and shadowing those legal problems which we propose rather to discuss.

THE CREED of Scotland and the Church of Scotland emerge into history so nearly at the same moment,[1] that it is difficult to say which has precedence even in order of time. It is at least equally difficult to say which is first in respect

[1] Whatever the Christian or the statesman may do, it does not seem practicable for the lawyer to go farther back than the Reformation in dealing with the history of the Scottish Church. The Scottish Reformers, indeed, like all others in Europe, acknowledged Roman Catholic baptism as valid; and this seems, on their own principles, to imply a visible Church of some kind previously subsisting in the country. So, too, the statute introducing the Scottish Confession abolishes many Acts of Parliament in the reigns of the first five Jameses, as having given occasion to the maintenance of "idolatry and superstition *within the Kirk of God*, and repressing of such persons as were professors of God's holy Word, wherethrough divers innocents did suffer;" and the phrase of the times, a "Re-formation" of religion, or a new "face" of religion, might carry a similar interpretation. (Knox, in a well-known and eloquent passage of his History, declares the object of all his efforts to have been, "That the reverend face of the primitive and apostolic Kirk should be reduced again to the eyes and knowledge of men.") But, on the other hand, the Acts declaring the new Church of "the blessed Evangel" to be the "only true and holy Church of Christ within the realm" (1567); and again, that there is "*no other* face of Church nor other face of religion than is presently by the favour of God established within this realm" (1579), are very express. No doubt this must not be pushed too far; for the "Church of the Evangel" held communion with the other Churches of the Reformation, whose doctrine and discipline, though similar, was not identical with its own; and our later legislation expresses this. A question might therefore conceivably be raised whether, now that the Revolution Settlement and the doctrine of toleration have intervened, these ancient statutes wholly exclude from the recognition of our law Dissenting Churches similar in doctrine to the Church of Scotland, or differing from it only in such a point as the practice of a moderate Episcopacy. But there can be no question as to the deadly opposition between all our statute-law since the Reformation, whether of an earlier or later date, and the Higher Church doctrine which would make either Episcopacy, or what the Scottish Confession calls "lineal descence," *essential* to a Church of Christ; and, of course, between it and that absolute and centralised form of the doctrine embodied in the Church of Rome. So, while the Reformation statutes ignore any previous Church of Scotland, they do not ignore but denounce the visible Catholic Church of Rome; and throughout our law the relation between the "Kirk" acknowledged before 1560 and that acknowledged after, is one of the sharpest contrast. In the Scottish Confession (1560) the Romish Church is alluded to very unmistakably as "the Church malignant;" while even that of Westminster, after declaring that some Churches have so degenerated as to become mere synagogues of Satan, pronounces the Pope to be Antichrist. (See on this subject Lord Medwyn's speech in the case of Cuninghame *v.* The Presbytery of Irvine; Report of the Stewarton case, p. 17.) We can therefore derive no advantage in

of authority; and, indeed, the question whether the Church is founded upon the creed or the creed upon the Church, appears to be at the root of most of the legal difficulties that lie before us.

The Church of Scotland was recognised or established by the State in 1567; but the Scottish Confession of Faith dates from 1560, in which year also the first General Assembly was held. For the origin of the Reformed Church, however, we have to go back several years earlier, to the December of 1557, when the leading men of the new persuasion signed what was called the "First Covenant," or common bond. The subscribers to this document, on a preface of attacks being made upon "the Evangel of Christ and His congregation," promise "before the majesty of God and His congregation," to maintain, nourish, and defend "the whole congregation of Christ, and every member thereof," to the death; "unto the

our inquiries from the Pre-Reformation statutes as to "the libertie of Holy Kirk" (1424, c. 1; 1424, c. 26; 1443, c. 7; 1466, c. 1; 1489, c. 7; 1515, c. 1; 1535, c. 9; 1535, c. 36; 1551, c. 7; 1551, c. 18); for the external or visible institute that is meant by the Kirk in all these is rejected by succeeding legislation in the most violent way. (The Statute 1571, c. 35, it must be admitted, reads ambiguously).

How the Reformers speak of a Church (invisible) in Scotland before the Reformation may be gathered from the following extract from the Harmony of the Protestant Confessions, where (in the year 1581) the Churches of France and Belgia comment on a statement by the sister Church of Bohemia. (It will be remembered that the "doctrine of the Reformed Churches" is imported into our law by the Act 1690, c. 5; and that our Scottish Confessions are rather more strongly anti-Romanist than those uttered abroad.) There are places, they say, where "it cannot safely be affirmed that the visible Church of Christ is to be seen, or is at all. And yet, notwithstanding, there is no doubt to be made, but some secret true members of Christ, and such as (it may be) are only known to God, be there hid; and therefore that there is a Church even in Popery, as it were, overwhelmed and drowned; whence God will fetch out His elect, and gather them to the visible Churches that are restored and *reformed*, whereas Popery never was, nor is, a true Church."—Harmony of Protestant Confessions, translated from the Latin: London, 1842.

Whether, theologically, they were not bound also to have acknowledged a Church *visible* within, or in some way connected with, the old Romish Church, it is unnecessary to inquire. The legislation which we are about to trace is pure from any such admission.

which holy Word and congregation we do join us, and also do renounce and forsake the congregation of Satan, with all the superstitious abominations and idolatries thereof." Henceforth the name Congregation[1] (by no means a worse rendering of the Scriptural *ecclesia* than the subsequent κυριακόν or kirk) was the distinctive name of those who held themselves to be the only "professors of the religion" or "of the truth" in Scotland; and their leaders are known in history as the "Lords of the Congregation." The first thing they did after being thus associated was to pass a remarkable ordinance as to the order of worship "in all the parishes of this realm," the much greater part of which was still Romish, so that the ordinance took no effect out of their own particular territories; and a year after they protested to the Queen Regent (Mary of Guise) and Parliament, "Seeing we cannot obtain ane just Reformation, according to God's Word, that it be lawful to us *to use ourselves* in matters of religion and conscience, as we must answer unto God, unto such time as our adversaries be able to prove themselves the true ministers of Christ's Church"—a prayer to "God's lieutenant" for what they call "indifference" which is rare in Scottish history,[2] and which the Queen Regent was at that time disposed to grant. Next year, 1559, a rupture took place, and we find letters and manifestoes to "the nobilitie of Scotland from the congregation of Christ Jesus within the same," as well as a much less civil and very menacing one to the "generation of Antichrist within Scotland." A second covenant or bond was made on the 31st of May of this year by "the congregation of the west country with the congregation of Fyfe, Perth, Dundee, Angus, Mearns, and Montrose, being convened in the town of Perth in the

[1] "The visible Church of Christ is a congregation of faithful men."—Nineteenth Article of the Church of England.

[2] Knox, looking back on this early time, says, "We offered due obedience to the authority, requiring nothing but the liberty of conscience, and our religion and fact to be tried by the Word of God."—Knox, i. 313. The references to Knox's Works in this volume are to Dr Laing's edition, in six volumes: Edinburgh, 1846.

name of Jesus Christ for forthsetting of His glory, understanding nothing more necessary for the same than to keep a constant amity, unity, and fellowship together." And three months after a third bond, with the more special object of defence, was signed at Stirling, while a public proclamation was made "to the nobility, burgesses, and commonalty of this realm of Scotland" from "the lord barons and others, brethren of the Christian congregation."[1]

The various "congregations" which belonged to the "congregation of Christ" in Scotland, seem at first to have used the liturgy of King Edward VI., which was the Book of Common Prayer referred to in the ordinance of the Lords of the Congregation just mentioned.[2] It included the Apostles' Creed, and when published in England in 1552, was followed in 1553 by King Edward's Catechism, "containing the sum of Christian learning" in the form of articles of religion, as well as of question and answer.[3] But this must have been very soon superseded by the "Order of Geneva," containing the Confession of Faith of the English congregation there, which had been presided over by Knox. This short Confession is said to have been "approved of by our Church" before 1560,[4] and was certainly used in it both before and after that time. But there is no record of any formal approval of any Confession (the ordinance as to worship being the nearest approach to it), until the death of the Queen Regent, and the calling of the Parliament of 1560, brought the nation to the great crisis of its history.[5]

[1] Knox, Calderwood, Spottiswoode, Keith, &c.

[2] Knox, i. 275, and vi. 277.

[3] Liturgies of King Edward VI. (Parker Society), 485.

[4] "Before this Book of Common Order is set down the Confession of the English Church at Geneva, which was approved by our Reformed Kirk, before this other Confession of our Kirk was ratified at this last Parliament."—Calderwood's History (folio), 25.

[5] Indeed, while the Church was in the state long after described by Knox, "when as yet there was no public face of a Kirk, nor open assemblies, but secret and privie conventions in houses or in the fields," public adoption of a Confession was hardly to be expected. If formally adopted at all, then it must have been for local

The Parliament of 1560—by far the most important which has ever sat in Scotland—contained a "great assembly,"[1] chiefly of the lesser barons; but being without royal authority, its legality was always impugned, and required the express ratification of a subsequent Act. That Act (the third of the first Parliament of James I., 1567) is the first in the usual editions of our Statute-book which refers to and embodies the Confession of Faith; but it does so in the following retrospective form: "Ratifies and approves the Act underwritten, made in the Parliament holden at Edinburgh the 24th day of August, the year of God 1560 years; and *of new* in this present Parliament, statutes and ordains the *said Act* to be as a perpetual law to all our sovereign lords and lieges in all times coming. Of the which the tenor follows." We are thus thrown back to the year 1560, and to the great document of that year, which is described in our Statute-book, in words every clause of which deserves to be carefully weighed, as "The Confession of the Faith and Doctrines believed and professed by the Protestants of Scotland, exhibited to the Estates of the same in Parliament, and by their public votes authorised as a doctrine grounded upon the infallible Word of God." The history of the transaction, in so far as it has been preserved, seems in accordance with each part of this terse description. A "Supplication" was presented to the Estates from "the barons, gentlemen, burgesses, and others, subjects of this realm, professing the Lord Jesus within the same," the first prayer of which was the abolishing of "such doctrine and idolatry as by God's Word are both condemned;" and in response to this "were the barons and ministers called

purposes, as elders and deacons were carefully and formally appointed.—Knox, ii. 151. And whatever was the case afterwards, the "gude and godly ballate" entitled 'The wind blaws cauld,' in all probability gives the true account of the confession of its authors in the earliest times—

"Wha does present the New Testament,
Which is our faith surely,
Priests calls him like ane heretick,
And says, 'Burnt shall he be.'"

[1] Knox.—The names of those who sat in it are to be found in Bishop Keith's History, i. 311.

and commandment given unto them, to draw in plain and several heads the sum of that doctrine which they would maintain, and would desire that present Parliament to establish as wholesome, true, and only necessary to be believed within the realm: which they willingly accepted, and in four days presented this Confession," says Knox, who undoubtedly was its principal author.[1] Yet either within this short period, or immediately after, it was subjected to at least one revision. "This our Confession," says Knox (for it was the Confession of the "Protestants within the realm of Scotland," presented to the Estates, and might have been rejected by the latter instead of being accepted), "was publicly read, first in audience of the Lords of the Articles,[2] and *after* in audience of the haill

[1] Our only information as to the compilers of the Confession seems to be Knox's statement with regard to the Book of Discipline. "Commission and charge was given to Mr John Winram, sub-prior of St Andrews, Mr John Spottiswoode, Johne Willok, Mr Johne Douglas, rector of St Andrews, Mr Johne Row, and Johne Knox, to draw in a volume the policy and discipline of the Kirk, *as well as they had done the doctrine.*"—Knox, ii. 128.

[2] The Parliament was summoned for the 10th of July, and (as the Act 1581 c. 115 informs us) was continued to the 1st of August; but "few or no lords" attended till the 8th, and Maitland says that it began, and that the Lords of the Articles were chosen, on the latter day, when he as chairman doubtless made his oration. The supplication might be presented shortly after; and the Lords of the Articles passed the Confession on the 14th. Randolph writes to Sir W. Cecil on the 15th as follows:—

"Mr Knox and Mr Wyllockes were yesterdaye before the Lordes of the Articles, with the Bishoppes. St Andrews desyered to have a coppie of the Confession of their Faythe. Yt was not denied hym to have yt shortly, thoughe yt be dowted that yt be to sende yt into France, before the Lordes do sende, then that he hathe any mynde t'examen the veritie or reforme hys consciencs, be yt never so resonable. Beinge but yesterdaye concluded, yt was not possible to send your honour a coppie thereof so soone. Forasmuche as yt is purposed shortly to sende them unto you, with whatsomever shallbe more resolved upon, I do also for thys tyme tayke my leave.

"Wrytten at Edenbourge, the xvth [of August], at viij of the clocke in the mornynge, 1560."

Maitland himself wrote Cecil on the same day:—

"There is sensyne already past the Confession off our Fayth, by ane uniforme consent off the haill Lords off Articles, and to be sent to the King and Quene, whereoff within these three or four dayes I shall send you the copy. The whole estait off the clergy is on our syde, a few excepted off them that be present, as the Archebishop of St Andrews, the Bishopes off Dumblane and Dunkeld. The religion is lyke aneugh to fynd mony favourers off the whole off all estates."—Knox, vi. 114, 115.

Parliament." Randolph, the envoy in Edinburgh of Queen Elizabeth, informs us that, "before it was published or many words spoken of it, it was presented unto certain of the Lords to see their judgments. It was committed unto the Laird of Lydington and the sub-prior to be examined." Maitland of Lethington, an able statesman, and afterwards as Secretary of State the clear-headed opponent of Knox, was speaker of this Parliament, which he had opened with a "harangue;" and the remit to him and Wynram, the sub-prior of the Augustinian convent at St Andrews, was doubtless made by their brethren, the other Lords of the Articles. Whether their revision resulted in the suppressing of a whole chapter on the duty of obeying or disobeying magistrates (Mr Tytler alleges this), seems very doubtful; but as Randolph, in a most interesting letter quoted below, positively states that, without interfering with the doctrine, they "mitigated the austerity of many words and sentences,"[1] it is probable that the alterations on this particular portion were considerable.[2] Knox says nothing of this whole matter of revision, merely saying that within four days from the time the commission was given, they (the

[1] "If my poore advice myght have bene harde touching the Confession of the Faythe, yt sholde not so soone have come into the lyghte. God hathe sent it better success for the confirmation thereof then was looked for. It passed men's expectatione to see it passed in such sorte as yt dyd. Before that yt was published, or maynie wordis spoken of yt, yt was presented unto certayne of the Lords to see their judgements. It was commytted unto the Laird of Lydington and the subprior to be examined. Thought theie coulde not reprove the doctrine, yet dyd theie mitigate the austeritie of maynie words and sentences which sounded to proceede reather of some evil conceaved opinion, then of anie sounde judgement. The autor of thys worke had also put in this treatie a tytle or chapitar of the obediens or dysobediens that subjects owe unto ther magistrates. It contayned lyttle les matter in fewe wordes then hathe bene otherwyse written more at large. The surveyors of thys worke thought it to be an unfit matter to be intreated at thys tyme, and so gave their advice to leave it owte."—Knox, vi. 120, 121.

[2] "It was no doubt owing to the recommendation of Lethington and Winram that the chapter in the Confession on the civil magistrate was drawn up in the language finally adopted—language which gives no encouragement to the political theories of the school of Knox and Goodman."—Grub's Ecclesiastical History of Scotland, ii. 91.

barons and ministers) "presented the Confession as it followeth without alteration of any one sentence."

The account of the public reading, "in audience of Parliament," on Saturday the 17th August 1560, is exceedingly interesting; and the graphic description given by the chief actor in the scene is countersigned by the private letters of the sagacious English envoy, now given to the world.[1]

[1] Randolph sends a copy of the Confession, which is still in the State Paper Office, to Cecil on the 19th August, with the following account of this extraordinary legislative scene: "I never harde matters of so great importance, nether soner dispatched, nor with better will agreed unto. The matters concluded and past by common consent upon Saturday last in such solemne sort, at the firste daye that thei assembled, are these: Firste, That the barons, accordinge to ane old Acte of Parliment, made in James's tyme the fyrste, the yeare of God 1427, shall have free voice in Parliment. This Acte passed without anie contradictioun, as well of the bishopes Papysts, as all other present. The nexte was the ratification of the Confession of their Fayth, in the which the Bishope of St Andrews, in maynie words saide this in effecte, That was a matter he had not byne accustomed with; he had had no sufficient tyme to examin yt, or to confer with his friends; howbeit as he yet will not utterly condemn it, so was he lothe to give his consent thereunto. To that effect also spoke the Bishops of Dunkell and Dumblane. Of the temporall lords the Earle of Cassiles and the Earle of Caithness said, Noe. The rest of the lords, with common consent, and as glad a will as ever I heard men speake, allowed the same. Dyvers with protestation of their consciens and faythe, desyred rather presently to end their lyves than ever to thinke contrarie unto that that allowed ther. Maynie also offereit to shede ther blude in defence of the same. The olde Lord of Lyndsay, as grave and goodly a man as ever I sawe, sayd, I have lived manie yeres; I am the oldeste in thys companye of my sorte; now that yt hath pleased God to lett me see this daye, wher so manie nobles and other have allowed so worthie a work, I will say with Simion, *Nunc dimittis*. The olde Larde of Lundie confessed howe longe he had lived in blindnes, repented his former lyf, and imbrased the same as his trewe beleive. My Lord James, after some other purpose, saide, that he muste the sonner beleeve yt to be trewe, for yit some other in the compagnie did not allowe the same, he knew that Goddes truthe wolde never be without his adversaries. The Lord Marshall saide, thoughe he were otherwyse assured that yt was trewe, yit might he be the bolder to pronounce yt, for that he sawe ther present the pyllars of the Pope's Church, and not one of them that wolde speake agaynste yt. Maynie other to lyke effect; as the Laird of Erskin, Laird of Newbottle, the Sub-Prior of Andrews, concludinge all in one that that was the faythe wherin thei ought to lyve and die."—Knox, vi. 116-118.

Next day the Archbishop of St Andrews, the head of the Papal party in Scotland, wrote to the Archbishop of Glasgow, then in Paris, "All men, for the most part, has made in Parlia-

"This our Confession was publicly read, first in audience of the Lords of the Articles, and after in audience of the whole Parliament, where were present, not only such as professed Christ Jesus, but also a great number of the adversaries of our religion, such as the forenamed bishops, and some others of the temporal Estate, who were commanded in God's name, to object, if they could, anything against that doctrine. Some of our ministers were present, standing upon their feet, ready to have answered, in case any would have defended the Papistry, and impugned our affirmatives: but seeing that no objection was made, there was a day appointed to voting in that and other heads. Our Confession was read every article by itself over again, as they were written in order, and the votes of every man were required accordingly. Of the temporal Estate only voted in the contrary, the Earl of Athole, the Lords Somerville and Borthwick; and yet for their disassenting they produced no better reason, but, 'We will believe as our fathers believed.' The bishops (Papistical we mean) spake nothing. The rest of the whole three Estates, by their public votes, affirmed the doctrine; and many the rather because that the bishops would nor durst say nothing in the contrary; for this was the vote of the Earl Marschall: 'It is long since I have had some favour unto the truth, and since I had a suspicion of the Papistical religion; but I praise my God, this day has fully resolved me, in the one and in the other; for seeing that my lords bishops, who for their learning can, and for that zeal they should bear to the verity, would (as I suppose) gainsay anything that directly repugns to the verity of God; seeing,

ment the confession of their faith, as ye shall receive the copy thereof, which was agreed in Parliament 17 Augusti, and voted without meikle resistance, except three bishops;" and he gives a list of seven lords who were absent and unfavourable to the ratification, and (seemingly) of three others who were present. "In time," adds the Archbishop, "if they be thollit (allowed), no man may live but without they grant their articles, which I will not." —Bishop Keith's Affairs of Church and State, iii. 4. See also Spottiswoode's account.

I say, my lords bishops here present speak nothing in the contrary of the doctrine proponed, I cannot but hold it to be the very truth of God, and the contrary to be deceivable doctrine. And therefore, in so far as in me lieth, I approve the one and damn the other: and do farther ask of God, that not only I, but also all my posterity, may enjoy the comfort of the doctrine that this day our ears have heard. And yet more, I must vote as it were by way of protestation, that if any persons ecclesiastical shall after this oppose themselves to this our Confession, that they have no place nor credit, considering that they having long advisement, and full knowledge of this our Confession, none is now found in lawful, free, and quiet Parliament to oppose themselves to that which we profess: and therefore, if any *of this generation* pretend to do it after this, I protest he be repute rather one that loveth his own commodity, and the glory of the world, than the truth of God, and the salvation of men's souls.'" [1]

Nothing can be clearer than that the doctrine was not adopted in any way upon the authority of the new-born or Reformed Church. Knox and his compeers were present to support their supplication; the bishops, in their place in Parliament, were invited to impugn the articles proposed; and all the forms of a free and deliberate voting of the doctrine *as truth*—as the creed of the Estates, not of the Church—were gone through. It was a doctrine "professed by the Protestants," exhibited by them "to the Estates," and by the Estates voted "as a doctrine grounded upon the infallible Word of God." The preface bears out the same thing, for it is directed by "the Estates of Scotland, with the inhabitants of the same professing Christ Jesus His holy Evangel, to their natural countrymen, and unto all other realms and nations professing the same Lord Jesus with them." [2] But indeed not only were the

[1] Knox, ii. 121.

[2] It goes on to speak of "this brief and plain confession of such doctrine *as is proponed unto us, and as we believe and profess.*"

relations of the civil magistrate *to the Church* in Scotland postponed and subordinated to the more immediate claims and more absolute authority of "truth" ("God's truth"—"the religion"—"doctrine grounded upon the infallible truth of God's Word"): but at this early stage these relations were almost wholly ignored, even in the Confession itself, while the magistrate's relation *to truth* is made most emphatic and express. "Moreover, to kings, princes, rulers, and magistrates, we affirm that, chiefly and most principally, the conservation and purgation of the religion appertains; so that not only they are appointed for civil policy, but also for maintenance of the true religion, and for suppressing of idolatry and superstition whatsoever."[1] "The religion" in every case comes first; and the allusions to the Church are either incidental or come in by way of inference and deduction. This precedence given to truth above all things, and to doctrine which is the form of truth, comes out in the whole legislation of Scotland, and is not wanting in the three Acts passed in 1560, exactly a week after the Confession was ratified—Acts which were all re-enacted in 1567.[2] By the first of these the jurisdiction of the "Bishop of Rome, called the Pope," was abolished, on the ground that it had been "very hurtful and prejudicial to our sovereign authority and commonwealth of this realm."[3] By the second, all Acts of Parliament "made in times bypast not agreeing with God's Word, and now contrary to the Confession of Faith, according to the said Word, published in this Parliament," were annulled,

[1] Scottish Confession, c. 24.

[2] These Acts, passed on 24th Aug. 1560, were formally repeated or re-enacted in 1567. The ratification of the Confession was never repeated, but is constantly founded upon in subsequent Acts. The minutes of Parliament, of 17th August 1560, embody the whole Confession, exactly as we give it in the appendix, with the addition, "Thir Acts and Articles are red in the face of Parliament, and ratefyit be the three Estates of the realme, at Edinburgh, the 17 day of August the year of God 1560 yearis."

The Scottish Confession is to be found in Knox's History, Calderwood's History of the Church of Scotland, Dunlop's Collection of Confessions, Edward Irving's reprint of the Confessions of Faith and Books of Discipline, and (translated into Latin) in Niemeyer's Collectio Confessionum.

[3] Act 1567, c. 2.

the reasons given in the preamble being their opposition to "God's Word," and that men had taken occasion by them of "maintenance of idolatry and superstition in the Kirk of God, wherethrough divers innocents did suffer."[1] By the third, on the ground that "God and His holy Word" had made the true use of the sacraments "notour and perfectly known," and yet that, "notwithstanding the reformation already made according to God's Word," some of the Papistical Kirk and their ministers stubbornly persevered in celebrating the mass, such "idolatry" was made penal, the third lapse into it to be punished with death.[2] It is the second of these Acts into which the Confession is incorporated in our published Statute-books. After being twice referred to in conjunction with God's Word, it is added, "of which Confession of the Faith the tenour follows;" and then are inserted the twenty-five chapters, some of which we give in full (with the titles and order of the whole Confession), in the appendix to this chapter.[3]

From 1560, after the death of the Regent, Mary of Guise, to 1567 and the abdication of Mary Queen of Scots, matters continued in the same state. The one circumstance that prevented the great doctrinal revolution being carried into effect by an establishment of the Church, was the arrival, in

[1] Act 1567, c. 3.

[2] Some Acts passed during the remainder of the century may here be enumerated as bearing remotely on the subject of this volume, and not specially referred to in subsequent pages, viz.:—1567, c. 11, "That teachers of youth should be tried by the visitors of the Kirk;" 1567, c. 14; 1557, c. 15; 1572, c. 53, "Excommunicate persons should be denounced rebels;" 1573, c. 55, declaring divorce for desertion competent, "since the true and Christian religion was publicly preached, avowed, and established within this realm, namely, since the month of August the year of God 1560 years;" 1578, c. 61; 1581, c. 91, "The ratification of the liberty of the true Kirk of God and Religion, with confirmation of the Laws and Acts made to that effect of before," containing an important enumeration; 1581, c. 100; 1581, c. 104; 1581, c. 106; 1581, c. 115; 1584, c. 131; 1584, c. 132; 1587, c. 23; 1587, c. 24; 1587, c. 25, "That sellers and dispersers of erroneous books should be punished, and the books destroyed;" 1587, c. 27; 1587, c. 125; 1593, c. 168; 1594, c. 196; 1594, c. 197; 1600, c. 16.

[3] Appendix, Note A. For the statutes see Note B.

1561, of a young, beautiful, and strong-willed queen, who was received with great enthusiasm. Mary's first proclamation was, Knox says, "penned and put in form by such as before professed Christ Jesus;" and it forbade any one, on pain of death, to make any alteration until a meeting of the Estates on the "state of religion which her majesty found publicly and universally standing at her arrival in this her realm." Mary's object, doubtless, was to recover her ancient kingdom to the Romish faith; but the tide ran so strongly against her that she found it impossible to preserve even the mass held in her private chapel from the indignant intolerance of the newly-converted nation. And shortly before her abdication she was able, with some show of truth, to take her subjects to witness, in an Act of Parliament, that "her highness, since her arrival, has attempted nothing contrary to the estate of religion which her majesty found publicly and universally standing." And all this time it was an "estate of religion," a reign of creed. The Church was not established — was scarcely recognised, certainly not as the national Church. Only the Estates of Scotland had solemnly confessed that "there has been, now is, and to the end of the world shall be, one Kirk—that is to say, one company and multitude of men chosen of God, who rightly worship and embrace Him." They had confessed also that "neither antiquity, title usurped, lineal descent, place appointed, nor multitude of men approving one error," were notes of the true Church; but, the true preaching of the Word, the right administration of the sacraments, and church discipline rightly administered. And wherever these last were found, though the number be about two or three, there is the Church of Christ — not the universal, of which they had given the definition before, but the particular, such as was in Corinthus, Galatia, Ephesus, and other places called in Scripture kirks of God. "And such kirks, we the inhabitants of the realm of Scotland, professors of Christ Jesus, profess ourselves to have

in our towns and places reformed." Farther than this they did not go—till Darnley was murdered in Kirk-of-Field, and Mary, after marrying Bothwell, succumbed to the indignation of her subjects.

And then, in the Parliament of 1567, that great Act was passed, "Anent the true and holy Kirk, and of them that are declared not to be of the same" (1567, c. 6), by which (far more than by the subsequent Act of 1592, which has been called its charter) the Church was formally recognised and defined. It is never to be forgotten, for it is very much a key to the history of Scotland, that the civil power thus actually sanctioned the creed of the Church seven years before it recognised the Church itself. And yet it was but one step more they had now to take. They had already confessed the religion and the Evangel, and had avowed that there was a church, or at least that there were churches of God in the realm. That state of matters had continued for many years, and for the last seven years had been avowed. The Act now proceeds upon it:[1]—

"Our sovereign Lord, with advice of his three Estates, and haill body of this present Parliament, has declared and declares the ministers of the blessed Evangel of Jesus Christ, whom God of His mercy has now raised up among us, or hereafter shall raise, agreeing with them that now live in doctrine and administration of the sacraments, and the people of the realm that professes Christ as He is now offered in His Evangel, and does communicate with the holy sacraments (as in the Reformed Churches of this realm are publicly administered) according to the Confession of the Faith, to be the only true and holy Kirk of Jesus Christ within this realm."

Several things will be observed in this important enactment. It is declaratory, proceeding upon a state of things fully understood and for a number of years avowed, but which it now

[1] Some confusion crept into the printing of this Act, and on this account it was corrected and re-enacted in the year 1579: Act c. 68. In the text above I give the corrected version, the original one being put in its place in the appendix to the chapter.

formally accepts, declaring the existing Church to be the true one. Secondly, it not merely acknowledges, but it establishes the Church (so far as enactment without endowment goes); and it establishes it not only for the present, but for all future time. And, lastly, it not only acknowledges and establishes, but it defines the Church. It does so by the "Evangel" as then preached, by "doctrine" as then held, and by the "sacraments" as publicly administered; but the definition is made far more valuable for our purposes when it is added, "according to the Confession of the Faith." And this application of the Creed of 1560 as, along with participation in the sacraments, a test and definition of the Church, comes out still more plainly in the rest of the enactment, which

"Decerns and declares all and sundry, who either gainsay the word of the Evangel, received and approved, as the heads of the Confession of the Faith professed in Parliament of before in the year 1560 years, as also specified and registrate in the Acts of Parliament made in the first year of his highness's reign, more particularly do express, or that refuse the participation of the holy sacraments as they are now ministered, to be no members of the said Church within the realm [and true religion[1]] now presently professed, so long as they keep themselves so divided from the society of Christ's body."

Thus it was that the Church, which seven years before had persuaded the Estates to acknowledge its creed as the truth of God, was, by a much later Act, acknowledged as being the Church of God. And the latter transaction was founded upon the former. It is the Confession of 1560 which in the Act of 1567 defines the Church.

But if the State in its dealing with creed acted independently of the Church, and indeed so long ignored it, the position of the Church during the same period is equally striking. We have seen it already as the "Congregation of

[1] These three words are not in the old Act.

Christ Jesus," embracing "particular Kirks;" and when "convened in council," making occasional ordinances for common prayers, doctrine, preaching, and interpretation of Scripture in all parishes; but without any regular polity or common ecclesiastical action. The great crisis for the Church in Scotland, as well as for every other interest there, was that of 1560. It was 1567, indeed, which statutorily recognised or established it, and so turned it, by State authority, from the Church in Scotland into the Church of Scotland. But while there is overwhelming evidence to show that the Church held itself long before this statute to be the Church of Christ in Scotland, there is not a little to indicate also that it held itself to be the Church of Scotland, if indeed in their view there was any difference between the two phrases. At all events, the Church of Knox, which even before 1560 called itself "the Congregation of Christ within the realm," was not likely to make too little of the all but unanimous approval of its whole doctrine by the Estates of Scotland. Besides, in the Confession itself there are two important doctrines bearing on the subject. They say nothing there, indeed, about a Church of Scotland. They confess first, like all the creeds of the Reformation, a church catholic, which is invisible, but consists of all throughout the world who individually believe in Christ. They also acknowledge particular churches visible in the "cities, towns, and places of Scotland"—that is, particular congregations. So far they have not arrived even at one church in Scotland, still less a Church of Scotland. But they go on to say, "We confess and acknowledge empires, kingdoms, dominions, and cities to be *distincted and ordained by God;* . . . so that whosoever goeth about to take away, or to confound the whole state of *civil policies, now long established,* we affirm the same men not only to be enemies to mankind, but wickedly to fight against God's expressed will." After this strong and rash expression of a divine right in existing nationalities, a particular Church of Scotland became almost a necessity, and they

scarcely needed the doctrine which immediately follows in the same chapter, but which is still more conclusive, that "kings, princes, rulers, and magistrates are appointed not only for civil polity, *but also for maintenance of the true religion.*" This latter principle they could, indeed, in the mean time make but partial use of; for their queen, "God's lieutenant," was steadily and skilfully hostile to them. But it was the manner of the Church in Scotland, then and always, to take all the recognition it could get, to demand more, and to protest that it had full original rights apart from any recognition at all. So here while the Church had assumed independent national action, without the magistrate, in regard to matters of polity, its apologists were obliged to take up a similar position even with regard to the creed. Immediately after the Parliament of 1560 voted the Confession, the Lord of St John (Sir James Sandilands) was sent to France to get the ratification of it by the young queen, then the wife of the Dauphin. He was not well received at the great Catholic Court of St Denis.[1] "No ratification brought he unto us. But that we little regarded, nor yet do regard; for all that we did was rather to show our dutiful obedience, than to beg of them any strength to our religion, which from God has full power, and needeth not the suffrage of man, but in so far as man hath need to believe it, if that ever he shall have participation of the life everlasting." While this most characteristic utterance shows the position which Knox was prepared to take up, if need be, against the Estates as well as the sovereign, it cannot be doubted that he and the whole Church highly valued the sanction which had been given to their Confession by the former power.[2] Had

[1] "Gusiani in eum asperrime cohorti increpabant, quod homo sacræ militiæ addictus mandata rebellium pro heresi illa execrabili, quam tum maximus omnium gentium consensus in Concilio Tridentino damnaret, perferenda suscepisset." — Historia Georgii Buchanani (folio, 1582), 199.

[2] The able argument of the Duke of Argyll, in his 'Presbytery Examined,' that the Church and the State were at this early time not really distinct, or at least not nearly so distinct as they afterwards became, is worthy of consideration. The history of the Reformed party, both before and after

this not been given, the Confession would have remained simply the creed of the Protestants in Scotland, exhibited to the Estates and rejected by them. As it was, they could claim that there was a "state of religion publicly and universally standing" when their queen came.

The Parliament had met, and the Confession had been ratified in August; and in December of the same year, 1560, the first General Assembly was held. We have seen already the two steps of theory by which they may have founded a Church of Scotland out of the "particular Kirks;" but it is curious to trace the actual transition in the Book of the Universal Kirk.[1] Whatever the theory may have been, it was practically

the Parliament of 1560, is unfavourable to the theory of identity; and the Confession itself, with the exception of the passage about the civil magistrate, bears against it. The joint Act of the Reformers and the Parliament in establishing the Confession of 1560, is the thing most in its favour; and it must be remembered that the General Assembly which met soon after never attempted to ratify the Confession, but took it as a *fait accompli*. The reason for this may have been that it was "the professors of Christ Jesus" who originally presented it to Parliament; but it may also have been that Parliament had authority to publish the creed for its subjects, and that the Church simply accepted it. And when we find the Estates, which in 1560 had professed the religion according to the Confession, declaring in 1567 that those who professed the religion according to the Confession are the Church, the coincidence of the two institutions, though not their identity, may be held to be proved.

The late Professor Ferrier of St Andrews had an extreme theory that the Church and State in Scotland are one; that the General Assembly is a national council, or junior House of Parliament, not subordinate to the other, being, in fact, "itself the State, acting in a peculiar capacity;" and that if, in 1843, it could not make terms with the *other* Parliament, it "should have clung at all hazards even to the temporalities." — Observations on Church and State, suggested by the Duke of Argyll's Essay. William Blackwood & Sons, 1848.

[1] This earliest record of the minutes of Assembly is entitled 'The Booke of the Universall Kirk of Scotland: wherein the heads and conclusions devyset by the ministers and commissionaris of the particular Kirks thereof are specially expressed and contained.' (In this work we quote the edition in one volume, 1839.)

It commences with the *first* General Assembly, giving "the names of the ministers and commissioners of the particular Kirkes of Scotland convened to consult upon these things which are to set forward God's glory and the well of His Kirk in this realm," in December 1560, ending on the 27th of that month, when "the Kirks convened continows this their Assembly till the 15th day of Januarie."

The *second* Assembly, 1561, commences, "The whole Kirk, convened

by meeting in General Assembly that the "particular Churches of Scotland" became "the whole Church convened," and "the universal Church of Scotland;" and it is strange to find the verbal traces of the old confused state of matters in the record of the polity which was superseding it. But with this the very first General Assembly and its work commenced the long and fatal question of Church independence. By it the Book of Discipline of the Church was "examined, allowed, and approved," and then, like the doctrinal Confession a few months before, presented to the nobility,[1] but with a different result. The Council from the first refused to sanction it;[2] and when the queen returned shortly after, it became hopeless to expect that this could be obtained.

The result was remarkable, and throws the strongest light

in the Tolbooth of Edinburgh, has decerned," &c.; and they, *inter alia*, authorised a petition to her majesty in the name of the "professors of Christ Jesus His holy Evangel."

The *third*, June 1562, bears to be "the convention of the Kirk of Scotland, gathered in Edinburgh," &c.

And the *fourth*, December 1562, is "the General Assembly of the Kirk of Scotland, convened at Edinburgh;" so that we need continue our deduction no farther.

[1] The right of the State to an independent judgment on Church matters is acknowledged in this transaction as clearly as it had been formerly with regard to matters of doctrine: "For as we will not bind your honours to our judgments further than we are able to prove by God's plain Scripture; so must we most humbly crave of you, even as ye will answer in God's presence, before whom both ye and we must appear to render account of all our actions, that ye repudiate nothing for pleasure and affection of men, which ye are not able to disprove by God's written and revealed Word."

It is well to observe here, what the reader of Scottish Church history finds everywhere afterwards, that the Book of Discipline is a sort of creed—a declaration of what was supposed to be God's mind and will in the particular region of Church matters. To follow out all the subsequent discussions on Church polity and discipline in this volume would be quite impossible—it would be to write the history of Scotland. But through them all *this* remained the position of the Church—not lower, founding on expediency; nor higher, founding on a Church right to give doctrine to the world; but merely, a continual *confession* of a Church order supposed to be delivered to men in Scripture—a faith in an external revelation, over which men had no power but to confess and obey it. The whole strength, or weakness, of the Church for many ages lay in this position.

[2] Knox writes the reasons with his sharpest pen: "Some were licentious; some had greedily gripped the possessions of the Kirk; and others thought that they would not lack their part of Christ's coat."

upon the interesting period between 1560 and 1567, when there was a creed of Scotland established, but no Church of Scotland established. The Book of Discipline being rejected by the State, the Church itself approved (and indeed the Assembly of 1560 had seemingly "subscribed"[1]) this scheme of its polity; and it instantly proceeded to carry it into execution, so far as all matters within its own control were concerned. The General Assembly continued to meet by the authority of the Church itself,[2] and year by year laid the deep foundations of the social and religious future of Scotland. From 1560, if not earlier, down to 1567, the Kirk was a voluntary Church, in the sense that not only all endowment, but all jurisdiction and authority, and even all recognition, were denied her by the State. During all this time the records of the first fifteen General Assemblies, preserved in the Book of the Universal (*i.e.*, whole) Kirk, show abundantly that the

[1] "Thus far out of the Book of Discipline, which was subscribed by the Kirk and the lords"—*i.e.*, certain of the lords of the Council.

[2] It has been observed that the doctrine of the independence of the Church has not that prominence in the writings and actings of Knox which his more zealous followers would have desired. The fact is, that that doctrine in its explicit form is scarcely found there. The work of that founder of our nation was to build up, not to break down—to unite Church and State in a perpetual bond, not to suggest reasons for their separation. Yet in that age of principles, men, whether they willed it or no, went deeper than the political surface; and in perusing every page of his History, we feel heaving under our feet the *ignes suppositos* of many a future explosion. This comes out especially in the conversations with Maitland, his great adversary, who, says Mr Froude, "would at any age of the world have been in the first rank of statesmen." The clear-sighted Erastian had objected to the first Assembly held after the arrival of Queen Mary, as being convened without her authority. Knox, of course, scouted the objection; but his reason is interesting: "Take from us the freedom of Assemblies, and take from us the Evangel; for without Assemblies, how shall good order and *unity in doctrine* be kept?" The connection between synods and community of creed is brought out more fully in the article on councils quoted in the appendix to this chapter.

It may be remembered that the freedom of assembly—the right to hold synods and councils apart from any permission by the State—has been held, even by High Churchmen (as by Mr Gladstone in his 'State in its relation to the Church,' ii. 28, 34), to be a test in the last resort of that native independence of the Church which for a time the Church may resign.

Church did not shrink from exercising all judicial and administrative and legislative—in short, all conceivable—functions of a Church; while for all civil objects and results that her unaided powers (stretched not a little) failed to attain, she constantly and clamorously appealed to the State, which for the time refused to hear.

Nearly three centuries later it was claimed pertinaciously at the bar and on the Scottish bench, as well as by the predominant party in the Church, that the State acquiesced in this independence claimed by the Church, and that on this understanding it was afterwards established. The claim was rejected after the fullest and most careful consideration; but while it has been decided that the claim of the Church was never submitted to by the State, the fact that such a claim was cherished and put forth by the Church itself has scarcely been seriously disputed, and the immense preponderance of historical evidence is in its favour. Yet while the claim of independence, made always in the matter of Church polity, applies *a fortiori* to that of Church doctrine, the conflicts have generally taken place about the former, not about the latter. The creed at the time of which we now treat was the bond between the Church and State—the one thing which both held, and to which they professed a common allegiance; and it has been the one thing from which, amid the innumerable struggles that have since taken place between the two parties, neither has ever broken away. Yet what has not occurred in the past may occur in the future; and though it might seem unnecessary, especially since 1843, to consider the effect of the old claims of independence upon the creed of the Church, even this may be too hasty a conclusion. But proposing in this volume to consider the relation to creeds, not only of the Established Church of Scotland, but of voluntary Churches claiming to represent its most ancient principles, it will be very necessary to bear in mind the position of the Universal Kirk before 1567.

We have seen the historical origination of the creed by the State and the Church, and their mutual relations in regard to it. Another interesting question arises, How far did they, or either of them, intend themselves to be permanently bound to this creed? The question is raised in the most striking way by the "Protest" embodied in the Preface to the Confession of 1560:[1] "Protesting that if any man will note in our Confession any article or sentence repugning to God's holy Word, that it would please him, of his gentleness, and for Christian charity's sake, to admonish us of the same in write, and we of our honours and fidelity do promise unto him satisfaction from the mouth of God—that is, from His holy Scriptures, or else reformation of that which he shall prove to be amiss." A very striking commentary on this abnegation of infallibility and expression of the right of private judgment is given in the article of the Confession which treats of general councils.[2] It goes very far, asserting that the right of councils is "neither to forge new articles of our belief, neither to give the Word of God authority, much less to make that to be His word, *or yet the true interpretation of the same, which was not before by His holy will expressed in His Word.*" None of the Confessions of the Reformation has a stronger expression of that right and duty of private judgment, on which

[1] We give in the appendix this important document, with the salutation from the Estates of Scotland to the world, from the minutes of Parliament of 1560; neither of them being reproduced in the Statute of 1567, which is commonly in the hands of lawyers, while in the title of the Confession there are also some verbal alterations.

[2] In reading the article on councils (see appendix to this chapter), it is interesting to remember that the Council of Trent was at that very time sitting in the south, slowly elaborating its colossal schism, and buttressing it with definition and anathema; that in Scotland several councils of the Roman Catholic Church —*i. e.*, clergy—had been held within the last few years; that on the other hand, "the lords and barons professing Christ Jesus convened frequently in council" had issued thence their ordinances; that the General Assembly commenced its sittings immediately after; and that the meeting in Parliament in 1560 was as like a general council as any of these, being universal as regards the nation, and as regards the Church, not only including its representatives, but laying a doctrinal foundation for its ordinary assemblies in time to come.

they are all founded, and which they necessarily tend to repress. The question at once occurs, How far this protest for freedom to follow God's Word only is reconcilable with enactments by the State founding the Church upon the Confession, or at least defining it by the Confession, as in the fundamental Act of 1567; or, indeed, with enactments by the Church itself binding itself for the future to the Confession of its present faith? It is difficult, on the one hand, to see how the Church can be recognised and established without some definition, such perhaps as the Confession supplies; on the other, the declaration that those who in all time coming shall believe it, and those only, are the true and holy Church of Christ Jesus, leaves little room for that correction of the Confession which our Reformers pray men of their gentleness to make.[1] It is to be remarked that the preface which con-

[1] It must not be forgotten that the Church gave a certain sanction to other doctrinal confessions and utterances, besides that adopted by statute, and seems to have felt itself in no degree restrained in this respect. Before 1560, the "Congregations" which made up the "Congregation of Jesus Christ within the realm," used first the Service-book of the Church of England (of King Edward VI.), and afterwards the Order of Geneva, the first part of which, beginning, "I believe and confess my Lord God eternal," &c., is entitled 'The Confession of Faith used in the English Congregation at Geneva, received and approved by the Church of Scotland.' The catechism also (Calvin's Catechism), contained in the Order of Geneva, is expressly appointed to be taught in Scotland by the First Book of Discipline—*i.e.*, as early as 1560. In 1564 the Book of Common Order was established by the Assembly as a form of worship; and this book not only contains the Genevan Confession and Calvin's Catechism, but appoints the parent at the administration of baptism to "rehearse the articles of his faith,"—*i. e.*, the Apostles' Creed, the clauses of which are expounded in detail.

An interesting episode is the solemn approval given by the Assembly of 1566 to the later Confession of Helvetia, sent for their approbation by Beza and his Church. A letter to Switzerland acknowledges the courtesy of the appeal to Scotland ("gentem in ultimis terræ angulis Domino servientem") for an expression of its communion in the faith confessed; and explains how, having met at St Andrews, they went carefully over every chapter and sentence, and now gave their united and energetic approval (patrocinium) to it. The members of this St Andrews meeting sign individually, and add the seal of the university, offering, if need be, to procure "subscriptionem hujus Ecclesiæ publicam," and to send to Zurich in return their own Scottish Confession. This was in September, and the Assembly which met in December adopted both the Zurich

tains this remarkable petition, and which is addressed by the Estates to all countries, though inserted in the minutes of the Parliament of 1560, is omitted when the Confession comes to be re-enacted in 1567, and does not now appear on our Statute-book. It remains, therefore, a document as much of the Church as of the State, and indeed is fully as characteristic of the former as of the latter, so far as aspiration for freedom is concerned. And yet we find that the Church, which always outran statesmen in its passion for orthodoxy, accepted establishment on conditions which seem practically to tie it down to doctrine, and, except on two important occasions of subsequent history, has never shown more than a formal willingness to carry out the protestation of 1560. Scotland has always, indeed, asserted the Word of God to be "the only *rule* of faith," while the creed is only the utterance, expression, or confession of that faith. It has always preferred to call this document not the standard, but one of the "subordinate standards," of the Church, reserving the absolute name for the holy Scriptures. Yet ever since the passing away of that noble generation of men whose earlier years were spent in rejecting the right of the Church to impose upon them any creed, and their later in fixing down, by civil and ecclesiastical enactment, their own creed upon all generations to come [1]—

Confession and the letter of approbation, and ordered both to be printed, adding, however, a note of exception to the clause approving of holidays. This Confession, besides having the approval of six Swiss Churches, was ratified by the Protestant Churches of Geneva, Savoy, Poland, Hungary, and Scotland.—See Knox, vi. 544.

The Scottish Confession, indeed, seems to have been felt as no bar, either to that sympathy with foreign Churches, by which the Scottish feeling of responsibility to European opinion (which Mr Froude notes) was at this time enriched, or, on the other hand, to the use of all other means of diffusing religious truth among the people at home.—See Notes upon the Catechisms of the Scottish Reformation (London, 1866), by Horatius Bonar, D.D.; where the sequence of Calvin's, Ursins's, and Craig's Catechisms, successively sanctioned by or used in the Church of Scotland during the reign of its earlier Confession, is traced.

[1] How the Reformed Church, immediately after so strong a statement of the right of private judgment, was able to combine with it a passionate attachment to the dogmatic truth they held themselves to have attained,

ever since that insurrection of private judgment which we call the Reformation—private judgment has been frowned upon in Scotland; and the people and youth have been practically referred, not to the "truth of God" alone, but to that wise and careful interpretation of it which their ancestors used *their* private judgment to attain.

It is to be remarked, however, that in the whole literature of this time, and especially in civil and ecclesiastical enactments, the Confession is always treated as a *whole*. Adherence to it is used as convertible with adherence to "the Evangel," or with "profession of Christ Jesus." One living principle, of immediate acceptance with God through His promise in Christ, in opposition to a system which was supposed to interpose a screen between God and man, burns through all the documents; and there is no approach to the idea which oppresses the mind of a colder age, that a confession is a vast congeries of propositions, all of nearly equal importance, and to be dealt with individually rather than collectively. It is also very manifest that this is essentially a Reforming Confession—not so much a scientific exhibition of theology as an explosion of God's truth against Rome; and in this respect, as in the former, it affords a contrast to the later Confession of Westminster.[1] These characteristics of the Scottish Confession

comes out well in their correspondence with no less illustrious a pupil than Queen Mary.—See Note G of Appendix.

[1] The object of the Confession is best to be gathered from the preface: "A thirst to notify unto the world the sum of that doctrine which we profess, and for which we have sustained infamy and danger," led to it; "partly for satisfaction of our brethren" who hear us calumniated, and "partly for stopping the mouths of blasphemers"—*i.e.*, revilers. "For God we take to witness in our consciences, that from our hearts we abhor all sects of heresy, and all teachers of erroneous doctrine," and they profess themselves ready to die for "the purity of Christ's Gospel."—See Preface in Appendix.

It is interesting to compare this with the Preface to the Geneva Catechism, a treatise which was afterwards adopted by the Church of Scotland, where the internal danger of error is more strongly insisted upon: "Moreover, the dangers which hang over Christ's Church in these days move us very much; for as men may see present signs of certain barbarousness, and puddles of error which are like to chance in the Church of God, so there is no better preservation against

are important for the study of the legislation of the time; and will probably be held of value in interpreting not only the greater statutes already narrated, declaring the Confession to be the Confession of the Church and those gainsaying it not to be members of the Church, but also those which we now proceed to notice demanding individual adherence to it, and even subscription.

Subscription is a distinct and additional step; and we find no record of this having been formally, or at least statutorily, required till 1572.[1] John Knox was still alive. The Queen of

the same than if all godly Churches would agree in one kind of doctrine and Confession of Faith, which in all points were agreeable to God's holy Word, that our posterity might be confirmed by the universal example of Christ's Church against all heresies, persecutions, and other dangers, perceiving that it is not only the doctrine of one man, but the consent of the whole Christian Church, and that wherein all youth hath been brought up and trained in."

[1] In Bishop Keith's History we have a letter to the Archbishop of Glasgow, then in Paris, from his factor, who was in Edinburgh at the time of the great Parliament of 1560, and having made application to "The Duke"—*i. e.*, of Chatelherault — for some of his lord's rents, "gat an answer, that his grace would not have ado therewith, and that there would no kirkmen be answered, neither of their places nor rents, without that they *subscribed* the articles of the new religion, as they have set it forward." — Keith's History (Spottiswoode Society edition), iii. 8. And it cannot be said that the idea of subscription was alien to the minds of churchmen even at this early time. The Book of Discipline was subscribed not only by the Assembly, but by many of the Council; and Knox has preserved a most interesting discussion as to the import of this act; Lethington having alleged that it was often done "*in fide parentum*, as the bairns are baptised," while his opponent pointed to the deliberate previous discussion of it that had taken place. — Knox, ii. 297.

The Book of Common Order of Geneva originally contained not only 'The Confession of Faith used in the English Congregation at Geneva, received and approved by the Church of Scotland,' but also another 'Form of the Confession of Faith, wherewith all subscribe as are received to be scholars in the Universitie of Geneva; and it is very profitable for all townes, parishes, and congregations, to discerne the true Christians from Anabaptists, Libertines, Arians, Papists, and other heretics.' See it printed in full in the sixth volume of Dr Laing's edition of Knox, p. 361.

In the Form of Election of Superintendents and Ministers, given by Knox as of date March 1560, after half-a-dozen doctrinal questions to the candidate, it is asked, "Will you not contain yourself in all doctrine within the bounds of this foundation?" But this is *stipulatio* rather than subscription; and the first of the

Scots was in prison in England. Scotland was torn by civil dissensions—the regent, in alliance with Elizabeth of England, waging doubtful war with the Roman Catholic barons. The Reformed Church was trodden aside amid the feudal turbulence; but in consequence of the representations of Erskine of Dun, the Convention of Leith was held, and the result was that curious compromise by which bishops and superintendents were retained in the Church, but both were made subject to the General Assembly *in spiritualibus*. But another result of this conference between "the commissioners of the king's majesty and the Reformed Kirk of Scotland" was the Act of date 26th January 1572, which usually appears in our Statute-book under the rubric, "That all ecclesiastical persons should subscribe the Confession of the Faith. Of heretics;" but which in the minutes of Parliament (Thomson's Acts, vol. iii.) bears the title, "That the adversaries of Christ's Evangel shall not enjoy the patrimony of the Kirk" (1572, c. 46). It proceeds expressly on the doctrine that the conservation and purgation of the religion pertains to Christian princes, and bears that "every person who shall pretend to be a minister of God's Word and sacraments," or who does or shall enjoy the funds of any benefice, "and is not already under the discipline of the true Kirk, and participates not with the sacraments thereof," shall give his assent, and "subscribe the articles of religion contained in the Acts of our sovereign lord's Parliament,"[1] and also give his oath for acknowledging the king,

questions refers to Scripture, as the "only true and most absolute foundation of the universal Kirk of Christ."—Vol. ii. 146.

At a date later than these, but still before 1572, a distinct case of compulsory subscription is found in the visit of the Regent Murray to Aberdeen in June 1569, when the principal, sub-principal, and regents, all said to be Popish, were ordered by the Privy Council to subscribe the Confession and submit to the Kirk. The Act of Council narrates that "they refused to give their said profession by their handwrits," and "in respect of the said persons' plain denial to join in the true Kirk of God," they are deprived of all instruction of youth.

[1] From the articles of the conference at Leith, of which this Act of Parliament is nearly a transcript, we learn that the "Articles of Religion" are the Confession of the Faith and

"and shall bring a testimonial in writing thereupon."[1] Farther, both the Confession and the testimonial are to be read openly "on some Sunday, in time of sermon or public prayers, in the Church" by the incumbent, within a month after his admission, under pain of deprivation. And then the latter part of the Act gives the rule for enforcing this Confession as a test: "If any person ecclesiastical, or who shall have ecclesiastical living, shall wilfully maintain any doctrine directly contrary or repugnant to any of the said articles, and being convened and called as follows, shall persist therein, and not revoke his error, or after his revocation shall of new affirm such untrue doctrine, such maintaining, affirming, and persisting shall be just cause to deprive him of his ecclesiastical living."

This Act, however interesting, is not so important as it appears. It and the subsequent Act 1572, c. 47, "Of Apostates," which declares that "adversaries of the true religion are not subjects to the king,"[2] bear marks of having resulted from the horror felt throughout northern Europe upon the recent massacre of St Bartholomew's Day. They are also obviously safeguards chiefly for the filling of the more lucrative higher offices now proposed to be introduced into the unwilling Church; and they shared in the dislike felt for Morton the regent, and in the discredit which very soon attached to the Convention of Leith.[3] There is no notice whatever taken

Doctrine of 1560, and that the enactment was intended to apply to all ministers, and probably also to laymen who might enjoy the emoluments of a benefice.—See Calderwood's History, iii. 175.

[1] There was at this early time no "formula of subscription" in addition to the subscription itself, the Scottish Confession (differing in this from that of Westminister) being framed in the first person, "We confess and acknowledge"—"We most constantly believe," and only requiring individual subscription to testify individual concurrence. The only thing like a formula is the preface, which we have already referred to.

[2] This is Sir Thomas Murray of Glendook's heading. The original Act has the more merciful rubric, "Anent the disobedients whilkis shall be ressavit to our soverane lordis mercy and pardoun."

[3] Principal Lee, in his Lectures on Church History, is inclined to ascribe this enactment to some contrivance against the queen's party on the

of the Act as to subscription in the records of Assembly; and it does not appear that it was ever obeyed or carried into effect by the Church.[1] Indeed, the regulations contained in it, excellent as they are, interfere (just because they are regulations) with that independent jurisdiction in matters of heresy which the Church in Scotland always claimed; and the very phraseology which it employs seems foreign to our ears. The most remarkable thing about it is thus the singular parallel between it and that important statute of Elizabeth from which it is evidently copied, which, more fortunate than this abortive piece of Scottish State policy, has become the great rule of the Church of England in matters of doctrine, and whose application to recent questions has attracted the keenest interest of the present age.[2]

part of Morton, the new regent, "who never got the credit of having intended this or any other measure for the benefit of the Church." But the whole Leith arrangement was odious to the Church. The Assembly of 1572 protested that it was to be "only received as an interim, until farther and mair perfect order be obtained;" and, two years after, the learned and fiery Andrew Melville organised an opposition to the pseudo-Episcopacy; and in the Second Book of Discipline the Church introduced a policy for itself, without any reference to this or similar enactments.

It is somewhat remarkable that subscription, both to the Westminster Confession and to this old one, seems to have been first introduced by a power from without while the Church was rather unwilling to receive it.

[1] This and the subsequent Act, however, were expressly confirmed by 1581, c. 99; and the Statute 1581, c. 105, against Papists, must refer to this Act, 1572, c. 46, among others, when it narrates that "sindrie persons, disobeyeris of his hieness authoritie, for not giving the Confession of their Faith, conform to the Acts of Parliament, has theirthrow tint their benefices, *ipso facto*."

[2] 13 Eliz. c. 12. For this statute, which passed in 1558, thirteen years before its Scottish counterpart, see the appendix to a subsequent chapter, where a summary of the English principles of law derived from the cases founded upon it is given.

Any evidence of the approximation in matters of faith between the two countries at that early time is interesting. We find Maitland writing to Cecil immediately after the Parliament of 1560, "begging to know if there be anything in the Confession of Faith which he mislikes." — State Papers, 13th Sept. 1560. And while that Parliament was still sitting, the English envoy writes of Knox, Goodman, and the ministers, "I have talked with them all, to search their opinions, how a uniformity might be had in opinions in both these realms. They seem willing that it so were: many commodities are alleged that might ensue thereof. *Howbeit I find them so severe in that they profess, so loath to remit anything of that they have re-*

Meantime, however, the Confession had evidently become not only a confession, but a standard, and even a test—and a test, too, to be enforced by subscription. It will be observed also that this statute speaks of doctrine repugnant to "*any* of the said articles of religion," instead of doctrine contrary to "the Evangel received and approved as the heads of the Confession do express." A farther step seems taken in the very next Act, already referred to; for while this Act enforcing subscription (c. 46) only relates to ministers, the Act 47 of the same Parliament declares "that none shall be repute as loyal and faithful subjects to our said sovereign lord or his authority, but be punishable as rebellers and gainstanders of the same, which shall not give their confession, and make their profession of the said true religion." It is not difficult to see how some things in these Acts should have been distasteful to the Scottish Church, which has always defended its members from any tyranny other than its own. It is doubtful whether it originally intended its Confession, in all its parts, to be used as a test or term of communion. It was, perhaps, meant to be a standard; but the Church seems to have intended to keep its standard in its own hands, educating the people individually, until the weak in faith grew up to the full measure of the true and holy Church.

And the year 1567, which saw the establishment of the Church, had produced also the statute "declaring and granting" jurisdiction to it.[1] The Church had, of course, exercised it, without civil sanction, for the seven years before; and it now claimed it, in no humble tone, as "justly appertaining to the true Church and immaculate spouse of Jesus Christ." But the Parliament was cautious in its enactment. It "declared and granted it," using two terms, the distinction be-

ceived, that I see little hope thereof." —Knox, vi. 119. The same project was renewed at the next great critical period, 1567.—See Froude's History, ix. 22.

[1] Acts of the Parliaments of Scotland (Thomson), iii. 24. Calderwood. Keith. Repeated in the Act 1579, c. 69.

tween which split the Church in sunder in the nineteenth century; and of this jurisdiction it says, that it "consists and stands in preaching of the true word of Jesus Christ, correction of manners, and administration of holy sacraments." This definition was not satisfactory to the Church, even when joined with the very strong declaration which follows, "that there is no other *face* of kirk nor other *face* of religion than is presently by the favour of God established within this realm; and that there be no other jurisdiction ecclesiastical acknowledged within this realm other than that which is and shall be within the same Kirk, or that which flows therefrom concerning the premises." Accordingly, the remainder of the Act contains a commission to several laymen—Maitland being one—and ministers, of whom was Knox—"to search furth more specially, and to consider what other special points or clauses should appertain to the jurisdiction, privilege, and authority of the said Kirk." This, however, procured nothing of note in the way of legislation. But a very important constitutional Act, "Anent the king's oath, to be given at his coronation," was passed at the same crisis of 1567; by which the kings of Scotland not only swore that "during the whole course of their lives they shall serve the Eternal God," and shall "maintain the true religion of Christ Jesus," but that "out of their lands and empire they shall be careful to root out all heretics and enemies to the true worship of God, *that shall be convict by the true Kirk of God of the foresaid crimes.*"[1] This was precisely the footing on which the Church desired to have the matter; and the Assembly of 1570 presented "Articles pertaining to the jurisdiction of the Church," of which the first is, "That the Church have the judgment of true and false religion or doctrine, heresies or siclike, annexed to the preaching of the word and ministration of the sacraments."[2] But no distinct response was made. Morton's Acts in 1572, as

[1] Statute 8 of Parliament 1567. Statute 6 had defined the true Kirk.

[2] Book of the Universal Kirk, 124 (twenty-second General Assembly).

we have seen, rather take these matters into the jurisdiction of civil statute. And the Act in 1579,[1] when the Church was again in power, is conceived in the same terms which we have quoted from that of 1567. The Church was left to claim and exercise this more special jurisdiction itself, as it does abundantly in the records of Assembly and in the Books of Discipline; and the strongest statutory recognition of the ecclesiastical jurisdiction in matters of creed and heresy is the indirect declaration embodied in the Act 1592, c. 116, by which the authority of the different Presbyterian Assemblies is established, and which provides "that the 129th Act of the Parliament holden at Edinburgh May 22, 1584" (which was an Act of Supremacy over Estates Spiritual and Temporal), "shall nowise be prejudicial nor derogate anything to the *privilege that God has given* to the spiritual office-bearers in the Kirk, concerning heads of religion, matters of heresy, excommunication, collation or deprivation of ministers, or any suchlike essential censures, specially grounded and having warrant of the Word of God." But whether by the assumption of the Church, or the acquiescence of the State, or the inference contained in the Acts which the Parliament did pass, it was early settled that the Church had complete and primary jurisdiction—possibly, even, as in later times has been conceded, exclusive jurisdiction[2]—in matters of doctrine and heresy. And the State proceeded—*e.g.*, by the Acts 1572, c. 53, and 1593, c. 164—to annex civil penalties to the ecclesiastical judgments, giving power, however, to those whom the Church sought to punish by the secular sword, "to propone their lawful defences."

Meantime, while the Church, without relying much on statute, cherished the Confession and cared for doctrine, the civil power, in the more rigid and formal way competent to it,

[1] Act 69 of James VI. (sixth Parliament).

[2] Can the word "privilege" (*privilegium*) in the Act 1592, be intended to include (inaccurately) the sense of exclusive or "privative jurisdiction"?

moved steadily in the same direction. It had declared the Confession to be grounded on the Word of God, and those who received it to be the true Church;[1] it had bound the king[2] to profess it, and with him all judges and members of courts of justice;[3] and it now declared that all *subjects* who did not do so should be reputed disloyal,[4] and that all ministers who did not do so formally should be deprived of their benefices.[5] Nor can it be said that either State or Church ever receded from the position which they had thus taken up, until the venerable Scottish Confession was superseded by our present Creed of Westminster. The Act 1581, c. 99, and that of 1592, c. 116, by which the present Presbyterian order was statutorily fixed or recognised, both imply what had been done before, and confirm the former Acts. The struggles between the State and the Church, or between statesmen and churchmen, were ceaseless; but they never touched upon any question of doctrine proper, nor drew into question the Confession of the Faith of 1560. We cannot follow the changes of the time; nor in particular do we propose to go into the new era when the Scottish Church, by successive national covenants, gave form and body to the pious patriotism of its members. It is only necessary to remark that these engagements proceeded upon, and expressly bound the people to, the ancient creed with which the history began. Thus there is a document which fills a large space in our history as the National Covenant. It was originally signed by James VI. in 1580, and thence took its name of the King's Confession of Faith, though as frequently called the Negative Confession, from being chiefly a repudiation of supposed errors. It was repeatedly commanded, both by the king and the Assembly, to be imposed upon all ranks and classes of the realm, laymen as well as ministers; and amid the subsequent struggles between the Presbyterian and Epis-

[1] 1567, c. 3.

[2] 1567, c. 8.

[3] 1567, c. 9: "None to be received to bear public office [removeable] of judgment, but such as profess the puritie of religion and doctrine now presently established."

[4] 1572, c. 47.

[5] 1572, c. 46.

copalian parties of the Church for several generations, it was held to by the latter party as well as by the former. It is, therefore, eminently a national and historical document; and the opening paragraph is one of the most characteristic of the old religion of Scotland that could be quoted. Yet this, the corner-stone of all the covenants, is nothing but a renewed adherence to the old Confession. "We, all and every one of us underwritten, protest that, after long and due examination of our consciences in matters of true and false religion, we are now thoroughly resolved in the truth by the Word and Spirit of God. And therefore we believe with our hearts, confess with our mouths, subscribe with our hands, and constantly affirm, before God and the whole world, that this only is the true Christian faith and religion, pleasing God and bringing salvation to man, which is now, by the mercy of God, revealed to the world by the preaching of the blessed Evangel, and is received, believed, and defended by many and sundry notable Kirks and realms, but chiefly by the Kirk of Scotland, the king's majesty, and three Estates of this realm, as God's eternal truth, and only ground of our salvation; as more particularly is expressed in the Confession of our Faith, stablished and publicly confirmed by sundry Acts of Parliament, and which now of a long time hath been openly professed by the king's majesty, and whole body of his realm, both in burgh and land. To the which Confession we willingly agree in our consciences, in all points, as unto God's undoubted truth and verity, grounded only upon His written Word."[1]

We have here acceptance of the creed by all—acceptance of it in all points—acceptance of it as the personal faith of the individual—acceptance of it expressed in formula and certified by subscription—all demanded, under appropriate penalties, by both Church and State. We need trace the matter no farther.

[1] Mr Gladstone instances this as one of the most complete and extreme illustrations of *private judgment* since the Reformation.—State in its Relations with the Church, ii. 123.

Through all the fluctuations of this first century of Scottish Church history, under presbyters, bishops, or superintendents, the Scottish Confession uttered by Knox to Parliament in "the beginning of the Evangel" remained the only creed which was fully acknowledged by both State and Church.[1] It is true that in 1616 the Church, then fully Episcopal, ordained that a new Confession, engrossed in the Acts of Assembly, should be universally received and subscribed in the kingdom; and this creed, somewhat more Calvinistic than that of Knox, must have had a certain authority for some years. At the enthusiastic Presbyterian Revolution in 1638, however, all the Acts of these Episcopal Assemblies were rescinded; and when the Episcopal form of government was brought back after the Restoration, the Confession of 1616 was forgotten, and the old Confession of 1560 was restored.[2] The new creed which was to supersede it, and to become the doctrinal standard of modern Scotland, was to come into existence in a different way.

[1] In the year 1616, about the time when King James's Episcopacy had attained undisputed sway, his majesty's commissioners proposed to the Assembly, among other resolutions, "That a true and simple Confession of Faith be set down, to the which all shall swear, before they be admitted to any office in Kirk or commonweil, and all students in colleges." The proposal was agreed to; and a new Confession of Faith, penned by Mr John Hall and Mr John Adamson, was presented to the Assembly, sanctioned by them, and was ordered to be revised before being printed. Bishop Russell states that this compend is "remarkable at once for its orthodoxy and moderation." It is as strictly Calvinistic, and as distinctly anti-Romanist, as that of Knox, which indeed it seems not to have opposed, being intended rather, as was surmised, to correct the Negative Confession or Covenant of 1580, by omitting (says the Presbyterian historian) "many points of superstition damned there." Calderwood, who gives it in full, fell at this time under the displeasure of the king for his opposition to some "points," introduced by the Articles of Perth; and James's discourse to him on the 12th July 1617 is interesting, when we remember the new creed recently brought in: "Hear me, Mr Calderwood. I have been an older keeper of General Assemblies than you. A General Assembly serves to preserve doctrine in purity from error and heresy, the Kirk from schisme; *to make Confessions of Faith*, to put up petitions to the king and Parliament. But as to matters of order, rites, and things indifferent in Kirk policy, they may be concluded by the king," &c.—Calderwood, vii. 226, 233, and 262; and Book of the Universal Kirk, 595.

[2] Test Act, 1681.—See *infra*.

APPENDIX TO CHAPTER I.

NOTE A.

THE SCOTTISH CONFESSION, AS RATIFIED IN 1560.

The Confession of the Faith professed and believed by the Protestantis within the realme of Scotland, publisched by thame in Parliament, and by the Estatis thareof ratifeit and aprovit, as holesome and sound doctrine, grounded upoun the infallibll treuthe of Godis Word.

MATHEI xxiv.: And this glaid tydings of the kingdome sall be preiched throw the haill world, for a witnes unto all natiounis, and then sall the end cum.

The Preface.

The Estaites of Scotland, with the inhabitants of the same, professing Christ Jesus his holy Evangell, to thair naturall countreymen, and unto all uthers realmes and natiouns, professing the same Christ Jesus with thame, wissch grace, mercy, and peice from God the Father of our Lord Jesus Christ, with the spirit of rychteous jugement, for salutatioun.

Lang have we thristed (dear brethren) to have notified unto the warld the soum of that doctrine quhilk we profes, and for the quhilk we have susteined infamy and danger. But sick hes been the rage of Sathan against us, and against Christ Jesus his eternall verity laitly borne among us, that to this day na tyme hes bene granted unto us to cleir our consciences, as maist gladlie we wald have done; for how we have bene tossed a haill yeir past, the maist parte of Europe (as we suppois) dois understand. Bot seing that of the infinite gudeness of our God (quho never sufferethe His afflicted utterly to be confounded) above expectation, we have obteined sum rest and liberty, we culd not bot set furth this breve and plane Confessioun of sick doctrine as is proponed unto us, and as we beleve and profes, partely for satisfactioun of our brethren, quhos hairts we dout not have bene and yet ar wounded by the despytfull raylling of sick as yet have not learned to speik well; and partely for stopping of the mouths of impudent blasphemers, quho bauldlie condemne that quhilk they have nouther hard nor understand. Not that we juge that the canckerit malice of sick is abill to be cured by this simple Confessioun; no, we knaw that the sweit savour of the Evangell is and sall be deyth to the sones of perditioun. But we have cheif respect to our waik and

infirme brethrein, to quhome we wald communicat the bottom of our hairts, least that they be trubled and caryed away be diversities of rumours quhilk Satan sparseth contrair us, to the defeating of this our godlie interpryis: Protesting, That if any man will note in this our Confessions any artickle or sentence repugning to Godis holie Word, that it wald pleis him, of his gentilnes, and for Christiane cheriteis saik, to admonische us of the same in writte, and we of our honours and fidelitie do promeis unto him satisfactioun fra the mouthe of God—that is, fra His holie Scriptures, or ells reformatioun of that quhilk he sall prove to be amiss. For God we tak to record in our consciences, that from our hairts we abhore all sectis of heresie, and all teichers of erroneous doctrine; and that with all humilitie we embrace the puritie of Christ's Evangell, quhilk is the onelie fude of our saulls; and tharefore so precious unto us, that we ar determined to suffer the extremitie of warldlie danger, rather than that we will suffer ourselvis to be defrauded of the same: for heirof we ar maist certanely perswaidit, That quhosoever denys Christ Jesus, or is aschamed of Him, in presence of men, sall be denyed befor the Father, and befor His holy angells; and thairfoir, be the assistance of the michtie Spirit of the same Lord Jesus, we firmlie purpois to abyde to the end in the Confession of this our Fayth.

Chapters.

1. Of God.
2. Of the Creation of Man.
3. Of Original Sin.
4. Of the Revelation of the Promise.
5. The Continuance, Increase, and Preservation of the Kirk:—

We maist constantly beleeve that God preserved, instructed, multiplied, honoured, decored, and from death called to life, His Kirk in all ages fra Adam till the cumming of Christ Jesus in the flesh. For Abraham He called from his father's cuntry, him He instructed, his seede He multiplied, the same He marveilouslie preserved, and mair marveilouslie delivered, from the bondage and tyrannie of Pharaoh; to them He gave His lawes, constitutions, and ceremonies; them He possessed in the land of Canaan; to them after judges and after Saul He gave David to be king, to whome Hee made promise, that of the fruite of his loynes suld ane sit for ever upon his regal seat. To this same people from time to time He sent prophets, to reduce them to the right way of their God, from the quhilk oftentimes they declined be idolatry. And albeit for their stubborne contempt of justice, He was compelled to give them in the hands of their enimies, as befoir was threatned be the mouth of Moses, in sa meikle that the haly cittie was destroyed, the temple burnt with fire, and the haill land left desolate the space of lxx zears: zit of mercy did He reduce them againe to Jerusalem, where the cittie and temple were re-edified, and they against all temptations and assaultes of Sathan did abide till the Messias came, according to the promise.

6. Of the Incarnation of Christ Jesus.

7. Why it behoved the Mediator to be very God and very Man.
8. Election.
9. Christ's Death, Passion, Burial, &c.
10. Resurrection.
11. Ascension.
12. Faith in the Holy Ghost.
13. The Cause of Gude Warkes.
14. What Warkes ar reputed gude before God.
15. The Perfectioun of the Law, and Imperfectioun of Man.
16. Of the Kirk :—

As we believe in ane God—Father, Sonne, and Halie Ghaist—sa do we maist constantly believe, that from the beginning there hes bene, now is, and to the end of the warld sall be, ane Kirk ; that is to say, ane company and multitude of men chosen of God, who richtly worship and imbrace Him, be trew faith in Christ Jesus, quha is the only Head of the same Kirk, quhilk alswa is the bodie and spouse of Christ Jesus ; quhilk Kirk is catholike, that is, universal, because it conteinis the elect of all ages, all realmes, nations, and tounges, be they of the Jewes or be they of the Gentiles, quha have communion and societie with God the Father and with His Son Christ Jesus, throw the sanctificatioun of His Haly Spirit ; and therefore is it called the communion, not of prophane persounes, bot of sancts, quha, as citizenis of the heavenly Jerusalem, have ye fruitioun of the maist inestimable benefites, to wit, of ane God, ane Lord Jesus, ane faith, and of ane baptisme : out of the quhilk Kirk there is nouther lyfe nor eternal felicitie. And therefore we utterly abhorre the blasphemie of them that affirme that men quhilk live according to equitie and justice sall be saved, quhat religioun that ever they have professed. For as without Christ Jesus there is nouther life nor salvatioun, so sall there nane be participant thereof bot sik as the Father hes given unto His Sonne Christ Jesus, and they that in time cum unto Him, avowe His doctrine, and beleeve into Him (we comprehend the children with the faithful parentes). This Kirk is invisible, knawen onelie to God, quha alane knawis whom He hes chosen, and comprehends alsweil (as said is) the elect that be departed, commonlie called the Kirk triumphant, and they that zit live and fecht against sinne and Sathan, as sall live hereafter.

17. The Immortalitie of the Saules.
18. Of the Notes be the quhilk the Trewe Kirk is decerned fra the False, and quha sall be Judge of the Doctrine :—

Because that Sathan from the beginning hes laboured to deck his pestilent synagoge with the title of the Kirk of God, and hes inflamed the heartes of cruel murtherers to persecute, trouble, and molest the trewe Kirk and members thereof, as Cain did Abel, Ismael Isaac, Esau Jacob, and the haill priesthead of the Jewes Christ Jesus himselfe and His apostles after Him; it is ane thing maist requisite that the true Kirk be decerned fra the filthie synagogues be cleare and perfite notes, least we, being deceived, receive and imbrace to our

awin condemnatioun the ane for the uther. The notes, signes, and assured takens whereby the immaculate spouse of Christ Jesus is knawen fra the horrible harlot, the Kirk malignant, we affirme are neither antiquitie, title usurped, lineal descente, place appoynted, nor multitude of men approving ane error; for Cain in age and title was preferred to Abel and Seth; Jerusalem had prerogative above all places of the earth, where also were the priests lineally descended fra Aaron. And greater number followed the scribes, Pharisies, and priestes, then unfainedly beleeved and approved Christ Jesus and His doctrine; and zit, as we suppose, no man of sound judgement will grant that ony of the forenamed were the Kirk of God. The notes, therefore, of the trew Kirk of God we beleeve, confesse, and avow to be, first, the trew preaching of the Word of God, into the quhilk God hes revealed Himselfe unto us, as the writings of the prophets and apostles dois declair; secondly, the right administration of the sacraments of Christ Jesus, quhilk mon be annexed unto the word and promise of God, to seale and confirme the same in our hearts; last, ecclesiastical discipline uprightlie ministred, as God his Word prescribes, whereby vice is repressed and vertew nurished. Wheresoever, then, thir former notes are seene, and of ony time continue (be the number never so fewe above two or three), there without all doubt is the trew Kirk of Christ, who, according unto His promise, is in the midst of them. Not that universal, of quhilk we have before spoken, bot particular, sik as was in Corinthus, Galatia, Ephesus, and uther places in quhilk the ministrie was planted be Paul, and were of himselfe named the Kirks of God: and sik Kirks we, the inhabitantis of the realme of Scotland, professoris of Christ Jesus, professis our selfis to have in our citties, townes, and places reformed, for the doctrine taucht in our kirkis is conteined in the writen Worde of God—to wit, in the buiks of the Auld and New Testamentis, in those buikis, we mean, quhilk of the ancient have beene reputed canonical. In the quhilk we affirme, that all thingis necessary to be beleeved for the salvation of mankinde is sufficiently expressed. The interpretation quhairof, wee confesse, neither appertaines to private nor publick persone, neither zit to ony Kirk, for ony preheminence or prerogative, personalle or localle, quhilk ane hes above ane uther; bot apperteines to the Spirite of God, be the quhilk also the Scripture was written. When controversie, then, happinis for the right understanding of ony place or sentence of Scripture, or for the reformation of ony abuse within the Kirk of God, we ought not sa meikle to luke what men before us have said or done, as unto that quhilk the Halie Ghaist uniformelie speakes within the body of the Scriptures, and unto that quhilk Christ Jesus himselfe did and commanded to be done. For this is ane thing universallie granted, that the Spirite of God, quhilk is the Spirite of Unitie, is in nathing contrarious unto Himselfe. Gif, then, the interpretation, determination, or sentence of ony doctor, kirk, or councel, repugne to the plaine word of God, written in ony uther place of the Scripture, it is a thing maist certaine, that there is not the true understanding and meaning of the Haily Ghaist, although that councels, realmes, and nations have

approved and received the same. For we dare not receive nor admit ony interpretation quhilk repugnes to ony principal poynt of our faith, or to ony uther plaine text of Scripture, or zit unto the rule of charitie.

19. The Authoritie of the Scriptures:—

As we beleeve and confesse the Scriptures of God sufficient to instruct and make the man of God perfite, so do we affirme and avow the authoritie of the same to be of God, and nether to depend on men nor angels. Wee affirme, therefore, that sik as allege the Scripture to have na uther authoritie bot that quhilk it hes received from the Kirk to be blasphemous against God, and injurious to the trew Kirk, quhilk alwayes heares and obeyis the voyce of her awin spouse and pastor, bot takes not upon her to be maistres over the samin.

20. Of General Councels, of their Power, Authoritie, and Cause of their Convention:—

As we do not rashlie damne that quhilk godly men, assembled together in general councel lawfully gathered, have proponed unto us, so without just examination dare we not receive quhatsoever is obtruded unto men under the name of general councels; for plaine it is, as they wer men, so have some of them manifestlie erred, and that in matters of great weight and importance. So farre, then, as the councel provis the determination and commandement that it gives, bee the plaine Worde of God, so far do we reverence and imbrace the same. Bot gif men, under the name of a councel, pretend to forge unto us new artickles of our faith, or to make constitutionis repugning to the Word of God, then utterlie we must refuse the same as the doctrine of devils, quhilk drawis our saules from the voyce of our onlie God, to follow the doctrines and constitutiones of men. The cause, then, quhy that general councellis convened was nether to make ony perpetual law quhilk God before had not maid, nether zit to forge new artickles of our beleife, nor to give the Word of God authoritie, meikle les to make that to be His word, or zit the trew interpretation of the same, quhilk was not before, be His haly will, expressed in His Word; bot the cause of councellis (we meane of sik as merite the name of councellis) wes partlie for confutation of heresies, and for giving publick confession of their faith to the posterite following, quhilk baith they did by the authoritie of God's written Word, and not by ony opinion or prerogative that they could not erre be reason of their general assemblie: and this we judge to have beene the chiefe cause of general councellis. The uther was for gude policie and ordour to be constitute and observed in the Kirk, quhilk (as in the house of God) it becummis all things to be done decently and into ordour. Not that we think that ane policie and ane ordour in ceremonies can be appoynted for all ages, times, and places; for as ceremonies (sik as men have devised) ar bot temporal, so may and aucht they to be changed, when they rather foster superstition then that they edifie the Kirk using the same.

21. Of the Sacramentes.

22. Of the richt Administration of the Sacraments.

23. To whome Sacraments appertaine.

24. Of the Civil Magistrate :—

We confesse and acknawledge empyres, kingdomes, dominiouns, and citties to be distincted and ordained be God ; the powers and authoritie in the same, be it of emperours in their empyres, of kings in their realmes, dukes and princes in their dominions, and of uthers magistrates in fre citties, to be God's haly ordinance, ordained for manifestatioun of His awin glory, and for the singular profite and commoditie of mankind : so that whosoever goeth about to take away, or to confound the haill state of civile policies, now long established, we affirme the same men not onely to be enimies to mankinde, but also wickedly to fecht against God his expressed will. Wee farther confesse and acknawledge that sik persouns as are placed in authoritie ar to be loved, honoured, feared, and halden in most reverent estimatioun, because that they are the lieutennents of God, in whose sessiouns God himself dois sit and judge ; zea, even the judges and princes themselves, to whom be God is given the sword, to the praise and defense of gude men, and to revenge and punish all open malefactors. Mairover, to kings, princes, rulers, and magistrates wee affirme that chieflie and most principallie the conservation and purgation of the religioun appertaines, so that not onlie they are appointed for civil policie, bot also for maintenance of the trew religioun, and for suppressing of idolatrie and superstitioun whatsoever ; as in David, Josaphat, Ezechias, Josias, and uthers highlie commended for their zeale in that caice, may be espyed. And therefore wee confesse and avow that sik as resist the supreme power, doing that thing quhilk appertains to his charge, do resist God his ordinance, and therefore cannot be guiltles. And farther we affirme that whosoever denies unto them their ayde, counsel, and comfort, quhiles the princes and rulers vigilantly travel in execution of their office, that the same men deny their help, support, and counsel to God, quha be the presence of His lieutennent dois crave it of them.

25. The Guiftes freelie given to the Kirk.

Arise, O Lord ! and let Thy enimies be confounded, let them flee from Thy presence that hate Thy godlie name. Give Thy servands strength to speake Thy word in bauldnesse, and let all natiouns cleave to Thy trew knawledge. Amen.

Thir Acts and Artickles ar red in the face of Parliament, and ratifyed be the three Estaitis of this Realm, at Edinburgh the 17 day of August, the zeir of God 1560 zeiris.

(*Note.*—The above Confession and the following statutes, printed from one of the older editions of the Scots Acts, are collated with Mr Thomson's Acts of the Parliaments of Scotland.)

NOTE B.

THE ACTS OF 1560 AS RE-ENACTED IN 1567.

1. Anent the Abolishing of the Pape, and his usurped Authoritie (Act 1567, c. 2).

Our soveraine lord, with advise of his dearest regent and three Estaitis of this present Parliament, ratifyis and apprevis the Act under-written, maid in the Parliament haldin at Edinburgh the 24 day of August, the zeir of God 1560 zeiris. And of new in this present Parliament, statutis and ordainis the said Act to be as ane perpetual law to all our soveraine lordis lieges in all times cumming. Of the quhilk the tenour followis: Item, the three Estaitis understanding that the jurisdictioun and authoritie of the Bischop of Rome, called the Pape, used within this realme in times bypast, hes not onely bene contumelious to the Eternal God, but also very hurtful and prejudicial to our soveraine's authoritie and commoun weill of this realme. Theirfoir has statute and ordained that the Bischop of Rome, called the Pape, have na jurisdictioun nor authoritie within this realme in ony time cumming. And that nane of our said soveraine's subjects, in ony times heirafter, sute or desire title or richt of the said Bischop of Rome or his sait to ony thing within this realme, under the paines of barratrie—that is to say, proscription, banishment, and never to bruke honour, office, nor dignitie within this realme. And the contraveners heirof to be called before the justice or his deputes, or before the Lords of the Session, and punisched therefoir, conforme to the lawes of this realme. And the furnischers of them with finance of money, and purchassers of their title of right, or maintainers or defenders of them, sall incurre the samin paines. And that na bischop nor uther prelat of this realme use ony jurisdiction in time cumming be the said Bischop of Rome's authoritie, under the paine foirsaid. And therefoir of newe decernis and ordainis the contraveners of the samin, in ony time hereafter, to be punished according to the paines in the foirsaid Act above rehearsed.

2. Anent the Annulling of the Actes of Parliament made against God his Word, and Maintenance of Idolatrie in ony Times bypast (Act 1567, c. 3).

Item, Our soveraine lord, with advise of his dearest regent and three Estaitis of this present Parliament, ratifyis and apprevis the Acte underwritten, made in the Parliament haldin at Edinburgh the 24 day of August, the zeir of God ane thousand five hundreth threescore zeiris. And of new in this present Parliament statutis and ordainis the said Act to be as a perpetual law to all our soveraine lordis liegis in all times cumming. Of the quhilk the tenour followis: The quhilk day, forsameikle as there hes beene divers and sinnrie Acts of Parliament made in King James

the First, Secund, Thrid, Fourt, and Fift times, kinges of Scotland for the time, and als in our soveraine ladie's tyme, not aggreing with God's haly Word, and be them divers persones tuke occasion to maintaine idolatrie and superstition within the Kirk of God, and repressing of sik persones as were professours of the said Word, quhairthrow divers innocents did suffer. And for eschewing of sik inconvenientes in time cumming, the three Estaitis of Parliament hes annulled, and declared all sik Acts made in times bypast, not agreing with God his Word, and now contrary to the Confessioun of Faith according to the said Word, published in this Parliament, to be of nane availe, force, nor effect. And decernis the said Acts, and every ane of them, to have na effect nor strength in time to cum, bot the samin to be abolished and extinct for ever, in sa far as any of the foirsaidis Acts are repugnant and contrarie to the Confessioun of Faith and Word of God foirsaid, ratyfied and approved be the Estaites in this present Parliament. And therefore decernis and ordainis the contraveners of the samin Act, in ony time hereafter, to be punisched according to the lawes. Of the quhilk Confession of the Faith the tenour followes.

(*In twenty-five chapters, as above printed, but excepting the Salutation and the Preface.*)

3. Anent the Messe abolished, and Punishing of all that hearis or sayis the samin (Act 1567, c. 5).

Item, Our soveraine lord, with advise of his dearest regent and the three Estaits of this present Parliament, ratifyis and apprevis the Act under-written, maid in the Parliament halden at Edinburgh the 23 day of August, the zeir 1560 zeires. And of new in this present Parliament statutis and ordainis the said Act to be as an perpetual law to all our soveraine lord's lieges in all times to cum; of the quhilk the tenour followes: The quhilk day, forsameikle as Almichty God, be His maist trew and blessed Word, hes declared the reverence and honour quhilk suld be given unto Him; and be His Sonne Jesus Christ hes declared the trew use of the sacraments, willing the same to be used according to His will and Word. Be quhilk it is notour and perfitelie knawen that the sacramentes of baptisme and of the bodie and bloud of Jesus Christ hes bene in all times bypast corrupted be the Papistical Kirk and be their usurped ministers. And presentlie, notwithstanding the reformatioun alreadie made, according to God's Word, zit not the less there is sum of the said Papis Kirk that stubburnely perseveris in their wicked idolatrie, sayand messe and baptizand conforme to the Papis Kirk, prophanand therethrow the sacraments foirsaides in quiet and secreete places, therethrow nouther regardand God nor His holy Word. Therefoire it is statute and ordained in this present Parliament that na maner of persoun or personnis, in onie time cumming, administrat ony of the sacraments foirsaids, secreetly or ony uther maner of way, but they that

are admitted and havand power to that effect. And that na maner of persoun or persounis say messe, nor zit hear messe, nor be present theirat, under the paine of confiscatioun of all their gudis, movabil and unmovabil, and punishing of their bodyes, at the discretioun of the magistrat within quhais jurisdictioun sik personnis happinnis to be apprehended, for the first fault; banishing of the realme for the second fault; and justifying to the death for the thrid fault. And ordainis all schireffes, stewards, baillies, and their deputes, provestes and baillies of burrowes, and uthers judges quhatsumever within this realme, to take diligent sute and inquisitioun within their bounds quhair ony sik usurped ministerie is used, messe saying, or they that beis present at the doing thereof, ratifyand and approovand the samin, and take and apprehend them to the effect that the paines above written may be execute upon them. And therefore of new decernis and ordaines the contraveneris of the samin, in ony tyme heirafter, to be punished according to the paines of the aforesaid Acte above rehearsed.

NOTE C.

ACTS DECLARING THE TRUE CHURCH, AND AS TO THE KING'S OATH.

1. Anent the Trew and Haly Kirk, and of them that ar declared not to be of the samin (Act 1567, c. 6).

Item, Forasmeikle as the ministers of the blessed Evangel of Jesus Christ, whom God of His mercie hes now raised up amangst us, or heirafter sall rayse, agreeing with them that now livis in doctrine and administratioun of the sacraments, and the peopil of this realme that professis Christ as He now is offered in His Evangel, and do communicat with the haly sacraments (as in the reformed Kirkes of this realme they are publicklie administrat) according to the Confessioun of the Faith: Our soveraine lord, with advise of my lord regent and three Estaitis of this present Parliament, hes declared and declaris the foresaid Kirk to be the onely true and halie Kirk of Jesus Christ within this realme. And decernis and declaris that all and sindrie, quha outher gainsayis the word of the Evangel received and approved, as the heades of the Confessioun of Faith professed in Parliament of before, in the zeir of God 1560 zeires, as also specified in the Actes of this Parliament mair particularlie dois expresse, and now ratifyed and approoved in this present Parliament, or that refusis the participatioun of the halie sacramentes as they are now ministrat, to be na members of the said Kirke within this realme now presently professed, sa long as they keep themselves sa divided fra the society of Christ's bodie.

2. Anent the King's Aith, to be given at his Coronation (Act 1567, c. 8).

Item, Because that the increase of vertew and suppressing of idolatrie craves that the prince and the people be of ane perfite religioun, quhilk of God's mercie is now presently professed within this realme, theirfore it is statute and ordained be our soveraine lord, my lord regent, and three Estaites of this present Parliament, that all kinges and princes, or magistrates whatsoever halding their place, quhilkis hereafter in ony time sall happen to reigne and beare rule over this realme, at the time of their coronatioun and receipt of their princely authoritie, make their faithful promise be aith, in presence of the Eternal God, that induring the haill course of their lyfe they sall serve the samin Eternal God to the uttermost of their power, according as He hes required in His maist haly Word, reveiled and contained in the New and Auld Testaments. And according to the samin Worde sall mainteine the trew religion of Jesus Christ, the preaching of His halie Word, and dew and richt ministration of the sacraments now received and preached within this realme; and sall abolish and gainstand all fals religioun contrare to the samin; and sall rule the peopil committed to their charge according to the will and commaund of God, reveiled in His foresaide Word, and according to the lovabil lawes and constitutions received in this realme na wise repugnant to the said Word of the Eternal God; and sall procure to the uttermaist of their power, to the Kirk of God and haill Christian peopil, trew and perfite peace in all time cumming. The richtis and rentis, with all just priviledges of the Crowne of Scotland, to preserve and keip inviolated, nouther sall they transfer nor alienate the samin. They sall forbid and represse, in all estaites and degries, reif, oppression, and all kinde of wrang. In all judgementes they sall command and procure that justice and equitie be keiped to all creatures, without exception, as the Lord and Father of all mercyis be merciful to them. And out of their landes and empyre they sall be careful to rute out all heretikes and enimies to the trew worship of God, that sall be convict be the trew Kirk of God of the foirsaidis crymes. And that they sall faithfullie affirme the things above written be their solemne aith.

Between these Acts stands the Statute 1567, c. 7.

That the examination and admission of ministers within this realm be only in power of the Kirk, now openly and publicly professed within the same; the presentation of lawit patronages always reserved to the just and ancient patrons.

NOTE D.

ACTS OF 1572.

1. That the Adversaries of Christis Evangell sall not injoy the Patrimonie of the Kirk (Act 1572, c. 46).

Forsameikle as the conservation and purgation of the religion chiefly perteines to the Christian and godlie kings, princes rewlars, and magistrats, and that it is maist requisite that the Kirk within this realme be served be godlie persones of sound religion, obedient to the authoritie of the king's majestie our soveraine lord, it is theirfoir concluded, statute, and ordained be his majestie, with advise of his said regent, the three Estaites, and haill bodie of this present Parliament, that everie person quha sall pretend to be an minister of God's Word and sacraments, or quha presentlie dois, or sall pretend to have, and bruik ony benefice, use of the fruites, stipend, pension, or portion foorth of benefice, and ar not alreadie under the discipline of the trew Kirk and participates not with the sacramentes theirof, sall in the presence of the archbischop, bischop, superintendent, or commissioner of the diocese or province quhair he hes or sall have the ecclesiastical living, give his assent and subscrive the artickles of religion, conteined in the Actes of our soveraine lord's Parliament, and give his aith for acknawledging and recognoscing of our soveraine lord and his authoritie, and sall bring ane testimonial in writing thereupon. And openly on sum Sunneday, in time of sermone or publick prayers in the kirk, quhair be reason of his ecclesiastical living he aucht to attend, or of the fruites quhairof he receives commoditie, reade baith the testimonial and confession ; and of new mak the said aith, within the space of ane moneth after the publication of this present Act. And gif he be foorth of the realme, within threescoir dayes after the publication heirof. And in time cumming, within ane moneth after his admission, under the paine that everie person that sall not do as is above appoynted, sall be, *ipso facto*, deprived, and all his ecclesiastical promotions and living sall be vacand, as gif he war then naturallie dead. And gif ony person ecclesiastical, or quhilk sall have ecclesiastical living, sall willfullie maintene ony doctrine directlie contrair or repugnant to ony of the saidis artickles, and being convened and called as followes, sall persist therein, and not revoke his error, or after his revocation sall of new affirme sik untrew doctrine, sik mainteining, affirming, and persisting sall be just cause to deprive him of his ecclesiastical living. And it sall be lauchful to them befoir quhome he is called and convened to deprive him. Quhilk sentence of deprivation pronounced, he sall be deprived indeede, and his living vacand, as gif he war naturallie deade. And that all archbischoppes, bischoppes, superintendentes, possessoures, or titulares of prellattis, be called and convened for this effect befoir the General Assemblie of the

Kirk; and all inferiour persones befoir the archbischoppes, bischoppes, superintendentes, or commissioneres of the diocese or provinces within the quhilkes they dwell.

2. Anent the Disobedientis whilkis salbe ressavit to our Soverane Lordis mercy and pardoun (Act 1572, c. 47).

Item, Forsameikle as there hes bene great rebellion and disobedience against our soveraine lord's authority in time bypast, and seeing the cause of God's trew religion and his hienesse' authoritie foirsaid ar sa joyned as the hurt of the ane is common to baith, it is theirfoir declared, statute, and ordained be our soveraine lord, with advise and consent of my Lord regentis grace, with the three Estaites and haill bodie of this present Parliament, that nane sall be repute as loyal and faithful subjectes to our said soveraine lord or his authoritie, bot be punishable as rebellares and gainestanderes of the samin, quhilk sall not give their confession and make their profession of the saide trewe religion. And that all sik as makis profession thereof and zit hes maid defection fra their dewe obedience aucht to our soveraine lord, sall be admonished be the pastours and ministers of the Kirk to acknowledge their offence and returne to their dewtiful obedience; and gif they failzie therein, to be excommunicate and secluded from the societie of the Kirk, as rebellious and corrupt members, betuixt and the first day of Junij nixt to cum. And that alwaies befoir sik personnes as hes maid defection be received to our soveraine lordis mercie and favour, they sall give the confession of their faith of new, and promise to continew in the confession of the trewe religion in time cumming, mainteine our soveraine lordis authoritie; and that they sall at the uttermaist of their power fortifie, assist, and mainteine the trew preachoures and professours of Christ's religion against quhatsumever enimies and gainestanderes of the samin; and namelie, against all sik, of quhatsumever nation, estaite, or degree they be of, that hes joyned and bund themselves, or hes assisted or assistes to set forward and execute the cruel decreittes of the Councel of Trent (quhilk maist injuriouslie is called be the adversaries of God's truth the Haly League), contrarie to the preachoures and trew professours of the Word of God.

NOTE E.

ACTS OF 1579.

1. Anent the Trew and Haly Kirk, and them declared to be not of the samin (Act 1579, c. 68; in Thomson's Acts, c. 6, iii. 137).

This is the ratification of Act 1567, c. 6 (see page 47): "Ordaining the

same to be here insert of new, because of sum defection and informalitie of words in default of the prenter." We have given the corrected form in the text (p. 17, 18), and need not repeat it. It is followed by—

2. Anent the Jurisdiction of the Kirk (Act 1579, c. 69).

Our soveraine lord, with advise of his three Estaites of this present Parliament, hes declared and granted jurisdiction to the Kirk, quhilk consistis and stands in the preaching of the trew Worde of Jesus Christ, correction of maners, and administration of the halie sacraments, and declairis that there is na uther face of kirk, nor uther face of religion, then is presentlie be the favour of God establisched within this realm, and that there be na uther jurisdiction ecclesiastical acknowledged within this realme uther then that quhilk is and sall be within the samin Kirk, or that quhilk flowis theirfra, concerning the premisses. (Then follows the appointment of a Commission.)

NOTE F.

ACT RATIFYING THE PRESBYTERIAN ORDER OF THE CHURCH. 1592.

Ratification of the Liberty of the Trew Kirk; of General and Synodal Assemblies; of Presbyteries; of Discipline; all Lawes of Idolatrie are abrogate; of Presentation to Benefices (Act 1592, c. 116).[1]

Our soveraine lord and Estaites of this present Parliament, following the lovabil and gude exemple of their predecessours, hes ratified and appreeved, and be the tenour of this present Act ratifies and apprevis, all liberties, priviledges, immunities, and freedomes quhatsumever, given and granted be his hienesse, his regentes in his name, or ony of his predecessours, to the trew and halie Kirk, presently established within this realm, and declared in the first Act of his hienesse' Parliament, the twentie day of October, the zeir of God ane thousand five hundreth threescoir ninetene zeires; and all and quhatsumever Actes of Parliament and statutes maid of before be his hienesse and his regentes, anent the liberty and freedome of the said Kirk; and specially the first Act of the Parliament halden at Edinburgh the twentie-foure daie of October, the zeir of God ane thousand five hundreth fourscore ane zeires, with the haill particular Acts there mentioned, quhilk sall be als sufficient as gif the samin were here ex-

[1] In the Acts of the Parliament (Thomson, iii. 541) this Act is entitled, 'Act for abolisching of the Actis contrair the Trew Religion.'

pressed ; and all uther Acts of Parliament maid sensine in favour of the trew Kirk ; and siklike ratifies and appreivis the General Assemblies appointed be the said Kirk ; and declares that it sall be lauchfull to the Kirk and ministers, everilk zeir at the least, and oftnes *pro re nata* as occasion and necessity sall require, to hald and keepe Generall Assemblies, providing that the king's majesty, or his commissioners with them to be appoynted be his hienesse, be present at ilk Generall Assemblie before the dissolving thereof, nominate and appoynt time and place quhen and quhair the nixt Generall Assembly sall be halden. And in case naither his majesty nor his said commissioner beis present for the time in that toun quhair the said General Assembly beis halden, then and in that case it sall be lesum to the said General Assemblie, be themselves, to nominate and appoynt time and place quhair the nixt Generall Assembly of the Kirk sall be keiped and halden, as they have bene in use to do thir times bypast. And als ratifies and apprevis the synodicall and provinciall assemblies to be halden be the said Kirk and ministers twise ilk zeir, as they have bene and ar presently in use to do, within every province of this realme. And ratifies and apprevis the presbyteries and particular sessiones appoynted be the said Kirk, with the haill jurisdiction and discipline of the same Kirk, aggried upon be his majesty in conference had be his hienesse with certaine of the ministrie conveened to that effect, of the quhilkes articles the tenour followes : Maters to be intreated in Provincial Assemblies.—Thir assemblies ar constitute for weichtie maters, necessar to be intreated be mutual consent and assistance of brethren within the province, as neede requiris. This assembly hes power to handle, ordour, and redresse all thinges omitted or done amisse in the particular assemblies. It hes power to depose the office-bearers of that province for gude and just cause deserving deprivation ; and generally, thir assemblies hes the haill power of the particular eldershippes quhairof they are collected. Maters to be intreated in the Presbyteries.—The power of the presbyteries is to give diligent laboures in the boundes committed to their charge ; that the kirkes be keeped in gude ordour ; to inquire diligently of naughty and ungodly persons, and to travel to bring them in the way againe be admonition, or threatning of Gods judgements, or be corection. It appertaines to the elderschippe to take heede that the Word of God be purely preached within their boundes, the sacramentes richtly ministered, the discipline interteined, and ecclesiastical guddes uncorruptly distributed. It belangis to this kinde of assemblies to cause the ordinances maid be the assemblies, provincialles, nationals, and generals, to bee keeped and put in execution, to make constitutions, quhilk concernis to prepon in the Kirk, for decent ordour in the particular kirk quhair they governe, providing that they alter na rules maid be the provincial or general assemblies, and that they make the provincial assemblies foresaids privy of the rules that they sall make ; and to abolish constitutiones tending to the hurt of the same. It hes power to excommunicate the obstinate, formal proces being led and dew interval of times observed. Anent particular Kirks, gif they be

lauchfully ruled be sufficient Ministers and Session.—They have power and jurisdiction in their awin congregation in maters ecclesiastical. And decernis and declaris the saids assembles, presbyteries, and sessiounes, jurisdiction and discipline thereof foresaid, to be in all times cumming maist just, gude, and godly in the selfe; notwithstanding of quhatsumever statutes, actes, canone, civill, or municipal lawes made in the contrare. To the quhilkis and every ane of them, thir presentes sall make expresse derogation. And because there ar divers Actes of Parliament maid in favour of the Papistical Kirke, tending to the prejudice of the liberty of the trew Kirk of God presently professed within this realme, jurisdiction and discipline thereof, quhilk stands zit in the buikes of the Actes of Parliament nocht abrogated nor annulled, therefore his hienesse and Estaites foresaids hes abrogated, cassed, and annulled, and be the tenour hereof abrogatis, cassis, and annullis, all Actes of Parliament maid be ony of his hienesse' predecessoures for maintenance of superstition and idolatry, with all and quhatsumever acts, lawes, and statutes maid at ony time before the daye and dait hereof against the liberty of the trew Kirk, jurisdiction and discipline thereof, as the samin is used and exercised within this realme.

And in speciall, that part of the seventh Act of Parliament halden at Striviling the fourth day of November, the zeir of God ane thousand four hundreth fourty-three zeires, commaunding obedience to be given to Eugenius, the Paipe for the time; the Acte maid be King James the Thrid, in his Parliament halden at Edinburgh the twenty-four day of Februar, the zeir of God ane thousand four hundreth fourscor zeires. And all utheris Actes quhairby the Paipis authority is established; the 47 Acte of King James the Thrid, in his Parliament halden at Edinburgh the twenty day of November, the zeir of God ane thousand four hundreth threescore nine zeires, anent the Satterday and uther vigiles to be halie dayes, from even-sang to even-sang.

Item, That part of the Act maid be the queene-regent in the Parliament halden at Edinburgh the first day of Februar, the zeir of God ane thousand five hundreth fifty-ane zeires, giving speciall licence for holding of Pasche and Zule. Item, The kingis majesty and Estaites foresaidis declaris that the second Acte of the Parliament halden at Edinburgh the xxij day of Maij, the zeir of God ane thousand five hundreth fourscoir four zeires, sall na wayes be prejudiciall nor derogate ony thing to the priviledge that God hes given to the spirituall office-bearers in the Kirk, concerning heads of religion, maters of heresie, excomunication, collation or deprivation of ministers, or ony siklike essentiall censours, speciallie grounded and havand warrand of the Word of God. Item, Our soveraine lord and Estaites of Parliament foresaids abrogatis, cassis, and annullis the 20 Act of the same Parliament, halden at Edinburgh the said zeir ane thousand five hundreth fourscoir four zeires, granting commission to bischoppes and utheris judges, constitute in ecclesiasticall causes, to receive his hienesse' presentationes to benefices, to give collation thereupon, and to put ordour in all causes ecclesiasticall; quhilk his majesty

and Estaites foresaidis declaris to be expired in the selfe, and to be null in time cumming and of nane availl, force, nor effect. And therefore ordainis all presentations to benefices to be direct to the particular presbyteries in all time cumming, with full power to give colation thereupon; and to put ordour to all maters and causes ecclesiasticall within their boundes, according to the discipline of the Kirk; providing the foresaids presbyteries be bound and astricted to receive and admitt quhatsumever qualified minister, presented be his majesty or uther laick patrones.

NOTE G.

CORRESPONDENCE BETWEEN THE GENERAL ASSEMBLY AND QUEEN MARY IN 1565.

The Church in 1565 had petitioned the queen that the mass be suppressed, and that the religion now professed be established by an Act of Parliament. "It is answered, first, for the part of her majesty's self, that her highness is in no ways yet persuaded in the said religion, nor yet that any impiety is in the mass; and therefore believes that her loving subjects will in no way press her to receive any religion against her own conscience, which should bring her to perpetual trouble by remorse of conscience, and therewith a perpetual unquietness; and, to deal plainly with her subjects, her majesty neither may nor will leave the religion wherein she has been nourished and upbrought; . . . praying all her loving subjects, seeing they have had experience of her goodness, that she neither has in times past, nor yet means hereafter, to press the consciences of any man, but that they may worship God in such sort as they are persuaded to be best, that they also will not press her to offend her own conscience." The Assembly in their answer do not concern themselves with how far this mutual toleration of opinion was consistent with the "religion in which her majesty had been brought up," but at once proceed to the position which they invariably take — founding nothing on expediency, but all on truth, and insisting on truth as a thing which may be discovered, proved, and held: "Where her majesty answers, that she is not persuaded in religion, neither that she understands any impiety in the mass, but that the same is well grounded, that is no small grief to the Christian hearts of her godly subjects; considering that the trumpet of Christ's Evangel has been so long blown in the country, that her majesty remains yet unpersuaded of the truth of this her religion; for our religion is not else but the same religion which Christ Jesus has in the last days revealed from the bosom of His Father, whereof He made His apostles messengers, and which they preached and established among His faithful till the 'gaincoming of our Lord Jesus Christ; . . . and therefore, as we are dolorous that her majesty in

this our religion is not persuaded, most reverently we require, in the name of the Eternal God, that her highness would embrace the means whereby she may be persuaded."—(Book of the Universal Kirk, 34, 35).

The right of their queen to a private judgment of her own seems here to be fully acknowledged, and to be qualified only by an obligation on her to "use the means" for persuading her to the truth. In the event, however, of her using these means, there can be little doubt that the Reformers were prepared to enforce another obligation, "to be persuaded" by them. And the Act "anent the mass," which had been already enacted by the Estates in 1560, and was repeated in 1567, shows the highest civil penalties attached to "stubbornness" in wrong opinions and practices in religious matters.

NOTE H.

EDWARD IRVING UPON THE SCOTTISH CONFESSION.

"This document is the pillar of the Reformation Church of Scotland, which hath derived little help from the Westminster Confession of Faith: whereas these twenty-five articles, ratified in the Parliament of Scotland in the year 1560, not only at that time united the states of the kingdom in one firm band against the Papacy, but also rallied the people at sundry times of trouble and distress for a whole century thereafter; and it may be said even until the Revolution, when the Church came into that haven of rest which has proved far more pernicious to her than all the storms she ever passed through; for, though the Westminster Confession was adopted as a platform of communion with the English Presbyterians in the year 1647, it exerted little or no influence upon our Church, was hardly felt as an operative principle either of good or evil, until the Revolution of 1688; so that the Scottish Confession was the banner of the Church in all her wrestlings and conflicts, the Westminster Confession but as the camp colours which she hath used during her days of peace—the one for battle, the other for fair appearance and good order. This document consisteth of twenty-five articles, and is written in a most honest, straightforward, manly style, without compliment or flattery, without affectation of logical precision or learned accuracy, as if it came fresh from the heart of laborious workmen, all the day long busy with the preaching of the truth, and sitting down at night to embody the heads of what they continually taught. There is a freshness of life about it which no frequency of reading wears off. Upon this also I would make one or two remarks.

"*Note First.*—This Confession is most precious on this account, that it hath guarded as well as could be against the abuse of Confessions by being advanced into a certain lordship over the consciences of the mem-

bers and ministers of the Church, yea, and of the Word of God itself. So little did the writers of it think that they were binding the Church of Scotland to the very words and sentences and even matters of this their deed of faith, that they declare themselves to be bound by it only so long as they should see it to be according to God's Word, and no longer. . . .

"*Note Second.*—This, the native and proper Confession of our Church, is very strong upon the nature of faith, as being no doubtsome, wavering, unresolved persuasion, but a firm and strong assurance of our personal interest in Christ; and so this they make to be not only of the essence, but the very essence of regeneration. . . .

"*Note Third.*—This Confession of ours is very strong and stable upon the subject of the incarnation of the Son of God, and the nature of the flesh in which He was incarnate. . . .

"*Note Fourth.*—This, the Confession of the Protestant Church of Scotland, is mighty upon the sacraments, that strongest hold of faith, which superstition is ever endeavouring to possess, and infidelity to undermine. . . .

"*Note Fifth.*—The Confession is good against the modern notion of a spiritual coming of Christ (as they term it); that is, a work done in the spirit, but not in person, for the end of bringing all things under Him upon the earth, Antichrist and all, some thousand years before the judgment. . . .

"*Note Sixth.*—The idea of a Church (not *the* Church) given in this precious symbol of our faith, and the faith of our fathers, is true, and well worthy of particular notice in these days, when it is believed that there are but two Churches in all this island, the Church of Scotland and the Church of England; which, in truth, are the only two things so named, that are, properly speaking, not *Churches*, but religious nationalities, or national communions of Churches: a church hath the same relation to the *National Church*, which *a person* hath to *the community*. . . . In one word, the church of which I am a minister, while doctrine, sacraments, and discipline are rightly administered in it, is, in the eye of our Reformers, as true and complete a church, as if it were the limb of a presbytery, synod, or General Assembly. This is an awfully important conclusion, and I thank the Reformers for being so explicit upon it. I learned it not from them, but from the patient study of the seven epistles in the Apocalypse. But I rejoice to know that it is the doctrine approved by the Church of Scotland.

"I now dismiss this document, with the highest encomium which I am capable of bestowing upon a work of fallible men. It hath been profitable to my soul, and to my flock. For several years I was in the habit of reading it twice in the year to my people; and once upon a time, when two men whom I wished to make elders had their difficulties in respect to the Westminster Confession, I found them most cordial in giving their assent to this. So that I may say my own church is constituted upon it. I love it for another reason, that it is purely a confession of faith, con-

taining neither matters of church government nor discipline. And if, as I foresee, the faithful of all Churches should be cast out of their communions, they could, without forfeiting any of their peculiarities of government and of worship, find in this standard a rallying-point. The doctrine is sound, its expression is clear, its spirit is large and liberal, its dignity is personal and not dogmatical, and it is all redolent with the unction of holiness and truth. With a very few enlargements of what is implied but not fully opened, with no changes or alterations, I could give it forth as the full confession of my faith."—Collected Writings of Edward Irving (London, 1864), i. 601.

CHAPTER II.

THE WESTMINSTER CONFESSION. 1647 AND 1690.

MIDWAY in the history of the Scottish Church, its Confession of 1560—the Scottish Confession proper—was exchanged for that of the Westminster Assembly. This step was taken by the Church in 1647, and was not sanctioned by the State for forty-three years after. The history of both incidents in the change must be adverted to.

Scotland was no longer "distincted" as a kingdom by having a separate king. The monarch whose first Parliament ratified the Confession of 1560, ascended the English throne: and the immediate consequence was, on the one hand, an attempt on the part of the Stewart sovereigns to model the Church of Scotland on some English pattern; and a farther developing, on the other hand, in the minds of churchmen, of the doctrine (latent in 1560) of the independence of the Church. Nearly a hundred years passed away with varied fortunes, till, Charles I. and Laud having driven Puritanism and Constitutionalism into an alliance, an explosion occurred at Edinburgh in 1638, succeeded immediately by the famous Assembly of that year, and the resumption by the Church of its long-claimed autonomy. In England the popular party had a longer battle to fight. The civil war commenced in August of the year 1642. In the September following, Prelacy was abolished by the Parliament; and on 12th June 1643, an "Ordinance of the Lords and Commons in Parliament" was

passed, calling the Westminster Assembly. It proceeds upon the statement that the "purity of religion" is "most dear to us;" that the liturgy, discipline, and government of the English Church requires reformation; and, in particular, that such a government must be settled therein "as may be most agreeable to God's holy Word, and most apt to procure and preserve the peace of the Church at home, and nearer agreement with the Church of Scotland and other Reformed Churches abroad:" and it proceeds to call certain learned, godly, and judicious divines to consult and advise as to doctrine, with a view to these ends. On 22d June, King Charles by proclamation forbade and denounced the meeting; but it commenced as ordered on the 1st of July, the Royalist divines staying away. On the 7th of August, commissioners from the Lords, Commons, and Assembly of Divines arrived in Edinburgh, with credentials addressed both to the Convention of Estates and to the General Assembly, desiring aid and counsel from the more united northern nation. After discussions, in which, Baillie says, "the English were for a civil league, we for a religious covenant,"[1] they agreed, as the best means for "settling the true Protestant religion and propagating the same to other nations, and for establishing his majesty's throne," to have a bond including both the civil and the religious element, as a "most near tie and conjunction" between the two nations. The result was the *Solemn League and Covenant*, the chief articles of which are engagements, first, for the preservation and reformation of religion in the three kingdoms, "according to the Word of God, and the example of the best Reformed Churches;" and, secondly, for the extirpation of "Popery and Prelacy." It was passed unanimously by the General Assembly on 17th August, the Lord High Commissioner of King Charles refusing to concur; and soon after received the solemn assent of the Scottish Convention of Estates, the English Houses of Lords and Commons, and the members of

[1] Baillie's Letters and Journals, ii. 90.

the Westminster Assembly. Commissioners were appointed by the General Assembly to represent Scotland in the Assembly of Divines, the ministers being Henderson, Gillespie, Rutherford, and Baillie,[1] and the elders, Lord Maitland [2] and Johnston of Warriston.

The Assembly of Westminster was at first occupied with the Form of Church Government, and Directory for Worship; both of which, after numerous and interesting discussions raised by the Erastian and Independent members, were passed, carried to Scotland, and approved of by the General Assembly, with a proviso that their general ratification "shall be in noways prejudicial to the farther discussion and examination" of certain articles. These documents so received by the Assembly have continued ever since to be of authority within the Church.

At a later period the Assembly took up the properly doctrinal part of their work, and in order to construct a Confession of Faith they on 9th May 1645 appointed a committee[3] and sub-committees to prepare each section and division, which were afterwards discussed and settled first by the larger committee and then by the Assembly itself. The whole was finished by November 1646, and towards the end of that year

[1] The first three, men of high repute for learning and piety; the last, the Boswell of the Westminster Assembly.

[2] The representative of the family of that Maitland of Lethington who had adjusted the first Confession with Knox, this nobleman was afterwards too well known in Scotland as Duke of Lauderdale. The parallel between his history and that of his greater ancestor is curious.

[3] The names of the committee were Dr Gouge, Dr Hoyle, Mr Herle, Mr Gataker, Mr Tuckney, Mr Reynolds, and Mr Vines, with the four Scots divines. Neal, in his History of the Puritans (iii. 378), says that "the English divines would have been content with revising and explaining the Thirty-nine Articles of the Church of England, but the Scots insisted on a system of their own." Yet the system adopted was not their own; and the model of the Westminster Confession seems to have been the Articles of the Irish Church, framed under the care of Archbishop Usher. It was certainly not the Scottish Confession. For valuable remarks upon these historical relations of the new creed, see 'Lecture on the Westminster Confession of Faith,' by Professor Mitchell, D.D., St Andrews; Edinburgh, 1866.

was presented to the Houses of Parliament. On the 22d March 1648 a conference was held on the subject between the two Houses; but the Westminister Confession was never formally adopted by the English nation or by its parliamentary representatives,[1] the obstacle being the strong feeling, on the one hand, in the direction of toleration and Congregationalism, and on the other of Erastianism, which prevailed in the Parliament. Cromwell's government was followed by the counter-revolution and the re-establishment of Episcopacy, after which neither Puritanism nor its doctrinal Confession ever recovered their hold in England. In Scotland the Restoration brought with it, as we shall afterwards see, renewed attempts to introduce Episcopacy, and a pressure on the Presbyterian Church, ending in a severe persecution; but at the close the Church system seems to have been deeper in the imaginations and hearts of the people than at any previous time, and the creed adopted in 1647 was accepted without any question in 1690 as that which the State was now willing to sanction.

As in the case of the Scottish Confession, we give in the appendix to this chapter the heads of all the chapters of that of Westminster, printing in full those sections which seem to bear on the subject of this volume.

Of the manner in which the Scottish Church adopted its present Confession we have, fortunately, very complete evidence in the important Act of Assembly of 1647, which we give in the appendix. It contains many points of interest, such as the importance of a Confession of Faith[2] (as "the chiefest

[1] The Parliament proposed to leave out the thirtieth and thirty-first chapters, relating to Church censures and to synods and councils; as also the fourth paragraph of chapter twenty, on the power both of the Church and magistrate to punish open maintainers of mischievous opinions or practices.—See these paragraphs given in full in the appendix to this chapter.

[2] The Westminster Confession, like that of 1560, has no chapter on creeds; and it lacks the preface which supplied that want in the case of its predecessor. On the other hand it is fuller and more express in the doctrinal region around and near the subject of

part of that uniformity in religion" which the three kingdoms were bound to endeavour); the deliberation of the Scottish Church in adopting the Confession, which was printed for the inspection and consideration of members, and not only ex-

creed; and we may here collate these utterances.

The Confession declares that God "is truth itself" (c. 20, § 4); that holy Scripture is "therefore to be received, because it is the Word of God;" and that the authority of it dependeth not upon the testimony of any church; that "God alone is Lord of the conscience, and hath left it free from the doctrines and commandments of men which are in anything contrary to His Word, or beside it, in matters of faith or worship" (c. 20, § 2); and that all synods and councils may err, and are not therefore to be made the rule of faith, but are to be used as a help to faith (c. 31, § 4). And yet this Christian liberty is not opposed to the "powers which God hath ordained," which are also set forth. God, the King of the world, hath ordained civil magistrates under Him for "His own glory and the public good;" and it is the magistrate's duty not only to take order for the unity of the Church, and the purity of God's truth, worship, and ordinances, but also to punish those who publish scandalous and mischievous doctrines (c. 23). The invisible Church is the whole elect, living and dead, and yet to live, under Christ their Head: the visible Church consists of all those everywhere "that profess the true religion;" and visible or particular Churches, with the highest privileges from Christ their King, are yet subject both to mixture and error (c. 25). They have from Him a government in the hands of church-officers, distinct from the civil magistrate; these officers have a "power of the keys," by the Word and Gospel, and also by censures and absolution (c. 30); and Christ's ministers may meet in synod or council with or without the magistrate, and to them so met it belongeth, not of their own authority, but as appointed thereunto by God, "to determine controversies of faith" in accordance with His Word. And while this is the function of synods, and the "civil magistrate may not assume to himself the administration of the Word," he has yet authority, in order "that the truth of God be kept pure and entire," to call synods, be present at them, and to "provide that whatsoever is transacted in them be according to the mind of God" (c. 23).

It appears to result generally from the paragraphs here reviewed and quoted in the appendix, that creeds (which are not directly treated of) have no proper authority, that being given only to truth or God's Word; that, however, both the magistrate and the Church having to deal with God's Word—the latter as its proper work, the former indirectly—they *may* have an interest that creeds be constructed, but that it is rather the province of the Church to construct them with the magistrate's countenance and sanction; that these two powers should work together in this matter, but if they cannot, may work separately; and, finally, that individuals, churches, and states are at all times and inalienably free to follow truth rather than their creeds, but at the risk on the part of the Church of being punished by the State, on the part of the State of being censured by the Church, and on the part of the individual of suffering in both ways.

amined in private, but twice publicly read over; the twofold approval of it, first, "as to the truth of the matter, judging it to be most orthodox, and grounded upon the Word of God:" and also, "as to the point of uniformity, agreeing, for our part, that it be a common Confession of Faith for the three kingdoms;" and, lastly, the independence of the Church's reception and approval of it, as shown in all these circumstances, and still more remarkably in the several explanations and modifications under which alone they accept and ratify it. These modifications are two—a reservation in favour of the system of Presbytery, which is omitted from the Confession, but which, though only given in the Directory, they indicate to be the "truth of Christ;" and a full statement as to the power of the magistrate in reference to synods or assemblies, and of the right of the Church to meet even without his consent.

No mention is made in this Act of the old Confession of 1560. It may be supposed that the Assembly held both their old Confession and their new to be true, and therefore consistent with each other; but this is not stated. Whether in any sense they held the old Confession to be still binding is a more doubtful matter. As the new one is to be a "Confession for the three kingdoms," it may be argued that the old Scottish Confession might still continue as a municipal or domestic authority for Scotland; but as the change is founded on the obligation to "uniformity in religion," the presumption seems rather in favour of the exclusive authority of the new creed.

The fact that the Scottish Church did, at the culminating point of its history, and in the period of its greatest energy and influence, throw away the old creed upon which it might plausibly be said to have been even founded, and *proprio motu* exchange it for another and a wholly new one, casts a strong and not unneeded light upon the previous and subsequent history. And this is not less striking when we observe that the new creed is in no respect a modification

or re-presentation of the old. Not only is it the case that many propositions, and even whole paragraphs and chapters, contained in the Scottish Confession, are not found in that of Westminster, and that very many are found in the new creed which were not in the old,—but the two were not even made upon the same plan. The structure of the one is wholly different from that of the other. And they are equally different in details. There is no one sentence or proposition in the Westminster Confession identical with any one in the Scottish Confession. The new creed was made *de novo*, without any thought of the old. It is not necessary, in noting the differences between the Confessions, to suppose that these are irreconcilable. All truths are reconcilable; and an adequate intelligence could deduce the whole body of divinity with absolute certainty from any one limb or fragment. But that very large differences do exist is certain. We shall have occasion afterwards to notice that, on so important a matter as the doctrine of the visible Church, these creeds occupy extreme positions, which are separated by the bulk of the Confessions of the Reformation. The doctrine of the Magistrate, of the Sabbath, of Predestination, of Assurance, of Church rulers, and of the Sacraments, may be instanced as matters in which all theologians have observed a great difference, while some have alleged a decided contrast between the two.[1] And while the diversity extends to each sentence and to each clause of each

[1] See Herzog's Real-Encyclopädie, article Schottland, xiii. 708. In 1831 Edward Irving printed an edition of the older Scottish standards, including the Confession, with a preface, some portions of which we have inserted in the appendix to the last chapter (Note H), as showing not so much the particular differences (which Irving was incapable of noting minutely or accurately), as the general influence of the Confession of Knox upon a mind singularly open to such influence. Irving's preference for the older Confession on the subjects of faith and assurance was shared by the "Marrow men," divines far more trusted in Scotland than the illustrious London preacher. Two of these ministers, in the year 1725, even brought, in their commissions to the General Assembly, "a declaration that they had signed the Confession of Faith as agreeable to our old standards."—Wodrow's Correspondence, iii. 194.

sentence, there is a difference in the tone and sentiment, as well as in the mode of treatment and style of thought, of the whole, which reminds us of the lapse of the century between, and of the difference between the stand-point of the Reforming and the Puritan age—a difference not so great, perhaps, as between that of the Puritans and our own, but still one which is unmistakable and important.[1] That the Scottish Church, bound with innumerable oaths and engagements to its old creed, should have voluntarily made a change so great without the smallest scruple or hesitation on the part of a single member of it, indicates a vitality in the protestation for freedom of 1560, which the intermediate history had scarcely given us the right to expect.

Two years after the General Assembly had adopted the Westminster Confession, the Estates of Parliament, "having seriously considered the Catechisms, with the Confession of Faith, with three Acts of Approbation thereof by the commissioners of the General Assembly, presented unto them by the commissioners of the said General Assembly, do ratify and approve the said Catechisms, Confession of Faith, and Acts of Approbation of the same."[2] But this was one of the Parliaments whose Acts were abolished by the Act Rescissory of Charles II.

A few months later[3] the General Assembly passed what became practically a very important Act, ordaining that in every house there should be at least one copy of the Catechisms, Directory, *and Confession of Faith* (that of Westminster had evidently already usurped the *clarum et venerabile nomen*, and needed no distinguishing addition); and all ministers and elders were ordained to further the teaching of the ignorant therefrom. During the twelve years of Cromwell's vigor-

[1] The mere difference of style of the new Confession is interesting — for example, that "*materiæ spissitudo*" which the old Latin translators of it plead to the reader as their excuse "si oratio nostra minus fluere tibi videatur." See appendix to Dr Niemeyer's Collectio Confessionum; Leipsic, 1840.

[2] Feb. 7, 1649. [3] July 30, 1649.

ous government, Scotland enjoyed profound peace, and the instruction of the people was carried on by the ministers in their presbyteries (meetings of the Assembly being prohibited) in a more thorough way than was perhaps the case before or since. The consequence was that the Confession and Catechisms became early what they have ever since been—the great theological repositories from which, or through which, Scripture truth flowed to the people; and the change of creed made in one day by the General Assembly of 1647, was accepted without difficulty or delay.[1]

On the accession of Charles II. in 1660, an Act[2] was passed in the first session of Parliament, rescinding and annulling all the Scottish Parliaments from 1640 to 1648, and all their

[1] *Was the Westminster Confession subscribed* between the years 1647 and 1690, either before or after the Restoration? This question was put to Robert Wodrow by an Irish correspondent at the time a controversy broke out upon subscription in Ulster, in the year 1723. Wodrow, in answer, regrets that he had not particularly inquired into the matter: "At present, what offers to me is this. Our National Covenant, you know, is properly a Confession of Faith against Popery, and accordingly was sworn and subscribed by all ministers and intrants, till Prelacy came in 1610. Then the Articles of Perth were urged; and as I think, though I cannot be positive about it, the conform clergy were urged to sign them, at least they did swear and sign the oath of canonical obedience. When, in the year 1636, our new canons were framed, it was designed they should be signed by all ministers and intrants; but this was happily prevented by the second Reformation, 1637 and 1638, which you know began with swearing and subscribing the National Covenant, and that with the explanation of the Assembly at Glasgow, declaring that Episcopacy was renounced in that Covenant. This continued to be the Confession of this Church, in consequence, as you know, of the Solemn League and Covenant, 1643. Whether that Confession was then formally signed, and ministers and intrants required to give their explicit assent, I cannot so well inform you; but of this I can, that till the Restoration the Solemn League and Covenant was still subscribed by intrants, and the Solemn League and Covenant binds down to that uniformity of doctrine, &c., that was to be agreed upon by both Churches, and consequently was a material subscribing of it when approven by the General Assembly. In licensing and ordaining *sub cruce*, I cannot be positive whether there was a formal subscription; but I know that there was a verbal assent required to our doctrines contained in the Westminster Confession; and the ministers, 1690, who framed the Act for subscribing the Confession, were just the suffering ministers in the period twixt the Restoration and Revolution." —Wodrow's Correspondence, iii. 84.

[2] Act 15, first Parliament of King Charles II.

enactments; and the immediately succeeding Act, while it allows "in the mean time" the present administration of the Church by sessions, presbyteries, and synods, declares his majesty's resolution "to maintain the true Reformed Protestant religion in its purity of doctrine and worship, as it was established within this kingdom during the reigns of his royal father and grandfather of blessed memory." No countenance is certainly intended to the Westminster Confession, which was the child of the Solemn League and Covenant, always denounced as "treasonable." The first Act of the second session of Parliament annulled "all Acts of Parliament by which the sole and only power and jurisdiction within this Church doth stand in the Church," and by which it would seem that the office-bearers of the Church had any "church power, jurisdiction, or government, other than that which acknowledgeth a dependence upon and subordination to the sovereign power of the king as supreme." The same Act restores the "ancient and sacred order of bishops;" and the next denounces the Solemn League and Covenant, and the modification of the old National Covenant sworn in 1638. These statutes are chiefly negative or condemnatory; but the first Act of his second Parliament (1669) asserted positively "his majesty's supreme authority and supremacy over all persons, and in all causes ecclesiastical, within his kingdom." The Westminster Confession is all this time ignored; and the famous *Test* ordered in 1681 to be administered to all persons in trust, goes expressly back to the Scottish Confession. Before going on to renounce the Covenants and acknowledge the king's jurisdiction in ecclesiastical causes, it commences, "I own and sincerely profess the true Protestant religion, contained in the Confession of Faith, recorded in the first Parliament of King James VI., and I believe the same to be founded on and agreeable to the Word of God."[1] The

[1] The oath goes on to "affirm and swear, by this my solemn oath, that the king's majesty is the only supreme governor of this realm over all per-

passing over the Westminster Confession is the more remarkable, as it is at this point that Bishop Burnet (on such a matter an impartial and competent witness) tells of the complete hold the later creed had got of the people. At this year, 1681, he says, the Confession of 1560 "was a book so worn out of use that scarce any one in the whole Parliament had ever read it; none of the bishops had, as appeared afterwards. *For these last thirty years* the only Confession of Faith that was read in Scotland was that which the Assembly of Divines at Westminster, *anno* 1648, had set out, and the Scotch Kirk had set up instead of the old one; and the bishops had left it in possession, though the authority that enacted it was annulled." This is borne out very much by the unquestioning way in which the Westminster Confession was afterwards received by all parties to the Revolution Settlement, when even those who, like William of Orange, desired to gather into the reconstituted Church all the Episcopal clergy, apprehended no difficulty in their signing the Westminster Creed. (Some of the bishops and ministers of this party seem to have leaned towards Arminianism, and this imputation was thrown out against them at the Revolution by the Presbyterians;[1] but they indignantly denied it.) With regard to the mass of the people, there can be no doubt that the Test proposed to them a Confession which they had forgotten, and a doctrine as to supremacy over the Church which most of them by tradition disliked, and some on principle abhorred. Their steadfast resistance is manifest as we go on into the Statute-book of James II., crowded with inquisitorial and persecuting Acts—the eighth statute of his

sons, and *in all causes, as well ecclesiastical* as civil; . . . and I judge it unlawful for subjects, upon pretence of reformation, or any other pretence whatsoever, to enter into covenants or leagues, or to convocate, convene, or assemble in any councils, conventions, or assemblies—to treat, consult, or determine in any matter of state, civil or ecclesiastic, without his majesty's express command or special licence had thereto."—Third Parl. of Charles II., c. 6.

[1] See History of the Scottish Episcopal Church, by J. P. Lawson, M.A., 1843, p. 166.

first Parliament, for example, enacting that those who are merely "present as hearers at field-conventicles shall be punished by death and confiscation of their goods."

We have now come down to the Revolution of 1688.

When William of Orange landed, the Estates of Scotland met, and, declaring in their letter to him that "religion, liberty, and law are the dearest concerns of mankind," they in all their subsequent enactments observed the same order and precedence of religion over other interests. King James's not taking the ancient oath to preserve the Protestant religion [1] is made the first article of grievance in the Claim of Rights.[2] The meeting of Estates was turned into a Parliament which in its first session abolished Prelacy, but postponed the question of what the Church government should be;[3] and accordingly it is to the second session of this Parliament, meeting in the year 1690, that we owe the present legislative constitution of the Church of Scotland.

The first statute of this most important session was one rescinding the Act of 1669 already mentioned,[4] which is described as "asserting his majesty's supremacy over all persons and in all causes ecclesiastical." The second restores the ministers who had been banished "for not conforming to Prelacy, and not complying with the courses of the time." The third and fourth relate to elections of commissioners and committees of Parliament. And the fifth is that most important statute, "Ratifying the Confession of Faith, and Settling Presbyterian Church Government,"[5] the chief part of which runs as follows:—

"Our sovereign lord and lady, the king and queen's majesties, and three Estates of Parliament, conceiving it to be their bound duty, after the great deliverance that God hath lately wrought for this Church and kingdom, in the first

[1] See p. 48, *supra*.
[2] April 11, 1689.
[3] 1 William and Mary, c. 3.
[4] 1690, c. 1.
[5] 1690, c. 5.

place to settle and secure therein the true Protestant religion, according to the truth of God's Word, as it hath of a long time been professed within this land; as also, the government of Christ's Church within this nation, agreeable to the Word of God, and most conducive to the advancement of true piety and godliness, and the establishing of peace and tranquillity within this realm; and that by an article of the Claim of Right it is declared that Prelacy, and the superiority of any office in the Church above presbyters, is and hath been a great and insupportable grievance and trouble to this nation, and contrary to the inclination of the generality of the people ever since the Reformation, they having reformed from Popery by presbyters, and therefore ought to be abolished; likeas, by an Act of the last session of this Parliament, Prelacy is abolished; therefore their majesties, with advice and consent of the saids three Estates, do hereby revive, ratify, and perpetually confirm, all laws, statutes, and Acts of Parliament made against Popery and Papists, and for the maintenance and preservation of the true Reformed Protestant religion, and for the true Church of Christ within this kingdom, in so far as they confirm the same, or are made in favours thereof. Likeas, they by these presents ratify and establish the Confession of Faith, now read in their presence, and voted and approven by them, as the public and avowed Confession of this Church, containing the sum and substance of the doctrine of the Reformed Churches (which Confession of Faith is subjoined to this present Act). As also they do establish, ratify, and confirm the Presbyterian Church government," &c.

Some things may be at once observed with regard to this Act.

Both in the preamble and in the enactment the settlement of religion takes precedence of the settlement of the Church.

The religion to be settled and secured is described in the preamble as "true;" as "Protestant" (or perhaps this means

the truly Protestant religion); and as "according to the truth of God's Word;" but also, "as it hath of a long time been professed within this land."

A *contrast* is acknowledged between this religion and Popery, insomuch that it is not held too vague to confirm all Acts against Popery and Papists, and in favour of this true religion and the true Church of Christ.

A continuity and identity is acknowledged in this true religion that has been "of a long time professed in Scotland" —seemingly, indeed, "ever since the Reformation:" insomuch that the present Confession (though not the original one in favour of which the Acts confirmed had been made) "contains the sum and substance of the doctrine of the Reformed Churches."[1]

Lastly, this *Scottish Religion* is confirmed not only as the religion of the people and Church of Scotland, but as "true," and "according to God's Word;" and the Church is acknowledged as the true Church of Christ.

But a question may be raised whether the Confession of Faith is adopted in the same express and absolute way in this statute as the "true Reformed Protestant religion" is. This Act was passed on the 7th of June 1690, and it is to be observed that the approval of the Confession by the Estates was on the 26th of May previous, running in these words, "The Confession of Faith under-written was this day produced, read, and considered, word by word, in presence of their majesties' High Commissioner and the Estates of Parliament; and being voted and approven, was ordained to be recorded in the books of Parliament." The old Confession of 1560 had been, "by the public votes of the Estates of Scotland, authorised as a doctrine grounded on the infallible Word of God;" and the voting, approving, and recording of the later

[1] The expression "Reformed Churches" is of course equivalent in our law to "the Protestant Churches." Abroad, the "Reformed Churches" have come to mean the Calvinistic, as distinguished from the Lutheran or Evangelical: but this is not the sense of the Act.

creed, after it had been "considered word by word," seems naturally to convey the same idea—to show, at least, that the Confession was not only approved, but adopted, by Parliament. Still the words of this Approval in May are by no means so strong as those of the ancient Acts; and the terms of the Act which followed in June are still less so. No doubt the sovereigns and Parliament "ratify and establish" the (new) Confession of Faith, and "vote and approve" it; but it is not said that they do so as their own Confession, or as "the truth of God," but "as the public and avowed Confession of this Church." The Church had forty-three years before "publicly avowed" a Confession, which the State having first approved now authorises her to maintain or retain; not, perhaps, on the ground that it is in all respects and absolutely true, but on these grounds at least, whatever others there may be—first, that it *is* her public and avowed Confession; and, secondly, that it "contains the sum and substance of the doctrine" which the State does acknowledge to be true, and desires to "settle and secure, maintain and preserve."

Taking the whole words of the Act in connection with past legislation confirmed by it, and comparing it with the approval given two months before, the enactment cannot mean *less* than we have here indicated, and it may mean more. At the same time, the well-known leanings of King William to a comprehension which should reconcile the Churches of England and Scotland in respect both of doctrine and government,[1] and the dissatisfaction which high Presbyterians have always expressed with this Act, even when founding upon it, combine to show that this moderate reading of the statute is nearly true. What the Revolution Settlement therefore unquestionably establishes

[1] The draft of this Act was sent up by the Earl of Melville to the king, who returned it with alterations, some of which were adopted, while others were not. This curious and important document is found in the Leven and Melville Papers (and with other valuable circumstances), in Dr M'Cormick's Life of Principal Carstairs, to whom it is believed King William dictated it. We give it in the appendix to this chapter, Note D.

is—1. The doctrine historically held by the people of Scotland (especially as that doctrine is common to the Reformed Churches and opposed to Popery); and this doctrine it confesses to be the truth of God. 2. The Presbyterian Church. 3. The Westminister Confession, as the public doctrine of the Church,[1] and now (generally) approved by the State.

[1] An idea has been frequently suggested of late that the Church of Scotland, and even the ministers of it, are bound by the Confession of Faith only in so far as it is the "sum and substance of the doctrine of the Reformed Churches;" and in fact are only bound to that substance of doctrine. It is to be observed—

1. So far as individual ministers are concerned, their adherence is regulated not by the Act 1690, from which these words are taken, but by the very strict terms of the Act 1693, now still farther straitened by the formula of subscription.

2. Even as to the Church, the words of the Act 1690, if construed on the ordinary principles of interpretation, are unfavourable to this suggestion. By it the Confession is ratified "as the public and avowed Confession of this Church, containing the sum and substance of the doctrine of the Reformed Churches." It does not appear, as has been already remarked, that the State ratifies the Confession as absolutely true. It does not say that it *is* the sum and substance of the Reformed doctrine; in which case, as we gather from the rest of the Act, there would have been no hesitation in ratifying it absolutely. It says that it *contains* that sum and substance, and therefore it ratifies it as the permanent Confession of the Church which had already adopted it. But it is the Confession which the statute thus ratifies—the Confession as it was read—and not the Reformed doctrine. (It does not appear that the word "as" is to be read in connection with the word "containing." The words "containing the sum and substance of the doctrine of the Reformed Churches" appear to be not *taxative* or conditioning, but *demonstrative* or descriptive.)

3. While this seems to be the strict construction, three things are to be observed on the other side. The Confession is treated as a whole, as a unity, almost as a system. It is ratified not as a detail of the doctrines of the Church, nor as a heap of propositions about these doctrines, but as *the* Confession of this Church — a Confession having gradation, subordination, and structure—having such an essential unity in it as to contain the sum and substance of thirty or forty Reformed Confessions, all of them systematic, and all so harmonious that this statute speaks of them in the singular number, as "the doctrine" of the Reformed Churches, and substantially one. In the second place, the statute refers to the Confession not only in connection with the doctrines of other Churches, but with the past history and past doctrine of the Church of Scotland; and recognises the doctrine as the same, though the Confession had been changed. In the third place, it is known that this was done not *per incuriam*, but deliberately, and with an intention, on the part of the sovereign at least, of recalling and perhaps reuniting the Church of Scotland to other Churches.

While, therefore, to qualify or limit the Confession by the "substance of

Another point of considerable interest in this statute relates to the independence of the Church as to the new Confession.[1] Does the Act impose a creed upon the Church, or does it ratify it as adopted by the Church long ago? It ratifies *the* Confession of Faith, meaning thereby not the Scottish Confession, but that of Westminster, which hitherto had only an ecclesiastical existence in Scotland. On the other hand, it ratifies and establishes it as "now read in the presence of the Estates, and voted and approven by them;" and it establishes it, so read, as "the public and avowed Confession of this Church," without any of those qualifications, reservations, or amendments

Reformed doctrine" would be to invert the meaning of the enactment, and to interpret *obscurum per obscurius*, contrary to the usual principles of exegesis of statutes, it does seem suggested or demanded by the Act that in all administration of the Confession by the Church or the Court respect shall be had to its character as a system of Reformed doctrine, an organisation of truth, in which some statements are principles, others deductions, and others details, and the whole is greater than the parts—in which some root propositions are properly vital, and others partake of their life. And thus also where any question occurs as to the meaning of whole or parts, or as to their subordination, which is left doubtful on the face of the document itself, it should probably be answered by a reference to the doctrine of the Reformed Churches, and especially of the old Reformed Church of Scotland.

But these remarks are thrown out, and thrown out with deference, only on the point of interpretation of this Statute of 1690. The conclusion for freedom, which its words do not seem of themselves sufficient to support, may possibly be reached by a wider historical survey, and a fearless application of more general legal principles.

[1] The Lord President Hope's statement in the Auchterarder case, though given in the form of a narrative, seems to be quite as much a statement of the true *theory* of a Church's rights in the matter: "Now as to this Act 1690, one circumstance is very remarkable. If there was one thing more than another within the compass of the exclusive cognisance and jurisdiction of the Church, it would seem to be the settling the terms of the Creed or Confession of Faith of the Church. But the Church knew that it could not do so, and did not venture to do so by its own authority. The Church drew up what she thought *ought to be* the Confession of Faith of the Presbyterian Church, but she did not declare and enact by her own authority that this is and shall be the Confession of Faith of the National Church of Scotland. No; the Church presented it to the Parliament, which 'by these presents ratify and establish the Confession of Faith *now read in their presence*, and *voted and approven by them*, as the public and avowed Confession of this Church, containing the sum and substance of the doctrine of the Reformed Churches.' Now, after this admission on the part of the Church of its dependence on the Legislature," &c.—Robertson's Report, ii. 13.

with which alone the Church had avowed it. The minutes of Parliament bring out very satisfactorily the meaning of the enactment. The Confession was read finally on the 26th of May, and approved by vote. It was then moved "that the approbation of the Confession may be as it was approven by the General Assembly 1647," and it was "answered, that this were contrary to the vote approving the Confession *as read*, the Confession as approven by the Assembly containing some differences." As the result, "the clause relative to the Assembly 1647" was "left out." And two days after (on the same day when, in direct opposition to King William's desire, Presbytery was declared to be "the *only* government of Christ's Church within this kingdom"), the question as to 1647 being again raised, was decided as before. The minutes of a meeting a few days previous (23d May) seem to show that, on the one hand, an attempt had been unsuccessfully made to dispense with the Confession as a standard altogether, or at least to leave "religion" very much to the "Church" alone; while, on the other hand, a motion "that the Assembly be prohibited to make any Act contrary to the standing laws of the kingdom," with a significant allusion to one of the immunities claimed by the Assembly in their Act 1647, was also made but not adopted. The former proposal was probably that of the highest Presbyterians, headed perhaps by the Earl of Crawford; the latter may have been by Stair or Dalrymple. But both proposals were a great deal too extreme to be adopted.[1] The Parliament compromised the matter. The old Act of Assembly and the claims of the Church were left unnoticed, on the one hand, and unassailed; but, on the other, the Confession was ratified, deliberately ignoring the modifications insisted on by that Act.[2] The question of independence

[1] See all the minutes of Parliament referred to in appendix to the chapter, Note D.

[2] "The only standard of the Church of Scotland which is now in force is the Confession of Faith as it was ratified by the Parliament of Scotland in the year 1690. . . . The difference between the Confession of Faith as ratified in Parliament 1690, and that

remained, as it had hitherto done, a doubtful and open one, not to be decided for a century and a half later.

But this ignoring of the Assembly of 1647 was one of the circumstances in the Act which now produced a strong feeling of resistance in the Church. And this feeling found expression in the very remarkable history attending the statutory introduction of the present subscription to the Confession of Faith.

A Church may make a Confession or declaration of its faith at any time in its history, without establishing it as a standard for the faith of its members or office-bearers. Again, it may do both these things—may issue its Confession, and afterwards hold and use it as a standard or even test—without requiring individual subscription to it. The Act "Ratifying the Confession and Settling Church Government," of 1690, cannot be said to have taken either of these additional steps. It establishes the Westminster Confession only as "the public and avowed Confession of this Church," leaving, seemingly, the use of it as a standard to that jurisdiction which was now restored to the Church; and not exacting any subscription, which indeed the Church itself had not done when it adopted it. But the Church on this point now took the initiative.[1] The Parliament had ratified the Confession in May and June 1690. The Assembly met in October, and "after mature deliberation" approved an overture, which it appointed "to have the force and strength of an Act and ordinance of Assembly," to the following effect:—

"For retaining soundness and unity of doctrine, it is judged

which had been approved by the Assembly 1647, appears to consist chiefly in the omission of the explanations or qualifications contained in the Assembly's Act of Approbation."—Principal Lee's History of the Church of Scotland, ii. 366. (From Paper on the Claims of the Church of Scotland, written in 1842.)

[1] Except with regard to universities, colleges, and schools, as to which Parliament had on 4th July 1690 passed an Act (c. 17) providing that none should bear office in these "but such as do acknowledge and profess, and shall subscribe to the Confession of Faith, ratified and approven by this present Parliament," and also swear the oath of allegiance, &c.

necessary that all probationers licensed to preach, all intrants into the ministry, and all other ministers and elders received into communion with us, in Church government, be obliged to subscribe their approbation of the Confession of Faith, approven by former General Assemblies of this Church, and ratified in the second session of the current Parliament; and that this be recommended to the diligence of the several presbyteries, and they appointed to record their diligence thereanent in their respective registers."

But while the Presbyterian Church had resolved to admit none who did not sign the Westminster Confession, it had by no means determined to admit all Episcopalians who should offer to do so; and on this point they were at issue with the king, who also irritated them by the calm and peremptory way in which he signified his wishes on points which they had always conceived to belong to themselves exclusively.[1] Accordingly William wrote to the Assembly of 1692, "It is represented to us that you are not a full General Assembly, there being as great a number of the ministers of the Church of Scotland as you are, who are not allowed to be represented;" and with regard to these, formerly Episcopal clergymen or curates, he says, "We have signified our pleasure to these conform ministers to apply to you in the terms of a formula and declaratory, which we have delivered to our commissioner, being rather inclined (that this union may be the more effectual and cordial) that it should be an act of your own to receive and assume into Church government and communion with you such as shall address to you in these terms and subscribe the Confession of Faith, *which clears the soundness of their principles as to the fundamental articles of the Protestant religion.*" The letter which the king sent at the same time to the large body of ministers of the Episcopal communion was well received. Two commissioners from the

[1] See his very fine letter to the Assembly of 10th October 1690, recorded in the Acts of Assembly of date 17th October.

Aberdeen Synod, the centre of northern Episcopacy, went to Edinburgh with authority to accept his majesty's proposal; and having there met the representatives of the southern Episcopalians, they united in presenting the requisite addresses to the Assembly. The "formula and declaratory" which they desired to subscribe was as follows: "I, A. B., do sincerely declare and promise that I will submit to the Presbyterial government of this Church; . . . and I do further promise that I will subscribe the Confession of Faith, and the Shorter and Larger Catechisms, now confirmed by Act of Parliament, as containing the doctrine of the Protestant religion professed in this kingdom." These last words should be remarked, as showing what William intended should have been the import of the Act 1690, c. 5. The symbols are confirmed not as being, but "as containing," the doctrine of the Protestant religion; and the subscription is to the Confession not necessarily as the personal belief of the individual, but "as containing the doctrine of the Protestant religion professed in this kingdom."

The Assembly remitted the applications to a committee, which studiously delayed its report; and was indeed so evidently determined not to acquiesce in the king's proposal, that the Earl of Lothian, the commissioner, suddenly and with some sharpness dissolved them, without naming a day for another meeting. The moderator stood up, and requesting in his brethren's name to be heard, protested (in the words of the proviso which the Assembly's Act of 1647 had added to the Confession, and which the recent statutes had ignored) "that the office-bearers in the house of God have a spiritual intrinsic power from Jesus Christ, the only Head of the Church, to meet in Assemblies about the affairs thereof, the necessity of the same being first represented to the magistrate;" and thereupon appointed a day on the authority of the Assembly itself for its next meeting, a proposal which was carried by acclamation. The Assembly so fixed was never held; but

before the day for it arrived the Act of Parliament was passed which introduced and still regulates the subscription to the Westminster Confession—an Act which had the unfortunate effect of both excluding the Episcopalians, and greatly increasing the irritation and alarm of the Presbyterian Church.

The Act "For Settling the Quiet and Peace of the Church" was passed on 12th June 1693, in the fourth session of this first Parliament of William and Mary (c. 22); and it commences with a ratification, approval, and perpetual confirmation of the still more important Statute of 1690, as to the Church's doctrine and government. It then "further" statutes and ordains—

"That no person be admitted, or continued for hereafter, to be a minister or preacher within this Church, unless that he, having first taken and subscribed the oath of allegiance, and subscribed the assurance in manner appointed by another Act of this present session of Parliament made thereanent, do also subscribe the Confession of Faith, ratified in the foresaid fifth Act of the second session of this Parliament, declaring the same to be the confession of his faith, and that he owns the doctrine therein contained to be the true doctrine which he will constantly adhere to; as likewise, that he owns and acknowledges Presbyterian Church government as settled," &c.

Unfortunately for the quiet and peace of the Church, several of the other provisions contained in this Act were very offensive to the Presbyterians, who indeed were most of all offended by the attempt to provide for the conduct of Church affairs by civil legislation at all. Thus all ministers were by it obliged to subscribe not only the Confession, but the oath of allegiance and assurance, taken to William as king not only *de facto* but *de jure*. The ministers, not seriously objecting to the substance of this oath, yet resented its being imposed upon them in their sacred capacity. The long manifesto preserved in the Life of Carstairs[1] (which, whether emanating

[1] Carstairs State Papers and Letters, p. 52.

from friends of the Church or enemies of William, was certainly intended to express and inflame the feelings of the former) treats the proposal to enforce oaths, the substance of which very few of the members scrupled at, as an act of unprecedented tyranny which it concerned the privileges of the Church to resist; and the same argument applied equally, or perhaps *a fortiori*, to subscription to the purely doctrinal Confession, the Act in both cases prescribing peremptorily to the Church whom it was to admit to the office of the holy ministry, and whom to exclude. But all the different objections to the Act united and culminated when it went on to provide for summoning a General Assembly by royal authority, and when, this having been done, all the members were ordered to make the subscriptions, and especially the Assurance, in terms of the statute, and that under a threat, first of being individually excluded from that court, and afterwards of its being dissolved. Scotland was once more in a religious storm. The Church was now on the old ground, so familiar to it from 1560 to 1843, of "freedom of Assembly," and the threat of a second dissolution seems to have made them resolve that on this occasion the "intrinsic power" to meet, asserted by their Act of 1647, should not bend to the Act of 1693. The Assembly was determined, if dissolved, to continue its sittings. The king was equally firm;[1] and all authorities appear to agree that the Church was on the point of an open breach with the new monarch and his government, when the hurried irruption of Mr Carstairs into the presence of the king at Kensington, after having intercepted the royal despatches, prevented the explosion at the last moment. On the morning of the meeting of Assembly, 29th

[1] William was probably displeased with his ministers, Dalrymple or Tarbat, for passing an Act with so much stricter a subscription than he had himself proposed to the Episcopalians; and he must have been confounded when he heard that the Presbyterians, upon what he considered a mere religious punctilio, refused and resented an enactment so much more favourable to them than he had intended.

March 1694, permission came to the royal commissioner to withdraw the threat of dissolution, and relieve the members from taking the Assurance. This concession was of the greatest service to King William. A cordial feeling took possession of the Assembly at once. They persisted, indeed, in steadily ignoring the obnoxious statute; but they proceeded at once to pass an Act which carried into effect almost exactly what the statute contemplated—so far at least as subscription to the Confession was concerned. The Assembly, by this Act (11 of 1694), appointed a commission, who "may receive into ministerial communion such of the late conforming ministers as, having qualified themselves according to law, shall apply personally to them one by one, duly and orderly, and shall acknowledge, engage, and *subscribe upon the end of the Confession of Faith* as follows, viz.:—

"*I,* , *do sincerely own and declare the above Confession of Faith, approven by former General Assemblies of this Church, and ratified by law in the year* 1690, *to be the confession of my faith; and that I own the doctrine therein contained to be the true doctrine, which I will constantly adhere to; as likewise that I own and acknowledge Presbyterian Church government of this Church,*" &c. . . .

"As also the General Assembly require all presbyteries and synods, in their admitting or receiving any to ministerial communion, that they oblige them to take and subscribe the above acknowledgment;" and the Commission is authorised also to fill up vacant congregations on the north side of Tay (the Episcopal part of the kingdom), "by ordaining well-qualified expectants, who shall be bound at their entry to subscribe the said Confession of Faith, with the acknowledgment above expressed."

The words of subscription are taken from the Act of Parliament; but the Assembly took care to interpolate the clause that the Confession had been "approven by former General Assemblies of this Church"—*i.e.*, by the Assemblies held in

1647 and thereafter, which were all held without or against the royal authority, and were ignored by the recent statutes. As a farther manifesto of independence, they enjoin in the same Act that none of their judicatories "take advantage to censure any minister whatsoever for not having qualified himself in terms of the 'Act for Settling the Quiet and Peace of the Church,'" an injunction which is repeated in a separate Act (12th of this Assembly); and seemingly well aware that even these safeguards would by no means satisfy the Cameronian party (who were not only offended by the ignoring of the whole "attainments" of the covenant period, but equally so by the statutory and, as they alleged, the quasi-Erastian character of the present settlement), they add (section 8 of Act 11), "The Assembly being informed that several aspersions are laid on the ministers and judicatories of this Church by some persons, as if the said ministers and judicatories had receded from the known principles thereof, in relation to the constitution and government of the Church, contained in the Confession of Faith,[1] though the contrary thereof be evident, not only by the ministers of this Church their owning of and adhering to the said Confession, wherein these principles are contained, but also by the whole course of their ministry, therefore the General Assembly require the said commission to take all due pains to inform, convince, and satisfy any such persons of their mistakes, that they may be reclaimed."

Meantime, amid all these protestations of independence, the Act of 1693 was translated into a formula of subscription; and the matter came to an end as a question between the Church and the State. It was not again raised, and it is not now likely that it ever will be. In the remainder of this chapter we may carry on the history of subscription as enforced by the internal regulations of the Church, the Act 1693 being the

[1] The reference is probably to the well-known clause of the Confession, "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."

only statute upon the subject. It will be seen that the ecclesiastical modifications have been in the direction of making the formula more stringent and exclusive.

The resolution of the Assembly of 1690 was merely that all office-bearers should "subscribe their approbation of the Confession of Faith."[1] The subscription proposed by King William in 1692 was also to be a general one to the Confession, "as containing the doctrine of the Protestant religion professed in this kingdom." The Act of 1693, repeated in the formula of 1694, is much more explicit, and, as the statutory bond of the Church to this day, requires careful attention. By it the subscriber (1) declares the Confession to be "the confession of his faith" (and the formula adds that he "sincerely" declares this); (2) he "owns the doctrine therein contained to be the true doctrine;" and (3) he engages "constantly to adhere to" this doctrine. Down to the year 1711 this was the only formula in use in the Church, and it is still that in terms of which elders sign the Confession. On 4th January 1696, the General Assembly, on a preamble lamenting the spread of scepticism and deism, and the attacks on "the grand mysteries of the Gospel" and the authority of revelation, give various recommendations to their ministers how to meet these; "and, in general, the Assembly doth discharge [*i.e.*, forbid] all ministers, and other members of this Church, to publish or vent, either by speaking, writing, printing, teaching, or preaching, any doctrine, tenet, or opinion contrary unto or inconsistent with the Confession of Faith of this Church, *or any article, part, or proposition therein;* and appoints that all such as contravene this Act, or any part thereof, be censured by the Church according to their demerit." The reference in this Act to the separate articles of the Confession is more stringent than anything we find since the Revolution; and it is repeated in nearly the same terms by the Act 12 of the Assembly of 1704. Both

[1] In another Act of the same Assembly 1690, it is expressed, "Shall own and subscribe the Confession of Faith." But this was in an authority to a commission appointed *pro presenti statu Ecclesiæ.*

these, however, relate to the ordinary judicial or inquisitorial proceeding of the Church, subscription remaining as settled in 1693 and 1694. It may, indeed, be doubted whether the Assembly's enactment of 1694, before narrated, did not relate exclusively to Episcopal ministers; but if it did not include all ministers (as the Statute of 1693 seems to have intended) and all elders (as the Acts of Assembly 1690 contemplate), that omission was attempted to be rectified by the 11th Act of the Assembly of 1700 (passed 17th February), which is as follows: "The General Assembly appoints that all ministers and ruling elders belonging to this National Church subscribe the Confession of Faith as the confession of their faith, according to the Act of Assembly 1690, and the formula agreed upon in the Assembly held in the year 1694, Act 11, paragraph 6; and that this be done betwixt and the next General Assembly." And on the footing of these Church ordinances, matters remained, in regard to ministers and preachers, down to 1711, and in regard to elders down to the present day.

In 1711 another change took place in internal legislation as to subscription, a change which introduced a stricter formula than that of 1694, for ministers and *probationers* (*i.e.*, candidates or expectants of the ministry who, as licensed to preach by the presbytery on probation, are also preachers or licentiates). The Act, the 10th of Assembly 1711 (passed 22d May), prescribes a course of six years' study of divinity for all candidates for the ministry, and enjoins presbyteries to make trial of their orthodoxy and knowledge in divinity: "And the General Assembly, *judging it fit* that the same method should be followed in all presbyteries as to the questions put to and engagements taken of all probationers when licensed, and ministers when ordained or admitted, and that probationers and ministers should not only give sufficient proof of their piety, literature, and other good qualifications for the ministry, but also *come under engage-*

ments to adhere to the doctrine, worship, discipline, and government of the Church, do therefore enact and appoint that the following questions be put to all such as pass trials in order to be licensed, as also to such as shall be ordained ministers or admitted to any ministerial charge or parish, and that they shall subscribe the formula after set down before they be licensed, ordained, or admitted respectively; and the General Assembly hereby strictly prohibits and discharges the licensing, ordaining, or admitting of any who shall not give *satisfying answers* to these questions, *and subscribe* the formula hereto subjoined." There are, therefore, two sets of questions to be put to ministers and probationers respectively, and a common formula to be subscribed by both, all which documents we give in full in the appendix to this chapter. Both sets of questions begin with a stipulation of belief in the Scriptures as "the Word of God and the only rule of faith." That for probationers proceeds, "Do you sincerely own and believe the whole doctrine of the Confession of Faith, approven by the General Assemblies of this National Church, and ratified by law in the year 1690, and frequently confirmed by divers Acts of Parliament since that time,[1] to be *the truths of God*, contained in the Scriptures of the Old and New Testaments? and do you own the *whole doctrine* therein contained as the *confession of your faith?*" And among the remaining questions to probationers are found these: "Are you persuaded that the said doctrine is founded upon the Holy Scriptures, and agreeable thereto? Do you promise that, through the grace of God, you will firmly and constantly adhere to, and in your station to the utmost of your power assert, maintain, and defend the said doctrine? Do you renounce all doctrines, tenets, or opinions whatsoever, contrary to or inconsistent with the said doctrine of this Church? Do you promise that you will submit yourself to the several judi-

[1] The Acts at the time of the Treaty of Union had intervened, of which in the next chapter.

catories of this Church, and are you willing to subscribe to these things?" The questions for ministers are nearly the same with those for probationers, only the "whole doctrine of the Confession" is here stated to be "founded upon the Word of God" instead of being "the truths of God;" but the personal confession and obligation is the same: some of the tenets inconsistent with the Confession are specified; and there is added a special engagement to submit to the judicatories of the Church, "and that, according to your power, you shall maintain the unity and peace of this Church against error and schism, notwithstanding of whatever trouble or persecution may arise; and that you shall follow no divisive courses from the present established doctrine . . . of this Church?" But the Formula, which is to be subscribed by all, includes all the expressions contained in *both* sets of oral questions, professing the "whole doctrine" to be "the truths of God," and also "founded on the Word of God, and agreeable thereto;" owning the Confession as the "confession of my faith," promising to "adhere to, assert, maintain, and defend it," and renouncing all doctrines "contrary to or inconsistent with" it.

Such is the present clerical subscription in the Church of Scotland. It has not been changed since the Act 1711; but the Act 1711 was itself a considerable change upon the subscription which had preceded it. Yet it does not appear that this was at the time held to be a very strong exercise of Church power. Principal Carstairs was the moderator of the Assembly; and Wodrow, in his Correspondence, says, in a very cursory way, of date 17th May 1711, "This afternoon, in the Committee of Overtures, the overtures anent ordination of ministers and elders and probationers were agreed upon as a directory, not as standing Acts."[1] Five days after, he records the voting and passing of the Act as we have it, with some particulars of the discussion.[2] The reasons for its being

[1] Wodrow's Correspondence, i. 227.

[2] "This day the Assembly voted the Acts anent admission of probationers, and questions to ministers and

passed seem to have been, first, a desire for uniformity in the procedure, as the Act itself bears;[1] secondly, a vague but strong dread of heresy, as indicated by an Act of the immediately preceding Assembly;[2] and, thirdly, a more special fear of that Episcopalian reaction which was now beginning upon

intrants were voted and passed. It was urged that the binding up of presbyteries from licensing till the judgment of the synod was known and had with respect to the young men, did infringe the radical power of presbyteries. But it was thought necessary to keep that in at this juncture. It was asked, If this formula did exclude all other questions at intrants? It was answered, It did. But there might be questions anent errors, &c., proposed at private trials. Mr Anderson of St Andrews alleged there were several questions ordinarily proposed (I suspect it was as to Prelacy and the Covenants) that were not there, and it was not proper to insist much on them; but he thought it hard to bind up persons to these only. It was answered, that all these were included in the general, if they believed the Scripture and Confession of Faith, and that a uniformity of queries was proper; and any that condescended upon particulars, if they were included in the generals, they were to do it *sub periculo.*"—Correspondence, i. 238.

[1] The above extract from Wodrow sufficiently shows that there had not as yet been any uniformity in the exaction of adherence to doctrine—but this is plain also from the records of Assembly.

[2] This Act, 12th of Assembly 1710, is very instructive as to the feeling of the time. It is entitled "Act for Preserving the Purity of Doctrine":—

"The General Assembly, considering that the purity of doctrine is a signal blessing to the Church of God, and that it hath been the great happiness of this Church, ever since her reformation from Popery, to have enjoyed and maintained the same; and that the avoiding all expressions in matter of faith, contrary to the form of sound words, tends not a little to preserve the said purity which is so desirable: And it being informed that in some places some expressions are used, and opinions as to some points of religion vented, which are not agreeable to our Confession of Faith *and Catechisms, and the known sentiments of the greatest lights and most famous Gospel ministers* wherewith this Church has been blessed: Therefore the General Assembly does discharge all persons to vent any opinions contrary to any head or article of the said Confession and Catechisms, or use any expressions in relation to the Articles of Faith not agreeable to the form of sound words expressed in the Word of God, and the Confession of Faith and Catechisms of this Church, which are the most valuable pieces of her Reformation. And the General Assembly does hereby further enact, that no minister or member of this Church presume to print or disperse in writing any catechism without the allowance of the presbytery of the bounds and of the Commission; and the presbytery is hereby appointed to lay any such catechism before the Commission; and the General Assembly does enjoin and require synods and presbyteries carefully to advert to the observation of this Act, and that they notice the transgressors thereof."

the accession of Queen Anne's last ministry, and which showed itself more clearly in the hostile legislation of the year 1712.[1] It is plain that this device of stipulation and subscription, which has come to be felt as a restraint on those within the Church, was originally intended chiefly as a protection against those outside it. It was so, in the case both of the Scottish Confession and of that of Westminster.

But whatever were the motives for the passing of the Act, it made a considerable change—a change so great that, when in last century subscription came to be felt as a grievance, the passing of this Act was denounced as illegal. The objections were twofold — its variation from the statutory formula of 1693, and the want of power in the Assembly to make the innovation (even had statute permitted it) without consent of a majority of presbyteries. The former objection, if valid, still remains. There can be no doubt that the Assembly in 1711 made a formula considerably stricter than the enactment of 1693, which again is much stricter than the Statute of 1690. The latter objection has been partially obviated. "A more distinct and comprehensive Act anent licensing probationers was first introduced in the year 1740; and being

[1] In the Assembly of 1710 old Mr Carstairs had proposed "a declaration of the Assembly's abhorrence of principles advanced eversive of the Reformed religion," an overture which Wodrow says he brought forward "in opposition to the Tories in England."—Correspondence, i. 138. The object is brought out more clearly when we learn (p. 151) that the queen was to be addressed not only for "scouring the north of priests," but for "taking some more effectual way to stop intrusions, and the Episcopal clergy *from licensing young men and perpetuating schism.*" And in the following year, when the friend during so many years of the great king now dead was chosen Moderator, the first use he made of his position was to address the commissioner, the Marquess of Annandale, upon the "surmises which were industriously spread from South Britain," as to the restoration of patronage, appealing frankly to "the assurances of the queen, her intrinsic virtues and goodness, the standing laws, and the justice of a British Parliament, that none of their legally-settled privileges would be broken in upon." A few days after, the new Act as to questions and subscriptions was passed by the Assembly; showing clearly that they were disposed to take what precautions they could against the succession of attacks which immediately followed.

transmitted for many successive years, was, in consequence of the approbation of a majority of presbyteries, converted into a standing law by the Assembly 1782."[1] And this Act (quotations from which, and from some others, we give in the appendix) merely prescribes to probationers *the questions and formula of* 1711; so that the stipulation and subscription of that year, so far *as regards probationers*, have received the sanctions contemplated by the Barrier Act, and are Church law, in so far as the Church has the power of making law. It is doubtful whether the questions and formula of subscription appropriated to ministers, and now used at ordinations, have ever passed the Barrier Act.[2] But as every minister must have been a probationer, and has been licensed before he has been ordained, this has come to be practically of little importance. The formula, which is the straitest part of the bond, is common to both.

Since 1711, accordingly, the questions and subscriptions, having received the additional but partial sanction of 1782, have remained the same down to the present day. The General Assembly of 1849 passed an Act (11th of that year) consolidating former Acts as to probationers, but retaining both the questions and formula which date from a hundred and thirty-eight years before. And elders, who are the lay rulers of the Church, sign the simpler formula of 1694, constructed by the Act of Assembly of that year, though the Statute of 1693 did not include them in its provisions.

Some farther questions with regard to subscription it may be necessary again to refer to. We give, in a note appended to this chapter, a short account of the controversies which again and again broke out in the Church of Scotland in the eighteenth century on this point, and on the general question of creeds; and continue in the text the history of legislation.

[1] Dr Hill's View of the Constitution of the Church of Scotland, p. 68.

[2] On this question see a paragraph in Note F of Appendix to this chapter.

APPENDIX TO CHAPTER II.

NOTE A.

THE WESTMINSTER CONFESSION OF FAITH.

Chapters.

1. Of the Holy Scripture :—

1. Although the light of nature, and the works of creation and providence, do so far manifest the goodness, wisdom, and power of God, as to leave men inexcusable ; yet they are not sufficient to give that knowledge of God, and of His will, which is necessary unto salvation : therefore it pleased the Lord, at sundry times and in divers manners, to reveal Himself, and to declare that His will unto His Church ; and afterwards, for the better preserving and propagating of the truth, and for the more sure establishment and comfort of the Church against the corruption of the flesh, and the malice of Satan and of the world, to commit the same wholly unto writing ; which maketh the Holy Scripture to be most necessary; those former ways of God's revealing His will unto His people being now ceased. 2. Under the name of Holy Scripture, or the Word of God written, are now contained all the Books of the Old and New Testaments, which are these— . . . All which are given by inspiration of God, to be the rule of faith and life. 3. The Books commonly called Apocrypha, not being of Divine inspiration, are no part of the canon of the Scripture; and therefore are of no authority in the Church of God, nor to be any otherwise approved, or made use of, than other human writings. 4. The authority of the Holy Scripture, for which it ought to be believed and obeyed, dependeth not upon the testimony of any man or Church, but wholly upon God (who is truth itself), the author thereof; and therefore it is to be received, because it is the Word of God. 5. We may be moved and induced by the testimony of the Church to an high and reverend esteem of the Holy Scripture, and the heavenliness of the matter, the efficacy of the doctrine, the majesty of the style, the consent of all the parts, the scope of the whole (which is to give all glory to God), the full discovery it makes of the only way of man's salvation, the many other incomparable excellences, and the entire perfection thereof, are arguments whereby it doth abundantly evidence itself to be the Word of God; yet, notwithstanding, our full persuasion and assurance of the infallible truth and Divine authority thereof, is from the inward work of the Holy Spirit, bearing witness by and with the word in our hearts. 6. The whole counsel of God, concerning all things necessary for His

own glory, man's salvation, faith, and life, is either expressly set down in Scripture, or by good and necessary consequence may be deduced from Scripture: unto which nothing at any time is to be added, whether by new revelations of the Spirit, or traditions of men. Nevertheless, we acknowledge the inward illumination of the Spirit of God to be necessary for the saving understanding of such things as are revealed in the Word; and that there are some circumstances concerning the worship of God, and government of the Church, common to human actions and societies, which are to be ordered by the light of nature and Christian prudence, according to the general rules of the Word, which are always to be observed. 7. All things in Scripture are not alike plain in themselves, nor alike clear unto all; yet those things which are necessary to be known, believed, and observed, for salvation, are so clearly propounded and opened in some place of Scripture or other, that not only the learned, but the unlearned, in a due use of the ordinary means, may attain unto a sufficient understanding of them. 8. The Old Testament in Hebrew (which was the native language of the people of God of old), and the New Testament in Greek (which at the time of the writing of it was most generally known to the nations), being immediately inspired by God, and by His singular care and providence kept pure in all ages, are therefore authentical; so as in all controversies of religion, the Church is finally to appeal unto them. But because these original tongues are not known to all the people of God, who have right unto and interest in the Scriptures, and are commanded, in the fear of God, to read and search them, therefore they are to be translated into the vulgar language of every nation unto which they come, that the word of God dwelling plentifully in all, they may worship Him in an acceptable manner, and, through patience and comfort of the Scriptures, may have hope. 9. The infallible rule of interpretation of Scripture is the Scripture itself; and, therefore, when there is a question about the true and full sense of any Scripture (which is not manifold, but one), it must be searched and known by other places that speak more clearly. 10. The supreme Judge, by which all controversies of religion are to be determined, and all decrees of councils, opinions of ancient writers, doctrines of men, and private spirits, are to be examined, and in whose sentence we are to rest, can be no other but the Holy Spirit speaking in the Scripture.

2. Of God, and of the Holy Trinity.
3. Of God's Eternal Decree.
4. Of Creation.
5. Of Providence.
6. Of the Fall of Man, of Sin, and of the Punishment thereof.
7. Of God's Covenant with Man.
8. Of Christ the Mediator.
9. Of Free Will.
10. Of Effectual Calling.
11. Of Justification.
12. Of Adoption.

13. Of Sanctification.

14. Of Saving Faith:—

1. The grace of faith, whereby the elect are enabled to believe to the saving of their souls, is the work of the Spirit of Christ in their hearts, and is ordinarily wrought by the ministry of the Word; by which also, and by the administration of the sacraments, and prayer, it is increased and strengthened. 2. By this faith, a Christian believeth to be true whatsoever is revealed in the Word, for the authority of God himself speaking therein; and acteth differently upon that which each particular passage thereof containeth; yielding obedience to the commands, trembling at the threatenings, and embracing the promises of God for this life and that which is to come. But the principal acts of saving faith are, accepting, receiving, and resting upon Christ alone for justification, sanctification, and eternal life, by virtue of the covenant of grace. 3. This faith is different in degrees, weak or strong; may be often and many ways assailed and weakened, but gets the victory; growing up in many to the attainment of a full assurance through Christ, who is both the author and finisher of our faith.

15. Of Repentance unto Life.

16. Of Good Works.

17. Of the Perseverance of the Saints.

18. Of Assurance of Grace and Salvation.

19. Of the Law of God.

20. Of Christian Liberty, and Liberty of Conscience:—

2. God alone is Lord of the conscience, and hath left it free from the doctrines and commandments of men which are in anything contrary to His Word, or beside it, in matters of faith or worship. So that to believe such doctrines, or to obey such commandments out of conscience, is to betray true liberty of conscience; and the requiring of an implicit faith, and an absolute and blind obedience, is to destroy liberty of conscience, and reason also. 3. They who, upon pretence of Christian liberty, do practise any sin, or cherish any lust, do thereby destroy the end of Christian liberty; which is that, being delivered out of the hands of our enemies, we might serve the Lord without fear, in holiness and righteousness before Him, all the days of our life. 4. And because the powers which God hath ordained, and the liberty which Christ hath purchased, are not intended by God to destroy, but mutually to uphold and preserve one another; they who, upon pretence of Christian liberty, shall oppose any lawful power, or the lawful exercise of it, whether it be civil or ecclesiastical, resist the ordinance of God. And for their publishing of such opinions, or maintaining of such practices, as are contrary to the light of nature, or to the known principles of Christianity, whether concerning faith, worship, or conversation; or to the power of godliness; or such erroneous opinions or practices, as either in their own nature, or in the manner of publishing or maintaining them, are destructive to the external peace and order which Christ hath established in the Church; they may lawfully be

called to account, and proceeded against by the censures of the Church, and by the power of the civil magistrate.

21. Of Religious Worship and the Sabbath-day.

22. Of Lawful Oaths and Vows.

23. Of the Civil Magistrate:—

1. 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, for the defence and encouragement of them that are good, and for the punishment of evil-doers. 2. It is lawful for Christians to accept and execute the office of a magistrate, when called thereunto: in the managing whereof, as they ought especially to maintain piety, justice, and peace, according to the wholesome laws of each commonwealth; so, for that end, they may lawfully, now under the New Testament, wage war upon just and necessary occasions. 3. 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. 4. 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. Infidelity, or difference in religion, doth not make void the magistrate's just and legal authority, nor free the people from their due obedience to him; from which ecclesiastical persons are not exempted; much less hath the Pope any power or jurisdiction over them in their dominions, or over any of their people; and least of all to deprive them of their dominions or lives, if he shall judge them to be heretics, or upon any other pretence whatsoever.

24. Of Marriage and Divorce.

25. Of the Church:—

1. The catholic or universal Church, which is invisible, consists of the whole number of the elect that have been, are, or shall be gathered into one, under Christ the Head thereof; and is the spouse, the body, the fulness of Him that filleth all in all. 2. The visible Church, which is also catholic or universal under the Gospel (not confined to one nation, as before under the law), consists of all those throughout the world that profess the true religion, together with their children; and is the kingdom of the Lord Jesus Christ, the house and family of God, out of which there is no ordinary possibility of salvation. 3. Unto this catholic visible Church Christ hath given the ministry, oracles, and ordinances of God, for the gathering and perfecting of the

saints in this life, to the end of the world; and doth by His own presence and Spirit, according to His promise, make them effectual thereunto. 4. This catholic Church hath been sometimes more, sometimes less visible. And particular Churches, which are members thereof, are more or less pure, according as the doctrine of the Gospel is taught and embraced, ordinances administered, and public worship performed more or less purely in them. 5. The purest Churches under heaven are subject both to mixture and error; and some have so degenerated as to become no Churches of Christ, but synagogues of Satan. Nevertheless, there shall be always a Church on earth to worship God according to His will. 6. There is no other Head of the Church but the Lord Jesus Christ; nor can the Pope of Rome in any sense be head thereof; but is that Antichrist, that man of sin, and son of perdition, that exalteth himself in the Church against Christ and all that is called God.

26. Of Communion of Saints:—

1. All saints that are united to Jesus Christ their Head by His Spirit, and by faith, have fellowship with Him in His graces, sufferings, death, resurrection, and glory. And being united to one another in love, they have communion in each other's gifts and graces; and are obliged to the performance of such duties, public and private, as do conduce to their mutual good, both in the inward and outward man. 2. Saints, by profession, are bound to maintain an holy fellowship and communion in the worship of God, and in performing such other spiritual services as tend to their mutual edification; as also in relieving each other in outward things, according to their several abilities and necessities. Which communion, as God offereth opportunity, is to be extended unto all those who in every place call upon the name of the Lord Jesus.

27. Of the Sacraments.

28. Of Baptism.

29. Of the Lord's Supper.

30. Of Church Censures:—

1. 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. 2. To these officers the keys of the kingdom of heaven are committed, by virtue whereof they have power respectively to retain and remit sins, to shut that kingdom against the impenitent, both by the Word and censures; and to open it unto penitent sinners, by the ministry of the Gospel, and by absolution from censures, as occasion shall require. 3. Church censures are necessary for the reclaiming and gaining of offending brethren; for deterring of others from the like offences; for purging out of that leaven which might infect the whole lump; for vindicating the honour of Christ, and the holy profession of the Gospel; and for preventing the wrath of God, which might justly fall upon the Church, if they should suffer His covenant, and the seals thereof, to be profaned by notorious and obstinate offenders. 4. For the better attaining of these ends, the officers of the Church are to proceed by admonition, suspension from the sacrament

of the Lord's Supper for a season, and by excommunication from the Church, according to the nature of the crime, and demerit of the person.

31. Of Synods and Councils:—

1. For the better government and further edification of the Church, there ought to be such assemblies as are commonly called Synods or Councils. 2. As magistrates may lawfully call a synod of ministers, and other fit persons, to consult and advise with about matters of religion; so if magistrates be open enemies to the Church, the ministers of Christ, of themselves, by virtue of their office, or they, with other fit persons upon delegation from their churches, may meet together in such assemblies. 3. It belongeth to synods and councils ministerially to determine controversies of faith, and cases of conscience; to set down rules and directions for the better ordering of the public worship of God, and government of His Church; to receive complaints in cases of maladministration, and authoritatively to determine the same: which decrees and determinations, if consonant to the Word of God, are to be received with reverence and submission, not only for their agreement with the Word, but also for the power whereby they are made, as being an ordinance of God, appointed thereunto in His Word. 4. All synods or councils since the apostles' times, whether general or particular, may err, and many have erred; therefore they are not to be made the rule of faith or practice, but to be used as an help in both. 5. Synods and councils are to handle or conclude nothing but that which is ecclesiastical; and are not to intermeddle with civil affairs, which concern the commonwealth, unless by way of humble petition, in cases extraordinary; or by way of advice for satisfaction of conscience, if they be thereunto required by the civil magistrate.

32. Of the State of Men after Death, and of the Resurrection of the Dead.

33. Of the Last Judgment.

NOTE B.

ACT OF THE GENERAL ASSEMBLY APPROVING THE CONFESSION OF FAITH, 27TH AUGUST 1647.

A Confession of Faith for the Kirks of God in the three kingdoms, being the chiefest part of that uniformity in religion, which, by the Solemn League and Covenant, we are bound to endeavour: And there being accordingly a Confession of Faith agreed upon by the Assembly of Divines sitting at Westminster, with the assistance of Commissioners from the Kirk of Scotland; which Confession was sent from our Commissioners at London to the Commissioners of the Kirk met at Edinburgh in January last, and hath been in this Assembly twice publicly

read over, examined, and considered; copies thereof being also printed, that it might be particularly perused by all the members of this Assembly, unto whom frequent intimation was publicly made, to put in their doubts and objections, if they had any: And the said Confession being, upon due examination thereof, found by the Assembly to be most agreeable to the Word of God, and in nothing contrary to the received doctrine, worship, discipline, and government of this Kirk: And, lastly, It being so necessary, and so much longed for, that the said Confession be, with all possible diligence and expedition, approved and established in both kingdoms, as a principal part of the intended uniformity in religion, and as a special means for the more effectual suppressing of the many dangerous errors and heresies of these times; the General Assembly doth therefore, after mature deliberation, agree unto, and approve the said Confession, as to the truth of the matter (judging it to be most orthodox, and grounded upon the Word of God); and also, as to the point of uniformity, agreeing for our part, that it be a common Confession of Faith for the three kingdoms. The Assembly doth also bless the Lord, and thankfully acknowledge His great mercy, in that so excellent a Confession of Faith is prepared, and thus far agreed upon in both kingdoms; which we look upon as a great strengthening of the true Reformed religion against the common enemies thereof. But, lest our intention and meaning be in some particulars misunderstood, it is hereby expressly declared and provided, That the not mentioning in this Confession the several sorts of ecclesiastical officers and assemblies, shall be no prejudice to the truth of Christ in these particulars, to be expressed fully in the Directory of Government. It is further declared, That the Assembly understandeth some parts of the second article of the thirty-one chapter only of kirks not settled, or constituted in point of government: And that although, in such kirks, a synod of ministers, and other fit persons, may be called by the magistrate's authority and nomination, without any other call, to consult and advise with about matters of religion; and although, likewise, the ministers of Christ, without delegation from their churches, may of themselves, and by virtue of their office, meet together synodically in such kirks not yet constituted, yet neither of these ought to be done in kirks constituted and settled; it being always free to the magistrate to advise with synods of ministers and ruling elders, meeting upon delegation from their churches, either ordinarily, or, being indicted by his authority, occasionally, and *pro re nata;* it being also free to assemble together synodically, as well *pro re nata* as at the ordinary times, upon delegation from the churches, by the intrinsical power received from Christ, as often as it is necessary for the good of the Church so to assemble, in case the magistrate, to the detriment of the Church, withhold or deny his consent; the necessity of occasional assemblies being first remonstrate unto him by humble supplication.

NOTE C.

1. Act Ratifying the Confession of Faith, and Settling the Presbyterian Church Government (Act 1690, c. 5).

Our sovereign lord and lady, the king and queen's majesties, and three Estates of Parliament, conceiving it to be their bound duty, after the great deliverance that God hath lately wrought for this Church and kingdom, in the first place to settle and secure therein the true Protestant religion, according to the truth of God's Word, as it hath of a long time been professed within this land; as also, the government of Christ's Church within this nation, agreeable to the Word of God, and most conducive to the advancement of true piety and godliness, and the establishing of peace and tranquillity within this realm; and that by an article of the Claim of Right it is declared that Prelacy, and the superiority of any office in the Church above presbyters, is, and hath been a great and insupportable grievance and trouble to this nation, and contrary to the inclination of the generality of the people ever since the Reformation, they having reformed from Popery by presbyters, and therefore ought to be abolished. Likeas, by an Act of the last session of this Parliament, Prelacy is abolished: Therefore their majesties, with advice and consent of the saids three Estates, do hereby revive, ratifie, and perpetually confirm, all laws, statutes, and Acts of Parliament made against Popery and Papists, and for the maintenance and preservation of the true Reformed Protestant religion, and for the true Church of Christ within this kingdom, in so far as they confirm the same, or are made in favours thereof. Likeas, they by these presents ratifie and establish the Confession of Faith, now read in their presence, and voted and approven by them, as the public and avowed Confession of this Church, containing the sum and substance of the doctrine of the Reformed Churches (which Confession of Faith is subjoyned to this present Act). As also they do establish, ratifie, and confirm the Presbyterian Church government and discipline—that is to say, the government of the Church by kirk-sessions, presbyteries, provincial synods, and general assemblies, ratified and established by the 114 Act, Ja. 6, parl. 12, *anno* 1592, entituled, Ratification of the Liberty of the true Kirk, &c., and thereafter received by the general consent of this nation to be the only government of Christ's Church within this kingdom: Reviving, renewing, and confirming the foresaid Act of Parliament in the whole heads thereof, except that part of it relating to patronages, which is hereafter to be taken into consideration: And rescinding, annulling, and making void the Acts of Parliament following—viz.: Act anent restitution of bishops, Ja. 6, parl. 18, cap. 2. Act ratifying the Acts of Assembly 1610, Ja. 6, parl. 21, cap. 1. Act anent the election of archbishops and bishops, Ja. 6, parl. 22, cap. 1. Act entituled, Ratification of the Five Articles of the General Assembly at Perth, Ja. 6, parl. 23, cap. 1. Act entituled,

For the restitution and re-establishment of the ancient government of the Church, by archbishops and bishops, ch. 2, parl. 2, sess. 2. Act 1, Anent the constitution of a national synod, ch. 2, parl. 1, sess. 3. Act 5, Act against such as refuse to depone against delinquents, ch. 2, parl. 2, sess. 2. Act 2, Act entituled, Act acknowledging and asserting the right of succession to the imperial crown of Scotland, ch. 2, parl. 3. Act 2, Act entituled, Act anent religion and the test, ch. 2, parl. 3, act 6, with all other acts, laws, statutes, ordinances, and proclamations, and that in so far allanerly as the saids acts and others generally and particularly abovementioned, are contrary or prejudicial to, inconsistent with or derogatory from, the Protestant religion and Presbyterian government now established; and allowing and declaring, that the Church government be established in the hands of and exercised by these Presbyterian ministers, who were outed since the 1st of January 1661, for nonconformity to Prelacy, or not complying with the courses of the times, and are now restored by the late Act of Parliament, and such ministers and elders only as they have admitted or received, or shall hereafter admit or receive: And also that all the said Presbyterian ministers have, and shall have right to the maintenance, rights, and other privileges by law provided to the ministers of Christ's Church within this kingdom, as they are or shall be legally admitted to particular churches. Likeas, in pursuance of the premisses, their majesties do hereby appoint the first meeting of the General Assembly of this Church, as above established, to be at Edinburgh, the third Thursday of October next to come, in this instant year 1690; and because many conform ministers either have deserted, or were removed from preaching in their churches preceding the 13th day of April 1689; and others were deprived for not giving obedience to the Act of the Estates made in the said 13th of April 1689, entituled, Proclation against the owning of the late King James, and appointing public prayers for King William and Queen Mary: Therefore their majesties, with advice and consent foresaid, do hereby declare all the churches, either deserted, or from which the conform ministers were removed, or deprived, as said is, to be vacant, and that the Presbyterian ministers exercising their ministry within any of these paroches (or where the last incumbent is dead), by the desire or consent of the paroch, shall continue their possession, and have right to the benefices and stipends, according to their entry in the year 1689, and in time coming, ay and while the Church as now established take further course therewith." And to the effect the disorders that have happened in this Church may be redressed, their majesties, with advice and consent foresaid, do hereby allow the general meeting, and representatives of the foresaid Presbyterian ministers and elders, in whose hands the exercise of the Church government is established, either by themselves, or by such ministers and elders as shall be appointed and authorised visitors by them, according to the custom and practice of Presbyterian government throughout the whole kingdom, and several parts thereof, to try and purge out all insufficient, negligent, scandalous, and erroneous ministers, by due course of ecclesiastical pro-

cess and censures; and likeways for redressing all other Church disorders. And further, it is hereby provided that whatsoever minister being convened before the said general meeting, and representatives of the Presbyterian ministers and elders, or the visitors to be appointed by them, shall either prove contumacious in not appearing or be found guilty, and shall be therefore censured, whether by suspension or deposition, they shall *ipso facto* be suspended from, or deprived of, their stipends and benefices.

(*Follows the foresaid Confession of Faith.*)

2. Act for Settling the Quiet and Peace of the Church (Act 1693, c. 22).

Our sovereign lord and lady, the king and queen's majesties, with advice and consent of the Estates of Parliament, ratifie, approve, and perpetually confirm the fifth Act of the second session of this current Parliament, intituled, Act ratifying the Confession of Faith, and settling Presbyterian Church government, in the whole heads, articles, and clauses thereof; and do further statute and ordain, that no person be admitted or continued for hereafter to be a minister or preacher within this Church, unless that he, having first taken and subscribed the oath of alledgiance, and subscribed the assurance in manner appointed by another Act of this present session of Parliament made thereanent, do also subscribe the Confession of Faith, ratified in the foresaid fifth Act of the second session of this Parliament, declaring the same to be the confession of his faith, and that he ownes the doctrine therein contained to be the true doctrine which he will constantly adhere to; as likewise, that he ownes and acknowledges Presbyterian Church government, as settled by the foresaid fifth Act of the second session of this Parliament, to be the only government of this Church, and that he will submit thereto, and concur therewith, and never endeavour, directly or indirectly, the prejudice or subversion thereof. And their majesties, with advice and consent foresaid, statute and ordain that uniformity of worship, and of the administration of all public ordinances within this Church be observed by all the saids ministers and preachers, as the samen are at present performed and allowed therein, or shall be hereafter declared by the authority of the same, and that no minister or preacher be admitted or continued for hereafter, unless that he subscribe to observe, and do actually observe, the foresaid uniformity: And for the more effectual settling the quiet and peace of this Church, the Estates of Parliament do hereby make a humble address to their majesties, that they would be pleased to call a General Assembly, for the ordering the affairs of Church, and to the end that all the present ministers possessing churches, not yet admitted to the exercise of the foresaid Church government, conform to the said Act, and who shall qualifie themselves in manner foresaid, and shall apply to the said Assembly, or the other Church judicatures competent, in an

orderly way, each man for himself, be received to partake with them in the government thereof: Certifying such as shall not qualifie themselves, and apply to the said Assembly, or other judicatures, within the space of thirty days after meeting of the said first Assembly, in manner foresaid, that they may be deposed by the sentence of the said Assembly and other judicatures *tam ab officio quam a beneficio;* and withal declaring, that if any of the saids ministers who have not been hitherto received into the government of the Church, shall offer to qualifie themselves, and to apply in manner foresaid, they shall have their majesties' full protection, ay and while they shall be admitted and received in manner foresaid; providing always that this Act, and the benefit thereof, shall noways be extended to such of the said ministers as are scandalous, erronious, negligent, or insufficient, and against whom the same shall be verified, within the space of thirty days after the said application; but these and all others in like manner guilty, are hereby declared to be lyable and subject to the power and censure of the Church as accords: And to the effect, that the representation of this Church, in its General Assemblies, may be the more equal in all time coming, recommends it to the first Assembly that shall be called, to appoint ministers to be sent as commissioners from every presbytery, not in equal numbers, which is manifestly unequal where presbyteries are so but in a due proportion to the churches and parochins within every presbytery, as they shall judge convenient; and it is hereby declared, that all schoolmasters, and teachers of youth in schools, are, and shall be lyable to the tryal, judgment, and censure of the presbyteries of the bounds, for their sufficiency, qualifications, and deportment in the said office. And lastly, their majesties, with advice and consent foresaid, do hereby statute and ordain that the lords of their majesties' Privy Council, and all other magistrats, judges, and officers of justice, give all due assistance for making the sentences and censures of the Church and judicatures thereof to be obeyed, or otherways effectual as accords.

NOTE D.

DOCUMENTS OF 1690.

1. Extracts from the Minutes of the First Parliament of William and Mary (Second Session, May 1690).

23 *Maii* 1690.

The Act concerning Church Government twice read. The narrative of the Act being again read, moved, that the religion and the Church might be joined in one clause, or that the clause "as it was established of a long time" may be left out; for, by the law lately, Episcopacy was joined with the religion, and in practice many of the ministers preached erroneous doctrine.

Answered, that there was a necessity of a standart, the Confession of Faith; and though there have been attempts against the religion or erroneous practices of some preachers, yet there was never general profession, practice, or establishment against the doctrinal part now ordered to be left out.

Moved, that the Act of Succession be nominatim excinded, and that all Acts be rescinded in so far as they are inconsistent with the religion and Church government.—Agreed to. And that there be a particular Act concerning the Act of Succession brought in.

And that the Confession of Faith of Westminster be engrossed and subjoined to the Act.—Agreed to. The Act of Parliament 1592, anent Church government, read.

Moved, that it might be cleared that the king's commissioner be present at the Assemblies, and that the Assembly be prohibite to make any Act contraire to the standing laws of the kingdom—the questions to be, whether the Act 1592 be approven as to all points, except the patronages, which are to be further considered.

Ane other draught of ane Act brought in and read.

26 *Maii* 1690.

After calling the rolls, the Confession of Faith read. The Act for Settling the Church Government read. Agreed, that mention of the Larger and Shorter Catechisms be left out of the Act.

The approbation of the foresaid Confession of Faith being put to the vote, it was approven.

Moved, that the approbation of the Confession of Faith may be as it was approven by the General Assembly 1647.

Answered, that this were contrair to the vote approving the Confession as read—the Confession as approven by the Assembly containing some differences. The clause relative to the Assembly 1647 left out.

28 *Maii* 1690.

Questioned, that in the draught of the Act read there is no mention of the Act of the General Assembly 1647. Answered, that last diet that clause was ordered to be left out. Which amendment was again owned. Ordered that it be read, "the only government."

2. Letter of the King to the Earl of Melville, transmitting the King's Remarks on the Church Government.

William R.

Right trusty and right entirely beloved cosin and councellour, wee greet you well. Wee having considered the Act anent Church Government, have returned the same, and the alterations wee have thought proper should be made in it. However, wee leave you some latitude, which wee wish you may use with as much caution as you can, and in the way will tend most for our service.

Given under our royall hand at our court att Kinsington, the 22d of May 1690, and of our reign the second year. W. R.

3. His Matie.'s Remarques upon the Act for Settling Church Government in Scotland, which, together with some Reasons designed for the clearing of it, and Answering those Objections that might be made against it, was sent to him by my Lord Commissioner.

WILLIAM R.

1st, Whereas it is said that the Church of Scotland was reformed from Poperie *by presbyters without Prelacy*, his maty. thinks that thô this matter of fact may be true, which he doth not contradict, yett it being denyed by some who discourse much of a power that superintendants had in the beginning of the Reformation, which was like to that which bishops afterwards had, it were better it were otherwise expressed.

2d, Whereas it is said that their maties. doe ratify the Presbyteriall Church government *to be the only government of Christ Church in this kingdom;* his maty. desires it may be expressed thus,—to be the government of the Church in that kingdom established by law.

3d, Whereas it is said that the government is to be exercised by sound Presbyterians, and such as for hereafter shall be owned by Presbyterian Church judicatories, *as such;* his maty. thinks that the rule is too generall, depending as to its application upon the opinions of particular men; and therefore he desires that what is said to be the meaning of the rule in the reasons sent to him, may be expressed in the Act—viz., that such as shall subscribe to the Confession of Faith and Catechismes, and are willing to submitt to the government of the Church as established by law, being sober in their lives, sound in their doctrine, and qualifyed with gifts for the ministry, shall be admitted to the government, and his maty. doth judge that the following declaration might be a good test:—

I, A. B., do sincerely declare and promise that I will own and submit to the present government of the Church, as it is now by law established in this kingdom, and that I will heartily concur with and under it for the suppressing of sin and wickednesse, the promoting of piety, and the purging of the Church of all erronious and scandalous ministers; and I doe alsoe assent and consent to the Confession of Faith and the Larger and Shorter Catechismes, now confirmed by Act of Parliament, as the standard of the Protestant religion in this kindgom.

4th, Whereas it is desired to be enacted, that the generall meeting of the ministers doe appoint visitors for purging the Church, etc., his maty. thinks fitt that, for answering even those objections, which the reasons sent to him with the Act doe suggest may made against this method, that what in the mentioned reasons is expressed by a *may be*, as to the concern of his Privy Councill in that matter, and the presenting of the visitors to the commissioner, that he may see they are moderate men, be planly and particularly enacted.

5th, As to what concerns the meeting of synods and generall assemblyes,

his maty. is willing that it should be enacted, that they meet at such and such times of the year, and as often as shall be judged necessary, provided always that they apply to him or his Privy Councill to know if there be any inconveniency as to publick affairs in their meeting at such times, and have his allowance accordingly; and that in all their generall assemblies, a commissioner in the name of his maty. be there present, to the end that nothing may be proposed but what merely concerns the Church; and in case anything relating to the civill government, or that is prejudiciall to it, should be there proposed or debated, the said commissioner may give a stop to it till he has acquainted the Privy Councill, and received their direction in it.

6th, Whereas it is desired to be enacted, that the parishes of those thrust out by the people in the beginning of this revolution be declared vacant upon this reason, *because they were put upon congregations without their consent*, his maty. desires it may be so expressed, as may be consistent with the right of patrons, which he thinks he hath the more reason to desire, because in the reasons sent up with the Act, it seems to be acknowledged that this procedure is extraordinary and not to be drawn into consequence.

7th, The king thinks fitt, that the clause from line 30 to 54 be absolutely left out as unnecessary, being merely narrative, and the Act concerning supremacy being now repealed.

His matie.'s resolution to be candid and above board in what he does; and his desire, that what is now granted by him to the Church may not be uneasie to him afterwards, do incline him to have the above-mentioned amendments in the Act.

It is his matie.'s desire, that such as are of the Episcopall persuasion in Scotland have the same indulgence that Dissenters have in England, provided they give security to live peaceably under the government, and take the oath of allegeance. W. R.

NOTE E.

QUESTIONS AND FORMULA APPOINTED BY THE ASSEMBLY OF 1711, AND AT PRESENT IN USE IN THE ESTABLISHED CHURCH OF SCOTLAND FOR MINISTERS AND PROBATIONERS.

1. Questions to be put to all Probationers for the Holy Ministry, before they are licensed to preach the Gospel.

1. Do you believe the Scriptures of the Old and New Testament to be the word of God, and the only rule of faith and manners?

2. Do you sincerely own and believe the whole doctrine of the Confession of Faith, approven by the General Assemblies of this National Church, and ratified by law in the year 1690, and frequently confirmed by divers

Acts of Parliament since that time, to be the truths of God contained in the Scriptures of the Old and New Testament? And do you own the whole doctrine therein contained as the confession of your faith?

3. Do you sincerely own the purity of worship presently authorised and practised in this Church, and asserted in Act 15, Ass. 1707, entitled, Act against Innovations in the Worship of God? And also own the Presbyterian government and discipline, now so happily established in this Church? And are you persuaded, That the said doctrine, worship, discipline, and church government are founded upon the Holy Scriptures, and agreeable thereto?

4. Do you promise, That, through the grace of God, you will firmly and constantly adhere to, and in your station, to the utmost of your power, assert, maintain, and defend the said doctrine, worship, discipline, and the government of this Church by kirk-sessions, presbyteries, provincial synods, and general assemblies?

5. Do you promise, That in your practice you will conform yourself to the said worship, and submit yourself to the said discipline and government of this Church, and shall never endeavour, directly or indirectly, the prejudice or subversion of the same?

6. Do you promise, That you shall follow no divisive courses from the present establishment of the Church?

7. Do you renounce all doctrines, tenets, or opinions whatsoever, contrary to or inconsistent with the said doctrine, worship, discipline, and government of this Church?

8. Do you promise, That you will subject yourself to the several judicatures of this Church?

2. Questions to be put to Ministers at their Ordination.

1. Do you believe the Scriptures of the Old and New Testament to be the word of God, and the only rule of faith and manners?

2. Do you sincerely own and believe the whole doctrine contained in the Confession of Faith, approven by the General Assemblies of this Church, and ratified by law in the year 1690, to be founded upon the Word of God; and do you acknowledge the same as the confession of your faith; and will you firmly and constantly adhere thereto, and, to the utmost of your power, assert, maintain, and defend the same, and the purity of worship as presently practised in this National Church, and asserted in Act 15, Ass. 1707?

3. Do you disown all Popish, Arian, Socinian, Arminian, Bourignian, and other doctrines, tenets, and opinions whatsoever, contrary to, and inconsistent with the foresaid Confession of Faith?

4. Are you persuaded that the Presbyterian government and discipline of this Church are founded upon the Word of God, and agreeable thereto; and do you promise to submit to the said government and discipline, and to concur with the same, and never endeavour, directly or indirectly, the prejudice or subversion thereof, but to the utmost of your power, in your

station, to maintain, support, and defend the said discipline, and Presbyterian government, by kirk-sessions, presbyteries, provincial synods, and general assemblies, during all the days of your life?

5. Do you promise to submit yourself willingly and humbly, in the spirit of meekness, unto the admonitions of the brethren of this presbytery, and to be subject to them, and all other presbyteries and superior judicatories of this Church, where God in His providence shall cast your lot; and that, according to your power, you shall maintain the unity and peace of this Church against error and schism, notwithstanding of whatsoever trouble or persecution may arise; and that you shall follow no divisive courses from the present established doctrine, worship, discipline, and government of this Church?

6. Are not zeal for the honour of God, love to Jesus Christ, and desire of saving souls, your great motives and chief inducements to enter into the function of the holy ministry, and not worldly designs and interest?

7. Have you used any undue methods, either by yourself or others, in procuring this call?

8. Do you engage, in the strength and grace of Jesus Christ, our Lord and Master, to rule well your own family, to live a holy and circumspect life, and faithfully, diligently, and cheerfully to discharge all the parts of the ministerial work, to the edification of the body of Christ?

9. Do you accept of and close with the call to be pastor of this parish, and promise, through grace, to perform all the duties of a faithful minister of the Gospel among this people?

3. Questions to be put to a Minister, already ordained, at his admission to a Parish.

You having already been ordained a minister of the Gospel of Christ, it is supposed that the usual questions on such occasions were then put to you; and that you did then declare, &c. (here the questions put to ministers at their ordination, *ut supra*, are to be repeated; and then say), And do you now consent and adhere to these declarations, promises, and engagements; and accept of, and close with a call to be minister of this parish; and promise, through grace, to perform all the duties of a faithful minister of the Gospel among this people?

4. Formula to be subscribed by all such as shall pass Trials, in order to be licensed, and that shall be ordained Ministers, or admitted to Parishes.

I, ———, do hereby declare, That I do sincerely own and believe the whole doctrine contained in the Confession of Faith, approven by the General Assemblies of this National Church, and ratified by law in the year 1690, and frequently confirmed by divers Acts of Parliament since that time, to be the truths of God; and I do own the same as the confes-

sion of my faith: As likewise, I do own the purity of worship presently authorised and practised in this Church; and also, the Presbyterian government and discipline, now so happily established therein; which doctrine, worship, and church government, I am persuaded, are founded upon the Word of God, and agreeable thereto: And I promise, That, through the grace of God, I shall firmly and constantly adhere to the same; and, to the utmost of my power, shall, in my station, assert, maintain, and defend the said doctrine, worship, discipline, and government of this Church by kirk-sessions, presbyteries, provincial synods, and general assemblies; and that I shall, in my practice, conform myself to the said worship, and submit to the said discipline and government; and never endeavour, directly or indirectly, the prejudice or subversion of the same: And I promise, That I shall follow no divisive course from the present establishment in this Church; renouncing all doctrines, tenets, and opinions whatsoever, contrary to or inconsistent with the said doctrine, worship, discipline, and government of this Church.

NOTE F.

CONTROVERSIES AS TO CREED AND SUBSCRIPTION IN THE CHURCH OF SCOTLAND IN THE EIGHTEENTH CENTURY.

The Revolution of 1688 was succeeded by what may be described, in the words of M. Montalembert,[1] as a "general and rapid lowering of the moral temperature of the country." This religious lukewarmness, rather than any heretical tendency, seems to have been the characteristic of Moderatism. The real connection between it and heresy is somewhat severely put by a very impartial historian, Dr Hill Burton: "The inferior race went on with little earnestness of purpose, generally conforming, but in some measure prying about, and finding occasion to carp and doubt." And the controversy about creeds which we propose here to notice sprang visibly rather from a feverish restlessness and weakness, than from freedom or strength of soul.

At the same time, it was no isolated or provincial movement. The age of disintegration of dogma had commenced. In Germany the creeds of the Reformation, untouched as yet by criticism, were losing their hold on faith. In England the Presbyterians, after oscillating towards Baxterianism and Neonomianism, became Arian, and then Unitarian, and discontinued the subscription to standards which they no longer gloried in. In the Church of England the same causes raised the controversy as to subscription, in which the names of Dr Clarke and Dr Waterland[2] occur,

[1] Life of Lacordaire.

[2] See Waterland's 'Case of Arian Subscription Considered,' in the second volume of his works, and particularly the summing up on page 307.

towards the earlier part of the last century; and that great body itself, having become generally Arminian, could look with very doubtful approval upon its ancient articles of religion. In Ireland the Presbyterians lapsed into the same doctrines with their brethren in England; and the influence exerted by both the neighbouring countries upon Scotland may be traced with ease in the Correspondence of Wodrow (vol. iii.) In 1717 Mr Simpson, Professor of Divinity in Glasgow, tried for teaching Arminianism and Arianism, professed his adherence to the Confession of Faith; but the ready quashing of the prosecution by the Assembly gave great offence to the more orthodox part of the Church. In the same year, the Presbytery of Auchterarder attempting to take additional guarantees for orthodoxy from William Craig, a candidate for licence, by means of strict and unwise questions, the Assembly interposed by an Act that forbade presbyteries to require from ministers or preachers subscription to "any formula but such as is or shall be agreed to and approven by the Assemblies of this Church."[1] The uneasiness as to creeds continued and spread; until, in 1719, the most respectable book in Scotland, and perhaps in the English tongue, on 'The Uses of Creeds and Confessions,' was published by Mr Dunlop, the young Professor of Ecclesiastical History in the University of Edinburgh. It was prefixed to a very valuable, and now very rare, collection of Confessions of Faith and other formularies and documents of public authority in the Church of Scotland; and has been recently reprinted separately, by Dr James Buchanan, Professor of Divinity in the New College, Edinburgh. It opens with the acknowledgment that creeds are "generally decried," and "of late years not only undervalued as mean and useless, but exclaimed against as unjust, arbitrary, and inconsistent in their frame and tendency with the liberty of mankind."

Dunlop's book is eminently fair and candid: he sets down the case of his opponents with great ingenuousness, and states his own position in favour of Confessions, as public manifestoes and also as tests, with modesty and power. The publication called the 'Occasional Paper,' carried on in England with much ability for some years after 1716, seems to have been that which he chiefly set himself to answer; and his book was replied to by Mr Lowman, one of the writers there.[2] It attracted much attention in Scotland, and was published by the order of the Assembly, though that court, after long debates, declined to give any more formal approbation to it. It remained a private treatise; and the account given by Wodrow (vol. iii. of Correspondence, Wodrow Society edition, p. 200) shows that dissatisfaction was even at this time expressed, not only with the omission to print along with the Confession the Assembly's Act of 1647 (by which they had conditionally adopted their creed), but also with some of Mr Dunlop's general arguments. This was much more strongly expressed in several publications emanating from that uncompromisingly orthodox party which soon afterwards seceded; and with all the praise which Mr

[1] Acts of Assembly 1717, c. 13.

[2] See the interesting chapter on the History of Creeds in Principal Lee's History of the Church of Scotland, i. 135.

Dunlop's book may justly claim, it must be said that some objections to it are just. When it is stated that creeds are an unfair restraint on Christian liberty, his leading argument in reply is, that there is no unfairness, for every society has a right to fix its own tests for admission, and therefore the interference with liberty would be rather in *preventing* the Church from so doing. To this the reply is obvious. If the Church were a voluntary society, it would certainly have a right to fix its own creed, and no one could complain. But no Church in the world has ever claimed to be a voluntary society, or represented it as purely a matter of option and liking, whether the individual joins it or not. And all Churches in Scotland have emphatically rejected such a position. Therefore the Church cannot fix its own test of admission, but must accept it from Christ. Mr Dunlop is happier when he argues that in the Church of Scotland the Confession is not a test of membership, but of office—*i.e.*, for ministers and elders.

The century passed on, and in the year 1767 the controversy again broke out, but on this occasion in a more undesirable form. A number of clergymen in the west of Scotland seem by this time to have held Socinian opinions in a very undisguised way; and Mr Fergusson of Kilwinning took the opportunity to deliver a sort of challenge to one of his orthodox brethren at a presbytery meeting, and immediately afterwards published it in the 'Scots Magazine' (April 1767). The result was a keen controversy in that periodical, and a process of heresy—the interest in both cases turning not so much on the truth or falsehood of the doctrine, as on the liberty to utter it after having subscribed the Confession. The 'Scots Magazine' for two years contains an able correspondence on the subject,[1] and in 1771 the principles of the party opposed to the Confession were very clearly stated, and very strongly urged, in a book entitled, 'The Religious Establishment in Scotland examined upon Protestant Principles: a Tract occasioned by the late Prosecution against the late Reverend Mr Alexander Fergusson, Minister in Kilwinning. London, T. Cadell; Edinburgh, J. Balfour.' It was at one time ascribed to Mr Dalrymple of Ayr, and seems to have passed through his hands; but the author is now understood to have been the Rev. Mr Mackenzie, minister of Portpatrick. The advertisement, by Mr Fergusson's friends, states that the treatise "came in separate pieces to Mr Fergusson, without its being possible to trace the quarter from which it proceeded." His death intervened, but his particular and last request is given as the reason why the volume was afterwards "revised by some of the friends of truth," and published.

This volume notices, in the first place, the process against Mr Fergusson, which may be studied much more accurately elsewhere; and the chief incidents in which were the resolution adopted by the Synod of Glasgow and Ayr, to "express their disapprobation and detestation of all disingenuity or equivocation in subscribing the Confession of Faith," and the

[1] Scots Magazine, xxix. 171, 254, 345, 524, 533, 553; xxx. 9, 121, 449, 557, 610.

disavowal by Mr Fergusson, at a subsequent stage, of having recommended this, and of denying the satisfaction of Christ. It then states the general arguments which have in all ages presented themselves against creeds, as restraints upon honesty and the search of truth; following this up in the second part with a very keen criticism of the different formulas of subscription used in the Church. It is argued strongly that the older subscription formulas are only general, and leave room for subsequent change of opinion; while the Formula of 1711, which had not then formally passed the Barrier Act, is denounced as illegal and unconstitutional, both on this and other grounds of law, and on the principles of Protestantism. The practical measures suggested are, that the Confession might be subscribed as a help to belief, and not as a system of belief; or as mere articles of peace; or that the subscription might be only to those parts of the Confession on which both parties in the Church were agreed; or, again, that subscription might be abolished altogether:—but as these schemes would require the concurrence of the legislature, it is proposed in the last place, as most practicable, that the Assembly should, by its own authority, abolish the Formula of 1711.

This vigorous publication was met by a book at least as able, entitled 'A Vindication of the Discipline and Constitutions of the Church of Scotland for Preserving Purity of Doctrine' (Edinburgh, 1774), the author of which was Mr Walker, minister of Dundonald, who, under the signature of *Philalethes*, had been the most powerful contributor to the Scots Magazine controversy. Mr Walker, like Mr Dunlop, writes with much candour and general fairness, professing a desire to widen the door of admission to the ministerial office in favour of those who believe "the most important articles of our common Christianity," though they may doubt the truth of "some less important determinations in the Confession of Faith;" but the gradual change during the half-century since Dunlop's time, resulting in the almost infidel position taken up by some of his opponents, enables him to take strong ground on the side of orthodoxy. The introductory part of the book deals with the general antagonism between the enlightenment of the last century and religious doctrine; and endeavours to obviate some general presumptions—

> "As if religion was intended
> For nothing else but to be mended;"

but he then goes on to defend positive propositions, such as "that our faith of the chief articles of revealed religion must be particular and explicit." The whole question of subscription is then gone carefully into, and the objections to the formula of 1711 are dealt with in detail. The treatment of this is able, and the argument (repeated in innumerable forms) against solemnly signing a personal belief which the subscriber does not hold, is not less so. He defends Mr Dunlop, who had founded the lawfulness of Church tests upon the right of private judgment and the freedom of societies; and he also puts the narrow range of such tests very forcibly. "Was there ever any man refused the privilege of presenting

his child in baptism because, when a student of divinity, he would not sign the Confession of Faith? . . . Was there ever an instance of any one who had a scruple about signing the Confession of Faith being upon that account excluded from the other sacrament of the Lord's Supper?"

Mr Walker, we have said, deals with the objections to the Formula of 1711, and especially with the objection that it had not at the time of its enactment passed the Barrier Act. He absolutely denies this allegation, on the ground of the following extract from the register of the Assembly of 21st May 1711 (not printed): "Some overtures containing questions to be put to all probationers and intrants to the holy ministry, before they be licensed to preach the Gospel, questions to be put to ministers at their ordination, and questions to be put to ministers who have been formerly ordained, at their admission to parishes, and a formula to be subscribed by them, *transmitted to Presbyteries in the larger overtures, and returned with their remarks thereon,* received a first reading, and were ordered to lie upon the table until the next sederunt." These appear to be unquestionably the same overtures which the previous Assembly of 1710 had transmitted to Presbyteries, who are "appointed to send their opinion to the following Assembly, that if the plurality of Presbyteries do agree thereto, that Assembly may enact these overtures to be perpetual standing rules to the Church" (Act of Ass. sess. 6, May 2, 1710). It is plain, therefore, that the Assembly of 1710 had transmitted the overtures, and that the Assembly of 1711 had received several returns from the Presbyteries; but the records of Assembly do not contain a distinct statement that the requisite number of consents by these inferior courts had been obtained, nor does the Act 1711 expressly make the "perpetual standing rules" which the previous Assembly had contemplated. Wodrow's jottings, as we have seen, are rather against the idea that the Act 1711 was to be a perpetual one. But the Act, in its nature, was one which had to be *acted on* by the inferior courts; and, whether as a regular constitutional law or as an interim Act, it was acted on from 1711 down to the time of the controversy we are considering. Eight years after the publication of Mr Walker's book, the new regulations as to probationers, mentioned by Dr Hill, passed the Barrier Act.

Leaving Mr Walker's book, let us return to his opponent's attack on subscription in "the religious establishment in Scotland." The concluding part of this Kilwinning treatise is perhaps the most interesting historically. The two parties in the Church are throughout the volume distinguished as the Orthodox and the Moral'; but it is carefully insinuated that the latter were as thoroughly Socinian in principle as the authors of the book were willing themselves to be thought; and a most urgent appeal is made to the dominant party and its leaders to break away the yoke: "For you of the other party, I need nôt spend much time in urging a reformation upon *you*. You are already convinced of its propriety. But you want resolution. What I more regret, you want unity. . . . But then the peace of the country —still the peace of the country. Ye cold politicians! it cannot be more

disturbed than it is already. This unhappy country is divided into as many religious sects as it will hold. Your opinions are known in *fact;* why will you not avow them in *name?* The people have already separated from you on this very account, and the boldest step you can *now* take will furnish them with no additional reasons." For the purpose of pressing this, the alleviations of the hardship of subscription, which in some other pages are doubtfully proposed, are wholly rejected: "Whoever asserts that the clergy of the Established Church of Scotland subscribe these articles as mere articles of peace, asserts an indisputable falsehood. This is a hard expression. . . . But if gentlemen will persist in artfully eluding all attempts towards reformation, while they think themselves sheltered behind political principles, they must be undeceived. . . . Some leading ecclesiastic, whose passions are exasperated *because his judgment is convinced*, will probably tell us that, in the present situation of the State, and dispositions of the people, such a reformation is absolutely impracticable." And then the leading ecclesiastic is assailed with personal arguments: "We are ambitious of recording the actions of others, and can acquit ourselves, in this province, with applause. Are none of us fired with the nobler ambition of acting ourselves, of bearing an honourable part in the great revolutions which affect the most important interests of mankind, and transmitting our *own* names, an applauded subject of history, to the latest posterity?"

The great embarrassment which the whole subject must have caused to Principal Robertson, then the leader of the Church, cannot have been diminished by this direct appeal to him, founded upon statements so compromising to his whole party in the view of the country. Nine years later he retired suddenly from all active part in ecclesiastical affairs, when still in full vigour; and the reason given by Sir Henry Moncreiff, in a letter to Dugald Stewart (published in the appendix to Dr Robertson's Life), shows that the agitation which we have been noticing had not then subsided.[1] "I do not know," says Sir Henry, writing at some time between 1793 and 1800, "whether the reasons which led Dr Robertson to retire from the Assembly after 1780 have ever been thoroughly understood. . . . I recollect distinctly what he once said to myself on the subject, which I am persuaded he repeated to many others. He had been often reproached by the more violent men of his party for not adopting stronger measures than he thought either right or wise. He had yielded to them many points against his own judgment; but they were not satisfied: he was plagued with letters of reproach and remonstrance on a variety of subjects, and he complained of the petulance and acrimony with which they were written. But there was one subject which, for some years before he retired, had become particularly uneasy to him, and on which he said he had been more urged and fretted than on all the other subjects of contention in the Church—the scheme into which many of his friends entered zealously for abolishing subscription to the Confes-

[1] Account of the Life and Writings of Principal Robertson, by Professor Dugald Stewart, p. 296.

fession of Faith and Formula. This he expressly declared his resolution to resist in every form. But he was so much teased with remonstrances on the subject, that he mentioned them as having at least *confirmed* his resolution to retire. He claimed to himself the merit of having prevented this controversy from being agitated in the Assemblies; but warned me, as a young man, that it would become the chief controversy of my time, and stated to me the reasons which had determined his opinion on the subject. The conversation was probably about 1782 or 1783. I have a distinct recollection of it; though I have no idea that his prediction will be verified, as the controversy seems to be more asleep now than it was a few years ago."

The failure of Dr Robertson's prophecy, or the postponement of its fulfilment,[1] was doubtless due to the French Revolution—an event which frustrated many expectations besides this—or rather to that change of sentiment throughout Europe, of which the Revolution was the most important crisis. That change bore upon Scotland and the question of creed there in at least two ways. In the first place, it gave an immense and permanent impulse to dissent, both in civil and ecclesiastical affairs. One great barrier to the freedom which some of the Moderate party desired was the interposition of statute, establishment, and endowment; and this barrier was felt to be so absolute that the independent action of the Church was never even proposed. Indeed, the only party which from its traditions could consistently propose such a thing, regarded the tampering with the Confessions as the most traitorous of all their opponents' proceedings. Part of the Established Church could not assert its freedom, and part would not; and an age which looked with a vague yearning to freedom as the first of blessings, soon came to revolt against an establishment which straitened while it cherished. The consequence was that the controversy as to Confessions within the Church was merged in a controversy between it and dissent. The connection between the last century question of Subscription and modern Voluntaryism comes out strikingly in a very able book, published so early as 1792, by the Rev. Mr Graham of Newcastle—'A Review of Ecclesiastical Establishments in Europe' (Glasgow, Niven), the origin of which is stated to have been the controversy we have just reviewed. "A controversy agitated some years ago concerning subscription to certain articles, gave occasion to the writer to turn his thoughts to the nature and essential characters of Christian Churches." And among the many arguments against civil establishments which this early book presents, we find an able chapter on Confessions and Subscriptions, pointing out that the chief objections to these arise not from their free use by the Church itself, but from the imposition of them upon the Church by the State.

Another reason for the postponement of the controversy was the modern Evangelical revival in the Scotch Church, the first ripples of

[1] Fergusson of Kilwinning's case was exactly a hundred years ago. A century before that the persecution of the Covenanters was at its hottest; and a hundred years earlier brings us to the statutory founding of the Church in 1567.

which were felt in the last century. As men got more interested in the doctrines of the Confession, they naturally got less anxious about being free from its bondage.—Yet the experience of the Church of Scotland seems to show that it is easier to make a great change at a time of religious earnestness and passion, as in 1647, than in a time when a desire for freedom is the only thing felt.

NOTE G.

ACTS OF ASSEMBLY CONFIRMING SUBSCRIPTION OF 1711.

1. From Act 8th of Assembly 1782.

The General Assembly having taken into their serious consideration the danger that ariseth to this Church, and to the souls of the people, by licensing any to preach the Gospel who are not duly qualified, according to the rules laid down in the Holy Scriptures; and considering that the several Acts made by former Assemblies on this subject lie so scattered, in many separate articles, at great distances from one another, that the directions therein given were in danger of being overlooked by Presbyteries, did collect what appeared to them most material in former Acts, and transmit the same, in form of an overture, to Presbyteries; and now finding, by report from their Committee for Overtures, that a majority of Presbyteries have agreed to turn the same into a standing law of the Church, the General Assembly, after reasoning, resolved, by a very great majority, to turn the said overture into a standing law of the Church, and accordingly did, and hereby do, enact and ordain, that the following regulations shall be strictly observed in all time coming.

. . . . . .

9th, The General Assembly recommends to Presbyteries that, before any student is entered on trials, the engagements required by Act 10th of Assembly 1711, of such as are to be licensed, be read to them; and that the Presbytery take promise of them, that they will subscribe to and particularly observe the same, in case the Presbytery see cause to license them; and that this promise be recorded in their books.

. . . . . .

11th, The General Assembly, judging it fit that the same method shall be followed in all Presbyteries, as to questions put to and engagements taken of probationers when licensed; and that the said probationers should not only give sufficient proof of their piety, literature, and other good qualifications for the sacred ministry, but also come under the strictest engagement to adhere to and maintain the doctrine, worship, discipline, and government of this Church, do there-

fore enact and appoint that the questions appointed by Act 10th, 1711, be put to all such as pass trials; and likewise that they shall subscribe the Formula set down in the said Act, before they be licensed to preach the Gospel. And the General Assembly strictly prohibits the licensing any person whatsoever, who shall not give explicit and satisfying answers to those questions, and subscribe the said Formula; and discharge any Presbytery to make use of any other questions or Formula.

2. From Act 11th of Assembly 1849.

14th, The student having gone through the several trials which are mentioned in the immediately preceding section of this Act, the Presbytery are ordained to proceed in the following order:—

1st, They shall deliberately and seriously take a conjunct view of the whole trials, and if they shall be of opinion that the student is not properly qualified to perform the duties incumbent upon a preacher of the Gospel, they shall by no means grant him a licence in his present circumstances.

2d, If, upon this review of the trials, the Presbytery are fully satisfied therewith, they shall record this opinion in their minutes.

3d, That the Presbytery shall then propose to the student the questions that are appointed to be put to all who pass trials by Act 10th, Assembly 1711, and require him to subscribe the Formula which is prescribed by the said Act. And the General Assembly strictly prohibit all Presbyteries from licensing any student to preach the Gospel, who shall not give explicit and satisfying answers to these questions, and subscribe the said Formula.

CHAPTER III.

THE TREATY OF UNION, AND THE DEFINITION OF 1843.

In carrying on the constitutional or at least the statutory history of the Church of Scotland from the Revolution Settlement, the next important point is the Union between Scotland and England. The first thing that broke down the old Scottish theory of the magistrate was the accession of the Scottish king to the English throne. The magistrate—God's lieutenant—the divinely-appointed king of a divinely-distincted nation—he to whom the defence of the truth appertained—was now an English monarch and head of the English Church, and condemned, so far, to a certain official neutrality, quite inconsistent with that personal conviction which the older Scottish statutes assume. The union of the two crowns came, indeed, in a guise too flattering to our pride to be resisted; but not the less was it the first step to the lower platform of 1688 and the Disruption of 1843. But the union of the two kingdoms and the merging of the two legislatures was a still more important step. The storm of opposition which was raised in Scotland against the Union, notwithstanding the great trading advantages which it proposed, sprang very much from the conviction that the Church of the weaker nation would be certainly exposed to attacks as soon as Scotland had lost both its Parliament and its king. The consequence was a succession of the most solemn legislative guarantees in favour of the Scottish Church, its principles, and its government—

guarantees which have as yet been broken only so far as to show the wisdom of their enactment. And the result as to creed is, that while the legal connection of the Established Church of Scotland with its creed depends, in the first place, upon the Statutes of 1690 and 1693, it hangs perhaps equally, upon the Act of Security incorporated into the Treaty of Union. For if the terms of the latter Act are somewhat less express, they are much more solemn and authoritative; and being founded on an international transaction, it claims to rest not on the strength of law alone, but on the faith of an executed treaty and an indissoluble bargain.

The Act of the Scottish Parliament appointing commissioners to treat with the commissioners of the Parliament of England about a union (Act 1705, c. 4), concludes with the provision, "That the said commissioners shall not treat of, or concerning, any alteration of the worship, discipline, and government of the Church of this kingdom as now by law established,"—a clause in which doctrine is not specially mentioned, though an alteration of the "discipline of the Church as now by law established" must probably be held to include any change of its legal standard of heresy. The "Act for Securing the Protestant Religion and Presbyterian Church Government" is so very important a document that we give it in full in the appendix.[1] It narrates the negative provision of the previous Act which we have just mentioned, and goes on to give positive securities, declaring it "reasonable and necessary that the *true Protestant religion, as presently professed* within this kingdom, with the worship, government, and discipline of this Church, should be effectually and *unalterably* secured;" and for this purpose "her majesty, with advice and consent of the said Estates of Parliament, doth hereby establish and confirm the true Protestant religion and the worship, discipline, and government of this Church, *to continue without any alteration to the people of this land in all succeeding generations.*"

[1] Note A.

The true Protestant religion may be common to England and Scotland, and to the whole of Protestant Europe, but the next clause of the enactment is more specific. In it her majesty "more especially" for ever confirms the Act 1690, c. 5, "intituled, *Act Ratifying the Confession of Faith and Settling Presbyterian Church Government*, with the haill other Acts of Parliament relating thereto, in prosecution of the declaration of the Estates of this kingdom containing the Claim of Right." The other Acts referred to do not seem to be those mentioned *in gremio* of the Act 1690, c. 5, as being there confirmed, but rather those surrounding and following it in the Statute-book—such as that abolishing the royal supremacy in the Church,[1] and that abolishing patronages[2] (at least the Church in 1712 claimed the latter Act as covered by the clause under consideration); and probably also the Act 1693, c. 22, as to subscription. Though this last Act is separated from the one primarily confirmed by a distance of four years, it has a very close internal connection with it (commencing, indeed, with a ratification); and the remainder of the Act of Security has a curious resemblance to the provisions of 1693. At the same time, the Act of Security does not specifically mention the Act 1693; but goes on to provide that "the foresaid true Protestant religion contained in the above-mentioned Confession of Faith, with the form and purity of worship, &c., all established by the foresaid Acts of Parliament, pursuant to the Claim of Right, shall remain and continue unalterable." The Act then provides, in remarkably express terms, for the subscription to the Confession, not of the ministers of the Church, but of "all bearing office in any university, college, or school," and especially in the universities and colleges of St Andrews, Glasgow, Aberdeen, and Edinburgh, which are to "continue within this kingdom for ever;" and the professors and others are to subscribe the foresaid Confession "as the confession of their faith," all for the greater security of the foresaid Protestant

[1] 1690, c. 1. [2] 1690, c. 23.

religion. A provision follows, that Scotland should be free for ever from any oath, test, or subscription, contrary to or inconsistent with what had been before confirmed—which was designed to guard against the introduction into this kingdom of any of the statutes protecting the English Church. Lastly, the sovereigns of Great Britain are in all time coming, on their respective accessions, to "swear and subscribe that they shall inviolably maintain and preserve the foresaid settlement of the true Protestant religion, &c., as above established by the laws of this kingdom; and this Act of Parliament, with the establishment therein contained, shall be held and observed in all times coming as a *fundamental and essential condition* of *any* treaty or union to be concluded between the two kingdoms, without any alteration thereof, or derogation thereto, *in any sort, for ever.*" These provisions and sanctions, being first enacted by the Scottish sovereign and Parliament before the treaty was agreed to, are afterwards re-enacted and incorporated *verbatim* into both the Scottish and English Acts ratifying and approving the Union, each of them declaring that the Articles of Union, and this Act of the Scottish Parliament in particular, were "to be, and continue in all time coming, the sure and perpetual foundation of a complete and entire union of the two kingdoms." The solemnity of words could go no farther; and the royal sanction on the 6th of March 1707 consummated the Union on the basis of fundamental conditions not to be altered or derogated from in any sort for ever.

This quality of irrevocableness is of importance in the region of legislation rather than of law. A statute which may be repealed to-morrow is in theory as sacred to the administrators of law as one which is bound up with the roots of national existence; and the Statutes of 1690 and 1693 would probably be held equally binding by our courts without the additional sanctions of 1707. Yet those sanctions, and the amount of deference which has been paid to them by the Legislature, have

many important retroactive effects; and remembering that the Creed of Scotland is the chief part of the chief statute which the Union assures to us for ever, we may notice, in passing, some circumstances (less important) in which the ecclesiastical stipulations of the Union are alleged to have been already disregarded.

We have, in the first place, the group of statutes passed by the later ministry of Queen Anne in the years 1711 and 1712; and especially the Toleration Act and the Act for the Restoration of Patronage. These two enactments are joined together in a memorial for the Church of Scotland which was presented at the time to Parliament by the venerable Principal Carstairs and the other commissioners of the Church, and was afterwards appointed by the Assembly of 1715 to be held "as the deed and mind of this Assembly."[1] The mere toleration of Episcopalian worship, or even of their voluntary church government in Scotland, is not here complained of; but rather a number of circumstances in the Act which seemed to show that the Legislature was determined to treat Presbyterian dissenters in England with much greater disfavour than they were to regard Episcopalian dissenters in Scotland,[2] and that the international fairness and equality which the Union Treaty seemed to stipulate for were being abandoned. The higher Presbyterians, no doubt, took much stronger ground than this; and the really important parts of the Act were the open statutory deliverance of a religious sect from the hitherto universal dominion of the Established Church, and the withdrawal of all civil sanctions and penalties formerly interponed

[1] Assembly 1715, Act 9.

[2] The most interesting of these for our purposes is that "in Scotland the toleration doth not restrain the disseminating the most dangerous errors, by requiring a confession of faith, or subscription to the doctrinal articles of the Established Church, as is required of dissenters in England." The Toleration Act in England (1 William and Mary, c. 18) exempted only *Protestant* dissenters from penalties on account of nonconformity, and these only on their professing their belief in the Trinity and in the Holy Scriptures, and in addition subscribing the Thirty-nine Articles (except the 34th, 38th, and 36th, and part of the 20th).

to ecclesiastical censures.[1] These stronger objections are taken in another memorial from the Commission of Assembly, which was "unanimously approved and ratified" by the Assembly of 1712 (in whose minutes it is inserted of date 13th May), in which the protection of the stipulations of the Union is appealed to with great detail. And all parties in the Church of Scotland united in the opposition to the other Act, that restoring patronage[2] (10 Anne, c. 12). The first-named memorial, after stating that, in order that the legal constitution of the Church of Scotland "might be unalterably secured, it was declared to be a fundamental and essential condition of the Union," represents that "by the Act restoring the power of presentation to patrons, the legally-established constitution of this Church was altered in a very important point."[3] This protest was repeated by the General Assembly year after year to near the close of the century, but in vain; and the original design of the promoters of the bill, as stated, truly or otherwise, by Bishop Burnet,—"to weaken and undermine the establishment" of the Scottish Church,—was brought about through its means in strange and unexpected ways. The consequences were more serious than protests by the Assembly; and the statement of them by another distinguished legislator is not much exaggerated. "The British Legislature," says Lord Macaulay, "violated the Articles of Union, and made a change in the constitution of the Church of Scotland. From that change has flowed almost all the dissent now existing in Scotland. . . . Year after year the General Assembly protested against the violation, but in vain; and from the

[1] It must be remembered that it was the intolerance of the Church of Scotland and the magistrates of Edinburgh towards Mr Greenshields the Episcopal minister that led the English Parliament to measures at once of defence and retaliation.

[2] Patronage had been abolished on 19th July 1690 by the same Parliament which on 7th June had ratified the Confession of Faith, and settled Presbyterian Church government. This was a concession to the urgent desire of the Church party, and quite in opposition to the wish of the new monarch.

[3] This was argued more formally and fully by the Assembly 1712.

Act of 1712 undoubtedly flowed every secession and schism that has taken place in the Church of Scotland."[1] Before the last and greatest of these schisms took place, the Church of Scotland once more carried a protest to the Legislature, that this Act was in itself null and void, because contrary to the stipulations of the Treaty of Union;[2] but Parliament deliberately declined to acknowledge the protest, and the courts of law were of course still less able to do so. Nothing can show the conclusive authority of mere statute more than the deliverance of the House of Lords in the first Auchterarder case, where the question of Church right, which had been treated in the court below as an historical and constitutional one, was at once decided on the bare authority of the Act 1711, c. 12. And nothing can show the difficulties flowing from an incorporating union of two legislatures more than the result of the appeal to Parliament which followed this judicial decision. For the inquiry into the "Protest" which the Church of Scotland had addressed to the "federal legislature created by the Treaty of Union," against *inter alia* a statute alleged to have been passed in 1711 "without the consent of this Church and nation," supported in 1843 by a majority of the members from Scotland, was rejected by a large majority of the whole House.

[1] Lord Macaulay's speech on the Test in the Scottish Universities; Speeches, ii. 180.

[2] "The General Assembly do, in name and on behalf of this Church, and of the nation and people of Scotland, and under the sanction of the several statutes, and the Treaty of Union herein-before recited, ... protest, that all and whatsoever Acts of the Parliament of Great Britain passed without the consent of this Church and nation, in alteration of, or derogation to, the aforesaid government, discipline, rights, and privileges of this Church (which were not allowed to be treated of by the commissioners for settling the terms of the Union between the two kingdoms, but were secured by antecedent stipulation, provided to be inserted, and inserted, in the Treaty of Union as an unalterable and fundamental condition thereof, and so reserved from the cognisance and power of the federal legislature created by the said treaty), as also, all and whatsoever sentences of courts in contravention of the same government, discipline, right, and privileges, are, and shall be in themselves void and null, and of no legal force or effect."—Claim of Right of the Church of Scotland, Assembly 1842.

Yet the restoration of the right of patronage was by no means so clear an infringement of the provisions of the Act of Security as one which has quite recently happened, in the overriding, by the Act 16 and 17 Vic., c. 89, of the clause appointing all university professors to sign the Confession. The remarkable and disproportionate prominence given to this matter in these Union statutes, makes the change more startling and instructive. For the provision of the Act of Security, that all professors "shall acknowledge and profess, and shall subscribe to the foresaid Confession of Faith as the confession of their faith," the Act of 1853 substitutes, in the case of professors other than theological professors and principals,[1] a solemn and sincere declaration "that, as professor of and in the discharge of the said office, I will never endeavour, directly or indirectly, to teach or inculcate any opinions *opposed* to the divine authority of the Holy Scriptures, or to the Westminster Confession of Faith as ratified by law in the year 1690." And in place of the "practising and conforming to the worship presently in use in this Church, and submission to the government and discipline thereof," formerly subscribed to, the new Act merely exacts a promise "that I will not exercise the functions of the said office to the prejudice or subversion of the Church of Scotland as by law established, or the doctrines and privileges thereof." This declaration is to be made now before the Senatus Academicus, not before the Presbytery as formerly; and the enforcing of subscription, and of adherence to the promise subscribed (which the ecclesiastical body had previously found great legal difficulties in carrying out),[2]

[1] By the Universities (Scotland) Act (21 and 22 Vic., c. 83), principals also were freed from the old subscription. The Act 1853 limits the words "Chair of Theology" to "Chairs of Divinity, Church History, Biblical Criticism, and Hebrew," so that other theological chairs which may be instituted would not necessarily be under the restrictions which apply to these four.

[2] This statutory change makes it unnecessary for us to trace the previous history of subscription in the universities of Scotland. It cannot be said that they have ever been free from doctrinal bonds. A country which, like Scotland, at once

are now left, the former to the Court of Session and the latter to her Majesty, in either case at the instance of the Lord Advocate.

The change, even in relaxation of subscription, is considerable; but it would not be of nearly so much importance were it not attained by the alteration of an Act fenced with such peculiar sanctions.[1] The modern statute does not seek to disguise this, but, commencing with the enactment that "it shall not be necessary to make and subscribe the acknowledgment mentioned in the *Act for Securing the Protestant Religion and Presbyterian Church Government*," it ends with the provision that "the said Act . . . shall be, and the same is hereby repealed in so far as inconsistent with this Act, but the same shall remain in full force and effect in all other respects whatsoever." The change, indeed, which a previous bill, and afterwards this Act, successively proposed was so unmistakable, that (while more soothing arguments were of course employed to show that the new provisions would tend as much as the old towards "securing the Protestant religion and Presbyterian

subjected both the adult population and children to the authority of the creed, might have been forgiven for doing all this if it had exempted the universities. These would thus be the natural breathing-holes of a nation too heavily mailed in dogma. Possibly their freedom might have been a sufficient practical concession to the national principle of private judgment. And in any case it would have been one of the best guarantees for a continual renewal of intellectual and perhaps moral life.

For some notice of a remarkable attempt in the year 1839 to overleap the restrictions of this Union statute as to subscription, on the part of Professor Blackie, then of Marischal College, Aberdeen, see Note B in appendix to the chapter.

[1] While the proposed change was being agitated for in Parliament, the General Assembly issued a Protest, Declaration, and Testimony, that "The Church of Scotland is vested with rights in the matter of national education, through means of the parish schools, which, under the Revolution Settlement, Act of Security, and Treaty of Union, have been irrevocably guaranteed to her, and which the sovereign of this country binds himself, by the most solemn obligations, to maintain inviolable. The General Assembly must ever hold that it is as much within the competency of the Legislature to abolish the Presbyterian and to re-establish the Episcopalian polity in Scotland, as to abrogate the connection between the parish schools and the Church of Scotland" (Assembly 1849, Act 9). See also the Resolutions of the Assembly 1844, May 24; Assembly 1845, May 24; 1846, May 28; 1849, May 29; Commission of Assembly, 6th March 1850; Assembly 1851, May 31.

Church government") some members, like Lord Macaulay, were forced to take the extreme step of arguing that "this Church" mentioned in the Treaty of Union was no longer the Church of the Establishment, but was truly represented by the independent Presbyterian party finally rooted out of it in 1843—rooted out, too, by the acts in 1712 and afterwards of the Legislature itself, which was now called upon to make some small amends. This argument, however proper in the mouths of the Free Church and its congeners, and however open to the historian and legislator, is of course inadmissible in law. The protests of 1733 and 1843 must be admitted by the Legislature before they can hope to be acknowledged by the courts. But Lord Macaulay's argument is interesting, as raising the higher national problems.

For all these instances of legislative interference with what *may* have been covered by the stipulations of 1707 suggest some general questions which must be put before passing away from the subject. Solemn and stringent as the terms of the Treaty of Union are, there are two reasons why no such treaty can ever be an absolute guarantee for all the provisions which it contains. In the first place, the right of one generation absolutely to bind all those that succeed it, has seldom been admitted by theorists, and more seldom by legislators, with regard to any department of human interests. And in the sphere of religion, of faith, it seems a more doubtful claim than in any other region. If the Scotland of the nineteenth century should depart from the Confession of its Faith (for example) which it made at the Revolution and confirmed at the Union, is there any power in the Constitution to keep her to it? If England, breaking off from its insular religionism, should either, on the one hand, gravitate Romewards, or, on the other, once more cultivate a communion with the great family of Reformed Churches that fill America and the north of Europe, could the Union "Act for Securing the Church of England" be rightfully invoked to forbid either change? Is

Parliament not entitled to do what seems to it best for the good of its people at the time, at least if the people desire it? How far is our present Legislature bound to do what seems to it inexpedient, and even wrong, because our ancestors, believing it to be right and expedient, made it a condition of the Treaty of Union that it should continually be done?—And if it be answered, that however expedient the breaking of a treaty may appear, it cannot rightfully be done so long as its fulfilment is insisted on, the question rises, in the second place, What party is there entitled to insist on the fulfilment of the Union obligations to Scotland? The unfortunate distinction of a treaty of this kind—a treaty of union or incorporation—is that by its very completion it destroys the separate individualities whose mutual and antagonistic rights were being secured. There are no longer two parties to the contract. The nation of Scotland, which was one of the parties to the Union, by that Union lost its separate existence; and a promise is in great danger of being broken when there is no one to claim its fulfilment. In the present case there is not only one monarch and one nation, but one supreme Legislature; and the merging of the two Parliaments in one makes it always a matter of more uncertainty whether, in point of fact, Scotland is at any particular time insisting on the fulfilment of some ancient arrangement. The representatives of Scotland have, as such, no separate constitutional standing. They have merely a numerical value in a House whose numbers twelve times exceed their own. There is no Parliament of Scotland. And whatever advantages may have been gained by the legal decisions against the Church of Scotland from 1834 to 1843, which we are about to notice, one serious result has been the crushing of the only institute that even pretended to represent the ancient independence of Scotland. The Claim of Right of 1842, by far the most important document in our modern history, had urged the original and inalienable independence of the Church of Scotland, as pos-

sessing an authority limited, no doubt, to spiritual matters, yet co-ordinate with that of the State itself. And such a body, if such a position were conceded to it, had, of course, not only interest, but right, to represent Scotland, even against the Legislature, in all those matters which, as affecting religion, the Act of Security reserved to the nation and the Church. According to the recent decisions, it cannot be said that the Church has now any such position ; and the fact is probably much more important in its bearing upon the provisions of the Union than any of those alleged infringements which we have mentioned. Whether the party now represented by the United Presbyterians and Free Church is historically identical with the Church of the Revolution Settlement, is much more doubtful than Lord Macaulay chose to consider it in debate. But the fact that the Established Church has now been finally denied that position of independence which this very party had always claimed for it is not a doubtful point ; and the suppression of this ancient claim, whether it was a valid claim or not, is important for the future. As the stipulations of the Union in favour of Scotland are chiefly ecclesiastical, they would certainly be more likely to be observed "for ever," if the Church had authority to demand their fulfilment even from the Legislature, as a matter beyond the authority of Parliament. No one imagines that this is now the case. So long, indeed, as Scotland appears to be unanimous, or nearly so, on the ground of the privileges secured by the Union, no attack can well be made upon them in the united Parliament of Great Britain. But in the event of either a need or a desire for a change on the part of Scotland being at any time demonstrated to the Legislature, it would be impossible for the Church of Scotland to oppose it on the ground of treaty made with it. In such a case the Legislature would come face to face with the great moral question which underlies all the legal and constitutional ones. Can one generation bind all those that succeed it in matters of conscience, religion, and faith? Can the

solemn engagements of our ancestors tie up their descendants from their permanent allegiance to truth and to God? Can the supreme power of the State be bound, absolutely and unchangeably, by *any* engagements?

These high and grave questions, which it is as necessary to put as it would be unwise to answer, may be best receded from by the following observations. I. The ecclesiastical stipulations of the Union have been in use to be confirmed annually, in communications from the monarch to the General Assembly of the Established Church, as to a body which had a right to receive these renewed assurances, and to plead the ancient engagements so confirmed. And at no time was this done more explicitly than when the alleged independence of the Church was finally denied, and its subjection to statute most clearly laid down. The Queen's letter of 1843, while it very plainly denies to the Church the right of differing from the Legislature in the construction of its ecclesiastical privileges, as clearly concedes to it the place and function of claiming these from the Crown so long as they remain upon the Statute-book.[1] The law has never questioned this right.

[1] The Queen's letter, presented by the Lord High Commissioner in 1843, immediately *after* Dr Chalmers and those who adhered to the Claim of Right had left, begins :—

"Victoria R.—Right reverend and well-beloved, we greet you well. Faithful to the solemn engagement which binds us to maintain inviolate the Presbyterian Church of Scotland in all its rights and privileges, we gladly renew the assurance that we desire to extend to you the continuance and support which the General Assembly has long received from our royal ancestors.

. . . . . .

"The faith of the Crown is pledged to uphold you in the full enjoyment of every privilege which you can justly claim ; but you will bear in mind that the rights and property of an Established Church are conferred by law : it is by law that the Church of Scotis united with the State, and that her endowments are secured ; and the ministers of religion, claiming the sanction of law in defence of their privileges, are specially bound by their sacred calling to be examples of obedience.

"The Act ratifying the Confession of Faith and settling Presbyterian Church government in Scotland was adopted at the Union, and is now the Act of the British Parliament. The settlement thus fixed cannot be annulled by the will or declaration of any number of individuals. Those who are dissatisfied with the terms

On the contrary, it holds that the Church of Scotland, if not independent, has at least a high jurisdiction and a perpetual existence as a living corporation statutorily belonging to the State. The covenant of 1707, therefore, while it exists, can never be in abeyance for want of a body in right to appeal to it; and can never be unjustly infringed, even by the Legislature, without a protest from a body which has both right and interest to make the protest. II. The alleged infringements which have already taken place have not been avowed or serious attacks upon what may be held the most important aspect of the Act of Security. The Act 1690 confirms, first, the Protestant religion as held in Scotland, and, secondly, its Presbyterian Church; and the Act of Security was unquestionably chiefly intended to secure these against the Episcopalian influence of the English Legislature. Neither the Toleration Act, nor the restoration of patronage, nor the modification of university tests, can be called an avowed or deliberate attack upon the Presbyterianism of that Act; and still less can the actings of the Crown, the Legislature, and the Court in 1843. What the Church recently split upon was not a question between Presbytery and Episcopacy, but one more ancient and abstract—one which had been debated between two parties within it, or at least between statesmen and churchmen within Scotland, long before the Revolution; and the obligations of the Union, though certainly founded on in that controversy, were less discussed than the Statutes of 1567 and 1690, and the fundamental relation of the Scottish Church and State. If the courts and the Legislature were right in their construction of that fundamental relation, they were not wrong in reference to the Treaty of Union, which merely perpetuated the relation existing at the time. The question of the independence of the Church may have been more important, or

of the settlement, may renounce it for themselves; but the union of the Church of Scotland with the State is indissoluble while the statutes remain unrepealed which recognise the Presbyterian Church as the Church established by law within the kingdom of Scotland."

less important, than that between Presbytery and Episcopacy; but it was a different question. And the threefold safeguard to Scotland against "Prelacy," of the Revolution Claim of Right, and the Act 1690, and the Act of Security, all confirming "the Presbyterian Church government and discipline to be the only government of Christ's Church within this kingdom," remain intact—binding the British Legislature to ignore in Scotland probably even such a simple Episcopacy as Knox was willing to tolerate, but infinitely more any conceivable Episcopacy which has not fellowship and communion with the Presbyterian Churches of the Reformation. III. The claim under the Act of Security, which is *prima facie* pleadable on behalf of Scotland only by the Established Church of Scotland, is doubtless capable of being strengthened by the concurrence of other Scotch Presbyterian bodies; for though these are ignored by the law, they are not necessarily ignored by the Legislature. The very strong historical claim of the Free Church might thus at any time be used (could it only forget the *spretæ injuria formæ*), not now to neutralise, but to corroborate with an independent strength, the claim of the Church Established against any threatened transgression of the Union securities. If this transgression were an infringement of religious freedom, the Voluntary Churches would have a right to be heard with peculiar respect; and (to return to our subject) the common claim would be exceedingly strong in anything relating to doctrine. In the Act of Security, and in all our legislation, doctrine takes precedence even of Church rights; and the same principle runs through the constitutions of all the Presbyterian Churches which fill Scotland at this day. They have laid great stress upon the rights and freedom of ecclesiastical assemblies; but their Second Book of Discipline declares that "the final end of all Assemblies is first to keep the religion and doctrine in purity, without error and corruption." And as the leading stipulation of the Act 1690 is not political, nor even ecclesiastical, but doctrinal, the various Presbyterian

Churches, differing among themselves in polity, might substantially agree in doctrine; and so long as they did so they would stand on the Union engagements of England in this respect with an impregnable moral and legal strength.

We shall not be thought to have devoted too much space to the Union Treaty, for it has always been spoken of as that which permanently binds both State and Church to the Confession of Faith. That this is so with regard to the State, or how far it is so, has already been considered. The same questions might now be raised on the side of the Church also, and we might proceed to inquire whether the Church of Scotland, independent (even of statute) as it has often claimed to be, is not bound by the compact of a federal treaty? But within the recollection of the present generation the whole question of Church independence, and especially of Church relation to statute, has been examined and decided; and one undoubted result of this process is, that the Church is as effectually bound to its creed by the Acts of the Revolution—*i.e.*, by simple legislation—as it could be by any supposed compact or treaty in 1707. We may, therefore, proceed at once to these decisions, which constitute the last chapter of the history of the Established Church necessary to be looked at before summing up the results as to its relation to its creed.

In tracing the history of the Church down to a period within the memory of our readers, we have been able to avoid the chief contests which took place on the subject of Church independence. Except for a brief period in 1794, our subject has led us away from these. Yet, while tracing the history of the Church solely in the interest of creed, we have been forced again and again to remark a constant tendency in churchmen to claim an original independence of the Church upon the State—an independence not lost or compromised

even by its establishment, by which indeed it was sometimes alleged to have been confirmed. That statesmen leaned to a different view was evident; but it was the interest of both parties to avoid collision. And it was not till near the end of the third century of its existence that a question so interesting to the Church in all its relations, and among others in its relation to its creed, was fairly raised, exhaustively discussed, and finally decided, at the expense of the excision from the Establishment of that Church party which for so many ages passionately maintained the doctrine. Whether the Revolution Settlement was more favourable to the Church's claims than its previous establishment is a little difficult to say. On the one hand, the Statutes of 1690 give far less of the appearance of a *jus divinum* to the Church than those of King James I.'s. But the Westminster Confession perhaps makes up for this by its famous assertion 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;" and while its 23d chapter gives large power to the magistrate *circa sacra*, it goes by no means so far in this direction as the Scottish Confession. The matter remained very equally poised, and left room for one of the greatest debates in modern jurisprudence. We shall find the legal definition of 1843 fruitful in inferences and illustrations bearing on the subject of these pages.

The occasion upon which the question arose was in every way an appropriate and adequate one. The resistance of the Church to patronage, which we have already seen manifested at the Revolution, and till long after the Union, had dated from the very commencement of its existence; and found expression, especially in the form of a determined opposition to *intrusion*, in both Books of Discipline.[1] Yet the rights of

[1] What measure of authority is allowed to the Books of Discipline by Lord Brougham, in his speech in the Auchterarder case, is not very clear. He says, "There are two authorities in favour of the call"—the First and Second Books of Discipline. But "the First Book of Discipline is of

the "just and ancient patrons" continued to hold their place in the Statute-book, and the system, abolished by King William and restored by Queen Anne, vexed and diminished the Church of Scotland during the hundred years that followed. And when the Church at last roused itself from the selfish somnolence of the last century, and began to covet and regain its ancient popularity, this question was found to lie full in front of it. It could not abolish the civil right of patronage; but in May 1834 the General Assembly passed an Act declaring, "That it is a fundamental law of this Church that no pastor shall be intruded on any congregation contrary to the will of the people." This step soon produced the inevitable results. In the Auchterarder case, "by far the most important the Court has ever been required to determine,"[1] the conduct of a presbytery in founding on this Act, and rejecting a presentee who had been refused by a congregation, was found illegal; and the defence that it was a matter "subject to the jurisdiction of the Church courts" was rejected. The position being laid down by the heads of the Court that this jurisdiction is derived from and dependent upon the State, the Assembly of 1838 adopted a contrary resolution, binding the Church to "assert and at all hazards defend" the independence of the Church, and to enforce obedience to this upon its office-bearers. This led to the Strathbogie cases, where the majority of a presbytery refused to obey the Act of Assembly 1834, now declared illegal, and insisted, in the face of orders from the Assembly, upon at once ordaining a presentee as minister of a recusant congregation. The Presbytery were accordingly suspended by the Church (before they were able to carry out

no *legal* authority at all;" and the doctrine of the Second Book on calls "is not the law *now:* it never was the fact at any time." Yet of the second of these "authorities, as they have been *strictly* called" (so in Supplement to Report, p. 18.—The Scottish Jurist Report has it, "as they have been *strangely* called"), his Lordship says, "If I were called to a conflict with the Book of Discipline on any point of Church discipline, or upon any article of theology, I should no doubt feel great anxiety." This whole speech was delivered extempore.

[1] Lord Cockburn.

the intrusion), but actively protected by the Court; whose powers, appealed to by parties having interest, now fell heavily in every direction upon the rebellious ecclesiastical body. Its position became especially unworkable when the *quoad sacra* and secession ministers, whom the Church had received by its own authority as equal in status and function with the ministers generally, were declared to be no members of Church courts, insomuch that their presence invalidated the acts of these judicatories, and when large sums of damages were found due to parties injured by acts of presbyteries done in obedience to the "fundamental law" of non-intrusion, and even by their evading or delaying the infraction of that law. The endeavour to escape, by in each case abandoning the temporalities of the benefice, and claiming the spiritual and pastoral rights only for the Church, was met by the principle that office-bearers of the National Church were statutory functionaries, who were bound and compellable to perform their duties as fixed by the Supreme Courts, and could not evade them by merely abandoning emoluments. The negotiations for relief from this conflict of supposed jurisdictions, by means of legislation, failed. The Church issued the Claim, Declaration, and Protest of 1842—a most important historical document, gathering up the principles of the party now dominant, and always up to this time represented in the Church; and in the following year the individual members commissioned to the Assembly of 1843, who adhered to the Claim,[1] seceded, declaring in a new Pro-

[1] The curious equipoise in the constitutional question was maintained with a nice justice to the last. The question whether it was a majority or a minority of members of Assembly who seceded, depends on whether the previous exception of *quoad sacra* ministers by the Church's own authority, many of whom were members, was valid. If the principles of the Church are admitted, the numerical result here is in its favour. On the other hand, even on these principles, the ministers and elders who throughout the country joined the Free Church were a minority.

Even had it been otherwise, the legal result would have been quite the same. According to some of the cases just decided, the majorities of judicatories in incompetent acts were ignored, and the minorities recognised; and the

test[1] that a free Assembly of the Church of Scotland could not be held under the conditions of establishment as now fixed; and, leaving "the presently subsisting ecclesiastical Establishment," they formed themselves into a body which claimed to continue or to become the Free Church of Scotland.

It will be observed that this critical discussion turned not on a matter of doctrine, but on a question of Church order, and afterwards on the question of Church authority and independence. Whatever instruction, therefore, we may look for from this period as to the connection of the Established Church with its creed, will be found (1) in the general principles laid down as to the relation of the Church to the State, (2) in more particular statements as to the binding force of statute, and (3) in certain references which the Bench made to the Confession in *illustration* of their central argument.

I. *The Relation of the Church to the State.*

The position of the Church, as set forth in the resolution of the Assembly 1838,[2] "anent the independent jurisdiction," was that "In all matters touching the doctrine, government,

attempt of any number of ministers, however large, whether acting as individuals or as judicatories, to sever the Church of Scotland from the State, would have been simply nugatory—while on the ecclesiastical principles, on the other hand, it was only separate from the State that the Church of Scotland could now exist, or at least hold Assembly. But the Protest of 1843, and the secession, were the acts not of judicatories, but of individuals. The Claim, Declaration, and Protest of 1842 was the act of the Assembly.

[1] These documents are interesting as illustrating *ex adverso* the principles brought out in this and the following chapter, but will be found of great importance when we come to treat in the second part of the volume of the principles of non-established Scottish Presbyterians. They are themselves, too, admirable specimens of public documents—whole centuries of history concentrated into formula. We can only print the conclusion of the Claim of Right, but give the Protest of 1843, and the short Act of Separation, in full.—See Appendix, Note D.

[2] Act 14. This Act, unlike the other manifestoes of the Church in its war of independence, was not rescinded by the Established Assembly of 1843.

and discipline of this Church, her judicatories possess an exclusive jurisdiction, founded on the Word of God, 'which power ecclesiastical' (in the words of the Second Book of Discipline) 'flows immediately from God and the Mediator Jesus Christ.'"[1] This position was not fully taken up in the pleadings by the senior counsel of the Church;[2] and among the powerful minority of Judges who favoured its claims,[3] some, like Lord Cockburn, acknowledge fully "the great principle that the Church, as an Establishment, has no power but what the State has conferred upon it," arguing thereafter that the State had conferred, or at least acquiesced in or acknowledged, all that the Assembly now claimed. But the opinions of the minority of the Bench, and the powerful argument in which they upheld the constitutional recognition of the Church's independent authority by the State, have now only an historical interest.

One Judge, who voted with the majority, took up in theory an almost intermediate position. Lord Medwyn held that the Church had natively and originally the independence and authority which it claimed, and had them not from the State, but from a higher source; but that, by forming a compact with the State, this original position had been abandoned, and that now the State has right and interest to enforce obedience upon the Church of all the conditions of the contract as the courts of law shall interpret them—reserving to the Church "a rescission of the contract, and a *restitutio in integrum*, which is always within its power, however much to be depre-

[1] The independence claimed by the Church of Scotland is stated by a very high authority to have been the same in extent with that maintained by the defenders of the "Gallican liberties" abroad, against Ultramontanes and Erastians.—Principal Cunningham's Discussions, 152.

[2] "It has been said that the Church has a divine right, independent of, and superior to, the power of Parliament. This was not argued by the counsel, and Mr Rutherfurd particularly disclaimed it. Assuredly such an argument can never be listened to here."—Lord Mackenzie in Middleton *v.* Anderson (Culsalmond case), 4 D. 1010.

[3] Lords Glenlee, Fullerton, Moncreiff, Jeffrey, Cockburn, and Ivory.

cated."[1] Lord Medwyn's opposition to the Church was upon the constitutional question—the question how much in point of fact the State in Scotland had (in compact) given to the Church. His general theory was rather favourable to eccle-

[1] "None of your Lordships can carry your notions higher than I do, as to the power of the Universal or Catholic Church as a spiritual body, and independent altogether of the State, for making laws relative to its constitution, ceremonies, polity, or confession of faith, binding on its own members, and to be submitted to as a test of membership, and enforced by ecclesiastical discipline. It is from a higher source than the temporal power that the Church derives its existence and rights; no less than from that Power 'which gave Christ to be Head over all things to (*i. e.*, to the benefit of, Whitby) the Church, which is His body.' Yet exalted as its origin, its dominion is but spiritual, and its legislative powers thus far limited; and care must be taken to keep their exercise within such limits that no civil right be affected by any law of this spiritual body, and obedience to its decrees can only be expected from its members. But when this independent society asks not toleration merely from the civil power, but establishment," &c. This was in the Auchterarder case (Robertson's Report, ii. 147); and in Lord Medwyn's third great speech in the case of Cruickshank *v.* Gordon, 10th March 1843, he says of the Church and the State: "Each will be entitled to support its own jurisdiction against aggression by the peculiar arms bestowed, — the Church, by ecclesiastical censures—the civil magistrate, by the sword. The Church is exclusive and independent, accountable to no one on earth in the exercise of her spiritual powers, in the performance of those ecclesiastical functions which she derives from her Divine Head; but it is only in the legitimate exercise of them that the Church can possibly have the high sanction which most churches have claimed; if they exceed their due power, it is excess—it is usurpation—it has no longer the privilege which it would have had under other circumstances, and cannot claim the sanction of its Divine Founder, because exceeding and not exercising powers committed by Him to His Church."—5 D. 926. Again in the same speech (5 D. 964) he says: "It is not, then, that the Court of Session exercises jurisdiction over a co-ordinate court, but that the supreme power of the State exercises its legitimate and constitutional mode of securing implement of a solemn contract entered into by itself in behalf of its subjects, and which the other contracting party knew at the time would be thus enforced, and hence has expressly agreed to. This must have been an inherent condition, otherwise it would have been a most insane act on the part of the State to have given an irresponsible power to a society that might become either a most useful and efficient ally, or a most tyrannical or oppressive opponent; and, further, to allow to this ally the right of saying, and that without review or control, that it is acting within its own province, when, in fact, it has failed in its duty to the State, by obstructing its lawful proceedings. This, however, was not done. On the contrary, the Church knew that it was intended to enforce the contract, with all its conditions, purchased by correspondent advantages. If the Church feels itself burdened with this condition, its remedy

siastical claims.[1] But this theory, like that of the Assembly, was opposed by the majority of the Court.

Lord Gillies says, in the Auchterarder case:[2] "As to the alleged compact between the Church and the State, I observe in passing that it is an improper term. There can be no compact, properly speaking, between the Legislature and any other body in the State. Parliament, the King, and the three Estates of the realm are omnipotent, and incapable of making a compact, because they cannot be bound by it."[3]

is not disobedience at its own hands, but a rescission of the contract, and a *restitutio in integrum*, which is always within its power, however much to be deprecated."

[1] Lord Medwyn's theory is interesting, as being very much that of English High-Churchmen, which is similar to the old Scottish doctrine, but probably essentially distinct from it. The root of the Scottish theory seems to be, that all church power is *ministerial;* that churchmen are not authorities, with a power of discretion, but *servants* of Christ; that, being servants, they have no right to do more in the Church than they are commanded to do in Scripture; but, on the other hand, they have no power to do less, or to delegate their church functions to others. The Church, therefore, on this theory, has no power to compromise or surrender its original independence even for a time. The theory, on the other hand, of Mr Gladstone (for example) assumes that it has some such power of surrender, and that for the noblest purposes; while the retention of an ultimate right of disruption is enough to defend it from the imputation of unfaithfulness.—State in its Relations with the Church, ii. 28-35.

[2] Robertson's Report, ii. 32.

[3] How far the Judges admitted the idea of contract may be gathered from the following statement of Lord Mackenzie's in the Culsalmond case: "It is said that our commission is limited; so that, independently of the alleged exclusive jurisdiction of the Church, we are barred from judging in this case by our own inherent want of power. I do not understand that. Suppose the Church had never been established, and had no exclusive ecclesiastical jurisdiction by law, but had been an independent sect, only tolerated, like the Episcopal sect in Scotland; and then suppose that a presbytery, duly authorised by the sect, had entered into an agreement with A B, by which he agreed to build a church, and endow it; and the presbytery, duly authorised by the sect, agreed that, upon a vacancy, A B should present a qualified person, whom the presbytery agreed to ordain;—suppose, then, A B fulfilled his part, and then, on a vacancy, the presbytery refused to fulfil its part—would it ever occur to anybody that we had not authority to enforce this contract? It would be no answer to say to us, You are not ecclesiastical—you cannot ordain. The answer would be, No; and, for that reason, we decern you to do it, as you agreed to do. Just as much must we have jurisdiction, unless it can be made out that we are excluded by ecclesiastical jurisdiction, given by statute to the Church, where a right and obligation to the same effect are created *vi statuti*. In

"In some expressions in Lord Medwyn's opinion," said the Lord Justice-Clerk Hope in the Stewarton case,[1] "which appear to admit of the possibility of a proper conflict of jurisdiction between the Church courts and the supreme court of law, I cannot concur. . . . . I cannot admit that an Establishment, instituted by statute, can claim or legally possess any authority from a divine source, which the State, constituting the Establishment, may not have thought fit to acknowledge as belonging to it. And, of course, I cannot admit that an Establishment can ever possess an independent jurisdiction, which can give rise to a conflict as between two separate and independent jurisdictions." In the same case,[2] the Lord President Boyle says, "There exists, in reality, no such thing as a conflict between the civil and ecclesiastical courts of a country, in which a Church is established and endowed by the State." The previous head of the Court, the Lord President Hope, was at least as emphatic on this point as his successor. In the Strathbogie case he puts it thus: "The Church courts say that they have an independent jurisdiction; but who gave them any jurisdiction? The law, and that alone, gave it; and the law defines what it has so given."[3] In the very first speech on the Auchterarder case

fact, patronage has, in justice, the support of contract or *quasi* contract also, as well as of statute. For Parliament, with the consent, I believe, of patrons, gave to the Presbyterians the whole Establishment; and, on a vacancy in a church, enjoined the patrons to present a qualified man to the presbytery to fill it; and that being done, Parliament bound and astricted the presbytery to ordain or admit. And of this gift of the Establishment, with its condition, the Presbyterian Church accepted, which bound her in good faith, as well as allegiance, to observe the condition, and admit the qualified presentee."—Middleton *v.* Anderson, 4 D. 1010, 1011. But that the legal ground was not good faith or contract, but allegiance, is put very expressly by Lord Mackenzie in the Auchterarder case (Report, ii. 121): "I agree with the senior counsel, that the subjection of the Assembly is *not owing to any contract between Church and State, but simply to the supreme power of the Legislature*, which every subject of this country, and all bodies consisting of subjects of this country, must obey."

[1] Cuninghame *v.* Lainshaw, 20th January 1843. See Separate 'Report of the Stewarton Case' (Thomas Clark, 1843), 53.

[2] Report, 141.

[3] 2 D. 606. And in Kinnoull *v.* Ferguson (second Auchterarder case),

he had put it more strongly still. "That our Saviour is the Head of the Kirk of Scotland in any *temporal*, or *legislative*, or *judicial* sense, is a position which I can dignify by no other name than absurdity. THE PARLIAMENT is the temporal head of the Church, from whose acts, and from whose acts alone, it exists as the *National* Church, and from which alone it derives all its powers." [1]

That these principles were reasserted in the House of Lords cannot be said; for they were not so much asserted as *assumed* throughout the speeches of Lord Brougham, Lord Cottenham, and Lord Campbell, in the first and second Auchterarder appeals.[2] The nearest approach to the formal discussion of them is perhaps Lord Brougham's allusion to a conflict between the House of Lords and the Church courts, which he condemned as an indecent supposition.[3] It will probably not be

5th March 1841, 3 D. 797, his Lordship says: "If these gentlemen wish to maintain the situation of what they call a Christian church, they would be no better off than the Catholic Church, or the Episcopal Church, or the Burghers or Anti-burghers; but when they come to call themselves the Established Church, the Church of Scotland—what makes the Church of Scotland but the law? What were they in the interval between the Restoration and the Revolution? A miserable sect—most cruelly and unjustly persecuted, it is true; but they were not the Church of Scotland. They are equally a Christian church, as all other churches are that acknowledge the Saviour as the Saviour of mankind; but they are the Church of Scotland only so far as the law has established their Church." Lord Meadowbank goes farther in the Auchterarder case than almost any other of the Judges. "Our Church has no foundation in the common law, but is the mere creature of statute."—Report, ii. 90. Long after, the Lord Justice-Clerk Hope, in the Stewarton case, said, "The Church of Scotland is wholly, as an Establishment, the creation of statute;" and Lord Wood, in the same case, "As an Establishment, it is the creature of statute."

[1] Report, ii. 10. The italics are his Lordship's.

[2] As all Church questions of importance are sure to find their way to the House of Lords, the past judgments of that illustrious tribunal are of the greatest importance. In Note E we collate some of the most important parts of the judgments delivered at this Church crisis by the court of appeal. Any necessary quotations from the Court of Session are given in the foot-notes to these pages.

[3] "My Lords, it is indecent to suppose any such case. You might as well suppose that Doctors' Commons would refuse to attend to a prohibition from the Court of King's Bench—you might as well suppose that the Court of Session, when you remit a cause with orders to alter the judgment,

doubted that the doctrine that there is no "independence" of the Church, and that its jurisdiction is derived from the State, has had more authority given it by the conclusive silence of the House of Lords than by the repeated and explicit propositions which we have quoted from the Judges in the court below. We shall find the higher tribunal more express on the second head, which is a logical corollary from the first proposition, but may be held separately.

II. *The Authority of Statute over the Church.*

"Upon the statute law of Scotland," said Lord Brougham, in the first Auchterarder case, "the whole controversy must ultimately depend."[1] The *legislative power* of the Church was one of the most important topics which had been pleaded in the controversy; and though our interest in this power refers to the *potestas dogmatica*, while the Auchterarder case turned on the *potestas diatactica*, the general principle as to this legislative power being controlled by statute is applicable to both. The Lord Chancellor (Cottenham) puts it thus: "If such be the construction of the statutes, of what purpose can

would refuse to alter it. Conflict of laws and of courts is by no means unknown here. We have, unfortunately, upon the question of marriage, had a conflict dividing the Courts of the two countries for upwards of twenty-five years, in which the Court of Session have held one law, and in which your Lordships and all our English Judges have unanimously held another law. The Court of Session in Scotland has held, and still hold, two persons to be married whom your Lordships hold not to be married. But has the Court of Session ever yet, when a case, which had been adjudicated by them according to their view of the law, came up to you, and you reversed according to your opposite view of the law,—has the Court of Session ever then continued the conflict, which would then have become not a conflict of law but a conflict of persons—a conflict of courts—a conflict in which the weaker would assuredly have gone to the wall? The Court of Session never thought for one instant of refusing to obey your orders upon this matter, whereupon they entertained an opinion conflicting with your own. For this reason alone, and it is enough, I have no doubt whatever that the presbytery, when your judgment is given declaring their law to be wrong—declaring the patron's right to have been valid—will, even upon the declaratory part of the judgment, do that which is right."—Supplement to Auchterarder Report, ii. 39.

[1] Supplement, 8.

it be to consider the supposed legislative power of the General Assembly? For it cannot be contended that there can exist in the General Assembly any legislative power *to repeal, control, or interfere with enactments of the Legislature; so that, even if the subject-matter were found to be within the general legislative power of the General Assembly, it would be powerless as to such subject-matter, so far as it is regulated by statute.*"[1] And in illustration, his Lordship, alluding to the preamble of the Veto Act passed by the Assembly to the effect "that it is a fundamental law of the Church of Scotland that no person shall be intruded in any congregation contrary to the will of the people," and to the argument that that Act was only an arrangement to carry the ancient principle into effect, remarks, "Whether that is, or ever was, a law of the Church of Scotland, is perfectly immaterial, if *the statutes* contain enactments and confer rights inconsistent with any such principle, or with the execution of any such law." That the Church's power is absolutely limited by statute was of course also held by the courts below; and while some, like the Lord Justice-Clerk (Hope), illustrated this by a reference to the statutes now actually in force,[2] others referred to future or possible legislation as having a similar omnipotence. In delivering the leading opinion on the Strathbogie interdict,[3] Lord Gillies states that the pretensions of the Church were "in direct contradiction to the constitutional law of Great

[1] Supplement, 51.

[2] "Statute has specially described the species of authority given to the Established Church. Its power of government is defined in different statutes, by terms which to my mind are clear and unambiguous; and in these statutes I find no legislative power granted to the Church, placing any changes within their competency. I do not find the recognition of any general and undefined legislative power. On the contrary, I think both the Statute 1592, and the statute at the Revolution, restoring Presbytery and embodying the Confession of Faith, exclude the least pretence to such power in the Church. These statutes are framed with most jealous and deliberate caution, and I think they settle and establish the Church of Scotland within limits the most precise, and with authority expressly limited to purposes therein set forth."—Stewarton Case Report, 60.

[3] Presbytery of Strathbogie, 14th Feb. 1840, 2 D. 594.

Britain," a statement of which he then quotes from Blackstone as follows: "Parliament hath sovereign and uncontrollable authority in making, repealing, revising, and expounding of laws concerning matters of all possible denominations, ecclesiastical or temporal. . . . . *It can alter the established religion of the land.*"—Blackstone, i. 156. But this leads us to present, in the third place, the direct references in these decisions to the doctrine, or confession, or creed of the Church.

III. *References to Creed.*

The principles above enounced seem to imply the authority of the civil power and of statute over the Church's creed; but as it was only gradually and in the course of a forensic struggle every step of which was contested, that these principles were reached, so it was only by degrees that the application of them to the Confession of the Church's Faith was apprehended. Thus in the very commencement of the Auchterarder case, Lord Jeffrey, arguing in the minority on the side of the Church, makes the supposed impossibility of confining the Church to its statutory creed an argument against interfering with it in other matters. "It is provided," said his Lordship, "by the Act 1592, that all questions of *Heresy* shall be for the Church judicatures alone; and it is certain that the Confession of Faith was fixed by Act 1567 and prior Acts, as the standard of that religion which the Church was primarily ordered and established to maintain. Nothing could, therefore, be more radically *ultra vires* than for her judicatures to desert that standard, and adopt other articles of belief and doctrine. But suppose it were to happen that the majority of the Church became heretical; and that in this state a patron who adhered to the old faith gave a presentation to one who was of the same persuasion, and that on account of that very adherence to the statutory standard he was rejected by the Presbytery and the Assembly as heretical and unsound in doctrine. *Could this*

Court possibly interfere to correct this flagrant illegality and monstrous *excess of power?* although the civil interests both of patron and presentee were affected by it as directly at least as they can be said to be here. Could your Lordships take the genuine Confession of Faith in one hand and the new heretical articles in the other, call for the minutes of the examination of the presentee, and if satisfied that he was right, and his ecclesiastical judges wrong, could you declare their proceeding illegal and *ultra vires*, or ordain them forthwith to retract and admit the presentee? I take it for granted that no one will maintain the affirmative."[1]

The rashness of this assumption was soon to appear; and in the same case we find Lord Medwyn again taking up what seemed to be an intermediate position, but one which practically agreed with that of the majority of the Court. It may be safely said that the illustrations in the commencement of the following paragraph are of very doubtful authority, while the latter part of it has received full subsequent confirmation. "It is true I can conceive an excess of power by the Church in a matter so purely ecclesiastical that it may not be competent for this Court to check it, and where it would be necessary to resort to the Legislature to obtain a remedy. If the General Assembly were to make an alteration in the Confession of Faith, and instead of Trinitarian articles introduce Socinian, or the Neology of Germany, and if they were to insist on their elders subscribing it before admission to that office, I think the civil court could not interfere. Again, if *jure devoluto* they were to appoint a minister to a parish, and require of him subscription to the new Confession before giving him collation, redress, I think, could not be obtained from the civil court. But as by an Act passed at the Revolution professors of universities are bound to subscribe the Confession of Faith, if the General Assembly insisted that he must subscribe the new Confession, while the professor-elect

[1] Report, ii. 381.

scrupled to do so, but professed his willingness to subscribe the Confession 1690, I have not the slightest doubt that we could authorise his reception by the university on his subscribing that Confession, and would arrive at that conclusion in a declaratory action against the Senatus, by finding that the General Assembly had exceeded their powers in making an alteration on the Confession of Faith without the authority of the State ; that it was *ultra vires* and illegal, and that the people were not bound to adopt it. Our jurisdiction in this matter would have arisen because a civil right was affected by it. Now, make the further supposition that, in proceeding to receive and admit a presentee on presentation by a patron, a presbytery, under the instructions of the General Assembly, required of the presentee subscription to the new Confession, and that the patron and presentee objected to it, the patron having presented him on the express condition that he should adhere to and preach the doctrine of the Confession 1690 ; suppose the presbytery then declined to take him on trial, and rejected him on this ground, would not the patron's right of patronage be affected by this proceeding, and would he not be entitled to seek redress from this Court against this refusal to give effect to his presentation, this invasion of his civil, and the presentee's patrimonial, right ? For against any excess of power which affects the civil rights of any individual or body of men, it must not only be competent to, but the bounden duty of, the civil court, as the authorised protector of the civil and patrimonial rights of the people, to give redress. I cannot conceive that if the Church act *ultra vires*, and to the injury of a civil right, the supreme civil court of the country cannot give protection and redress against a usurpation of power, even by the Church." [1]

Lord Medwyn's idea, that there might be an excess of power in things for the matter of them so purely ecclesiastical that the Court could not check it, was not countenanced by the

[1] Report, 148.

majority even at this early date; and the principle adopted at last, both by the Court of Session and the House of Lords, as to all statutory matters, was that most tersely put by the Lord Justice-Clerk Hope in the third Auchterarder case: "Although the functions committed to the presbytery, and the duty to be performed, are strictly ecclesiastical, and to be exercised by them in their ecclesiastical capacity,[1] yet the obligation to perform them is statutory. Statute imposes the duty on the Church courts of the Establishments. Their refusal to perform the ecclesiastical duty is a violation of a statute, *therefore* a civil wrong to the party injured,[2] *therefore* cognisable by courts of law, *therefore* a wrong for which the

[1] See Lord Gillies's remarks in the Marnoch case (Edwards *v.* Cruickshank), where the Court ordained a presbytery to receive and admit a presentee as minister of a parish. "It is said that to receive and admit requires ordination, which is a purely spiritual act," &c.—3 D. 295, Dec. 18, 1840.

[2] This matter of civil injury is also powerfully stated by Lord Gillies, in a passage of much interest for the subject of this volume: "To maintain that the Church courts may proceed in disregard or violation of Acts of Parliament, binding the clergy as well as the laity, and that there is no tribunal competent to redress the wrong in the kingdom, is absurd, since for every wrong there must be a remedy. Suppose the General Assembly were to make a law that no one should be licensed to preach or be ordained as a minister, who did not sign a declaration that the repeal of the Test Act was sinful, and the admission of Roman Catholics into Parliament contrary to the law of Christ, could the Court of Session give no redress, by ordaining the presbytery to take the party upon trial, though he refused to sign such a declaration? Or, if they took the licence from a probationer, or deposed a settled minister on a similar ground, would not the Court interfere to prevent or remedy the wrong? So also, if similar declarations were required with regard to the 10th of Anne, establishing patronage, and if no minister was taken upon trial unless he disclaimed all right to the benefice except by popular call, would not the judgments of a presbytery, acting on that principle, be suspended or declared null by the Court of Session? In fact, an attempt was made to get quit of patronage in this way at the end of the sixteenth, and again at the end of the seventeenth century, but presentations were enforced by the civil court notwithstanding. The principle of non-intrusion now contended for, whether in the shape of the Veto Act, or any other shape yet proposed, is a direct attempt to repeal the 10th of Anne, and to abolish patronage by Act of Assembly. It is in vain to say that the General Assembly enacts nothing with regard to temporalities or benefices, by which they mean the stipend, manse, and glebe. In the case of deposition, they deprive a minister of those advantages, and he

ecclesiastical persons are amenable to law, because there is no exemption of them from the ordinary tribunals of the country, if they do not perform the duty imposed on them by statute."[1] The possibility of the application of this principle to a statutory Confession is clear; but in the many cases decided, the references to the Church's relation to its creed were few. Both parties felt it an awkward subject. The judges favourable to the Church scarcely ventured to claim for it the right of changing the national creed; while the majority felt that, "if there was one thing more than another within the exclusive cognisance and jurisdiction of the Church, it would seem"[2] to be that creed. Gradually, however, especially after the House of Lords' judgments, the principles of the supremacy of civil statute, and the right of all parties to enforce obedience to it who have any patrimonial interest, came to bear fruit. In the case of Cruickshank *v.* Gordon,[3] where the long debate ran itself down to some of its deepest roots, about two months before the disruption of the Church, the Court sustained their right to reduce (*i.e.*, annul) a sentence of deposition of the Strathbogie ministers, and this high reach of jurisdiction was accompanied by a reference to their right to interfere with the equally remote and ecclesiastical region of doctrine. Lord Medwyn's opinion now is clearer than it was in 1838: "I presume it will not be alleged that the General Assembly could at their own hand alter the Confession of Faith, strike

cannot get them unless their sentence is declared null; but, laying these out of view, it is a grievous civil injury to disqualify a probationer from entering the Church by withholding his licence, and to affix a stigma to his character for doing what the law enjoins, or for not doing what it prohibits. It is still worse to extrude a minister from the Church for the same cause, and to disable him from exercising the civil jurisdiction which law has given the Church courts in several departments with regard to manses, glebes, schoolmasters, &c."—2 D. 593, 594.

[1] Kinnoull *v.* Ferguson, March 10, 1843; 5 D. 1010. The Reports do not give the views of the Bench in this case; but the Lord Justice-Clerk's statement will be found on page 5 of the Opinions of the Consulted Judges in the Session Papers.

[2] The Lord President in Auchterarder case; Report, 13.

[3] March 10, 1843; 5 D. 909.

out all the Trinitarian articles, and substitute a Socinian one; or introduce Mormonism, or even Arminianism, in place of Calvinism."[1] The Ordinary (Lord Cuninghame), when alluding, in the note to his judgment, to the Assembly's having deposed the Strathbogie ministers for obeying the law, says: "The case appears to be the same as if the General Assembly, taking their own view of the Act establishing Presbytery, had commanded their presbyteries, in admitting candidates for the ministry, to leave out the 23d chapter of the Confession of Faith in the copy submitted for subscription, or, in giving licence and induction to ministers, to omit the administration of the oath of allegiance, as expressly required by another statute, because these enactments were obnoxious to the present majority of the Church. If the General Assembly had deposed any of their brethren for disregarding such a mandate, it is not thought that they would have been making, in any respect, a more extreme stretch of incompetent power, than is set forth in the libel now under discussion."[2] And lastly, the

[1] 5 D. 938.

[2] 5 D. 917. Lord Cuninghame adds, in a subsequent paragraph: "In so far as the Church claim the station and privileges of a supreme Legislature, the pretension is essentially unfounded. In the words of Erskine, they derive their whole powers from the State, through the Acts of the civil Legislature. It was by Act of Parliament that a change from the ancient Catholic faith to the Protestant creed was authorised; by the same authority the Confessions of the new faith were from time to time sanctioned and enforced, and the judicial powers of the Church in spiritual matters were also defined by Act of Parliament. The Church, then (as an Establishment), is in the situation of an important corporation, embodied by the State, with no powers of general legislation, but with an unquestionable right, like other corporations, to make by-laws—not to alter or repeal, but to enforce and promote the objects of their institution, in so far only, however, as these may be consistent with the provisions of the statutes under which they are constituted. If, however, under the form or disguise of such by-laws, they trench upon a single Act of the civil Legislature (as in the case of the Veto Act), the operation of the regulation may be at once corrected by a declarator of its nullity before the Supreme Court. Thus, if the General Assembly, as an assumed Legislature, passed an Act declaring that every candidate for orders, and every intending communicant, who did not profess non-intrusion principles, should be held guilty of heresy and punished accordingly, there can be no doubt that a law so incompetent would be at once declared illegal, and contrary to the statutes."—5 D. 919, 920.

Lord President (Boyle), formerly the Lord Justice-Clerk, says: "Can it be pretended that if a majority of the General Assembly were to take upon themselves to alter the Confession of Faith, on which the Established Church is founded, and depose as for heresy all those ministers who refused to subscribe to their new creed, that such depositions are to be held unimpeachable, and carried into full effect by this Court? Or suppose that the General Assembly (as was recently done by that body in regard to an elder from Kilmarnock in regard to an ecclesiastical offence) was in its wisdom now to bring a charge against the late venerable head of this Court, and depose him from the office of eldership, the duties of which he has so long and honourably fulfilled, on the mere ground that his opinions, formerly delivered from this chair in certain causes, amounted to a denial of the sacred Headship of the Church, and a violation of its constitution, could it seriously be maintained by any sane man that such a sentence could not be suspended and reduced *in toto?*"

These principles and illustrations bring out a result much more definite than the well-known statement of Mr Erskine in his Institutes, though quite in accordance with it: "By the present Establishment our General Assemblies or convocations of the clergy may define or explain articles of faith, condemn heretical opinions, and make canons for the better establishment of the government and discipline of the Church, *provided* their resolutions be consistent with the laws of the realm, from which our National Church derives its whole authority."[1] More than this has now been ascertained. The

[1] Erskine's Institutes of the Law of Scotland, 1. 5. 24. Upon this the Lord President remarks in the Stewarton case (Report, 137): "In thus referring to the laws and statutes of the realm, as the source of the authority of the Church, this learned author was indeed asserting only what is in truth evinced by the whole history of the Reformation, and the completion of the establishment of our National Church. For it is always carefully to be recollected, that when the Reformed Church was established in Scotland, it was not by an alliance being entered into between the Estates of Parliament and a known existing Church, as if wholly independent of

jurisdiction of the Church in doctrine is now within the limits set by the Statutes of 1690 and 1693; and being derived from the supreme authority of the State, any excess in the exercise of it is held to be capable of rectification. The results of this doctrine with reference to the Church's creed we postpone to the next chapter; but in a note appended to this we give a list of the cases between 1838 and 1843 in which the Court sustained its right to interfere with the proceedings of the ecclesiastical body, and which it is desirable carefully to compare with the principles upon which they were professedly founded.[1]

At the time the above illustrations as to the Confession of Faith were uttered on the Bench, the Church party was in the throes of its dissolution from the Establishment, and not disposed to meet arguments drawn from the remoter field of doctrine, even had it been able to do so; but in the Catechism of the Principles and Constitution of the Free Church, issued

each other, and based on treaties, the exposition of which might depend on the understanding of the different parties to them. On the contrary, after the Papal establishment was swept away by the Act of the Convention of Estates declaring it to be idolatrous, and never afterwards to be kept up to any extent, the Estates agreed to sanction a new form of religion, which, from the very first moment, received the impress of the authority of the Legislature, by its agreeing to and adopting the first Confession of Faith, and placing it on the Statute-book."

[1] See Appendix, Note F. This is important, not only as showing the various *modes* of interference which are competent, but also as registering the *occasions* on which interference may take place, and so enabling us to test the principles already quoted from the Bench. The law must probably be gathered, not from what was *said* by the Court alone, nor only from what was done by it, but from both. It is the more important to keep this in mind, because the time was one of almost revolutionary excitement; and the actings of the Court were more than once said by it to be of the nature of extraordinary remedies for extraordinary and constitutional disturbance. The principles stated may in some cases, therefore, have exceeded what the Court would again choose to act up to, while in other cases the measures actually taken may have gone farther than the legal doctrine. Both must be compared; and it is besides desirable that the unprofessional reader should be enabled to collate the rubrics, taken from Mr Shaw's impartial Digest, with the indignant enumeration of attacks recorded by the Church in the Claim of Right, and summarised in the separating Protest.

a few years after 1843 under the authority of its Assembly,[1] the challenge as to creed is taken up, and the counter-principle very deliberately enounced. It is laid down there that Christ is the Head of the Church; that His Word is its ultimate standard; and that the principle of his Headship "is violated *when a Church is tied to its Confession by civil enactments*"—a doctrine which is immediately explained, in perfect accordance with the principles of this section of the Church in ancient and modern times, as follows: "It is one thing for the civil privileges and endowments of a Church to be tied to a Confession by civil enactments, and quite another thing for a Church itself to be so. In the former case, the Church, when she finds that any articles of her Confession are unscriptural, is at liberty to renounce them, being only bound, if she do, to resign her temporalities. In the latter case, the law allows no relief whatever to the Church, in her corporate capacity, when she discovers errors in her Confession; which, of course, is as much as to say that the Church is bound always to go absolutely upon the supposition of its soundness, and to interpret the Word of God agreeably to its declarations. Under these circumstances, the supreme and ultimate standard of doctrine is not the Bible, but the Confession of Faith."[2] The only answer that it seems possible to make to this vigorous statement is, that though "*the law* allows no relief whatever to the Church" in the case supposed, legislation may do so; and that the Confession is not the "ultimate standard" of truth to the Legislature, whatever it may be *in the mean time* to the ecclesiastical body. The attempted *reductio ad absurdum* is based wholly on the old theory of the Church of Scotland being an independent and originally

[1] The General Assembly of the Free Church of 1847 took up this Catechism, and "approve generally of the same, as containing a valuable summary of this Church's history, and exhibition of her distinctive principles, from the beginning of the Reformation to the present time." It is a very able, but intensely polemical little volume.

[2] Catechism, p. 18.

separate body—an idea which, as we have seen, was repeatedly and emphatically rejected on the Scottish Bench, and was anything but favoured in the House of Lords. And it is only upon this theory that the "Church as a corporate body" can expect to become free from established law by the mere process of "resigning her temporalities." Lord Medwyn's opinion, that the Church could resort to this remedy at any time by a simple "rescission of the contract," seems to have fallen with the theory of compact on which it was founded, and with the doctrine of original independence on which alone the theory of compact rests. This came out more clearly towards the close. It had been already laid down that the individual minister or presbytery, while remaining in the Church of Scotland, could not, under that Church's sanction, abandon the temporalities, and so be free from statute in spiritual and pastoral matters;[1] and the principle seemed to imply that the Church itself, or its majority, was equally powerless to do so. It was now decided, not only that the acts of majorities of Church courts refusing to obey the law were

[1] In the House of Lords, in the second Auchterarder case (Kinnoull *v.* Ferguson, 11th July 1842, where the action of damages by the patron and presentee against the presbytery was sustained), Lord Campbell said: "The doctrine has been hinted at by the counsel for the appellants, rather than explicitly announced, that the spiritual office of minister of a parish in Scotland may be entirely separated from the temporalities, and that the Church renouncing the temporalities may dispose of the spiritual office as they please. To this doctrine I, for one, beg leave to express my dissent. By the law of the land, in framing which the Church was a party, the temporalities are united to the spiritual office, and this office with the temporalities is to be enjoyed by the person duly qualified presented by the patron, the Church being the sole judges of his qualifications. There is a civil right to this office, which the civil courts will recognise and vindicate. A renunciation of the temporalities of the Church, with a view to retain spiritual jurisdiction, cannot be made by those who continue members of the Establishment." And he adds: "While the appellants remain members of the Establishment, they are, in addition to their sacred character, public functionaries appointed and paid by the State, and they must perform the duties which the law of the land imposes upon them. It is only a voluntary body, such as the Relief or Burgher Church in Scotland, self-founded and self-supported, that can say they will be entirely governed by their own rules."—Report, 70-73. See Lord Cuninghame's opinion in Cruickshank *v.* Gordon, 10th March 1843; 5 D. 969.

invalid, but that the acts of the minorities obeying it should be valid and sufficient.[1] And so when the Claim, Declaration, and Protest of 1842 pledged the Church (not, to rescind the compact, for the Scotch theory never acknowledged that a compact affecting proper ecclesiastical functions was, or could competently be made, but) to abandon the temporalities of the Establishment as its conditions were now fixed, and when the Protesters of 1843 claimed to be the Church of Scotland stripped of its temporalities, the Crown at this crisis threw its authority into the constitutional doctrine which its supreme courts in Scotland had for years consistently maintained. The Queen's letter to the General Assembly of 1843 declares:—

"The Act ratifying the Confession of Faith and settling Presbyterian Church government in Scotland was adopted at the Union, and is now the Act of the British Parliament. The settlement thus fixed cannot be annulled by the will or declaration of *any number* of individuals. Those who are dissatisfied with the terms of this settlement, may renounce it for themselves; but the *union of the Church of Scotland with the State is indissoluble* while the statutes remain unrepealed which recognise the Presbyterian Church as the Church established by law within the kingdom of Scotland."

The royal hands thus laid the topstone on the legal doctrine so laboriously built up. The more these memorable decisions are studied, the more does it appear that a real definition, disruption, and separation has by them been effected between the two principles that struggled for centuries in the womb of Scottish history. The Nationalism of Knox

[1] This was the third Auchterarder case (Kinnoull *v.* Ferguson, 10th March 1843), where "the majority of a presbytery having refused to take a presentee on trial, though the Court had found that it was not within their competency to refuse, held that an action at the instance of the patron and presentee, concluding to have it declared that the proceedings of the minority of the presbytery, who were willing to obey the law, should be valid and sufficient in the matter, and for interdict against the interference of the majority, was competent."

might mean either of two very different theories. He was scarcely in his grave when the struggle between the two began; and perhaps the strangest thing of all is that it was not till 1843 that it was decided that it did *not* mean merely the recognition by the State of an independent Church of Scotland, possessing, by divine appointment, an exclusive jurisdiction in spiritual matters. These decisions *tend* at least to a nationalism of quite another kind—not now the casual coincidence of two independent bodies, the temporary concordat of two equal powers; but rather, the essential and indissoluble connection of the most sacred function of the State with the State itself; or, perhaps, the essential and indissoluble dependence of the noblest institute of the State upon that national power which gives it existence and authority. Knox was not content to have a Church of Christ in Scotland—he was determined to have it a Church *of* Scotland. The State allowed the change, but has added its own interpretation—declaring it to be *its* Church, finally and inseparably; and Knox's descendants have found, what that great man strove not to see, that a Church with both independence and nationality, though in theory the most beautiful of all things, may at any moment be found to be practically impossible. The shining of that devout "Imagination" has fascinated the eyes of many generations in Scotland, but will do so no more.

The instinctive way in which the eyes of thoughtful men in the Established Church of Scotland have followed the indication of the legal decisions in the direction of the Church theory of Coleridge and Arnold is remarkable.[1] But these great decisions have had an effect in another direction. The feeling that the Church is now, in a sense never before

[1] Some such theory lies at the root of the most valuable Essay of the Duke of Argyll, which, however, treats Scottish Church history in the manner of a legislator rather than of a historian—not as it has occurred, but as it ought to have occurred.

attempted, a National Church, has had its inevitable and proper influence on the question of creeds. In such a case the Confession comes naturally to be regarded as the Confession of the nation, rather than of the individual, or even of the Church; and the ecclesiastical body must make use of it accordingly. A Church that is free to change her Confession may be tyrannical, but a Church that is bound to her Confession must be moderate, in its administration.[1] And, with

[1] In May of last year, 1866, the moderators of both the Established and Free Assemblies gave addresses bearing upon the question of creed. The addresses by the moderator are in no respect authoritative, but they generally indicate the prevailing and received sentiment of the Church on the subject discussed. We shall make some extracts from the address of the Free Church moderator in its proper place. At the close of the Established Assembly, the Rev. Dr Cook of Haddington, the moderator, said :—

"The Dissenting Churches around us set forth with holding the same creed as our own, but it is quite competent for them to make any change or modification upon it; and by one great body this has already been, as to one article, done; and the other appear to contemplate a union with the former, which seems to imply the necessity of doing so; and with their so doing, provided they are unanimous themselves, no party, it seems, has any right to interfere. But it is not so with the Established Church. Following out the great principles of religious freedom which Presbyterianism had asserted before it was placed in the position which it occupies, the doctrines it held, embodied in its Confession, were submitted to the Estates of Parliament, and became the subject of careful consideration. That Confession was accepted as the truth of God; and the Church was endowed and established, not free at any time to modify, alter, or depart from it, nor to hold the truth of any of its doctrines an open question. A minister cannot, in consequence, openly within the Church impugn the Confession. He must forfeit, should he be led to change his views with regard to it, that position, his admission to which his signature to the Confession of Faith was an essential preliminary."

The moderator's address, received at the time by the Assembly with applause, was immediately followed by a weighty protest from many of its members—of course at an unofficial meeting. Principal Tulloch, following out his able pamphlet on 'The Function of Debate in Theology,' led this demonstration, which, however, did not question the moderator's statement of the constitutional position of the Church, but rather insisted that, this position being what it is, individual ministers had all the more a claim to a tolerant and liberal construction of their relation to their creed. The Duke of Argyll also about this time interposed with the following letter:—

"As regards the Westminster Confession, any attempt to abandon it, or to change it, would, in present circumstances, be an attempt most injurious to the interests of the Church; but as there are parts of it which every man must now qualify with more or less of explanation and abatement, so it seems to me that this ne-

all alleviations, that formula of creed which Scotland once wore lightly as armour—claiming power perhaps to doff it, but choosing rather to keep in it nightly watch and daily ward—that old creed is sure to trouble the modern Church with a doubtful uneasiness—perhaps to burden it with weight, certainly to vex it with constraint.

cessary liberty ought to be openly admitted in the terms and in the methods of subscription. Such admission has been now made, and adopted by authority, as regards subscription to the formularies of the Church of England. There is no human composition professing to be an epitome and definition of Christian faith which can bear to demand subscription without such reasonable reserve. Least of all can it be demanded for a composition which deals minutely with matters not belonging to faith at all, and which trenches largely on the region of philosophical, and even of political opinion. Nothing is gained, but much is sacrificed, by refusing to allow men to make openly those qualifications which they must be allowed to make in secret. Churches, like other societies, must trust something to the honour of their members. Our Church retains in her hands the free powers of discipline. Cases of extreme and unjustifiable departure from doctrines of essential value can be met by those powers."

APPENDIX TO CHAPTER III.

NOTE A.

ACT OF SECURITY.

Act for Securing the Protestant Religion and Presbyterian Church Government (as incorporated into the Act Ratifying and Approving the Treaty of Union, of date 16th January 1707).

Our sovereign lady and the Estates of Parliament considering that, by the late Act of Parliament for a treaty with England for an union of both kingdoms, it is provided that the commissioners for that treaty should not treat of or concerning any alteration of the worship, discipline, and government of the Church of this kingdom, as now by law established; which treaty being now reported to the Parliament, and it being reasonable and necessary that the true Protestant religion, as presently professed within this kingdom, with the worship, discipline, and government of this Church, should be effectually and unalterably secured; therefore her majesty, with advice and consent of the said Estates of Parliament,

hereby establish and confirm the said true Protestant religion, and the worship, discipline, and government of this Church, to continue without any alteration to the people of this land in all succeeding generations; and more especially, her majesty, with advice and consent foresaid, ratifies, approves, and for ever confirms the fifth Act of the first Parliament of King William and Queen Mary, intituled, Act Ratifying the Confession of Faith and Settling Presbyterian Church Government, with the haill other Acts of Parliament relating thereto, in prosecution of the declaration of the Estates of this kingdom, containing the Claim of Right, bearing date the eleventh of April one thousand six hundred and eighty-nine; and her majesty, with advice and consent foresaid, expresly provides and declares that the foresaid true Protestant religion contained in the above-mentioned Confession of Faith, with the form and purity of worship presently in use within this Church, and its Presbyterian Church government and discipline—that is to say, the government of the Church by kirk-sessions, presbyteries, provincial synods, and general assemblies, all established by the foresaid Acts of Parliament, pursuant to the Claim of Right—shall remain and continue unalterable; and that the said Presbyterian government shall be the only government of the Church within the kingdom of Scotland. And further, for the greater security of the foresaid Protestant religion, and of the worship, discipline, and government of this Church, as above established, her majesty, with advice and consent foresaid, statutes and ordains that the Universities and Colleges of St Andrews, Glasgow, Aberdeen, and Edinburgh, as now established by law, shall continue within this kingdom for ever. And that, in all time coming, no professors, principals, regents, masters, or others bearing office in any university, college, or school within this kingdom, be capable, or be admitted or allowed to continue in the exercise of their said functions, but such as shall owne and acknowledge the civil government, in manner prescribed or to be prescribed by the Acts of Parliament. As also, that before or at their admissions, they do and shall acknowledge and profess, and shall subscribe to the foresaid Confession of Faith, as the confession of their faith, and that they will practise and conform themselves to the worship presently in use in this Church, and submit themselves to the government and discipline thereof, and never endeavour, directly or indirectly, the prejudice or subversion of the same; and that before the respective presbyteries of their bounds, by whatsoever gift, presentation, or provision they may be thereto provided. And further, her majesty, with advice foresaid, expresly declares and statutes that none of the subjects of this kingdom shall be lyable to, but all and every one of them for ever free of any oath, test, or subscription within this kingdom, contrary to, or inconsistent with the foresaid true Protestant religion and Presbyterian Church government, worship, and discipline, as above established; and that the same, within the bounds of this Church and kingdom, shall never be imposed upon or required of them in any sort. And lastly, that after the decease of her present majesty (whom God long preserve), the sove-

reign succeeding to her in the royal government of the kingdom of Great Britain shall, in all time coming, at his or her accession to the crown, swear and subscribe that they shall inviolably maintain and preserve the foresaid settlement of the true Protestant religion, with the government, worship, discipline, right, and privileges of this Church, as above established by the laws of this kingdom, in prosecution of the Claim of Right. And it is hereby statute and ordained, that this Act of Parliament, with the establishment therein contained, shall be held and observed, in all time coming, as a fundamental and essential condition of any treaty or union to be concluded betwixt the two kingdoms, without any alteration thereof, or derogation thereto, in any sort for ever. As also, that this Act of Parliament, and settlement therein contained, shall be insert and repeated in any Act of Parliament that shall pass, for agreeing and concluding the foresaid treaty or union betwixt the two kingdoms; and that the same shall be therein expresly declared to be a fundamental and essential condition of the said treaty or union, in all time coming. Which Articles of Union, and Act immediatly above-written, her majesty, with advice and consent foresaid, statutes, enacts, and ordains to be, and continue in all time coming, the sure and perpetual foundation of an compleat and intire union of the two kingdoms of Scotland and England, under this express condition and provision, that the approbation and ratification of the foresaid Articles and Act shall be noways binding on this kingdom, untill the said Articles and Act be ratified, approven, and confirmed by her majesty, with and by the authority of the Parliament of England, as they are now agreed to, approven, and confirmed by her majesty, with and by the authority of the Parliament of Scotland. Declaring, nevertheless, that the Parliament of England may provide for the security of the Church of England as they think expedient, to take place within the bounds of the said kingdom of England, and not derogating from the security above provided for establishing of the Church of Scotland within the bounds of this kingdom. As also, the said Parliament of England may extend the additions and other provisions contained in the Articles of Union, as above insert in favours of the subjects of Scotland, to and in favours of the subjects of England, which shall not suspend or derogat from the force and effect of this present ratification, but shall be understood as herein included, without the necessity of any new ratification in the Parliament of Scotland. And lastly, her majesty enacts and declares, that all laws and statutes in this kingdom, so far as they are contrary to or inconsistent with the terms of these Articles as above mentioned, shall from and after the union cease and become void.

NOTE B.

UNIVERSITY TESTS.

PROFESSOR BLACKIE AND THE PRESBYTERY OF ABERDEEN.

The reader must by this time have observed how very little there is in the law of Scotland of direct judicial decision on the subject of creed, and on the various questions, such as the question of subscription, which are embraced within it. I am indebted to the learned and generous scholar who provoked the following discussion, for some information as to a litigation which would have been one of the most interesting in our books had it prospered to maturity.

In the year 1839 Mr John Stuart Blackie, the present Professor of Greek in the University of Edinburgh, and the accomplished translator of Æschylus and Homer, received a presentation from the Crown to the Professorship of Humanity in Marischal College of Aberdeen. On the 2d of July of that year Mr Blackie appeared before the Presbytery of Aberdeen, and subscribed the Confession of Faith and the Formula of 1694 ("I sincerely own and declare the above Confession of Faith to be the confession of my faith; and I own the doctrine therein contained to be the true doctrine, which I will constantly adhere to," &c.) The stipulation of the Act of Security, it will be remembered, is not so full as this. It, however, provides that professors "shall acknowledge and profess, and shall subscribe to the foresaid Confession of Faith as the confession of their faith."

Upon signing, Mr Blackie made a statement to the presbytery to the following effect, the exact words being transmitted by him on the next day to the public newspapers: "I wish it to be distinctly understood, and I request that the clerk be ordered to put it upon record, that I have subscribed this Confession of Faith, not as my private confession of faith, nor as a churchman learned in theology, but in my public professional capacity, and in reference to university offices and duties merely. I am a warm friend of the Church of Scotland, and have been accustomed to worship according to the Presbyterian form, and will continue to do so; but I am not sufficiently learned in theology to be able to decide on many articles of the Confession of Faith."

Mr Pirie then said that "this should have been stated *before* signing, and that the presbytery sitting there had nothing to do with any gentleman's reservations." Whereupon Mr Blackie said: "I have no reservations. I make a *public declaration;* and I do so for the sake of the presbytery as well as for the vindication of my own liberty of conscience. If the presbytery is dissatisfied with my declaration, they are now at liberty to bring an action against me on my own confession, and eject me. As to the matter of record, if my declaration does not appear in the presbytery's books, it will appear in the public papers, and that is all I want."

The presbytery did not at the time record Mr Blackie's statement, or take any formal notice of it, but, on the contrary, granted him the usual certificate of having subscribed the Confession and Formula. On the appearance, however, of the exact narrative in the newspapers, with a letter from the professor elect stating that he held that in law a non-theological professor is not subject to the spiritual jurisdiction of the Church, but signs the articles as articles of peace only, the presbytery first recalled their certificate, and afterwards came to a finding that Mr Blackie "has not signed the Confession of Faith as the confession of his faith, in terms of the Act of Parliament; and further, that he does not consider himself bound by the Formula signed by him," which finding they transmitted to the Senatus Academicus; and that body, having consulted counsel, "resolved not to proceed to fix a day for the admission of Mr Blackie, while the obstacle or objection created by these findings remains." Upon this Mr Blackie raised an action of declarator against the Senatus Academicus of the university, concluding that they were bound to admit him. The Senatus declined to enter into the merits of the action, stating that they regarded the Presbytery of Aberdeen as the principal party in the defence. The presbytery lodged a minute in the action, craving that they, though not called in it, might be sisted as defenders, and this point was the only one which was decided in court. After able printed pleadings, written on the part of the presbytery by Mr (now Lord) Neaves, and on the part of the professor elect by Mr Robert Hunter, Lord Cuninghame (Ordinary) pronounced the following interlocutor, refusing the presbytery a *locus standi:* "In respect it is admitted that the pursuer subscribed an authentic copy of the Confession of Faith, in presence of the said presbytery, on 2d July 1839, without any limitation or reservation on the face of the instrument so subscribed; and that he got a certificate of his having done so on that date, under the hand of the presbytery clerk, by authority of the said presbytery, which is neither reduced, nor offered to be made the subject of reduction on any competent ground; and in respect the presbytery have failed to condescend on any legal title or ground sufficient to establish a right in them, in any form, to oppose the pursuer's admission to the professorship libelled on; Finds that the said presbytery are not entitled to enter appearance in the present action, and therefore repels the motion of the presbytery, and allows the pursuer, and the proper defenders called in the action, to complete the record on the merits *quamprimum.* Finds neither party entitled to any of the expenses hitherto incurred in reference to the presbytery's appearance and motion, and decerns."

The leading ground of Lord Cuninghame's decision was that the presbytery had no *title* to appear, their duty in the matter of witnessing a subscription being *ministerial* only. "The statute confers no right or title on any presbytery in this matter, except to see the genuine copy of the Confession of Faith, as sanctioned by Parliament, subscribed without alteration. Hence, while presbyteries are not entitled to put any subordinate question to parties taking the test, as to their apprehension of its

import, they are equally excluded from admitting or paying attention to verbal explanations, afterwards given, which the parties do not insist on forming part of their written and statutory oath or declaration. The subscribing parties are bound by their subscription to such extent and effect as the law holds the oath or Confession to import, and no subsequent verbal statement can either qualify or in any shape affect their written oath or declaration."

But the note farther points out that, even if the presbytery had a title, they had no probable or relevant ground for appearing, so as to induce the Court to let them into the process. Lord Cuninghame argues that it is impossible to read a page of the Confession "without perceiving that there is much in it that most men are not qualified to judge of, upon their own researches or knowledge, and therefore they proceed on the authority of those who framed the Confession, and of the Legislature which enforces the subscription;" and he instances the question of the authenticity of the several books of the canon as one which all cannot have been expected to investigate. He therefore rather held that Professor Blackie's error "lay in his thinking it necessary to state in any form that which all mankind would have implied."

The case, thereupon, went to the Inner House, but suddenly collapsed. A compromise was effected; and on each party paying its own expenses, the presbytery withdrew their demand to appear in the case. They do not appear to have ever expunged from their records their recall of the certificate of subscription; but the Senatus Academicus, finding that they no longer actively pressed their opposition, resolved to admit the professor elect, as being still in possession of that certificate, and to ignore the subsequent intimation which had been made to them by the ecclesiastical court.

The Formula of subscription which Professor Blackie refused or qualified was, as we have seen in the text, abolished for universities in 1853. We give below the enactment abolishing the same in the whole parochial and burgh schools of Scotland.

NOTE C.

TESTS IN PAROCHIAL SCHOOLS.

Extracts from an Act to alter and amend the Law relating to Parochial and Burgh Schools, and to the Test required to be taken by Schoolmasters in Scotland (24 and 25 Vic., c. 107, 6th August 1861).

From and after the passing of this Act, it shall not be necessary for any schoolmaster, or for any person elected a schoolmaster, of any paro-

chial school, or of any school under the provisions of the Act of the first and second years of the reign of her Majesty, chapter eighty-seven, to profess or subscribe the Confession of Faith, or the Formula of the Church of Scotland, or to profess that he will submit himself to the government and discipline thereof: Provided always that every person elected a schoolmaster of any such school shall, as a condition of the office, and before admission thereto, produce before the principal, or, in case of his absence or inability to act, before one or other of the professors in the Faculty of Divinity of the university in which he has been examined, an abstract or certified copy of the minutes of his election, together with the said certificate by the examiners, and shall in the presence of the principal or professor emit and subscribe a declaration in the following terms; that is to say,

"I, A. B., do solemnly and sincerely, in the presence of God, profess, testify, and declare, that as schoolmaster of the parochial school at in the parish of , and in the discharge of the said office, I will never endeavour, directly or indirectly, to teach or inculcate any opinions opposed to the divine authority of the Holy Scriptures, or to the doctrines contained in the Shorter Catechism agreed upon by the Assembly of Divines at Westminster, and approved by the General Assembly of the Church of Scotland, in the year one thousand six hundred and forty-eight; and that I will faithfully conform thereto in my teaching of the said school, and that I will not exercise the functions of the said office to the prejudice or subversion of the Church of Scotland as by law established, or the doctrines and privileges thereof."

And the person elected to be schoolmaster, having made such productions and declaration, shall be furnished with an attestation to that effect subscribed by the said principal or professor, which attestation shall complete his right to the emoluments provided by this Act.

. . . . . .

From and after the passing of this Act, it shall not be necessary for any person elected to be a schoolmaster of any burgh school to profess or subscribe the Confession of Faith, or the Formula of the Church of Scotland, or to profess that he will submit himself to the government and discipline thereof, nor shall any such schoolmaster be subject to the trial, judgment, or censure of the presbytery of the bounds for his sufficiency, qualifications, or deportment in his office, any statute to the contrary notwithstanding; and this enactment shall be a sufficient defence in answer to any proceedings against any schoolmaster of any burgh school in respect that he has not made such profession or subscription.

NOTE D.

THE CLAIM OF RIGHT OF 1842, AND PROTEST AND ACT OF SEPARATION OF 1843.

1. Claim, Declaration, and Protest by the General Assembly of the Church of Scotland of 1842, anent the Encroachments of the Court of Session.

[The Claim begins with an argument that an original and exclusive jurisdiction of the Church *quoad spiritualia*, "founded on God's Word, and set forth in the Confession of Faith and other standards of this Church," has been recognised and ratified, on the part of the State, by many statutes and on many occasions therein enumerated, especially at the Revolution and the Union; and, after a reference to the fundamental principle of non-intrusion, it then proceeds:—]

And whereas, by a judgment pronounced by the House of Lords, in 1839,[1] it was, for the first time, declared to be illegal to refuse to take on trial, and to reject the presentee of a patron (although a layman, and merely a candidate for admission to the office of the ministry), in consideration of this fundamental principle of the Church, and in respect of the dissent of the congregation; to the authority of which judgment, so far as disposing of civil interests, this Church implicitly bowed, by at once abandoning all claim to the *jus devolutum*,—to the benefice, for any pastor to be settled by her,—and to all other civil right or privilege which might otherwise have been competent to the Church or her courts; and anxiously desirous, at the same time, of avoiding collision with the civil courts, she so far suspended the operation of the above-mentioned Act of Assembly, as to direct all cases, in which dissents should be lodged by a majority of the congregation, to be reported to the General Assembly, in the hope that a way might be opened up to her for reconciling with the civil rights declared by the House of Lords, adherence to the above-mentioned fundamental principle, which she could not violate or abandon, by admitting to the holy office of the ministry a party not having, in her conscientious judgment, a legitimate call thereto, or by intruding a pastor on a reclaiming congregation contrary to their will; and farther, addressed herself to the Government and the Legislature for such an alteration of the law (as for the first time now interpreted), touching the temporalities belonging to the Church (which alone she held the decision of the House of Lords to be capable of affecting or regulating), as might prevent a separation between the cure of souls and the benefice thereto attached:

. . . . . .

And whereas, pending the efforts of the Church to accomplish the desired alteration of the law, the Court of Session,—a tribunal instituted by special Act of Parliament for the specific and limited purpose of

[1] Auchterarder case, 1839.

"doing and administration of justice in all *civil actions*" (1537, c. 36), with judges appointed simply "to sit and decide upon all *actions civil*" (1532, c. 1),—not confining themselves to the determination of "civil actions,"—to the withholding of civil consequences from sentences of the Church courts, which, in their judgment, were not warranted by the statutes recognising the jurisdiction of these courts,—to the enforcing of the provision of the Act 1592, c. 117, for retention of the fruits of the benefice in case of wrongful refusal to admit a presentee, or the giving of other civil redress for any civil injury held by them to have been wrongfully sustained in consequence thereof,—have, in numerous and repeated instances, stepped beyond the province allotted to them by the Constitution, and within which alone their decisions can be held to declare the law, or to have the force of law, deciding not only "actions civil," but "causes spiritual and ecclesiastical,"—and that, too, even where these had no connection with the exercise of the right of patronage,—and have invaded the jurisdiction, and encroached upon the spiritual privileges of the courts of this Church, in violation of the Constitution of the country —in defiance of the statutes above mentioned, and in contempt of the laws of this kingdom: as for instance—

By interdicting presbyteries of the Church from admitting to a pastoral charge,[1] when about to be done irrespective of the civil benefice attached thereto, or even where there was no benefice—no right of patronage—no stipend—no manse or glebe, and no place of worship, or any patrimonial right, connected therewith.[2]

By issuing a decree,[3] requiring and ordaining a Church court to take on trial and admit to the office of the holy ministry, in a particular charge, a probationer or unordained candidate for the ministry, and to intrude him also on the congregation, contrary to the will of the people;—both in this, and in the cases first mentioned, invading the Church's exclusive jurisdiction in the admission of ministers, the preaching of the Word, and administration of sacraments — recognised by statute to have been "given by God" directly to the Church, and to be beyond the limits of the secular jurisdiction.

By prohibiting the communicants[4] of the Church from intimating their dissent from a call proposed to be given to a candidate for the ministry to become their pastor.

By granting interdict against the establishment of additional ministers to meet the wants of an increasing population,[5] as uninterruptedly practised from the Reformation to this day: against constituting a new kirk-session in a parish, to exercise discipline; and against innovating on its existing state, "as regards pastoral superintendence, its kirk-session, and jurisdiction and discipline thereto belonging."

By interdicting the preaching of the Gospel, and administration of ordinances,[6] throughout a whole district, by any minister of the Church

[1] First Lethendy case.
[2] Stewarton case.
[3] Marnoch case.
[4] Daviot case.
[5] Stewarton case.
[6] Strathbogie cases.

under authority of the Church courts; thus assuming to themselves the regulation of the "preaching of the Word" and "administration of the sacraments," and at the same time invading the privilege, common to all the subjects of the realm, of having freedom to worship God according to their consciences, and under the guidance of the ministers of the communion to which they belong.

By holding the members of inferior Church judicatories liable in damages [1] for refusing to break their ordination vows and oaths (sworn by them, in compliance with the requirements of the statutes of the realm, and, in particular, of the Act of Security embodied in the Treaty of Union), by disobeying and setting at defiance the sentences, in matters spiritual and ecclesiastical, of their superior Church judicatories, to which, by the constitution of the Church and country, they are, in such matters, subordinate and subject, and which, by their said vows and oaths, they stand pledged to obey.

By interdicting the execution of the sentence of a Church judicatory, prohibiting a minister from preaching or administering ordinances within a particular parish,[2] pending the discussion of a cause in the Church courts as to the validity of his settlement therein.

By interdicting the General Assembly and inferior Church judicatories from inflicting Church censures; as in one case, where interdict was granted against the pronouncing of sentence of deposition upon a minister found guilty of theft, by a judgment acquiesced in by himself;[3] in another, where a presbytery was interdicted from proceeding in the trial of a minister accused of fraud and swindling;[4] and in a third, where a presbytery was interdicted from proceeding with a libel against a licentiate for drunkenness, obscenity, and profane swearing.[5]

By suspending Church censures,[6] inflicted by the Church judicatories in the exercise of discipline (which, by special statute, all "judges and officers of justice" are ordered "to give due assistance" for making "to be obeyed, or otherwise effectual"), and so reponing ministers suspended from their office, to the power of preaching and administering ordinances; thus assuming to themselves the "power of the keys."

By interdicting the execution of a sentence of deposition from the office of the holy ministry, pronounced by the General Assembly of the Church;[7] thereby also usurping the "power of the keys," and supporting deposed ministers in the exercise of ministerial functions; which is declared by special statute to be a "high contempt of the authority of the Church, and of the laws of the kingdom establishing the same."

By assuming to judge of the right of individuals elected members of the General Assembly to sit therein,[8] and interdicting them from taking their seats; thus interfering with the constitution of the supreme court

[1] Second Auchterarder case.
[2] Culsalmond case.
[3] Cambusnethan case.
[4] Stranraer case.
[5] Fourth Lethendy case.
[6] First and second Strathbogie cases.
[7] Third Strathbogie case.
[8] Fifth Strathbogie case.

of the Church, and violating her freedom in the holding of General Assemblies, secured to her by statute.

By, in the greater number of instances above referred to, requiring the inferior judicatories of the Church to disobey the sentences, in matters spiritual and ecclesiastical, of the superior judicatories, to which, by the constitution in Church and State, they are subordinate and subject, and which, in compliance with the provisions of the statutes of the realm, their members have solemnly sworn to obey;—thus subverting "the government of the Church by kirk-sessions, presbyteries, provincial synods, and general assemblies," settled by statute and the Treaty of Union, as "the only government of the Church within the kingdom of Scotland."

By all which acts, the said Court of Session, apparently not adverting to the oath taken by the sovereign, from which they hold their commissions, have exercised powers not conferred upon them by the Constitution, but by it excluded from the province of any secular tribunal,—have invaded the jurisdiction of the courts of the Church,—have subverted its government,—have illegally attempted to coerce Church courts in the exercise of their purely spiritual functions,—have usurped the "power of the keys,"—have wrongfully acclaimed, as the subjects of their civil jurisdiction, to be regulated by their decrees, ordination of laymen to the office of the holy ministry, admission to the cure of souls, Church censures, the preaching of the Word, and the administration of the sacraments,—and have employed the means intrusted to them for enforcing submission to their lawful authority, in compelling submission to that which they have usurped,—in opposition to the doctrines of God's Word set forth in the Confession of Faith, as ratified by statute,—in violation of the Constitution,—in breach of the Treaty of Union, and in disregard of divers express enactments of the Legislature:

And whereas farther encroachments are threatened on the government and discipline of the Church as by law established,[1] in actions now depending before the said court, in which it is sought to have sentences of deposition from the office of the holy ministry reduced and set aside,[2] and minorities of inferior judicatories authorised to take on trial and admit to the office of the holy ministry, in disregard of, and in opposition to, the authority of the judicatories of which they are members, and of the superior judicatories to which they are subordinate and subject:

And whereas the government and discipline of Christ's Church cannot be carried on according to His laws and the constitution of His Church, subject to the exercise, by any secular tribunal, of such powers as have been assumed by the said Court of Session:

And whereas this Church, highly valuing, as she has ever done, her connection, on the terms contained in the statutes herein-before 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

[1] Fourth Strathbogie case. [2] Third Auchterarder case. Third Lethendy case.

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:

Therefore, the General Assembly, while, as above set forth, they fully recognise the absolute jurisdiction of the civil courts in relation to all matters whatsoever of a civil nature, and especially in relation to all the temporalities conferred by the State upon the Church, and the civil consequences attached by law to the decisions, in matters spiritual, of the Church courts,—do, in name and on behalf of this Church, and of the nation and people of Scotland, and under the sanction of the several statutes, and the Treaty of Union herein-before recited, claim, as of right, that she shall freely possess and enjoy her liberties, government, discipline, rights, and privileges, according to law, especially for the defence of the spiritual liberties of her people, and that she shall be protected therein from the foresaid unconstitutional and illegal encroachments of the said Court of Session, and her people secured in their Christian and constitutional rights and liberties.

And they declare, that they cannot, in accordance with the Word of God, the authorised and ratified standards of this Church, and the dictates of their consciences, intrude ministers on reclaiming congregations, or carry on the government of Christ's Church, subject to the coercion attempted by the Court of Session as above set forth; and that, at the risk and hazard of suffering the loss of the secular benefits conferred by the State, and the public advantages of an establishment, they must, as by God's grace they will, refuse so to do: for, highly as they estimate these, they cannot put them in competition with the inalienable liberties of a Church of Christ, which, alike by their duty and allegiance to their Head and King, and by their ordination vows, they are bound to maintain, "notwithstanding of whatsoever trouble or persecution may arise."

And they protest, that all and whatsoever Acts of the Parliament of Great Britain, passed without the consent of this Church and nation, in alteration of or derogation to the aforesaid government, discipline, right, and privileges of this Church (which were not allowed to be treated of by the commissioners for settling the terms of the union between the two kingdoms, but were secured by antecedent stipulation, provided to be inserted, and inserted in the Treaty of Union, as an unalterable and fundamental condition thereof, and so reserved from the cognisance and power of the federal Legislature created by the said treaty), as also, all and whatsoever sentences of courts in contravention of the same government, discipline, right, and privileges, are, and shall be, in themselves void and null, and of no legal force or effect; and that, while they will accord full submission to all such acts and sentences, in so far—though in so far only — as these may regard civil rights and privi-

leges, whatever may be their opinion of the justice or legality of the same, their said submission shall not be deemed an acquiescence therein, but that it shall be free to the members of this Church, or their successors, at any time hereafter, when there shall be a prospect of obtaining justice, to claim the restitution of all such civil rights and privileges, and temporal benefits and endowments, as for the present they may be compelled to yield up, in order to preserve to their office-bearers the free exercise of their spiritual government and discipline, and to their people the liberties, of which respectively it has been attempted, so contrary to law and justice, to deprive them.

And, finally, the General Assembly call the Christian people of this kingdom, and all the Churches of the Reformation throughout the world, who hold the great doctrine of the sole Headship of the Lord Jesus over His Church, to witness, that it is for their adherence to that doctrine, as set forth in their Confession of Faith, and ratified by the laws of this kingdom, and for the maintenance by them of the jurisdiction of the office-bearers, and the freedom and privileges of the members of the Church from that doctrine flowing, that this Church is subjected to hardship, and that the rights so sacredly pledged and secured to her are put in peril; and they especially invite all the office-bearers and members of this Church, who are willing to suffer for their allegiance to their adorable King and Head, to stand by the Church, and by each other, in defence of the doctrine aforesaid, and of the liberties and privileges, whether of office-bearers or people, which rest upon it; and to unite in supplication 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, in former days, by statutes and solemn treaty, and the obligations, come under to God himself, to preserve and maintain the government and discipline of this Church in accordance with His Word; or otherwise, that He would give strength to this 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 also 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; and that, in His own good time, He would restore to them these benefits, the fruits of the struggles and sufferings of their fathers in times past in the same cause; and, thereafter, give them grace to employ them more effectually than hitherto they have done for the manifestation of His glory.

2. Protest by Commissioners to the General Assembly appointed to meet on 18th May 1843.

At Edinburgh, and within a large hall at Canonmills, the 18th day of May 1843 years. Sess. 1.

The Commissioners to the General Assembly of the Church of Scot-

land, appointed to have been holden this day, having met in St Andrew's Church, the ministers and elders, commissioners thereto, whose names are appended to the protest then and there made, and hereinafter inserted, having withdrawn from that place, and having convened in a large hall at Canonmills, in presence of a great concourse of ministers, elders, and people, and having duly constituted themselves in the name of the Head of the Church, and appointed the Rev. Dr Chalmers to be their moderator, the protest above mentioned was produced and read, and thereafter ordered to be recorded as follows:—

We, the undersigned ministers and elders, chosen as commissioners to the General Assembly of the Church of Scotland, indicted to meet this day, but precluded from holding the said Assembly by reason of the circumstances hereinafter set forth, in consequence of which a free Assembly of the Church of Scotland, in accordance with the laws and constitution of the said Church, cannot at this time be holden—

Considering that the Legislature, by their rejection of the Claim of Right adopted by the last General Assembly of the said Church, and their refusal to give redress and protection against the jurisdiction assumed, and the coercion of late repeatedly attempted to be exercised over the courts of the Church in matters spiritual by the civil courts, have recognised and fixed the conditions of the Church Establishment, as henceforward to subsist in Scotland, to be such as these have been pronounced and declared by the said civil courts in their several recent decisions, in regard to matters spiritual and ecclesiastical, whereby it has been held *inter alia*,—

First, That the courts of the Church by law established, and members thereof, are liable to be coerced by the civil courts in the exercise of their spiritual functions; and in particular in the admission to the office of the holy ministry, and the constitution of the pastoral relation, and that they are subject to be compelled to intrude ministers on reclaiming congregations in opposition to the fundamental principles of the Church, and their views of the Word of God, and to the liberties of Christ's people.

Second, That the said civil courts have power to interfere with and interdict the preaching of the Gospel and administration of ordinances as authorised and enjoined by the Church courts of the Establishment.

Third, That the said civil courts have power to suspend spiritual censures pronounced by the Church courts of the Establishment against ministers and probationers of the Church, and to interdict their execution as to spiritual effects, functions, and privileges.

Fourth, That the said civil courts have power to reduce and set aside the sentences of the Church courts of the Establishment deposing ministers from the office of the holy ministry, and depriving probationers of their licence to preach the Gospel, with reference to the spiritual status, functions, and privileges of such ministers and probationers—restoring them to the spiritual office and status of which the Church courts had deprived them.

Fifth, That the said civil courts have power to determine on the right to sit as members of the supreme and other judicatories of the Church by law established, and to issue interdicts against sitting and voting therein, irrespective of the judgment and determination of the said judicatories.

Sixth, That the said civil courts have power to supersede the majority of a Church court of the Establishment, in regard to the exercise of its spiritual functions as a Church court, and to authorise the minority to exercise the said functions, in opposition to the court itself, and to the superior judicatories of the Establishment.

Seventh, That the said civil courts have power to stay processes of discipline pending before courts of the Church by law established, and to interdict such courts from proceeding therein.

Eighth, That no pastor of a congregation can be admitted into the Church courts of the Establishment, and allowed to rule, as well as to teach, agreeably to the institution of the office by the Head of the Church, nor to sit in any of the judicatories of the Church, inferior or supreme—and that no additional provision can be made for the exercise of spiritual discipline among the members of the Church, though not affecting any patrimonial interests, and no alteration introduced in the state of pastoral superintendence and spiritual discipline in any parish, without the sanction of a civil court.

All which jurisdiction and power on the part of the said civil courts severally above specified, whatever proceeding may have given occasion to its exercise, is, in our opinion, in itself inconsistent with Christian liberty, and with the authority which the Head of the Church hath conferred on the Church alone.

And farther considering, that a General Assembly, composed, in accordance with the laws and fundamental principles of the Church, in part of commissioners themselves admitted without the sanction of the civil court, or chosen by presbyteries composed in part of members not having that sanction, cannot be constituted as an Assembly of the Establishment without disregarding the law and the legal conditions of the same as now fixed and declared;

And farther considering, that such commissioners as aforesaid would, as members of an Assembly of the Establishment, be liable to be interdicted from exercising their functions, and to be subjected to civil coercion at the instance of any individual having interest who might apply to the civil courts for that purpose;

And considering farther, that civil coercion has already been in divers instances applied for and used, whereby certain commissioners returned to the Assembly this day appointed to have been holden, have been interdicted from claiming their seats, and from sitting and voting therein; and certain presbyteries have been, by interdicts directed against their members, prevented from freely choosing commissioners to the said Assembly, whereby the freedom of such Assembly, and the liberty of election thereto, has been forcibly obstructed and taken away;

And farther considering, that, in these 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;

And considering that, while heretofore, as members of Church judicatories ratified by law and recognised by the Constitution of the kingdom, we held ourselves entitled and bound to exercise and maintain the jurisdiction vested in these judicatories with the sanction of the Constitution, notwithstanding the decrees as to matters spiritual and ecclesiastical of the civil courts, because we could not see that the State had required submission thereto as a condition of the Establishment, but, on the contrary, were satisfied that the State, by the Acts of the Parliament of Scotland, for ever and unalterably secured to this nation by the Treaty of Union, had repudiated any power in the civil courts to pronounce such decrees, we are now constrained to acknowledge it to be the mind and will of the State, as recently declared, that such submission should and does form a condition of the Establishment, and of the possession of the benefits thereof; and that as we cannot, without committing what we believe to be sin—in opposition to God's law—in disregard of the honour and authority of Christ's crown, and in violation of our own solemn vows,—comply with this condition, we cannot in conscience continue connected with it, and retain the benefits of an Establishment to which such condition is attached.

We, therefore, the ministers and elders foresaid, on this the first occasion, since the rejection by the Legislature of the Church's Claim of Right, when the commissioners chosen from throughout the bounds of the Church to the General Assembly appointed to have been this day holden are convened together, do protest, that the conditions foresaid, while we deem them contrary to and subversive of the settlement of church government effected at the Revolution, and solemnly guaranteed by the Act of Security and Treaty of Union, are also at variance with God's Word, in opposition to the doctrines and fundamental principles of the Church of Scotland, inconsistent with the freedom essential to the right constitution of a Church of Christ, and incompatible with the government which He, as the Head of His Church, hath therein appointed distinct from the civil magistrate.

And we farther protest, that any Assembly constituted in submission to the conditions now declared to be law, and under the civil coercion which has been brought to bear on the election of commissioners to the Assembly this day appointed to have been holden, and on the commissioners chosen thereto, is not, and shall not be deemed, a lawful and free Assembly of the Church of Scotland, according to the original and fundamental principles thereof; and that the Claim, Declaration, and Protest of the General Assembly which convened at Edinburgh in May 1842, as the act of a free and lawful Assembly of said Church, shall be holden as

setting forth the true constitution of the said Church; and that the said Claim, along with the laws of the Church now subsisting, shall in nowise be affected by whatsoever acts and proceedings of any Assembly constituted under the conditions now declared to be the law, and in submission to the coercion now imposed on the Establishment.

And, 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; and thereupon adopting such measures as may be competent to us, in humble dependence on God's grace and the aid of the Holy Spirit, for the advancement of His glory, the extension of the Gospel of our Lord and Saviour, and the administration of the affairs of Christ's house, according to His Holy Word; and we do now, for the purpose foresaid, withdraw accordingly, humbly and solemnly acknowledging the hand of the Lord in the things which have come upon us, because of our manifold sins, and the sins of this Church and nation; but, at the same time, with an assured conviction, that we are not responsible for any consequences that may follow from this our enforced separation from an Establishment which we loved and prized—through interference with conscience, the dishonour done to Christ's crown, and the rejection of His sole and supreme authority as King in His Church.

3. Act of Separation and Deed of Demission by Ministers (registered in the Books of Council and Session, of date 8th June 1843).

The ministers and elders subscribing the Protest made on Thursday the 18th of this instant May, at the meeting of the commissioners chosen to the General Assembly appointed to have been that day holden, against the freedom and lawfulness of any Assembly which might then be constituted, and against the subversion recently effected in the constitution of the Church of Scotland, together with the ministers and elders adhering to the said Protest, in this their General Assembly convened, did, in prosecution of the said Protest, and of the Claim of Right adopted by the

General Assembly which met at Edinburgh in May 1842 years, and on the grounds therein set forth, and hereby do, for themselves, and all who adhere to them, separate from, and abandon the present subsisting ecclesiastical Establishment in Scotland, and did, and hereby do, abdicate and renounce the status and privileges derived to them, or any of them, as parochial ministers or elders, from the said Establishment, through its connection with the State, and all rights and emoluments pertaining to them, or any of them, by virtue thereof: Declaring, that they hereby in no degree abandon or impair the rights belonging to them as ministers of Christ's Gospel, and pastors and elders of particular congregations, to perform freely and fully the functions of their offices towards their respective congregations, or such portions thereof as may adhere to them; and 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; and that henceforth they are not, and shall not be, subject in any respect to the ecclesiastical judicatories established in Scotland by law; reserving always the rights and benefits accruing to them, or any of them, under the provisions of the statutes respecting the Ministers' Widows' Fund: And farther declaring, that this present Act shall noways be held as a renunciation on the part of such of the ministers foresaid as are ministers of churches built by private contribution, and not provided or endowed by the State, of any rights which may be found to belong to them, or their congregations, in regard to the same, by virtue of the intentions and destination of the contributors to the erection of the said churches, or otherwise according to law; all which are fully reserved to the ministers foresaid and their congregations: And farther, the said ministers and elders, in this their General Assembly convened, while they refuse to acknowledge the supreme ecclesiastical judicatory established by law in Scotland, and now holding its sittings in Edinburgh, to be a free Assembly of the Church of Scotland, or a lawful Assembly of the said Church, according to the true and original constitution thereof, and disclaim its authority as to matters spiritual, yet in respect of the recognition given to it by the State, and the powers, in consequence of such recognition, belonging to it, with reference to the temporalities of the Establishment, and the rights derived thereto from the State, hereby appoint a duplicate of this Act to be subscribed by their moderator, and also by the several ministers, members of this Assembly, now present in Edinburgh, for their individual interests, to be transmitted to the clerk of the said ecclesiastical judicatory by law established, for the purpose of certiorating them that the benefices held by such of the said ministers, or others adhering to this Assembly, as were incumbents of benefices, are now vacant; and the said parties consent that the said benefices shall be dealt with as such. And they authorise the Rev. Thomas Pitcairn, and the Rev. Patrick Clason, conjunct clerks to this their General Assembly, to subscribe the joinings of the several sheets hereof, and they consent to the registration hereof in the books of Council and Session, or others competent,

therein to remain for preservation; and for that purpose constitute their procurators, &c. In testimony whereof, these presents, written upon stamped paper by William Petrie Couper, clerk to James Crawford, junior, Writer to the Signet, are, with a duplicate thereof, subscribed by the whole parties in general meeting assembled.

NOTE E.

THE HOUSE OF LORDS' OPINIONS IN THE AUCHTERARDER CASES.

The first Auchterarder case was an action by Lord Kinnoull, the patron of the parish of Auchterarder, and his presentee, to have it declared that the presbytery were bound to take the latter on trials, with a view to admit him minister of the parish, notwithstanding that he had been *vetoed* by a majority of the congregation in terms of the Act of Assembly 1834. Judgment was pronounced by the House of Lords on 2d May 1839.

Lord Brougham said:—

"My lords, in rising to state the opinion which I have formed upon this case, I own that I approach the question with very considerable anxiety,—an anxiety occasioned by its vast importance, increased by my knowledge of the deep and universal interest which it excites all over the kingdom of Scotland, and consummated by the very considerable difference of opinion which has prevailed among the learned judges who have decided it in the court below—a decision pronounced by very little more than a bare majority of the Court, preceded by very elaborate argument at the Bar, accompanied with very elaborate argument from the Bench, and dissented from by no less than five of those learned persons who are among the most distinguished of the Scottish judges. . . .

"I will now proceed to state the reasons upon which I have come to a conclusion in favour of the judgment under appeal. They are short and satisfactory to my mind. They consist in a reference to the statute law of the country, and they leave upon my mind no doubt whatever,—unless we are to allow niceties drawn from antiquarian lore, subtleties gathered from disputed points of church history, refinements borrowed from the controversies among theologians of past ages, and metaphysical distinctions and arguments *ab inconvenienti*, and misconceived notions with respect to the bounds and limits of jurisdictions, to prevent the plain intendment of statute law,—that intendment which is to be gathered from the words of the Legislature, which is confirmed by the reason of the thing, which is established above all by the manifest purpose of the enactment, as declared by the lawgivers themselves, and

which is ultimately clenched as it were, and made fixed and sure, by comparison with other branches, other principles, and other provisions of the law itself. . . .

"If the General Assembly have a power to impose the will of this kind of majority upon the whole parish, have they not equally the power to make a totally different arrangement altogether? Can any one earthly reason be propounded which justifies the present criterion adopted by the Assembly, the majority of heads of families in communion with the Church, which would not just as well, and for the exactly same reasons, and precisely on the same grounds, have justified a totally different scheme of induction altogether? Suppose it had been enacted thus—provided that he shall be acceptable to the majority of the synod; that is a very important body: Or, provided he shall be acceptable to and chosen by, or not rejected by a commissioner whom the Assembly shall appoint for that purpose to superintend, as they have done in former times.—Because I read to your lordships out of the Book of Discipline, and I read to you out of an Act, that at one time the superintendence and control was given to commissioners appointed by the Kirk to regulate the presentment and induction of ministers. They might have done that. Or I will tell you what they might have done, and for aught I know it is the next thing they will do, if you allow them to do what is now attempted. They might have said—provided he be agreeable to the presbytery of the bounds; who could object to that? Is it impossible they should do that? My lords, it is so far from being impossible, that they have done it already. There was an Act in 1576 made by the General Assembly, by which it was provided, that none seek preferment without the advice of the presbytery—that was for a season the law of the Kirk: the Assembly may now revive it, and the Legislature may make that law, now, which out of the Kirk courts was the law before; but has the General Assembly any right to do so? Has the Church judicature and the General Assembly, which by the common law of the land, and by statutory enactment, is limited to ecclesiastical concerns, a right to do that? For the statutory enactment of the year 1592 is revived in all particulars by the Act of 1690, cap. 5, except as to patronage, and that is disposed of by the subsequent Act of 1690, cap. 23, which is repealed by the 10th of Queen Anne; but the other is not repealed: the Act of 1592 is to all intents and purposes revived; and among other intents and purposes to that of defining, chalking out, and limiting the bounds and the functions of the ecclesiastical jurisdiction. By all these rules, by the common law, by the Parliamentary Constitution of the country, by statutory enactment, by the Act of 1592, by the Act of 1711, it is the province of the General Assembly, and the inferior Church courts, to take cognisance of Church matters, and to make regulations touching ecclesiastical concerns, and ecclesiastical concerns alone, and they are excluded, they are barred and shut out from any cognisance of civil patrimonial rights; and not only of civil patrimonial rights directly, but of those things which indirectly affect civil patrimonial

rights. They cannot do *per nefas* what they cannot do *per fas:* they cannot do indirectly what they cannot do directly. They have a right to make rules as to qualification, and they have a right to make rules as to who shall judge, and how they shall judge, upon qualification; because qualification is admitted, upon all hands, to be a matter of ecclesiastical cognisance. But they have no right to make a rule as to who shall be chosen, and how he shall be chosen, when the patron presents him: they have no right to transfer from the patron, either the whole, or the half—and in this case they have transferred by far the larger half—of the choice and selection of the presentee."

In a subsequent part of the speech his Lordship made the remarks already quoted on page 139, as to the outrageous supposition that the presbytery might refuse to obey the judgment even of the highest civil court.

The Lord Chancellor, Lord Cottenham, in the course of his judgment, remarked:—

"If such be the construction of the statutes, of what purpose can it be to consider the supposed legislative power of the General Assembly? For it cannot be contended, that there can exist in the General Assembly any legislative power to repeal, control, or interfere with enactments of the Legislature—so that even if the subject-matter were found to be within the general legislative power of the General Assembly, it would be powerless as to such subject-matter, so far as it is regulated by statute. It would, therefore, be beyond the powers of the General Assembly to interfere with the right of the patron, as secured by statute, by adding to the powers of the presbytery.

"But this legislative power claimed for the General Assembly is confined to ecclesiastical matters; and it is insisted that the matter to which the Act of 1834 applies is ecclesiastical. Now, although it is clear that if it were so the legislative power of the General Assembly would be controlled by the statute, it is worth considering, whether the matter in question can be considered as ecclesiastical. It is clear that there is nothing ecclesiastical in the right of presentation—that is a purely civil right. The adjudication upon the qualification of the presentee may be a matter ecclesiastical; but it is the right of presentation, and not the power of adjudication, which is affected by the Act of 1834. . . .

"Another ground upon which the Act of 1834 has been justified, and which is recited in it as the foundation of it, is, that it is a fundamental law of the Church of Scotland, that no person shall be intruded in any congregation contrary to the will of the people; and that the Act is only an arrangement to carry that principle into effect. Whether that is, or ever was, a law of the Church of Scotland is perfectly immaterial, if the statutes contain enactments and confer rights *inconsistent* with any such principle, or with the execution of any such law. The absolute right of patronage, subject only to the rejection of the presentee by the adjudication of the presbytery for want of qualification, which is secured by the statute, is inconsistent with the exercise of any volition by the inha-

bitants, however expressed. The Second Book of Discipline, cap. 12, p. 9, says 'that the liberty of election, so that none be intruded upon any congregation by the prince, or any inferior person, without the assent of the people, cannot stand with patronage and presentation.' Therefore, the Reformers of those days sought to destroy patronage; but the Legislature rejected the proposition, and confirmed the law of patronage. . . . .

"The next subject for consideration is the remedy for this wrong; and before I apply myself to the consideration of the objections which have been made to the proceedings of the Court of Session for this purpose, I must make some observations upon an argument of a more general nature, urged on behalf of the defender, which, if well founded, would in effect give to the General Assembly a legislative power uncontrollable even by Parliament; and would exhibit a case, I will not say of wrong, as that would be a contradiction in terms, but of a serious deprivation of valuable civil private rights, without the possibility of redress.

"It is argued that, although the right of presentation belongs to the patron, yet that everything connected with the admission of the minister after the presentation is, by law, subject to the jurisdiction and direction of the Church: that the General Assembly has legislative power to make what regulation it thinks fit upon that subject; and that no complaint can be made of anything done by the presbytery, relative to the admission of ministers, but to the superior ecclesiastical courts—that is, ultimately, to the Assembly. The result would necessarily be, that the Assembly, in its legislative capacity, might make laws destructive of the right of patronage; and, having sole jurisdiction over the execution of its own laws by the inferior jurisdictions, no means would exist of questioning the legality of its enactments. This is but a mode of describing pure despotism. If any such power had existed in the Church, the struggle against patronage, continued through so many years, could not have been unsuccessful. Whatever Parliament might have enacted, the General Assembly had only to enact laws of its own inconsistent with the enactments of Parliament, and itself to have enforced the execution of them. It could not have failed to effectuate what it attempted in 1596 and 1638 by accepting the presentation, but enacting that the presbytery should not proceed to admit the presentee unless he had previously received the consent of the presbytery. From a rejection by the presbytery upon this ground, there would, according to the argument, be no appeal or means of redress, but by application to the General Assembly, who, supporting the act of the presbytery in the execution of their own enactment, would at once transfer the right of patronage from the lay patron to the presbytery.

"However extravagant this proposition may appear to be, it is necessarily included in the argument for the defenders. If the presbytery may refuse, not to receive, but to act upon a presentation, because a majority of heads of families dissent, why may they not do so, because a majority do not assent at a meeting held for that purpose—which is election; or because a majority of the presbytery do not assent—which is, in

fact, the usurpation attempted in 1596 and 1638? In all these cases the violation and destruction of private civil rights would be effectual, because the only remedy, according to the argument, would be by application to the authors of the wrong. Nothing can be further from my wishes than to treat lightly the opinions which have been expressed by any of the very learned and able judges who dissented from the judgment of the Court of Session, but it is impossible to do justice to the case, without following out these opinions to what appear to me to be their inevitable results.

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

The House of Lords, accordingly, affirmed the judgment of the court below, that the presbytery, in refusing to take Mr Young on trials and rejecting him as presentee, "have acted to the hurt and prejudice of the said pursuers, illegally and in violation of their duty, and contrary to the provisions of certain statutes libelled on," and in particular of 2 Anne, c. 12.

The second Auchterarder case was an action of damages at the instance of the same patron and presentee of Auchterarder against the individual members composing the majority of the presbytery, concluding for £5000 in the case of the patron, and £10,000 in the case of the presentee, as damages and solatium.

Judgment was given in the House of Lords on the 11th July 1842, when the Lord Chancellor (Lord Lyndhurst) referred to the decision of the former case between the same parties in that House, in terms of which the Lord Ordinary had pronounced an interlocutor.

"That interlocutor became final; it was extracted on the 2d of July; it was served on the defenders, and at the same time Mr Young presented himself in order that they might make trial of his qualifications. The question was put to the vote; it was decided against accepting him upon trial by a majority, and by evasion (for I consider it a mere evasion) the matter was referred to the General Assembly. I consider, therefore, the facts established, that it was their duty to take him upon trial, and that they refused to do so. Those are two points I think which do not admit of dispute.

"Now, my lords, what is the rule of law as applicable to questions of this kind? When a person has an important public duty to perform, he is bound to perform that duty; and if he neglects or refuses so to do,

and an individual in consequence sustains injury, that lays the foundation for an action to recover damages, by way of compensation for the injury that he has so sustained. . . .

"Now, my lords, what is the argument of the appellants in this case? It is said that this was the decision of a court, the court of presbytery; that they were acting judicially; and that acting judicially, therefore, if they committed an error, no action can be maintained against them. My lords, I do not deny that principle as a general principle; and if they had admitted that gentleman upon trial, and after taking him upon trial, had come to the conclusion that he was not properly qualified, in that case it would have been a judicial decision, and might not have afforded a ground for supporting an action, although the party should have sustained damage in consequence of it.

"But, my lords, that does not apply to the present case. Here they had no discretion to exercise; they had to form no judgment; they were bound by the law to do the act; they could appeal to no tribunal. It was imperative upon them to accept the party upon his trial; it was their public duty. It bears no analogy, no resemblance to a judicial decision; and I apprehend that under such circumstances it is quite clear that this action can be supported."

Lord Brougham followed on the same point:—

"If the law casts any duty upon a person which he refuses, or fails to perform, he is answerable in damages—as my noble and learned friend has stated—to those whom his refusal or failure injures. If several are jointly bound to perform the duty, they are liable jointly and severally for the failure or refusal; and if it is a duty which the majority of the members are bound to perform, those who by their refusal prevent the greater number from concurring, are answerable to the party injured; that is, all those who constitute a majority, such majority committing the non-feasance, violate the duty imposed, disobey the law, occasion the injury, and are answerable for it.

"Nor are these propositions the less true generally, and as the rule, because there are exceptions, and a very few exceptions, introduced into the law and constitution of this, and indeed of every country, from the necessities of the case. Thus, the Legislature can of course do no wrong. But so its branches are placed beyond all control of the law. And the courts of justice—that is, the superior courts, courts of general jurisdiction—are not answerable either as bodies, or by their individual members, for acts done within the limits of their jurisdiction. Even inferior courts, provided the law has clothed them with judicial functions, are not answerable for errors in judgment; and where they may not act as judges, but only have a discretion confided to them, an erroneous exercise of that discretion—however plain the miscarriage may be, and however injurious its consequences—they shall not answer for. This follows from the very nature of the thing. It is implied in the nature of judicial authority, and in the nature of discretion, where there is no such judicial authority. But where the law neither confers judicial power nor any

discretion at all, but requires certain things to be done, every body—whatever be its name, and whatever other functions, of a judicial or of a discretionary nature, it may have—is bound to obey, and, with the exception of the Legislature and its branches, every body is liable for the consequences of disobedience; that is, its members are liable, through whose failure or contumacy the disobedience has arisen, and the consequent injury to the parties interested in the duty being performed. . . .

"Now, in the present case, that is alleged and proved which is tantamount to malice—illegal conduct in violation of duty, and injurious to the party; and the conduct is alleged to be continued refusal to do an act declared by a judgment to be imperative. 'The defenders have, from the 2d of July 1839, and do still, illegally refuse to make trial.'

"In Drew *v.* Coulton, in 1st East. 563, and indeed in Ashbey *v.* White, in 6th Modern Rep. 46, such averment seems to have been held sufficient allegation of malice. If the acts alleged to be illegal and in violation of duty had been alleged in terms to have been wilfully done, there can be no doubt that this would have come up to an averment of malice. But the word 'wilful' needs not to be used any more than the word 'malice.' The continued illegal refusal is clearly equivalent to wilfully doing an illegal act. . . .

"The court below in giving, and this House in affirming, the decree against the majority of the presbytery, do not incur in the present stage of this unhappy controversy, the charge so freely brought elsewhere of violating the conscience of the Church courts and their members. That topic has been abstained from since the answer was more than once, and in other kindred cases, given to it, respectfully suggesting, that if any individuals should find obedience to the law of the land repugnant to their conscientious scruples, they had, if not a remedy for the grievance, at least an escape from its pressure, placed within their reach, and open to them of their own free-will.

"But other appeals of a like nature have been made. It has been said, that to suppose the Legislature, which acknowledged the divine origin of the Church's powers, would ever intend to enforce their exercise by the sanction of temporal penalties, is to charge that Legislature with conduct as profane as it is absurd. Yet the compelling men, and bodies of men, to exercise faculties which they have received from Heaven, is one of the most ordinary acts of legislative, of executive, and of judicial power; not to mention that it is the act of ordination itself, and not the preparatory process of trial, which the Church claims to have received from above.

"But when these men seek to excuse themselves, to palliate, or rather to deny their contumacy, by asserting that they only desired to consult the General Assembly, their ecclesiastical superiors, they have fallen into a much more practical error—an error wearing a more sinister aspect, come of more base parentage, and fruitful of more dangerous offspring. 'We had,' say they, 'on the one hand, the opinion of the civil court; on the other, the positive injunctions of our ecclesiastical superiors, and all

we did was to refer to them for advice.' Advice on what point? In what difficulty—touching what nice and perplexed matter—involved in what entangled controversy was it, that they required such a resort for light and help? No less nice, and difficult, and perplexing a question, than whether they were to perform the duty in terms declared to be incumbent on them—declared by the supreme tribunals of their country—or to follow the advice of other persons who had set themselves in opposition to the tribunals, and had commanded or enjoined them to disobey their decrees. And to whom do they resort for advice in this emergency, for a solution of this difficulty? Not to any impartial and unbiassed adviser, whose counsels it would be safe to follow, but to the party whence had proceeded the unwholesome advice to disregard the law. It is fit that these men learn at length the lesson of obedience to the tribunals which have been appointed over them; a lesson which all others have long acquired, and which they, on learning it, should also practise. It is just that they should make reparation to those whom their breach of a plain duty has injured. The duty is not doubtful; the courts have laid it down. Their failure is not a mistaken opinion; their fault is not an error of judgment. They knew what they ought to have done, and they refused to do it. The penalty of their transgression is to make compensation to those whom they have injured by their pertinacious refusal to perform their duty, and yield obedience to the law."

Lord Cottenham agreed in the opinions delivered.

Lord Campbell, in the course of his speech, remarked:—

"Next, it is said, the summons is bad, as it contains no allegation of *malice*. Where the judge of an inferior court, acting within his jurisdiction, from corrupt motives, gives a wrong decision, malice is the foundation of any action against him, and malice must be alleged and proved. But this action is for a refusal to do a ministerial act, and the summons shows that the defenders have committed a wrong, which has worked damage to the pursuers. I must likewise observe, that malice, in the legal acceptation of the word, is not confined to personal spite against individuals, but consists in a conscious violation of the law, to the prejudice of another. The facts charged and admitted in this case, amount to a deliberate disobedience of the law of the land, the necessary consequence of which is a prejudice to the pursuers, and it is a well-established maxim, that every one must be taken to intend the necessary consequence of his deliberate acts.

"Then we are told, 'that the action cannot be maintained because there was no mandate in the original interlocutor of the Court of Session, affirmed by this House, or in the last interlocutor of the Lord Ordinary, from which there was no appeal, and that without a mandate the presbytery were at liberty to refer the matter to the General Assembly.' I conceive that the declaration, that 'the refusal of the presbytery to take the presentee on trials was illegal, and in violation of their duty; and that they were bound and astricted to take him on trial, and if found qualified, to admit him minister of the parish,' is equivalent to a mandate

to that effect. The duty being declared to do a specific act, the law commands that it shall be done. The reference to the General Assembly was, under these circumstances, a mere evasion, and tantamount to a direct refusal; it may be likened to the resolution of a vestry to adjourn for a year, when a motion has been made for a church rate, which has been clearly held to amount to a refusal to grant any rate. The reference to the General Assembly, the authors of the Veto Law, adjudged to be invalid, was a mere defiance of the courts which had pronounced that judgment.

"Perhaps I ought to notice the argument, 'That, at all events, this is a case of *injuria absque damno*, because the patron is indemnified by the vacant stipend; and the presentee, with respect to the temporalities of the living (which alone can be the subject of compensation), till in holy orders, has neither *jus in re*, nor *jus ad rem*.' But without at all considering the question, whether the patron, under the circumstances, is entitled to the vacant stipend, or the uses to which it is to be applied, this boon never could be given to him as a satisfaction for the wrongful act of the presbytery in violating his right of patronage, and cannot be considered the measure of the damage which he thereby sustains. As to the presentee, he is debarred from his status as minister of the parish of Auchterarder, to which, in the absence of all objection to him, we are bound to suppose he is entitled, together with the profits of the living.

"The doctrine has been hinted at by the counsel for the appellants, rather than explicitly announced, that the spiritual office of minister of a parish in Scotland may be entirely separated from the temporalities, and that the Church renouncing the temporalities may dispose of the spiritual office as they please. To this doctrine I, for one, beg leave to express my dissent. By the law of the land, in framing which the Church was a party, the temporalities are united to the spiritual office, and this office with the temporalities is to be enjoyed by the person duly qualified presented by the patron, the Church being the sole judges of his qualifications. There is a civil right to this office, which the civil courts will recognise and vindicate. A renunciation of the temporalities of the Church, with a view to retain spiritual jurisdiction, cannot be made by those who continue members of the Establishment.

"But the defence is explicitly and broadly put forth, that the defenders are bound by the Veto Law, and not by the decrees of the Court of Session, or of this House, because 'they have come under the most solemn obligations to conform themselves to the discipline of the Church, and the authority of its several judicatures.'

"My lords, it is impossible not to respect those who are actuated by the construction they conscientiously put upon an oath, however erroneous it may be. But, my lords, it is my duty to say, that all oaths of obedience to superiors are attended with the implied condition that their commands are lawful. From the time of St Thomas-à-Becket till now, there has been no such pretension in any part of this island, as that ecclesiastics, in the exercise of a *liberum arbitrium* inherent in them,

are, of their own authority, conclusively to define and declare their own power and jurisdiction, and that no civil tribunal can call in question the validity of the acts or proceedings of any ecclesiastical court. In the most palmy days of Popery in England, if 'the Courts Christian' exceeded their jurisdiction, as if they were seeking to enforce an unlawful canon, instead of appealing to the archbishop or to the Vatican at Rome, an application was made to the Courts of Westminster Hall for a prohibition, the prohibition was granted, and the law would easily have vindicated its dignity if the bishop had insisted on proceeding in the face of the prohibition. I am not aware that the Roman Catholic Church in Scotland claimed a higher exemption from civil authority than the Roman Catholic Church in England, or that the founders of the Reformed Presbyterian Church in Scotland claimed a higher exemption from civil authority than the Roman Catholic Church to which it succeeded."

These two were the only cases submitted to the judgment of the Court of Appeal throughout the Church controversy.

NOTE F.

List of Decisions by the Court of Session before May 1843, in reference to the Claims of the Church of Scotland, and of its General Assembly, or Inferior Courts.[1]

1. Held that a presbytery acted illegally and in violation of the 10th Act of 2d Anne, c. 12, in refusing to take a presentee on trials merely because he had been objected to, without cause assigned, by a majority of the male heads of families in communion with the Church, conformably to the Act of the Assembly called the Veto Act: and that the Court of Session had jurisdiction to pronounce to that effect.—Earl of Kinnoull *v.* Presbytery of Auchterarder, Feb. 27, 1838: 16 S. 661; 13 F. 527. Affirmed May 3, 1839: M'L. & Rob. 220; Dunlop, 305.

2. A preacher presented to a presbytery a writ under the sign-manual appointing him assistant and successor to the minister of the parish of which the Crown was patron, which was sustained; but he was rejected on the Veto Act, whereupon he raised an action of declarator to have it found that the presbytery was bound to take him on trials, and on being found qualified to admit him; and the minister having died, another preacher got a royal presentation to the parish: held (1) that the first presentee had a title to apply for an interdict against the presbytery

[1] From Digest of Cases decided in the Supreme Courts of Scotland. By Patrick Shaw, Esq., advocate.

taking the second on trials or inducting him, and against that presentee from presenting himself for induction; and (2) that the Court of Session had jurisdiction to grant such interdicts, and to punish the members of presbytery and the presentee for a violation of them.—Clark *v.* Stirling, June 14, 1839: 1 D. 955; 14 F. 1049; Dunlop, 330.

3. Interim interdict granted *ex parte*, on the application of the presentee to a parish whose presentation and acceptance had been sustained by the presbytery, and who had resolved to moderate in a call against certain heads of families, communicants, then appearing under the Veto Act, and tendering dissents without assigning special objections.—Mackintosh *v.* Rose (parish of Daviot), Dec. 17, 1839: 2 D. 253; 15 F. 240; Dunlop, 330.

4. The majority of a presbytery having resolved to obey the decree of the Court of Session ordering the presbytery to take on trial a presentee who had been rejected under the Veto Act, and if found qualified to admit him, and to act in opposition to the order of the Commission of the General Assembly prohibiting them from taking any such steps *in hoc statu*, the Commission thereon pronounced a sentence whereby they suspended for a time the majority from their offices, instructed the minority to supply ministerial services in the parishes of the majority, and granted warrant to all presbytery and session officers to intimate the deliverance to them, and appointed persons to preach in their parishes and intimate the sentence; interim interdict *ex parte* granted in the first instance against the service and intimation of the sentence, and against preaching in or intruding into the churches or churchyards, or schoolhouses, and from using church bells; and thereafter the interim interdict *ex parte* extended to the whole sentence; and on the expede letters the interdict declared in absence perpetual by the Lord Ordinary; and a similar interim interdict granted as to a similar sentence and order by the General Assembly.—Presbytery of Strathbogie, Dec. 20, 1839; Feb. 14, June 11, and July 11, 1840: 2 D. 258, 585, 1047, 1380; 15 F. 605, 1478; Dunlop, 64, 330.

5. A certificate in an application for the benefit of the poor's roll from the ministers and elders of a *quoad sacra* parish, erected under the Act of Assembly 1834, refused.—Bell, Dec. 10, 1840; 3 D. 204.

6. A presentee obtained decree in absence against a presbytery, declaring that they were bound to receive and admit him as minister of a parish, if on trial found duly qualified; and he was found qualified by the presbytery, the majority of which was suspended by the General Assembly for acting in violation of the Veto Law, but the effect of which suspension was interdicted by the Court of Session; and the majority having, from the position in which they were placed, delayed, and the minority refused to admit him, he raised an action against the presbytery and the individual members, concluding for decree ordaining them to receive and admit him; and the majority having admitted that they could not resist decree, the pursuer moved for decree against the presbytery and the consenting majority, which motion was opposed by the

minority on the ground that the granting of it would be prejudging their pleas in defence, which were, that the pursuer as a presentee had no title to maintain the action, that the Court had no jurisdiction to order a presbytery to admit and receive him as minister, and that the majority having been suspended by the Church courts, had no power to admit and receive him: held that the pursuer's motion was competent, and granted accordingly.—Edwards *v.* Cruickshank, Dec. 18, 1840: 3 D. 283; 16 F. 226.

7. After a decree finding that a presbytery were bound to take a presentee on trials, a memorial was presented by him and the patron to them, requesting them to make trial of his qualifications, and if they found him qualified, to admit him; but in place of doing so, a majority resolved to refer the memorial to the Commission of the General Assembly: held that an action of damages at the instance of the presentee and patron against the individual members constituting the majority of the presbytery in respect of such resolution was relevant, and that it was not necessary to aver malice.—Earl of Kinnoull *v.* Ferguson, March 5, 1841: 3 D. 778; 16 F. 841.

8. Question, Whether ministers of *quoad sacra* parishes are constituent members of the presbytery?—Livingstone, May 28, 1841: 16 F. 1017. July 20, 1841: 3 D. 1288; 16 F. 1017.

9. An ordained minister having received a presentation, the presbytery first adopted the procedure prescribed by the Veto Act; thereafter, although dissents were tendered by an apparent majority on the roll of communicants, the presbytery, by a majority, sustained the call, and admitted the presentee; and a petition and complaint having been presented to the Commission of the General Assembly by the minority, and by a number of parishioners, against the presentee and the majority, particularly on the ground that the presbytery had disregarded the Veto Act, the Commission cited the parties to appear, and in the mean time interdicted the presentee from officiating in the parish, and enjoined the members of presbytery, not complained of, to provide for worship; a note of suspension and interdict against this deliverance passed, and interim interdict granted.—Middleton *v.* Anderson, March 10, 1842: 4 D. 957; 14 Jurist, 347.

10. Question, Whether the Commission of the General Assembly is a judicature of the Church, established and recognised by the laws and constitution of the realm?—Middleton *v.* Anderson, March 10, 1842: 4 D. 957; 14 Jurist, 347.

11. A minister presented a note of suspension and interdict against the proceedings of a presbytery, on the ground that a minister of a *quoad sacra* parish took part in them: interim interdict was granted by the Lord Ordinary on the bills; and no answers having been lodged, the court, on consideration, passed the note, and continued the interdict.—Wilson *v.* Presbytery of Stranraer, May 27, 1842: 4 D. 1294; 14 Jurist, 414.

12. Interdict granted at the instance of the majority of a presbytery,

who had been deposed by the General Assembly, but had been reponed by the Court of Session, prohibiting the commissioners elected by the minority from sitting in the General Assembly.—Presbytery of Strathbogie, May 27, 1842: 4 D. 1298; 14 Jurist, 415.

13. Interim interdict granted against the proceedings of a presbytery, in which the minister of a parliamentary church was alleged to have taken part.—Smith *v.* Presbytery of Abertarff, July 2, 1842: 4 D. 1476; 14 Jurist, 556.

14. A presbytery, in terms of the Act of Assembly 1839, anent reunion with Seceders, admitted the minister of a congregation of the Associate Synod to be a minister of the Established Church, and added his name to the roll of presbytery, and thereafter took steps for allocating a parochial district to his church *quoad sacra;* interdict granted by the whole Court, at the instance of the patron and several heritors of the parish out of which the parochial district was proposed to be allocated, against the minister sitting and voting as a member of presbytery in matters connected with the parish; against all proceedings for dividing the parish; designing and erecting a new parish therein; placing the same under the pastoral superintendence of the person so admitted or any other person; constituting a new and separate kirk-session, having jurisdiction and discipline over the proposed new parish; and generally against innovating upon the existing parochial state of the parish as regarded pastoral superintendence, its kirk-session, and jurisdiction and discipline belonging thereto.—Cunninghame *v.* Presbytery of Irvine, Jan. 20, 1843: 5 D. 427; 15 Jurist, 213.

15. The judgment of a presbytery finding a libel against a clergyman for intoxication relevant, having been appealed to the General Assembly, but the appeal departed from before the Commission (to which the Assembly had remitted the case), and the Commission having thereupon remitted to the presbytery with instructions to proceed with the case, held that as the subsequent proceedings were within the competency of the presbytery, independent of authority from the General Assembly or its Commission, they were not affected by the circumstance that the Assembly and Commission were composed in part of *quoad sacra* ministers. —Campbell *v.* Presbytery of Kintyre, Feb. 21, 1843: 5 D. 657; 15 Jurist, 313.

16. The majority of a presbytery having refused to take a presentee upon trials, though the Court had found that it was not within their competency to refuse, held that an action at the instance of the patron and presentee, concluding to have it declared that the proceedings of the minority of the presbytery, who were willing to obey the law, should be valid and sufficient, and for interdict against the interference of the majority, was competent.—Earl of Kinnoull *v.* Ferguson, March 10, 1843: 5 D. 1010; 15 Jurist, 381.

17. Held, 1st, That the Court of Session had jurisdiction to entertain an action of reduction of a sentence of deposition by the General Assembly of certain parish ministers, which sentence was rested on the ground

(*inter alia*) of these ministers having applied to the Court for protection against censures of the Church courts, imposed on account of proceeding to induct a presentee, notwithstanding his rejection under the Veto Law; and also to entertain a conclusion of declarator that the sentence was beyond the power of the Assembly, and inoperative: 2d, That the moderator and first and second clerks of the General Assembly, as representing the Assembly of which they were the office-bearers and as individuals, and the procurator for the Church, were properly called as defenders.—Cruickshank *v.* Gordon, March 10, 1843: 5 D. 909; 15 Jurist, 378.

18. A presentee who had been vetoed obtained an interdict against the presbytery of the bounds and a new presentee, prohibiting them from proceeding to fill up the vacancy, and "from doing any act or deed prejudicial to the status, rights, and privileges conferred upon him." He was afterwards inducted by a majority of the presbytery; but the General Assembly having declared the settlement null, and appointed them to proceed according to the laws of the Church in settling the other presentee, he obtained another interdict to the same effect as the first. In the course of subsequent proceedings, other interdicts of the same description were obtained; but the minority of the presbytery, acting under the direction of a special Commission appointed by the General Assembly, admitted the new presentee "to the pastoral charge of the congregation in M——" (the vacant parish) adhering to the Church of Scotland, and worshipping in the church at A—— (where a place of worship had been erected), and added his name to the roll of the presbytery: held that this amounted to a breach of the interdicts.—Edwards *v.* Leith, March 11, 1843; 15 Jurist, 375.

CHAPTER IV.

THE PRACTICAL RELATIONS OF THE ESTABLISHED CHURCH TO ITS CREED.

In the previous chapters we have been occupied, and have been forced by the course of the history to occupy ourselves, with the constitutional or *external* relation of the Established Church to its creed. In this chapter we propose to notice some questions which may arise as to the Church's *internal* or administrative relation to it.

The practical relations of the Church to its creed may be considered as arising from, first, its legislative; secondly, its judicial, functions.

I. The Legislative Power of a Church as to Creed is either direct or indirect. It is either a power of dealing directly with articles of faith, in the way of framing or abolishing, enlarging or diminishing them—a *dogmatic power* proper; or it is a power of framing "constitutions"[1] and regulations as to the administration of the creed, without interfering with the Confession itself. Of these in their order.

The direct or dogmatic power has certainly always been claimed in the Church of Scotland as theoretically pertaining to a Church; but if the law, as now defined, leaves it any such power at all, it is within the very narrowest limits. The Westminster Confession is made the general creed of the Church,

[1] Act 1592, c. 116.

and the personal creed of the teachers of the Church, by the Revolution statutes, into one of which every sentence of it is incorporated; and the authority of statute over the Church, as explained by the House of Lords, is absolute. Were these statutes not in existence, then, on the general principles laid down in the judgments of 1843, a very nice question might arise. The question would then be, whether the creed was not so fundamental to the Church, so much a part of its constitution, that it would be *ultra vires* of the ecclesiastical body which stands on that constitution to alter it,—or perhaps, whether it might not be a civil injury to those who had entered the Church on the faith of it to do so. No one can study the cases in the conflict between the Court and the Assembly without seeing that very serious questions might conceivably arise, even if the creed of Scotland were unprotected by statute, and stood merely on ancient acceptance and immemorial use by the Church itself. But, in the mean time, the declaration by statute that it is[1] and shall be unalterably for ever[2] the public and avowed Confession of the Church of Scotland, makes the formal and direct abandonment of it, or any part of it, an impossibility. And the words equally negative any formal resolution to *ignore* either the whole Confession or any part of it.

If the power which Erskine ascribes to the Church of "*defining* or explaining articles of faith" refers to its legislative functions at all, and not wholly to its judicial, it can only be exercised within the limits of whatever creed the State has accepted or imposed;—in the present case, within the limits of the Westminster Confession. And with a Confession so large, elaborate, and minute as that of 1690, the range of freedom becomes very small indeed. But another question arises. The Church, it is acknowledged, cannot abolish or disavow its statutory creed, in whole or in part. But is it not free to add to it? It is to be "unalterably" the public

[1] 1690, c. 5. [2] 1707, c. 6.

Confession of the Church; but is it to be so exclusively? Can the Church not enlarge its Confession? In answer to this, it must be remembered, that though the Statute of 1690 does not expressly declare the Westminster Confession to be the Church's only standard, it does declare it to be its public and avowed Confession of Faith; and a Confession is as much changed by additions as it is by deductions. The mere utterance of a doctrinal manifesto by a General Assembly would not raise the difficulty. The difficulty would only emerge in the event of the Assembly desiring to bind its new manifesto permanently on the Church; a proceeding the administrative effects of which (if any effect were given to it) would be undistinguishable from those caused by a simple and formal addition to the chapters of Westminster. In the one case as well as the other the objection that such additions are an unconstitutional interference with the fundamental standard of the Church, would be sure to be raised. And the other objection, that by the proceeding proposed civil injuries were inflicted, would be more forcible in the case of addition to the creed than in that of subtraction from it. The *favor libertatis*, which is an attribute of law, would plead in this case very strongly. A man who could enter the Church under the statutory creed, might be repelled by any doctrinal utterance which the Church had added to it; and according to some of the cases decided, such an injury, especially if it lead in result to distinct loss of status or money, is a sufficient ground for the civil courts being set in motion in the matter at the instance of the party aggrieved. Besides, not only does the addition to a Church's creed shut out members from it, but it imperils the safety of those who are already inside. At present the Westminster Confession, as established by law, seems to be a protection against the accusation of heresy to all who do not contravene it. The erecting of another permanent Confession alongside of it or subsidiary to it would enlarge the area of opinions condemned

by authority and liable to censure. The more the matter is considered, it seems plain that the Church can no more add to the Confession of its faith than it can subtract from it.

There is an important distinction here between the dogmatic power which is exercised judicially, and a similar power attempted to be exercised legislatively. In one sense it is true that the Church courts *must* continually "define articles of faith," over and above those definitions which they have in the Confession. The Presbytery or Assembly must explain and apply the doctrine of the Confession in each particular case of heresy that comes before it, as a part of its ordinary judicial and administrative action. Every "judgment of relevancy" in a heresy case is a doctrinal application of the Confession, and therefore a doctrinal addition to it. It is a finding that such and such an utterance libelled is or is not inconsistent with the truth of God and with the Confession. But the attempt, by way of overture[1] or otherwise, to erect any of these momentary definitions into a permanent doctrinal rule of the Church, would appear to be equivalent to making a distinct addition to the standard. It would be a translating of the judicial function into a legislative one.[2]

[1] "The proposal of making a new general law, or of repealing an old one, in our ecclesiastical language, is called an overture."—Dr Hill's View of the Constitution of the Church, 66.

[2] A milder way of doing this was suggested by Dr Fleming in the well-known case of Mr Campbell of Row; viz., that the Assembly has power to pass a *declaratory* Act, stating how it understands such and such a doctrine of the Confession. It does not appear that this change of form makes any difference in principle. The fate of the resolution proposed by Lord Moncreiff in 1834 is a memorable instance of the futility of the attempt to do what is not permitted by law, even under the form of a mere declaratory enactment. If this be a mere expression of opinion by the Assembly, it does no harm, and may be of use at a particular time. But if authority is attempted to be given it, it becomes a rival of the statutory creed, or at the least an addition to it. Its proper force is only equivalent to that of a very solemn decision by the Assembly in a judicial matter. In the case of such a decision the act of the Supreme Court of the Church will be much pondered by all its members and judicatories; but it is a mere precedent, and has no proper dogmatic authority, either over succeeding Assemblies, or over Presbyteries. A declaratory enactment by the Assembly as to dogma seems to be in nearly the same position. It is the

And while, as we shall see, the judicial function of the Church is almost unfettered, its legislative powers on all subjects are in modern times very much limited; and its direct legislative power as to creed—its dogmatic power—is cut away on both sides, and rendered probably almost *nil*, by the circumstance that that creed has already been statutorily fixed and declared.

But besides this direct power, the Church has a power of dealing *indirectly* with creed, which may fitly be considered under this head of legislative function. It may be doubted, indeed, whether it is properly entitled to that name. It is a grave question whether the Church has any power higher than that of making mere Regulations for the better working of its fixed legal constitution, and the carrying on of its existing functions. But whether we call these acts legislative, or merely regulative, it is certain that they have had in time past, and they may perhaps have again, an important bearing on the matter of creed. Thus, for example, the obligation of elders of the Church to subscribe the Confession is not founded, like that which concerns ministers and probationers, on statute. It is, as we have seen already, founded on an Act or Acts of Assembly, and on the acquiescence and practice of the Church, and has remained on this footing for a century and a half. Again, the formula of subscription imposed upon ministers and preachers in 1711, and still in use, differs very appreciably from that appointed in the Statute of 1693. In the latter of these cases the excess of subscription, as in the former the existence of subscription, was due to the intrinsic power of the Church. Again, the whole working and administration of the creed, both for the instruction of the people and for the judicial expelling of heresy, is left in the hands of the Church; and it is obvious that, whatever regulations it

Act of an Assembly, not the law of the Church; and the attempt to strengthen it by passing it through the ordeal of the Barrier Act, as was also done in the case of the Veto, would be at least equally ineffectual.

chooses to establish for its own action in these regards (and some regulations it must have), may come to be practically of great importance. If we put the legislative power of the Church at its lowest, or even, with some lawyers, deny it altogether,[1] it is still obvious that it has powers which may be exercised to important issues about and around the matter of its fixed and unalterable creed. How far do these powers extend?

The first legal limitation of the Church's powers which occurs to every one, is that they are controlled by statute. We have seen how conclusive this is as to the direct relation of the Church to creed. But it has also a very important bearing now on its power of making other rules, laws, and regulations. It cannot be doubted that the decisions of this century have given the Act 1592, c. 116,[2] a new authority and importance. The functions which it assigns respectively to the General Assembly, to synodical and provincial assemblies, and to presbyteries and particular sessions, indicate a mixed and elaborate constitution, with much equipoise and compensation in it. And it is certain that this statutory constitution is now binding on the Church, and that acts done by any of these ecclesiastical bodies in infraction of it are *ultra vires*, and may be corrected by those supreme courts to which are intrusted both the construction and the enforcement of statute. And what is said of this important statute is true of all other enactments. The legislative power of the Church, in whatever region exerted, and among others in the administration of creed, is limited by statute.

But is statute the only legal limitation of the legislative power of the Church? Has the Assembly, with consent of the Church generally, power to innovate to any extent in all

[1] We have reserved to this place a collation of the opinions on the question of the legislative power of the Church given by the judges after the "legislation" of the Veto Act. See Note A at the end of the chapter.

[2] See it printed in Appendix to Chapter I., p. 51.

directions, provided only it does not impinge upon the provisions of positive statute? Without answering this rather difficult question, it may be remembered that the Church of Scotland is a body unquestionably possessed of continuity and corporate life of the highest kind, with a most important judicial and administrative jurisdiction guaranteed to it by law; and that it has a clear right to explicate that jurisdiction by making and remaking and altering all manner of by-laws and regulations. Yet, on the other hand, these alterations and innovations, it is equally clear, must not alter or impair its constitution. And it cannot be said that its constitution is wholly given it by statute. The Church was in existence, and had developed all its organs, and exercised all their powers, before statute came to sanction it; and these statutes confirm the constitution of the Church generally, while they specify some, and perhaps most, of its important features. Yet, if it shall turn out that any feature of that constitution, any fundamental element of the Church, has not been specified in the statutes, it would be premature to hold that it is on that account not binding, or that the Church has power to abrogate it. The great principle which the Court of Session and the House of Lords vindicated in the Auchterarder case, was not the supremacy of statute, but the supremacy of law. In that case, indeed, it so happened that the law to which effect was given was expressed in a statute of Queen Anne; and the express law thus enacted was held to overbalance the vaguer constitutional presumptions urged on the other side. But where there is no express statute, there may still conceivably be immemorial law; and Church legislation may be as truly incompetent when it violates the latter as when it attacks the former.

If the power of change competent to the Church is limited not only by statute but by its own ancient constitution, it is plain that many questions may arise having an interesting bearing on creed. From what other sources, besides statute,

is this ancient constitution to be gathered?—The long series of Acts of Assembly come to be important in answer to this question; for even those which have no binding authority in themselves may be valuable as evidence of immemorial Church law. But of still greater importance is the connection between the Church and the documents (other than its Confessions of Faith) which it has held as, in some sense, standards. The First Book of Discipline was contemporary with the Scottish Confession, and was received by the First General Assembly with more formality than they thought it necessary to treat even the doctrinal creed. The Second Book of Discipline has still higher claims, for it is usually described as the "Heads and Conclusions of the Policy of the Kirk; Agreed upon in the General Assembly 1578; Inserted in the Registers of Assembly 1581; Sworn to in the National Covenant; Revived and Ratified by the Assembly 1638, and by many other Acts of Assembly; *and according to which the Church government is established by law,* ann. 1592 and 1640." The "National Covenant," or negative Confession of Faith, received innumerable sanctions, ecclesiastical and civil, between the times when it was signed by James VI. in 1580 and by Charles II. in 1651; and even the Solemn League and Covenant, the civil sanctions of which were rescinded at the Restoration, was yet the historical source not only of our present creed, but of the Form of Presbyterial Church Government—the Directory for Church Government, Church Censures, and Ordination of Ministers—and the Directory for Public Worship,—documents of very great importance, and which have always had a certain authority within the Church. And while these have all a close bearing on the administration of doctrine, we have to add to them the various catechisms and documents of instruction which have been used by the authority of the Church from time to time, some of them well known to be of the greatest importance. We have dealt in this volume with Confessions of Faith; but the Shorter Catechism, one of

the two compiled by the Westminster Assembly, has been for many generations the real creed of Scotland, so far as the mass of the people is concerned. It has been that from which the youth have learned their religion, and in the words of which they have been taught to confess their religion. And when we come down from standards and catechisms to rules and procedure, we have a more recent but very important document in the "Form of Process in the Judicatories of the Church of Scotland," adopted by the Assembly of 1707, after it was transmitted to the presbyteries for their judgment.

These are the *leges legum* of the Church Statute-book.

The proposal to abolish any present practice, regulation, or "constitution" of the Church, will always raise in some minds a question of competency, even when there is no civil statute directly concerned. In such a case, the question whether the change is *ultra vires* would seem to depend on whether it affects the legal constitution of the Church; and whether any change affects that constitution, must turn very much on two points—the inherent magnitude of the change proposed, and the amount of authority (such as of the ecclesiastical documents above quoted) which must be set aside to carry out the innovation. Whether any of the above documents is of so great authority as to be itself the law of the Church, which the Church therefore cannot change, we do not propose to discuss. Even if this is not so, the sanction of one or more of them, combined with immemorial practice, would give a strength to any existing Church arrangement which it would be perilous to tamper with. Ancient and uninterrupted usage is of weight, even on the question of legality, in an institution so venerable as the Church of Scotland. The contrary effect of disuse for a long period must also be kept in view. Recent and virid observance may in some cases be equivalent to centuries of age in others.

The difficulty of this complicated question is enhanced when we remember how little aid we can derive from past

precedent on this matter. It would be very rash to stretch the present legislative powers of the Church so as to include all that the historical Church party (which disliked the name of legislation in the Church much more than it avoided the thing) chose to assert or to exercise. The records of the Church for three centuries show innumerable acts which nothing can justify but a feeling of Church independence, or at least an idea that the spiritual region and that with which the State had to do were distinct; and we are left to wonder, either that the union between Church and State could have continued so long, or, seeing that it did so continue, that the obvious and ancient question which recurred in 1834 was not by care and patriotism once more adjusted. But one result of this history is, that when the Church is now placed on a legal, if not a statutory basis, we are deprived of many of the precedents which its greatest men have struck out in its most critical times, and, in order to judge whether a proposal is *ultra vires*, have to look at the constitution of the Church apart from much of its history, and, in particular, apart from many of its legislative acts.

Leaving these abstract questions, there is an important practical regulation on this matter of innovations and legislative power. Before the so-called "Barrier Act" in 1697, two different enactments of the Assembly appear as to "Novations," and these, "revived" in 1695, appear never to have been revoked. The first (1639) guards against changes being "sudden" by ordering them to be discussed in presbyteries and synods before coming to the Assembly; while the second (1641) ordains, on the other hand, that they be not "brought in or practised in this Kirk, unless they be first propounded, examined, and allowed in the General Assembly." Upon these followed the Barrier Act, which, with its predecessors, we give in the appendix.[1] We may present a description of it

[1] Note B.

here from Dr Hill. "From the first establishment of Presbyterian government in 1560 till some years after the Revolution, such laws proceeded from the sole authority of the General Assembly. But an Act of the Church in the year 1697, which we are accustomed to call the Barrier Act, prescribes the following mode of enacting permanent and standing constitutions. The proposal of making a new general law, or of repealing an old one, which, in our ecclesiastical language, is termed an overture, originates with some individual, who generally lays it before his presbytery or synod, that if they approve it may be sent to the General Assembly as their overture. The General Assembly may dismiss the overture, if they judge it unnecessary or improper, or adopt it as it was sent, or introduce any alteration which the matter or the form seems to require. If it is not dismissed, it is transmitted by the General Assembly in its original or its amended form to the several presbyteries of the Church for their consideration, with an injunction to send up their opinion to the next General Assembly, who may pass it into a standing law, if the more general opinion of the Church agree thereunto; that is, if not less than forty presbyteries approve."

In this passage it will be observed that Dr Hill rather represents the power of the Church as originally vested in the General Assembly, which by the Barrier Act *proprio motu* limited its own energies; and which, of course, retains all power which it has not expressly given up—including, according to many Presbyterians, a certain *nobile officium* which extends very far. Another theory has, however, been always very prevalent in the Presbyterian Church; namely, that the presbyteries or local courts (perhaps presbyteries or congregations) are the native and proper seat of all Church power (the life of the National Church being thus diffused and ganglionic, rather than cerebral or centralised), and that the Assembly is a mere delegation from presbyteries, and possesses only such powers as they expressly give it. According to this

view, the Barrier Act is merely a measure conservative of the proper powers of the Church in general,—its defence against the unwarranted actions of a meeting which has only a borrowed authority, and which does not even exist except during the few days it is actually sitting. These extreme views, with the various intermediate modifications of them, have many interesting relations. Theologically, they seem to connect themselves with different theories of the Church of Christ; the one leaning rather to a congregational genesis of it, according to which the two or three gathered together in His name form the complete Church unit, the mere aggregation of which makes up larger bodies (a theory rather favoured by the Confession of Knox, composed at a time when no General Assembly had met, but when "particular Kirks" flourished); while the other, on which the Church is essentially one rather than manifold, is countenanced by the Confession of Westminster, which acknowledges a "universal Church visible," before it descends to particular Kirks which are members of it. Historically, the power of the Assembly was maintained by Principal Robertson, and resisted by the Evangelical party of the last century, especially by those afterwards driven into secession; though when this latter party, in earlier, and also in later times, obtained a majority in the Supreme Court, they never hesitated to use the central power as strongly as their opponents had done. These questions have still a comparatively open field to work themselves out in the non-established Presbyterian bodies (among whom the Free Church has a visible tendency to the despotic, and the United Presbyterian Church to the democratic theory); but the working of the Barrier Act in the Established Church must now be held as controlled by the provisions of statute generally, and especially of the Act 1592. It seems plain that while this Act (which was fortunately framed upon the general model of the Second Book of Discipline, the polity devised by the age that succeeded Knox) locates original Church power neither in the

presbyteries nor in the Assembly, but *in the Church*, it leaves the primary jurisdiction and administration rather in the hands of the local courts, whether these are supposed to be presbyteries or kirk-sessions. Yet these local courts are to carry out the "ordinances" and "rules" made by the superior Assemblies; and the whole forms a mixed and balanced constitution, the preservation of which, though now taken into the care of civil law, is in the first place the work of the Church itself. This internal equipoise adds another to the many delicate questions as to the regularity and validity of ecclesiastical Acts, which remain to be decided in the future.

A good illustration of legislation by the Church on a matter not exactly doctrinal, but connected with doctrine, is supplied by the Act of Assembly 1768, c. 4,[1] appointing the form of commissions from presbyteries and other bodies to the General Assembly. The form is that in use at the present day, and is of course important in its bearing on the functions of the supreme court of the Church. By it, the presbytery being met "in order to elect their representatives in the ensuing Assembly," nominate and appoint certain ministers and a ruling elder "their commissioners to the next General Assembly of this Church indicted to meet at the day of next to come, or where and when it shall happen to sit, willing them to repair thereto, and to attend all the diets of the same, and there to consult, vote, and determine in all matters that come before them, to the glory of God and the good of His Church, according to the Word of God, the Confession of Faith, and agreeable to the constitutions of this Church, as they will be answerable; and that they report their diligence therein at their return therefrom. And the said presbytery does hereby testify and declare that all the ministers above named have signed the Formula enjoined by the 10th Act of the Assembly 1711; and the ruling elders above written have signed the Formula prescribed by the 11th Act of the Assem-

[1] Re-enacted by Assembly 1783, Act 10.

bly 1694. And, further, that the said elders are of unblemished characters, circumspect in their walk, regular in giving attendance on the ordinances of divine institution, and behave in other respects agreeable to their office. All which the presbytery have hereby attested on proper information."

If during many generations the members of the General Assembly have only had commission to act there "according to the Word of God, the Confession of Faith, and agreeable to the constitutions of the Church," it seems clear that whatever the Church might do, its General Assembly has had no power, at least no delegated power, to change any of the standards and authorities thus referred to.[1] This is, at all events, a good illustration of those numerous existing regulations in the Established Church which are not prescribed by statute, but which may nevertheless conceivably form part of the legal constitution of the Church, and which, in that event, cannot safely be tampered with by any supposed legislative power of the ecclesiastical body.

II. The Judicial Power of the Church in regard to Creed.

But while the Church since 1843 appears to have no direct and little indirect power of dealing *legislatively* with doctrine, its exclusive right to deal with it *judicially* has been reaffirmed since the Disruption decisions with more emphasis

[1] Of less importance than the constitution of the Assembly is the constitution of the Commission of Assembly, which is a kind of committee of the whole House, and has power to meet at any time of the year to take order "ne quid detrimenti capiat ecclesia." The *Instructions* to the Commission have been the same for generations; and while these include powers to watch over the correct printing of the Scriptures, Confession of Faith, and Catechisms, the Commission is also enjoined—

"To inquire how the 10th Act of the General Assembly, anno 1711, concerning probationers and settling ministers, with questions to be proposed to, and engagements to be taken of them, are observed; and to advert that masters in colleges, and all schoolmasters, do subscribe and engage according to the Act of Parliament, anno 1707."

The Parliament's provisions of 1707 are abolished: the Assembly's ordinances of 1711 survive.

than even at the earliest date. The procedure of the Court in its conflict with the Church very seriously imperilled this principle; but the needed rehabilitation has been given by a series of decisions, the most important of which are Sturrock *v.* Greig,[1] and Lockhart *v.* the Presbytery of Deer.[2] The Court has of course not receded from its position, that the limits and conditions of this Church authority are derived from the State, and that it is to be construed only by the civil courts, which have also both right and power to enforce their own construction upon the Church; but within the limits thus fixed, the jurisdiction in matters spiritual, "granted" no doubt by the State, has been granted to the ecclesiastical body exclusively. And in this jurisdiction the administration of creed is most certainly included.

In the case of Sturrock *v.* Greig it was held that "no action for damages will lie against a Church court of the Established Church for any sentence or judgment pronounced by them in a proper case of discipline duly brought before them, regularly conducted, and within their competency and province as a Church court, even although it be averred that the judgment was pronounced maliciously and without probable cause." This extremely strong position was objected to by Lord Cockburn in one of his pithiest speeches,[3] but the rest of the Court on this occasion was unanimous. The decision is more than satisfactory to Churchmen. Even the Free Church, on the

[1] 11 D. 1220. 1849.

[2] 13 D. 1296. 1851.

[3] "There are cases in which a consequence is the best of all arguments. If the plea of the defenders be sound, kirk-sessions have an absolute licence of defamation. They have nothing to do but to keep within their jurisdiction; and then, let them abuse it as they may, they are liable to no civil responsibility. They may, with conscious falsehood, ascribe specific crimes to every parishioner who has the misfortune to incur their dislike; or they may select a single individual, and deliberately doom him to destruction by libel; by the assertion of facts fatal to his character and peace, which they know to be groundless; and they may persevere in this scheme of moral murder in spite of every explanation, and in defiance of all decency. True, they must preserve the shelter of their jurisdiction, both as to matter and as to form; but this it is always in their power to do."—11 D. 1238.

principles of co-ordinate jurisdiction which it draws from the Second Book of Discipline, does not necessarily demand more than that malice be alleged along with injury, in order to justify either review of an ecclesiastical sentence by the civil, or of a civil sentence by the ecclesiastical court; it being held that where the act of the judge is proved to have been done from private ill-will, and (in the words of Sturrock's summons) "*under the cloak* of official duty," the act is no longer a privileged one—is, in truth, no longer an official act.[1] Accordingly the doctrine of this case must be regarded as modified by the opinion delivered in a case which occurred soon after, of Edwards *v.* Begbie,[2] in the other Division of the Court. This was the case of a non-established (Episcopal) Church, but the plea that the members of the Dissenting Church court were not liable even when malice was alleged was expressly founded on the case of Sturrock.[3] And the opinion delivered by the Court, after very careful discussion, includes the general principle; and applies, and was intended to apply, to the courts of the Establishment. The argument was long and keen; but the opinion of Lord Mackenzie (with whom the Lord President M'Neill, now Baron Colonsay, and Lord Fullerton, concurred) was short and explicit: "Supposing the defenders could be regarded as having acted judicially, I conceive the general rule to be, that judges, civil or ecclesiastical, if they, in the exercise of their function, com-

[1] This at least was the form in which it was expressed to the author on one occasion by the late Principal Cunningham, the weightiest defender in modern times of Church prerogative in Scotland.

[2] 12 D. 1138, 28th June 1850.

[3] All the judges indicated in Sturrock's case that the same privilege, even against allegations of malice, which they ascribed to the Establishment, would probably be enjoyed by the voluntary tribunals of non-established Churches. Probably neither the one nor the other is absolutely so privileged. Lord Colonsay, when President, indicated in the Cardross case, that malice must be alleged against Dissenting Church judges to found an action; and his successor, the present head of the Scottish Court (in Gibb *v.* Barron, 21 D. 1099), seems to hold the same — doubting, however, whether it is necessary here, as in the case of the Established Church, to add "want of probable cause."

mit a wrong maliciously and without probable cause, must be liable in damages."

The judgment in Sturrock's case, even if we hold it to be erroneous on the point as to malice, is important and instructive on the general question of the administrative jurisdiction of the Established Church. We give in the appendix the more important parts of the opinions, and especially of the opinion of the Lord Justice-Clerk Hope, who, having been the leading counsel against the pretensions of the Church before 1843, had now to clear its authority, at least in the matter of Church censures. He quotes the well-known declaration of the Confession, as to a government instituted by Christ in His Church, distinct from the civil magistrate; and without formally contradicting the strong statements made by the heads of the Court in the previous controversy, he holds it undeniable that in regard to *discipline* ("whether as to doctrine or evil practices") this divine institution is the source of a peculiar and separate jurisdiction. Lord Medwyn found it easier to take the same position, in accordance with the principles which he had consistently maintained and learnedly illustrated. Lord Moncreiff agreed in the practical result, quoting the thirtieth chapter of the Confession of Faith, "Of Church censures," and holding that Sturrock, as a member of the Church, had "voluntarily submitted himself to the jurisdiction legally constituted for dealing with such things." Lord Cockburn protested in vain, that the decision amounted to a "direct reversal of the principle of the memorable decisions" pronounced twenty years before; and the Court refused to send to a jury the judgment of the kirk-session alleged to have been pronounced "falsely, calumniously, maliciously, and without probable cause."

This is so very strong that we become chiefly interested in what the cases are which the Bench was willing to admit as exceptions. The Lord Justice-Clerk observed, "that the Church courts must act within the limits assigned to them;"

that the matters dealt with must be "clearly within the cognisance of Church officers or courts;" that a member of an Established Church has this protection, "that the grounds on which discipline can be exercised over him may be defined by, or must be consistent with, law;" and that, for example, the Church courts "may be limited in their powers as to what shall be the doctrines of the Church." His lordship's most important generalisation was, that "these views will not surround these courts with protection *if they exceed their jurisdiction,*" giving instances of this excess which have a manifest bearing on the cases before the Disruption of 1843; but he went very much farther when he added, in accordance with the same cases, that these would be no protection "if Church courts" (negatively) "*refuse to perform* a duty imposed on them by statute, as a part of the ecclesiastical constitution of the Church." And in accordance with this, he declared that he could easily conceive many questions "which might arise regarding the conduct of a Church court, even when in the exercise of its proper province of discipline" (such conduct, for example, as subornation of testimony, an allegation which he held would be diverse from that before the Court, which was a mere general imputation of malice). Lord Medwyn remarks that the boundary between the civil and ecclesiastical is hard to hit, but that "within the proper province of the Church court" its proceedings cannot be questioned by the civil authorities. He adds, however, the awkward exception, that if, for example, a minister were kept out of his benefice "from some unworthy and improper motive, and in a case of manifest violation of duty," damages could be obtained through the civil court—making the difference between such a case (which was the second Auchterarder case) and the present, that the present was not for patrimonial loss but for solatium—a distinction which Lord Moncreiff ignored, and Lord Cockburn scouted, in their opinions which followed.

That this case, even with these exceptions, gives a large

measure of protection to Church judicatories is certain. The general rule, that an action of damages will only lie against the members of an inferior court, if they are alleged to have acted maliciously and without probable cause, was affirmed in the same year in the case of Dunbar *v.* the Presbytery of Auchterarder.[1] Here the Court reduced the sentence of a presbytery deposing a schoolmaster (under the Schoolmasters Act), but refused the man injured an action against the members of court unless he made these allegations. Up to this point there is no doubt of the protection accorded to Church courts, even when they act under special statute. But the attempt of the Lord Justice-Clerk to carry this farther in the case of Sturrock, so as to give these courts in matters of discipline not only a real but a peculiar and aboriginal jurisdiction, and so to refuse action against their members when both malice and want of probable cause are alleged, cannot be said as yet to be successful. The practical result of it has, as we have seen, been authoritatively questioned in the case of Edwards *v.* Begbie; and the theory on which it was founded was, with much plausibility, stated by Lord Cockburn to be equivalent to "a direct reversal of the principle" of the judgments of 1843. "I am aware that this is not what your lordships mean; but I suspect that it is the only construction that lawyers can put upon what you are doing." Perhaps the only thing to be certainly concluded from this case of Sturrock is, that the bare *allegation* of malice, without a sufficient detail of facts to support it, will not be listened to against ecclesiastical judges. A mere imputation of evil motive will not found a claim of reparation. In the mean time we may pass from it to the next important case.

Two years after, in Lockhart *v.* the Presbytery of Deer,[2] "a minister, who had been deposed by the General Assembly on

[1] The opinions of the First Division upon the occasion are instructive; 12 D. 284, 11th Dec. 1849. See also Smith *v.* Presbytery of Auchterarder, 12 D. 296.

[2] 13 D. 1296.

the ground of immoral conduct, presented a note of suspension against the sentence being carried into effect, on the grounds that the libel on which the sentence proceeded was defective in the instance, that evidence had been improperly rejected, and that the procedure before the presbytery had been generally irregular and oppressive." The former case had been before the Second Division; and this came before the First on a reclaiming note from the decision of Lord Colonsay, afterwards the Lord President, who held that it did not appear that the presbytery, in dealing with a case confessedly appropriate for its decision, had "exceeded their powers, or acted in violation of any statute." The Court did not even call upon counsel for the presbytery, but unanimously refused to inquire into its proceedings. They held, in the words of Lord Cuninghame, that "the ecclesiastical courts have an exclusive jurisdiction in proper ecclesiastical cases; and we are no more competent to review the proceedings of such courts on preliminary or incidental points, than their final judgments on the merits." Or, as Lord Ivory put it, "If we are not entitled to review a sentence on its merits—even in the extreme case, that it is plainly against all principles of law and justice—still less can we interfere with any of the steps of procedure by which that sentence has been reached." The difficulty of the Auchterarder and Strathbogie, and other precedents, was referred to by Lord Fullerton, who thought them "special cases;" and by Lord President Boyle, who defended them on the ground that the decisions of the General Assembly, which had been there reviewed, "involved a departure not only from the statutes of the realm, but from the constitution of the Church itself."

In comparing these two cases, and the theoretical exceptions allowed in them, with subsequent cases (such as Edwards *v.* Begbie, and the Cardross case, and others, in which it was attempted, though chiefly in the case of Dissenters, to reduce these theoretical exceptions to practice), the idea occurs very

frequently that the question is one of *degree*. The courts have refused to allow an action against ecclesiastical judges on the ground of malice,[1] and have refused to review an ecclesiastical sentence on the ground of irregularity.[2] Yet there can be little doubt that *such* a case (of malice on the one hand, or of irregularity on the other) could be stated as the Court would at once take up. If the irregularity came to be *ultra vires*, or to be contrary to statute, or, without being so, amounted to a gross withholding of justice by the ultimate Church tribunal, the act would probably be held to amount to legal malice, and at all events to come up to the exceptional cases admitted by the Lord Justice-Clerk Hope. And if the allegation of malice, on the other hand, were not only, as in the case of Sturrock, a mere imputation of motive, but a detail of ecclesiastical corruption or conspiracy against which there was no ecclesiastical remedy, the result would probably be the same. In both the cases which we have been considering, it was carefully laid down by the Bench that they did not mean to make a precedent for "extreme cases:" and it may be safely inferred that the Scottish Supreme Court will not, in this century, exclude itself by anticipation from the consideration of such cases when they arise. The occasions on which jurists have held that there is a *recursus ad principem*, cited especially by Lord Medwyn in the case of Cruickshank *v.* Gordon (10th March 1843), and the interdicts and decisions following upon the Auchterarder case, however inapplicable to a theory of co-ordinate jurisdiction, are of permanent value in the ecclesiastical constitution as now fixed. Before as well as after 1843, the majority of the Court protested that they did not interfere, and would not interfere, with the proper spiritual or ecclesiastical jurisdiction of the Church; and the emphatic reassertion of this principle as to discipline after the Disruption does not change the position.

One point, indeed, these later cases, taken by themselves,

[1] Case of Sturrock. [2] Cases of Lockhart and of Dr Lang, *infra*.

would seem to show—viz., that so long as there is any ecclesiastical remedy competent for an ecclesiastical irregularity, the Court will not step in to put it right. They will not reverse the ecclesiastical act until the superior court has been appealed to. This was formally found in the case of Dr Lang *v.* The Presbytery of Irvine (5th March 1864, New Series of Reports, ii. 823), where an action of reduction of the findings of a presbytery on the ground of irregularity and illegality was held not competent, because the pursuer had not exhausted the remedies open to him in the ecclesiastical judicatories. This of course does not apply to actions of reparation or damages for the irrevocable consequences of a wrongful act already done; and this very case of Dr Lang's indicates that the courts may in some cases leave it to the Assembly to rectify the ecclesiastical wrong, while (if malice is proved) they may themselves give civil reparation for the civil injury which that wrong has caused. But it cannot be said that the courts have receded from their ultimate right to reduce and reverse the ecclesiastical sentence itself, by way of reduction, provided there be a final failure of justice.

But this failure of justice, it would seem, must be no mere common mistake, either in matter or form. It must be something excessive and gross, before the courts will even consider it. For there is no (ordinary) appeal from the ecclesiastical to the civil courts; and the latter have no (ordinary) power of review of the judgment of the former. And this seems to indicate a permanent distinction between the law in England and in Scotland. "From all these (ecclesiastical) courts," says Blackstone, "an appeal lies to the king in the last resort." The Act, indeed, authorising appeals, declares that "for lack of justice at or in any the courts of the archbishops of this realm, or in any the king's dominions, it shall be lawful to the parties grieved to appeal to the king's majesty in the king's Court of Chancery;"[1] and the phrase "lack of justice" might be held

[1] 25 Henry VIII., c 19, sec. 4.

to mean something other or worse than a mere false decision. But it has been construed so as to give the right of ordinary and regular appeal from all ecclesiastical or spiritual decisions; and the extension of the liberty cannot be said to be inconsistent with the statutory doctrine that the king "is and hath always justly been by the Word of God supreme head in earth of the Church of England, and hath full power and authority to correct, punish, and repress all manner of heresies, errors, vices, sins, abuses, idolatries, hypocrisies, and superstitions, sprung and growing within the same, and to exercise all other manner of jurisdictions, commonly called ecclesiastical jurisdiction," and that by means of laymen learned in the civil or Church law, as well as clergymen.[1] Blackstone's three "strong marks and ensigns of authority" of the king over the Church—viz., the power of prohibition or interdict, the power of interpretation of ecclesiastical statutes, and the appeal to the king—have all been exercised in Scotland through the king's courts, but only in extraordinary circumstances. The separate and exclusive jurisdiction of the ecclesiastical courts, in all ordinary circumstances, has here been always acknowledged; and this too is in consistency with the express repudiation of the royal supremacy in matters ecclesiastical, by which our Revolution Settlement was inaugurated. The principles, therefore, which the English Supreme Court of Ecclesiastical Appeal has laid down for its own guidance, a note of which we think it well to give in the appendix, possess but a remoter legal interest for us.[2]

It would appear, therefore, that, in the judicial proceedings of the courts of the Established Church, it is only when they act in some way which is *ultra vires*, or outrageously unjust,[3]

[1] 37 Henry VIII., c. 17. See also the Act of Elizabeth, "To restore to the Crown the ancient Jurisdiction over the Estate Ecclesiastical and Spiritual, and Abolishing all foreign Powers repugnant to the same."

[2] See Appendix, Note D.

[3] In Dunbar *v.* Stoddart (11 D. 587) the phrase "violation of duty" was held to be pretty nearly equivalent to malice. See also the Auchterarder cases.

or contrary to express law, that they can be repressed by the supreme civil courts. These civil courts, on the other hand, have the exclusive right of determining whether the former have or have not so acted: and their right of correcting and coercing the Church courts extends to the *spiritualia* as well as the *temporalia* with which these may have to deal. And lastly, this interference may be claimed and set in motion by any one who can show any civil right or any civil interest affected directly or indirectly by ecclesiastical proceedings of the extraordinary nature supposed. For it is only in extraordinary cases that the question can arise—in cases where the wrongful act has been so wrongful as to lose the aspect of being judicial, and the protection which that aspect affords.

We have referred to the so-called legislative power of the Church, and to its undoubted judicial power. Both may be held to be parts of its administrative function, and to this more general region may be referred another question which has been raised. The Church courts cannot exceed their legal powers, and may be restrained from doing so. But must they exercise their legal powers, and can they be compelled to do so? Thus, in the case of creed, they cannot change the Confession of Faith, or use anything else as their standard. But *must* they use it? Can they decline to exercise their functions? Has the Court power to enforce upon the Church the positive exercise of its judicial functions, and in particular, the administration of its creed?

There is a good deal to be observed on either side of this interesting question. Confining our view of the use of the Confession to the judicial function of the Church, or its dealing with heresy, we may remember, in the first place, that no process against a minister or probationer can be instituted in a kirk-session (Form of Process, vii. 1; Act 9, Assembly 1745).

"It belongs to presbyteries to receive and investigate charges against *their* characters."[1] But while the presbytery is the only court, the origination of such processes before it is two-fold. "A libel may proceed at the instance either of the presbytery within whose bounds the parish is situated, or of individual parishioners." In the former case, the presbytery are both prosecutors and judges; and they have successively the two questions to consider: first, whether they ought to libel at all—whether they ought to commence the process; and, secondly, whether, having raised the process, they are to find the libel relevant and proven. The second question is wholly judicial, and our previous remarks apply to it. The former is a point of administration, which, if not judicial, is at least committed to the discretion of the presbytery; and it is always a very delicate and often a very difficult one. The rules laid down in Church books are that the presbytery should be slow to raise a libel, and become prosecutors of a brother; and that this should only be done on a distinct and credible accusation lodged with them by persons in the parish, or on a vague but loud and unmistakable *fama*.[2] But of the sufficiency of these reasons the presbytery seem to be absolutely the judges; so absolutely, that only some such outrageous case as we saw excepted by the Court in the case of Sturrock would entitle the civil court to interfere with their proper and sacred function. That a case could be figured where the general *fama*, or the particular allegation laid before the presbytery, might be so intolerably strong as to make it dangerous for them, even in civil law, to decline to take it up as prosecutors, is conceivable. But it is barely conceivable, especially when we remember that it is at all times open to individuals within the parish to prosecute if the presbytery refuse, or whether they refuse or not.

Any male parishioner may prosecute for heresy, and the pres-

[1] Dr Hill's Practice in the Church Courts.

[2] Form of Process. Cook's Styles. Hill's Practice.

bytery have no power to decline taking up the case. And it is not necessary that the parishioner should be in communion with the Church. "In the case of the libel against the Rev. James Scott, minister of Banchory-Ternan, the objection to the title of the prosecutor, who was patron and one of the principal heritors in the parish, that he was not also in communion with the Church, was repelled (Assembly 1845, sess. 8); and in another more recent case, the fact that the libeller, the principal heritor and vice-patron of the parish, was not a member of the Church of Scotland, although brought under the notice of the Assembly, was not founded upon as an objection to his title (Hope, Assembly 1849, sess. 10, 11)."[1] In these cases it will be observed that the libeller had an important civil connection with the parish as heritor, but his right to bring the ecclesiastical charge was seemingly no stronger than that of any individual in the parish, and was certainly weaker than that of every one within it in communion with the Church. And when such a charge is brought, the presbytery seem to have no such discretion as to receiving it as they had in the question whether they would become prosecutors or not. No doubt they are the exclusive judges in the case; but a judge has no power to dismiss a case unheard and uncalled. In exercising the judge's function he is privileged and protected, whether his judgment be right or wrong. But the Auchterarder case makes it for ever clear that there is no safety in *refusing to exercise* that function—in declining to judge.[2] When a libel has been presented to the presbytery, whether at the instance of the presbytery itself or of individuals, the only thing to be done is to cite the accused, receive his defences, and proceed to "judge of the relevancy of the libel."

Our ecclesiastical law still retains this important peculiarity,

[1] Dr Cook's Styles, 106 (edition 1856).

[2] Nor is it at all clear, from the precedents of 1839-1843, that in such a case the Court could not be at once invoked against the presbytery without the necessity of appealing even to the higher ecclesiastical tribunals.

that before any proof of the facts alleged in the libel can be taken, their *relevancy* to infer the conclusions of the libel must be affirmed. The result of this is that all questions of general interest emerge on the very threshold of every ecclesiastical process; and while a recent Act (Assembly 1851, 2d June, sess. 15) appoints the presbytery, after finding the relevancy, to go on to proof notwithstanding any appeal taken to the superior courts against this their judgment, reserving the discussion of these appeals till the case is closed, there is a special exception of cases "which involve error in doctrine." In these cases the old form of process still holds. Not only does the judgment on the relevancy come first, but that judgment must be finally settled by the court immediately concerned, or by the court of appeal, before anything more can be done in the case.

"The body of the libel consists of three parts, which, together," it is commonly said, "should form a regular syllogism. The first or major proposition sets forth the criminality of the *species facti* charged, and alleges the guilt of the accused; the second, or minor, narrates the facts of the particular offence; and the third, or conclusion, deduces the justice of punishing the individual offender."[1] The major proposition, or first part of the so-called syllogism, must always be a doctrinal statement in the class of cases which we are considering. In one of the most famous cases of alleged heresy with which the Church of Scotland has had to deal, the following was the major: "That albeit the doctrine of universal atonement and pardon through the death of Christ, as also the doctrine that assurance is of the essence of faith and necessary to salvation, are contrary to the Holy Scriptures and to the Confession of Faith approven by the General Assemblies of the Church of Scotland, and ratified by law in the year 1690; and were moreover condemned by the 5th Act of the General Assembly held in the year 1720 as being directly opposed to the Word

[1] Dr Cook's Styles, 106.

of God, and to the Confession of Faith and Catechisms of the Church of Scotland; yet true it is and of verity, that you . . . hold, and have repeatedly promulgated and expressed the foresaid doctrines from the pulpit or other places; in so far as," &c. This older example does not follow the rule which Dr Cook in his 'Styles' lays down, that "if a statute or act is to be founded on, the passage of the statute or act should be quoted at length in the major proposition;" and indeed the form of libel is somewhat different from what, according to the same authority, seems to be generally used. That form runs, "Albeit, by the Word of God, and the laws and discipline of the Church of Scotland, is an offence of a heinous nature, unbecoming the character and the sacred profession of a minister of the Gospel, and severely punishable by the laws and rules of the Church; yet true it is and of verity, that you are guilty of the said offence, in so far as," &c.

The minor ought to contain a detail of circumstances which amount to the general offence set forth as criminal in the major. This narrative is introduced by the words, "in so far as," as above, and must set forth the time, place, and circumstances of the alleged offence or offences.

It follows that the judgment of relevancy is twofold. The major proposition or statement that such and such a doctrine is a crime against the creed must be found relevant first, and then follows the question, whether each or all of the separate utterances alleged, which make up the minor, amount to this doctrine. Each of these must be found separately, and any number of the propositions in the libel may be found irrelevant and struck out, provided a major proposition be left, under which the surviving charges of the minor may be legitimately and relevantly grouped.

It is obvious that it is under the question of relevancy that the most interesting questions in reference to the creed of Scotland may be expected to arise judicially. It is at this

point alone that important errors in the administration of the creed may be made. It is here that a practical refusal on the one hand to execute the creed at all, perhaps amounting to an abnegation of legal functions, may be possible. Here, too, an excessive and outrageous application of the existing creed may take place, quite equivalent to the addition of a new and private faith to the common and authorised standard. Yet, in looking at the question how far the law can at all concern itself with such actings of the ecclesiastical court, the first thing to be kept in view is that the judgment of relevancy is undoubtedly and eminently *a judicial act.* It is not ministerial, like the act of a judge in receiving a libel and citing the accused,[1] but is judicial. Whatever has been already ascertained in this chapter with regard to the protection to which such acts are entitled, is applicable to this first act of the presbytery as much as it is to their findings upon the evidence, and their decision of the whole case. And, therefore, while the members of the Church courts are statutory functionaries, legally bound to administer justice in cases of heresy and doctrine (and that according to the Church's public and avowed confession), and while the allegation that by their interlocutor of relevancy, in any particular case, they had denied such justice, and by wilful contempt or extreme neglect of law had caused serious civil injury to one of the lieges, would not be incompetent, yet such an allegation would be so excessively difficult to prove, that the attempt to bring it forward in the civil courts is unlikely and remote. It might be possible to make such an allegation so strongly, and with such a detail of extreme circumstances, that the Court could not throw it out on the mere ground of the exclusive ecclesiastical jurisdiction. But such a case, even if admitted to a proof before answer, would have little chance on the

[1] The judge does this—receives the libel, and compels the attendance of the accused — not as judge, but as magistrate. The two functions, theoretically distinct, were actually separated, and assigned to different persons, in the Roman law.

principles of the cases before 1843, and very little indeed on those of the cases decided since.

It must be remembered that the jurisdiction in heresy is not only peculiarly appropriate to the Church, but that it has been *left* in her hands by the State, rather than expressly given by statute; and that the creed is declared by the Revolution statute to be the "public and avowed Confession," but not the standard, of the Church, though the Church has itself always used it as the latter. Farther, the extent in which the Church shall use it as a standard seems to be nowhere regulated or prescribed by law. On this last point it may be remembered that the ordinary form of libel states in the major that the delinquency, whether heresy or otherwise, "is a heinous crime and severely punishable;" and the question of degree, or heinousness, is certainly for the Church court. Some remarks on this may be appropriate.

The "Form of Process" approved by the General Assembly in 1707, declares that "nothing ought to be admitted by any Church judicatory as the ground of a process for censure but what hath been declared censurable by the Word of God, or some act or universal custom of this National Church agreeable thereto;" and it is intimated that what the judicatories ought to take notice of are *scandals—i.e.*, things not merely evil, but which, being evil, offend also the moral or religious sense of the community, and are of dangerous example. Error in doctrine evidently has, or may have, such a position; for among the processes which "natively begin at the kirk-session," or lowest or congregational court, but which "for the atrocity of the scandal, or difficulty in the affair, or general concern," should be at once remitted to the presbytery or higher court, consisting of the ministers and elders of the district, are enumerated "heresy and error, vented and made public by any in the congregation." What, then, is heresy? A modern divine of much authority within the Established Church as now constituted says: "Heresy, when considered as a legitimate

object of Church censure, denotes not the entertaining of a false opinion in the mind, but the publication of that opinion by discourse or by writing. Secondly, heresy, when considered as a legitimate object of Church censure, must respect some fundamental and pernicious error."[1] This agrees sufficiently with the utterance of the most ancient standard of the polity of the Kirk, which declares, "If any minister be deprehended in any notable crime, as whoredom, adultery, manslaughter, perjury, *teaching of heresy*, or any other deserving death, or that may be a note of perpetual infamy, he ought to be deposed for ever." But then follows the definition of heresy: "By heresy we mean pernicious doctrine *plainly taught, and openly defended*" (in another edition it reads, "obstinately defended") "*against the foundations and principles* of our faith; and such a crime we judge to deserve perpetual deposition from the ministry; for most dangerous we know it to be to commit the flock to a man infected with the pestilence of heresy."[2]

In recalling to our readers these points, we do not mean to imply that the Church ought not by law to use the whole Confession as its creed and test; but merely that, in the event of any of its judicatories seeming not to do so in a particular case, it would be exceedingly difficult to invoke the civil law to protect the orthodoxy which the appointed guardians of it were alleged to have slighted in the exercise of their proper jurisdiction. A formal resolution to ignore the creed is one thing: the actual neglecting of it, or any part of it, is another.

But it may be argued, though the law in most matters leaves the creed to the independent administration of the Church, it has taken the complete orthodoxy of ministers and probationers under its special cognisance by the Statute of 1693, ordering *subscription*. This does not, however, appear to be conclusive. The Statute of 1693 is not like the old one of 1572. It merely

[1] Dr Hill's View of the Constitution, 82. [2] First Book of Discipline.

orders subscription *at entering upon the function* of minister or probationer; and it might plausibly be argued that, by thus providing a guarantee of orthodoxy once for all, it intends to liberate the party signing from any subsequent inquisitorial proceedings on the part of the Church courts. And even Church courts, when prosecuting their ministers for error in doctrine, have not usually adduced the breaking of the subscription engagement as an aggravation. The great *nomen juris* of heresy has been found in Scotland weighty enough and odious enough without adding an imputation which harasses pure and tender minds in proportion to their tenderness and purity. The Church courts have seemingly not the power of demanding a renewed subscription from a minister; or of forcing him to say how far he now adheres to the clauses of the Formula. It is rather as a case of heresy that they must take it up. Subscription is, no doubt, intended to exert a certain influence over the whole of the rest of a man's life, and to bind him to doctrinal truth by good faith and honesty. But it must be remembered that the clauses which refer to the future in the existing Formula do not belong to the Act of Parliament, but were chiefly introduced by the Assembly. And while, if the Church enforced them strictly, the Court might probably not interfere in the direction of freedom, it is almost impossible to imagine that it could in any case step in to compel the ecclesiastical court to greater strictness in this which is so much its exclusive territory.

APPENDIX TO CHAPTER IV.

NOTE A.

OPINIONS ON THE LEGISLATIVE POWER OF THE CHURCH.

In the original Auchterarder case, Lord Medwyn said (Robertson's Report, ii. 147):—

"It is true the Church has legislative powers. In this respect it resembles a corporation or society which has the power of making by-laws for its internal government and regulation. But the Church holds this power on a still higher footing, and in this respect is altogether unlike an ordinary corporation. A corporation derives its existence and its privileges solely from the sovereign or executive power. The Church has a different origin."

Lord Meadowbank said (Report, ii. 108, 109):—

"That a power of legislation exists in the Church, to a certain extent, no one can possibly deny. Its General Assemblies are authorised by the Confession of Faith, *which forms part of the statute law of the land*, 'to determine controversies of faith and cases of conscience—to set down rules and directions for the better worship of God and the government of His Church—to receive complaints in cases of maladministration, and authoritatively to determine the same.' But these are all the powers which, in the Confession of Faith, the Church lays claim to, in any part of this, which it required the Legislature, in the year 1690, to recognise as the charter of its rights, and as exhibiting the extent of its legal powers. . . .

"In like manner, in the Statute 1592, I can find no sanction for appealing to any power of legislation derogatory to or subversive of any of the municipal and legislative enactments of Parliament, or of the civil rights of the people. And holding the Church to be but the creature of the law, and that every power which it possesses is derived from the law, it must follow, as a necessary consequence, that if those powers of regulating its own affairs, which it has nicknamed a power of legislation, are exceeded, the Church, like every other body of temporal creation, must, in the exercise of its temporal powers, whether of adjudication or alleged legislation, be subject to the control of the civil magistrate represented by your lordships."

The curious inconsistency (verbal at least) between these two paragraphs of Lord Meadowbank's speech is repeated in the more important speech of Lord Gillies (Report, ii. 25, 30):—

"Here again it is said that the General Assembly is a legislative body. So is every corporation. For the nature and extent of its legislative powers, I turn to Bankton, ii. 592, who there says: 'The jurisdiction of the General Assembly is either constitutive or judicial. The first consists in making acts and canons ordering the method of proceeding in matters before them, and other affairs touching the discipline and government of the Church, *in the same manner as other corporations make by-laws.*' Not legislative but constitutive powers are assigned to it by Bankton. Thus its power is just that of making by-laws—a *privilege*, properly speaking, of corporations. Every corporation has privileges. The power of making by-laws is one of its privileges. I certainly mean and wish to say nothing disrespectful to the Assembly. On the contrary, I feel great regard and veneration for it. It holds, and properly holds, a high place in our constitution; but as to its legislative powers, I humbly think, with Bankton, that they are just analogous to the powers or privileges of corporations generally to make by-laws. Its laws are perfectly good, if they are completely consistent with the law of the land, and do not interfere with civil rights; but good for nothing, if inconsistent in any degree with either. Good also, if ratified by Parliament—as are the by-laws of the town of Edinburgh and other corporations. . . .

"As to this claim of legislative power, I have one observation yet to make. If the claim is good, there is a union in the same body of judicial and legislative power. This is *reprobated* by every political writer. I am aware of the Barrier Act, requiring the concurrence of the presbyteries; but that does not affect my argument. If the General Assembly of the Church combines the legislative with the judicial power, and if its judgments must take end in it as a court, then indeed its power is supreme and unexampled. But it is said that this is only in matters ecclesiastical, which obviates the danger," &c.

The chief other references which we find to legislative power are in the second Auchterarder case, the Strathbogie interdict, and the Stewarton or *quoad sacra* churches case.

In the first of these (Kinnoull *v.* Ferguson, March 5, 1841, 3 D. 787), Lord Cuninghame, Ordinary, says, in the note to the interlocutor affirmed by the Court:—

"The Scottish Legislature, from the first, gave only the most limited power to the Kirk. The Legislature prescribed their creed, fixed the constitution of the ecclesiastical bodies, by repeated provisions as to the rights of presentees, and conferred on Church courts the very limited

powers legally possessed by them, chiefly in cases of examination and heresy. The Kirk, therefore, can no more, of their own authority, disregard any of these fundamental statutes than they can, by a direct law of their own, abolish the whole of the present system of Church government (as the General Assembly of 1638 did), and substitute a new one in its place. When such an attempt is made, in whole or in part (and the exclusion of a qualified presentee is of that description), it is clearly open to the Supreme Civil Court of the State, as the constitutional expounders of the statutes, to afford protection and redress to the lieges, when they have sustained injury by a manifest departure from the law."

We have already quoted a similar utterance of this judge, on p. 147, from the case of Cruickshank *v.* Gordon, March 10, 1843, 5 D. 909.

In the Strathbogie case (February 14, 1840, 2 D. 606) one of the heads of the Court, Lord President Hope, said :—

"The Church courts cannot go one inch beyond the limits which the law has assigned to them. The Presbyterian form of Church government is not an innate or self-created system. The Church, as an Established Church, did not give it to itself. The Reformation took place in 1560, and it was not till the Act 1592 that the Presbyterian form of government was created. It was created by that Act, which is the charter of the Presbyterian Church. It was not at its creation endowed with all the powers which it would have assumed to itself in the two Books of Discipline, nor, generally, with any powers such as it might afterwards choose to assume to itself. It was created with definite powers, and under various obligations, one of which expressly was, that the presbyteries should be bound and astricted to take on trials the presentee of the lawful patron. But we are told that this Established Church, which exists by statute, may go beyond its statutory powers, and usurp whatever powers it thinks necessary for ecclesiastical purposes. Were this well founded, we should not only have an *imperium in imperio*, but an *imperium super imperium*, in this country."

We conclude with the statement already quoted, of the Lord Justice-Clerk Hope, in the Stewarton case (Report, p. 60). He had by this time succeeded Lord Justice-Clerk Boyle.

"Statute has specially described the species of authority given to the Established Church. Its power of government is defined in different statutes, by terms which, to my mind, are clear and unambiguous; and in these statutes I find no legislative power granted to the Church, placing any changes within their competency. I do not find the recognition of any

general and undefined legislative power. On the contrary, I think both the Statute 1592 and the statute at the Revolution, restoring Presbytery and embodying the Confession of Faith, exclude the least pretence to such power in the Church. These statutes are framed with most delicate and deliberate caution; and I think they settle and establish the Church of Scotland within limits the most precise, and with authority expressly limited to purposes therein set forth."

NOTE B.

BARRIER ACT AND ITS PREDECESSORS.

1. Act 1639.

The General Assembly, desiring that the intended Reformation, being recovered, may be established, ordains, that no novation which may disturb the peace of the Church and make division be suddenly proponed and enacted; but so as the motion be first communicate to the several synods, presbyteries, and kirks, that the matter may be approved by all at home, and commissioners may come well prepared, unanimously to conclude a solid deliberation upon these points in the General Assembly.

2. Act 1641.

Since it hath pleased God to vouchsafe us the libertie of yearly Generall Assemblies, it is ordained, according to the Acts of the Assembly at Edinburgh, 1639, and at Aberdene, 1640, that no novation in doctrine, worship, or government, be brought in or practised in this Kirk, unless it be first propounded, examined, and allowed in the Generall Assembly; and that transgressors in this kinde be censured by presbyteries and synods.

3. Act 9, 1697.—Act anent the Method of Passing Acts of Assembly of general concern to the Church, and for Preventing of Innovations (commonly called the Barrier Act).

The General Assembly, taking into their consideration the overture and Act made in the last Assembly concerning innovations, and having heard the report of the several commissioners from presbyteries to whom the consideration of the same was recommended, in order to its being more ripely advised and determined in this Assembly; and considering the frequent practice of former Assemblies of this Church, and that it will mightily conduce to the exact obedience of the Acts of Assemblies, that General Assemblies be very deliberate in making of the same, and

that the whole Church have a previous knowledge thereof, and their opinion be had therein, and for preventing any sudden alteration or innovation, or other prejudice to the Church, in either doctrine, or worship, or discipline, or government thereof, now happily established; do therefore appoint, enact, and declare, that before any General Assembly of this Church shall pass any Acts which are to be binding rules and constitutions to the 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 agreed thereunto.

NOTE C.

OPINIONS ON THE PRESENT JUDICIAL POWER OF THE ESTABLISHED CHURCH.

I. Case of Sturrock *v.* Greig, 3d July 1849, 11 D. 1220.

In this case the Lord Justice-Clerk Hope said:—

"The procedure before the kirk-session raises the important question we are to decide—a question of the greatest delicacy, and of unspeakable importance. With a view to that, the material point is the matter of fact already adverted to, that the pursuer distinctly stated to us, that the ground of action against the kirk-session for defamation and damages in this part of the case, was the actual findings and sentence of the kirk-session in the case of discipline brought before them. He admitted, most fully and fairly, that he did not found on any preliminary statements or narrative in the minutes, but distinctly, solely, and purely on the findings and sentence pronounced by the kirk-session, as their deliverance and judgment on the matter which came before them.

"The defenders then maintain that no action will lie in law against them, the kirk-session—minister and elders—for any sentence or judgment pronounced by them in a proper case of discipline duly brought before them—pronounced by them as a Church court, on matters which are clearly proper questions of discipline, and so within their competency and province as a Church court, even although the pursuer avers that the findings and sentence—their judgment, in short—was pronounced maliciously and without probable cause. I add the latter quality, because none of us had any doubt that the want of probable cause in any view must be averred, and because, when the pursuer came to explain his case, he substantially and practically admitted that he must establish to the

jury the absence of probable cause. The plea of the defenders, however, is that, even when these qualities are distinctly alleged, still no action for damages can, on the facts averred, be maintained in point of law.

"Then, what are the facts, as they appear on the face of the pursuer's statement, and the proceedings he sets forth? First, that one of the kirk-session, the minister, brought before them, and that the session entertained, a charge involving a matter of Church discipline against the defender, he being a member of the Established Church, and subject to its discipline as such, and also as the parochial schoolmaster of the parish: that this charge was taken up by the kirk-session in its capacity as a judicature of the Church: that the matters of complaint against the pursuer, so stated to the kirk-session, were within the cognisance and competent jurisdiction of the kirk-session, as proper matters of ecclesiastical discipline, according to the laws of the Church, apart of course altogether from any question as to the propriety or discretion of the proceeding; this was distinctly admitted: that the kirk-session took the matter up in their capacity as a Church court, and in no particular went beyond their duty, competency, and province as such judicatory—laying aside as wholly immaterial, as it was admitted to be, the irregularity in point of form on the first reason, in holding that the party ought to have appeared, in consequence of a certain letter, and was pronounced against in absence as contumacious: that his case was entered on and discussed—his defences heard, and professedly taken into consideration, and judgment finally and competently pronounced on the charges then competently brought before them.

"All these facts are, in truth, admitted, in the way the case is brought before us.

"Hence the kirk-session were acting within their competency, duty, and authority as a Church court, in considering a question of discipline duly brought before them, respecting a party, *ratione officii*, and *ratione status personalis*, subject to their discipline, being a member of the Church. Then the procedure is that of a deliverance and judgment by the kirk-session acting as a Church court on this proper matter of discipline brought before them as a court, to whose ecclesiastical jurisdiction (I prefer the term to 'spiritual') the pursuer was subject.

"He avers that they entertained, entered upon, and disposed of the alleged violations of religious duty, and irregularities in point of discipline and order, by him, as a member of the Church, maliciously and without probable cause, and with these dispositions judged of the case, and pronounced the sentence of suspension from Church privileges. The pursuer has already appealed against this deliverance and sentence of the kirk-session, and has obtained a reversal and acquittal from the supreme Church court, the General Assembly.

"It is to be observed, that no case is stated of subornation of testimony by the defenders, of preparation of false evidence by forgery or otherwise, of fabrication of documents, or alteration or vitiation of the same—nothing amounting to a crime, or even to any overt act, in violation of

their duty. I notice such cases, and many other extreme cases might be figured, in which other elements might occur, in which the question might not be, as here, With what motives did the defenders discharge their duty? I desire to give no opinion except on the general case, very fully and fairly raised on the record before us—which seemed to all of us, I believe, to raise a general point, depending on no specialties averred by the pursuer, or appearing on the face of the proceedings. I repeat, that on that general case alone I give my opinion—reserving for consideration any special case; and I can easily conceive many which might arise regarding the conduct of a Church court, even when in the exercise of its proper province of discipline.

"I am of opinion that, on the facts of this case, as above explained, an action of damages cannot be entertained, notwithstanding the averment of malice and want of probable cause, against the kirk-session.

"I have, I admit, great jealousy and distrust of Church discipline exercised judicially, and by the infliction of Church censures, or suspension of Church privileges—great jealousy of the spirit, temper, and feelings with which it is liable to be exercised—and the utmost distrust not only of the fitness of the fallible office-bearers of every Church who attempt to exercise it, but of the expediency and good for the interests of the Church, except in very flagrant cases, of that mode of enforcing the authority and principles of religion, or of preserving the purity of the Church as a body, the obedience to the faith of its members, and the influence of the courts of the Church. But this is not the place to discuss the great questions which occupied the mind and talents of Calvin and Knox, or the wisdom of the powers actually intrusted to the Church courts of this country, by the laws and constitution of the Church, although greatly modified and softened in practice.

"I distrust the mind of man when invested with the high prerogative, so flattering to pride, so apt to magnify trifles into acts of irreverence, sinfulness, and irreligion, for the duty of judging of the religious conduct and motives of others—by whomsoever that prerogative shall be exercised; and I cannot forget that, under the discipline of one of the best Christians and greatest theologians the Church ever knew—that of the great Calvin—414 public trials took place before the Consistory in two years (1558 and 1559), ending not only in Church censures, but many in civil punishments, for matters, a great number of which there is not a pious Christian of the present day would not deem wholly unfit to be noticed in any other way than by private rebuke.

"I think it right to say this, that I may not be suspected of dealing with the very serious question, raised by the defenders, in any other spirit than that of a lawyer. But, on the other hand, I am very clearly of opinion that, on the facts as above stated, an action for damages against the Church judicatory, acting in a proper case of discipline, will not lie, although malice and want of probable cause shall be averred.

"We must attend to what is involved in the subjection to Church discipline, undertaken and submitted to by every one who joins any Church

in which Church discipline is to be exercised by the office-bearers, or courts whom the Church intrusts with such authority, and to whom they hold that such authority over the members of the Church is committed by our Lord, in His commission to the ministers and presbyters and office-bearers of the ministry of the Gospel. There can be no doubt that, according to the Word of God, as interpreted and adopted by the Church of Scotland, that authority is bestowed, and the members of the Church subjected to the discipline flowing from that authority.

"We are not now discussing the right principles of Church government according to the Scriptures, neither are we to consider the extent of the authority over the members of a dissenting establishment flowing from the principles sanctioned among themselves, and submitted to by the act of joining the same. I avoid the question as to whether similar protection extends to their Church courts, solely because that is not the case before us—but not from any doubt now entertained by me that they may claim the same. I take simply the fact that the Church of Scotland, as established by law, has adopted—and that statute has declared and proclaimed that, according to the Word of God, as interpreted by the Church of Scotland, its Church courts are invested with—the right and duty of discipline over its members; and that such right flows from the divine institution of the Christian ministry, and of the presbyteries which the Church of Scotland holds to be, although not of divine prescription, as the only form of Church government, but as founded on and as agreeable to the Word of God.

"No one need be, unless he chooses, a member of the Church of Scotland, or of any particular sect, in the constitution of which there are things to which he objects. If he joins the same—and, if I understand the statements here, the pursuer did so deliberately, after being employed in the teaching of youth, and therefore of mature years—then he must take its constitution as he finds it. He must be subjected to the authority and discipline of the Church, and he must be content to acknowledge the authority under which that discipline is exercised to be of divine institution, and bestowed by the great Head of the Church on the office-bearers of the Church over him—if such shall be the view taken of his subjection to Church discipline by the laws of the Church of Scotland.

"No doubt all this is a very grave and weighty question — one of the most serious with which legislation or the arrangements of Voluntary Churches have to deal. No doubt such views of the origin and character of the authority of the Church over its members, whether an Established or Dissenting Church, intrust much to the weakness and frailties of human nature. But if the Church which the individual has joined, being the Church of Scotland, has proclaimed and announced its views of Scripture on this subject, and placed its members under the discipline of the Church, by reason and in respect of the authority bestowed on the Church acting through its office-bearers by divine ordination and appointment; then, according to that very theocracy, so established, the member of the Church must acknowledge and submit to

the authority under which the discipline is exercised over him. In an establishment he may have this advantage, that the grounds on which discipline can be exercised over him may be defined by, or must be consistent with, law; and, whether some think this interferes with the spiritual liberty of the Church, at least in this question it removes one great source of objection to the plea contended for by the defenders, and affords the members of the Established Church a protection which it *may* be—I only say it *may* be—the constitutions of Voluntary Churches may not have given as clearly as they have established the subjection of their members to ecclesiastical discipline.

"Now I am not about to state theoretical views as the result of a theological inquiry as to the nature of the authority of a Christian Church and its office-bearers over its members. The inquiry here is simply, What is the *source*, *foundation*, and *character* asserted by the law of the Church of Scotland for the authority of the courts of that Church over its members, and the extent of their duties and dominion, the exercise of such discipline, and of the character and kind of submission to that discipline, which the view taken by the Church laws of its origin and high authority necessarily fixes down on those who have subjected themselves to the jurisdiction of the Church?

"We have to deal only with a party who has deliberately by choice, we must presume, and still more by the acceptance of an office, but still voluntarily, subjected himself to the discipline of the Church of Scotland, whatever that may be.

"Clear it is to my mind that he can have no claim for reparation of alleged wrong, said to be committed in the exercise of that discipline, if that claim is utterly irreconcilable with the character of the authority over him which he has acknowledged, and with his subjection to that authority.

"It will be of no avail to him to state as a general plea, 'I aver I have been greatly injured: your defence will arm the Church court with powers which may exterminate and crush individuals, ruin character, and destroy peace of mind: it is tyranny over the mind, and over the character, not safe to enforce; and there is no form of it more hideous, more oppressive, more appalling, than that exercised under the power of Church discipline.'

"It may be so. Viewing such discipline as a likely source of abuse in the hands of man, there may be some truth in the dogma. But in this case it is only a dogma, if the Church of Scotland, as by law established, has settled the character of the authority which it exercises on discipline, and the nature of the subordination of its members to their office-bearers who exercise such authority. Now, then, what is the character in respect of which the office-bearers of the Church of Scotland exercise jurisdiction in proper matters of discipline falling within their competency, to the extent to which law has admitted their functions and jurisdiction, and what is the nature of the subjection which the members of the Church have acknowledged they owe to that authority? The subjection is of a

nature peculiar—exclusive—distinct from all others, and that in respect of the source from which the authority is derived.

"In the consideration of this matter I go no farther than the Act 1690, establishing the Church in Scotland, and containing, as a statutory enactment, the Confession of Faith. That this statute may have been intended to apply to all the subjects may be true, from the hope that thereafter dissent could not exist. But at least its enactments are binding on all the members of the Church, and part of the statute is even broader.

"Its object is declared to be 'the government of Christ's Church within this nation, agreeable to the Word of God, and most conducive to the advancement of true piety and godliness.' Then the statute 'ratifies and establishes the Confession of Faith subjoined, as the public and avowed Confession of this Church.' Further, it 'ratifies, establishes, and confirms the Presbyterian Church government and discipline'—that is to say, it revives the Act 1592, and describes the judicatories of the Church, kirk-sessions, and so forth. By that statute, 1592, the special jurisdiction of particular sessions as to maintaining of discipline and diligent inquiry 'of naughty and ungodly persons,' is very particularly set forth.

"Then the Confession of Faith, the law of the Church by statute, treats separately, and with great discrimination, doctrinal or spiritual matters, and ecclesiastical matters. As to doctrinal matters, it distinctly subjects all false doctrines to the censures of the Church. And, in considering the question now before us, we must remember, that if an action will lie in a case of discipline such as the present, it must equally lie in a case where the Church courts, acting within their competency as to the proper doctrines of the Established Church—adding nothing thereto as requirements from its members—have judged of heresy, and suspended or deprived a minister in respect of false doctrines; a notion utterly repugnant, surely, to any conception which can be taken of the authority of the Church courts in the Church of Scotland, as developed in the Westminster Confession of Faith. They may be limited in their powers as to what shall be the doctrines of the Church; but I am treating at present of an inquiry into their motives, when the matters are within their competency, and when they are dealing with the recognised doctrines of the Church. The Confession then, in chapter 30, comes to the title of Church censures—the title is short, and I shall read it all—[reads].

"Now, the first section announces a great truth of the Church—liable to misapprehension, doubtless, but a doctrine which is the foundation of the whole authority and government of the Church over its members—that is, that in the matter of discipline, whether as to doctrine or evil practices, or non-observance of Church ordinances, the Church is exercising a government through its Church officers, appointed by the Lord Jesus, distinct from the civil magistrate.

"Whatever questions have been raised as to the wider effect of this declaration, to which I need not now advert, this is undeniable, that, in regard to discipline, the authority of the Church, as a distinct and

separate government, is so derived from that source. To that declaration, as the foundation of the exercise of Church censure over the members of the Church, I think courts of law must give full effect, as much as to any other statutory enactment. It is not our place to consider the truth of this declaration; if it were, I should be prepared to defend it. Neither are we to consider whether it will arm men with alarming power, capable of producing great mischief. The statute has given the remedy in the courts which it trusted—in the appeals competent to the superior Church courts. But the matter of discipline it has vested in the Church officers.

"I need not pursue this point farther, for in the view I take of the case, the Church, in exercising discipline on its members, is thus exercising that separate government for the Church, the authority and source of which is declared to be divine appointment.

"From this I think it necessarily follows, that in matters clearly within the cognisance of Church officers or courts, as subject of Church censures (I keep to the exact case before us, and the law within the statute), when the Church judicatory is thus exercising the government so intrusted to it, its judicatories and officers are not amenable to the civil courts of the country in damages for alleged wrong. They have been trusted as a separate government. The declaration of the authority under which they act assumes that it must be separately administered—free from control—free from subjection or subordination to civil tribunals.

"The inquiry into their motives—which is the very essence of the pursuer's case—by other civil courts—it may be by men not even of the Church—is absolutely repugnant to the freedom which must belong to a Church in matters of discipline.

"To any party alleging wrong by such courts, the answer, then, is plain, If these courts were acting wholly within the matter committed to them, they are distinct and supreme, and the authority under which they sit excludes any inquiry into their motives by civil courts. But hardship, in truth, there is not, whatever the party may feel, for he has chosen to subject himself, in all matters which can come within the discipline of the Church, to the Church of Scotland as established by law; and the authority of that Church, in cases falling within discipline, has been announced and fixed.

"The view that may be taken of this matter by independent religious bodies, unless their constitution is very express, may go much further; and it may be that their Church courts may have, as against their own ministers, the sole right to decide what is competent matter for Church discipline and ecclesiastical government. And such bodies may consider it an objection to the purity and independence of the Established Church, that it does not possess such power uncontrolled. But to the members of the Establishment there is, on the other hand, the benefit of the protection which the establishment of a Church by statute implies—viz., that the Church courts must act within the limits assigned to them. Now the opinion I give applies solely to a case in which, as here, it is distinctly admitted, or plainly appears, that the Church censures were enforced in

respect of matters clearly falling within the discipline competent to the Church, and of which the Church court had entire cognisance.

"This view will not surround these courts with protection, if they exceed their jurisdiction—*e.g.*, to take a case I stated many years ago: If a kirk-session, on grounds of discipline within their cognisance, refuse a member of the Church admission to the Lord's table—not rejecting his application without inquiry, but judging of his case, and on such grounds refusing to admit him—they are not subject to be compelled to receive him by the civil courts, nor can he call on the civil courts to inquire into their motives. But if they refuse to receive him, because he will not subscribe a covenant to extirpate Episcopacy in England, or to expel the Bishops from the House of Lords, or to assert the entire independence of the Established Church from the jurisdiction of the civil courts as to the extent of its forms, or on any ground palpably not within the subject of the separate government of the Church by its officers which the statute acknowledges, then they have not the same complete protection; so, also, if Church courts refuse to perform a duty imposed on them by statutes, as a part of the ecclesiastical constitution of the Church.

"I am not afraid, then, of any hazardous results from the protection which I think the Church courts possess, from any inquiry into their motives when exercising, in the matters falling within Church discipline, that separate government recognised in the Church as of divine appointment; for the limit of their protection is, I think, clearly defined, and is sufficient, as it has hitherto proved to be, to guard against any great abuse. And I see no other remedy, if there has been abuse, compatible with the declaration of the Confession of Faith, but an appeal to the higher judicatories; and of that appeal this pursuer had the benefit."

Lord Medwyn, in the course of his opinion, said:—

"In every country in Christendom there are Church courts as well as civil courts: while the jurisdiction of the latter embraces all acts done by one member of the State to another, and to redress all wrongs done and suffered in that character; within the cognisance of Church courts are all matters of Church discipline founded on the conduct of the members, leading to many delicate inquiries into character, and which it is the duty of the office-bearers in the Church to inquire into according to forms prescribed. In discharge of this important duty, and while acting in their ecclesiastical character, the civil court can have no right to interfere with or control them. The two jurisdictions, the civil and ecclesiastical, are as separate and distinct as the subject-matters about which they adjudicate, and the objects with which they act. The boundary between the two is not always very easy to define; but whenever the matter clearly falls within the proper province of the Church court, its proceedings cannot be questioned in the civil court. The Scottish Confession of Faith is declaratory of this distinction, and of the independence of the Church courts of the Established Church of Scotland; but the rule is not confined to these. I ascribe the right of independent Church government to a much higher source, and give it a much wider application: accord-

ingly, our courts respect it in the case also of all tolerated sects—those other religious bodies where the members submit themselves voluntarily to the jurisdiction of the office-bearers of their Church, whatever it may be, so that no member can come to the civil court with a claim of damages in a proper ecclesiastical question, implying a review of the proceedings of the Church court on its merits, on an allegation of a wrong done by that court. This was found in the case of Auchincloss against Black, 6th March 1793, reported by Borthwick, p. 405, where Lord Justice-Clerk Braxfield pronounced an interlocutor, finding it 'incompetent to this Court to review the proceedings of Associate congregations, commonly called Burghers, when sentences are pronounced by them in their ecclesiastical character.' A similar judgment was given in another case, Grieve against Smith, 12th February 1808, as to the sect called the Beræans.

"It will not make it competent to apply to the civil court, by simply libelling that the proceeding was done maliciously and without probable cause. This averment is easily made; and more especially it will not avail, if no specific statement is made as to the cause and origin of the malice, nor any instances given of the indulgence of this improper feeling."

2. Case of Lockhart *v.* the Presbytery of Deer, July 5, 1851, 13 D, 1296.

In this case we give the following quotations from the four judges of the First Division who decided it:—

Lord President.—"My lords, I do not think we require any further argument. The only question we have to determine is, whether this Court has any power to interfere with the proceedings of the Church courts in a matter of ecclesiastical discipline. Although we may form a different opinion in regard to matters of form, or even of substantial justice, in my opinion we cannot interfere to quash the sentence. I listened with the greatest attention to the argument of Mr Logan, and though he opened the case with his usual ability, he cannot make bricks without straw.

"Although I had the misfortune to differ from my brethren on the right hand, Lords Fullerton and Ivory, in the memorable cases of Auchterarder and Strathbogie, I did so on the ground that these cases involved matter of civil right, and that the decisions of the General Assembly involved a departure not only from the statutes of the realm, but from the constitution of the Church itself. I stand clear of any inconsistency in holding the opinion I do in this case; for I hold that the matter involved in the proceedings before us is a pure question of ecclesiastical discipline.

"We have not here anything like the question which was raised in the cases of Kilberry and Ferguson. These were the cases of schoolmasters, over whom the presbytery have jurisdiction by the force of a statute. The Court held that in these cases the presbyteries had deviated from the

forms which under the statute they should have observed—that they had deviated from the ordinary principles of justice and law—and that, acting under the Schoolmasters Act, they were bound to adhere to the rules which they had disregarded.

"This case, however, stands on a ground totally different. No doubt the note of suspension contains very clamant statements as to the irregularity of the mode in which the case was conducted before the presbytery; but this was a libel at the instance of a presbytery against a clergyman charged with offences which infer deposition; and after it had been fully heard before all the Church courts, the General Assembly, in discharge of a most solemn and painful duty, deposed this man from the office of the ministry. The offence was an ecclesiastical offence, the charge was tried in an ecclesiastical court, and we cannot interfere. We are just driven to ask this question, Does the Court of Session sit in review of the highest ecclesiastical court? We have just as little right to interfere with the procedure of the Church courts in matters of ecclesiastical discipline, as we have to interfere with the proceedings of the Court of Justiciary in a criminal question.

"I am therefore of opinion that this application is incompetent, and that the Lord Ordinary was right in refusing the note."

Lord Fullerton.—"I am perfectly satisfied that the Lord Ordinary was right.

"This is an attempt which, if successful, would go far indeed. For, on the very principle that we are called on to suspend the proceedings taken by the Presbytery of Deer, under an order of the General Assembly, we may, and in all probability will, be called upon to review every sentence of the Church courts, which a party considers or maintains to be contrary to form, and unwarranted by the justice of the case.

"I think it of the utmost importance that we should at once express our sense of the incompetency of any such attempt."

Lord Cuninghame.—"I apprehend that the present case is not attended with any difficulty. The ecclesiastical courts have an exclusive jurisdiction in proper ecclesiastical cases; and we are no more competent to review the proceedings of such courts on preliminary or incidental points, than their final judgments on the merits.

"On the contrary, it is notorious that Church courts have their own appellate jurisdiction, from which parties subject to them must seek redress upon all objections to evidence and forms arising in the course of a properly spiritual process. Accordingly, there can be no doubt that the very objection to evidence maintained in this suspension was competent to the suspender before the Church courts primary and appellate. And if these judicatories have disposed of it, can we review their judgment? It would be altogether unprecedented and unconstitutional to do so.

"It is said the suspender's civil right in the benefice is affected by the proceeding complained of. But that consequence (which must follow in all trials for grave ecclesiastical delinquency) does not give the civil court right to assume a jurisdiction not belonging to them, but appropriately

conferred privately on Church courts. If it did, this Court might be called to review the sentence of a Church court in a case of heresy, which, it is obvious, would be preposterous."

Lord Ivory.—"I am of the same opinion. This Court does not sit as a court of review over the Church courts in ecclesiastical matters. We are asked to quash certain proceedings taken before the proper tribunal, the ecclesiastical court; and we are asked to do so upon some such ground as this, that, being the supreme judicatory of the land, we have a control over all other judicatories, and are bound to keep them within their proper forms of procedure.

"Even taking the matter in that view, it is only as a supreme *civil* judicatory that the Court can exercise these functions; and it is one of the inconveniences, if inconvenience it be, of having two independent and supreme judicatories in the same kingdom, that each is necessarily supreme within its own province, and is not, with reference to matters falling within that province, liable to any review whatever.

"Even where the matter is properly within the province of the civil court, and where we are interfering with an inferior civil judicatory, whose jurisdiction in that particular matter has been declared exclusive, and not subject to review, our right to control its proceedings arises from the fact, that the inferior judicatory has exceeded its powers. We interfere, because the inferior court has gone beyond its province, and has by doing so lost the protection of the statute under which it possesses exclusive jurisdiction.

"I should no more think of disturbing a decision of the supreme ecclesiastical court in an ecclesiastical matter, than I should think of disturbing the decisions of the Courts of Justiciary or Exchequer in a matter falling within their respective provinces. These courts may, in our opinion, have gone wrong in rejecting evidence which we would have received; but because there happened to be a diversity of opinion as to the propriety of rejecting that evidence, could it be maintained that it was competent to seek a remedy in this Court?

"Where any court possesses an exclusive jurisdiction, supreme within its province, any question arising within that province must be exhausted and brought to a close before that tribunal. Here the offence is ecclesiastical, the procedure is ecclesiastical, and the whole matter was competently dealt with by the supreme ecclesiastical court. If we are not entitled to review a sentence on its merits—even in the extreme case, that it is plainly against all principles of law and justice—still less can we interfere with any of the steps of procedure by which that sentence has been reached.

"Suppose that the sentence we are called upon to review had been pronounced by the presbytery, and that the complainer was asking for interdict against any further proceeding until these witnesses had been admitted, would not the answer have been that he should go to the tribunal appointed to dispose of such matters—that his remedy lay in the ecclesiastical court through all its gradations? If there be no remedy in

that case, neither is there any here. If a great wrong is to be redressed, the sooner it is corrected the better. We could not do it in the case supposed, because we have no jurisdiction—still less can we do it here. It would be a most dangerous precedent to entertain this application. . . .

"I give this opinion with greater confidence, because in the memorable cases of Auchterarder and Strathbogie, in which I had the misfortune to differ from the majority of the Court, I was inclined to take the wider view of the ecclesiastical jurisdiction. I am bound to hold that these cases were rightly decided; but what was the ground on which the Court interposed? It was not because they thought themselves entitled to interfere with the proper ecclesiastical jurisdiction of the Church courts, but because they held that the ecclesiastical courts were going out of their province, and were touching matters which were properly questions of civil right. That ground went to this, that in those questions, viewed as questions of civil right, the Church court was no tribunal at all."

NOTE D.

DECISIONS OF THE ENGLISH PRIVY COUNCIL IN CASES OF DOCTRINE AND HERESY.

A most valuable 'Collection of the Judgments of the Judicial Committee of the Privy Council in Ecclesiastical Cases relating to Doctrine and Discipline' has been published by the Bishop of London (Murray, 1865), edited, under his lordship's direction, by the Hon. Mr Brodrick, barrister-at-law, and by the Rev. Mr Fremantle, the bishop's chaplain. The object of the publication is stated in Dr Tait's preface to be to present "the series of those judgments which the Final Court of Appeal from the Ecclesiastical Tribunals in England has pronounced in causes relating to doctrine and discipline since the Court assumed its present constitution" — that is, since the year 1833. The introduction gives a history of the right of appeal to the sovereign in English ecclesiastical cases, and of the various ways in which this has been exercised, down to the constitution of the present Court; and it observes that "there are a few leading principles which have been enunciated in the decisions of the committee, and by which the Court may be considered to be bound. The most important and comprehensive of these are to be found in the judgments in cases of doctrine—viz., those of Mr Gorham and Mr Heath, and of Dr Williams and Mr Wilson."

I. THE GORHAM CASE.

I am indebted to the editors of this volume (page 64) for the following summary of the principles laid down in the Gorham case, given nearly

in the exact words of the judgment: "And it must be remembered that this case, being the first in which the limits of clerical liberty, in matters of doctrine, were brought under the cognisance of the Judicial Committee, has been cited ever since as the leading case on the construction of the formularies of the Church of England in proceedings involving questions of a like nature."

The positions so laid down are as follows:—

"1. The question which the Court has to consider is, not whether the opinions impeached are sound or unsound, but whether they are contrary and repugnant to the doctrines which the Church of England, by its Articles, Formularies, and Rubrics, requires to be held by its ministers.

"2. The Court applies to the Articles and Liturgy the same principles of construction which are by law applicable to all written instruments, assisted only by such external or historical facts as it may find necessary to enable it to understand the subject-matter to which the instruments relate, and the meaning of the words employed.

"3. In all cases in which the Articles considered as a test admit of different interpretations, it must be held that any sense of which the words fairly admit may be allowed, if that sense be not contradictory to something which the Church has elsewhere allowed or required.

"4. If there be any doctrine on which the Articles are silent or ambiguously expressed, so as to be capable of two meanings, we must suppose that it was intended to leave that doctrine to private judgment, unless the Rubrics and Formularies *clearly* and *distinctly* decide it.

"5. Devotional expressions (in the Services) involving assertions, must not, as of course, be taken to have an absolute and unconditional sense. The meaning must be ascertained by a careful consideration of the nature of the subject, and the true doctrine applicable to it.

"6. The whole Catechism requires a qualified or charitable construction. The Services abound with expressions which must be taken in a charitable or qualified sense, and cannot, with any appearance of reason, be taken as proofs of doctrine.

"7. The Court does not affirm that the doctrines and opinions of eminent divines can be received as evidence of the doctrine of the Church of England; but their conduct, unblamed and unquestioned as it was, proves at least the liberty which has been allowed of maintaining such doctrine."

The following are some of the more important parts of the judgment in this case, as delivered by Lord Langdale on the 8th of March 1850:—

"These being, as we collect them, the opinions of Mr Gorham, the question which we have to decide is, not whether they are theologically sound or unsound—not whether upon some of the doctrines comprised in the opinions, other opinions opposite to them may or may not be held with equal or even greater reason by other learned and pious ministers of the Church; but whether these opinions now under our consideration are contrary or repugnant to the doctrines which the Church of England, by its Articles, Formularies, and Rubrics, requires to be held by its minis-

ters, so that upon the ground of those opinions the appellant can lawfully be excluded from the benefice to which he has been presented.

"This question must be decided by the Articles and the Liturgy; and we must apply to the construction of those books the same rules which have been long established, and are by law applicable to the construction of all written instruments. We must endeavour to attain for ourselves the true meaning of the language employed, assisted only by the consideration of such external or historical facts as we may find necessary to enable us to understand the subject-matter to which the instruments relate, and the meaning of the words employed.

"In our endeavour to ascertain the true meaning and effect of the Articles, Formularies, and Rubrics, we must by no means intentionally swerve from the old-established rules of construction, or depart from the principles which have received the sanction and approbation of the most learned persons in times past, as being on the whole the best calculated to determine the true meaning of the documents to be examined. If these principles were not adhered to, all the rights, both spiritual and temporal, of her Majesty's subjects would be endangered.

"As the subject-matter is doctrine, and its application to a particular question, it is material to observe that there were different doctrines or opinions prevailing or under discussion at the times when the Articles and Liturgy were framed, and ultimately made part of the law: but we are not to be in any way influenced by the particular opinions of the eminent men who propounded or discussed them; or by the authorities by which they may be supposed to have been influenced; or by any supposed tendency to give preponderance to Calvinistic or Arminian doctrines. The Articles and Liturgy as we now have them must be considered as the final result of the discussion which took place;—not the representation of the opinions of any particular men, Calvinistic, Arminian, or any other; but the conclusion which we must presume to have been deduced from a due consideration of all the circumstances of the case, including both the sources from which the declared doctrine was derived, and the erroneous opinions which were to be corrected.

"It appears from the resolutions and discussions of the Church itself, and from the history of the time, that from the first dawn of the Reformation, until the final settlement of the Articles and Formularies, the Church was harassed by a great variety of opinions respecting baptism, and its efficacy, as well as upon other matters of doctrine.

"The Church, having resolved to frame Articles of faith, as a means of avoiding diversities of opinion, and establishing consent touching true religion, must be presumed to have desired to accomplish that object as far as it could, and to have decided such of the questions then under discussion as it was thought proper, prudent, and practicable to decide. But it could not have intended to attempt the determination of all the questions which had arisen or might arise, or to include in the Articles an authoritative statement of all Christian doctrine; and in making the necessary selection of those points which it was intended to decide, we

may be allowed to presume that regard was had to the points deemed most important to be made known to, and to be accepted by, the members of the Church, and to those questions upon which the members of the Church could agree, and that other points and other questions were left for future decision by competent authority, and, in the mean time, to the private judgment of pious and conscientious persons.

"Under such circumstances, it would perhaps have been impossible, even if it had been thought desirable, to employ language which did not admit of some latitude of interpretation. If the latitude were confined within such limits as might be allowed without danger to any doctrine necessary to salvation, the possible or probable difference of interpretation may have been designedly intended, even by the framers of the Articles themselves; and in all cases in which the Articles considered as a test admit of different interpretations, it must be held that any sense of which the words fairly admit may be allowed, if that sense be not contradictory to something which the Church has elsewhere allowed or required; and in such a case, it seems perfectly right to conclude that those who imposed the test, command no more than the form of the words employed in their literal and grammatical sense conveys or implies; and that those who agree to them are entitled to such latitude or diversity of interpretation as the same form admits.

"If it were supposed that all points of doctrine were decided by the Church of England, the law could not consider any point as left doubtful. The application of the law, or the doctrine of the Church of England, to any theological questions which arose, must be the subject of decision; and the decision would be governed by the construction of the terms in which the doctrine of the Church is expressed—viz., the construction which on the whole would seem most likely to be right.

"But if the case be, as undoubtedly it is, that in the Church of England many points of theological doctrine have not been decided, then the first and great question which arises in such cases as the present is, whether the disputed point is or was meant to be settled at all, or whether it is left open for each member of the Church to decide for himself according to his own conscientious opinion. If there be any doctrine on which the Articles are silent or ambiguously expressed, so as to be capable of two meanings, we must suppose that it was intended to leave that doctrine to private judgment, unless the Rubrics and Formularies clearly and distinctly decide it. If they do, we must conclude that the doctrine so decided is the doctrine of the Church. But, on the other hand, if the expressions used in the Rubric and Formularies are ambiguous, it is not to be concluded that the Church meant to establish indirectly as a doctrine that which it did not establish directly as such by the Articles of faith—the code avowedly made for the avoiding of diversities of opinion, and for the establishing of consent touching true religion."

Again :—

"This Court, constituted for the purpose of advising her Majesty in

matters which come within its competency, has no jurisdiction or authority to settle matters of faith, or to determine what ought in any particular to be the doctrine of the Church of England. Its duty extends only to the consideration of that which is by law established to be the doctrine of the Church of England, upon the true and legal construction of her Articles and Formularies; and we consider that it is not the duty of any court to be minute and rigid in cases of this sort. We agree with Sir William Scott in the opinion which he expressed in Stone's case, in the Consistory Court of London: 'That if any article is really a subject of dubious interpretation, it would be highly improper that this Court should fix on one meaning, and prosecute all those who hold a contrary opinion regarding its interpretation.'"

II. MR HEATH'S CASE.

The next important case was that of Heath *v.* Burder, 1860-62. Lord Cranworth, in commencing to deliver the judgment, said:—

"It may be well to premise that the offence charged against Mr Heath, though of an ecclesiastical character, is one strictly defined by statute. He is accused of having, in violation of an Act of Parliament, propounded doctrine contrary to that laid down in certain of the Articles of Religion. In investigating the justice of such a charge, we are bound to look solely to the statute and the Articles. It would be a departure from our duty if we were to admit any discussion as to the conformity or nonconformity of the Articles of Religion, or any of them, with the Holy Scriptures. The statute forbids the promulgation of any doctrine contradicting the Articles. It leaves no discretion. All, therefore, which we have to do is, first, to ascertain, on the ordinary principles of construction, what is the true meaning of any of the Articles alleged to be infringed; next, what is the fair interpretation of the language used by Mr Heath; and then, finally, to decide whether, by his language so construed, he has or has not put forward doctrine which contradicts the Articles.

"These are the principles of decision which the Dean of the Arches laid down, and we think most correctly laid down, as those by which he ought to be governed, and they must also guide us."

The points decided in this case are stated as follows:—

"As to the sufficiency of the accusation:—

"In a proceeding under 13 Eliz., c. 12, being a penal statute, it is necessary that, besides the extracts from the writings of the accused person, the articles of charge should contain a statement of those portions of the Thirty-nine Articles of Religion which he is alleged to have contravened, and a specification of the unsound doctrine which he is alleged to have maintained.

"But if a single distinct passage complained of contains a plain meaning which can admit of no doubt, it may be sufficient to set it out, and state that it is directly contrary to such one or more of the Thirty-nine Articles as are conceived to be opposed to it.

"The judgment upon the merits of the case decides the following points :—

"1st, It is immaterial, in a general charge of publishing false doctrine in sermons, whether the sermons were actually preached or not.

"2d, The word 'advisedly,' in 13 Eliz., c. 12, s. 2, means not 'intentionally,' or 'avowedly,' but 'deliberately.'

"3d, It is the duty of the Court, in considering a charge of contravening the Articles of Religion, to satisfy itself, (1) As to the meaning of the article alleged to be contravened, (2) As to the meaning fairly to be put on the language of the accused person.

"4th, It is not necessary, in order to bring a clergyman within the Statute 13 Eliz., c. 12, that the Court should distinctly comprehend the exact bearing of the whole of his opinions on the subject as to which false doctrine is imputed to him. It is sufficient that he should have propounded doctrine directly contrary to the doctrine laid down in the Articles.

"5th, To obtain the benefit provided by the Statute 13 Eliz., c. 12—viz., the benefit of retractation—the clergyman accused must hand in to the Court a formal revocation of those parts of his published writings which have been adjudged heretical."

III. THE 'ESSAYS AND REVIEWS.'

The last great doctrinal case is that of the 'Essays and Reviews'—Williams *v.* the Bishop of Salisbury, and Wilson *v.* Fendall, 1864. The two archbishops dissented from those parts of the judgment pronounced by Lord Chancellor Westbury, which found that certain opinions as to the inspiration and authority of the Bible were not penal in a clergyman. But the whole members of the Court, lay and clerical, seem to have concurred in the following rules as to its procedure, which we have therefore to add to those already expressed in the cases of Mr Gorham and Mr Heath :—

"1. The Court does not pronounce upon the general tendency of writings from which extracts are brought before it, but only upon the extracts themselves.

"2. Proceedings under the ecclesiastical law for the correction of clerks are of the nature of criminal proceedings, and it is necessary that there should be precision and distinctness in the accusation.

"3. The accuser is, for the purposes of the charge, confined to the passages which are included and set out in the articles as the matter of the accusation ; but it is competent to the accused party to explain from the rest of his work the sense or meaning of any passage or word that is challenged by the accuser.

"4. The Court cannot ascribe to the Church any rule or teaching which it does not find distinctly stated, or which is not plainly involved in, or to be collected from, that which is written.

"5. The meaning to be ascribed to the passages extracted from the

writings of accused parties must be that which the words bear, according to the ordinary grammatical meaning of language; and the writer cannot be held responsible for more than is directly involved in his assertions.

"6. The accuser having specified the portions of the Formularies which he thinks to have been contravened, the Court is confined to the consideration of these materials."

These cases have proceeded chiefly upon the Statute 13 Elizabeth, c. 12, passed in the year 1558, and to which we have referred in an earlier chapter as remarkably parallel to the early Scottish Act 1572, c. 46—each of them enforcing subscription to the Articles of Religion, and adherence to the doctrine therein contained, in nearly the same phraseology. We give the English Act below, and the reader can compare it with the Scottish statute already printed on page 49.

The English Act is of course immensely more important than its northern counterpart—if, indeed, the latter is not quite obsolete. The Act 13th of Elizabeth, along with the Act of Uniformity (13th Charles II.), are the only two statutes specially confirmed in the "Act for Securing the Church of England as by Law established," which was introduced into the Treaty of Union to balance the Scottish Act of Security; and it may be held, therefore, to correspond to our Act 1690, in so far as it "ratifies the Confession of Faith," and to include the Act 1693 as to subscription; while the Act of Uniformity may have more analogy to the remainder of the former statute, "Settling Presbyterian Church Government." This Act seems to be variously entitled,—"To Reform Disorders touching the Ministers of the Church," and sometimes, as in the Union statute,

"An Act for the Ministers of the Church to be of Sound Religion" (13 Eliz., c. 12).

"Be it enacted, that every person under the degree of a bishop, which doth or shall pretend to be a priest or minister of God's Holy Word and sacraments, by reason of any forme of institution, consecration, or ordering, then the forme set forth by Parliament in the time of the late king of most worthie memorie, King Edward the Sixt, or now used in the raigne of our most gracious soveraigne lady, before the feast of the Nativitie of Christ next following, shall, in the presence of the bishoppe or gardian of the spiritualities, of some one dioces where he hath or shall have ecclesiasticall living, declare his assent, and subscribe to all the Articles of Religion which onely concerne the Confession of the true Christian faith, and the doctrine of the sacraments, comprised in a booke imprinted, intituled 'Articles whereupon it was agreed by the archbishops and bishops of both provinces, and the whole clergie, in the convocation holden at London in the yeare of our Lord God a thousand five hundred sixtie and two, according to the computation of the Church of England, for the avoyding of diversities of opinions, and for the establishing of consent

touching true religion, put forth by the queene's authoritie :' and shall bring from such bishop or gardian of spiritualities in writing under his seale authentike a testimoniall of such assent and subscription : and openly on some Sunday in the time of the publique service afore noone, in every church where, by reason of anie ecclesiasticall living, he ought to attend, read with the said testimoniall, and the saide Articles, upon paine that every such person which shall not before the said feast doe as is above appointed, shall be (*ipso facto*) deprived, and all his ecclesiasticall promotion shall be voide, as if he then were naturally dead. And that if any person ecclesiasticall, or which shall have ecclesiasticall living, shall advisedly maintaine or affirme any doctrine directly contrary or repugnant to any of the said Articles, and being convented before the bishop of the diocesse, or the ordinarie, or before the queene's highnesse Commissioners in Causes Ecclesiasticall, shall persist therein, or not revoke his errour, or after such revocation, eftsoones affirme such untrue doctrine ; such maintaining, or affirming and persisting, or such eftsoones affirming, that be just cause to deprive such person of his ecclesiasticall promotions. And it shall be lawfull to the bishoppe of the diocesse, or the ordinarie, or the said commissioners, to deprive such person so persisting, or lawfully convicted of such eftsoones affirming, and upon such sentence of deprivation pronounced he shall be indeede deprived. And that no person shall hereafter be admitted to anie benifice with cure except he then be of the age of three-and-twentie yeares at the least, and a deacon, and shall first have subscribed the saide Articles in presence of the ordinarie, and publiquely reade the same in the parish church of that benefice, with declaration of unfeined assent to the same. And that every person after the end of this session of Parliament, to be admitted to a benifice with cure, except that within two months after his induction he doe publiquely reade the said Articles in the same church whereof he shall have cure, in the time of common prayer there, with declaration of his unfeined assent thereto, and be admitted to minister the sacraments within one yeare after his induction, if he be not so admitted before, shall be upon every such default, *ipso facto*, immediately deprived. And that no person now permitted by anie dispensation, or otherwise, shall retain anie benifice with cure, being under the age of one-and-twentie yeares, or not being deacon at the least, or which shall not be admitted as is aforesaid, within one yeare next of the making of this Act, or within sixe months after hee shall accomplish the age of twentie-four yeares, on paine that such his dispensation shall be meerely void. And that none shall be made minister, or admitted to preach, or minister the sacraments, being under the age of foure-and-twentie yeares, nor unless hee first bring to the bishoppe of that diocesse, from men knowne to the bishoppe to be of sound religion, a testimoniall both of his honest life and of his possessing the doctrine expressed in the said Articles ; nor unless he be able to answer and render to the ordinary an account of his faith in Latine, according to the said Articles, or have speciall gift and abilitie to be a preacher ; nor shall be admitted to the order of deacon or ministerie, unlesse he shall first subscribe to the said

Articles. And that none hereafter shall be admitted to anie benifice with cure of or about the value of £30 yarely in the queene's bookes, unlesse he shall then be a Batchelor of Divinitie, or a preacher lawfully allowed by some bishoppe within this realme, or by one of the universities of Cambridge or Oxenford; and that all admissions to benefices, institutions, and inductions to be made of any person contrarie to the forme or any provision of this Act, and al tolerations, dispensations, qualifications, and licences whatsoever to be made to the contrarie hereof, shall be meerely void in law, as if that never were; provided alway, that no title to conferre or present by lapse shall accrue upon any deprivation, *ipso facto*, but after six months, after notice of such deprivation given by the ordinarie to the patron."

CHAPTER V.

THE LEGAL THEORY OF NON-ESTABLISHED CHURCHES.

THAT law has to do with Established Churches, and may have to do with their creeds, is obvious and intelligible. But it does not at first sight appear that law has anything to do with Churches which are not established; and lawyers on the one hand, and churchmen on the other, would be well pleased if the separation between the two could be made permanent and complete. Such a separation is impossible, under any conceivable jurisprudence; and it will be our duty, in the remainder of this volume, to bring out how, in the jurisprudence of Scotland, the legal relation of such Churches to their creeds already forms a chapter of much importance and of great difficulty.

Toleration was long unknown in the law, as in the history, of Scotland. The intense sentiment of national unity was strongly against it. The nation was one, and the Church became one. The Church claimed to be the Church of Christ in the realm, exclusively and of divine right. The State so far acknowledged it as even to declare statutorily that those who did not believe its doctrine and communicate in its ordinances were "no members of the Kirk of Christ so long as they keep themselves so divided from the society of Christ's body;" and the sentence of excommunication, pronounced by the Church on heresy in the exercise of its own jurisdiction, was followed by civil pains and penalties. The

Church brooked no rivals, and tolerated no individual and far less any collective dissent. Claiming independence of the State, it at the same time demanded full and exclusive recognition from it; and it used against all dissent both its proper and its borrowed power. The war between Presbytery and Episcopacy was so bitter, very much because neither party contemplated the possibility of their coexisting side by side. The obligations of the National Covenant of course greatly strengthened the feeling of religious unity; and the Solemn League and Covenant came into existence just at the time when the first symptoms of modern disintegration began to be felt in England. The Scottish Commissioners went to the Westminster Assembly to work out the "covenanted uniformity in religion;" and the new doctrine of the "toleration of sects" which met them there they most earnestly resisted.[1] The restoration of Charles II. brought back Episcopacy to both England and Scotland; but what was soon acquiesced in by the former kingdom was felt as a foreign yoke in the latter, and in 1688 the royal institute was overthrown in a day. Presbytery was by statute declared to be the only government of Christ's Church within the kingdom; and the dissenting, or nonconformist, or seceding Churches which now exist, commenced their course without any reason or theory being struck out upon which the law could recognise their existence.

The Episcopal Church in Scotland claims precedence as the most ancient of these bodies, as having been once established, and as still standing over against all the others in the possession of a polity held essential by so much of Christendom, and held dear by so much more. Identical before the Revolution with the Presbyterians in ritual and creed, and seemingly willing at that crisis to have surrendered whatever elements of individuality it did possess, it was driven into independence against its will; and, in spite of the curious infelicity with

[1] See Baillie's Letters, *passim*.

which it has attached itself to every failing cause and every unpopular name in the history of Scotland, it has survived to represent a great ecclesiastical principle, and possibly to enact a more important part in the future. Coeval with it, or at least like it dating a separate existence from the Revolution, we may note the REFORMED PRESBYTERIAN CHURCH, or Cameronians, who would not enter the Established Church on account of the alleged defects in its reconstitution, and whose long contest with the party which most resembled them in the Establishment as to the legal import of the Revolution Settlement has now, after one hundred and fifty years, been decided in favour of the malcontents by the courts of law themselves. Neither of these two eldest Churches was in a position to familiarise the law with the doctrine of toleration. The Cameronians objected to the doctrine altogether, and the Episcopalians had the suspicion of disloyalty added to the fact of their dissent. All the more important was the Act 10th of Queen Anne, cap. 7, which we have already had occasion to notice, and which for the first time, and in the interest of the Scottish Episcopalians alone, forced upon our courts the recognition of *a Church* other than *the Church* which the law established, and extended to this Church in its worship and other functions a certain measure of positive protection. This, the only Scottish Toleration Act, we give in full in the appendix.[1]

But these Churches of the Revolution were not the most important of the nonconformist bodies of Scotland. For the last century the SECESSION CHURCH and the RELIEF CHURCH, with their various subdivisions,[2] now generally merged into the one "United Presbyterian Church of Scotland," were the

[1] See Note C.

[2] Scotland has never been able to plead (in the words of the Compte de Narbonne to Napoleon I.), "Sire, il n'y a pas assez de réligion en France *pour en faire deux*;" and the divisions of Scotch dissent are so numerous as to make a map absolutely necessary. Accordingly we give one on a subsequent page, reference to which at different points may be found of use.

most important body of Scottish dissenters — if indeed we may apply to them such a name. For the great peculiarity of Scottish dissent has been, that it was not properly dissent at all, and earnestly repudiated the name. Not merely was it the same in doctrine, discipline, and worship, with the Church of Scotland, but the desire to maintain that doctrine, discipline, and worship unimpaired was the cause (at least in the case of the earlier or Secession Church of 1733) of its very existence. It separated—or, in its own phrase, *seceded*—from the majorities of the Church, from a regard to that Church's honour and faithfulness; and its bitterness was the perverted flow of love. The word they chose was one which should express not dissent from true doctrines, but separation from unfaithful men; not an abnegation of their old tenets, but merely a change from their former surroundings. The Scottish secessions were eminently conservative—looking back to a golden age of Church purity and independence; and the greatest of all, that of 1733, was eminently so. We must refer to histories of the time for the narrative how patronage and other grievances gave occasion to the movement; but sufficient evidence will be found in their subjoined manifesto,[1]

[1] "We hereby adhere to the protestation formerly entered before this Court, both at their last meeting in August, and when we appeared first before this meeting; and further, we do protest in our own name, and in the name of all and every one in our respective congregations adhering to us, that, notwithstanding of this sentence passed against us, our pastoral relation shall be held and reputed firm and valid; and likewise we protest that, notwithstanding our being cast out from ministerial communion with the Established Church of Scotland, we still hold communion with all and every one who desire with us to adhere to the principles of the true Presbyterian Covenanted Church of Scotland, in her doctrine, worship, government, and discipline; and particularly with every one who are groaning under the evils, and who are affected with the grievances we have been complaining of, who are in their several spheres wrestling with the same. But in regard the prevailing party in this Established Church, who have now cast us out from ministerial communion with them, are carrying on a course of defection from our reformed and covenanted principles, and particularly are suppressing ministerial freedom and faithfulness in testifying against the present backslidings of the Church, and inflicting censures on ministers for witnessing, by protestation or otherwise, against the same:

that they carried the old passion for Scottish Church purity along with that (equally characteristic of their party) for Church independence. But as years passed away, the latter principle gradually became stronger; and in the second Secession, when Mr Gillespie in 1752 originated the Relief Church, the doctrine of the spirituality of the Church, and its freedom from State control, had acquired preponderance. Gillespie himself had originally signed the chapter of the Confession of Faith as to the power of the civil magistrate in matters of religion with an explanation or modification. He was deposed by the Assembly in Dr Robertson's time, because he refused to take a personal part in ordaining a presentee over a reclaiming congregation, and the majority of the Church had determined to exact on this point not merely passive, but active and individual obedience. The Churches founded by himself and his friends, being consequently very much Churches of *relief* from the supposed despotism of an Established Church, laid more stress on freedom of conscience, and less on the old Scottish uniformity, than had hitherto been done. And as years passed on, the contest of those in both communions who had left the Church naturally came to be not with the Moderate party, but with those who, holding the same principles within the Church with themselves, had yet not seceded. Men who held spiritual independence, whether within or without the Established Church, agreed in condemning the practical administration of the matters of that Church by the dominant party, as being a denial of that principle. But

Therefore we do, for these and many other weighty reasons to be laid open in due time, protest that we are obliged *to make a secession from them*, and that we can have no ministerial communion with them till they see their sins and mistakes, and amend them. And in like manner we protest that it shall be lawful and warrantable for us to exercise the keys of doctrine, discipline, and government, according to the Word of God, and *Confession of Faith*, and the principles and constitution of the Covenanted Church of Scotland, as if no such censure had been passed upon us. Upon all which we take instruments; and we hereby appeal to the first free, faithful, and reforming General Assembly of the Church of Scotland." See 'History of the Secession Church,' by the Rev. John M'Kerrow, D.D.

while those who remained in held this to be merely an abuse, those who had left soon came to argue that it was more or less essential to the very existence of an Establishment. A great revolution of opinion on this point passed over the minds of the large bodies of Seceders—a crisis which, as we shall see in the next chapter, has left considerable traces in the precedents of our law. The larger masses of these Churches became Voluntary, though minorities objected to the change, and split off to emphasise their adherence to the old doctrine. But the majorities received what was called the "New Light" hospitably, and a great controversy arose on the principle of Establishments, which in this century swelled into a storm. It was at last about to spend itself, when a strange climax occurred to the whole history. The spiritual independence party *within* the Established Church obtained the majority, and immediately, as we have seen, used their power to carry out their ancient principles. The result was that, being met and challenged by the law, they preserved indeed their own consistency at the expense of extreme sacrifice, but one great point of the argument in the question with the Voluntaries was finally decided against them. We observed above that the conditions of the Revolution Settlement have now been decided by law to be what the Cameronians had ever since 1688 held them. We must add that the whole conditions of Establishment have also been decided by law to be what the later Seceders, as distinguished from the elder, accused them of being. The principle of these decisions, as expressed in repeated powerful opinions of the majority of the Court, is, that not merely the Revolution Settlement, but the whole establishment of the Church of Scotland, *ab initio*, was upon grounds irreconcilable with the claims of the Church party, as these were put forward by Andrew Melville in the Book of Discipline, and have been held since by all the sections above enumerated. The Free Church no doubt left upon the table of the Court and the Legislature its "Protest" that this

was a misreading of the legislation of Scotland. But even the Free Church does not venture to deny that this reading has now been given, and that it has been given authoritatively by the functionaries who are entitled to declare what the meaning and intention of the law has been throughout all those ages. The protest of the Free Church is, that the conditions of establishment have been changed. But the doctrine of law is, that the conditions of establishment have really been ever since 1560 what they are now defined to be, and that the connection of the Church of Scotland upon these conditions with the State is indissoluble. One step more. No one can carefully study the judgments following the Auchterarder case without seeing that their principle is not only that there has been, but that there *can* be, no establishment of a church by the State except on the principles of subordination there laid down. It is clearly put in many of these, and it is implied in all of them, that the old claim of Church independence and co-ordinate jurisdiction is absolutely unrealisable except on the condition of Voluntaryism.—If the defeat of 1843 has been claimed by the Free Church as a moral triumph, it may certainly be claimed as a legal triumph by its old adversaries the Voluntaries.

Reverting, however, to the earlier days of these dissenting Presbyterians, it is obvious that, so long as they retained a passionate attachment to the old Church of Scotland, and merely resented its want of that purity and independence which in an unwilling separation they exhibited themselves, the Courts had rather a difficult task to perform in dealing with them. Accordingly the manner in which the law of Scotland dealt at first with such bodies was peculiar. It vacillated between the attempt to ignore them altogether, and (when this was impossible) the abandonment to them of everything they claimed. The Courts had of course in their statutory confessions the definition of a Church; and they knew generally that, high as the rights of this spiritual body were construed

to be by the Established Church, the view taken of these by non-established (Presbyterian) bodies was higher still. Consequently, when in some of the cases they were forced to acknowledge the existence of these communities, they treated their jurisdiction in their own matters ecclesiastical as undoubted and axiomatic—a public fact, not admitting denial, and not needing proof.[1] But in the earlier cases a different feeling—the idea that law was bound wholly to ignore them—finds a place. Thus, in a very early case,[2] in 1752, it was

[1] This seems to have been the case in Auchincloss *v.* Black, March 7, 1791, reported by Baron Hume (Dic. 595), and mentioned in the report of the case of Dunn *v.* Brunton (F. C. No. 14, p. 29; and Morrison, *voce* Society, App. part 1, p. 16). Here "Lord Justice-Clerk Macqueen refused to review the proceedings of the Associate Synod, so far as they regarded an ecclesiastical offence"—a decision the weight of which is very greatly enhanced by the converse proceeding "in an advocation from the sheriff between the same parties," in which the same judge "sustained the competency of certain proceedings respecting the possession of the meeting-house glebe and manse, and admitted the relevancy of an investigation as to which of the parties was supported by a majority of the congregation." In the former or ecclesiastieal offence case, a deposed Associate Burgher minister "argued the point of jurisdiction," but the judges threw out the case as incompetent unless he proved malice.

There is a similar case, also reported by Baron Hume (p. 637), viz., Grieve *v.* Smith, where the Lords thought "everything must be laid aside which had passed, judicially in some measure, at the meetings of the congregation, and according to the rules and usages" of a Church of Dissenters, who either called themselves, or were called, by the eccentric but honourable name of Bereans. Of these modern Bereans, the reporter says (seemingly without any idea that the same might have been the case with their Macedonian prototyes), "It is a fundamental rule of their policy and discipline that every member shall watch over the moral and religious deportment of his brethren, and submit the matter, if he find anything amiss, to the cognisance of the congregation, whose decision shall be final."

[2] Gib's case — reported by Lord Elchies under the name of Bryson and others *v.* Wilson and others—of date June 30, 1752. Here the congregation of the "Seceding Meeting-House at Bristo," Edinburgh, called upon the trustees in whom the building was vested to denude in favour of new trustees named by them, in terms of powers to that effect in the title. They refused. The new trustees sued. The old objected "that the congregation was not *nomen juris*, and they were not a body corporate, neither was this seceding session, and therefore could neither sue nor be sued;" and "the Lords found that the pursuers had no legal title to pursue, their constituents being no legal congregation." On the 8th of July of the same year "the like was found" in the case of Pollock *v.* Maxwell (Eaglesham congregation), also reported in

found that a dissenting Church "was no legal congregation," and therefore that its trustees had no title to sue; while in another important one to be noticed in next chapter, the ignoring not now of the congregation, but of the whole body of the sect, was ably urged and as ably opposed by some of the greatest names that have ever adorned our Bar.[1] And even when the judges did come to recognise the tolerated bodies as existing, their refusal to intermeddle with Church matters by no means took the form of respect for the privileges of such sects. On the contrary, their utterances often remind us of that most characteristically Roman speech of the Proconsul of Achaia, "If it were a matter of wrong or wicked lewdness, O ye Jews! reason would that I should bear with you; but if it be a question of words and names and of your law, look ye to it—*I will be no judge of such matters.*" Yet all these various causes combined to bring about the same result—that in the earlier cases of the Scottish Court's dealing with non-established and tolerated Churches, they avoided interfering with the ecclesiastical acts and jurisdiction. But they did so without much inquiry as to what the ground of that jurisdiction was, or upon what legal theory it could be supposed to exist.

And even when the Courts began to deal with the interests of such religious bodies, it was only gradually that the principles now recognised in our law with regard to them were settled. The

Elchies's Decisions. The principle of these cases was reversed in Wilson *v.* Jobson, 1771 (Morrison, 14555); and Allan *v.* Macrae, 1791 (Morrison, 14583).

[1] Davidson *v.* Aikman (Craigdallie or Perth case). We shall have occasion very carefully to review in the next chapter the decision arrived at in this case in the House of Lords, which did not at all turn on the toleration or recognition of dissenting Churches. But in the Faculty Collection for the year 1805 (No. 216, p. 481), and in Morrison's Decisions, 14584, a most interesting discussion in the Court of Session is reported, in which the recognition of these sects, as continuous if not corporate bodies, was vigorously debated. Most of these cases are to be found under the word "Society" in Morrison; and in the Appendix to that title (p. 10), another equally interesting discussion is reported in the case of Dunn *v.* Brunton—a case about the year 1794—F. C. No. 14, p. 29.

question, in particular, whether dissenting Churches are held in law to be mere voluntary associations founded on contract, or to be communities which at common law have a peculiar and public privilege of jurisdiction, has only recently been finally discussed and determined in Scotland, though in England it seems to have been long held as settled. And the farther questions, by what means such a contract may be proved, and how far it may when proved give a voluntary jurisdiction to bodies which without it have no authority, cannot be said to be yet settled in our law. And it will be found that these questions have a bearing on our subject. It has, no doubt, been in questions as to the destination of *property*, as we shall find afterwards, that the law as to the creed and principles of dissenting Churches has been chiefly elaborated; but the root and principle of that law—viz., the legal theory of what a Church, not established, is—has come out more in cases of jurisdiction; and we shall find it of advantage to review these in the first place.

The first case in which the *ground* of Church authority came to be discussed was that of a sentence by a bishop of the Scottish Episcopal Church, pronounced in very special circumstances.[1] An Episcopal congregation in Aberdeen, which for a century from 1722 had existed independently of any connection with the Scottish Episcopal Church (and which was described in its title-deeds as "a voluntary society, united under the sanction of the Act of Toleration"), at last, in 1841, entered into a deed of "voluntary union," by which, under certain conditions and safeguards for retaining their former modifications of doctrine and worship, and declaring that any violation of these conditions should put an end to the union, they agreed to join the Scottish Episcopal Church. Their clergyman also at the same time was admitted by the Bishop of Aberdeen, and came under a solemn obligation to acquiesce in

[1] Rev. Sir W. Dunbar *v.* Bishop Skinner, 3d March 1849, 11 D. 945.

the decisions of the Episcopal authorities in all questions falling under their spiritual jurisdiction, and not to appeal from their sentence to the civil court. Quarrels soon arose as to doctrine and practice, acts of the bishop were declared by the clergyman (Sir William Dunbar) to amount to violation of the deed of union, and he withdrew from the authority to which he had submitted; a step which was immediately followed by a sentence of deposition and almost excommunication on the part of Bishop Skinner, to which the widest publicity was given. An action of damages for defamation was raised by the clergyman, the first defence stated to which was the exclusive spiritual jurisdiction of the bishop. All the judges remarked on the peculiarity of the circumstances, as not raising the ordinary case of an ecclesiastical superior and inferior; but they at the same time took occasion, for the first time in Scotland,[1] to indicate what the principle of law should be not only in exceptional but in all other cases. "There exists in Scotland no Episcopal Church whatever," said Lord President Boyle, "except as a distinct sect, fully recognised and protected under the Toleration Act." And such a body, being constituted by agreement or contract, has, properly speaking, no jurisdiction—none at least that can be recognised by a court of law. "Jurisdiction," said Lord Fullerton, "necessarily implies the existence of a power conferred by the State, and vested in functionaries sanctioned for that purpose by the State. . . . In regard to the Protestant Episcopal Church of Scotland, it appears to me that this Court, administering the laws of the realm, can recognise no jurisdiction whatever as existing in any official of that communion. They enjoy, it is true, toleration, but merely as a body of private individuals united by particular religious views, and associated for the laudable purpose of promoting those views." On the question how far the contract may simulate jurisdiction, or may confer

[1] Lord Moncreiff had done this already, but only as Ordinary, in the case of Osborne afterwards referred to.

a factitious and voluntary power equivalent to jurisdiction, his lordship's views are guarded: "There is no doubt that all parties entering into an association for purposes not prohibited by law, may effectually bind themselves to submit without appeal to the determination of certain matters, and even to the infliction of certain censures, by the official authorities to whom such power is committed by the terms of the association; and if it could be instantly shown that, by the admitted or proved circumstances of this case, the defender had absolutely bound himself to submit to such a sentence as that for which he now seeks redress, the defence in the second plea in law might have been sustained, and the case sent out of Court." [1]

These views were destined to receive more careful consideration and more deliberate utterance in a case directed against the body whose very existence rested upon its claim to ecclesiastical jurisdiction and independence. Seventeen years after the High party in the Establishment finally left it, protesting that they were the true representatives of the *Free* Church of Scotland, one of their ministers was accused of misconduct in his presbytery, and the libel, partly sustained by the presbytery, but wholly refused by the synod, came by appeal to the Assembly. The Assembly, having all the evidence in the case in their hands in print, insisted on taking up the whole matter as it had originally come before the presbytery, and found the accused guilty to a considerably larger extent than the presbytery originally had done. This course was taken only after long reasoning on Church law and the *nobile officium* of the Assembly, the constitutional objections to it being strongly urged by Mr Macmillan, before the sentence, which was resolved upon by a majority, was pronounced.[2] He at once appealed to the civil court against a judgment which unquestionably drew

[1] 11 D. 962. See opinions in this case in the Appendix, Note D.

[2] His objection was, of course, that the Assembly was thus judging of what had never been appealed, and what was not competently before it.

after it results affecting his civil interests and emoluments, by presenting a Note of Suspension and Interdict. A copy of the Note of Suspension having been served upon the Assembly in ordinary form while it was still sitting, they instantly resolved "to cite Mr Macmillan to appear at their bar on Tuesday, the first day of June next, at twelve o'clock noon, to answer for his conduct thereanent." He appeared accordingly (preceded by a messenger-at-arms, who served upon the moderator a Summons of Reduction of the previous sentence, the interdict against its execution having been refused in the Bill Chamber), and being ordered by the Assembly to say (Yea or Nay, without explanation or defence) whether or not he had authorised the application to the civil court, he answered Yes; upon which, by the immediate and unanimous resolution of the Assembly, and "in respect of the reply so given," he was deposed on the spot from the office of the holy ministry.

This exceedingly characteristic proceeding[1] resulted in two actions of reduction and damages—reduction of the two sentences by the Assembly, and damages against it in respect of

[1] In the Assembly of 1581, the case of Robert Montgomery, minister of Stirling, accused of having accepted a bishopric from the Court against the Book of Discipline, was called, when a Messenger appeared, and handed to the moderator the king's letters from the Lords of Secret Council, forbidding the Assembly to take up the case on this ground. The Assembly appointed Montgomery to appear at ten o'clock next day, when he was accused, *inter alia*, of "raising and executing letters, procuring the letters by sinistrous information, for overthrowing the discipline of the Kirk," and "procuring a charge discharging the Assembly, under paine of horning, to proceed against him," found guilty, suspended, and appointed to be *excommunicated*. The sentence of excommunication was prevented at the time by his submission, but on his relapse was executed. The case is more than a parallel. Nothing can show more the extraordinary tenacity with which the Church party in Scotland holds to its history, than the fact that the Act of Assembly 1582, passed after Montgomery's affair, was quoted and founded upon by the Free Church in the Cardross case as of present authority. It enacts that no minister "make any appellation from the General Assembly to stop the discipline and order of ecclesiastical policy and jurisdiction granted by God's Word to the office-bearers within the Kirk, under the pain of excommunication summarily and without any process or admonition." See Calderwood's History (Wodrow edition), iii. 599; and Acts of Assembly.

each of them—and the two actions were subsequently conjoined. Partly from the strong feeling excited in Scotland by the *Cardross case* while it lasted, and partly from the confusion and failure into which the action as laid ultimately fell, the precise amount of gain from it to our law has not been accurately estimated. More has sometimes been found in it than was actually decided; while, on the other hand, it has been contended that nothing, or at least nothing of more than technical importance, was there laid down against the claims of Scotch dissenting Churches in general, and the Free Church in particular. This seems a mistake.

It was, in the first place, decided again, in the clearest way, that every Church in Scotland but the Established Church is to be regarded as a mere voluntary association for religious purposes, founded upon contract between the members, and that it therefore has, and can have, no proper jurisdiction. This point had not properly or purely arisen in the case of Skinner *v.* Dunbar; but it was now solemnly decided, in the face of the most strenuous opposition, raised not by an Episcopalian, but by a Presbyterian Church, appealing to the ancient conception of a church as imbedded in Scottish legislation; and this doctrine, together with the most wholesome rule that the Court will always insist on *examining* every ecclesiastical sentence complained of (whether they will thereafter judge of it or not),[1] was nearly all that was decided at the first hearing of the cause. On this occasion[2] the Church was ordered to produce the sentences complained of, reserving *all* its pleas against the right of the Court to judge of them when produced.

The second step in the case was more important, but it was a logical consequence of the principle already laid down. The

[1] The Toleration Act provides that the doors of the churches tolerated shall be not locked, barred, or bolted while the worship permitted is going on. An instructive analogy.

[2] Macmillan *v.* the General Assembly of the Free Church, 22 D. 290, 23d Dec. 1859. See Appendix, Note E, for some of the more important principles laid down on this occasion.

pleas of the Free Church in this case were of two kinds—some which were stated as common to it with all Christian Churches, and others which were founded on its own individual constitution. It pleaded, first, that, simply on the ground of its being *a church*, its church sentences could not be reviewed; and only thereafter went on to plead the special ground of its being the Free Church, with such and such a constitution. And the Court by their finding gave the greatest prominence to this distinction. The two general pleas of the defenders were as follows:—

"1. The sentences complained of being spiritual acts, done in the ordinary course of discipline by a Christian Church, tolerated and protected by law, it is not competent for the civil court to reduce them, and the action should therefore be dismissed.

"3. As the actions, in so far as they conclude for reduction of the sentences complained of, do not relate to any question of civil right, the actions cannot be maintained."

These two pleas were *repelled.*

Besides these general pleas, the defenders presented the following:—

"2. The pursuer, by becoming and continuing a minister of the Free Church, and by having voluntarily acknowledged and submitted himself to its authority in spiritual matters as final, cannot maintain the present actions, which should therefore be dismissed.

"5. As the sentences complained of were pronounced in the exercise of the authority belonging to the courts of the Free Church, as acknowledged by its members, and to which authority the pursuer had subjected himself, no decree for damages can be pronounced."

These pleas were *reserved.*

And they were reserved expressly on the ground "that the parties are not agreed as to the terms of the constitution of

the Free Church of Scotland."[1] That is, the pleas founded on public privileges of Churches were rejected, while those founding on private contract were retained. The pleas common to all Churches were disregarded, but those proper to the individual Church in question were reserved. This result was exactly what the legal principle already laid down demanded; and it was that also which might have been safely inferred from the current of decision before the disruption of the Church in 1843. The Court then steadily refused to listen to theories, whether drawn from Scripture or the Confession of Faith, as to what "a church" was, and demanded proof from statute or otherwise of what powers had been expressly given by the State to this particular institute. And in spite of chance hints thrown out to the contrary,[2] it was plain that a similar principle would guide its dealing with dissenting bodies. But it was fit that that Church which in the Establishment had maintained its supposed native and original rights with unparalleled boldness and power, should maintain the same position and suffer the same defeat as the self-constituted representative—not now of the Church of Christ established in Scotland, but of the Church of Christ pure and simple.

It is much to be regretted that the Cardross case did not go on farther,[3] so as to deal with the question how far the con-

[1] See Lord Jerviswoode's interlocutor, adhered to by the First Division, 19 July 1861, 23 D. 1314. Appendix, Note F.

[2] "If these gentlemen wish to maintain the situation of what they call a Christian Church, they would be no better off than the Catholic Church, or the Episcopal Church, or the Burghers or Antiburghers; but when they come to call themselves the Established Church, the Church of Scotland—what makes the Church of Scotland but the law?"—The Lord President in the second Auchterarder case, Kinnoull *v.* Ferguson, March 5, 1841, 3 Dunlop, 778.

[3] The fate of the Cardross case was curious. Being directed against the General Assembly of the Free Church as a body, and concluding for a formal reduction of their sentence, as well as damages, it excited the greatest opposition; and it was with difficulty that the Church defending agreed, even upon a reservation of all its pleas, to "satisfy production"—*i. e.*, formally to produce their sentence for the review of the Court—and it did so only after the statement from the Bench that

tract or constitution of the Free Church individually, as acceded to by her recalcitrant office-bearer, gave it authority—how far it was a "contract of jurisdiction." There is no doubt whatever that it would have turned out to be, in the intention of the parties, and as a contract between them, a contract of jurisdiction—a yielding to jurisdiction in the strict sense of the word.[1] This might be proved without difficulty in the case

the reduction was auxiliary to the civil claim for damages. At a later stage the Court, very much *proprio motu*, and before any inquiry as to what the constitution of the Free Church was had been gone into, pronounced that no action for damages could lie against an unincorporated body like the General Assembly, and that this part of the action must be dismissed; and farther, that the action of reduction, being only auxiliary to the claim of damages, fell to be dismissed likewise. Not only the dismissal, but the grounds of it, were to a certain extent satisfactory to the Church concerned, which has well earned a right to represent other Churches in questions of jurisdiction. An action of damages against *individual* office-bearers (provided malice be alleged, as was contemplated by Lord Colonsay when sitting as President in this case) seems always admissible, and affords no ground of umbrage to a Church. It was the action against the Assembly as such that exacerbated this contest, and the refusal to allow such an action, with the consequent rejection of the reduction, is gratifying to churchmen. But the comparison of the earlier and closing part of this protracted case yields no clear result for lawyers.

[1] The only doubt that has arisen on this subject is from the occasional use of the word *jurisdiction* in the sense of what has been called *coercive* jurisdiction—a right not only *jus dicere*, but also to enforce the law declared. And it is argued this cannot even be pretended to by unestablished tribunals.

Assuming, for the sake of argument, that this is contained in the proper meaning of the word, there is no difficulty in seeing how the Apostle John, or Polycarp, could claim jurisdiction within the Christian Church as truly as any of their successors recognised by Constantine. Their judgment, or that of the humblest Christian Church, is not necessarily futile because it is not enforced by civil law. "Whatsoever ye bind on earth shall be bound in heaven." It is not necessary that the law should believe this; it is only necessary that the law should believe that the Church believes this. For this justifies the Church's use of the word, and makes a coercive jurisdiction of the highest kind. But again, the sentence takes its proper earthly effect within the Church, upon the consciences both of the culprit and of others, and affects their whole relations; and that without any appeal to civil law. Indeed, the results and consequences which civil law has to do with are always remote and secondary, and are not the proper and immediate objects of the sentence. Church jurisdiction is jurisdiction *quoad spiritualia*. For the temporal consequences, as the Church of Scotland always acknowledged, appeal may have to be made to the magistrate; for these belong

of every Presbyterian Church in Scotland—certainly in the case of every Presbyterian disestablished Church;[1] and in the case of the Free Church, with its modern documents all referring to claims lying in the full blaze of Scottish history for centuries back, it is probably more undoubted than in the case of any other Church in the world. But that certainly does not exhaust the matter. Assuming that this was the intention and contract of the parties, how far will the Court carry it into effect? There are some possible heights of authority—some conceivable incidents of jurisdiction—which it rather seems the Courts would not acknowledge, however clearly it be proved that they were submitted to; and, in particular, any attempt by way of private contract to shut out the Court from the fullest inquiry and *investigation* into all matters would not be tolerated. But, on the other hand, the principle that the Court has proper and primary jurisdiction, does not make it by any means impossible for it to recognise (always within limits) another secondary jurisdiction founded upon voluntary

properly to the province of the magistrate. The churchman is *functus* before the civil judge is appealed to. The civil coercion belongs to the jurisdiction of the civil judge, who may be appealed to even on the ground of contract and fairness to add these consequences; but whether he chooses to add his coercion or not does not affect the religious jurisdiction, which is already explete and finished.

It always comes back to the same point. The courts cannot hold that the Christian Church has jurisdiction until it is established; but its own members do. And their use of the word is not inaccurate.

All this is trite in Scotland, and may be found coming out in the English courts, as in the recent judgment in the case Colenso *v.* Gladstone, by the Master of the Rolls, afterwards referred to.

[1] The *a fortiori* nature of the claim of the Free Church and other non-established bodies in Scotland is very strongly alluded to by the Lord Justice-Clerk Hope in Sturrock *v.* Greig, quoted from in a former chapter. While indicating in several parts of his judgment that he had no doubt dissenting judicatories could claim the same protection from actions of damages which that judgment gives to the Established Church, *even against allegations of malice*, he adds, "The view that may be taken of this matter by independent religious bodies, unless their constitution is very express, *may go much further;* and it may be that their Church courts may have, as against their own ministers, the sole right to decide what is competent matter for Church discipline and ecclesiastical government."

and private contract.[1] This is not impossible; and if full effect is to be given to the principle of contract, it is necessary; but it is always a question how far it is expedient. The most important deliverance upon this subject in the courts of the United Kingdom, is the principle of the Privy Council decision in the case of Long *v.* the Bishop of Capetown, which was stated as follows:—

"The Church of England, in places where there is no Church established by law, is in the same situation with any other religious body—in no better, but in no worse position; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body, which will be binding on those who expressly or by implication have assented to them. It may be further laid down that where any religious or other lawful association has not only agreed on the terms of its union, *but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not,* and what shall be the consequence of such violation, then the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and if not, has proceeded in a manner consonant with the principles of justice."

[1] The words of a famous judgment of Lord Stowell may be used to illustrate this. Speaking of a question turning on a Scotch marriage, he says, "The cause being entertained in an English court, must be adjudicated according to the principle of the English law applicable to such a case: but the only principle applicable to such a case by the law of England is, that the status or condition of the claimant must be tried by reference to the law of the country where the status originated; and having furnished this principle, the law of England withdraws altogether and leaves the question of status in the case put to the law of Scotland." The puzzle in the Cardross case as to two possible jurisdictions is effectually unravelled here; but the real question is, whether civil law *will* allow to a Christian Church, in the unestablished and merely tolerated form which it held for the first centuries of its existence, that jurisdiction which it is supposed to have then claimed, and which Scotch Churches at least have always claimed, expressly on the ground that the early Church did so. See in the Appendix some very interesting remarks by M. Renan on the early Church and the Roman law, Note B.

It can scarcely be said that the courts of Scotland have gone so far as this in recognising voluntary tribunals.[1] Yet Churches in Scotland have from time immemorial gone much farther than this in constituting them; and if the Court is to ignore their voluntary jurisdiction, it must do so on some other ground than the doctrine of contract. And if the Court adheres to the doctrine of contract in the ecclesiastical region, how far will it adhere to it? It will not allow the name of jurisdiction,[2] but how far will it give the thing? The question still lies open for discussion in our law,[3] and it

[1] Except, perhaps, in the last judgment in the Cardross case, which see in the Appendix.

[2] The English Court is clear on this in the above judgment. To the paragraph above quoted it is added: "In such cases the tribunals so constituted are not in any sense courts; they derive no authority from the Crown, they have no power of their own to enforce their sentences — they must apply for that purpose to the courts established by law, and such courts will give effect to their decision, as they give effect to the decisions of arbitrators, whose jurisdiction rests entirely upon the agreement of the parties.

"These are the principles upon which the courts in this country have always acted in the disputes which have arisen between members of the same religious body not being members of the Church of England."— Ecclesiastical Judgments of the Privy Council, 310. John Murray: London, 1865.

[3] See indications of different leanings of opinion in the later stages of the Cardross case, some of the utterances in which are given in the Appendix. The same came out in a brisk exchange of sentiments in Lang *v.* the Presbytery of Irvine (vol ii. of New Series of Reports, p. 823, March 5, 1864), in the First Division, where Lord Deas says: "The only other observation I have to make is this, that as we are here dealing with the procedure of a constituted court of the country, the principle is different from the principle applicable to a voluntary association — different as respects their right to regulate their own procedure and power of process, and as respects the principles of their constitution. In the case of a voluntary association, the question resolves itself into a breach of a civil contract, and I know no law for holding that malice is necessary to render parties liable for a breach of a civil contract. That was the sort of question that occurred in the case of Macmillan against the Free Church." Lord Ardmillan, in the close of his judgment, said: "In consequence of what has fallen from Lord Deas, I feel it to be my duty to state my deliberate opinion, that in this matter of privilege in judicial proceedings there is no difference between the judgment in matters spiritual of the Church courts of the Established Church, and the Church courts of nonconforming bodies, provided there is jurisdiction which by law or contract the parties are bound to recognise, and a judgment pronounced by judges whom by law or by contract the parties are bound to obey. In both cases I think

may be assumed that the Courts will not rashly close it by extreme utterances. The general rule at least has been fully laid down—that Churches not established are founded on contract; that their authority is founded on contract; that the Court will not assume them to have authority till it is proved, and that when it is proved as part of the contract the Court will (generally) sustain it.[1]

that the judgment is privileged, and that malice must be alleged." Lord Deas: "I must explain that I did not give any opinion as to what would be the law in the case of a civil contract with a voluntary association acting within the contract. The case to which I referred was one in which it was distinctly alleged, and offered to be proved, that the parties had acted not according to, but in violation of, the contract. It was of that case alone I spoke." Lord Ardmillan, "I referred to no particular case."

[1] An early anticipation of this doctrine seems to be found in Lord Moncreiff's judgment on the unreported case of Osborne *v.* the Southern Reformed Presbytery. His lordship's judgment was as follows:—

"*Edinburgh, July* 5, 1831.—The Lord Ordinary having considered this bill, with the answers and productions, and having heard parties by their counsel,—In respect that the complainer admits that he was a member of the religious society referred to, that he received his ordination as a minister from this Reformed Presbytery, and that he bound himself to submit to their jurisdiction as an ecclesiastical body; and in respect that it does not appear to the Lord Ordinary, according to the statement of the complainer himself, that he had been loosed or released from that connection and jurisdiction in regard to his ecclesiastical status, finds it incompetent for this Court to interfere to stop the proceedings of the respondents in the matters alleged, which are purely of an ecclesiastical nature: therefore refuses the bill as incompetent, finds expenses due, and remits the account, when lodged, to the auditor to be taxed.

"James W. Moncreiff."

This reads like a full acknowledgment of ecclesiastical claims, but his lordship's note places these distinctly on the ground of contract:—

"*Note.* — The complainer having voluntarily bound himself, as a member of this association of Christians, tolerated and protected by law, to submit to the discipline of the Presbytery, according to the ordinary principles of Presbyterian government, the law will recognise the obligations thereby come under as matter of contract. This gentleman admits that he was charged with certain matters of a proper ecclesiastical nature; and while the Presbytery were *in cursu* of prosecuting the charges, he says that he intimated that he wished to renounce the connection, and cease to be a member of the society. But the Lord Ordinary apprehends that an ordained minister of any such sect or association cannot, merely by saying so, relieve himself from the jurisdiction, once solemnly contracted; and that the legal effect of the contract is, that the Presbytery must have authority to prosecute to an end the measures of Church censure or discipline which they have begun, unless the party has been loosed from his connection with them by their own act."

But on the particular applications of it great doubt may rest. Thus in the Cardross case. If the Court had gone on, as it proposed, to inquire into the constitution of the Free Church and the contract of its members, it would have found that it was a contract to submit to jurisdiction, and that in the intention of the parties this was intended to exclude all civil redress for such mere irregularities in form of process or otherwise as the Court refused to review in the Established Church in the case of Lockhart *v.* Deer. But the allegations of Mr Macmillan in the Cardross case were a great deal more serious than those of Mr Lockhart in the other case, and might be argued to involve not forms of process merely, but questions of Church constitution. It may well be doubted, on the legal principles which we have endeavoured to reach in the last chapter, whether, if a case like his had been brought forward in the Established Church with its undoubted but limited legal jurisdiction, the Court would not have at once inquired into the competency of the General Assembly, as merely one organ of the Church, to do such an act as Mr Macmillan complained of. No doubt the jurisdiction claimed by the Free Church is *a fortiori* of that claimed by the Established Church. No doubt it was expressly to conserve this larger jurisdiction that the Free Church was erected; and therefore it is more likely to be fundamental to it, and part of the original contract of its members. But this being granted, two questions remain. It does not, in the first place, appear whether the Free Church itself holds that its contract and jurisdiction are intended to exclude from the judgment *quoad civilia* of the civil court any properly *constitutional questions*. And, secondly, if it did, the Court would probably refuse to give effect to the contract to this extent; leaving a voluntary jurisdiction acknowledged by civil law not much wider (if at all) than that which civil law has expressly given to the Established Church of the country. The only difference might come to be, that the extraordinary emphasis with which the contract of the Free Church guards

against its spiritual sentences being formally reviewed, might, as in the Cardross case, prevent its members from asking any interference with them *quoad spiritualia*, and prevent the Court from giving it. But it would not prevent the Court from giving damages against Church office-bearers for acts which in the sense of law were *malicious* and wrongful. It is difficult to believe that, even on the doctrine of contract, law will yield to a tolerated Church a much higher jurisdiction than it concedes to its own guarded and limited national institute. Instead of any farther immunities, bodies not established must probably content themselves with that position of freedom to act according to the corporate conscience (with whatever civil pains and inconveniences), the attaining of which was the ostensible reason—and, according to the documents of 1843, the only sufficient reason—for the schism of the Free Church.

Scotland has long been the arena of questions of this kind. But recently the higher courts in England have been occupied with a number of cases of Church jurisdiction, all from the colony of the Cape of Good Hope, and the convergence of these with cases from Scotland may in future bring out some interesting legal points. In the recent equity case of the Bishop of Natal (Dr Colenso) *v.* Gladstone (Law Reports, Equity Cases, iii. 1), the Master of the Rolls, Lord Romilly, on 6th November 1866, pronounced a judgment finding Dr Colenso sufficiently a bishop to be entitled to his salary, notwithstanding that he had no territorial or coercive[1] jurisdiction, and had been deposed by his metropolitan (who, according to a previous judgment, had himself no jurisdiction to depose him); and the discussion brought out some interesting points, though nothing of great importance to our law. Another case from the same region, Murray *v.* Burgers, was a case before the Judicial Committee of the Privy Council from the Dutch Reformed Church of the Cape, and had a considerable analogy

[1] See previous note as to coercive jurisdiction, p. 259.

to the Cardross case. In it the supreme court of their body had insisted on trying a minister for heresy without his ever having come before the presbytery or local court at all; and he raised an action of reduction of their sentence of suspension. But the peculiarity of this case is that this body, though, according to Lord Westbury, "a voluntary society, constituted and subsisting by voluntary agreement," has been for a good many years under "an Ordinance or Statute enacted in 1843 by the Governor of the Cape of Good Hope, with the advice and consent of the Legislative Council thereof," which this Church seems to have asked for or accepted as a constitution. And on a construction of this document, with certain alterations made upon it in 1847, the Privy Council found, as matter of fact, that "the object and intent of the Ordinance of 1847 was to strip the synod absolutely of all original jurisdiction in cases of charges against the doctrine or conduct of ministers, and to reduce it simply in such cases to a court of appeal."[1] The Dutch Reformed Church itself seems strongly to object to this rendering, on the ground of an exception in the Articles of 1847, which reserves "the right of the higher courts to take notice of cases, even without appeal, which concern the welfare of the Church in general, and come under its jurisdiction." But the case of a Church under such statutory ordinances, and yet not established, is peculiar; and the chief interest attaching to it is in the difficulty as to the ecclesiastical position of the minister, who is at this moment regarded by the Church as suspended, while the civil court has set aside the suspension "as illegal and void." In this case, that simple reduction of a Church sentence seems to have been carried out from which, in the Cardross case, the Courts of Scotland shrunk.

These precedents give a still greater interest to the last important Scotch case, Forbes *v.* Eden, 8th December 1865 (Third Series of Reports, vol. iv. p. 143)—one which has been recently decided—which has gone to the House of Lords upon

[1] See Lord Westbury's judgment, delivered on 6th February 1867.

appeal[1]—which, like that of the Bishop of Natal, concerns an Episcopal Church—and, like the Cardross case, is an action of reduction. Similar to some of the previous cases in these respects, this last has a more immediate bearing upon our subject; for it is an attempt on the part of a clergyman to get the Court to reduce not a particular act of discipline, but a *code of canons,* on the ground that the Church in question had no right to change its former regulations and give authority to these. This case of Mr Forbes against the Synod of the Episcopal Church in Scotland has therefore much resemblance to a pure question of change of creed, and it is remarkable also for the startling and suggestive difference of opinion that appeared upon the Bench in Scotland.

Part of the difficulty in this, as well as in the Cardross case, seems to have been caused by the form of the action of reduction—a mode of procedure, the usefulness of which in Church cases has by no means compensated for the intense irritation which it excites in every ecclesiastical body attacked by it. In this case the embarrassment was increased by the fact that patrimonial loss was hardly alleged to have been sustained by the pursuer,[2] and in trying to reduce the new regulations he was forced to take his stand on possible or future loss of his pastoral status in consequence of their enactment. This loss of status, however, the present Lord President of the Court argued very powerfully would be patrimonial or equivalent to patrimonial;[3] and the more important doubt remained,

[1] See Appendix for the result.

[2] In the Cardross case the Court took occasion to explain, in the most elaborate way, that they only allowed the action of reduction as auxiliary or ancillary to the demand for damages; the pursuer, to meet this, formally stated that "the action contains no conclusion that the pursuer should be restored to his position as a minister of the Free Church;" and, lastly, the Court, acting on this principle (but Lord Deas dissenting), threw out the reduction as soon as they became of opinion that the claim for damages was not competently laid. See Appendix, Notes F and G.

[3] The course of the cases has been such as to bring out very clearly the futility of this circumstance of *patrimonial right* as a criterion. Lord Brougham's principle in the Auchterarder case, that Church courts "are barred and shut out from any cognisance of civil patrimonial rights, and not only of civil patrimonial rights

whether such a real loss, if caused by the exercise of proper Church authority, could receive any remedy at the hand of the Court, or at least the remedy of reduction.

There was nothing in the opinions given to indicate any resiling on the part of the Court from the principle laid down, that Churches are held at law to be founded on contract; but there was much to show the extreme difficulty of applying the doctrine, and ascertaining the extent of ecclesiastical jurisdiction which the contract provided. The present Lord President of the Court, Lord Glencorse, laid down the general principle as follows: "If a society, whether for religious or secular purposes, is bound together by articles of constitution, and an attempt is made to alter any fundamental article of the constitution, the general rule of law undoubtedly is, that the majority may be restrained, on the application of the minority, from carrying the alteration into effect." Not merely, his lordship argued, could the minority have redress for civil injury actually sustained thereby, but they would be entitled to anticipate the injury and prevent the alteration being carried into effect—a conclusion from which Lord Cowan, as well as Lord Barcaple, the Ordinary in the case, seemed distinctly to dissent. But the illustrations by the Lord Justice-Clerk, now Lord President, of what "fundamental articles" may be, are still more important. The creed of the Scottish Episcopal Church at present is the Thirty-Nine Articles. In last century, and until recently, it seems to have been the Confession of Knox. Could they revert now from their present standard to their former? "The whole body would have power to make the change, if they were unanimous. But a majority, I apprehend, would have no power to do so against the wishes of a minority, however small." Again, passing from doctrine to ritual, "If the Synod, whose acts are here complained of,

directly, but of those things which indirectly affect civil patrimonial rights," if taken literally, would render incompetent every judgment ever delivered by any Church court, established or dissenting. Every ecclesiastical act has civil consequences.

had passed an ordinance prohibiting the use of all set forms of prayer, the result would be the same; and any one having sufficient interest might complain of it as a breach of contract, because in this communion it seems to be a fundamental article of the constitution, since 1811 at least, that set forms of prayer shall be used in public worship."

These startling illustrations imply that, if not in the deliberate and official judgment, at least in the opinion at the time of utterance, of the distinguished judge who spoke them, the Articles and set forms of prayer are fundamental in the Scottish Episcopal Church; and negatively, that there is in its constitution no fundamental power of abandoning them. Whether they also imply that that Church has no power of *modifying* them, might be more difficult to say; and it would be very rash to conclude that the illustrations are intended to apply to other Churches, or to the general case, so as to make the existing creed and ritual of every dissenting Church more fundamental than any right to change alleged to exist in its constitution. At the same time, the contrast between the general leaning of this speech on the one hand, and the note to the Lord Ordinary's interlocutor, confirmed by the opinion of Lord Cowan, on the other, is striking.[1]

Lord Cowan says: "I cannot but regard it as an entire novelty to ask courts of law to determine whether the ruling judicatory of a voluntary Church acted within its powers in matters so purely and exclusively relating to the government of the body as a Church, its doctrine and discipline." And Lord Barcaple says: "It appears to the Lord Ordinary that the present action proceeds upon a fallacious view of principles, which have been recognised in these cases, and of *dicta* which had reference only to the questions then under consideration. When, in defence against an action on account of something done by an ecclesiastical body, it was pleaded that the matter, being ecclesiastical,

[1] See Appendix, Note H.

was solely for the determination of that body itself, it was effectually replied that that was an assertion of exclusive power of jurisdiction, which could only rest upon contract, and that the contract was to be found, if anywhere, in the constitution and laws of the Church. In the discussion which thus arose, the constitution and laws of the Church came to be referred to as 'the contract' upon which the question turned, and most correctly; for by reference to them the question of jurisdiction, or of the legality of the proceeding complained of, was to be determined. The fallacy of the present action appears to the Lord Ordinary to be, that the pursuer treats the canons of his Church as if they were primarily and by their main intention a contract between the members of the Church. Taking this view, he complains that the terms of his contract have been changed without his authority, and to his injury. Analogies are brought forward drawn from other associations, formed for entirely different purposes, and having nothing equivalent either to the authority which is vested in synods and other ecclesiastical bodies, or to the regulations for the doctrine and internal government of a Church. And the Court is asked to deal with the canons of a Church as they are from time to time enacted by the proper authority, as if they were nothing else than attempted modifications of the contract between the members of an association for ordinary civil purposes. This is, as the Lord Ordinary thinks, altogether a fallacious view, and quite unwarranted by the authorities referred to. The canons of a Church are not enacted for the purpose of constituting a contract, but to establish and regulate its doctrine and discipline. The contract, in the sense in which that expression is important in these discussions, may or may not be embodied in the canons. They are only to be looked at as giving evidence, more or less complete, in regard to it." And again: "Into matters of this kind courts of law have always refused to inquire, except for the purpose of vindicating a civil right

or protecting against a civil wrong. Even in that case the courts have never given the remedy by altering or setting aside proceedings taken by the ecclesiastical authorities within their proper province, and least of all by making or unmaking regulations for the doctrine or discipline of the Church. The pursuer, indeed, does not ask the Court to pronounce as to the theological soundness of the doctrines in question, but only as to whether they are not now brought in as an innovation. But civil courts do not undertake to protect Churches, or individual members of Churches, from the influx of new doctrines. They only interfere to prevent the uses of property being perverted through its being retained by a majority who only keep the name, while they have abandoned the principles, of the Church to which it was devoted. The proposal to give such a remedy as is here asked, against the canons regarding the powers of the bishops to establish missions, and the power of general synods to make and alter canons, may appear less startling, because they are not strictly matters of theological doctrine, though they are not less polemical for that reason. But the Court will as little interfere to impose upon a dissenting body immutability of Church government as immutability of doctrine; while in either case it will protect property from being diverted, or persons from being injured, by the consequences of changes on doctrine or constitution."

It does not appear that there is any absolute inconsistency between these opinions and that of the present Lord President, unless upon the one point of the Court's interfering to prevent *anticipated* patrimonial loss—and perhaps on the definition of what patrimonial loss should be held to be. From the later paragraphs of the Lord President's speech as given in the Appendix, it would seem that his general propositions above quoted are intended to be received with some qualification. And while the opinions of Lord Cowan and Lord Barcaple are directed against the "reducing" of a merely ecclesiastical

(certainly of a merely doctrinal) sentence, and indeed against interfering with it at all unless it has been followed with consequences of civil injury, neither of these judges objects to such civil injuries being taken cognisance of (perhaps by some other form than the action of reduction) when they have actually resulted. In such a case the unanimous view of the Bench is that the Court would sustain their own jurisdiction, and would proceed at least to inquire into the matter. And the inquiry would be, as we have already seen, What is the constitution of the body? Are these canons, this ritual, this creed, fundamental to it in whole or in part? Are they so fundamental to it that they cannot be altered? Or is there a fundamental power of alteration in the constitution? and if so, how far does it extend?[1]

But the most important body of authority on this matter belongs to another department of the law, which we must now take up.

[1] Probably even the objection which some of the judges expressed to dealing directly with a code of canons may be reduced to the principle we venture here to extract from former cases. The Court, they say, shrinks from doing such a thing. But why? Probably because it is assumed, and perhaps could be proved, that an appeal to the Court for this purpose is contrary to the constitution of this (or of every) Church, and contrary to the "contract" of jurisdiction submitted to by its ministers.

But the preliminary pleas of defence in this case were not discriminated in the instructive way we have noticed in the Cardross case—the defenders preferring to join issue on the relevancy of the special averments on record, a course in which they were successful.

This case has gone by appeal to the House of Lords upon a very full and able case for the appellant. But unless the Court of Appeal should differ in opinion with *all* the inferior judges as to the fact of the case (the question whether the Scottish Episcopal Church has made such an alteration as is complained of), it is not likely to discuss the general question of law which would only then emerge—viz., had it not a *right* to make the alteration complained of? Mr Forbes argues that the change is a change of doctrine, and, being so, is incompetent: the Synod denies that there is any change of doctrine, or any serious change of practice; but rather avoids deciding the question whether and how far such a change, had it existed, would have been competent for the Church.

While these sheets are passing through the press, the appeal case has been heard at the bar of the House of Lords, and the decision of the Court below unanimously affirmed. Extracts from the judges' opinions will be found in the Appendix.

APPENDIX TO CHAPTER V.

NOTE A.

CHURCHES AND THE DOCTRINE OF CONTRACT.

The doctrine that Churches are founded on contract presents many advantages and facilities for the administration of law, but it has at the same time some disadvantages. Of these the first in order, though perhaps not the most important, is that it is not true. Churches do not spring out of contract any more than families or nations do. And they are not mere religious associations. There are innumerable religious associations in this and every country; but they do not claim to be Churches. They claim to be founded on contract; and *because* they do so, they are not Churches, according to the universal use of language. Churches claim to be founded on the relation of the individuals composing them to God, and they *are* founded on the belief of that relation. So the submission of each member to their so-called jurisdiction is rather his submission to God's jurisdiction assumed to be exercised in matters ecclesiastical through church-rulers as in matters temporal through civil rulers. This of course is the theory of Scotch Churches especially, as laid down in the standards familiar to the Statute-book. The Court cannot, however, admit this alleged divine authority as *a fact* in any case, unless it chooses to do so in the case of an established Church. All other Churches it regards as founded not on divine authority, *but on their own persuasion of divine authority.* The Court does not believe in this divine obligation, and cannot be expected to do so. But they do. And as a matter of fact it is on this conscientious belief that they have been founded. To say that they have been founded on contract is either an inaccurate use of words or a convenient and justifiable legal fiction. Originally and fundamentally there is no contract between the members. Mutual relations of the nature of quasi-contract no doubt soon and necessarily arise between them, and these get indefinitely complicated as the Church deals with civil interests. But Church authority historically rests, and permanently rests, if not upon divine right, which the Court will not allow, at least upon a persuasion of divine right—*i.e.*, upon *conscientious obligation*, a different category from contract.

No doubt this chapter of conscientious obligation is one so embarrassing for jurisprudence that it would be allowable to substitute any other name that would equally serve the purposes of justice. But (in the second place) it remains to be seen how far the idea of contract will be adequate as a substitute. Could we—through the means of a contract of jurisdiction, a con-

tract of authority, a contract of obedience, a contract of faith—restore all the elements of the original and true Church relation, obliging the parties in each case to prove, as in an ordinary case of civil *consensus*, that such elements did exist, and then giving judicial effect to them, the legal path might be safe though circuitous. But apart from the difficulties of proof, it has yet to be seen how far all or any of these ideas, undoubtedly parts of the Church relation, can be allowed entrance under the narrower category. We have already seen significant intimation that it might become *pars judicis* to step in and refuse effect to some of these, though admitted to have been conditions in the contract made, on the ground of *pactum illicitum*. The circumstance is most suggestive. It proves that it is impossible to deal with this matter exhaustively otherwise than as a branch of public law. If the existence of Churches, as divine institutions, or at least as religious institutions founded on conscience, is denied, and they are attempted to be dealt with under the category of private contract, it will be necessary that public law step in at a later stage to rectify the inadequacy of the earlier treatment. The decision in each particular case whether that voluntary jurisdiction (which it would be the easiest of all things to prove to have been submitted to in the case of nearly all Scotch Churches) is to be recognised by the Court, is not a decision that can be pronounced on the ground of contract, or upon any of the principles of private law. The admission, or the rejection, of such a fact are equally steps which belong to a higher region of jurisprudence, and which call for the exercise of those greater functions which courts are slow to exercise, but slower to resign. The majesty of law has always hitherto maintained its ability to deal on equal terms with religion and conscience, and all the greatest powers of human life; and a persistent attempt to evade this responsibility might lead not merely to self-impoverishment and degradation, but to positive danger. Those great spiritual forces, which create and rend nations, cannot be wholly compressed within the narrow limits of a commercial formula; and it is better to recognise that they cannot. The greater present anxiety to the law is counterbalanced by the diminished risk of future explosion; and in the mean time there is no abnegation of her functions, "to whom all things in heaven and earth do homage—the very least as feeling her care, and the greatest as not exempt from her power." There can be no doubt that our courts will yet have to deal face to face with Churches as institutions founded neither on statute nor on contract, but on conscience towards God; and there can be equally little doubt, in spite of some present appearances, that our law will not then be found to have prematurely disabled itself from the discharge of its highest functions.

NOTE B.

M. RENAN ON THE CHRISTIAN CHURCH UNDER THE ROMAN LAW.

An eloquent writer has recently pointed out that the attacks upon the Christian Church under the Empire were directed not so much against the individual religionist, as against the liberty of association—the Roman law making gatherings under the head of religion or vows come within the range of "majestas" and the Lex Julia. "The root of all the persecutions," says M. Ernest Renan, "was the refusal to allow communities to exist for purposes of religion *within the State, but independent of the State.*"

And this, he argues, is for modern times the great question of the future. The statement is remarkable in one who founds the Church upon the "enthusiasm of humanity." It would be in no respect extraordinary in a writer who should found it, as almost all Churches—Presbyterian, Episcopalian, and Roman Catholic—have done, on the enthusiasm of Divinity and the obligations of the religious conscience.

We take the following quotations from the chapter in the 'Les Apôtres' of M. Renan (Paris, 1866), entitled "The Religious Legislation of the Time:"—

"La seule chose à laquelle l'empire romain ait déclaré la guerre, en fait de religion, c'est la théocratie. Son principe était celui de l'Etat laïque; il n'admettait pas qu'une religion eût des conséquences civiles ou politiques à aucun degré; il n'admettait surtout aucune association dans l'Etat en dehors de l'Etat. Ce dernier point est essentiel; il est, à vrai dire, la racine de toutes les persécutions. La loi sur les confréries, bien plus que l'intolérance religieuse, fut la cause fatale des violences qui déshonorèrent les règnes des meilleurs souverains. . . .

"Une des principales attentions de César et d'Auguste fut d'empêcher la formation de nouveaux colléges, et de détruire ceux qui étaient déjà établis. Un décret porté, ce semble, sous Auguste, essaya de définir avec netteté les limites du droit de réunion et d'association. Ces limites étaient extrêmement étroites. Les *colléges* doivent être uniquement funéraires. . . . Voilà pourquoi le christianisme se présenta longtemps à Rome comme une sorte de *collegium* funèbre et pourquoi les premiers sanctuaires chrétiens furent les tombeaux des martyrs. Si le christianisme n'eût été que cela, il n'eût pas provoqué tant de rigueurs; mais il était bien autre chose encore; il avait des caisses communes; il se vantait d'être une cité complète; il se croyait assuré d'avoir l'avenir. . . .

"Les sociétés, une fois munies d'une autorisation spéciale, avaient à Rome tous les droits de personnes civiles; mais cette autorisation n'était accordée qu'avec des réserves infinies, dés que les sociétés avaient une caisse et qu'il s'agissait d'autre chose que se faire enterrer. Le prétexte de religion ou d'accomplissement de vœux en commun est prévu et formellement indiqué parmi les circonstances qui donnent à une réunion le car-

actère de délit ; et ce délit n'était autre que celui de lèse-majesté, au moins pour l'individu qui avait provoqué la réunion. Claude alla jusqu'à fermer les cabarets où les confrères se réunissaient, jusqu'à interdire les petits restaurants où les pauvres gens trouvaient à bon marché de l'eau chaude et du bouilli. Trajan et les meilleurs empereurs virent toutes les associations avec défiance. L'extrême humilité des personnes fut une condition essentielle pour que le droit de réunion religieuse fût accordé ; et encore l'était-il avec beaucoup de réserves. Les légistes qui ont constitué le droit romain, si éminents comme jurisconsultes, donnèrent la mesure de leur ignorance de la nature humain en poursuivant de toute façon, même par la menace de la peine de mort, en restreignant par toute sorte de précautions odieuses ou puériles un éternel besoin de l'âme. Comme les auteurs de notre Code Civil, ils se figuraient la vie avec une mortelle froideur. Si la vie consistait à s'amuser par ordre supérieur, à manger son morceau de pain, à goûter son plaisir en son rang et sous l'œil du chef, tout cela serait bien conçu. Mais la punition des sociétés qui s'abandonnent à cette direction fausse et bornée, c'est d'abord l'ennui, puis le triomphe violent des partis religieux. Jamais l'homme ne consentira à respirer cet air glacial ; il lui faut la petite enceinte, la confrérie où l'on vit et meurt ensemble. Nos grandes sociétés abstraites ne sont pas suffisantes pour répondre à tous les instincts de sociabilité qui sont dans l'homme. Laissez-le mettre son cœur à quelque chose, chercher sa consolation où il la trouve, se créer des frères, contracter des liens de cœur. Que la main froide de l'Etat n'intervienne pas dans ce royaume de l'âme, qui est le royaume de la liberté. La vie, la joie ne renaîtront dans le monde que quand notre défiance contre les *collegia*, ce triste héritage du droit romain, aura disparu. L'association en dehors de l'Etat, sans détruire l'Etat, est la question capitale de l'avenir. La loi future sur les associations décidera si la société moderne aura ou non le sort de l'ancienne. Un exemple devrait suffire : l'empire romain avait lié sa destinée à la loi sur les *cœtus illiciti*, les *illicita collegia*. Les chrétiens et les barbares, accomplissant en ceci l'œuvre de la conscience humaine, ont brisé la loi ; l'Empire, qui s'y était attaché, a sombré avec elle."

M. Renan has sometimes slender evidence for his conclusions, and the texts on this subject in the Roman law are very few. One of them is under the title "Quod Cujuscunque" (Dig. 3. 4. 1), which begins, "Neque societas, neque collegium, neque hujusmodi corpus passim omnibus habere conceditur ; nam et legibus, et senatus-consultis, et principalibus constitutionibus ea res coercetur : paucis admodum in causis concessa sunt hujusmodi corpora, ut ecce, vectigalium publicorum," &c. The other important heading, "De Collegiis et Corporibus" (Dig. 47. 22. 1), says distinctly that "religionis causa coire non prohibentur," provided the senatus-consulta are not infringed ; but Ulpian (Dig. 47. 11. 2) observes that "sub prætextu religionis, vel sub specie solvendi voti, cœtus illicitos nec a veteranis tentare oportet ;" and the same jurist (tit. "De Coll. et Corp.") makes the penalty of an illicit collegium to be that provided by

the Lex Julia Majestatis for attempts "adversus populum Romanum vel adversus securitatem ejus."

The Code Napoléon, to the administration of which M. Renan seems to refer, defines *Société* as a contract by which two or more persons agree to put something into common property, with the intention of getting some benefit from it. It lays down that every society must have a lawful object, and must be contracted for the common interest of the parties, and that each member of it must contribute either money, or other goods, or his industry. It takes no notice of religious associations.

NOTE C.

THE SCOTTISH TOLERATION ACT.

An Act to prevent the Disturbing those of the Episcopal Communion in that part of Great Britain called Scotland, in the Exercise of their religious Worship, and in the use of the Liturgy of the Church of England; and for repealing the Act passed in the Parliament of Scotland, intituled An Act against irregular Baptisms and Marriages. (10th of Anne, cap. 7, A.D. 1711.)

Whereas, since the abolishing of Episcopal government in Scotland, those of the Episcopal persuasion there have been frequently disturbed and interrupted in their religious assemblies, and their ministers prosecuted for reading the English service in their congregations, and for administering the sacraments according to the form and manner prescribed in the Liturgy of the Church of England: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, that it shall be free and lawful for all those of the Episcopal communion in that part of Great Britian called Scotland, to meet and assemble for the exercise of divine worship, to be performed after their own manner by pastors ordained by a Protestant bishop, and who are not established ministers of any church or parish, and to use in their congregations the Liturgy of the Church of England, if they think fit, without any let, hindrance, or disturbance from any person whatsoever; and all Sheriffs of Shires, Stewards of Stewartries, and Magistrates of Boroughs, and Justices of the Peace, are hereby strictly required to give all manner of protection, aid, and assistance to such Episcopal ministers, and those of their own communion, in their meetings and assemblies for the worship of God, held in any town or place, except parish churches, within the extent and jurisdiction of that part of Great Britain called Scotland.

II. Provided always, and be it enacted by the authority aforesaid, that none shall presume to exercise the function of a pastor in the said Episcopal meetings and congregations, except such as shall have received holy orders from the hands of a Protestant bishop; and that every person who shall be called or appointed to be a pastor or minister of any Episcopal congregation or assembly, before he take upon him to officiate as pastor of the said congregation, be hereby obliged and required to present his letters of orders to the Justices of Peace, at their General or Quarter Sessions to be held for the shire, stewartry, city, town, or other place in which the said Episcopal congregation is or shall be; and that the said letters of orders be there entered on record by the register or clerk of the said meeting of the justices, for which there shall be no greater fee or reward taken than the sum of one shilling.

III. And be it further enacted by the authority aforesaid, that all ministers of the Established Church of Scotland, and all and every person and persons, who is or are pastor or pastors, minister or ministers, of any Episcopal congregation in Scotland, shall be obliged and are hereby required, on or before the first day of August next, to come to take and subscribe the following oaths, in such manner and under such penalties, as all officers, civil and military, in Scotland are obliged to take the oath recited in the fourteenth Act of the sixth year of her majesty's reign, intituled An Act for the better Security of her Majesty's Person and Government; and that all ministers of the Established Church of Scotland, hereafter to be admitted into their respective churches or benefices, and all and every person and persons, who shall hereafter be pastor or pastors, minister or ministers of any Episcopal congregation, shall, before such admission or exercise of their respective functions, be obliged to take and subscribe likewise the following oaths, in the same manner, and under the same penalties above mentioned: "I, A. B., do sincerely promise and swear that I will be faithful, and bear true allegiance to her majesty Queen Anne. So help me God." "I, A. B., do truly and sincerely acknowledge, profess, testify, and declare, in my conscience before God and the world, that our sovereign lady Queen Anne is lawful and rightful queen of this realm, and of all other her majesty's dominions and countries thereunto belonging. . . . And all these things I do plainly and sincerely acknowledge and swear, according to these express words by me spoken, and according to the plain and common sense and understanding of the same words, without any equivocation, mental evasion, or secret reservation whatsoever. And I do make this recognition, acknowledgment, abjuration, renunciation, and promise, heartily, willingly, and truly, upon the true faith of a Christian. So help me God."

IV. Provided always, that the assemblies of persons for religious worship in the Episcopal meetings be held with doors not locked, barred, or bolted during such assembly; and that nothing herein contained shall be construed to exempt any of the persons frequenting the said Episcopal congregations from paying of tithes or other parochial duties to the church or minister of the parish to which they belong and in which they reside.

V. And whereas since the establishment of the Presbyterian government in Scotland, some laws have been made by the Parliament in Scotland against the Episcopal clergy of that part of the United Kingdom, and particularly an Act passed in the Parliament held in the year one thousand six hundred ninety-five, intituled Act against irregular Baptisms and Marriages, by which all Episcopal ministers, who were turned out of their churches, are prohibited to baptise any children, or to solemnise any marriage, upon pain of perpetual imprisonment or banishment: Be it therefore enacted by the authority aforesaid, that the said Act above mentioned be hereby repealed and annulled; and that in all time coming no person or persons shall incur any disability, forfeiture, or penalty whatsoever upon account of his or their resorting to the said Episcopal meetings held for the worship of God; and that it shall be free and lawful for all the subjects in that part of Great Britain called Scotland to assemble and meet together for divine service without any disturbance, and to settle their congregations in what towns or places they shall think fit to chuse, except parish churches, and for the Episcopal ministers not only to pray and preach in the Episcopal congregations, but to administer the sacraments, and marry without incurring any pain or penalty, any law or statute to the contrary notwithstanding.

VI. Provided always, that the parents who have their children christened by Episcopal ministers be hereby obliged to enter the birth and christening of their children in the register-books for christenings belonging to the respective parishes in which they live; and provided likewise, that no Episcopal minister or ministers residing within that part of the United Kingdom called Scotland presume to marry any persons but those whose bans have been duly published three several Lord's days in the Episcopal congregations which the two parties frequent, and in the churches to which they belong as parishioners, by virtue of their residence; and that upon the same pains and punishments as are already inflicted by the laws of Scotland in cases of clandestine marriages, and the ministers of the parish churches are hereby obliged to publish the said bans; and in case of neglect or refusal, it shall be sufficient to publish the said bans in any Episcopal congregation alone, any law, statute, or custom to the contrary notwithstanding.

VII. Provided always, and it is the true intent and meaning of this Act, that all the laws made against prophaneness and immorality, and for the frequenting of divine services on the Lord's day, commonly called Sunday, shall be still in force, and executed against all persons that offend against the said laws, or shall not resort to some church, or to some congregation or assembly of religious worship allowed and permitted by this Act.

VIII. Provided likewise, that neither this Act nor any clause, article, or thing herein contained, shall extend, or be construed to extend, to give any ease, benefit, or advantage to any Papist or Popish recusant whatsoever, or to any person that shall deny in his preaching or writing the doctrine of the blessed Trinity.

IX. And be it further enacted by the authority aforesaid, that if any person or persons, at any time after the twenty-fifth day of March next to come, shall willingly and of purpose, maliciously or contemptuously, come into any congregation or assembly of religious worship permitted by this Act, and disquiet or disturb the same, or give any disturbance to the said congregation at the doors or windows, or misuse any minister or pastor of such congregation, such person or persons, on proof thereof before two Justices of the Peace, by two or more sufficient witnesses, shall find two sureties to be bound by recognisance in the penal sum of fifty pounds sterling, for his or their appearance at the next General or Quarter Sessions, or before the Court of Justiciary, or other judge or judges competent, and in default of such sureties shall be committed to prison, and upon conviction of the said offence at the said General or Quarter Sessions, or before the said Court of Justiciary, or other judge or judges competent, shall forfeit the sum of one hundred pounds sterling; one moiety thereof to the informer, the other to be disposed of for the use of the poor of the parish where such offence shall be committed: and if the magistrates of any town or place, or others pretending to have authority or jurisdiction any where in Scotland, shall, in contempt of this law, forbid or hinder those of the Episcopal persuasion from meeting or assembling together for divine worship in the places subject to their jurisdiction, or shall shut up or cause to be shut up the doors of the houses or other places where such Episcopal assemblies are held, or intended to be held, such magistrates or others so offending, upon proof thereof before the Court of Justiciary, by two or more sufficient witnesses, shall forfeit the sum of one hundred pounds sterling, to be distributed as aforesaid.

X. And be it further declared and enacted by the authority aforesaid, that no civil pain or forfeiture, or disability whatsoever, shall be in any ways incurred by any person or persons, by reason of any excommunication or prosecution in order to excommunication by the Church judicatories, in that part of Great Britain called Scotland; and all civil magistrates are hereby expressly prohibited and discharged to force or compel any person or persons to appear when summoned, or to give obedience to such sentence when pronounced, any law or custom to the contrary notwithstanding.

XI. And be it further enacted by the authority aforesaid, that every minister and preacher, as well of the Established Church in that part of Great Britain called Scotland, as those of the Episcopal communion protected and allowed by this Act, shall, at some time during the exercise of the divine service in such respective church, congregation, or assembly, pray in express words for her most sacred majesty Queen Anne, and the most excellent Princess Sophia, Electress and Duchess-dowager of Hanover whilst living, and all the royal family. And every such minister or preacher neglecting to do so, shall for the first offence forfeit the sum of twenty pounds sterling, to be recovered and distributed in such manner as touching the other penalties in this Act is herein before directed: and for the second offence every minister of the Established

Church in that part of Great Britain called Scotland, being thereof convicted by the oaths of two sufficient witnesses before the Lords of Justiciary, shall be *ipso facto* deprived, and declared incapable of any church or ecclesiastical living during the space of three years; and every Episcopal minister allowed and protected by this Act, being thereof in like manner convicted, shall from thenceforth forfeit and lose the benefit of this Act, and be declared incapable of officiating as pastor of any Episcopal congregation during the space of three years.

XII. Provided always, that no minister or preacher offending herein shall suffer such penalties, or either of them, unless he be prosecuted for the same within the space of two months after the offence is committed.

NOTE D.

THE CASE OF DUNBAR *v.* SKINNER.

In giving judgment, on 3d March 1849 (11 D. 945), in this case, the circumstances of which have been generally stated in the text, the Lord President Boyle said :—

"That no privilege, or claim of jurisdiction, as it has sometimes been styled, has been established in the person of the reverend defender, so as to render it incompetent for this Court to take cognisance of the action at the instance of the pursuer, the Rev. Sir William Dunbar, when the summons, the record, and the various documents and productions referred to by the parties are attended to, seems to me a proposition that is most abundantly manifest. As all that the Lord Ordinary has done is 'to repel the defences pleaded in respect of privilege, and to sustain the competency of the action as well as the jurisdiction of the Court to try the same,' and as he only remits to the Issue-clerks that the cause may be prepared for trial in common form, it seems to be free from all doubt that the Lord Ordinary has adopted the only course that is proper under the circumstances.

"For surely it cannot be doubted that, even if the reverend defender can successfully establish that all that is complained of as to his proceedings by the pursuer, was protected and justified by his having acted only in the due exercise of the privilege he asserts to belong to him as bishop of the Scottish Episcopal Communion, acting with the assistance of his Synod, it is still undoubtedly within the jurisdiction of this Court to try such an action as the present, concluding for damages on the ground of a grievous wrong having been inflicted, as set forth in the summons and record. For, supposing such an action concluding for damages had been raised even against one of the most eminent ministers of the Established Church of Scotland, no allegation of privilege on his part, or assertion that he was only acting in the exercise of his ecclesiastical functions,

could be pleaded as a bar to the competency of the action, or to exclude the jurisdiction of this Court to try it. We have had many such cases recently brought before us, in which reverend clergymen have been called as defenders, such as Smith *v.* Gentle, Adam *v.* Allan, and the case of Dudgeon against a minister of a parish in the north of Scotland, in all of which, while privilege and the exercise of ecclesiastical jurisdiction were pleaded in defence, nobody contested the jurisdiction of this Court to entertain the actions.

"The sustaining the jurisdiction of this Court, and finding such an action competent, does not certainly preclude the defender from pleading on his privilege; but that is not a reason for at once dismissing the action. Nothing is yet decided by the Lord Ordinary as to what form of issue may be necessary for the pursuer to adopt, and we are not at present arrived at that stage so as to be able to decide that no issue should be granted. All that has hitherto been decided is, that the reverend defender has shown no such privilege as entitles him to object to the competency of the action, or exclude the jurisdiction of this Court to try the case.

"Such, then, being the shape in which the interlocutor of the Lord Ordinary truly presents the case to us, I hardly think it necessary to say more, because it is possible that when issues are prepared they may give rise to discussions on which it may become indispensably necessary for the Court to enter, and to deliver an articulate judgment regarding them. At present it appears to me to be premature for us to advert, with any degree of particularity, to the various topics on which so much was said on both sides of the Bar.

"I am, however, quite satisfied that the defender has been entirely unsuccessful in showing—notwithstanding his extensive and elaborate review of the history of the Scottish Episcopal Communion, beginning from its first legislative recognition, in the Act of the 10th of Queen Anne, granting it toleration and protection, after Prelacy had been totally abolished at the Revolution, and the Presbyterian Church fully established, according to the Bill of Rights, and declared unalterable by the Treaty of Union; and tracing it down through the heavy pressure laid upon it in 1746, by the 19th of Geo. II., c. 38, and the repeal of that Act by the 32d Geo. III., c. 63, and again extending to it equal toleration with that granted to any other body of Protestant dissenters from the Church of Scotland—that any jurisdiction whatever was conferred upon its bishops, and certainly nothing of the nature of privilege such as can exclude a court of law from entertaining an action such as the present, against any of its members. Neither can the late statute of her present Majesty, 3 & 4 Vict., c. 33, though unquestionably recognising the order of bishops of the Protestant Episcopal Church in Scotland, apparently for the first time, and conferring, under certain limitations, the right on the bishops or clergy of the Scottish Episcopal Church in Scotland, to officiate in the Churches of England or Ireland, provided they have been ordained by a bishop thereof, have any such effect. This recognition of the order of

Scottish Episcopal bishops cannot, however, aid the defender's objection to the jurisdiction of this Court, or establish his right to deal with the pursuer as complained of in the summons. And surely the late judgment and opinions in the House of Lords, in the case of Snell's exhibition, establish beyond all controversy, that there exists in Scotland no Episcopal Church whatever, except as a distinct sect, fully recognised and protected under the Toleration Act."

Lord Fullerton said:—

"The objection to the jurisdiction forms the subject of the defender's first plea in law, and is as follows: '1. The declaration of rejection complained of, being an ecclesiastical and judicial sentence *in spiritualibus*, regularly pronounced by the defender with his clergy sitting in lawful Synod, in his ecclesiastical character as a bishop of the Protestant Episcopal Church in Scotland, of which the pursuer was a minister, cannot be called in question by the pursuer, or interfered with by a civil court.' The defence of privilege forms the ninth plea, and is, in the present stage of the process, inseparably connected with and dependent on the proposition assumed in the first—viz., that the sentence pronounced by the defender was so pronounced in virtue of the jurisdiction vested in him as a bishop of the Protestant Episcopal Church in Scotland. In short, it is maintained that this Court has no jurisdiction, because the defender had the exclusive jurisdiction in the matter involved in the sentence complained of by the pursuer.

"Now, I cannot entertain a doubt that the Lord Ordinary was perfectly right in repelling that defence. The jurisdiction of a bishop of the Protestant Episcopal Church in Scotland has no existence. Indeed, though not expressly disclaimed, it was hardly asserted in the defender's argument, unconnected from the other point, to be afterwards considered, of the relative rights and duties created by special agreement between the parties.

"According to the definition of the civil law, jurisdiction is '*potestas judicandi et exsequendi causas jure magistratus competens.*' According to our own, as laid down by Erskine, 'jurisdiction is a power conferred on a judge or magistrate to take cognisance of and determine debatable questions according to law, and to carry his sentences into execution.' And taking the widest construction of these terms 'judge and magistrate,' jurisdiction necessarily implies the existence of a power conferred by the State, and vested in functionaries sanctioned for that purpose by the State. Accordingly we have various courts of civil, criminal, and fiscal jurisdiction; and we have courts of ecclesiastical jurisdiction in our presbyteries, synods, and General Assembly. But, in regard to the Protestant Episcopal Church of Scotland, it appears to me that this Court, administering the laws of the realm, can recognise no jurisdiction whatever as existing in any official of that communion. They enjoy, it is true, toleration, but merely as a body of private individuals, united by particular religious views, and associated for the laudable purpose of promoting those views. Bishops, of course, are, in some of the tolerating

Acts, recognised as existing *de facto*. But no office-bearer of their communion, or of any other merely tolerated communion, can lay claim to jurisdiction any more than the office-bearer of any private association.

"But this goes far to solve the only question now before us. For if there is here no jurisdiction in the proper sense of the term, pleadable by the defender, the question truly resolves itself into one of agreement, and that seems to be the import of the second plea in law.

"Now, there is no doubt that all parties entering into an association for purposes not prohibited by law, may effectually bind themselves to submit without appeal to the determination of certain matters, and even to the infliction of certain censures, by the official authorities to whom such power is committed by the terms of the association; and if it could be instantly shown, without any further inquiry, that, by the admitted or proved circumstances of this case, the defender had absolutely bound himself to submit to such a sentence as that for which he now seeks redress, the defence in the second plea in law might have been sustained, and the case sent out of Court. But can it be said with any show of reason, that the case does stand in that situation? or that the Lord Ordinary was wrong in holding that there were various matters of fact here on which the parties were at variance, and which required to be ascertained in the usual way, before the case could be disposed of.

"In the first place, when the defender's case is put, not on jurisdiction, where I think it cannot rest, but on the terms or conditions of that private association designated the Protestant Episcopal Church in Scotland, the defender cannot advance a step without proving the nature and extent of his rights and powers as a bishop of that Church. We, administering the law of Scotland, are presumed to know the nature and limits of the jurisdiction of the various constituted authorities. But of the rights and powers of a bishop in the Scottish Episcopal Church we can know nothing until they are established in evidence, like the terms and conditions of any other association.

"Secondly, the nature of the alleged agreement in this case presents additional difficulties. It is one of a very peculiar kind."

NOTE E.

THE CARDROSS CASE—FIRST JUDGMENT.

In pronouncing judgment on the question of satisfying the production in this case, on 23d December 1859 (22 D. 290), the Lord President (Lord Colonsay) said:—

"A good deal is said throughout the papers, especially in the revised case for the defenders,—which, I suppose, is language intended to be used in a limited sense,—in which they describe their authority over the body

in this way: 'While the Free Church cannot prevent parties betaking themselves to the civil courts, they can say, and have said, that, as a Church of Christ tolerated by law, they have an independent jurisdiction in spiritual matters, and that, if a member does not choose to abide by their sentences, he cannot remain in their body.' And again they say, 'That the sentences themselves, and consequently an action for the purpose of reducing them, involve exclusively a question of ecclesiastical discipline, and not any question of civil right; and that therefore a civil court cannot take cognisance of them; and that an allegation that a court which is admittedly supreme in all matters which come within its jurisdiction has violated its forms of process, is a plainly irrelevant ground of action, for the simple reason, that the admission that the court is a supreme court necessarily involves an admission of its power to regulate its forms.' Now, in using this expression 'court,' 'a supreme court,' and 'court of supreme jurisdiction,' I presume the parties mean to use it as the most convenient way of expressing what the rules and constitution of that body are. For in a strict sense I cannot hold that they are a court recognised as such by law—a supreme court recognised by law, or exercising jurisdiction in a strict sense. I adopt upon that subject the views and expressions of Lord Fullerton in one of the cases which were previously decided. But they are convenient enough expressions for indicating the kind of self-constituted jurisdiction and authority that these parties have by their own constitution; that they have formed themselves into presbyteries, synods, and General Assembly; that they have subjected themselves to certain authority which they have agreed to confer on these respective bodies; and that the 'court' is used in that sense, and the word 'jurisdiction' in that sense; and in that sense it is easily intelligible."

Lord Ivory held that the importance of the case was exaggerated:—

"There seems more or less on both sides to be no inconsiderable misapprehension as regards the practical and ultimate bearing and operation of the present action. It will settle nothing, or all but nothing, of the larger field of constitutional matters that have been brought under discussion; for even were the pursuer to succeed, that judgment could not materially, if at all, affect the radical and fundamental right of the defenders to frame a new constitution for their body, under which, there being nothing incompatible with the public law of the country, they might competently and validly bind their members to fulfil and obtemper all and every of those provisions and enactments therein embodied, and so framing a mutual compact whereby they would be well and lawfully associated, and to which contract the various consenting parties would thenceforth be subject. The power of the defenders, as of every other dissenting Church, and, indeed, as the power of every private association of individuals, so to associate themselves together, and, in all respects, not encroaching on the law of the land, to frame a code of by-laws binding within their body, no one would be disposed to dispute, and this Court would be the first to support, and the last to interfere with. Ac-

cordingly it is not there that any difficulty arises in the present case. The puzzle here is in getting at the solution of two questions—first, What truly is the contract? and second, What is its sound and legal construction, if it exists? If the present constitution, therefore, shall turn out to work defectively in any respect, it only follows that it has in so far been ill made, and the parties might at once proceed to frame another and a better. But whatsoever contract they may frame, certainly no more than any other contracting parties, whether an association or individuals, will they be able to exclude the ordinary civil jurisdiction of this Court to decide between the members—1st, Whether such a contract does really subsist or not? 2d, What is the true measure and meaning of that contract? and 3d, What is the construction and interpretation to be put on any one or more of its particular clauses and provisions, about which the members of the body are at variance? When these questions, however, are once settled—and they are clearly here, as in all other questions of private contract, questions for the decision of a civil tribunal—this Court may be excluded from interfering in any matter which truly falls within the contract, and the dealing with which the parties have reserved to themselves. But if anything be attempted out of the contract, and beyond its stipulated action, the Court undoubtedly will continue to have jurisdiction in that case, as in every other, to keep the contracting parties to the bargain, whatever it may be, which they have made for themselves. It may be of use, therefore, and tend somewhat to allay any apprehension that in any quarter may exist, to keep in view that such is all the length which even the most unfavourable decision in the present case could possibly go as against the defenders. The parties are here at issue as to what their contract is, and this must be decided between them. But were the decision to be ever so unsatisfactory, the remedy is open. The Free Church and its members would only have to begin anew, and frame with greater care and better success a fresh contract, more perfect in its operative enactments, and more consonant with the views and intentions of all and sundry."

Lord Curriehill, under one of the heads of his speech, observes:—

"1. It is maintained that the pursuer has no title to insist in this action. Assuming that he would succeed in establishing the case he has stated in the summonses, I cannot doubt that he has a sufficient title to insist in them. If it be true that by the sentences complained of he has been deprived of his office, status, and emoluments thereto attached, that these sentences were *ultra vires* of the body by whom they were pronounced, and that he is in consequence entitled to pecuniary reparation from the defenders, he has a good title to insist in an action for trying the legality and validity of these sentences. Hence it is plain that the merits of this objection depend upon the merits of the actions themselves; and that it cannot be sustained as a preliminary bar to the trial of these actions.

"2. It is maintained that the reductions are incompetent in this Court because the sentences were pronounced in matters of ecclesiastical disci-

pline or Church government by a judicatory of an association of Christians tolerated and protected by law. The meaning of this plea appears to be, not that the General Assembly of the Free Church is empowered by the conventional agreement among its members and office-bearers to exercise authority over them, because they state a separate plea to that effect—to which I shall presently advert—but that it is a judicial institution. If this is what is meant by the plea, it plainly cannot be sustained. The dissenting bodies in this country, although they are unquestionably tolerated and protected by law, are still in their nature and character only voluntary associations or societies, and those office-bearers whom they appoint for the management of their affairs are not included among the judicial institutions of the country. The associations themselves are constituted only by the conventional contracts of their members. Their office-bearers have no authority over any persons except those who are parties to these contracts; and their authority even over the latter does not extend beyond what is conferred upon such functionaries by the terms of the conventional constitutions of the societies. Nor does such authority over them endure longer than while they voluntarily remain members of the association. If this plea has any other meaning, it has not hitherto been explained to us; and therefore it cannot at present be sustained as a bar to the progress of the cause. If the defenders have any other explanation to give of it, or can state anything further in support of it, as a defence on the merits of the actions, it will be open to them to do so under the reservation with which the judgment now to be pronounced will be qualified.

"3. It is maintained that the pursuer, as a minister of the Free Church, did contract and bind himself to submit to the discipline and government of that Church. This plea raises what is truly the main question in this case. The parties are agreed that, by the contract which forms the constitution of the Free Church, the pursuer became bound to submit to its discipline and government. Both parties found upon that contract; and the question between them, when sifted, comes to be, whether or not, by that contract, authority was conferred upon the defenders, the Free Church Assembly, to pronounce the sentences under challenge. If it did, the pursuer, who was confessedly a party to that contract, is bound to submit to these sentences. If it did not, he is not bound to do so. Hence the question between the parties appears to me at present to resolve into one as to the true meaning and effect of the contract."

Lord Deas's statement is especially clear and vigorous; and though violently opposed to the whole doctrine of the Scottish Church as to the source of Church jurisdiction, it lies very much in the line of the important judgments of the heads of the Court in the leading cases in 1838 and afterwards, and also, it may be said, of the dicta of Erskine:—

"Now, if anything be clear in the case, it is, that the defenders are invested with no jurisdiction whatever, ecclesiastical or civil. All jurisdiction flows from the supreme power of the State. The sanction of the same authority which enacted the laws is necessary to the erection of

courts, and the appointment of judges and magistrates to administer the laws. The Established Church of Scotland had, and has, this sanction. The statute law of the land conferred upon it ecclesiastical jurisdiction, to be exercised by kirk-sessions, presbyteries, provincial synods, and General Assemblies. But there is no such statute law applicable to the association called the Free Church. When the defenders separated from the Establishment, they left all jurisdiction behind them. If they meant to carry it with them, as some expressions in the deeds and writing produced would seem to indicate, it is enough to say that this could not be done. No voluntary association can, by an agreement among its members, assume jurisdiction, which flows only from the legislative power and royal prerogative. The Free Church of Scotland is a voluntary association, tolerated and protected by law, as all voluntary associations, for lawful purposes, in this free country are. What is termed toleration is in reality freedom, just as much as if there were no Established Church in the country. But the presbyteries, synods, and assemblies of the Free Church have not been erected into courts, either ecclesiastical or civil. The constituent members of these presbyteries, synods, and assemblies are not judges in any legal sense. They sit, and act, and vote solely in virtue of private contract, regulating their proceedings among themselves, and such contract neither does nor can confer upon them any jurisdiction whatever. There is no such thing as voluntary jurisdiction, in the ordinary sense of the term 'voluntary.' What was called 'voluntary' jurisdiction in the Roman law, was that which related to matters admitting of no opposition, in contradistinction to 'contentious,' which related to matters debatable. Voluntary jurisdiction may be exercised by a judge at any time and in any place,—such as administering an oath of ratification to a married woman, or any lawful affidavit,—but still it must be by a judge. There is no such thing as a voluntary judge, in the sense of his being created either by his own act, or by the act and consent of any individual or set of individuals."

NOTE F.

THE CARDROSS CASE—SECOND JUDGMENT.

On 19th July 1861, the First Division unanimously affirmed the following interlocutor of Lord Jerviswoode, Ordinary:—

"13*th November* 1860.—Repels the first and third pleas in law stated on behalf of the defenders, the General Assembly of the Free Church of Scotland, and the office-bearers thereof, and also the first, second, and fourth pleas in law stated in defence for the Rev. Dr Alexander Beith and others, as individuals; and, further, in respect that the parties are

not agreed as to the terms of the constitution of the said Free Church of Scotland, and as to other matters of fact material to the issue raised under the record, and the pleas in law, other than those hereby disposed of, appoints the cause to be enrolled, that parties may be heard in regard to the manner and form in which probation is to proceed as to such matters; reserving entire the pleas of parties, excepting in so far as expressly dealt with by the present interlocutor, and reserving also all questions of expenses."

The chief pleas here referred to have been stated in the text.

In pronouncing judgment, the Lord President, Lord Colonsay, observed:—

"This question does not arise out of the proceedings of any established judicatory of the land, civil, criminal, or ecclesiastical—out of the proceedings of any institution on which the State has conferred jurisdiction, or to which it has delegated power or authority of any kind. The question arises out of the proceedings of a voluntary association—a numerous body, certainly, of Christians—associated for purposes of religion—forming a religious society called, and perhaps not inappropriately, a Church, though we could get no accurate definition of that word; and it is a body of professed Christians, tolerated by law and enjoying the protection of the law in the expression and promulgation of their religious opinions and doctrines, and in the performance and exercise of their religious rights. That body has a constitution and rules by which the society is governed, and to which its members have voluntarily subjected themselves; and in so far as they have subjected themselves to these rules, and to that constitution, the civil courts will not hold that they are entitled to complain when these rules are observed, unless there is something in them contrary to the public law of the land. It is not necessary, in the view I take of this case at present, to go into the question whether any of these matters that are said on one side to form part of the rules of this association, and on the other not to be part of them, are of that character or not. It has certainly not been made out that they are.

"But this association formed for that proper and laudable purpose is an association which has temporalities as well as spiritualities. It has stipends, manses, offices of emolument, to the possession and enjoyment of which certain of its members are eligible. . . .

"I cannot assent to the proposition which was contended for on the part of the defenders, that, whatever may have been the constitution and rules of this association, and however flagrantly they may have been violated by the Assembly, no redress can be obtained in the civil courts. I think that, for injury done by gross violation of the contract, redress may be given, and in the form in which it is asked—that is to say, in the form of damages; and I think that there is no incompetency, but, on the contrary, that there is expediency, in accompanying the claim for damages with a conclusion for reducing the sentence, and having it declared null and void. There is no proposal here to review this sentence on its merits, or to review it at all in any technical or proper sense of

that term. The object is to have it declared null, and to have the pursuer reponed and restored against it. That conclusion, I apprehend, must be construed with reference to the objects of the action, and the powers of the Court to which it is addressed. The Court may not have the power to repone and restore the pursuer to the ministry, but it does not thence follow that the Court may not repone and restore him, to the effect of depriving the sentence of which he complains of any validity as an obstacle to the prosecution of his civil rights and interests, whatever they may be. . . .

"It always comes back to this, Has the pursuer sustained injury by the act of the defenders in violation of the agreement which they entered into with him? Has that injury accrued to him in violation of the agreement? It may be that there was no violation of the agreement. It may be that the pursuer and other members of this association have submitted themselves absolutely to the uncontrolled power, or it may be the caprice, of other members of the association. It may be, as was contended on the part of the defenders, that they are entitled, without being called in question, to do what they like with any of the members—that is to say, that their rules are in no way binding upon themselves—they may be binding on the individual members, but they are not binding on the body. They are no protection to the individual members composing the association. If that shall be made out as part of the constitution of this body—if they are entitled at any time, as was the case put—if the General Assembly may any morning draw any ten names from the ballot-box and declare them to be no longer ministers of the body—for that was the legitimate consequence fairly admitted by the defenders—if that be part of the rules and constitution of this association—then this pursuer cannot obtain the redress which he asks, because he has submitted himself to such conditions and such control. But until it is established that such is the contract—until we see what the contract is—until the pursuer shows that the contract has been violated—we cannot take for granted either that it has or has not been violated. We must take the averments as they are made at present; and when we see the results of the investigation, which is what the Lord Ordinary has desired to inquire into, we shall then know how the case is to be further dealt with. If they could do that without violating their compact—if they could do all that is contended for—I think there would probably be an end of this case, unless there was something in it that was contrary to morality and propriety. One can fancy in the contract of a body of this kind something which the law will not recognise at all. I do not say there is anything of the kind here. If there were, it might still be open to the pursuer to obtain redress. But I do not say whether that is so here. It is not necessary to go into that question now."

Lord Ivory said:—

"I may take the liberty of expressing my surprise that this question has given rise to so much feeling and temper, as it is impossible to live in this country without perceiving that it has been attended with, in the

different sections of the public mind. It seems to me an absolute delusion on the part of the members of the Free Church to speak of the interference of this Court in these proceedings as implying, in the most distant degree, an interference with the freedom of religious opinion or religious status in congregations or other combined bodies—as interfering in the slightest degree with their full and perfect freedom of action and toleration. The Free Church on this question is in precisely the same predicament with any other dissenting Church, and it is not necessary that that Church should be a Christian Church in order to entitle them to the freedom and toleration which the law of this country gives to all bodies associated in such a manner, so long as they do not interfere with or infringe the public law of the land. It is a very broad question, and it is impossible to approach it without seeing the necessity and the propriety of watching over the principles upon which such questions are to be dealt with, because justice demands that the same course shall be followed, and the same judgment pronounced, in regard to the rights of other tolerated bodies as in regard to the rights of this tolerated Free Church.

"Now, with reference to one and to all, I beg, for my own part, that I be distinctly understood as recognising the fullest right in the Free Church, and other dissenting Churches, to deal with their own constitution. They are free within themselves to frame their constitution, and to set forth its principles and its limits, and to point out the duties and the course of conduct to be expected within the association. They may hold their own opinions, they may settle their own doctrines, they may regulate their discipline, they may regulate the appointment and the deposition of their officers. They may make what nobody will object to call their own judicatories, and in certain respects they are entitled also to settle and regulate their own forms of proceeding. All this they may do in the most complete manner; and when they have done so, if they will only add the virtue of remaining together, and not differing and contending with each other, they have the power of doing everything which any person whatever ought to wish in a free land to be entitled to do. They may also pronounce their sentences and decrees, and if they pronounce them within the powers given by the constitution, no man will interfere with them or say that they have done wrong. But if they are not conforming to the constitution—if they act against the powers which they have vested in their judicatories — if their sentences are pronounced by those who are not judicatories to that effect, it is a very different affair. Then what has been so done will have been done against law, will have been done so far against law that this Court must be entitled to interfere, and they will do so, because such proceedings will be an infringement and violation of the constitution, without which they cannot exist as a body at all. The moment they proceed beyond the powers vested in their officers, whoever these officers may be within their courts, whatever may be the decrees of subordination and succession of the tribunals, the moment they go beyond the constitution they are act-

ing *ultra vires*, they are acting in breach of their own solemn compact, and the proceedings which they thus perform may be quashed, and declared to be void.

"Their sentences and decrees in such a case will not be reviewed upon their merits. That has never been hinted at. It has never been attempted; it would be beyond the jurisdiction of this Court or of any other court to interfere as to that. But, apart from that, the sentence may be bad for reasons of inherent invalidity, as well as for unsoundness in their reasonings upon which it is propounded. But if the parties have power by the constitution to deal with the question, and if they deal with it in the manner pointed out by their constitution, then, although they may err in the conclusions to which they may come, although they may err in the amount of proof with which they are satisfied, or although, in any other manner, they may pronounce an erroneous and unsatisfactory judgment, being within their power, being within that which the defender in the case has submitted to bear at their hands, it will not be interfered with.

"There has, in the course of this discussion, been a remark oftentimes repeated, that in regard to matter of process every judicatory is entitled to enforce its own rules, and that what they do in that respect is not reviewable at all. That is partly true, and partly not so. The case of Lockhart is a clear case. That was a case within the Established Church, and it must be kept in mind that the Established Church and its judicatories form a recognised institution of the land—that the judicatories are of the description which exercise jurisdiction by authority of the country—that their courts are supreme and independent courts in ecclesiastical matters—that they are just as much supreme as the Justiciary Court is in regard to criminal questions, or this Court in regard to civil questions,—and, therefore, as every independent judicatory has inherent within itself the power of doing all which is necessary to follow out its proper jurisdiction, they may make their own forms of proceeding, and no other court can interfere, because no other court is more independent than themselves, and while they are proceeding within their proper functions, they are as supreme as this Court. But there is this important distinction in the present case, and I do not think it should be overlooked—it is too much overlooked, I am afraid, by these defenders—that even in the matter of process they have no jurisdiction. In the proper sense of the term they have none, but in the matter of process they have no power, and no jurisdiction, and no right to make rules; and these rules, when made, have no other authority than by the constitution consented to by all the parties, and made effectual in consequence of the agreement of the individuals composing that body. It is that, that is the measure of the form of process; and if, in the body of the constitution, it is expressed in distinct and intelligible terms what are the forms of process, then the members of the Church are entitled to have these forms followed out as much in regard to process as in regard to anything else."

Lord Curriehill went carefully over the whole case, and remarked, with regard to the action of reduction:—

"The other erroneous assumption of the defenders to which I have referred, is that, by the conclusion for reduction of the sentence and for restoring the pursuer against it *in integrum*, the pursuer calls upon this Court to replace him in an office from which he has been removed, and which he does not at present hold. As I read the summons, this is not the case. The fallacy upon which this assumption rests consists in overlooking a broad distinction which exists between two different kinds of actions of reduction. Those of the one class are in effect declaratory actions. Their object is merely to have it declared by the judgment of the Court that what is complained of never has had any validity or effect, and has been *ab initio* null and void. Reductions of the other class have the effect of creating a nullity, in deeds or proceedings which are effectual so long as they are not rescinded. As examples of rescissory actions of the former class, reference may be made to the cases of reductions of deeds granted by persons in a state of insanity or of pupillarity, and of decrees arbitral pronounced *ultra vires compromissi*. As examples of rescissory actions of the other class, reference may be made to reductions of deeds granted by minors beyond the years of pupillarity on the ground of minority and lesion, or of deeds granted on deathbed. The distinction between the two classes of reduction is also illustrated by those which are instituted for rescinding decrees of inferior courts. When the ground of reduction is only that the inferior court has exceeded its powers, the effect of the decree of reduction is merely to declare judicially the inherent nullity of the decree of the inferior court, and to leave entire the merits of the matter on which that court may have so incompetently adjudicated; and, accordingly, such an action of reduction is competent in this Court, even although the question on the merits be excluded from its jurisdiction. But if, in such a case, the summons should also conclude that this Court should pronounce a judgment on the merits of the question itself, that conclusion would be dismissed as incompetent. In the present case, what is sued for is merely a decree reducing the proceeding complained of as having been *ab initio* a nullity, and not a judgment on the merits of that proceeding. The remedy, therefore, which the pursuer is seeking by this action is not of the nature and import which has been assumed by the defenders in their argument, but is limited to a demand for having the sentence reduced, as having been *ab initio* null for want of power in the defenders to pronounce it, and for reparation of loss and damage alleged to have been sustained by the pursuer in consequence of its having been so pronounced. What, then, are the defences which are pleaded against this action? The defenders deny the more important of the allegations of the pursuer as to the constitution of the Church; and make counter-allegations that by that constitution the ministers and the members individually of the association bound themselves to submit implicitly to the sentences of the defenders, whatever these might be, and not to seek redress from a civil

court, however much the defenders might exceed the power or contravene the conditions of their constitution. If the defenders aver, as I understand they do, that by their constitution the ministers and members individually of the Free Church have intrusted such arbitrary power to them, I am not prepared to hold that these averments would be irrelevant as a defence against this action. If, by the constitution of the Free Church, its members and ministers individually have thought it right or proper to surrender their right to challenge in a civil court any acts of their governing bodies, even although these should be contraventions of the condition of that constitution itself, I do not see why they should not be bound by that agreement. In the record the pursuer pleads that such a condition would be *pactum illicitum*. But I don't see that there would be anything *contra bonos mores* in such an agreement, even if its members had agreed to a condition that their General Assembly should, in the exercise of an unlimited discretion, and without assigning any reason for their conduct, be empowered to deprive any of their office-bearers of their offices, or even to expel from the association. I do not think there would be anything unlawful in such a contract. But as the allegations of the defenders are denied by the pursuer, I think that the Lord Ordinary is quite right to institute an inquiry into the truth of these disputed matters. But while the defenders admit in their argument in this case that the constitution of their association is not only the source, but likewise the measure, of their powers over their members and ministers, they notwithstanding maintain that, although they should transgress the powers so committed to them in their proceedings against any of their members or ministers, the parties so wronged would not be entitled to have the nullity of the proceeding adjudged by this Court. The grounds upon which they maintain this doctrine in the present action are embodied in two of their preliminary pleas now under our consideration. They are—first, that the proceedings are 'spiritual acts done in the ordinary course of discipline of a Christian Church, tolerated and protected by law;' and, secondly, that 'the actions, in so far as they conclude for reduction of the sentences complained of, do not relate to any question of civil right.' These pleas raise a question of vast importance to all the individual members and office-bearers not only of the Free Church, but also of all the religious associations in Scotland; for, while the questions raised upon the conditions of the constitution of the Free Church would affect the rights of the ministers and members of its own communion, the far wider question raised by those preliminary pleas would affect the rights of the ministers and members of all the religious associations in Scotland. That is a question between the members and office-bearers, individually, of these associations on the one hand, and the bodies to whom they intrust the supreme power of governing them on the other. And the question is, Whether the former can have no redress whatever against the proceedings of the latter, however unlawful and unconstitutional these may be? For, if these pleas be well founded, no limits nor conditions which, in framing their constitutions, the members of such associations may think fit to place upon the powers

of the bodies to whom they intrust the supreme power of managing their spiritual affairs, would be practically available to them, because in such cases, however much the proceedings of such ruling bodies might be beyond the power intrusted to them by their constituents, no redress could be obtained by the latter either *extrajudicially* — because there would be no other tribunal within the association itself to whom application for relief could be made—or *judicially*, because the proceedings would, according to the plea, be spiritual acts, and would not relate to matters of civil right."

Lord Deas, in the following portion of his vigorous and eloquent speech, alluded first to the results of reduction, and afterwards to the necessity of having an inquiry into matters of fact:—

"The notion that we shall, in any event, reduce these sentences, except in so far as they may form a bar to redress for civil injury, has not, so far as I know, been hitherto countenanced by any of your lordships. If there has been no civil contract at all—if no civil wrong, for which the law provides redress, has been committed—we shall neither give reduction nor damages. If, on the other hand, a civil contract has been violated, we cannot refuse to the pursuer an opportunity of establishing his claim for damages occasioned by that violation. If the sentences complained of shall be found to carry with them no presumption of validity, and so not to stand in the way of a claim of damages, there may be no necessity for any reduction of them. But if they are to be reduced, it has never occurred to me, and I do not think it has been suggested by any of your lordships, that such reduction could go further than removing them out of the way as an apparent obstacle to patrimonial redress. Nobody contemplates that the defenders are to be ordained to receive the pursuer back into their association—to allow him to sit and vote in their presbyteries, synods, and general assemblies—or that the Free Church congregation at Cardross are to be compelled either to listen to his sermons or to absent themselves from the church, and leave him to preach in it to empty benches. The principle upon which we should decline to take that course is a very ordinary principle. If a master unwarrantably dismisses his servant, we give pecuniary redress; but we do not compel the master to take the servant back into his service. If I engage a teacher in any department of science, literature, or art, the law will compel me to pay him, but the law will not compel me to be taught by him. It is not because the office of a clergyman is a holy office—it is not because those who ordained or deposed him did so by divine authority—it is not because the Church he belongs to is a Christian Church—it is not because the object of the association is a religious object—that we decline to interfere further than I have indicated; it is simply because this Court deals only with civil or patrimonial interests and consequences, and, while vindicating or giving redress for these, refuses to go beyond them.

"It is upon the same ordinary principle that, if no civil interests are involved, we refuse to interfere at all. Men may associate themselves

together for innumerable purposes under rules and regulations which may be called, if you please, a contract or agreement, but of the breach or observance of which the law will take no cognisance. It is of no moment whether these purposes be trivial or important—temporal or spiritual—scientific or religious—so long as they do not involve civil or patrimonial rights. If our judicial interposition, or non-interposition, turned, to any extent, upon the laudable nature of the association—upon its object being spiritual or religious, or upon the truth or falsehood of its religious principles—it is quite plain that, before determining whether and how far we should interfere or not, we would have to inquire into and judge of the very matters and distinctions which the defenders are so anxious to keep in their own hands, and with which, happily, we have nothing to do. But if parties choose to connect with, or superadd to such objects, or any of them, a lawful civil contract—if they introduce the element of pecuniary or patrimonial remuneration—then our interposition in aid of civil rights, and to redress civil wrong, is just as much a matter of course, irrespective altogether of what may be the object of the association, as our non-interference where the civil element is wanting. There are innumerable compacts or arrangements every day entered into which, although not to be compared in importance with compacts or arrangements as to matters of religion, may materially affect the comfort and happiness of society, and in respect of which, nevertheless, so long as they do not involve civil or patrimonial rights, no action will lie, either for implement or damages. Two persons agree to ride together, to dance together, to sing or play together, to travel together; the one breaks his engagement, and the other shall have no redress. But if the one has agreed to pay the other for the instruction to be derived in riding, dancing, music, or any other branch of study, or for accompanying him as his *courrier* or *valet de place*, the law will give redress to the party injured by the breach of that agreement. So it is in other matters, less or more important. The case is not varied by the introduction of the religious element. A number of persons agree to constitute themselves an association to read the Bible together, to pray together, to worship together in any form which the law sanctions or tolerates, and the law will not interfere whether they keep or break such engagements. They may call themselves a Christian Church, or a Synagogue, or a Free Church, or a True Church, or any name they please, and the law will not even inquire whether they merit the name they so appropriate, nor whether their doctrines be heterodox or orthodox, provided only their objects be not unlawful. They may assign to certain of their number certain functions —so many to be ministers or office-bearers of whatever kind suits the denomination to which they belong; and if the labours of the minister and other office-bearers are undertaken only by those who are rich enough and generous enough to undertake them gratuitously, the association may enjoy that happy state of freedom in which nobody is bound to anything. But if the association make a compact with certain of its members that, on condition of the latter going through a long course of

study and preparation, and devoting themselves exclusively to the labours of the ministry, they shall be held qualified to be inducted, and accordingly do induct them into the charge of particular congregations, with right to certain emoluments as a means of livelihood, and on the footing that the qualification thus conferred shall not be taken away except for one or more of certain causes, to be ascertained by certain tribunals, acting in a specified order, then the association, or its members, if they break this compact, may become liable for the consequences, precisely as if the emoluments had been attached to a purely secular qualification and employment. A minister is just as much entitled to rely upon his compact for the means of subsistence as any other man. A breach of that compact, whereby he and his family are thrown upon the world to starve, is a wrong which could only be left without a remedy in a country where law is unknown. It was stated by the defenders' counsel, Mr Young, in answer to questions put, partly by your lordship in the chair, and partly by me, that the Free Church General Assembly might, at any time, resolve that any given number of ministers, whose names should be first drawn from a ballot-box, should be deposed; and that, if the pursuer had been convicted of being sober, in place of being intoxicated, on Christmas-day 1857; or if the sentence had borne that he was the ablest man and the best preacher in the Church, and therefore that he was deposed, there would still have been no legal claim for redress. It may be so, if it can be shown either (*first*) that the pursuer bound himself to such conditions, or (*second*) that the compact involved no matters of civil or patrimonial right. But if neither of these two things can be shown, the result seems just about as startling as that the Faculty of Advocates should be allowed, with impunity, to expel one of its members because he was the most able and accomplished and successful member of the body. If the ministers of the Free Church choose to agree that a majority of their General Assembly, or any other committee of the association, shall have power to depose all or any of them at pleasure, without cause assigned, let them do so. No man in this country has any power over another, in matters either religious or civil, beyond what the civil law itself confers, except by that other's own consent. But there is great latitude in the extent to which this consent may be carried. It may go the length of enabling any leader of a dissenting presbytery, synod, or assembly, who can command a bare majority at the moment, to have any leading member of the minority at once deposed, without cause assigned; or of enabling the majority at once to depose the whole minority. But such consent, to be effectual, must be clear on the face of the compact. The law will neither presume nor readily infer such consent where civil interests are involved. The liberty of the majority may be the slavery of each individual, and of the whole minority. That is not the kind of liberty which the law of this country favours. Still less does the law favour or even recognise the liberty of one party to a civil contract to break it with impunity, or to interpret it in his own favour to the prejudice of the other party. The interpretation of all contracts belongs to

the civil courts, to the effect, in the first instance, of ascertaining whether they involve civil rights; and, in the next place, if they do, of vindicating or giving redress for the violation of these rights; and, although every human tribunal must be fallible, history has shown that nowhere else can these powers be so safely lodged. Rightly viewed, they are, in us, not powers, but duties which, when required by any of her Majesty's subjects, be their religion what it may, we have no choice but to perform."

NOTE G.

THE CARDROSS CASE—THIRD JUDGMENT.

On 9th July 1862, this case was advised for the third time, nominally upon issues reported by Lord Jerviswoode, to which the Church defending wholly objected; but the Court took the opportunity of reviewing the whole case and hearing counsel, especially upon the question whether parties were well called.

Lord Colonsay, President, explained the grounds on which he thought the whole action should be thrown out:—

"The action is directed against the General Assembly of the religious denomination calling themselves the Free Church of Scotland, and the Rev. Dr A. Beith, the moderator, and the Rev. P. Clason and the Rev. Sir H. Moncreiff, both residing in Edinburgh, the Assembly's clerks, as representing the General Assembly. I am of opinion that it is not competent so to convene that body or aggregate of persons in an action of damages. They are not a corporation; they are not a joint-stock company, that are to be sued by their office-bearers. They are a certain selected number of the members of a voluntary association—members chosen and assembled according to the rules of the association—to transact a certain part of its business, and then to be dissolved. It was said that they met as a court, and in their collective and *quasi* judicial character did the wrong complained of; but it does not from thence follow that in their collective capacity they can be convened in an action, and subjected in damages. There is nothing on the record to show who were the individuals composing the body, or composing the alleged majority in the division which is said to have taken place. There is nothing to show who were the doers of the wrong that is complained of. The wrong—I mean the wrong inferring liability for damages—if done at all, was done by the members of the body who voted for and carried the sentence complained of as having caused injury. For these reasons I am of opinion that the conclusion for damages cannot be insisted in, and that no issue for damages should be allowed in reference to the matter involved in the first action in which the General Assembly are the only defenders. There is no record to show a case as against any person whatever. It is against

that body such as I have described it. Now, if the conclusion for damages cannot be insisted in or sent to trial, the only other conclusions in that action would be the reductive conclusions. In regard to these conclusions, I am of opinion that, if dissevered from the demand for damages, they cannot in this action be proceeded with as separate and independent conclusions. I form this opinion upon the same grounds on which I formerly rested my opinion that the reductive conclusions were competently and fitly coupled with the demand for damages. It was not maintained by the pursuer, and certainly not stated by the Court, that these conclusions were to be read and construed in the widest sense which the language of them can upon any reading admit of—that they could be read as extending to anything but civil consequences. They must be read with reference to the action in which they occur, and with reference to the demand which the pursuer is making for redress in that action on account of a civil wrong. The redress which he is here asking is damages; the party from whom he is asking that redress is the General Assembly. He is not asking to have it declared that he is still entitled to the emoluments of his former offices; the proper parties to resist any such demand are not here. It is not alleged that the stipend was payable by the General Assembly. The demand here is a demand for damages against the General Assembly. The Assembly have no interest in this action; they are not the proper parties for that demand; and the parties who might have an interest in supporting the sentence, as against another demand, are not here. I therefore read these conclusions for reduction as auxiliary to the demand for redress which the action contains, and as proper and fit to be there, in case the sentences should be set up as a bar to the demand, and to give the power to sweep them out of the way, so far as they could in any view be construed as an impediment to getting at once to that demand. But I read them with reference to that demand. I read the summons as showing the purpose for which they are there. They are there as auxiliary to the demand for damages; and being of opinion that the demand for damages cannot be maintained under this action, I am of opinion that these conclusions, which are auxiliary to that demand—and which are only there for the purpose of enabling the party to get at that demand without impediment, and with reference to the parties entitled to resist that demand for damages—cannot be maintained either."

While thus dismissing the action on the ground of form, his lordship indicates his opinion on what is probably the most important practical point embraced in it:—

"There is another view of the matter which might lead to the same result, though upon other grounds, and it is this: The matter with which the General Assembly were dealing, as I have already observed, was a matter which had been brought before the presbytery. It was competently before the presbytery. The presbytery is a tribunal which exists by the rules of this voluntary association, and is capable of dealing with such matters; and the parties had voluntarily submitted themselves to

it. They erected that tribunal for the determination of questions which might be raised in reference to them, and it is not contended that the tribunal of the presbytery had no power to pronounce such a sentence upon the matter submitted to them. The synod and the General Assembly are also tribunals which the parties have reared up for the government of their own affairs, and for the discipline of their own Church. The matter which was dealt with here was a matter which came before them as acting as a *quasi* court or tribunal, so constituted by the voluntary act of the parties concerned. If they had refused to entertain questions such as were fit to be entertained, and proper to be entertained before them, as between the parties, and to decide them, they would have been refusing to perform the duty which the members of the Free Church were entitled to expect to be performed at their hands. The matter which they were so asked to deal with was a matter on which they were to adjudicate. It is contended that the matter which they did adjudicate upon—the guilt or innocence of the party of certain charges—was not competently before them, and, therefore, that they were beyond their power; but they were bound to adjudicate upon this question whether it was competently before them or not. I do not mean to say that, by dealing with that question in a wrong way, the members who do so may not subject themselves to damages; but when they are required by the parties to exercise a judgment—when they are placed by the parties in a position in which they are to exercise a judgment in reference to a questionable matter or mode of proceeding, as to a subject which the Church courts can entertain—till I hear something more, I am disposed to think that, with reference to such a question, in maintaining that they had gone wrong, it would require to be alleged that, in coming to the decision at which they arrived, they were actuated by malice. But I do not think that question is necessary for the disposal of this action."

Lord Curriehill speaks more fully upon the same important point:—

"What, then, is the redress which the pursuer is actually claiming by this action? He asks a decree for payment of a sum of £500, in reparation of the loss and damage which, as he alleges, he has sustained by having been irregularly deprived of these emoluments. And the question is, Whether the pursuer's allegations in the record, even assuming all of them to be true, would be relevant to support that claim? I am of opinion that this question must be answered in the negative. The ground of this opinion is, that parties upon whom judicial functions are lawfully conferred, and who, in the *bona fide* exercise of these functions over parties subject to their authority, fall into errors in judgment, are not liable in damages to these parties in consequence of such errors. *Humanum est errare.* Infallibility of judgment is attainable by no man, however laboriously and conscientiously he may exert his powers to do what is right; and if, notwithstanding a judge's best and *bona fide* endeavours to do so, he should be liable in damages for errors into which he might fall, such offices would be shunned by those best qualified for performing their functions. But such functionaries have an immunity

from liability for errors in judgment, unless their errors arise from corruption or malice. The law unquestionably confers such an immunity upon judges officiating in the public judicial institutions of the country, whether civil, criminal, or ecclesiastical, upon whom jurisdiction is conferred by the State. It also extends such immunity to private persons upon whom parties, by voluntary agreement, confer authority to adjudicate in certain matters among themselves—it being the policy of our law to encourage and support the settlement of disputes by such private arrangements. This is exemplified by the support which is afforded to arbitrations. It is likewise illustrated by those conditions which are often inserted in mutual contracts, to the effect that disputes which may arise among the contracting parties as to the subjects of their contracts shall be adjudicated upon by parties therein appointed for that purpose. Such arbitrators are not liable in damages to the contracting parties for errors of judgment into which they may happen to fall in the *bona fide* exercise of the functions so conferred upon them. In like manner, when voluntary associations, constituted for religious purposes, confer upon some of their own members authority to adjudicate among them in certain matters, the law extends to the persons so appointed immunity from claims of damages, on the part of members of their respective associations, for errors into which these functionaries may fall in the *bona fide* exercise of the authority so intrusted to them. They enjoy such immunity, not because such functionaries become invested with any superhuman authority in addition to that which they derive from the members of their own associations, but because these members, by voluntarily conferring such judicial authority upon them, are held to confer upon them likewise the privilege which the law itself attaches to the *bona fide* exercise of judicial functions. This is a principle which is of great importance in this country, as, in my opinion, it enters into the constitution of most, if not all, of the voluntary religious associations which have been formed in Scotland under the protection of the Toleration Acts. And, accordingly, effect has often been given to this principle in questions which have arisen between individual members or office-bearers of such associations, and those whom they had voluntarily invested with such judicial authority. For example, in the case of Auchincloss, 6th March 1793 (Hume, 595), a presbytery of the association which was denominated the Associate Burghers having deposed one of its ministers on a charge of licentious conduct, he sued some of the members of the presbytery for damages on the ground of the allegation being false; but he did not allege that the charge had been made maliciously. It was held 'that the defenders were answerable, if it could be shown that, though made in a judicial form, the charge against the pursuer was truly a calumny, and was made and prosecuted in a malicious spirit; but all agreed in thinking that the pursuer had not condescended relevantly.' In the case of Smith *v.* Grieve, 18th February 1808 (Hume, 637), a member of the association called Bereans sued some other members of the congregation (which, according to the constitution of that body, was intrusted with such judicial authority)

for damages for defamatory language used by them in a congregational inquiry as to some charges against him. It was held that they 'were not liable for anything which has passed judicially in some measure at the meetings of the congregation according to the rules and usages of the Berean Society.' And in the case of Edwards, 28th June 1850 (12 D. 1134), the principle was recognised in opinions delivered by the Court (although the ultimate judgment was rested on other matters) in reference to a claim of damages made by a member of a vestry in an Episcopalian association against the other members for a defamatory sentence of that body, notwithstanding a reversal of that sentence by the bishop as having been *ultra vires* of the vestry. These cases exemplify the operation of the principle that tribunals upon which, by the constitution of such voluntary associations, judicial authority over its individual members and ministers is conferred are not liable in damages to them for what may be done *in bona fide* by these tribunals in the exercise of such judicial functions; and, in accordance with that principle, I am of opinion that in the present case the defenders, who were intrusted by the pursuer and the other members of the association with such authority, would not be liable to him in damages for what they did in the exercise of that authority, even were it true that they fell into an error to the extent alleged by him, since he does not accuse them of having acted maliciously and without probable cause.

"The pursuer, however, maintains that the defenders are not entitled to that immunity, because to some extent it was *ultra vires* of them to pronounce the sentence complained of, in consequence of the alleged irregularity in the proceeding. But assuming, as must be done in this question of relevancy, that there was such an irregularity in the procedure, still, according to the pursuer's own statements in the record, the error imputed to them as to the extent of their powers would have been merely an error in judgment in the *bona fide* exercise of their judicial authority.

"But I must here guard against any misconception as to what would be the legal effect *in other respects* of such a transgression of their powers as is imputed to the defenders. The conditions of the constitution of such voluntary associations are as binding upon the functionaries to which the members intrust such judicial authority, as they are upon the members themselves; and the latter are not bound by such proceedings of the former as are beyond the limits of the powers conferred upon them by the constitution. It was upon this ground the Court, in the former stages of this case, repelled the plea of the defenders, that their sentence, even supposing it to have been beyond their powers, precluded us from even entering upon the consideration of the pursuer's claims; and although that line of pleading is not now persisted in, and we are now disposing of these claims of damages on their own merits, I do not say that the allegation of the sentence having been *ultra vires* of the Assembly would not have been relevant to support a claim for redress of a different kind. For example, were a claim made by the pursuer against

the administrators of the funds and subjects from which the patrimonial emoluments are derived, and were the sentence in question pleaded as a bar to such a claim, I do not say that the alleged nullity of the sentence would not have been relevant to support a claim for redress of that kind. A claim for redress of that kind would depend upon principles quite different from those which regulate such a claim of damages as we are now considering; and I reserve my opinion upon any such case until it shall actually occur. In many cases, judgments pronounced by Sheriffs, Justices of the Peace, and others, in contravention of conditions of statutes under which they were acting, have been set aside as incompetent, even although the statutes have declared their judgment not to be subject to review; and the rights of parties against whom such sentences were pronounced have been found to remain unaffected by such judgments, and yet the judges by whom they were pronounced were not liable in damages. So also arbiters, if they pronounce awards which are *ultra vires compromissi*, are not liable in damages if they acted purely, although their awards may be found to be null and ineffectual against the parties."

Lord Deas dissented from the judgment, on the ground that "it is not a sufficient objection to the competency of a reduction that the damages are not claimed in the same action, or that, being claimed, the conclusions for these damages are ill laid, and are either abandoned or fall to be dismissed."

NOTE H.

MR FORBES *v.* THE SCOTTISH EPISCOPAL SYNOD, 1866.

The Rev. Mr Forbes *v.* Dr Eden and Others, Members of the General Synod of the Episcopal Church in Scotland held in 1862 and 1863.

This is an action of reduction of the new Canons, in so far as specified in the summons; with farther conclusions that, whether they were reduced or not, the alterations upon the Canons formerly existing in this Church should be declared *ultra vires* of the defenders, and the pursuer declared free from them; and also with certain petitory conclusions. (The effect of the alterations may be roughly stated to be to authorise the use of the English Communion Office in any congregation of the body which prefers it to the Scottish Office.) But the nature of the action is sufficiently stated in the Lord Ordinary's note to his interlocutor of 18th March 1865, finding that the pursuer's statements "are not relevant or sufficient in law to support the conclusions of the action."

His lordship (Lord Barcaple) says:—

"This case differs materially from others of a somewhat similar kind that have been before the Court. The action is brought by the pur-

suer as an ordained clergyman of 'the religious denomination known as the Episcopal Church in Scotland,' and minister of the Scotch Episcopal congregation, Burntisland. It is directed against the bishops and a large body of the clergy of that Church, as members of a General Synod of the Church held in 1862 and 1863, and as individuals. The leading conclusion of the action is for reduction of certain portions of a Code of Canons of the Episcopal Church in Scotland, enacted in 1863 by the General Synod before mentioned. There are also conclusions for declarator—*first*, that it was *ultra vires* of the General Synod to alter, amend, or abrogate any of the Canons contained in a previous code enacted in 1838, or to make new Canons, except in conformity with the constitution which was recognised, and the practice which was acknowledged, at the time of the pursuer's ordination, and set forth in the Code of Canons of 1838, which was then subscribed by him; and, *secondly*, '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 Canons of 1838, and is entitled to the free exercise and enjoyment of all the privileges conferred on him under these Canons, or under the deed of institution in his favour. The summons finally contains pecuniary conclusions against the defenders, conjunctly and severally, or severally and respectively. There is first the sum of £120 concluded for, as the amount paid by the pursuer to the Reverend Mr Wilkinson for his services as curate, of which the pursuer was deprived through the wrongous refusal of a licence to Mr Wilkinson. There is finally the sum of £200, concluded for generally as damages and *solatium* for the loss and injury which the pursuer has sustained patrimonially, and in his health and feelings, by the wrongous refusal to license his curate. This refusal is alleged, and indeed admitted, to have been caused by the curate declining to sign the Canons. It thus appears that the whole matters as to which the pursuer seeks a remedy, either consist in or arise out of the enactment of the Canons of 1863, in so far as they alter the Canons of 1838 in a way not in conformity with the consitution and practice of the Church. Both sets of Canons are referred to by the pursuer, and made part of his case.

"The peculiarity of the case is, that the pursuer does not merely ask redress against an invasion of his rights, which he alleges to have taken place in consequence of the enactment of these Canons, and under their authority, but he complains of the Canons, and seeks to have them set aside by the Court, as being in themselves, and by their mere enactment, a wrong done to him. In short, he maintains that he acquired such a *jus quæsitum* in the Canons of 1838, which were in existence when he was ordained, and in the constitution of the Church as fixed by them, that he is entitled, as a matter of civil right, to prevent them being altered by the Synod, except in so far as the alterations may be consistent with the recognised constitution and acknowledged practice of the Church. It may be that the reductive and declaratory conclusions are also intended to prepare the way for the conclusions for damages. But as the Lord Ordi-

nary reads the record, and as he understood the argument for the pursuer, the more important complaint made against the Canons, for which redress is sought in this action, is, that they are in themselves, and irrespective of anything that may have followed upon them, a wrong done to the pursuer of such a kind that he is entitled to be protected against it by a court of law.

"It may be more convenient to consider, in the first place, whether the pursuer has stated a relevant case of injury inferring damages against the defenders by the wrongous refusal to license his curate. It appears to the Lord Ordinary that, on principles altogether apart from the ecclesiastical origin of the cause, this part of the pursuer's case is clearly irrelevant."

After stating these reasons, the conclusion is drawn :—

"If the case is irrelevant as regards the conclusions for damages, the existence of these conclusions cannot aid the relevancy of the case stated by the pursuer for redress against the new Canons by reduction and declarator, which must therefore be considered upon its own merits.

"The defenders do not raise any question either as to the jurisdiction of the Court or the competency of the action. They maintain that, upon his own showing, the pursuer has not a good case in law for any of the remedies which he seeks. On the other hand, the pursuer does not maintain that he can ask the Court to interfere with, or even inquire into, the Canons of his Church, except for the purpose of giving him redress in a matter of civil right. The peculiarity of his case, apart from the claim for damages, is, that the civil right, which he alleges to have been illegally invaded, is his right to insist that the Canons of 1838 shall not be altered except in conformity with the recognised constitution and acknowledged practice of the Church ; and that the wrong which he seeks to have redressed is the adoption and continued existence upon the Statute-book of the Church of the Canons which were enacted in 1863. This is a case very different, as it appears to the Lord Ordinary, from any of the same class which have been hitherto insisted in."

The peculiarity of this case, and the grounds on which it is rejected, are put in the following passage :—

"The pursuer admits that he can only seek redress for a civil wrong ; and the wrong of which he is here complaining is the enactment and subsistence of the altered Canons which he asks leave to set aside by the Court. He does not dispute that the General Synod was competent, by the laws of the Church, to alter and enact Canons. Indeed, he refers to Canon 33 of 1838, which enacts that a General Synod 'has the undoubted power to alter, amend, and abrogate the Canons in force, and to make new Canons,' which 'being in conformity with the recognised constitution and acknowledged practice' of the Church, shall bind all its members. The Canons, therefore, which the Court is asked to treat as being in themselves, by their mere enactment, a civil wrong done to the pursuer, and on that ground to set aside, are internal regulations, enacted by the proper authority, in regard solely to the ecclesiastical and spiritual affairs of the Church itself. The Lord Ordinary does not know of any similar demand having

hitherto been made for the intervention of a court of law in matters touching the faith and discipline of a religious denomination. There is not here any violation of statutory duties and rights, as in the Auchterarder case. Neither is there the alleged perversion of property from its destined use, as in Craigdallie *v.* Aikman, 1 Dow, 1 and 2 Bligh, 529; Smith *v.* Galbraith, 6 June 1839, F. C.; and Attorney-General *v.* Pearson, 7 Simon, 290; and the case of Lady Henley's charity, *ib.* p. 309. Nor is there the allegation of direct patrimonial injury done by an ecclesiastical body acting illegally, as in the case of Macmillan *v.* the Free Church, 23 D. 1314; or of injury by libellous matter contained in an ecclesiastical sentence, as in Dunbar *v.* Skinner, 11 D. 945. In all these cases it was not only alleged that the ecclesiastical body or its office-bearers had violated the law or constitution of the Church, but a direct and substantive patrimonial injury was alleged to have been inflicted on the party seeking redress.

"It appears to the Lord Ordinary that the present action proceeds upon a fallacious view of principles, which have been recognised in these cases, and of *dicta* which had reference only to the questions then under consideration. When, in defence against an action on account of something done by an ecclesiastical body, it was pleaded that the matter, being ecclesiastical, was solely for the determination of that body itself, it was effectually replied that that was an assertion of exclusive power of jurisdiction, which could only rest upon contract, and that the contract was to be found, if anywhere, in the constitution and laws of the Church. In the discussion which thus arose, the constitution and laws of the Church came to be referred to as 'the contract' upon which the question turned, and most correctly; for by reference to them the question of jurisdiction, or of the legality of the proceeding complained of, was to be determined. The fallacy of the present action appears to the Lord Ordinary to be, that the pursuer treats the Canons of his Church as if they were primarily and by their main intention a contract between the members of the Church. Taking this view, he complains that the terms of his contract have been changed without his authority, and to his injury. Analogies are brought forward drawn from other associations, formed for entirely different purposes, and having nothing equivalent either to the authority which is vested in synods and other ecclesiastical bodies, or to the regulations for the doctrine and internal government of a Church. And the Court is asked to deal with the Canons of a Church as they are from time to time enacted by the proper authority, as if they were nothing else than attempted modifications of the contract between the members of an association for ordinary civil purposes. This is, as the Lord Ordinary thinks, altogether a fallacious view, and quite unwarranted by the authorities referred to. The Canons of a Church are not enacted for the purpose of constituting a contract, but to establish and regulate its doctrine and discipline. The contract, in the sense in which that expression is important in these discussions, may or may not be embodied in the Canons. They are only to be looked at as giving evidence, more or less complete, in regard to it. For that purpose the Canons of the pursuer's Church of 1838

are as available now as ever they were. If the pursuer can show that he has suffered patrimonial injury by the violation of any civil right which he possessed under them, the enactment of altered Canons in 1863 will not deprive him of his legal remedy. But it is new, and, as the Lord Ordinary thinks, contrary to all the principles which have been recognised in this class of cases, that the Court should be asked to interfere with the Canons of a Church, and that not for the purpose of protecting a party from injury done to him under their authority, but merely to relieve him from what he considers to be the civil wrong done to him by their enactment and subsistence."

None of the civil evils threatened by the change, it is remarked by the Lord Ordinary, have as yet come upon the pursuer. When they do, it will be time to try what is the constitution or contract of the Church. In the mean time,—

"By the declaratory conclusions, the Court is called upon to deal with the Canons of 1863, by declaring, first, that it was *ultra vires* of the General Synod to enact them; and, secondly, that the pursuer is entitled to perform his functions as a clergyman in conformity with the Canons of 1838. This is just asking the Court to regulate the internal affairs of this Church in regard to the matters as to which the pursuer alleges that the two sets of Canons differ—the more important of which are alleged by him to relate directly to questions of doctrine. Into matters of this kind courts of law have always refused to inquire, except for the purpose of vindicating a civil right or protecting against a civil wrong. Even in that case the courts have never given the remedy by altering or setting aside proceedings taken by the ecclesiastical authorities within their proper province, and least of all by making or unmaking regulations for the doctrine or discipline of the Church. The pursuer, indeed, does not ask the Court to pronounce as to the theological soundness of the doctrines in question, but only as to whether they are not now brought in as an innovation. But civil courts do not undertake to protect Churches, or individual members of Churches, from the influx of new doctrines. They only interfere to prevent the uses of property being perverted through its being retained by a majority who only keep the name, while they have abandoned the principles, of the Church to which it was devoted. The proposal to give such a remedy as is here asked, against the Canons regarding the powers of the bishops to establish missions, and the power of General Synods to make and alter Canons, may appear less startling, because they are not strictly matters of theological doctrine, though they are not less polemical for that reason. But the Court will as little interfere to impose upon a dissenting body immutability of Church government as immutability of doctrine; while in either case it will protect property from being diverted, or persons from being injured, by the consequences of changes on doctrine or constitution."

The Second Division advised the case on the 8th December 1865.

The Lord Justice-Clerk said:—

"The pursuer, who describes himself as 'a clergyman of the religious denomination known as the Episcopal Church in Scotland,' and 'minister of the Scottish Episcopal congregation at Burntisland,' brings this action against a large number of persons who are also clergymen belonging to the same communion, and several of them holding the office of bishop in that communion, all as members of a General Synod of the body held at Edinburgh in the end of 1862 and beginning of 1863.

"His complaint against them is that, in making certain alterations on the Code of Canons, they have violated the constitution of the religious body to which both parties belong, and have thus committed a breach of contract.

"He alleges further, that he cannot conscientiously obey or conform to the new and altered code, and, as by that altered code itself he is taken bound to do so under heavy penalties, including degradation from the office, functions, and character of a clergyman, he has a material interest, personal and patrimonial, to challenge the legality of the alterations complained of, and to seek the protection of the law against their enforcement.

"To the general relevancy of such an action it does not appear to me that any good objection can be stated.

"If a society, whether for secular or religious purposes, is bound together by articles of constitution, and an attempt is made to alter any fundamental article of the constitution, the general rule of law undoubtedly is, that the majority may be restrained, on the application of the minority, from carrying the alteration into effect. The rule may be illustrated by an example which comes readily to hand. This religious body effected a union with various congregations of English Episcopalians on the footing of taking the Thirty-nine Articles of the Church of England as their formulary and standard of faith and doctrine. They might nevertheless now propose to abrogate that standard, and revert to the Confession of Faith originally prepared by Knox and the other early Reformers, and sanctioned by Parliament in 1567, which was their only standard or formulary (if they had any except the Apostles' Creed) during the eighteenth century. The whole body would have power to make the change, if they were unanimous (though they might thereby individually lose some statutory privileges). But a majority, I apprehend, would have no power to do so against the wishes of a minority, however small. Again, if the Synod, whose acts are here complained of, had passed an ordinance prohibiting the use of all set forms of prayer, the result would be the same. If all the members of the communion agreed or acquiesced, the change would be perfectly lawful; but any one having sufficient interest might complain of it as a breach of contract, because in this communion it seems to be a fundamental article of the constitution, since 1811 at least, that set forms of prayer shall be used in public worship, and in the administration of the sacraments.

"There may no doubt be breaches of contract where the party complaining has no such interest to enforce the contract as can be recognised

by a court of law. Thus an association may be formed for mere sport or amusement, which every member is at liberty to leave as soon as he feels inclined, and which he can leave without any pecuniary loss. In such a case the law will not interfere. And though the subject-matter of this contract be as far removed as possible from sport or amusement, still, if the complaint here were at the instance of a mere lay member of the Scottish Episcopal communion, his interest and title to defend the constitution of the society might be seriously questioned; for he would be met with the ready answer, that as soon as the practice of the religious body became disagreeable to him he was at liberty to bring his connection with it to an end.

"It may seem that the distinction between a lay and clerical member of such a voluntary association is scarcely so substantial as to justify giving to the one and refusing to the other a legal title to complain of any violation of the fundamental articles of association. But there are some weighty considerations which support such a distinction.

"The possession of a particular status, meaning by that term the capacity to perform certain functions or to hold certain offices, is a thing which the law recognises as a patrimonial interest; and no one can be deprived of its possession by the unauthorised or illegal act of another without having a legal remedy.

"The position of a minister or clergyman in a dissenting communion differs, no doubt, from that of a minister of the Established Church, and from that of a member of any of the law or medical corporations, inasmuch as he has no legal or recognised status. But it is beyond question, that where a religious society embraces a numerous and wealthy section of the community, the position of a minister of religion in that society is an object for the attainment of which men are specially educated at considerable cost, and for the sake of which they throw away, it may be, other and more profitable prospects. When, therefore, one has, by competent authority, been ordained a minister in such a communion, I hesitate to come to the conclusion that he has not obtained something which is of appreciable value, even according to the vulgar standard of money.

"If, therefore, the pursuer can show that he became a minister in the Episcopal communion under one law, and now finds himself, by the proceedings of the defenders, under a new law, the enactment of which is a breach of the fundamental constitution of the society which he cannot conscientiously obey, and which, if he disobey, he is liable to be deprived of his position as a minister, and of the character impressed on him by his ordination, I am not prepared at once to say that he is without legal remedy. That he has not yet been challenged for his disobedience to the new law, and has suffered no actual injury, seems to me of little importance. If he can satisfy the Court that injury is surely impending, he is as much entitled to the exercise of preventive justice to stop the infliction of a wrong, as he is to reparation when the wrong has been done and the injury suffered.

"Holding these views as to the general nature of the case before us, I

hesitate to adopt the course of reasoning in the note of the Lord Ordinary, and to give judgment against the pursuer solely or mainly on the ground that he has no sufficient title and interest to sue, apart from a full consideration of the grounds of his complaint on its merits. I think we can scarcely do justice between the parties in this case unless we carefully consider what are the terms of the contract alleged to subsist between them, and what are the alleged breaches of that contract."

His lordship accordingly went on to point out that there had been no change in point of fact from the old standard, because in point of fact no fixed and accurate formulary had been appointed before.

Lord Cowan also agreed with the Lord Ordinary's judgment on the matter of fact; but, unlike the Lord Justice-Clerk, approved of it also on the general ground of law:—

"The first inquiry to which I have directed my attention, in advising the lengthened and able argument addressed to us in this case, regards the extent to which the Court is called on to deal judicially with the important questions that have been argued. And the more consideration I have given to the case, I have become the more satisfied with the manner in which it has been disposed of by the Lord Ordinary, and with the grounds of judgment on which his lordship has proceeded, as these are explained in the note to his interlocutor.

"Both parties concur in the statement, that no point affecting the jurisdiction of the Court to entertain this action has been raised; and I am willing so to view the case; but while making this admission, the defenders state in their record, that, 'having regard to the subjects and terms of the Canons which are complained of, they respectfully maintain that the Canons are not liable to be reduced by this Court.' This statement appears to me to suggest very important matter for consideration, which requires to be disposed of at the outset. For on the same grounds that the reductive conclusions are thus objected to, the competency of a judgment on the declaratory conclusions of the summons, in the general terms in which they are expressed, may be challenged. These conclusions are twofold: (1.) That it was and is *ultra vires* of the Synod of this Church to alter, amend, or abrogate any of the Canons contained in the Code of 1838, or to make new Canons, except in so far as in conformity with the constitution and acknowledged practice of the Church at the time of the pursuer's ordination as a minister; and (2.) That the pursuer is entitled to celebrate divine worship and to administer sacraments in conformity with the Canons of 1838, and is entitled to the free exercise and enjoyment of all the privileges conferred on him by these Canons, and under the deed instituting him to be minister of the Episcopal congregation of Burntisland. These are very wide conclusions, and, as I apprehend, could be entertained in this Court for judgment only if the Canons themselves, to which the pursuer objects, could be competently reduced. For, assuming the Code of 1863 to be left the standing law of the Church, it is impossible to see how on any good ground the Court could be called on to declare either

that the alterations it makes on the prior Code of 1838 are *ultra vires* and inoperative, or that the pursuer is entitled to continue a minister of the Scotch Episcopal Church on the footing of the law of the Church being the abrogated Code of 1838. . . .

"I cannot but regard it as an entire novelty to ask courts of law to determine whether the ruling judicatory of a voluntary Church acted within its powers in matters so purely and exclusively relating to the government of the body as a Church, its doctrine, and discipline. It surely could not be pretended that any one of the laity of the Church, connected with it only as in the enjoyment of its ordinances, could thus evoke the jurisdiction of the civil court. When the ecclesiastical governing body has recognised changes either in doctrinal matters or in the rights and ceremonies of the Church, dissentient laymen may leave its communion. Their remedy cannot be to bring the resolutions of the Church judicatory into a court of law, as a court of review. Some civil wrong justifying a demand for redress, or some patrimonial injury entitling the party to claim damages, must be alleged and instructed, ere the civil court entertain and adjudicate in such cases. This is the principle which pervades the whole of the cases of this class. And it leads directly to the solution of what I have ventured to state is the primary inquiry under this record. Has the pursuer set forth that, by and through the synodical acts of which he complains, he has suffered civil wrong or patrimonial injury, to support and justify his demand on the civil court to investigate and adjudicate upon those acts of this spiritual court in matters ecclesiastical and connected with the government of their Church, as in themselves right or wrong, or as within or beyond the powers of the Synod?"

Farther on, Lord Cowan says:—

"(1.) The first point resolves into the question, Whether there is a title in every presbyter of the Church, as matter of contract, to evoke the jurisdiction of the civil court to set aside and overrule any alleged departure from the doctrine and discipline subsisting in the Church at the time of his entering on his office, which the constituted authorities may at some future period consider it expedient to enact? To affirm this proposition in the abstract, and irrespective of alleged patrimonial injury to be redressed, would, I apprehend, be as inconsistent with sound principle as it is unsanctioned by any precedent. The Court will not take notice of religious opinions with a view to decide whether they are right or wrong, or whether regulations for the internal administration and discipline of a religious body have been rightly and properly adopted; but it will notice them as facts pointing out the ownership of property, or as supporting a claim for civil redress for civil wrong. Nor does the *dictum* of Lord Eldon, C. (1 Dow, 16), lose its force by asserting that in the new regulations and declaration of doctrines there is a departure from the old principles to which some of the body may still tenaciously adhere. When no patrimonial right is to be settled, or no injury patrimonially to be redressed, it is vain for dissentients to plead breach of contract with them on the part of the ruling authorities within the Church. It is the pro-

vince of the civil courts to redress civil wrongs. It is not their province, and has not been their practice, to interfere as courts of review with the theological dogma, or the internal regulations or discipline of religious sects or denominations. And it would be a strange utterance from this Court to pronounce a judgment in terms of the reductive or declaratory conclusions of the summons. The Lord Ordinary has, in my opinion, justly observed on this part of the case, that the fallacy of the pursuer's action lies in his treating 'the Canons of his Church as if they were primarily, and by their main intention, a contract between the members of the Church;' whereas 'the Canons of a Church are not enacted for the purpose of constituting a contract, but to establish and regulate its doctrine and discipline.' Taking this view, as there is no civil wrong or injury to redress arising out of the alleged breach of contract, the demand for judicial investigation and for a decerniture to the effect concluded for is not one which this Court will sanction.

"(2.) Entertaining this view, on the first aspect of the plea under consideration, I might leave the case to be decided on the grounds which have been fully noticed, and as the Lord Ordinary has done. But in justice to the parties I feel that I ought to advert shortly to the other aspect in which this plea may be considered—its sufficiency, viz., to support the summons, having regard to the allegations in the record bearing on the question whether the changes were or were not in the power of the Synod by which the Code of 1863 was sanctioned."

Lord Benholme stated that he was "clear for adhering to the Lord Ordinary's interlocutor," but the grounds stated by his lordship are those more special ones to which the Lord Justice-Clerk had confined himself. He sums up the argument of the defenders to the following effect:—

"The doctrines of this Church are not to be found set forth and defined either in the English Office or the Scotch Office. These Offices, being both either sanctioned or permitted by the Canons of the Church, must be held both of them to be consistent with the doctrines of the Church as to the solemn subject to which they relate; but they cannot be considered as creeds, or as exclusive expositions of doctrinal truth. The differences in point of form and expression between them may well give rise to a preference for the one or the other amongst the different members of the Church. But, except as matter of mere inference, in deducing which minds of different character will necessarily disagree, no specific or distinctive doctrines can be deduced from them. It is quite otherwise with the Articles of the Church of England, which are subscribed as the basis of doctrine by all clergymen of the Episcopal Church in Scotland. These Articles have been subscribed by the pursuer; and the 28th, 29th, 30th, and 31st Articles state in definite terms the doctrines of both Churches on the subject of the holy communion."

Lord Neaves gives a very interesting historical review of the career of the Scottish Episcopal Church, in respect especially of its creed and

formularies, and agrees with all the other judges in the result bearing on this case. On the general question as to which we have given extracts he expresses hesitation:—

"With regard to the reductive and declaratory conclusions, the Lord Ordinary seems to me to rest his judgment upon the ground mainly that the questions raised relate to an ecclesiastical matter which involves no civil right. I do not say that the Lord Ordinary's views in this respect are erroneous. On the contrary, I concur in them generally. But there is one aspect of the case on which I entertain some doubt, and would wish to reserve my opinion. Suppose it could be held that the pursuer, as he alleges, was placed by the Canons complained of in imminent peril of being deprived of, or degraded from his orders, I am not satisfied that that may not involve a matter of civil injury from which the pursuer might seek protection. If, contrary to the Canons and to the contract with him, the pursuer was threatened with the immediate prospect of degradation, there seems to me to be room for considering whether the possession of holy orders, and the loss of them through a wrongful act, do not involve privileges and capabilities that may infer civil or patrimonial consequences. Clerical orders conferred by a non-established Church may have little or no civil effect in this part of the island. But they may possibly confer benefits elsewhere which may entitle the pursuer to have them preserved by the interference of a civil court. The pursuer may not be in a situation personally to urge this plea, or his complaints may be groundless, or his action premature, or not directed against the proper parties; but at present I should hesitate to throw it out on the mere ground that it involved no civil interest. It was suggested at the Bar that the pursuer's orders could not be taken away. But this is a mistake. The Church that confers orders can take them away, and the new Canons contemplate the exercise of this power. The ground on which I am prepared, without difficulty, to adhere to the Lord Ordinary's interlocutor, is that the pursuer has not shown any excess of powers in the acts of the defenders, or any contract of which they have committed a breach."

NOTE H.

FORBES *v.* EDEN.

DECISION BY THE HOUSE OF LORDS.

This case was pleaded at the bar of the House of Lords at great length by the reverend appellant personally; and judgment was pronounced on the 11th April 1867, confirming the decision of the Court below, and dismissing the appeal with costs. I am indebted to the courtesy of the pursuer's agent, Mr Peacock, for an early perusal of the shorthand

report of the opinions delivered by the judges present,—the Lord Chancellor (formerly Sir Frederick Thesiger), Lord Cranworth, and Lord Colonsay. Those parts of the speeches which relate to the general question, in which all Churches have a common interest, are given in full below.

The views expressed in this last utterance of the supreme tribunal of the law of Scotland are interesting and important; but they postpone rather than solve some grave questions. The Court, it is decided, will not deal with merely doctrinal or abstract questions, nor will they interfere with Church actions at all, unless it is alleged that civil injuries have been already suffered, or civil—*i. e.*, patrimonial—rights have been already interfered with. But when such results have emerged, all the judges agree that the jurisdiction of the civil court is cleared, and that it will entertain the question whether the Church act in question was competent. But even in such a case (*e. g.*, in the "alleged perversion of property from its destined use" by a change of doctrine), the question of competency may not be an easy one, and we may be only at the threshold of the real difficulty. The Court may have to deal with the question, What are "the *fundamental* doctrines or *articles of faith* upon which the constitution of a religious community depends," as opposed, not only to matters of order and discipline (as the Lord Chancellor puts it), but to minor matters of opinion? And still more, it may have to deal, as the speech of Lord Cranworth (concurred in by Lord Colonsay) very strikingly suggests, with an essential power of change in the governing body of the Church—a power of change which there seems no authority for confining to the region of Church practice.

The *recital* or preamble of the Code of Canons of the Scottish Episcopal Church (referred to especially by Lord Colonsay) does indeed give great prominence to the distinction between doctrine and discipline, and this came to be of much importance in this case. This preface, retained in the new Code as well as the old, says,—

"The *doctrine* of the Church, as founded on the authority of the Scripture, being fixed and immutable, ought to be uniformly received and adhered to at all times and in all places. The same is to be said of its *government*, in all those essential parts of its constitution which were prescribed by its adorable Head. But in the *discipline*, which may be adopted for furthering the purposes of ecclesiastical government, regulating the solemnities of public worship as to time, place, and form, and restraining and recifying the evils occasioned by human depravity, this character of immutability is not to be looked for."

But while the Scottish Episcopal Church holds this, other Churches may hold, and have held, otherwise. They may hold, on the one hand, that some rules of discipline are at least as essential as many doctrines; and, on the other, that the "character of immutability" in all its doctrines is not essential to a particular Church of Christ, which is under a constant obligation to go back to Scripture. And it does not appear that our law has committed itself to any of these theories. Its theory seems

rather to be that whatever is held essential by a Church (whether doctrine or practice) will be given effect to by the law; and that whatever the Church holds itself to have power to alter, the law will permit it to change. It will be observed, indeed, that Lord Cranworth reserves the question whether the supposed authority to change, inherent in a governing body, can be allowed to "affect civil rights already acquired;" and the same reservation runs through most of the opinions in the lower and higher court. Yet if the civil rights are acquired by members of the Church after this authority of the Church and its judicatories has been distinctly understood and acknowledged within it, it should seem that such rights are qualified thereby—that the power of change (within the understood limits) has become a condition of the contract or of the trust —and that civil law, if it acknowledges the condition as really existing, must acknowledge it as existing to its necessary intents and effects.

But the case we are considering seems rather to lead up to this question than to decide it.

The Lord Chancellor, after describing the nature and conclusions of the action, said:—

"The ground of action laid by the appellant is that the General Synod, in making alterations in the Code of Canons of 1838, by the new Canons of 1863, have departed from the recognised constitution and acknowledged practice of the Scotch Episcopal Church, and have therefore violated the contract into which he entered by subscribing the Code of 1838. And he alleges that he cannot conscientiously obey this new Code, and in consequence may become liable to penalties, even to the degradation from his office of minister of the Scotch Episcopal Church, and thereby be deprived of all the temporal advantages he derives from his office of minister of the congregation of Burntisland, which is a damage and injury of which the civil courts can take cognisance. The appellant does not allege any actual damage which he has sustained, except with regard to the refusal to license his curate; but he founds his action upon the possibility of his sustaining damage hereafter by a conscientious adherence to his own views of his obligations, and upon what I must call a sentimental feeling of having been brought to be a member of an association which, departing from the original terms of communion, has left him in the position of a dissenter.

"If it had not been for the petitory conclusion of the summons, I think there might have been a plea to the relevancy of the action upon the claim for reduction of the enactments in the Code of Canons of 1863. Supposing the appellant to have really sustained damage by reason of the Code of 1863, it would have been open to the Court to consider whether the General Synod had authority to make the Canons from which this civil injury had arisen; but actual damage flowing directly from the effect of the Canons of 1863 is wholly out of the question. The Court had therefore to consider whether it could properly entertain the question of the reduction of the Canons upon the ground that they were a departure from the

doctrine and discipline of the Scotch Episcopal Church at the time the appellant became one of its ministers. Now, this it refused to do, as it was a mere abstract question involving religious dogmas, and resulting in no civil consequences which could justify the interposition of a civil court.

"The case of Macmillan *v.* the General Assembly of the Free Church of Scotland (23 Dunlop) was frequently relied upon in the course of the argument, and the opinions of the judges were referred to on both sides. The appellant urged it as a strong authority in his favour, because it was there held that sentences of suspension and deposition pronounced by the General Assembly of the Free Church of Scotland, a voluntary religious association, against one of its ministers, were properly the subject of an action of reduction and damages, on the allegation that such sentences had been irregularly pronounced in excess of their powers, and in violation of the conditions which regulated the proceedings of the association amongst themselves, and which were alleged to form a contract amongst the members of the association. But it must be observed that in that case there were actual sentences of suspension and deposition, from which the loss of the pursuer's emoluments as minister of the Free Church of Cardross followed as a consequence. The appellant in this case has not been disturbed either in his charge of the congregation at Burntisland, or in his legal position as a minister of the Scotch Episcopal Church. If he had been—though in this latter respect only—I should have considered, with the Lord Justice-Clerk, that 'the possession of a particular status, meaning by that term the capacity to perform certain functions or to hold certain offices, is a thing which the law will recognise as a patrimonial interest, and that no one can be deprived of its possession by the unauthorised or illegal act of another without having a legal remedy.'

"The appellant not having sustained any injury which can be the subject of cognisance in a civil court, his appeal might be shortly disposed of upon that ground. But the questions of the power of the General Synod to enact the Code of Canons of 1863, and their moral effect upon the position of the appellant as a minister of the Scotch Episcopal Church, have been so earnestly and strongly pressed upon your lordships' attention, that I do not feel justified in passing them by without notice.

"The appellant rests his claim to maintain his action upon the following grounds: He alleges that, by his ordination as a minister of the Scotch Episcopal Church, he became a member of a voluntary religious association under a contract, the terms of which were contained in the Canons of 1838, which he subscribed; that it was not competent to any number of the members of the association, short of the whole body, to change its fundamental character; and that the enactment of the Canons of 1863 was a violation of the contract into which the appellant had entered, and materially and injuriously affected his position as a member of the association.

"It does not appear to me that the Canons of 1838 can properly be regarded as the contract between the members of the Scotch Episcopal

Church at the time when the appellant was ordained to the ministry. They are principally, if not altogether, directed to the regulation of order and discipline, and contain nothing with regard to the fundamental doctrines or articles of faith upon which the constitution of a religious community depends. But assuming that the Canons of 1838 are to be taken as the contract between the members of the Scotch Episcopal Church, the appellant subscribed (amongst the rest) to the 33d Canon, which declares that '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 by his subscription to the Thirty-nine Articles he agreed that the Church has authority over rites and ceremonies, as declared in the 20th and 34th Articles."

. . . . . .

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 cognisance 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 cognisance 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 station 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 alterations 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 here there is no question of that sort.

"This seems to me to dispose of the whole case, for I cannot think that the statements in the condescendence allege the violation of any legal right which enabled 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 the benefits of the 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 his 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, that I should consider whether, assuming that there is any power in the Court to reduce the Canons of 1863, he has shown any ground for such reduction. I am of opinion that he has not.

"The appellant rests his 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 authorise 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 principles the Synod, or general

assembly of persons associated as a Church or 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 authorised to do so by the terms of their constitution. But the Synod of a 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 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 only other part of the new Canons 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 recognised 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 recognised constitution and *acknowledged practice* of the Scotch Church. The appellant argues that the omission of these words, *and 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 power inherent in a Synod, are sufficient to show 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, however, they 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 of 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 "*recognised 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 recognised 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—1st, That the Canons made from time to time by Synods 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; 2dly, That no such questions of right are raised on this record; and, 3dly, That, even if the validity of the new Canons had been properly before the Court, the appellant has not shown any valid ground of complaint.

"I concur, therefore, with my noble and learned friend, in thinking that the appeal ought therefore 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 interests, entitled himself to have the judgment of the Court on those civil rights and interests; and the conclusion for reduction which this summons contains was not an inept conclusion in reference to such a demand, because it might have been pleaded against a mere petitory action, that those rules stood in the way, and that 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 interests, 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 of the position in which he is placed with reference to the refusal of a licence to his curate. That 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.

"My lords, 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 recognised 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 that the Church has power to alter from time to time; and 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 in this 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, my lords, 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 great 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 recognise it. They allow the two modes, the two Services; but, although they allow the 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 which 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 a united Christian

and Mohammedan 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 these Canons of 1838, it was perfectly within their power to do. Therefore I entirely concur in the proposition which has been made, that this judgment should be affirmed."

CHAPTER VI.

QUESTIONS OF CHURCH PROPERTY IN RELATION TO CREEDS.

WHILE the general desire of courts of law is to avoid ecclesiastical or spiritual questions, they find it impossible wholly to do so. We have seen that it is impracticable, even with regard to dissenting associations, whose Church existence is not formally acknowledged by the State—impracticable, even when there is no question of their property involved.

But it is with regard to questions of property that it becomes most plainly necessary for courts of law to elaborate a principle and lay down a rule for dealing with differences in religion. If a body of men have wrongful possession of a church, or of a sum of money—on the pretence, for example, that they are the religious body to which the money or the building was destined—their opponents have no way of redressing the wrong and vindicating their own rights, except by appealing to the civil tribunals of the country. And these civil tribunals have no means of doing justice, except by investigating into the differences—of doctrine, discipline, or practice—which to the litigants may be religious differences, but to the judge are mere matters of fact bearing upon a question of civil right.

Accordingly, it is chiefly through questions of property that the law of Scotland has been called on to interfere with dissenting Churches, and it is almost exclusively through such questions that it has taken to do with their creeds. And the

peculiarity of this branch of our law (which has now attained to considerable bulk) is, that all the recent decisions have been mere applications and illustrations of a single principle laid down by Lord Eldon in the year 1813—a principle as to the exact meaning of which there has been much difference of opinion even on the Bench, but which is held on all hands to have overturned the old rules upon which our courts proceeded before it was laid down.

Before commencing the history of this subject, it must be remembered that, when we speak of the property of a Church, the expression is inaccurate. By the common law of Scotland no Church can itself hold property, for (with the exception of the Established Church, which for other reasons seems not to possess property[1]) it is not a legal person. A Church is not a corporation; and it is, therefore, not regarded in law as an individual. "In former times," one of our lawyers remarks, "the erection of corporations for the advancement of religion, learning, and commerce, formed an important department of public policy;" and in some great jurisprudences at the present day—notably in those of America, where Presbyterianism has found its western home—the erecting of Churches into corporations, or at least the erecting of corporations which shall represent Churches, and hold Church property by a perpetual tenure, is almost universal.[2] But in Scotland, where "there can be no corporation without a charter from the Crown, express or implied," Churches have not been in use to ask, nor the Crown to grant, the privilege of incorporation. In some respects they may conceivably consider this an advantage, as when in the Cardross case it was found, expressly on this ground, that the Free Church could not be called to the bar of the Court, nor could any civil sentence proceed against it.[3] For on this precedent a Christian Church, while

[1] Duncan's Parochial Ecclesiastical Law, 221.

[2] See Appendix, Note E.

[3] Even the General Assembly of the Free Church, not being a corporation, could have no decree directed against it.

it has a most real existence for its own members, instantly becomes invisible to every one who approaches it with hostile intentions, and enjoys an absolute, and what its members may choose to regard as a sacred, immunity from attack. These members, of course, are themselves exposed to civil actions and penalties for anything they have individually done — a principle which has been always admitted in Scotland since the Reformation in the case of both laymen and clergymen. But with regard to the Church itself, the prevalent sentiment in Scotland has been that it is a divine corporation, not deriving from the Crown; and so long as this invisible corporation is ignored by the law, it is inaccessible and inviolable. But while this disembodied and unincorporate state of Churches may have some advantages, it may well turn out to have some serious disadvantages and disabilities. And one important result of it is that our Scotch Churches hold no property directly. All their property is held by individuals *in trust* for them; and the chapter in our law which treats of Church property comes to be a chapter of the law of trusts.[1]

Another important circumstance is that the Church in Scotland has never been rich, and has never been centralised; it has always been parochial — *i. e.*, congregational and territorial. The consequence with regard to nonconformist Churches has been that their property has also always been local, and in particular that each chapel, or church, or so-called manse, has been held by special local trustees. These local trustees will, of course, hold the church under whatever purposes the trust may provide; in particular, they may hold it (as was very clearly put by a recent judge) either solely for the local congregation with which they are connected (and this has been construed to be the meaning of most of our trusts hitherto), or for some larger body of which that congregation forms a part. But in any case the almost universal

[1] Yet by 13 Vict., c. 13, the trust may be a perpetual trust in the officials of the Church, which comes to be very nearly an incorporation.

tenure of dissenting property in Scotland is that each church, chapel, or other building, is held in the names of a few local trustees.

We have already seen that the courts of Scotland in the last century declined as much as possible, though on various grounds, to meddle with the matters of dissenting Churches. This comes out as strikingly in questions of property as in questions of jurisdiction. Down to the year 1813 the universal principle of our Court was, when any such question arose, to abandon the decision of it to the Church itself. The only difference in its practice was that in some cases the Bench left it to the congregation—*i.e.*, to the majority of the congregation ; in other cases to the whole Church—that is, to the majority of the whole Church or body. This course of conduct had, as we have seen in parallel cases of jurisdiction, a two-fold origin—a feeling on the one hand that dissenting bodies ought to be ignored by the law, and on the other a feeling that bodies which sacrificed so much for the sake of separation and independence ought to have their independence respected. The desire to ignore such bodies rather tended to make the Court leave questions of property to be decided by the local majority—the majority of the *congregation* more immediately concerned: the other principle led (though later) to their leaving it to the decision of the presbytery, synod, or other judicatory of the general body. But on both principles, and on either course, the result was that the Court, down to the days of some men yet living, declined to investigate any doctrinal questions existing between Dissenters, and when the possession of property depended on such questions, gave the property to the party in whose favour the Church (*i.e.*, in general the congregation) had itself decided.

We shall not find it necessary in the text of this chapter to give much of this earlier history. It is given in much detail in the Lord Justice-Clerk's speech in the Kirkintilloch case, quoted in the Appendix, where the reader will find not only

the opinions of the judges in the most early important case, but a note of the whole cases tried, "all of which" his lordship was "able from one source or other to examine and consider." (It should be remembered, however, that this characteristically careful and laborious detail by the Lord Justice-Clerk Hope was given as part of an argument against a proposal which he held to lean too strongly to the ancient principle of our courts. And it should not be forgotten that this ancient principle, which the courts in Scotland unanimously held (and which has some practical advantages), was upset by one decision in the House of Lords in 1813, and that the results and applications of this one decision have never had the same advantage of being submitted to the Court of Appeal.)

In these earliest cases, "the Court went distinctly, and in some of them in express terms, upon the principle that the property belonged necessarily to the majority of the congregation;" [1] and they made no inquiry as to the connection of the congregation either with doctrines on the one hand, or with an ecclesiastical body on the other. It was obvious that this state of things could not always continue unquestioned. As soon as changes and divisions occurred among the bodies concerned, new legal questions must arise, and these divisions and changes soon came. The early objections which the Court felt to recognise a whole dissenting body as "a permanent religious establishment" had by this time partly passed away. But the growth of the same principles of toleration within the dissenting bodies themselves, which were thus felt even on the Bench, brought the legal question to a crisis. The inevitable influence of a position outside a Church establishment produced an uneasiness in the two great branches of the Secession—the Associate Synod and the Relief Synod—with regard to the strong powers about matters of religion ascribed to the civil magistrate by the Confession of Faith. A majority of the Associate Synod in 1795 passed an explanatory preamble

[1] Lord Justice-Clerk Hope.

to their Formula of subscription, modifying, qualifying, or explaining their adherence to the 23d chapter of the Confession, and also their adherence to the Covenants.[1] A minority protested; congregations were divided; and among other cases the question arose, to which of the two parties the church or meeting-house at Perth should belong. This case, of Davidson or Craigdallie *v.* Aikman, "was selected out of many then occurring, to try the general point again more deliberately;"[2] and, as Lord Meadowbank informs us, "was taken up and determined with the very view of fixing and settling a general question;" and from the various reports of it in the Faculty Collection,[3] in the Appeal Cases of Mr Dow,[4] Mr Bligh,[5] and Mr Paton,[6] the notes of the judges' opinions preserved by Sir Islay Campbell,[7] and the investigations of Lord Meadowbank[8] and the Lord Justice-Clerk Hope,[9] we have the opportunity of fully investigating this case, and comparing the old principle which the Court of Session reaffirmed and modified in its successive stages, with the new doctrine which the House of Lords laid down for future acting upon. The first decision in the Craigdallie case was given by the Court of Session on 16th November 1803, when the lords found "that the property of the subjects in question is held in trust for a society of persons who contributed their money

[1] The preamble was as follows: "Whereas some parts of the standard books of this Synod have been interpreted as favouring compulsory measures in religion, the Synod hereby declare that they do not require an approbation of any such principle from any candidate for licence or ordination. And whereas a controversy has arisen among us respecting the nature and kind of obligation of our solemn covenants on posterity, whether it be entirely of the same kind upon us as upon our ancestors who swore them, the Synod hereby declare that, while they hold the obligation of our covenant upon posterity, they do not interfere with that controversy, as tending to gender strife rather than godly edifying."

[2] 12 Dunlop, 536.

[3] xiv. 481.

[4] Dow's Reports, i. 1.

[5] Mr Bligh's Reports, ii. 529.

[6] Mr Paton's Report, Craigie and Stewart's Appeals, vi. 626.

[7] See them quoted in the Lord Justice-Clerk Hope's speech in the Appendix.

[8] Campbeltown case, *infra*.

[9] Kirkintilloch case, *infra*.

for purchasing the ground, and building, repairing, and upholding the house or houses thereon, under the name of the Associate Congregation of Perth; and so far repel the defences, . . . and find that the management must be in the majority, in point of interest, of the persons above described; and before farther answer in the cause, remit to the Lord Ordinary to ascertain what persons are entitled to be upon the list of contributors aforesaid, and whether the majority aforesaid stands upon the one side or the other," thus nearly reaffirming the doctrine of their previous decisions. In these previous decisions they had given the property to the majority of the congregation: here they gave it to the majority in point of interest—a variation which pointed out still more emphatically that they did not intend to inquire into the purposes for which the building was destined. "The decision," says the Lord Justice-Clerk in the Kirkintilloch case, "was as irreconcilable with the law of toleration as with the law of trusts." This criticism seems almost justified by the statements of Sir Islay Campbell, in pronouncing judgment with the majority of the Court: "The sole question is, Who are the majority of this body of individuals assuming the name of a congregation, and who are the trustees named by them? . . . As to the Associated Synod, the Court can take no notice of such a body of men as a superior judicature. . . . When parties come regularly before a court in order to have their differences on points of civil law determined, they must found their pleas on common established grounds of law, and the judge cannot listen to the peculiar doctrines, either of ecclesiastical discipline or of moral or political system, adopted by voluntary associations of men uniting together for any purpose whatever." We have already remarked that the tone of all the early judgments as to dissenting Churches is like that of the Roman Gallio, who declined to be a judge of such matters as words and names and Jewish superstitions. But it does not appear that Gallio had any question of property, or

even any matter of civil right, brought before him on the occasion;[1] and our Scottish judges had. And though they did not venture now to go so far as to say simply, "In turpi causa melior est conditio possidentis" (which was almost the ground on which

[1] This point may be worth looking at. It is sometimes rashly inferred that because the Roman proconsul "cared for none of those things" which were at this time brought before him, he therefore acted with careless injustice in refusing to consider them. On the contrary, his speech is a perfect expression of the wise and haughty justice of Rome. There can be no doubt that he was bound to dismiss the complaint. But it is sometimes assumed that, on the same grounds on which he dismissed this complaint, he would have been entitled to get rid of all such questions, however they were brought before him—or at least, that being, as we may assume, disposed to get rid of them, he would on the same grounds have been able to do so. This is certainly not the case.

Annæus Gallio was seemingly at this time newly come to his proconsulship; but he could not have long remained a judge to that nation without finding cases in which a "matter of wrong"—ἀδίκημά—coming before him could only be put right through means of an inquiry into some of the religionisms of the confused time. He could not, at least, always refuse an action in the same summary way to those who complained. If instead of the Jews saying to the unsympathising governor, "This fellow persuadeth men to worship God contrary to the law," Paul had complained that they had turned him out of the synagogue with violence, or had refused him and his friends a share of the benefactions left in their hands by some devout and honourable person for all Jews who should hereafter come to Corinth, a personal action would seem to have been competent to the aggrieved. It may be very doubtful, indeed, whether Paul would have availed himself of this right of complaint. Instead of doing so, both here and in Ephesus he "separated himself" (evidently much against his will) from the regular synagogue, and opened another hard by. But if his excommunication involved direct pecuniary loss or penalty, the complaint would have been *prima facie* competent. And the *exceptio* or defence of the accused would be that Paul was no Jew; for "after a way which they called heresy so worshipped he the God of their fathers;" unless, indeed, they confined themselves to the preliminary objection, that on all matters connected with the synagogue they had full authority by the consent of the worshippers themselves. But whichever the objection might be, the proconsul would send it, along with the accusation, to a Judex for his decision.—Or let us take the most important case at once. Six years after this occurrence, Sosthenes and some of his fellow-rulers of the synagogue might again have appeared before the judgment-seat, complaining that by the gradual growth of this heresy two-thirds of the Jewish community had now adopted the views of the Tarsus enthusiast, and that the majority having usurped the control of the synagogue in which their fathers had prayed, now refused to permit any one to use it except in worship of that Jesus who had been condemned as a deceiver by the central authorities at Jerusalem. And the vindication of their building—their demand that it be given back to them exclusively—

the very earliest cases were decided, or rather were refused decision), something of the same view may have lingered in their minds when they decided that a church should always belong to the simple majority of the worshippers, or to the pecuniary majority of the contributors. At the same time, the great simplicity of the former, and the great equity of the latter, alternative in this early rule should not be overlooked.

One farther step they had to take before their whole principle was changed. Refusing to look farther than the mere fact of a majority, there arose the question, A majority of whom? In dealing with a single congregation—as, for example, an Independent church—the question is easily answered. It is the majority of the congregation; or, as the first interlocutor ran in the Craigdallie case, a majority of the contributors. But where the congregation in question is one of a larger body—one, for example, of a body of congregations belonging to "the Associate Presbytery" or "Synod"—when

would be founded, not on the allegation that the new religion was false, but on the allegation that it was another religion from that for which the building was intended. What would be the answer of Crispus and Gaius, and the other elders of the "church of God which is at Corinth"? Unless they had wholly lost the spirit of their apostle, who said, "I stand at Cæsar's judgment-seat, where I ought to be judged," but who thought himself happy to stand there in presence of King Agrippa, because he knew the king "to be expert in all customs and questions which are among the Jews," they would have accepted the challenge with the utmost alacrity. And their defence as Jews would be not only that they worshipped the God of their fathers, believing all things which are written in the law and the prophets, but that they *alone* clave to the promise to which their twelve tribes instantly serving God night and day for so many ages had hoped to come, and that it was their opponents who had apostatised from the central hope, for the cherishing of which the nation existed and the synagogue was built. The proconsul could hardly refuse to decide a simple question of property. Yet the question of property (or use) in this case could not well be settled without deciding first the whole great question of Church identity which Paul argues in many a fiery page—unless, indeed, the Roman had acted like our earlier Scottish judges before Lord Eldon's time, and simply given the property to the majority (of members of the synagogue, or builders of the synagogue, or rulers of the synagogue, for all these were tried), without any inquiry into opinions at all. But even this (which is the course to which Scotch churchmen have always leaned) implies that the action is not dismissed as incompetent, but entertained and decided.

a dispute as to the property of a particular building arises, the question comes to be, Is the property to be abandoned to the majority of the congregation, or to the majority of the Synod? If the Court wishes to be no judge in such matters, should it not leave the matter to the judicatories of the body itself? If a congregation of the ecclesiastical body divides and quarrels about property, should not the property remain with that part of the congregation which adheres to the ecclesiastical body?

This was the view which was contended for in the case of Craigdallie, and while in the first interlocutor of 1803 already quoted the old principle of a simple majority (though not now of the congregation, but of the contributors) prevailed upon the Bench, by the following year some of the judges had been changed, and the case again coming up according to the forms of process then used, the majority went the other way. The Lord President Hope's opinion (he was then Lord Justice-Clerk) is noted by Sir Islay Campbell, and may be taken as representing the view which the Court now took. It gives tersely enough the reasons against the mere principle of a majority:[1] "This congregation did not mean to become Independents. They meant to continue Presbyterians. If a minister is deposed by his own judicatories, we must give effect to it, even *in civilibus*. Complete toleration is not substantially different from the Establishment. The essence of it is subordination. . . . I have no access to know who are the real Burgher Seceders, but the judicatories themselves." And accordingly the judgment of the Court now was as follows (1st February 1804): "Alter the interlocutor of 16th November last, and find that the property of the subjects in question is held in trust for a society of persons who contributed their money, either by specific subscription or by contribution at

[1] And as to pecuniary interest, the Bench was no doubt influenced by the consideration that comes out afterwards in Lord Eldon's speech, that it was practically impossible to collect and weigh the votes of all the contributors, original and otherwise, according to their contributions, long since, perhaps, forgotten.

the church doors, for purchasing the ground, and building, repairing, and upholding the house or houses thereon, or for paying off the debt contracted for these purposes, *such persons always,* by themselves or along with others joining with them, *forming a congregation of Christians continuing in communion with, and subject to, the ecclesiastical discipline of a body of dissenting Protestants,* calling themselves the Associate Presbytery and Synod of Burgher Seceders."

The *first* judgment, therefore, gave the Perth church to the majority of the contributors of the congregation; the *second,* to that part of these congregational contributors which adhered to the Presbytery and Synod. But both proceeded a good deal on the principle of rather dismissing the case than looking into it; and in 1804, as in 1803, no real inquiry was made whether the congregation, or either division of it, or the Synod, or the dissidents from it, adhered to their original principles, or whether, and how far, subordination to their courts was part of these principles. This later decision, says the Lord Justice-Clerk Hope (who had already, as we have seen, condemned on similar grounds the previous principle of a majority), "was manifestly against the leading principle in the law of trusts." And he holds that "the mistake consisted in taking as decisive what was only one element, and it might be an element of no importance" (namely, adherence to the judicatories), "in the inquiry what was the original trust."

Both interlocutors went up to the House of Lords for its judgment. The case, which was selected to try a general point "more deliberately," was conducted with such exemplary delay, that twenty years elapsed from its commencement to its final decision. But the principle was settled in Lord Eldon's speech of 14th June 1813.[1] Much important discussion has since taken place upon the Bench as to the meaning and scope of this judgment—an elaborate exposition

[1] Reported in vol. i. of Dow's Appeal Reports, p. 1, and much more fully in Paton's Appeal Reports, vi. 626.

of it pronounced in 1837 by Lord Meadowbank,[1] and seemingly acquiesced in at the time by the Scottish Bench, having been impugned and repudiated by the Lord Justice-Clerk Hope in 1850.[2] Both judges went into the history of the case, with the view of bringing out their several interpretations of the judgment, and a comparison of these commentaries with each other, and with Lord Eldon's text, will be found interesting and important.

Lord Eldon, in his judgment delivered on 18th June 1813, and given in Mr Paton's Reports as taken in shorthand by Mr Gurney,[3] commences by stating the very great importance of the case, though it did not appear to him to bear upon the doctrine of toleration in the way that had been supposed.[4] After stating the facts and history of the case, he pointed out the extreme inconvenience, and indeed impracticableness, of the course of referring the property of the building to the majority of the contributors to its erection, repair, maintenance, and redemption from burden of debt for so many years. These contributors and their representatives (for many of them were now dead) it would be impossible to trace; and on this account alone it was necessary to remit the interlocutor of the Court for some modification.[5] But, in addition, he expresses doubt

[1] Galbraith *v.* Smith (Campbeltown case), 10th March 1837, 15 Shaw, 808.

[2] Craigie *v.* Marshall (Kirkintilloch case), 25th January 1850.

[3] Craigie and Stewart's Appeals, vi. 626.

[4] The matter had been discussed in the Court below very much as a question whether the central authority of the Synod, as giving a unity to the whole dissenting Church, should be recognised (see the Report of the argument, well given in the Faculty Collection, vol. xiv.) This course was objected to as forming a dissenting Church into an establishment or incorporation, contrary to public policy. Lord Eldon was prepared to sweep away this objection, *provided* a contract to submit to the central authority and jurisdiction were sufficiently made out; and he thus got past the question of toleration.

[5] "When you consider that this body for religious worship was formed so long ago as between the year 1730 and 1740; that between 1730 and 1740 the sums which were subscribed for the purposes of the building were subscribed, and that the individuals of that day, every one of whom must have contributed towards the carrying on the worship there—when you consider that those contributions at the church doors, which are spoken of in

as to the principles which that interlocutor seems to imply:—"If, on further consideration, the learned judges adhere to the principle that this place was vested in trustees for the benefit of the society adhering to certain religious principles, and that because that society adhered to the Synod in 1737, that Synod, at the same time, possessing certain religious doctrines and certain religious principles, the property is now to be held not for those of that congregation who adhere to their original principles and the original doctrines to which they agreed, but in trust for those who do not adhere to the original doctrines and the original principles, but to that change, as they call it, of doctrine, which the Synod has introduced—propositions of law, in my opinion, extremely difficult to be maintained; if they shall adhere to those propositions, I conceive there is an utter impossibility in applying that principle by interlocutors worded as these are.

"My lords, upon the doctrine itself I will only state, with respect to the English law, to which the attention of the Court of Scotland has been called in some degree, I have no doubt,

the second interlocutor, have been made almost quarterly from that time—when you consider that the stipend has been from time to time supplied through all this vast course of years—when you consider that the debt which was contracted, and which the last interlocutor says 'every person contributing towards the payment of is entitled,' &c.—and when you consider who are meant to be described in this interlocutor, I think I may ask your lordships, whether you can solve the difficulty which you would find yourselves under, if it was referred to you to state who are the persons who contributed their money, either by specific subscriptions or by contributions at the church doors, for purchasing the ground, and building, repairing, and upholding the house or houses thereon, or for paying off the debt contracted for these purposes, that debt having been paid off many years ago, and then to state who are the majority of them, with a view for the Court to determine for whose benefit this place is to be considered as held by the survivors of four sons, to whom it was conveyed between the years 1730 and 1740? My lords, it does appear to me that, in any way of looking at these interlocutors, independently of the great importance of the principle which is involved in them, the House will find itself utterly unable to apply the interlocutors, according to the terms they have used, so as to execute them; and, therefore, independently of all other considerations, I do not see how it is possible to refuse to remit this case for further consideration."—Craigie and Stewart's House of Lords Reports, vi. 633.

if it leaves an estate in trustees to be used for the purposes of religious worship, the courts of this country, acting upon the principles of toleration, will enforce those persons to permit the property to be used for the purposes of that religious worship to which it was devoted. If the instrument contains in it a provision for the case of schism and separation among the members themselves, I apprehend the courts themselves will act according to the provisions so contained; but I have not yet met with a case that authorises me to say that it is as clear as the Court of Scotland appears to think it, that if we have an instrument of trust, devoting property to purposes of religious worship, and making no provision for the case of schism or separation, that property being acquired by the trustees at the expense of the *cestui que trusts*, and being acquired for the benefit of the *cestui que trusts* in matters of religious worship, in which they are all interested, I have not found a case which authorises me to say, that if that society should separate from each other in point of religious opinion (and I particularly beg my learned and noble friends' attention to this), a court in this country would enforce the trust for the benefit of those, not who have adhered to what was originally the religious principle upon which they founded the Church, but for the benefit of those who appear to be a mere majority (if they were a majority), much less if they were a minority, much less for the benefit of those if they were not one to ten (which is the principle which must be considered as running through these interlocutors), not adhering to the principles upon which the society was formed, but departing from them, and that in point of pecuniary interest, those who adhered to their original principles should forfeit all their property, and those who departed from their original principles should, notwithstanding that departure, not only have their own property in the meeting-house, but the property of the other original subscribers. I have found no case whatever which authorises such a decision. If it can be made out that this society originally said

this, We will contribute our money for the purposes of building a meeting-house, and we will place ourselves under the jurisdiction of the Associate Presbytery, and afterwards of the Associate Synod; and placing ourselves under the jurisdiction of the Associate Synod, we agree that the Associate Synod shall direct the application of this place so built;—that is matter of law, and the contract will apply to the law. But I have found no such contract; and upon the fullest consideration I have been able to give to the subject, I propose, when we meet on Wednesday morning, to move your lordships that this should be sent back to the Court of Session, with two findings, which the circumstances of the case, I think, will authorise me to propose to your lordships: the one, that it appears in matter of fact, that this house and ground was originally purchased and built, and the property vested in four persons, for the purposes of religious worship, by individuals united in their religious principles and persuasions, and proposing to continue united in such principles and persuasions; but, *secondly*, that it does not expressly appear as matter of fact (I will not say impliedly, for that must be left to the Court, but that it does not expressly appear) to what purposes it was the interest of all these individuals, or any of them, should be applied if they should happen to differ in opinion; and with these findings, the one affirmative and the other negative, I shall propose to your lordships to remit these two interlocutors, upon which I have observed, to the Court of Session."

When formally moving the judgment, two days after, the Lord Chancellor again referred to the English law as follows:—

"I do apprehend there is no case that we have had that would authorise me to say, that if persons had subscribed to the building a meeting-house for religious worship, and if those persons afterwards disagreed in opinion, you would compel the execution of the trust for the purpose of carrying on

the religious worship of those who had changed their opinion, instead of executing that trust for the benefit of those who had adhered to their religious opinions. I know of no case which has gone that length. When I speak of religious opinions in such a case, I would state that the Court here would examine what were the religious opinions, merely as a matter of fact, not for the purpose of stating which of them contained more, and which of them contained less, of sound doctrine, but as mere matter of fact, in order to get at the intent and purpose with which the property was purchased and the building was erected; and when it got at that intent and purpose, it would either effectuate that intent and purpose, or say that it failed altogether. With these few words with respect to our own law, I propose to your lordships the judgment in the form in which I now read it."

The remit of the House, the terms of which are important, and seem to have been carefully framed, was as follows:—

"The lords find, as matter of fact, sufficiently established by proof, that the ground and buildings in question were purchased and erected with intent that the same should be used and enjoyed for the purposes of religious worship, by a number of persons agreeing at the time in their religious opinions and persuasions, and therefore intending to continue in communion with each other; and that the society of such persons acceded to a body, termed in the pleadings 'the Associate Synod;' and find that it does not expressly appear, as matter of fact, for what purposes it was intended at the time such purchase and erections were made, or at the time such accession took place, that the ground and buildings should be used and enjoyed, in case the whole body of persons using and enjoying the same should change their religious principles and persuasions, or if, in consequence of the adherence of some other such persons to their original religious principles and persuasions, and the non-adherence of others of them thereto, such persons should cease to agree in their original religious

principles and persuasions, and should cease to continue in communion with each other, and should cease, either as the whole body, or as to any part of the members composing the same, to adhere to the body termed in the pleadings 'the Associate Synod;' and it is therefore ordered and adjudged that, with these findings, the cause be remitted back to the Court of Session in Scotland, to review all the interlocutors complained of in the said appeal; and upon such review, to do therein what shall appear to them to be meet and just."

The case went back to the Court below, and after "condescendence, answers, replies, and duplies," and the lapse of some years, the Court of Session found that, "as far as they are capable of understanding the subject," the pursuers (*i. e.*, the minister and the Old-Light party in the congregation) had failed to show any deviation on the part of the defenders (adhering to the Synod and the modified Formula) from their original principles, or that there was any *real* difference between the two parties, and consequently that the case did not arise in the view of which the House of Lords had ordered inquiries.[1] Lord Eldon, on 19th July 1820, confirmed this

[1] The interlocutor of the Court of Session is as follows: "21st February 1815. — The lords having resumed consideration of this petition, with condescendence, answers, replies, duplies, and whole cause, find that the pursuers, James Craigdallie and others, have failed to condescend upon any acts done, or opinions professed by the Associate Synod, or by the defenders, Jedidiah Aikman and others, from which this Court, as far as they are capable of understanding the subject, can infer, much less find, that the said defenders have deviated from the original principles and standards of the Associate Presbytery and Synod. Farther, find that the pursuers have failed in rendering intelligible to the Court, on what ground it is that they aver that there does at this moment exist any *real* difference between their principles and those of the defenders; for the lords further find that the Act of Forbearance, as it is termed, on which the pursuers found, as proving the apostasy of the defenders from the original principles of the Secession, and the new Formula, were never adopted by the defenders, but were either rejected or dismissed as inexpedient; and that the preamble to the Formula, which was adopted by the Associate Synod in the year 1797, is substantially and almost *verbatim* the same as the explication which the pursuers proposed in their petition of the 13th April 1797 to be prefixed to the Formula; and to which, if it would have satisfied their brethren, they declared that they were willing to agree;

decision, adopting also the unusual clause by which the Scotch Court qualified its judgment; but in doing so, he took occasion to recapitulate the general views he had laid down seven years before, in the following words: "When this matter was formerly before the House, we acted upon this principle, that if we could find out what were the religious principles of those who originally attended the chapel, we should hold the building appropriated to the use of persons who adhere to the same religious principles; and in that view it became necessary to determine whether any, and if so, which of the persons who were contending for the use of this place of worship adhered to, or had ceased to adhere to those which were originally the religious principles which led to the establishment of this place of worship, with a view to determine what was to be done if the right principle was to appropriate the building to those who continued to hold those religious principles, and were in communion with those who did so." After quoting the terms of the former decision, he says: "By this judgment it was intended that the congregation originally, if I may so represent them, were persons who adhered to the doctrines of what is known in Scotland by the name of the Associate Synod. This place for religious worship being built by the contributions of a great many persons adhering to the doctrines of the Associate Synod, if the whole body of those who now frequent the place no longer adhered to the doctrines

therefore, on the whole, find it to be unnecessary now to enter into any of the inquiries ordered by the House of Lords, under the supposition that the defenders had departed from the original standards and principles of the association, and that the pursuers must be considered merely as so many individuals who have thought proper voluntarily to separate themselves from the congregation to which they belonged without any assignable cause, and without any fault on the part of the defenders, and therefore have no right to disturb the defenders in the possession of the place of worship originally built for the profession of principles from which the pursuers have not shown that the defenders have deviated; therefore sustain the defences, and assoilzie; and in the counter-action of declarator, at the instance of the defenders, Jedidiah Aikman and others, decern and declare in terms of the libel; but find no expenses due to either party."—2 Bligh's House of Lords Reports, 537.

held by the Associate Synod, then it became a question for whom at present this building should be held in trust, which was purchased by money originally subscribed by those who held the opinion of that Synod. The question then would be, Whether any of the members now desiring to have the use of this place of religious worship could be considered as entitled to the use of a building purchased by persons adhering to those religious opinions? And supposing that there is a division of religious opinions in the persons at present wishing to enjoy this building, the question then would be, Which of them adhered to the opinions of those who had built the place of worship, and which of them differed from those opinions? Those who still adhered to those religious principles being more properly to be considered as the *cestui que trusts* of those who held this place of worship in trust, than those who have departed altogether from the religious principles of those who founded this place, if I may so express it."

After stating that he could not read his own former judgment without remarking the "infinite difficulty" which the case had at that time presented, the Lord Chancellor shortly stated what had since happened in the Court below, and closed the case with the following characteristic paragraphs:—

"The Court has pronounced an interlocutor, in which it describes the utter impossibility of seeing anything like what was intelligible in the proceeding" (that is, in the proceedings in the Church courts on the part of the parties concerned, and particularly of the Old-Light party, now the appellants); "and I do not know how this House is to relieve the parties from the consequence. The Court of Session in Scotland were full as likely to know what were the principles and standards of the Associate Presbytery and Synod of Scotland as any of your lordships; and are as well, if not better than your lordships, able to decide whether any acts done, or opinions professed, by the defenders, Jedidiah Aikman and others, were opinions and facts which were a deviation, on the

part of the defenders, from the principles and standards of the Associate Presbytery and Synod. If they were obliged to qualify their finding, as they do, intimating that they doubt whether they understood the subject at all, under the words, 'as far as they are capable of understanding the subject,' I hope I may be permitted, without offence to you, to say that there may be some doubt whether we understand the subject, not only because the Court of Session was much more likely to understand the matter than we are, but because I have had the mortification, I know not how many times over, to endeavour myself to understand what these principles were, and whether they have or have not deviated from them; and I have made the attempt to understand it, till I find it, at least on my part, to be quite hopeless.

"The questions, therefore, in this case are, Whether the interlocutors by which the defences are sustained and these parties assoilzied are right? And, to be sure, if they cannot show that the defenders, or any of them, had departed from the original standard and principles of their association, and if the Court is satisfied that the pursuers have not departed from these principles, but have thought proper voluntarily to separate from the congregation to which they belonged, the inquiries directed by the judgment of the House would be altogether unnecessary; for the inquiries directed by that judgment aimed at having it ascertained whether the defenders and pursuers, or either, and if so, which of them, had departed from the original principles of the congregation? And according to what the Court of Session now tell us, they cannot find out, nor has either party enabled them to find out, that either the one or the other had departed from the original principles of their association; and the consequence of that is, that those who have not attended the meeting, but who are yet insisting that they have interests in the property in which the meeting is held, are to be considered as persons voluntarily separating themselves from the congregation without

cause; and all I can say upon the subject is, that after racking my mind again and again upon the subject, I really do not know what more to make of it."

Lord Eldon, it is clear, treated this case as an important and new one; and his doctrine, that the property is held *in trust for the principles* of the Church, is drawn, if not from English law rather than from Scotch, at least not expressly from the latter — probably from some source deeper than either, and common to both. For this and other reasons it is desirable to give some statement of the more important cases in the English courts in which the principle has since been followed out; but this may be done in the Appendix.[1]

On the Scottish Bench, until a very recent time, the chief, and indeed the only exposition of the principle laid down by Lord Eldon, was the speech of Lord Meadowbank in the first stage of the Campbeltown case (Galbraith *v.* Smith, 10th March 1837, 15 S. 808). The authority of this utterance, not disputed at the time, has since the year 1850 been denied; but it is important, both for the history of the cases and for extracting their principle, that we should notice it. Lord Meadowbank had been counsel in the Craigdallie case for the Synod, and a bias in this direction is discernible through his speech. At the same time, this makes his narrative of the case more interesting. He states that, after Lord Eldon's remit in 1813 to the Scottish Court, the principle of a majority, whether of congregation or contributors, was given up by the pursuers (the minister and his local adherents) who had previously urged it. He admits, on the other hand, that the other party, who adhered to the Synod, did not after that date press the Synod's authority as a defence; but he says this was not because they were forced to relinquish it by the principles laid down by the House of Lords: "It would have been competent for them to have shown, as matter of fact, that it having been a fundamental rule of the sect that in the supreme judicatory alone was vested the power of determining all questions of doctrine and

[1] See Note D.

discipline, so the judgment of the Synod was to be received as *probatio probata* of their adherence to their original principles, it being incompetent for the civil court to review the decisions in such matters of the ecclesiastical judicatories. But they were advised at once to join issue with their opponents upon the fact that there had been no apostasy on the part of the Synod, and that the tenets which it and those adhering to it professed were the original tenets of the Burgher Secession." And he elsewhere states the following as general principles deducible from this and the other decisions:—

"First, I take it to be clearly and finally settled, that a trust may be legally established, a civil right created for behoof of a body of dissenting Christians professing certain tenets, and agreeing to have those civil rights fixed by and dependent upon the observance of such rules and regulations as are inherent in, and calculated to maintain, the principles they support.

"Secondly, That it is a legal object of such a trust that it may profess to be constituted with a view to perpetuity, even by placing in the hands of a recognised body the right and power of controlling and modifying those rules and regulations, in conformity with the fundamental principles of that sect of dissenting Christians to which those constituting the trust may have professed to adhere, and that the civil court will not take cognisance of the proceedings and determinations of those ecclesiastical judicatories, as they may be termed, upon matters of doctrine and discipline, but hold them to be *probatio probata* of the principles of the sect.

"Thirdly, That the original deed or other instrument by which the trust is created need not, in order to be effectual, specify within itself the particular conditions of its creation, but that these objects may be ascertained, in order to their recognition and enforcement by courts of law, by facts and circumstances, and by a train of proceedings indicative of the purposes and the views of the parties.

"Fourthly, That in order to confer upon a party the right of

enforcing the objects of the trust, it is only essential that he should possess a *persona standi in judicio,* and qualify an interest to have it enforced. But it is not required, and that is the point which, though now settled, was originally doubted, that in those cases where the parties contributing their money and their means to the constitution of such a trust, and forming a congregation of dissenting Christians, shall have differed in opinion, and both claim possession of the trust-estate, the success of either will depend, not upon the greater amount which each may have contributed in the creation of the subject, or in their numerical superiority, but in their adherence to the original principles which it was their professed object to maintain in the constitution of the trust."

It will be observed that in the first of these quotations Lord Meadowbank holds, as matter of fact, that the judgment of the Associate Synod was intended, according to the trust in question, to be conclusive as to adherence to its principles; in the second he merely claims that it is possible to construct a trust in which this shall be the case. In his general proposition, too, he qualifies the power of the supposed Synod by a proviso that their judgments shall be "in conformity with the fundamental principles" of the sect, without however qualifying in the same way, as seems to be logically necessary, his conclusion as to their judgments being *probatio probata.*

In his very important speech in the Kirkintilloch case in 1850,[1] the Lord Justice-Clerk Hope held that the principle of judgment of the House of Lords had been "wholly misunderstood" by Lord Meadowbank in the speech just quoted from. And he puts his finger on the worst error in the following sentence: Lord Meadowbank's view "takes adherence to the Synod as *conclusive,* and *excludes* inquiry into the original opinions or doctrines, if opposed to the declaration made by the Synod as to what these doctrines are, and is precisely the error in the Craigdallie case again brought out, and in more

[1] Craigie *v.* Marshall, 25th January 1850, 12 Dunlop, 523.

absolute terms." That error, he says again, was one "founded on the *assumption* that connection with a dissenting Synod was as decisive a criterion by which to determine property and civil rights as adherence to the Established Church.[1] The mistake consisted in *taking as decisive* what was 'only one element, and it might be an element of no importance,' in the inquiry what was the original trust, and which party maintained the principles." Lord Meadowbank's doctrine of *probatio probata* may be held to be the point most unanimously and emphatically repudiated by the Court on this occasion, and ever since. Whatever weight may be attached to the fact of Presbyterian or Church subordination, it is not to be *assumed* as conclusive. That, at least, is settled by the case of Craigdallie. "The connection with, and subordination to, any ecclesiastical superiors, must be matter of contract proved in evidence, in order to be a subject for a court of law." "I protest against the influence of any general notions of subordination, union, or schism, on the rights of property of the defenders." "The only question is, Where is adherence to this United Secession Church declared to be the condition on which the property is held in trust?" It must be "made out, as a matter of fact, that such was the trust by the original contract of parties."[2] All are agreed that the Craigdallie principle is, that the property follows not the central judicatories, but the original principles of the congregation. And to Lord Meadowbank's rejoinder, "But submission to the judicatories may be one of these original principles," the first answer of his successors on the Bench is, "*Then you must prove that.* It is not *probatio probata.* It is not even a presumption of law. The presumption is the other way."

[1] "We, administering the law of Scotland, are presumed to know the nature and limits of the jurisdiction of the various constituted authorities. But of the rights and power of a bishop in the Scottish Episcopal Church we can know nothing until they are established in evidence, like the terms and conditions of any other association." —Lord Fullerton in Dunbar *v.* Skinner, 11 D. 945.

[2] From the Lord Justice-Clerk Hope's speech.

But does not the Craigdallie principle, as expounded in the Kirkintilloch and more recent decisions, go farther than this? Does it not *exclude* the consideration of submission to the judicatories in every case, and throw us back on the tenets of the congregation alone? It may often appear so, as when Lord Eldon in his second judgment says that the question is, "Which of the parties adhered to the *opinions* of those who had built the place of worship?"[1] using the word opinions instead of the "principles and persuasions" of his remit; or, still more strongly, when he remarks, in the case of Folgin *v.* Wontner, "I take it to be now settled by a case in the House of Lords, on appeal from Scotland, that the chapel must remain devoted to the *doctrines* originally agreed upon;"[2] or where the Lord Justice-Clerk Hope says, "The truth is, that if the original principles of the congregation are established, adherence to them and not to the Synod is the rule fixed by the case of Craigdallie; so that separation from the Synod is really in that case *immaterial*." But that such a conclusion would be unfair, is manifest not only from the repeated statements above quoted, to the effect that submission to the judicatories, though not a conclusive element, is *one* element—one that needs indeed to be proved, but may be proved to be even *the* condition of the trust,—but by the express statement of Lord Chancellor Eldon already quoted, "If it can be made out that this society originally said this, We will contribute our money for the purposes of building a meeting-house, and we will place ourselves under the jurisdiction of the Associate Synod, and we agree that the Associate Synod shall direct the application of this place so built—that is matter of law, and the contract will apply to the law." It is plainly held that there *may* be such a subordination to Church judicatures as shall override many, possibly all, of the other principles of the congregation. It is conceivable that submission to a superior and central authority may be the one religious principle of a

[1] 2 Bligh, 541. [2] 2 Jacob and Walker, 247.

Church. There are Churches of colossal pretensions of whose principles this would be a plausible representation. It is at least conceivable that such a submission may exist within certain limits, so that the individual, or the congregation, becomes subject to a *potestas dogmatica*. It is a possible thing that, in the words of Lord Meadowbank, a trust may profess "to place in the hands of a recognised body the right and power of controlling and modifying its rules and regulations in conformity with the fundamental principles of the sect." A Church may have the acknowledged right to modify for the better both the common practice and the common creed of its members. It may have power to alter its Confession of Faith, and may have this as one of its fundamental principles.

But that it has must be made out to the satisfaction of the Court. And in none of the cases which have occurred in Scotland since the Campbeltown case in 1837 has this been seriously attempted.

And it is obvious that this matter of submission to a dogmatic power in the judicatories is only one part of a much larger question—the question whether there is a right of dogmatic change or deviation in the Church at all. If the Church generally—the whole body, with its judicatories—have no right to modify or change its doctrines, the duty of adherence to it on the part of the congregation cannot relieve the latter from its own supposed original immobility of doctrine. If, on the other hand, there is a right claimed by the Church or sect, and therefore allowed by the Court, to be free from documents of dogma, and to have a right within certain limits to modify its opinions, such a liberty may probably be shown to have been part of the original principles of the congregation itself. In neither case does it appear so necessary as might be supposed from this case of Campbeltown, to go round to the judicatories for an authoritative judgment which cannot be questioned by the Court and will protect the congregation. Every such judgment, even of the highest dissenting judicatory, can

and will be questioned by the Court to the extent of determining, with a view to civil interests, whether it be competent. The real question will be, whether the Church as a whole claims and has a power of deviation; and what are the things fundamental to it from which it cannot deviate. The question of how closely the congregation is bound to it will follow upon this; and it is quite conceivable that, while submission to the judicatories on some other points—such as discipline or the form of worship—may be easily proved, it may be difficult or impossible to show that the congregation is bound to follow the Church into a change of doctrine which yet may be quite competent to the Church itself. Yet, generally, the question of competency for the Church will be the measure of competency for the congregation. Besides, it must not be forgotten that, on the one hand, there are in all Christian countries many congregations which hold their native independence, and are their own judicatories, and on the other, that the question may arise about the property held for a whole Church as well as for a congregation merely. In either of these cases (which, strangely enough, have not yet come into Court in Scotland[1]) the question of power of deviation would arise simply, uncomplicated by any question of subordination.

But hitherto in Scotland this right of doctrinal deviation has scarcely been at all pleaded. The Campbeltown case, indeed, in its second stage, is the only one where it distinctly came out; and on this occasion, while the judges held that it was a point of much importance, the parties declined to take advantage of it. The first judgment in this case, in 1837,[2] was on the question of interdict or interim possession, and the opinions delivered had reference to the connection of the congregation with the judicatories. But in the second judgment, in 1839,[3] the Court had to decide on the merits of the case, and

[1] See Connell *v.* Ferguson, March 6, 1861; 23 D. 683.
[2] 15 S. 806, March 10, 1837. See Appendix.
[3] 14 Fac. Coll. 979, June 6, 1839; also 5 D. 665. See Appendix.

it is in some respects the most important judgment of this kind which has been delivered. Lord Moncreiff, who was Ordinary, and whose connection with the dominant party in the Establishment during the Voluntary controversy adds on such a point to the value which his judicial eminence gives to his decisions generally, stated the general question as to limits of deviation as follows:—

"But the defenders maintain another point, which, if well founded, may carry them through the case, even though they should fail in everything else. Supposing that the Relief Church did originally hold the scriptural lawfulness of the Church Establishment, and that the Court should be satisfied that the Presbytery and Synod have now rejected that principle, and adopted the reverse proposition, the defenders still maintain that that is *not an essential point* of doctrine, or of opinion, sufficient, in a question among the present parties, to justify an abandonment of the Relief Presbytery and Synod, or to entitle a minority of the proprietors to carry off the property from the majority adhering to those bodies. The Lord Ordinary considers this to be the most important, and perhaps the most difficult, point in the cause. It might bring it near to the ultimate state of the case of Aikman. For although, on the assumption that the difference between the Synod and the defenders adhering to it and Mr Smith, and the other pursuers adhering to *him*, may be quite clear and intelligible, it yet may not be sufficient, in point of vital importance, to warrant the Court to find that the property must devolve on a small minority of the proprietors seceding from the Relief body. It cannot be held that every article of the Confession of Faith is a *necessary article of communion*. Private Christians are under no obligation, even in the Established Church, to sign the Confession of Faith, though admitted into full communion; and the defenders may reasonably maintain, that there may be minor points involved in it, not entering into any of the essential doctrines of Christianity; a difference of opinion on which

will not warrant a separation to carry with it rights of property, contrary to the destination for a church in connection with the Relief Presbytery."

When Lord Moncreiff at a later stage made avizandum with the case to the Court,[1] he intimated that his own leaning was to hold it proved both that the Relief body originally held the lawfulness of Church establishments, and that they now held their unlawfulness. This finding in point of fact, would of course raise the general question above indicated, whether the doctrine was fundamental. And the Lord Ordinary had "to regret that the defenders have scarcely dealt with the difficulty," and that "from an evident unwillingness to meet the question on the assumption of the facts" which raised it. But though the Church defending, with characteristic Scottish love of consistency, declined to argue on the assumption that there had been any change of tenets, the influence of the idea suggested by Lord Moncreiff is very visible in the opinions of the Bench. The chief ground on which the Second Division assoilzied the defenders, was doubtless, as stated in the rubric of the Faculty Collection, "that there was no sufficient proof that the principle alleged to be departed from"—that is, the principle of establishments, or rather of endowments—"had been inherent in the original constitution of the Relief body." But the other judges seem rather to have thought with Lord Moncreiff, that this tenet had been held by that body in point of fact, whether it formed part of its *constitution* or not. The Lord Justice-Clerk Boyle says: "It appears to me that there is a failure of such proof, as it can only be inferred from the original members having adopted the Westminster Confession, but which, it may fairly be held, was adhered to merely as their creed in regard to doctrine and discipline, and not as an essential criterion of their sect."[2] No doubt his lordship holds, also,

[1] His note here is reported only in the Faculty Decisions, xiv. 992.

[2] 5 D. 679. In Fac. Coll.: "They adopted it as to religious doctrine and discipline only, but not as to other matters."

that in the Confession there is "not one word with regard to an obligation on the civil magistrate either to maintain or endow the Church," and Lord Medwyn agrees with him on this point. But on the more general question Lord Medwyn also says: "The view I take is, that although, as I think, the Relief Synod do hold the Voluntary principle to be the scriptural one, and the Church of Scotland holds the Endowment principle, it is not an article of faith as affecting the Relief Church to which such effect is to be given, as is here sought, by transferring the property of the Church from the great majority, and these adhering to the Relief Synod, to a small minority who dissent from the Synod. It is not every opinion held by the Church of Scotland at the time the Westminster Confession was adopted, a departure from which will warrant the pursuers to insist that, if they retain the same opinions, they are entitled to the exclusive property of this church." We find Lord Meadowbank seemingly occupying the same twofold position, arguing, on the one hand, that there is no evidence that it was a fundamental principle of the Church of Scotland itself that it should be endowed; but holding still more decidedly that, even if that Church had in its Confession a reference to endowments, it would be a question whether the Relief body, in abandoning this, had abandoned any "principle of faith, any religious principle."[1] The judgment delivered by the Inner House in this case is not at first sight a very vigorous or satisfactory one;[2] and the opinions give one the feeling that the judges, as Lord Moncreiff

[1] Faculty Collection Report. In the other Report his lordship says he had tried to discover what deviations from their original professions had been made by the judicatories, "and if any, whether it has been of that character and description which essentially changed the character of the tenets and faith originally professed;" for any "abandonment of the faith professed by the founders" would leave the property to those adhering to it.

[2] The difficulty is increased by the fact that the Report in the Faculty Collection is the only one published at the time. The other in the authorised Report did not appear till 1843, and varies from the former considerably—not always to the advantage of the learned speaker. We print, however, from it in the Appendix.

hints, were giving the Relief Church the benefit of a right to change its doctrine which that Church had not itself claimed. Yet the principle so stated is not of less importance that it originated with the administrators of law; and the opinion even of Lord Moncreiff, who both in this and subsequent judgments leans to the side of orthodoxy, is quite distinct: "The Lord Ordinary cannot go so far as to hold with the pursuers, that everything whatever which is laid down doctrinally in a Confession of Faith must be held to be *de essentialibus*, the least departure from which will affect the use of the property."[1]

This right of doctrinal deviation has scarcely been claimed by any Church since the Campbeltown case in 1839. The two chief cases which have occurred since, the Kirkintilloch case in 1850, and the Thurso case in 1859, were both cases in which, as Lord Meadowbank put it, it perhaps "might have been competent" to plead a power of deviation to some extent inherent in the Church, and forming a condition of the trust; but in both the parties were desirous, or "were advised at once to join issue" on the question whether there had been any such deviation or not. The intense conservatism of the Scottish character, and the infinite respect which it has had for creed, has produced a startling contrast between the cases decided in England since Lord Eldon's time, and those which during the same period have emerged here.[2] In the former country, the questions that have occurred have been between parties separated from each other by great theological gulfs, generally Calvinistic Presbyterians on the one side, and Unitarians or Socinians on the other. Yet in these cases, strange to say, the most earnest and powerful appeals have been made to the Court, on the ground of the essential freedom of a Church to change its doctrines, and of this having been one of the principles of the body whose right to its property was imperilled by its having traversed the whole

[1] Note on making avizandum with the case, Fac. Coll. xiv. 993.

[2] For the leading English and Irish cases see Note D.

diameter of opinion.[1] In Scotland the cases have been remarkably otherwise. They have not been between Trinitarians and Socinians, or between Romanists and Protestants. They have not even been between Episcopalians and Presbyterians, Baptists and Pædobaptists, Calvinists and Arminians, or any of the other well-known and important divisions of Christian fellowship. They have been all between Calvinistic Presbyterians, and Calvinistic Presbyterians too of the same historical school. This contrast between the English and Scotch cases in point of fact, was early noticed on the Bench as making room for an important difference in the application of the principle;[2] but up to the present time the general question has not again been effectually raised by litigants, and it has been willingly escaped from by the Court. In the Kirkintilloch case the differences between the Associate Synod and the United Presbyterian Church, and in the Thurso case (still more fully) the differences between the United Associate Synod of Original Seceders and the Free Church, were carefully gone into by the Bench; and the cases were decided upon them, without seriously raising the question, whether the differences, supposing them to exist, were not within the *limits of deviation*, which every Church, at least every Pro-

[1] Some recent cases in Ireland have turned on points as narrow as the Scotch, and indeed identical with them. See in particular the case of Attorney-General *v.* Miller, in Note D.

[2] Lord Moncreiff, in the first of his notes in the Campbeltown case, already quoted from, says: "The Lord Ordinary attaches the more importance to this point, because, if it cannot be made out that the tenet concerning the lawfulness of a Church Establishment is *de essentialibus* in such a Church as the seceding Voluntary Church of Relief, the force of the decisions on the English and Irish cases would be entirely taken off, and the pressing difficulty in the argument, when the supposition of the Synod having become Unitarian or Roman Catholic is made, would be almost entirely overcome. The Lord Ordinary therefore directs the special attention of both parties to this point, which he thinks by far the strongest point of the defence. He does not mean to say that there *may* not be a solid answer to it. But he states the difficulty strongly, in order that the pursuers may see the necessity of meeting it with care, understanding distinctly the view to be, that there *may* be points even of religious principle, a difference on which will not warrant a separation in the question of property."

testant Church, must retain. In the later cases, since 1850, there has been a decided reaction on the Bench, in the direction of a much stricter interpretation than that which guided the Court in the early cases of Perth and Campbeltown, and a tendency to lapse into phraseology, sometimes used by Lord Eldon and his successors, as if a Church were tied not only to its principles (an instructive truism), but to all its doctrines, tenets, and articles—all that it has ever taken up or accepted. The position of Lord Moncreiff and the three Inner House judges—that all that is in a Church's Confession may not be fundamental to the Church—has at no time been denied or even disputed, but in recent cases it has been somewhat ignored. Accordingly, while some of these are on this account all the more interesting to ecclesiastical readers (who will find a little in the appendix to this chapter, and a good deal more in the Reports themselves, on the actual differences of doctrine and distinctions of principle among Churches), they must probably be perused with a recollection that there is this general question behind.

We have mentioned one difference which exists between the Scotch and most of the English cases. Another very obvious one is the great care with which the courts of England have considered the question of what evidence is admissible to prove the original principles of a Church. The traditions of our Church bodies have been so well preserved by their historical standards, and there has been so little of Church life separate from these bodies—*i.e.*, of Congregationalism—in Scotland, that it has not been necessary to discuss this matter. In England, as in the case of Lady Hewley's charities, it has been most elaborately inquired into,[1] the result being that, where there is not a deed or document of trust of some kind, the courts admit almost any evidence to prove what in point of fact was the intention—and as a means to proving this, what were the principles—of the truster. This, of course, implies

[1] See Note D.

that it is presumed the truster meant that those whom he endowed were to teach (generally) his own principles, and were not to have a power of deviation; and undoubtedly that is the general English rule, qualified only by the fact that the question raised by Lord Moncreiff as to what are essentials seems never to have been discussed there, and that it was not so necessary to discuss it, the differences there dealt with being theologically very important and, *prima facie*, fundamental.

The four cases to which allusion has been made—the Craigdallie or Perth case, in 1813; the Campbeltown case, in 1837; the Kirkintilloch case, in 1850; and the Thurso case, in 1859—are the leading cases in this branch of the law. Of these the first two, notwithstanding the discrepancy pointed out between the opinions of Lord Eldon and Lord Meadowbank, are very much in the same line. Both were raised by the great change of principle, or at least of opinion, which passed over the larger masses of Scottish dissent at the beginning of the century, and made those who were at first protesters against an impure Establishment, content to carry on an independent Church life on the principles of Voluntaryism. The former case belonged to "the Secession," and the latter to "the Relief" body, the two great branches of Scottish dissent of last century. In both cases it seems to have been ultimately found not proven that the Churches had apostatised from their principles, and in both (amid many discrepancies) the burden of proof seems to have been held to lie on the congregation (in the one case) and the minister (in the other) who dissented from the "Body" and the ruling judicatories.

In the third, or Kirkintilloch case, as we have already seen, it was pointed out with a weight of authority that has ruled the cases since, that the question always is, What are the original principles, not of the body, but *of the congregation?* and that

adherence to the judicatories is by no means necessarily one of these principles. But in addition to this exposition of Lord Eldon's general principle, the long and powerful speech of the Lord Justice-Clerk Hope laid down (with the full concurrence of Lord Moncreiff) a farther doctrine, which has very important consequences, and to which one Division of the Court has since given its approval. For while the Kirkintilloch case had some things in common with previous cases, it had others that were new. It was, like the earlier cases, a dispute between a large body and one of its congregations, and, like them, it involved the question, whether the Body had departed from its principles. But the dispute in this case arose in consequence of the ecclesiastical body having resolved to *unite* with another body of Seceders,[1] and the particular congregation were found entitled to complain of the mere *union* as a departure from the separate identity to which their Church was bound. The question was fairly raised, How far is union possible to Churches that have been separate?

The Lord Justice-Clerk gave his opinion distinctly that, in the ordinary case of our Church tenures, if one congregation of a Church simply objects to its forming a union with another body, it is not bound to follow the Church into that union under the penalty of losing its property. "The right to refuse to submit to any such changed government, or to concur in any such union," is, in his opinion, the leading and fundamental principle of all such associations, which he afterwards expresses as "the desire to keep separate—to keep up one sect apart from all others." "Be the objection" (to union) "in the opinion of others valid or fanciful, it is a change to which no congregation is bound to submit. *For separation, then, when such union is to be entered into, no reasons, in my*

[1] The first half-century of Scottish dissent shows an extraordinary tendency to split and subdivide among bodies whose doctrines and practice to all outside Scotland seemed almost identical. The latter half of its history shows the reuniting process in equally powerful operation. For Map see Note F.

opinion, need be assigned. The right to refuse is absolute; and the notion that the majority" of the congregation " is to forfeit their property, is, in my judgment, perfectly extravagant." These very strong statements are slightly qualified by the words that immediately follow; for his lordship adds, that such an idea is " extravagant, *and* without the slightest support *from any evidence that such is a condition of the trust.* Indeed I did not hear it maintained that obligation to unite with other sects was an original condition of this trust held for a congregation of Seceders. It would be a very strange condition to incorporate with any trust for a congregation of old Seceders." This shows us the exact position upon this point of the Lord Justice-Clerk. He held that an obligation to union with a separate body was not an impossible thing, but extremely improbable—not to be presumed, but to be clearly proved—and that union might be resisted by a particular congregation, which would still retain its property unless it were specially averred and proved that it was bound by the trust of its title-deeds to go into it. Lord Cockburn objected to this doctrine, and to the principle of separatism on which it presumed Churches to be founded, holding that " union—that is, the extension of what it thinks right—seems a necessary principle with every rational religious society." But Lord Moncreiff went fully as far as the Lord Justice-Clerk, holding that the union of separate bodies, with separate judicatories, was itself "an essential change in the constitution of either Church." He puts the question thus: " There being such a marked separation between the United Secession Church and the extensive body of the Relief, were the members of the Kirkintilloch congregation, when a union between these two bodies was proposed, *bound even to inquire* what the religious tenets or ecclesiastical opinions of the Relief Church were, so as to know how far they agreed with their own, or how far they differed from them? I apprehend that they were not; and that it was enough for enabling them to

determine whether to consent, or to refuse to consent, to the union, that the Relief was an entirely different and separate Church of dissenters, with whom the Secession Church had hitherto had no connection." It may be that these principles have been laid down not as rules imported into all possible Church trusts, but merely as *presumptiones juris;* but they are laid down very strongly, and with great authority.

And they have been since reasserted, enlarged, and acted upon in extreme cases. In the last important case on this branch of the law of trust, that of *Thurso* (Couper *v.* Burn)[1] in 1850, where two Church bodies united — the "United Associate Synod of Original Seceders" merging into the Free Church by a vote of a majority—the congregation of the former body at Thurso joined the union, also by a majority. An action was brought by the minority of the congregation to have it declared that they were entitled to the property of the chapel, notwithstanding their dissent from the majority of the Synod and from the majority of the congregation. In this, as in the Kirkintilloch case, the chief stress was laid on the fact that the majority, by union, had departed from the original principles of the congregation, and that those adhering to these principles, whether majority or minority, were, as doing so, entitled to retain the property—a view confirmed by the Court in their decision. But Lord Wood, in delivering the unanimous judgment of the Court to this effect, founded it upon the views of Lord Justice-Clerk Hope in the Kirkintilloch case, and held that not only a proved departure from principles by the majority of the Church, but their mere union with a body hitherto separate, even were its principles the same, was a thing to which no congregation was bound to submit, and against which even the minority of a congregation could successfully reclaim. After stating the question, he says, "Had the pursuers here been a majority of the congregation, instead of a minority, a direct answer would, we ap-

[1] December 2, 1850, 22 D. 120.

prehend, be afforded by the judgment in the case of Craigie *v.* Marshall." But on principle the case is the same when only a minority reclaims. "A resolution to form a union with a separate body is not an act of management properly falling to be regulated by the voice of the majority of the congregation. It is one affecting and altering the use, possession, and destination of the property of the body. . . . According to the obvious spirit of the Kirkintilloch principle, the like circumstances and reasons which are of sufficient potency to entitle an adhering and resisting majority to refuse to join a minority in a union with another religious body, *without its being necessary to establish that the minority by the union would be departing from original principles,* must also be available to an adhering and resisting minority." "We therefore hold that the principles and views recognised in Craigie *v.* Marshall are sound in themselves, and, when duly followed out, legitimately lead to the same result where it is a minority of the congregation that refuse to unite, and thereby sink their distinctive name and testimonies, and their very existence, in a separate sect, which was arrived at, where it was the majority that did so."

The authority of a principle like that thus initiated by the Lords Justice-Clerk Hope and Moncreiff, and confirmed by the unanimous judgment of a Division of the Court, is very great. Yet the greatest accumulation of authority cannot prevent the misgivings which are felt when this doctrine is looked at on the side of its results. That all dissenting Churches should be absolutely tied to their distinctive principles—*i. e.*, as these more recent judgments put it, to their tenets—under pain of forfeiture of their property, might seem to be going far enough. It is a sufficient concession to the genius of sectarianism. But that they should be to all time forbidden under the like penalty to unite with the Established Church or with each other, even when it is not alleged that their doing so would compromise any of their principles,

is a farther step. To perpetuate schism and subdivision of schism cannot be part of the public policy of the law, which rather tends to provide "*ne inimicitiæ hominum immortales, dum ipsi homines mortales, sint.*" Yet, upon the principles already quoted, and more fully detailed in the appendix to this chapter, it should seem that a single individual in any dissenting congregation in Scotland may prevent that congregation from joining in a union with another Church whose principles are alleged, and not denied, to be identical with its own—that, in short, not only unity of principle, but unanimity of individuals is required before any such union can take place, or at least before it can take place without forfeiture of property. And under this condition, *Vestigia nulla retrorsum*, all the large property of all the splits and sections of dissenters, seceders, and protesters in Scotland would thus be held in all time to come.

Admitting that the doctrines laid down since the date of the Kirkintilloch case have been stated in rather an extreme way, and one that seems to lead to startling consequences, it may, it is thought, be denied that any decisions of the Court on this subject necessarily bind upon it for the future what is so extravagant. For they have all been mere applications of the law of trust, which is essentially a law of equity; and for any needed qualification in the future of doctrines which may have been laid down too broadly in the past, it is only necessary to revert to the original principle of Lord Eldon, and to remember that the law of the trust is the law of the case. Thus if, instead of the older Scottish doctrine which made the decision of the judicatories conclusive as to the principles of the congregation and the destination of its property, recent cases seem to hold that the decision of the judicatories is absolutely of no consequence, it may be enough to recall the illustrations of the Lord Chancellor in the Craigdallie case, and to remember that the question is at all times a question of fact, Did the principles of the congregation

submit it to the judicatories, or did they not, and to what extent and effect? And when it is laid down that the union of two Churches which had been hitherto separate is necessarily an abandonment of their principles, it is implied that these Churches have not averred, or at least have not proved, that part of their original principles was an obligation to unite with separate Churches holding like doctrine or practice with themselves.[1] There is in every case implied a decision on some question of fact—on the question of fact, What was the original trust? And any imagined failure on the part of the Court to arrive at the right result in the past only lays on future litigants the duty of more carefully furnishing the Court with the materials for its decision, according to the legal presumptions now established — presumptions which abundantly show where and how heavy in each particular case is the burden of proof.

But whether the principles already laid down shall be held in future by the Bench to be mere general presumptions or absolute rules—a matter for the authority of the Court to declare rather than for the ingenuity of private students of the law to anticipate—these general principles, as more recently expressed, seem to be as follows:—

1. That in the ordinary case[2] the trust is a trust for the congregation.

[1] In an eloquent passage of the Lord Justice-Clerk Hope's speech, which is quoted by Lord Wood in the Thurso case, and which seems to reveal the germ of the doctrine he lays down, he speaks of "the desire to keep separate —to keep up one sect apart from all others"—as if it were the originating or fundamental principle of bodies like the Secession. It is probable that no communion in the world ever acknowledged such a motive as their principle of existence; and it is certain that the Seceders of Scotland theoretically regarded sectarianism with special detestation. Even his lordship's statement, that "obligation to unite with other sects would be a very strange condition in any trust for a congregation of old Seceders," does not strike one as necessarily true, when we remember the special attachment of the Seceders to the Solemn League and Covenant with the Church and people of England.

[2] *i.e.*, Of title. For titles see next chapter.

2. That therefore the destination and use of the property must be regulated by the principles of the congregation—not of the ecclesiastical body with which it is connected.

3. That when the Church, or general ecclesiastical body, changes its principles, it cannot compel the congregation to go along with it.

4. That where the Church, without changing its principles, merges its separate identity by union with another body, it cannot compel the congregation to go along with it.

5. That not only a majority, but even a minority of the congregation, has a right to vindicate the congregational property in the two cases last mentioned. The minority of the congregation may demand the property in the event of the majority acquiescing in the departure of the whole Church from (1) its principles, or (2) its separate identity.

6. But unless the minority take action, the act of the majority is presumed to be right; and the minority must take action at the time, or without undue delay.

The last rule is derived from the case of Cairncross *v.* Lorimer (Carnoustie case), May 28, 1858.[1] The action was one nearly the same on the merits as the Thurso case (Appendix, Note C); but it was thrown out on the ground that the minority of the congregation of United Original Seceders, who objected to the union of the majority with the Free Church, had not raised the question *debito tempore*, and having delayed three years, must be held to have acquiesced. Against this it was very strongly urged that the nature of the title as one of trust, as laid down in the decisions already referred to, made it of no consequence when the objection to perversion of the property was raised. The replies of Lord Wood (who, as we have seen, gave the judgment in the Thurso case, which went farthest against union), and that of the Lord Justice-Clerk Hope (one

[1] Or Cairncross *v.* Meek, 20 D. 995. Affirmed in House of Lords, 9th August 1860: 22 D. (House of Lords), 15; 3 Macqueen, 827.

of the last decisions of that most laborious and energetic lawyer), are instructive, and seem to show, if not a modification of the general views they elsewhere laid down, at least a shrinking from extreme applications of them.[1] The case, too, went to the House of Lords, where the judgment throwing out the case on the ground of delay (the action being one brought not by officials, but by individuals for a personal wrong done them) was affirmed; and the Lord Chancellor Campbell added, "I confess I should have been sorry if we had been obliged to pronounce a judgment which would have given such facility to the stirring up and the revival of disputes between the different dissenting religious persuasions into which Scotland is unhappily divided, and I feel great satisfaction in being able, according to the well-established principles of Scottish law, to advise your lordships that this appeal be dismissed with costs." It is striking that this, the only judgment of the House of Lords on this subject since Lord Eldon's in 1813, should be rather in the nature of a check to the recent very strict applications of Lord Eldon's principle. It would perhaps have been desirable if the series of judicial interpretations given in Scotland, with the contrast between the Perth and Campbeltown cases on the one hand and the Kirkintilloch and Thurso cases on the other, had been submitted to the judgment of that Court of Appeal which had originally given the law.

[1] Lord Wood, 20 D. 1002; Lord Justice-Clerk Hope, 20 D. 1001.

APPENDIX TO CHAPTER VI.

NOTE A.

THE CAMPBELTOWN CASE.

I. GALBRAITH *v.* SMITH, MARCH 10, 1837.[1]

In this case the majority of the Relief congregation at Campbeltown, having, like the Relief Church generally, become *Voluntary* in their leanings or principles, disagreed with their minister, Mr Smith; and after much procedure, his presbytery "declared Mr Smith out of connection with the Relief body." The church, in consequence, being appointed to be "preached vacant," Mr Smith applied to the sheriff, and obtained an interdict against any one taking possession of his pulpit; and on the question of continuing the interdict, the following opinion was delivered:—

LORD MEADOWBANK.—"Your lordship having been pleased to call upon me to deliver my judgment upon this case, I can have no difficulty in stating the views which have occurred to me on going through this very voluminous record, and considering the cases for the parties. In doing so, I beg leave, in the first place, to state the points that I now understand to be settled by the case of Aikman *v.* Craigdallie and others, and the rest of the cases to which we have been referred.

"First, I take it to be clearly and finally settled, that a trust may be legally established, a civil right created, for behoof of a body of dissenting Christians professing certain tenets, and agreeing to have those civil rights fixed by and dependent upon the observance of such rules and regulations as are inherent in, and calculated to maintain, the principles they support.

"Secondly, That it is a legal object of such a trust that it may profess to be constituted with a view to perpetuity, even by placing in the hands of a recognised body the right and power of controlling and modifying those rules and regulations, in conformity with the fundamental principles of that sect of dissenting Christians to which those constituting the trust may have professed to adhere, and that the civil court will not take cognisance of the proceedings and determinations of those ecclesiastical judicatories, as they may be termed, upon matters of doctrine and discipline, and hold them to be *probatio probata* of the principles of the sect.

"Thirdly, That the original deed or other instrument by which the trust is created need not, in order to be effectual, specify within itself the par-

[1] 15 Shaw, 808.

ticular conditions of its creation, but that these objects may be ascertained, in order to their recognition and enforcement by courts of law, by facts and circumstances, and by a train of proceedings indicative of the purposes and the views of the parties.

"Fourthly, That in order to confer upon a party the right of enforcing the objects of the trust, it is only essential that he should possess a *persona standi in judicio*, and qualify an interest to have it enforced. But it is not required, and that is the point which, though now settled, was originally doubted, that in those cases where the parties contributing their money and their means to the constitution of such a trust, and forming a congregation of dissenting Christians, shall have differed in opinion, and both claim possession of the trust-estate, the success of either will depend, not upon the greater amount which each may have contributed in the creation of the subject, or in their numerical superiority, but in their adherence to the original principles which it was their professed object to maintain in the constitution of the trust.

"All these propositions were sifted to the bottom, and, as I think, and shall immediately show, finally settled, in an early case, that of Auchincloss, not referred to in the papers, and in the case of Aikman and Craigdallie.

"In the present case it is unnecessary to discuss any question of title. There is no doubt that each of the parties has a *persona standi*, and both have an equal interest to enforce the object for which they are contending; but I have found it indispensably necessary for me, even in this question of possession, to consider how those settled doctrines to which I have referred are to be affected by the judgment we are now to pronounce in favour either of the one party or the other; and your lordships will therefore permit me to state, in the first place, in point of fact, that I have no doubt that the meeting-house at Campbeltown was originally erected, and the endowment connected with it thereafter created, for the uses of a congregation of dissenting Christians, to be in all future time connected with, and in subordination to, that body which the contributors and congregation recognised as the Synod of Relief. This object of the trust, I may state generally, and without going into particulars, is sufficiently ascertained by a consideration of all the acts of the parties exactly as they were in Craigdallie's case (and, in fact, the condescendence here is, *mutatis mutandis*, little else than a transcript of the condescendence there), and from the call and ordination of the different clergymen, and of Smith himself, under authority of the Synod, and whose sole title of induction was the licence to preach which he had received from the judicatories of the Relief Church. Secondly, It is admitted, nay, it is maintained by both parties, that the tenets of the Relief Church are those of the Church of Scotland, and the Confession of Faith and Formulæ of the latter constitute the foundation of the former. By these, your lordships know well, the rights of presbyteries, synods, and General Assemblies, in all matters of discipline and doctrine, are declared to be incontrollable; and while these judicatories in the Established Church

possess the exclusive power of determining the ecclesiastical relation between pastors and their congregations, so in the Church of Relief they possess a power equally supreme and irreversible. Of the effect of the ecclesiastical relation, in the Established Church, upon the civil rights of the pastors, there can be no question, and so it is stated by the Lord Ordinary; but I think his lordship inaccurately supposes that this effect is produced from express statutory enactment; for I am acquainted with no statute which expressly provides that such shall be the civil effect consequent upon a judgment of an ecclesiastical court. It only is the result of the legislative recognition, at the establishment of the Presbyterian worship, that the government of the Church is in these bodies formed and constituted upon principles exclusive of the control of the civil power, and upon the plain principle thence following, that if the ecclesiastical body possess the power to suspend, or take away from the pastor his right to the character or function in which alone he had acquired the civil right, the latter must follow of course the loss of the former.

"Whether the same effect is to be produced upon the pastors of Relief congregations, when deprived by their ecclesiastical superiors of the character and functions of clergymen, if bodies having a *persona standi* and a legal interest to maintain their rights, come before your lordships, proving that it was a fundamental principle of the Relief Church that the right of deprivation lay with the Synod—that the Synod exercised their ecclesiastical power—and contending that the pastor, being deprived of his function, could no longer be maintained in the civil possession of a right, which, by the agreement of parties, had been created solely for the purpose of maintaining a congregation in connection with the Relief Church, is the question we are now required to determine.

"In this respect, I am humbly of opinion that the Established Church and the Relief Church are precisely in the same situation. The difference between the two I apprehend to be simply, that the one is an endowed Church, where the civil right flows from the provision of the State, while in the other it has been constituted by the voluntary agreement and obligation of the parties. But in both it is the right to the function, as determined by the ecclesiastical authorities of the bodies respectively, upon which the civil and patrimonial rights of the parties in this respect must altogether depend; so, accordingly, in England the law was so declared by Lord Mansfield, in a case where a mandamus was applied for to restore a clergyman to a dissenting meeting-house. 'The right,' his lordship says, 'to the function is the substance, and draws after it everything as a pertinent thereto. The use of the meeting-house and pulpit follows by necessary consequence the right to the function of the minister, preacher, or pastor.' . . .

"I pray your lordships also to observe, that in this case the determination of the Synod was unanimously pronounced, and there is no room for maintaining an argument, as was done in the cases of Bulloch and Craigdallie, to which I shall more immediately refer in the sequel, that here had been a schism in the supreme judicatory of the dissenting body, one

party adhering to, and the other abandoning, the original tenets for maintaining which the trust then in question was originally constituted; and it was therefore *prima facie* incumbent upon the Court to ascertain, not merely what was the original tenet of the body, but which of the parties continued to adhere to it, and by so doing had, in truth, become the Associate Synod. Here the unanimous decision must, upon every principle, be taken *prima facie* as *probatio probata* of what is the true doctrine of the sect; and therefore, upon general principle, and in a preliminary question of possession, I should have thought that, if the points I have before referred to had not even been finally fixed and determined, as I take them to have been, the party who, by his own showing, has been deprived of that character, under which alone he got possession of the meeting-house, and that is the only question before us at present, is bound to yield it up for the use of those in whose favour a right was constituted, of a nature totally exclusive of any interference on his part, cut off as he is from his connection with the Relief Church.

"While I state this generally, however, I am free to admit that, upon a consideration of the circumstances in which Craigdallie's case was ultimately determined in this Court, though not upon the terms of the judgment of the House of Lords, remitting the case for consideration, that it might be thought and contended that, supposing the respondents to have distinctly averred that the whole of the Relief Synod had concurred in abandoning the original tenets they professed, by becoming Mohammedans, Unitarians, or Episcopals, it would have been incumbent upon your lordships, after due inquiry, and being ascertained of the fact, to have pronounced a judgment finding that that judicatory was no longer the Relief Presbytery, and that the respondents or others, as the case might be, as adhering to their original tenets, were entitled to enforce the maintenance of a trust in consonance with the principles and objects for which it was originally constituted.

"But this is an extreme case, which cannot admit of being supposed."

Lord Meadowbank then goes over the cases of Bulloch, Jan. 31, 1809, and Craigdallie, with regard to the latter of which he says :—

"The pursuers (the party who were in opposition to the majority of the Syond, and who had renounced its authority) presented a petition to apply the judgment, in which it was fairly admitted that the House of Lords had upset that ground of their action, which rested upon the proposition that the rights of the parties were to be determined by their numerical majority according to the amount of their contributions, and that the subjects must ultimately be decerned to belong to those who continued in communion with the Associate Synod, upon the principles on which the Secession was originally formed.

"Aikman's party, of course, agreed in this explanation of the views of the House of Lords, but it would have been competent for them to have shown, as matter of fact, that it having been a fundamental rule of the sect, that in the supreme judicatory alone was vested the power of determining all questions of doctrine and discipline, so the judgment of the

Synod was to be received as *probatio probata* of their adherence to their original principles, it being incompetent for the civil court to review the decisions in such matters of the ecclesiastical judicatories. But they were advised at once to join issue with their opponents upon the fact that there had been no apostasy on the part of the Synod, and that the tenets which it, and those adhering to it, professed, were the original tenets of the Burgher Secession. Accordingly a condescendence was ordered to be given in by the pursuers of what they averred as to change of doctrine; and, upon advising the pleadings of the parties, the Court pronounced a judgment, finding that there had been no deviation, on the part of the Synod, from their original standards and principles; and therefore sustained the defences of Aikman, and ordained the others to be removed from the possession of the subject."

The Lord President Hope reminded the Court that this was a mere question of possession; and stating that Lord Meadowbank's speech might be of great service when they came to the merits, he proposed on other grounds to maintain Mr Smith's possession and keep the interdict.

Lord Glenlee had found difficulty as to what should be the issue of the declarator, and in the mean time was for letting this lie over.

Lord Medwyn suggested a compromise, and the parties accordingly arranged that each party in the congregation should have the use of the church at alternate diets of worship.

II. SMITH *v.* GALBRAITH, JUNE 6, 1839.[1]

The case came up at a subsequent stage on the merits in an action of declarator (on the part of Mr Smith, two of his pew-holders, and one trustee, against the other trustees), to have it declared that the Relief Church was essentially attached to the principle of Establishments; that the leading pursuer, who had not changed his principles, was still minister, notwithstanding his exclusion by the Synod; and that the opposing party should be interdicted from molesting him. The evidence that the Relief Church had changed its views was much stronger than that brought forward as to the older branch of the Secession, the Synod having in 1832 altered their formula of subscription to the Confession of Faith by adding the qualification, "except in so far as said Confession recognises the power of the civil magistrate to interfere in religious matters."

The Lord Justice-Clerk Boyle said:—

"Notwithstanding the extraordinary length to which the pleadings have been extended, I have no intention of delivering an opinion in any degree corresponding to them in that respect, or with the view of discussing the various topics that are embraced in them. I shall content myself with a brief statement of the grounds of the opinion I have formed on the case.

"Keeping in view the terms of the summons of declarator at the instance of the Rev. Mr Smith and Messrs Watson and Colville, against Mr Galbraith and the other defenders, as therein enumerated and designed,

[1] 14 Faculty Collection, 979. 5 Dunlop, 665.

and the conclusions that are contained in it, we are now called upon to decide, in consequence of the Lord Ordinary having taken the cause to report, whether the pursuers are or are not entitled to decree in terms of their summons.

"The pursuers contend that, according to the principles of law, as laid down in the case of Aikman, when disposed of in the House of Lords, and since acted upon in other cases, particularly in that one called the Clough case, decided in the Court of Exchequer in Ireland, property which has been settled in trustees or managers for a certain religious body, must remain vested for behoof of those who adhere to the original tenets of that religious body, and cannot be retained or disposed of by a majority of the body, however large, that has deviated from those original principles (and by which decisions we must all be guided), the pursuers are entitled to succeed in the conclusions of this action, for having the property of the Relief Church at Campbeltown declared to belong to the parties therein mentioned, and the other conclusions of the action found *in terminis*.

"In order to obtain such decree from this Court, it is, however, indispensable that the pursuer shall prove, by evidence that is clear and unequivocal, that, as this particular church at Campbeltown was to be held for behoof of persons, members of, and in communion with, the Church of Relief, which was first established in 1761, the defenders who, as a majority of managers, proprietors, and contributors, assert their right to the property, have deviated from certain fundamental and essential principles of the Relief Church, and that the pursuers themselves, though a small minority, now adhere to those principles from which the defenders have so deviated, and are therefore entitled to have the property declared to belong to them exclusively, while Mr Smith should be declared as alone entitled to the use of the church, and possession of the stipend provided under its constitution.

"The way in which the pursuers contend that the defenders have departed from the original principles of the Church of Relief, is by asserting that, at its constitution, it declared its adherence to the Westminster Confession of Faith, and the Establishment principle, as recognised by the Church of Scotland itself; and that, as the Relief Synod, which has cut off Mr Smith from their body, has deviated from that principle, and adopted the Voluntary principle, and that the defenders adhere to the Synod, they have also deviated from the original principles of the Church of Relief.

"We must particularly observe, that neither the Synod of Relief nor its members are parties to this litigation; and that the pursuer, Mr Smith, has, by the unanimous decision both of the Glasgow Presbytery, of which he was a member, and of the Synod of Relief, been cut off, or deprived of all connection with those judicatories which constitute the Relief clerical body.

"Whatever Mr Smith had done, in asserting, either in his own name or those of the other pursuers, his adherence to, and the Synod's departure

from, the original principles of the body, both his presbytery and the Synod decided unanimously against him. The *prima facie* presumption is, therefore, against Mr Smith's allegations, adopted, as they are, by the other pursuers. But although this is not to be held as *per se* decisive of the case, yet it does materially distinguish it from both the case of Aikman, and the Clough case, in which there was a difference of opinion, and a schism among the members of the respective bodies of clergy, and into whose opinions an inquiry was accordingly necessarily made. The Synod continues of the same denomination as that of the Relief Church; and no set of men, or even any other man than Mr Smith, assert that it does not compose the Relief body, as constituted by its original founders. This does, therefore, make a wide difference between the present case and those I have referred to.

"I may here observe that, with regard to the alleged irregularities in the procedure before the presbytery and Synod, in regard to the mode of setting Mr Smith aside, as being in matters clearly connected with the discipline of the Relief Church, it cannot be thought that this Court can interfere. That point was ruled by Lord Braxfield's decision in the case of Auchincloss, confirmed by the Court.

"But to proceed. As to the alleged deviation from the original principles of the Relief Church, it must be observed at the outset, that much obscurity arises from there having originally been no specific constitution drawn up, or any distinct and explicit exposition of the principles on which the Relief Church was founded. Nothing can, indeed, more clearly evince the conviction of the body itself of this defect, than those treatises and histories of its rise that were directed to be prepared, and which were undertaken and published by some members of Synod, even at late periods, as noticed and founded on by both parties in this case.

"But the pursuers seem to maintain, that the Establishment principle as professed by the Church of Scotland, or, in other words, the principle of that Church as to the powers and obligations of the civil magistrate in reference to spiritual matters, was adopted as a fundamental and essential tenet of the Church of Relief, which all its members were bound to maintain—and that of late the Relief Presbytery and Synod, as a body, and the defenders individually, have professed an opposite doctrine, holding it unlawful and unscriptural for civil rulers, as such, by their maintenance and support, to aid in the promotion of religion, or to maintain an Established Church. The *onus* of proving this proposition lies clearly on the pursuers, and the question now to be determined is, Has this obligation been fulfilled?

"The two chapters or sections in the Westminster Confession relied on, and which the Relief body subscribed, are to be found in the papers in this case, and I need not stop to read them. Now, by having subscribed or declared adherence to this Confession, in which those passages are contained, it is maintained that the fundamental principle in question was adopted by the Relief body.

"It is pretty material, however, to observe, that there are in those

chapters no words whatever which directly amount to an obligation on the civil magistrate either to endow or maintain the Established Church; and considering what the individual clergymen and congregations actually did when they separated from the Church of Scotland, and established the first Relief Presbytery in 1761, it is extremely difficult to comprehend how they could be held to adhere *in toto* to the standards of that Church, embracing an unqualified assent to the Establishment principle as now explained by the pursuers.

"So far as doctrine and general discipline are settled by the Westminster Confession, they possibly might and did adhere to it. But being directly opposed to patronage and its exercise as unscriptural, the very idea of getting entirely rid of it, accomplished by leaving the Church, seems itself to show a positive departure from the constitution of the Established Church.

"But holding the burden of proof to be entirely on the pursuers, can it be held—even taking into view all that sort of evidence of so multifarious a nature to which they have referred, with so much anxiety, and which it would be an endless labour to go through, when contrasted, as it must be, with that to which the defenders appeal of the same character—that it is proved that the Establishment principle, or duty of the State to maintain an endowed Church as a scriptural doctrine, was held originally as a fundamental and essential tenet of the Relief Church?

"It appears to me that there is a failure of such proof, as it can only be inferred from the Relief dissenters having adopted the Westminster Confession, but which, as already observed, it may fairly be held, was adhered to merely as their creed in regard to doctrine and discipline, and not as an essential criterion of their sect.

"There is the strongest ground, on the other hand, for holding that, from the earliest period, and according to the opinions openly expressed by the most influential members of the Relief Church, this Establishment principle was not deemed an essential tenet, and that a latitude of opinion in regard to the point was permitted among the members of the Relief body, without their ever being called to account.

"But, at any rate, it is enough that in such circumstances the proof on the part of the defenders (if there is in truth any proof in the case) is as pregnant as that on the part of the pursuers, on whom it was undoubtedly incumbent to bring forward decisive and unequivocal evidence, before they can prevail."

Lord Medwyn, *inter alia*, remarked:—

"The principles of decision in such a case admit now of no dispute. The case of Aikman, as decided in the House of Lords, and followed by the courts both in England and Ireland, affords us the proper guide here. The Court is not entitled to take notice of religious opinions with a view to decide whether they are right or wrong, but they must notice them as facts pointing out the ownership of property. If property is held in trust for a congregation for the purpose of religious worship, the Court will enforce this trust, and retain the property for those who adhere to the original principles of the religious

body—the principles on which the congregation had originally united; so that, if we can find out what were the religious principles of those who originally attended the church or chapel, we must hold the building appropriated to the use of the persons who adhere to the same religious principles, though these be a minority of the congregation.

"These propositions are derived from the speeches of Lord Eldon in the case of Aikman. The principles to be inquired into are religious principles, in such a case as this of a religious society, and religious principles affecting them in their character of persons associating for a religious purpose, and separating from the Established Church on account of principles of faith and religious practice, so important and fundamental in their eyes, as to warrant their separation, without incurring the sin of schism.

"I have no occasion to discuss what is fundamental or not, as an article of faith of this religious body, and whether departure from any such religious tenet would warrant a forfeiture of this property. For if it be true that the original formation of the Relief Presbytery in 1761 was on account of patronage, and that the Campbeltown congregation joined this body in 1767 on account of an alleged abuse of patronage (combined unquestionably with offence taken at the conduct of the presbytery of the Established Church to which they were subject), and not from any notion that a Church endowed by and connected with the State was unscriptural; and further, although it be established that the Relief Synod have adopted, within more recent times, the opinion, that for the State to establish and endow a National Church is unscriptural, I cannot hold that this is such a departure from their religious principles, those applicable to this independent unendowed Church, and which must, as long as it remains a separate Church—*i. e.*, the Relief Church—continue inapplicable to and unaffecting its members (for while separate from the Established Church there is no chance of a proposal to endow it while they reject it), as to entitle the Court to forfeit the property of those who adopt this opinion, and give it to those who think otherwise.

"It is true, when they separated from the National Church and set up a separate one, they adhered to the doctrine and discipline of the Church of Scotland, as contained in the Westminster Confession of Faith. I cannot say that I am satisfied that in this Confession I can discover anything about endowment by the State, or that, in requiring subscription to this Confession, they went further than what was applicable to themselves in it, as a separate Church, adopting the doctrine and discipline of the Church of Scotland. In the papers the portions of the Confession are given which are said to import the Endowment principle. But a State might do all there mentioned for the sake of policy and good government, without endowing a Church. I am glad to find that on this point your lordship's opinion concurs with mine. You are necessarily much better versed in these matters than I can be. I study such questions only as a judge in this Court, and on such facts as are presented to me; and certainly the view I take is that, although, as I think, the

Relief Synod do hold the Voluntary principle to be the scriptural one, and the Church of Scotland holds the Endowment principle, it is not an article of faith as affecting the Relief Church, to which such effect is to be given, as is here sought, by transferring the property of the Church from the great majority, and these adhering to the Relief Synod, to a small minority who dissent from the Synod. It is not every opinion held by the Church of Scotland, at the time the Westminster Confession was adopted, a departure from which will warrant the pursuers to insist that, if they retain the same opinions, they are entitled to the exclusive property of this Church. The Confession contains the system of faith and discipline the Relief Church adopted; but by subscribing it they can be supposed to have accepted it only so far as applicable to themselves; and I should doubt whether they would admit the presence of the civil magistrate in their assemblies, to provide that what is transacted in them is agreeable to the mind of God. All this may be done by a State without endowing a Church. The one is not a necessary consequence of the other, nor of course implied in it.

"But further, in a case of this kind, I think the religious opinions, departure from which is to forfeit the property purchased for and acquired by a religious body, must be such as characterised them in their own religious character, influencing their conduct as men and Christians in their state of separation; that no abstract opinion as to the belief or practice of any other religious community, which does not affect or influence any of their own religious principles, can have such an effect as to forfeit the property of the one part to the other. We must look to the principles of separation, not of agreement, with the Established Church, which do not affect them as a religious body—the principles which produced the formation of this congregation in union with the Relief Church; and I do not see that in any of their doctrines or religious principles, the Synod, and those who adhere to them in this congregation, have deviated from the Confession as to any of them. I must, therefore, sustain the defences.

"As to the case of Mr Smith, so far as different from the case of the other pursuers, viewed as a case of discipline, should not the Synod have been called to defend? But I see no such violation of their own forms, or of material justice, as to authorise the Court to interfere in the sentence pronounced by his ecclesiastical superiors against him. Mr Smith's offence was virtually attempting to withdraw his congregation from the Relief Secession, and by thus not adhering to his ordination vows, involving also contumacy, it is purely a case of discipline, to which the case of Auchincloss directly applies."

Lord Meadowbank, after referring to his former judgment, proceeded, in a diffuse and extempore speech, to express his agreement with all the grounds of judgment stated by the other judges. The defences to the declarator were sustained, and the original interdict recalled.[1]

[1] See Dr Struthers's 'History of the Relief Church' for a full account of this case.

NOTE B.

THE KIRKINTILLOCH CASE.

CRAIGIE *v.* MARSHALL, JANUARY 25, 1850.[1]

Upon the union of the Secession and Relief Churches into the present United Presbyterian Church, Dr Andrew Marshall, minister of a Secession congregation at Kirkintilloch, with the majority of his congregation, refused to go into the union. The present action was brought by a minority of the trustees of the chapel, to obtain from the majority the possession of it for those adhering to the union.

The LORD JUSTICE-CLERK HOPE'S speech in this case is so important that it must be given almost in full, but so long and complicated that it will be necessary to break it up into distinct parts.

No part of it is more important than the introduction, on *the difference between a trust for a Church or sect, and a trust for a congregation.*

"The property intended for the use of a dissenting congregation may stand, generally speaking, in one or other of two situations—widely different, and to which totally different rules are to be applied. The property (especially if it come in whole, or partly, from the funds of other parties than the congregation) may be held by titles vesting it in trustees for the general governing body or ecclesiastical judicatory of the sect, so as to separate the patrimonial right and interest entirely from the individuals composing the congregation, in such a way as to make their adherence or separation in truth a matter of no importance, since the property belongs to managers or trustees for the aggregate representative of the sect. Or the property—as has generally been the case when purchased and built by funds contributed by the individuals composing the congregation—may be held by the titles as a trust for the congregation and its members. Such a trust may, it is true, restrain and limit the property to the portion of the congregation holding certain opinions, or as in subjection, it may be, to a certain governing body. That is an adjection perfectly consistent with a trust for the congregation and its members.

"Now, property standing in these two several positions is held on totally different conditions, and the principles to be applied, in the event of difference among its members, are perfectly distinct.

"In the former case, the *use* only is given; and it is specially designed for those whom the governing body, or ecclesiastical judicatory, may acknowledge as belonging to them. The members of the congregation will have no patrimonial interest in the property—at least if they separate from the ecclesiastical judicatory: their opinions are of no importance: to them no heritable right or *jus crediti* belongs. If they separate, even

[1] 12 Dunlop, 523.

the whole congregation, from the governing body, that in no degree can affect the property, which belongs to the trustees for the aggregate body, and so no question can arise except this, Does the governing body still exist in name? They may have wholly changed their opinions; they may have become, from Presbyterians holding the Westminster Confession of Faith, decided Unitarians; yet to them, and not to the congregation, the property belongs. The object of the property being so held is to make the property a bond, and strong bond, of union—to try to exclude difference of opinion by the immediate and necessary consequence of the forfeiture of the use of the place of worship—and so strengthen the hold and power and influence of the governing body, by the property being vested in them, and by the congregation having no interest in it. Whether this is a wise method of attempting to secure permanent concord in a dissenting body, or will not ultimately lead naturally to decided dissatisfaction, by introducing an element at variance with the first principle of dissent—that of voluntary association—is another matter. But the rule applicable to property so held is of course unmistakable. Differences of opinion which lead to separation, leave the property where it was; and the members of the congregation, or the whole congregation, must find of necessity another place of worship, if they leave the governing body; for the property is held for the latter, distinct and apart from the congregation.

"But in regard to property held on the other footing, the leading consideration to keep in view in such questions as the present is, that the members of the congregation are the *proprietors;*—under whatever conditions—whatever may be the restraints as to the opinions those must hold who form the proper congregation—still the members of the congregation alone are the proprietors. In them the right—a direct personal right and interest in heritable property—exists, from the very nature of the trust. The governing body, or ecclesiastical judicatory, has no interest in or power over the property. The relation of the congregation to such governing body, or the maintenance of the same opinions with that body, or the maintenance of the opinions originally professed by that body, may be in different cases more or less important in ascertaining for what portion of the congregation, in the event of division among the congregation, the property is held. But such a question is one entirely between the individual members of the congregation. The party who says the other has lost the right, especially if the majority have possession, must make out and establish that such majority have lost the character of those for whom the property is held, and have *individually*, by their acts, opinions, and tenets, departed from the principle of the *associated* congregation (I use that term as a generic description of such society), and so forfeited their right of property. What is to prove such departure is a different point. It may be affected or decided by the terms of the contract of such society; it may be affected, or even decided, by the relation subsisting or renounced with some ecclesiastical judicatory, when such has been proved to form a condition of the trust; or it

may be a question depending wholly on adherence to the principles on which the congregation associated and formed itself—the maintenance of which being in truth always the rule, even when the determination of that point is affected by the continued relation with, or renunciation of, ecclesiastical superiors. In the latter case, the point is still (when the property is held for the congregation) to ascertain by whom (in the event of difference) the original principles of the association are maintained. Adherence to a certain judicatory of the sect *may*, by the terms of the title, decide that point. But, in all cases of trusts for the congregation, the element of association is the continued maintenance of the opinion on which the congregation (the proprietors) associated; and that is the point to be decided, however it may be ascertained. This consideration, that the members of the congregation are the proprietors, was lost sight of by this Court in the judgment in Craigdallie—and hence the error in the judgment.

"Now, while the rules as to property held in these two different situations are so widely different, it has happened unfortunately, in Scotland, that these two classes of cases have been sadly confounded; and our Courts at one time acted on the extreme of one principle, and then very suddenly went, from seeing their former error, to the extreme of the other principle—and that, as it turned out, from an entire misapprehension of the scope of certain English cases which they thought applied.

"It is always the interest of one party or the other, in such divisions among a congregation, for whom, *qua* such, property is held, to invoke the principles applicable to the case of property held for the governing body; and even though the question arises among the members of the congregation, and though the judicatory could not, either in form or right, appear in the discussion, the portion of the congregation adhering to the governing body or judicatory wish to make their relation to that body the important and decisive element. And in that view there is much plausibility. It solves difficulties. Change of opinion in the governing body—the Synod and Presbytery, for instance—is not so presumable as departure and schism by a portion of a congregation. The governing body ought the best to know the opinions of the sect, it may be plausibly contended. Adherence to the Synod and Presbytery seems to give, even to a minority, a character and stamp which the majority separating have not. The Court, more accustomed to look to the Establishment, and desirous to give to dissenting bodies the full benefits of toleration, may invest this Synod with a character and status, adherence to which seems to be a condition of the associated congregation, rather than the maintenance of religious opinions, which it may be difficult to ascertain, or invidious to sift and compare. Thus it is that a great source of error in the decision of such cases may be introduced; and hence the source of the error in principle, carried to the extreme in the case of Craigdallie; for it was decided in this Court on the very ground applicable to a trust, not for the congregation, but for the governing body or Synod; but which was corrected by the House of Lords in a judgment,

the bearing and effect of which, I had hoped, could not have been called in question."

His lordship then refers to the *nature of the title* in this case; the sasine being in favour of "trustees for behoof of the members of the foresaid Associated Congregation of Kirkintilloch."

"That the above, then, is a trust for the members of the congregation, and in no respect whatever, by implication, even for the governing body or Synod, is undeniable. It bears to be expressly for the members of the congregation; and the results must depend on questions raised between the members themselves, in regard to their own individual rights and interests, dependent on their own individual acts or tenets. No doubt it may be that the trust, though for the congregation, may more or less fix down of what character the proper congregation must be, and what tenets or principles they must hold, or by what rule these tenets are to be ascertained, or the character of the proper congregation for whom the trust is held is to be fixed. But still, whatever effect any term descriptive of the congregation may have in deciding what shall constitute the requisites and qualities of the association called the congregation, it is clearly a trust for the members of the congregation. Nor has that been disputed.

"Further, there is no doubt, and never has been in any of the discussions in this country, that a trust for the members of a congregation is in the first instance a trust for the majority, until it is made out that such majority no longer can hold the property, because no longer properly the congregation designed. But that loss of character must be proved against the majority of the congregation. Originally, the error in the older Scotch decisions was to take the majority as the only rule for deciding with whom was the property. But, under even the corrected rule of law, the fact is of the greatest importance, that the party said to have lost the property are a majority of the members of the congregation for whose behoof the trust is held, and against whom, therefore, as the proper proprietors (until forfeiture shall be proved), it must be established that they can no longer claim the character which was the purpose of the trust."

He next proceeds to examine the summons thus brought virtually against the majority of the congregation, and after going over its parts, says:—

"The pursuers proceed on the same condition of the case as that taken up by the defenders. They admit that they must establish that the defenders, who are the majority of the members of the congregation, have by their acts and conduct violated the conditions on which the property belonging to the congregation was held in trust, and so have ceased to have any right thereto. These are the very words of the subsumption in the summons. This proposition the pursuers must establish. They may have aid from the titles in proving this, or in shifting the *onus*. But this they undertake to establish, and this they are bound to make out. If the matter is left in doubt, the case cannot be decided against the majority of the congregation; and the ground on which the proposition is

to be made out is, that separation from the United Secession Church is a violation of the conditions of the trust."

The next portion of the judgment is the *history of the principle of law* on which the case is to be decided.

"The first matter is to settle the rule of law applicable to such a case. When a clear conception is obtained of the rule of law, it does not appear to me that this case is attended with any doubt whatever. I am the more desirous to explain what I hold to be the settled rule of law on the above issue between the minority and majority of a congregation, for the members of which property is held in trust, because I think the matter has been very much thrown loose again, and great uncertainty created by an elaborate opinion in Galbraith *v.* Smith, March 10, 1837, in which, I apprehend, the principle of judgment adopted by the House of Lords in Craigdallie *v.* Aikman was wholly misunderstood. In the practical result, the other judges in that case concurred with Lord Meadowbank; and hence it is often thought that his view of the law was adopted. It was not so, for the Court, I think, differed from him in principle, though they concurred in one judgment, in the circumstances of that case. I am aware of no point of more importance to be constantly stated, with reference to the interests and the peace of large religious bodies.

"In the outset it is to be observed, that we have not here any case as to the exercise of discipline over a member or minister of a voluntary religious body by the ecclesiastical superiors to whom he chose to subject himself. That is a case quite apart from the present.

"On the occurrence of differences among the congregations of Seceders, and other dissenting bodies in Scotland, during the last half of the last century, a variety of cases were tried, all of which I have been able from one source or other to examine and consider—although few are reported.

"1. Bryson *v.* Wilson and Bain, commonly called Gib's case—decided by Lord Elchies, 1751. 2. Morrison *v.* Struthers, called Allan's case—from Lanark. 3. Wilson *v.* Jobson, 1771—a Dundee case, and embodying the principle of judgment very distinctly in the express terms of the interlocutor. 4. Allan *v.* M'Crae, 1791—a Berean case, also stating the ground of judgment. 5. Auchincloss case, 1792—as to possession under the action of damages, and which I shall notice separately. 6. Smith *v.* Kidd, 1797. 7. Dun *v.* Brunton, 1800—which also stated the ground of judgment. 8. Bulloch, 1800—which went on same ground.

"In all these cases, the Court went distinctly, and in some of them in express terms, upon the principle, that the property belonged necessarily to the majority of the congregation, and laid aside, as a point quite irrelevant, the inquiry, whether that majority had departed from the religious principles on which the association was formed, and this though the title was in some cases in terms stronger than the present—being in two or three to a congregation designed 'as subject to, and under the inspection of, the Associate Synod,' or 'under the inspection of the Associate

Synod.' So strongly was this principle fixed that, in the case of Auchincloss, while Lord Braxfield, in the action of damages on account of deposition, found that 'it was not competent to review the proceedings of Associate congregations commonly called Burghers, when sentences are pronounced by them in their ecclesiastical character,' and on that ground assoilzied, yet, in the removing, which was to obtain the property, he directed inquiry to be made as to which party had the majority, and at last pronounced in the removing this interlocutor: 'Having resumed consideration of the mutual condescendences and answers, and heard parties' procurators thereon—as it appears to the Lord Ordinary that the majority of the original contributors are at present with the pursuers—in respect thereof, and whole circumstances of this case, particularly that the defender Mr Auchincloss was ordained and settled minister at Liff by the Associated Presbytery of Perth, under authority of the general Associated Synod of Burgher Seceders at Stirling, and has been deposed and excommunicated by the same authority—therefore advocates the cause, and decerns in the removing as libelled, to take place at Martinmas next, superseding extract.' I find this interlocutor copied by Sir Islay Campbell on his papers in Craigdallie's case, and I have seen it nowhere else.

"The view taken by the Court in all these cases, as appears from the concurring statements and quotations by both parties in Craigdallie, was this—partly that a trust for a permanent religious association, or for the maintenance of particular opinions, was not a trust which law could support, or at least, if not unlawful, the only party to decide on the matter was the congregation itself—that is, the majority; and that the course taken by the majority, although they separated from such judicatories, was one of which the minority could not complain. This view rested on the principle, that the property was in the members of the congregation; but in the extent to which it was carried there was a great error. It partly involved a denial of the lawfulness of such associations, and of trusts for their behoof, and partly also involved a power in the majority, against the first principles in the law of trusts, to divert from the purpose for which it could be shown to be clearly held, property bought or built with common funds for that original purpose. The principle of these decisions was fatal to the security of such property, and sacrificed the interests of those maintaining the common purpose for which the property was held in trust, to the will of a majority. It was a principle also as irreconcilable with the law of toleration as with the law of trusts. The feeling against it began to show itself in one or two cases soon after the dates of those last referred to; and as the differences then prevailing among the Seceders, leading to the New Light and the Old Light, were giving rise to more questions, one case at last (as President Blair states in a case of Bulloch, in 1809)—the case of Davidson or Craigdallie *v.* Aikman—was selected, out of many then occurring, to try the general point again more deliberately. The result was, as is often the case, that the sound principle was not attained at the first change of opinion, and a

principle in the opposite extreme adopted, although by the narrowest majority—indeed, with President Campbell's vote not counted, and with a Court equally divided—which was as erroneous, and as adverse to the law of trusts, and as much opposed to the principle of voluntary association in a religious body, as that which the Court had so long acted upon, but at length abandoned.

"As the rule of numbers was abandoned, the party adhering to the Synod put forward then the simple and inviting principle, 'Who is to decide which is the true congregation but the Synod of the body? Is a court of law to investigate our doctrines? Is a court of law to say the minority are the true Seceders—the real maintainers of the Secession principles—when the fathers of that Church in Synod declare the reverse? Our opponents have seceded from the Synod: they say so. Their act is avowed separation. Your task will be endless if you investigate doctrines: separation ought to be the test. Besides, our Church government is really that of the Establishment. Subordination to our courts is a fundamental element of association, as much as in the Establishment; and here, then, you have a safe, a clear, a satisfactory ground for decision.'

"No doubt this was a very inviting view to put before the Court, and a very important view for the Synod to make its adherents struggle for. But, in cases in which the property was held for the members of the congregation, it was manifestly against the leading principle in the law of trusts, and founded on the assumption, that connection with a dissenting Synod was as decisive a criterion by which to determine property and civil rights, as adherence to the Established Church. The mistake consisted in taking as decisive what was only one element, and it might be an element of no importance, in the inquiry, what was the original trust, and which party maintained the principles on account of which the property was bought, seeing that the members of the congregation were proprietors, not possessors and users merely. I have extracted, and had intended to read, a number of passages from the pleadings—as there is no good and intelligent report of the case—placing in a very clear light the above respective and different principles for which the parties contended. But it becomes unnecessary to read them; for on Sir Islay Campbell's session papers I have found the two principles set in strong contrast: in his note of his own opinion, the rule to which he still adhered—the old rule of numbers—is forcibly stated; and in his note, though short, of the opinion of the late Lord President (whose own papers have been lost), given at the last advising, before the case went to the House of Lords, the other rule (which, it appears from Lord Eldon's speech, he had also strongly urged as counsel in this Court, and adhered to on the Bench) is very clearly propounded.

"It will be seen that each pushed the opposite opinions too far, and that, though Sir Islay Campbell seemed at one time to state very nearly the rule adopted by the House of Lords, still he would not make the matter turn on the doctrines of the original members, but solely on numbers.

"Sir Islay Campbell's first opinion is as follows: 'There seems to be little doubt that the property in question belongs to, and is held in trust for, a larger description of people than merely the persons who originally subscribed small sums for purchasing the ground, and raising the buildings upon it, as a great part of the expense was defrayed by after-contributions. The establishment, in short, was made for a seceding congregation of a certain description called the Associate Congregation of Burgher Seceders at Perth, and of course the members of that congregation who either originally contributed, or afterwards acceded, became proprietors of the feudal subject, and they, or a majority of them in case they differ in opinion, must regulate the management, and dispose of the property when any dispute arises.

"'As to the Associated Synod, the Court can take no notice of any such body of men as a superior judicature exercising the rights of control over the congregation, or having anything to do with the enjoyment or disposal of their civil properties. The Court upon one occasion ordered the very name assumed by them to be expunged from the record; and it is clear, from the terms of their own original establishment, that they pretended to nothing but a direction in spiritual matters. The words, key of government and discipline, &c., are merely figurative, and have no relation to temporal affairs. Their sentence of deposition of one minister, or appointment of another, cannot be regarded by this Court. Neither can we enter into the disputes and schisms among them about spiritual matters, or speculative doctrines of any kind.

"'The sole question is, Who are the majority of this body of individuals assuming the name of a congregation, and who are the trustees named by them in whose favour those who are at present trustees were called upon to denude of the property, in order that it may be at the disposal of the persons having right in law to that property, and who may of course appoint any person they please to occupy the premises, and to perform worship in their own way to the people of the congregation? This is a question of a very simple nature, and easily extricated, and it is upon this principle that all the former decisions have rested. Voluntary associations have not the privileges of law incorporations (Dict., vol. iii. p. 110; vol. iv. p. 283).

"'It was for some time thought that Seceding congregations, not being societies known in law, could not maintain actions for the purpose of asserting their just rights (case of Gib, 1752). But this altered in case from Lanark in 1757; Jobson, 13th December 1771; Allan *v.* M'Crae, 8th March 1793; Smith *v.* Kidd, 26th May 1797; Bulloch *v.* Douglas, 27th May 1800; Dun *v.* Brunton, 13th May 1801. A mandamus in England means no more than what is meant here by an order of the sheriff, or an interdict in the Bill-Chamber, regulating the interim possession upon *prima facie* evidence, in order to preserve peace and good order among parties. But when parties come regularly before a court in order to have their differences on points of civil right determined, they must found their pleas on common established grounds of law, and the

judge cannot listen to the peculiar doctrines, either of ecclesiastical discipline, or of moral or political system, adopted by voluntary associations of men uniting together for any purpose whatever.'

"The first judgment was then pronounced; but it was altered, and another given, both of which I shall afterwards quote. Then there was a reclaiming petition against the last.

"Sir Islay Campbell's opinion at the last advising, when the Bench, as appears from the papers, was considerably changed, is as follows: '1. Misappropriation of collection at church doors—applicable to charity alone. Besides, how are the donors to be traced, and what each gave? If at all to be considered, it must be as belonging to congregations at large, and partly to make up deficiencies of stipend. 2. Subjection to another body of men called an Associate Presbytery or Synod. This control they cannot exercise or enforce without being a legal incorporated body, which they are not. What if whole of this congregation to a man differ in opinion from the Synod, are they to forfeit their property to a new or different body? This is indirectly the consequence of interlocutor. It is a *modus acquirendi et omittendi dominum* hitherto unknown. This proviso, therefore, in the interlocutor, ought to be thrown out.

"'Forty congregations of Burgher Seceders of Old Light have formed themselves into a Presbytery, and petitioners are attached to them. The change of opinion and principles is Presbytery and Synod, not in congregation, or at least majority.

"'The continuing together as a congregation, and, still more, the subjecting themselves to the control or inspection of ecclesiastical superiors of any description, is all a voluntary business. They may dissolve themselves when they please. They may change their principles, and they may put themselves under other superiors. In all such circumstances, we can only count numbers, otherwise we at once convert them into a permanent established body—*i. e.*, a legal corporation.

"'In case of Auchincloss, Synod and majority of congregation were at one, and Auchincloss maintained himself in possession by force. Why alter the terms of the original trust? The same body that exercises the right of patronage, exercises also the jurisdiction.'

"In the above opinion it will be observed, that Sir Islay Campbell in two places adverts to the opinions of the congregation remaining the same, and to the change being in the Synod; but still he does not take this as a principle or test for judgment. On the contrary, the rule of simply counting numbers excludes this point altogether.

"The opinion of the late Lord President, then Lord Justice-Clerk, who had been appointed since the former judgment, is thus noted down by Sir Islay Campbell: 'An individual may reserve property and right of patronage (Lady Glenorchy, Haldane, &c.) Persons may also put the management and right of patronage in another. This congregation did not mean to become Independents. They meant to continue Presbyterians. The essence of it is subordination. Even when Episcopacy was restored, the Presbyterian form continued. If minister deposed by his

own judicatories, must give effect to it, even *in civilibus*. Complete toleration not substantially different from Establishment. Have no access to know who are the real Burgher Seceders but the judicatories themselves. Craigdallie, &c., have seceded from the Burgher Secession. For adhering.'

"The principle adopted by the Court in the case of Craigdallie was, in substance, that stated by the late Lord President, to which the first Lord Meadowbank also adhered, as appears from Sir Islay's note, and which was very elaborately argued by the last Lord Meadowbank in support of the ultimate interlocutor, and from which view I think his mind was not afterwards relieved.

"The interlocutors will be stated in noticing the report in the House of Lords.

"That the congregation in Craigdallie's case was one in connection with the Associate Synod, was admitted by all parties, and was ultimately found as matter of fact by the House of Lords. The minutes of the congregation, the ordination of the minister, and many other facts, fully proved that connection. That finding then made the case, I think, exactly the same as the present.

"Before the case of Craigdallie was decided in the House of Lords, two cases occurred in the interval in this Court after its decision—1. In the First Division, Bulloch, January 1809, in which the majority of that Division refused to hold the general point as fully settled by the case of Craigdallie. 2. The other, M'Intyre *v.* M'Crie, 24th February 1809, in the Second Division, in which, Lord Robertson dissenting, the Court acted on the principle adopted in Craigdallie as summarily settling all such questions ; and the Court refused to entertain the question as to doctrine. The determination to be given in the House of Lords thus became of greater importance."

After quoting the first judgment of the Court in Scotland, giving the Perth chapel to the majority, and the second giving it to those who adhered to the judicatories, the Lord Justice-Clerk read *Lord Eldon's judgment* (which, like the others, we have quoted in the text), and adds :—

"I own I had not thought that it was possible to throw doubt on the import of this judgment. I think it directly negatives the position laid down by this Court, that there is any other question than inquiry into the principles held by the congregation as it was formed, and the continued maintenance of the same principles—being the origin and object of the trust ; and negatives the doctrine, that the judicatory and adherence to it is to decide, provided the doctrines of the congregation can be ascertained.

"Here, then, is the error in the view of this case, which was stated so anxiously by Lord Meadowbank in Galbraith *v.* Smith, 10th March 1837. This takes adherence to the Synod as conclusive, and excludes inquiry into the original opinions or doctrines, if opposed to the declaration made by the Synod as to what these doctrines are, and is precisely the error in the Craigdallie case again brought out, and in more absolute terms."

The actual *result* of the Craigdallie case is then explained as having proceeded on the ground, "that the party leaving the Church and Synod were held to have gone out of their congregation and trust without cause." But adherence to the Church was not *the principle.* What it was is now restated :—

"The truth is, that if the original principles of the congregation are established, adherence to them, and not to the Synod, is the rule fixed by the case of Craigdallie ; so that separation from the Synod is really in that case immaterial. If the party separating have departed from the principles of the original trust, then, in respect of that departure, they lose their property, though in connection with the Synod. If they have not—if that is not made out—then separation from the Synod is in itself of no moment, for the Synod may have departed from its principles. The standards of the Synod may be very important in evidence of the principles of the congregation itself, and the declared adherence of the Synod to these standards, without addition or construction, may also be important in the matter of evidence ; and if the parties, though a majority, can show no departure in those who adhere, then the fact of separation may cast the balance in such a case as Craigdallie, or it may not.

"But the mere fact of separation from the Synod or governing body in any congregation in which the trust is for the members of the congregation, and where the principles on which the association was formed can be ascertained and cleared up, so as to show what was the object of the trust, is in itself of no moment, unless adherence to that body is made an essential condition in the contract, without reference to principles or opinions. The question is, whether the congregation itself, or what portion, adhere to the principles, the maintenance of which formed the purpose of the original trust.

"Here we must keep steadily to our proper duty as a court. We have no concern with the duty of union, the sin of schism, or the expediency and importance and policy of subordination, in all Churches according to their several schemes of government. With such matters we have no concern—first, because, as the case of Craigdallie proves, the connection with and subordination to any ecclesiastical superiors must be matter of contract proved in evidence, in order to be a subject for a court of law; and, secondly, because the duty of union, or the sin of schism, is an element of consideration so perfectly arbitrary, varying so much according to each individual's notion as to a Church, or as to particular Churches, that no two men could ever concur in administering justice on such a ground.

"Laying aside, then, all prepossessions on this subject, we are to look to the matter solely as a court of law.

"Then the next point is clearly to understand what the pursuers mean when they maintain that separation from the judicatories of the Secession Church involves forfeiture of the property. Though several times pressed to state what was their legal proposition, they avoided carefully giving us any explanation on the point; and, so far as I could discover, the two counsel for the pursuers were not exactly agreed on the subject.

"The two pleas on record are as follow—it is most important to consider them: '1. The church or meeting-house, and other property now in question, having been purchased and acquired, and held in trust for the behoof of a congregation of Seceders, dissenting from the National Church, but remaining in communion with the United Secession Synod, now called the Synod of the United Presbyterian Church, and the defenders, who formerly made a part of such congregation, having now either become an independent congregation, or having joined with some other religious body, are no longer entitled to claim the possession or use of the said church and meeting-house, or other property, and decree ought to be pronounced in terms of the conclusions of the pursuers' libel. 2. The mere averment that the defenders hold certain tenets similar to those which were held by the congregation for whose behoof the property in question was acquired and held in trust, can be of no avail, even if it were true, seeing that the property is not held for the behoof of a congregation holding certain tenets, but for the behoof of a congregation remaining in communion with a certain ecclesiastical body, and subject to the jurisdiction of the Synod and other courts of that body.'

"The first is vague enough; the second, as worded, is directly against the judgment in the case of Craigdallie, unless it is made out as matter of fact that such was the trust by the original contract of parties.

"But then arises at once the great importance of the question put by Lord Eldon. *Quid juris*, if the whole congregation had refused longer to be subject to the jurisdiction of the Synod: Is it maintained that the congregation would forfeit their property, and in favour of whom? Has the Synod (apart from the technical objection of not being an incorporated body) any right to enforce such an alleged condition by claiming the property? There is no greater error than avoiding the consideration of fundamental principles, as was done in this Court in Craigdallie's case, by stating that extreme cases are to be judged of when they arise.

"But this question by Lord Eldon, and urged in this Court, is not putting extreme cases, but only considering the consequences, when legitimately followed out, of such vague propositions as those stated on this record; and in that way alone can the principle really at the foundation of the plea be correctly ascertained and understood. Now, then, Is this a trust only in name for the congregation, but in effect and reality for their ecclesiastical superiors? Is it a trust for the Burgher Associate Synod, and subsequently for the Secession Church? Have any parties *personæ standi* under this title to vindicate the property as not that of the members, in the event of their no longer remaining in connection with and subject to the United Secession Church? That proposition the pursuers would not directly maintain. Yet that ought to be the result if the plea is sound; for what is the meaning of a trust of property, the condition of which is adherence and subjection to the ecclesiastical superiors of the sect, and in regard to which separation from that body is a violation of the trust, and infers forfeiture of the property? It means, that those who originally acquired the property, and formed the trust, did not intend

that the property should ever be diverted from the purpose for which it was held; and hence, if a fundamental condition was subjection to the governing body, then the whole congregation ought to forfeit the property in the event of separation. If not, then clearly such subjection was not a fundamental purpose of those who formed the trust. Now, the pursuers would not maintain that, if all the congregation left the Secession, and an entirely new set of persons came forward, saying, We are now Seceders in Kirkintilloch in connection with the Secession Church, and though only just formed, and never part of the former congregation, the result would be that the members of the congregation which had always been there would forfeit their property. That the pursuers could not, and did not contend. Yet, unquestionably, if it was a proper trust for union with the Secession Church, in the abstract, that would be the result, and one quite easily extricated in point of law.

"But, in truth, the whole of this plea is an attempt to confound two things, distinct in nature and origin and results—a trust for the members of a congregation, and a trust for the governing body of such sect, or for the use of any congregation of that sect at the place."

After going into a still more careful and minute inquiry into the titles, the former history of the congregation, and the recent events which had disturbed it, his lordship comes to the second question, to which we have referred in the text, as to *the right of a congregation to refuse to enter into a union with another body*, without assigning reasons for so refusing. We give the following paragraphs:—

"Whether the body generally could compel any objecting congregation to join in this union under the penalty of forfeiting their property, or whether, if a majority of such congregation refused to concur in this union, they must lose their property, held by a trust, long previously constituted, and surrender it to a minority, although against such majority not the slightest departure from principles is averred, are points on which, although very urgently put to the counsel of the pursuers, we got only at last, not a very distinct answer, and not one word of argument. Mr Bell most dexterously assumed that the defenders admitted that they must justify refusal to go into the union, by showing the union to be unconstitutional or illegal, and contented himself with an elaborate argument to show that it was neither. The Dean of Faculty waived the point entirely, for he argued that the property was previously and legally forfeited before the union, and that the whole matter as to the union was thus entirely out of the case. But when we are brought to the point, if the separation is truly on occasion of, and in respect of, the proposed union on a basis objected to, is the property of the majority to be forfeited without any change of principle on their part, simply because they refuse to go along with the United Secession Church into the union? We have not heard any distinct plea stated, much less argument, in support of such a novel proposition, in regard to the position of congregations of dissenters.

"I am very clearly of opinion that, whether in other respects united to

ecclesiastical superiors, and whatever might be the effect of separation if not arising out of such proposed union, any congregation in the circumstances of this one is entitled to refuse to submit themselves to any such changed government, or to concur in any such union. This is, in my opinion, the leading and most fundamental principle of all such associations as that of a congregation placing itself in connection with, and under the superintendence of, ecclesiastical superiors, such as a synod or presbytery of a body already formed—known as composed of certain classes, called by a certain name, and among whom certain standards, and perhaps still more certain great fathers and lights of the truth, and only these, are revered, appealed to, and looked upon, as authoritative and conclusive.

"The desire to keep separate—to keep up one sect apart from all others—as in itself a good way strictly to maintain certain peculiar opinions, especially if of a severe and stern character—to stand by a name as recalling for ever the struggle in which the sect had its origin, and fixing down, as it were, in stern, exclusive, and deeply-graven characters, the aspect and tone of language even, as well as of devotional sentiment, which that name forces on every one—the desire to prevent the risk of defection in faith or in zeal for that rigorous exposition of doctrine, which the very name of such a sect as the Secession may be thought to guard against, by a sort of standing reproach to all who do not utter the very language of Erskine, Wilson, Fisher, and Moncreiff, and the resolution to make no union with anybody, but steadily to require all to join distinctly to the name of the Secession, in order to proclaim that, as it was formed in 1733, so it remains, and, on that footing, that all must enter it as members thereof, without separate pretensions, notions, or origin;—such desire may be unreasonable—it may be to many unintelligible—it may appear idle caprice: but it is the first privilege of every congregation of such a body—it is their right—it is a desire springing from attachment to the causes which led to the formation of the Church, and the constant commemoration of which, as the true (and, they may think, the most important) distinctions from all other Churches, they may deem the best safeguard for the maintenance of the principles involved in these causes of secession. It seems to me utterly repugnant to every notion of such a sect to suppose that their congregations can be compelled to unite with any other Church or sect whatever.

"I avoid, of course, expressing any opinion of my own—I shall only say, that if I had belonged to the Secession Church, and cherished the opinions and principles on which it was formed, I believe that I would not have united with the Relief, so much do I understand the objection, even without examination of special reasons assigned—at least I most perfectly understand, as conscientiously operating on others, this general objection. But be the general objection in the opinion of others valid or fanciful, it is a change to which no congregation is bound to submit.

"For separation, then, when such union is to be entered into, no reasons, in my opinion, need be assigned. The right to refuse is absolute; and the notion that the majority is to forfeit their property, is, in my

judgment, perfectly extravagant, and without the slightest support from any evidence that such is a condition of the trust. Indeed, I did not hear it maintained, that obligation to unite with other sects was an original condition of this trust, held for a congregation of Seceders. It would be a very strange condition to incorporate with any trust for a congregation of old Seceders."

The concluding part of the speech states another ground for the judgment:—

"Even on the supposition that the majority must, in a question with the minority of the congregation, assign reasons in order to justify their refusal to go into this union, sufficient reasons have in this case been stated on which a majority of a congregation are well entitled to refuse to be parties to any such new cast of government or novelty in their Church.

"Here, I am afraid that it may appear as if I were expressing an opinion of my own as to the propriety or fitness of the union formed. I have no such intention. The question is not one on which a court of law can decide. The fact that such large numbers of professing Christians, guided by divines of great learning, talent, and zeal, were able to lay aside supposed differences, and unite in one Church, is itself sufficient vindication of the measure. But then, although we are not to decide whether the reasons against the union are well founded, yet, far short of that, in such a question there may be fair grounds of objection, strongly founded in the feelings of the sect, upon its past history, on the previous differences between the two bodies, and on the mode in which it is proposed to get over these differences, and to exercise discipline in the proposed united body, which, operating on the minds and consciences of majorities in congregations, may well entitle them, members of a particular voluntary association, to say, 'We must remain as we are: we have no confidence in this proposed union: to us it seems irreconcilable with the tenets, spirit, and character of our sect, as we understand them, and as the divines we look up to expressed and recorded them. With their language you cannot reconcile this union; and we prefer their language to your more soft and modified statements as to points of difference. We call things by the names they used: they may be wrong, but into that we do not inquire. We associated for adherence to these stern old champions of the Secession, you may think, even in their errors and uncharitable view of others; but that was our principle of association, and it forbids us to call the Relief Church our united brethren.'

"In estimating the reasons assigned, it would have aided the Court much if the pursuers had distinctly announced what extent of power they held the other congregations and the Synod, or what the minority of a congregation, had over the majority of a congregation who declined to enter into a union with another Church, which to the Synod appeared reasonable and expedient. I should have wished to see some precedent on such a peculiar and most delicate question as to the rights and interests

of dissenting bodies. Binding such authority was not contended to be irrespective of the character and objects and nature of the proposed union; but what degree or extent of authority exists in such a matter, we are not told.

"I lay aside, as altogether unworthy of observation, the plea, that this was not a union with another sect, but an extension of the Secession, by taking in a number of Relief congregations who chose to join. In such a case, no union, or basis of union, would have arisen for consideration. Such congregations would simply have been admitted into the Secession Church as members of the same, according to its own opinions, sinking all opinions of their own. The whole negotiation, and the articles of union, prove that the two bodies were most jealous on the point of not sinking one into the other by simple admission into it; and that, as the Secession would not enter into the Relief, so neither would the Relief enter into the Secession. It was to be in the most marked manner a union of two separate Churches, even stipulating for continuance of differences of opinion after union—a thing unexampled.

"That the two sects were, in origin, actual presbyterial government, and professed tenets on certain points, quite separate Churches, is matter of fact sufficiently proved. That the difference of tenets also was such that to many minds they might seem irreconcilably opposed, is also, I think, fully made out by the fact that for long they did oppose each other in very strong terms; although, to many other minds, such difference may have appeared to be immaterial, or to have been removed, as the union actually proves to be the opinion of many. But to the opinions as expressed by their forefathers and leaders in the Secession Church, although it may seem to others that it is only to exaggerated expression of opinions that the parties cling, any congregation, or majority of the same, was well entitled to cling, and to maintain that such recorded opinions of those in whom alone they trusted, and to whom they acceded as the expounders and defenders of their faith, proved the union to be against their principles. They are well entitled to say, 'We wish no modern or modified exposition now of the Secession: we rely wholly on the views of the founders and fathers of the Secession; they made the Church; they fought the battle: we think with them; we view others as they did, through their uncompromising view of matters, and we feel ourselves resolutely opposed to union against their views. The very statement, that there has been no real difference between the Secession and the Relief, or that the grounds of difference have been removed, greatly alarms us; we think that statement forebodes an entire change in the character of our Church, and is in itself a change of views. How would the divines, whose writings we adhere to and revere, have been startled to be told, You were writing without sense or meaning; your denunciations of error were senseless or groundless?' Now that the views expressed by the earlier Seceders respecting this younger offshoot from the Establishment are such as to imply, in their opinion, utter repugnance—substantial difference from, and much hostility of aspect to, the Secession—

is beyond doubt ; and to such views of these matters, which go to the original character and spirit of the Secession, the defenders are surely entitled to adhere. 'We wish to avoid now,' they say, 'to reproduce in our own language any such condemnation of the views and of the origin of the Relief Church as our forefathers have recorded; but if you insist on this union, we tell you we think of that Church as they thought—we adopt their language. If they have changed—if they now are true Seceders—their remedy is simple, their course plain : let them, as converted and penitent brethren, apply by individual congregations to be admitted into the Secession. But such is not their object or position. They make no acknowledgment of error ; they make no acknowledgment of the orginal principles of the Secession. Each is to be silent as to the origin of the other, or of itself.' "

This view of the matter is still more enlarged upon ; and in conclusion, while intimating that he was ready to enter on the question, whether the Synod had, as alleged by Dr Marshall, departed from its doctrines and standards—a matter quite appropriate for the Court to examine into—he thought it unnecessary, preferring to rest the judgment on the ground recapitulated as follows :—

"The closing and decisive consideration is that which from the outset of the case must be kept steadily in view—which, in my own view of the law and of the facts, is of itself conclusive. This congregation—I call it the congregation, for the majority are of course in the first instance to be so regarded—this congregation have not changed one opinion or tenet of their forefathers of the Secession. They adhere to them all—they adhere to them as they have ever been taught and expounded in the supreme Church. No departure from such tenets is alleged against them. Their orthodoxy is not impeached on any one point. They remain as they were. They desire so to remain. The only act averred against them is separation at this conjuncture of union—*i. e.*, refusal to go along with the union. But compulsory adherence to such a measure is no part of the contract of the trust for this property ; and hence, when their principles, tenets, and practice remain unaltered, there is no legal ground on which their property can be forfeited."

Lord Moncreiff gave his opinion next, which agreed in all points with that of the Lord Justice-Clerk. We may give the very full and strong argument upon which he holds that no two *Churches uniting* can bring their congregations along with them (in the ordinary state of dissenting title) unless these choose to come :—

"The essential point is, that however the members of these two Churches might agree in some points, or differ in others, they were two distinct and separate bodies of extensive connection, standing apart from one another—each having his own system of superior and subordinate jurisdictions, and each maintaining its own status against the other, as well as against the Established Church. This is the broad fact. They

both stood on contract, but on separate contracts, which bound the members severally and respectively to one another. When, therefore, a union of two such bodies was proposed, whatever else it was, it was decidedly an essential change in the constitution of either Church, and an essential change in the condition of any one congregation. When we look, then, to a title of property standing in trust for the members of a congregation of the United Secession Church, in connection for the time with the existing Synod of that Church, it is impossible to dispute that the measure of a union generally with another Church so entirely distinct as that of the Relief, necessarily imported an essential change on the condition of that congregation, and a direct departure by those who promoted it from the Church state of the congregation as it was.

"This entire separation, as matter of fact, of the Secession Church from the Relief, which had subsisted from the very foundation of the Relief, was surely sufficient to presume that there was some essential difference between them. It was not even like the case of the Burghers and Antiburghers, who were both branches of the same original secession. The Relief was perfectly different, the founders of it having left the Established Church (not admitting themselves to be seceders from it) at a much later period, and had not hitherto, during two-thirds of a century, entered into any connection with the Secession Church. Now, I ask this question, There being such a marked separation between the United Secession Church and the extensive body of the Relief, were the members of the Kirkintilloch congregation, when a union between these two bodies was proposed, bound even to inquire what the religious tenets or ecclesiastical opinions of the Relief Church were, so as to know how far they agreed with their own, or how far they differed from them? I apprehend that they were not; and that it was enough for enabling them to determine whether to consent, or to refuse to consent, to the union, that the Relief was an entirely different and separate Church of dissenters, with whom the Secession Church had hitherto had no connection. That there had been a difference between them and the Secession, and that there was still a difference which had hitherto been sufficient to keep them distinct from one another, under different constitutions, was, in my opinion, sufficient to regulate the judgment of a particular congregation, and to entitle them to withhold their consent to any such union.

"But, to come a little closer to the point in this view of the case, the question is, Whether the Synod of the United Secession Church had power, by its contract relation to the congregation of Kirkintilloch, to compel that congregation to go along with them in a union with the Relief? Any power which the Synod had over this congregation, in regard to its civil rights, is of a very doubtful character. I have indicated already a very serious doubt, whether the title is such as to have prevented the congregation from breaking the connection with the Synod, without assigning any reason at all. For the title is in the congregation, and its connection with the Synod is only described by the term, 'presently in connection' with the United Secession Church. And it might even be doubted

whether, if the congregation had determined to form a different connection, there was anything to prevent such a measure in respect of the title of property. But that is not the case here. The fair case, even thus taking it, is that the congregation remain exactly as they were; but the Synod, concurring with a minority of the congregation, choose to break that connection; how is the title for the congregation then to stand? Is it not still a trust for the members of the congregation, commonly called Seceders? But, though I think it a very doubtful matter, whether, in any view, a different result could be obtained, this is still not the case in hand. For the case is, that the minority with the Synod, forming a union with a different Church, must maintain that the Synod had power to force the majority of the congregation into that union, or into a surrender of the property, to be constituted in a trust for the United Presbyterian Church, or a congregation to be in connection with them. But I see no principle on which this can possibly be held.

"It is rather insinuated than directly maintained, that the Synod had such power, because it had been acknowledged as the superior Church judicatory of the United Secession Church. I entirely dissent from that principle as a matter of law. We must remember that this is a case of contract simply. And I know of no principle on which a congregation, possessing property by a precise title, can be held, merely because they have for a time placed themselves, of their own free will, under the spiritual jurisdiction of a particular Church judicatory, to have thereby given power to that judicatory to dispose of their property at their discretion, or to require the congregation to go into a particular measure of new contract or arrangement, under pain of forfeiture of their civil estate. I deny it altogether. Though this congregation was by contract, for the time at least, subject to the jurisdiction of the Synod in spiritual matters, which is all that can be implied in the term *subordinate*, frequently repeated by the pursuers, it does not follow that they had rendered themselves subordinate to the Synod in their patrimonial rights. The terms of the title give no property in the church to the presbytery or the Synod. There may have been cases in which the terms of the trust might imply something like this. But it is not the case here—the trust being for the members of the congregation simply.

"But then the point returns. The measure proposed to the congregation unquestionably importing a change in their status as a congregation, were they legally bound to accede to it under pain of forfeiture of their property? Or, to put it as far as the pursuers can possibly state it, were they bound to accede to the measure under pain of forfeiture, unless they should undertake and be able to show that there were differences in religious principle of vital importance between the Relief Church and the Secession Church? This is truly the point to which the pursuers desire to drive the question. But I apprehend that it is most erroneous, and that the defenders are not bound to undertake any such *onus;* though the very best of the case of the pursuers depends on their making out the existence of such an obligation lying on the defenders. It is truly enough,

in my opinion, that it was a real and substantial change from their previous status that was proposed, and that the congregation had seen cause to refuse to consent to it.

"It will not do, in my humble judgment, to say that the Secession Synod were merely making an extension of the Secession Church, by adding certain congregations to it. The reality of the case must be faced. This is not the state of it. The summons itself bears, that what is now called the United Presbyterian Church consists of two distinct Churches—the United Secession Church and the Relief Church—each consisting of many presbyteries and separate Synods. The pursuers will not say that this is merely an extension of the Relief Church, and that they are become members of the Relief. If they did say it, it would not be true. On the one side, there is no proposal by any particular congregation of the Relief Church to become simply members of the United Secession Church; and on the other, there is no proposal by the members of particular congregations of the United Secession Church to become members of the Relief Church. This is not the thing proposed or done. What is proposed and done is, that the whole Relief Church and the whole Secession Church shall be united *per aversionem*, upon a treaty as to the terms of this union. The very necessity of a treaty between the two Synods demonstrates that it is not a case of extension by the one or the other, to be accomplished in its own will. And when we look at what the treaty was, and the conclusion in which it terminated, it is apparent that each party retained all its own principles, and all its own practice—the very making of which reservation implied the existence of some difference between them, which could only be adjusted by a specific treaty.

"Therefore I am of opinion, without inquiry as to the extent of the difference in principle between the United Secession Church and the Relief Church, that as the act of union, or the serious entertaining of a treaty for it, imported a change in the constitution of this congregation, there was no competency in the Synod of the Secession Church to force this congregation into such a union, or to infer a forfeiture of the property by their refusal to go into it."

Lord Cockburn alone took the other side, and rather indicated his opinion on the different parts of the case than unfolded it. But his views are suggestive:—

"It has been said that there is no charge of having abandoned their principles, made against the defenders. But this is a great and vital mistake. They are not charged with abandoning the principles which they held in 1765, before the Associate Synod arose. But if it be true that they subsequently became a permanent part of this Synod, and adopted allegiance to it as a supplementary principle, then they are not only charged with dereliction of principle, but this is the whole case against them.

"After continuing in admitted communion with the Synod from 1820 till 1847, the Relief and the Synod joined; and the defenders say that

this confluence alone entitles them to keep the property, although they admit that their communion has ceased. And on what ground do they say this? Not because they never, and with a permanent intention, joined the Synod, but solely because the Synod, by absorbing the Relief, *has ceased to be the religious community with which they united themselves.* Hence this has been the great, and indeed nearly the sole, subject of discussion in this cause.

"In judging of the validity of this plea, it is indispensable that we consider its different grounds separately, and not lose the merit or demerit of each point, by mixing the whole into one mass. There are none of the points on which the defenders rely upon which I have any doubt, except one.

"In the *first* place, they object that the existing Synod has no right to compel them, who were adherents of the Associate Synod, to join what the defenders call the new body. I concur in this; but I do not see its application. Because neither the new nor the old body is attempting to compel any one to join them. The Synod is not in this process at all. It is an action by certain individual members of the congregation to vindicate property, which they allege belongs to them; and they are trying to vindicate it, quite independently of the Synod, which is standing aside, though probably surveying the contest, and not uninterested in its result. Even the pursuers are not trying to compel the defenders to join the Relief. They are only saying that they cannot renounce their principles and yet keep this property.

"It is maintained, in the *second* place, that, independently of identity, or of repugnance of principles, they, the defenders, are liberated from their allegiance to the Synod, by the mere fact of its union with the Relief. I think this untenable. It seems odd in them to say, that all union was repugnant to their ecclesiastical tenets, who admit that they themselves, who began as Burghers about 1765, united with their rivals the Antiburghers, and thus formed the Associate Synod, in 1820. Union —that is, the extension of what it thinks right—seems a necessary principle with every rational religious society. I never heard of any religious society indeed, whether rational or not, which adopts separation as so essential a principle, that it shuts its gates against all converts. It is said that the junction with the Relief let a host of new congregations and presbyteries into the Synod. And why not, if there was no sacrifice of principle? The defenders say, that they *never subjected themselves to Relief presbyteries.* And they are not asked to do so now. They are only asked to continue under the jurisdiction of the presbyteries of the Associate Synod, though these may be multiplied, and though some of them may formerly have been of the Relief. Undoubtedly, the Synod could have sucked in the whole Relief—individuals, congregations, and presbyteries—one by one. Or if the Relief community had come forward, and honestly abjured whatever it was that had till then kept it apart from the Synod, I see no legal objection to the Synod's receiving the whole body, arranged into presbyteries, at once. The defenders may

not like the individuals, and may fear that both the brethren and the presbyteries of the Relief will still be actuated by the principles and habits of their former sect. But this personal suspicion is no legal objection. If the Synod could have received every converted member of the Relief individually, and thus taken the whole of them in at once, which I hold to be clear; and if it could then have arranged them into presbyteries corresponding with their Relief ones, which I hold to be clear also, I cannot conceive how it could not receive them, arranged into presbyteries at once.

"It has been urged, or rather insinuated, in the *third* place, that the mere *change of name* entitles the defenders to secede, and yet to retain the property. We have had no authority for this, nor can I discover any in the law of Scotland. I can conceive an alteration of name so marked, or so meant, that it indicates, or is naturally supposed to indicate, a change of principle or of object. But I am not aware that unestablished religious associations are bound to adhere to every letter of any title they may have ever assumed; just as a mercantile company may be, where a partner insists upon it. It may certainly be made a question whether a proposed change be too great; but I know no authority for the abstract and universal proposition, which is all that we have had as yet, that every change of name is, in all circumstances, fatal. The defenders have not said that there is anything in the nature of the alteration from the United Associate Synod to the United Presbyterian Synod, that entitles them to break off. It is to *any* change that they object; and this not to the extent of disliking the change, but of holding that it dissolves their connection. But I think that this will not do.

"But these are mere outposts. The defenders' main battle is, that the union with the Relief *implies an abandonment of principle*, or of system, by the Synod; and so gross a one, that it *destroys the identity of that body*, and entitles the defenders to be considered as the persons for whose use the chapel was acquired. There can be no doubt of the relevancy of this plea. It is sanctioned by the whole of the well-decided cases. Some of these depended on the fact; and, so far, they can have little or no valuable application to the specialties of other questions. But they all recognise and proceed upon the great rule, that property held for a particular religious community must, in the event of a schism, continue to be held by those who adhere to the principles and objects of the trust. This is the whole applicable matter that I can extract out of any of the cases, now of weight—that of Craigdallie particularly included—which establishes the exact principle for which the pursuers contend. But what I doubt is the fact.

"In order to ascertain whether the junction involves a change of ecclesiastical nature, two things are necessary—1st, that we should know—and know exactly—what the peculiar principles of the Synod at the period of the union, or at least in 1820, were; and, 2d, what deviation from these principles is implied in the amalgamation with the Relief. And in proving either of these facts, we must be guided chiefly, if not

entirely, by what are referred to in the proceedings of the two sects, as 'the authorised documents of the respective bodies.' These are their standards, or testimonies, or declarations, or acts, or other authentic evidence, which authoritatively records or discloses the principles of the two communities.

"But hitherto we have had a total absence of anything approaching to precision on these matters. There is no statement in the record, or anywhere, of the exact peculiarities that constitute the principles either of the Synod or of the Relief. Of course there is, and can be, no precise statement of the changes implied in the union of these two bodies. Almost the only repugnance between them that the record specifies, is in their different views about the *atonement;* but this seems to have been forgotten in all the subsequent discussions. Then it turns upon differences about *patronage*—next about theological *doctrine*—then about laxity of *discipline,* and so on. But the exact number of these alleged abhorrences has never been given; their exact nature has never been explained; and as to proof of their existence, we have not had a legal particle of it. We had the opinions of each community as represented by its *opponents,* or by its injudicious and unauthorised friends; or we have been asked to gather it, as a matter of general history, from any of the sources, direct or indirect, from which general history flows. *But I defy both parties to point out one single atom of admissible and authoritative evidence hitherto produced upon this subject.*

"If there be nothing better than this to be obtained, we must proceed on what we can get; and the matter will probably depend on where the burden of proving lies. But it is very improbable that the principles of two bodies, so large and so old, cannot have their essences proved by some simpler and weightier evidence. The discussion at the Bar was conducted with great ability, and with much desultory learning. But the only result upon me was, that at the end of it I felt myself seated in a thick fog."

He refers, in conclusion, to the argument that the mere fact of union implies there was a previous difference of principle which made a union necessary, and holds the converse to be presumably the case:—

"The only plausible passage for the defenders is that part of the Synod's minute of the 13th of May 1847, in which it is said that each congregation may keep its old name if it pleases, and that the union shall not be considered as 'changing their ecclesiastical connection, or affecting any of their civil rights.' Now, 1st, This forms no part of the 'Basis of Union;' it only forms part of a previous minute of the Synod, but is not repeated in the basis. 2dly, Whatever else these words may mean, they neither do, nor can mean, that each party held opinions inconsistent with the opinions of the other, and was to retain them; for this was in direct contradiction with what they were both doing, and had both been setting forth, at that moment. And, 3dly, Assuming that each party was to retain its own tenets, it still remains to be settled whether the tenets of the one were different from those of the other.

"On the whole, upon this, which I conceive to be the main point of the case, *I want more light.* If we must proceed on what we have, there is nothing to remove from my mind the *prima facie* evidence of the identity of their principles, which is supplied by the mere fact of their uniting. That religious parties should differ on imaginary or immaterial grounds is no uncommon occurrence; but that, with real differences, they should unite, is, I suspect, a case without example, unless where secular considerations have extinguished ecclesiastical feelings. No such considerations have been averred to operate here. And, so far as appears, the junction has been acceded to by the whole members of both bodies, except the defenders. The defenders, nevertheless, may certainly be right, and every one else wrong. But, *prima facie*, the probability is the other way."

Lord Medwyn was absent.

The pleas which were sustained for the defenders in this case were the following:—

"4. The defenders, being a majority of the congregation to whom the property belonged, were entitled to the control and management of it so long as they continued to retain the character and maintain the doctrines on which the congregation was originally formed, and apply the property to the purposes for which it was designed; and as the defenders had done so in all respects, there was no ground in law for interfering with their possession. 5. It was not an implied condition in any of the grants of the property in question that the congregation should remain subject to the jurisdiction and discipline of the United Secession Church; and there was no ground in law on which the declaratory conclusion to that effect could be maintained. 6. Even if such condition had been implied, fulfilment of it had been rendered impossible, and the defenders were liberated from the effect of it by the union of the Secession Church with the Relief body; and the conclusion, to have it found and declared that the pursuers still adhered to the jurisdiction and discipline of the Church, was altogether inept."

NOTE C.

THE THURSO CASE.

COUPER *v.* BURN, DECEMBER 2, 1859.[1]

The rubric of the Report in this case is as follows:—

"A congregation of seceders possessed a chapel which was vested in trustees for behoof of a congregation in connection with the body that afterwards became the 'United Associate Synod of Original Seceders. A majority of the Synod joined the Free Church; the minority met and constituted themselves the Synod, adhering to their former principles.

[1] 22 Dunlop, 120.

The congregation was divided, but a majority was in favour of the union. In an action of declarator by the minority to vindicate their right to the chapel, held (*alt.* judgment of Lord Ardmillan) that, having regard to the trust-title under which the property was held, the chapel belonged to the part of the congregation which adhered to the principles maintained by the Church for whose behoof it was vested in trustees; that a majority of such a body were not entitled to compel the minority to unite with any other body, or divert the chapel from the purpose for which it was held in trust; that the principles of the Free Church and of the United Associate Synod of Original Seceders were different in essential particulars; and, therefore, that the pursuers were entitled to decree as concluded for."

Lord Ardmillan, Ordinary, had thrown out the action brought for the minority of the congregation, holding that they had not made out a case of departure of principle on the part of the majority who joined the Free Church, and that it was incumbent on them to do so:—

"The burden of proving that the defenders have, in following the Synod into the Free Church, departed from the principles of the foundation of their own Church, and have thereby forfeited the property held in trust for the congregation in connection with the Synod, rests on the pursuers.

"The result of the authorities, and especially of the decisions in the cases of Craigdallie *v.* Aikman, in the House of Lords, of Galbraith *v.* Smith, and of Craigie *v.* Marshall, in so far as applicable to this case, appears to be that the adherence of the congregation to the Synod or governing body, though not conclusive, is an important fact, creating a presumption in favour of adherence to the principles of the Church; that the decision of the congregation for the union complained of is an important fact, creating a presumption in favour of such union being according to the principles of the congregation; and that when, as in this case, the connection of the congregation with the Synod is not set forth in the titles as descriptive of its ecclesiastical position and character, then the concurrence of the Synod and of the congregation in the views adopted, and in the act complained of, gives to these presumptions, when combined, a power and value greatly exceeding that of their separate force."

This was reversed by the Second Division, the whole judges in which had been changed by death since the Kirkintilloch case in 1850—the occupants of the Bench now being the Lord Justice-Clerk Inglis, Lord Wood, Lord Cowan, and Lord Benholme. The opinion of the Court, however, was delivered by Lord Wood alone.

Early in the judgment his lordship takes occasion to declare that the decision in the Kirkintilloch case "must be accepted as of ruling authority upon the point of title, and of great authority upon all the other

matters which it involves, for the case is one which received most deliberate and anxious consideration."

And the first point to which this is applied is the question of *union or separation*, as dealt with by the Lord Justice-Clerk and Lord Moncreiff. The former case is held to be an authority in favour of the present pursuers, although a minority of the congregation.

"A resolution to form a union with a separate body is not an act of management properly falling to be regulated by the voice of the majority of the congregation. It is one affecting and altering the use, possession, and destination of the property of the body. The principle recognised by the Court in Craigie *v.* Marshall is founded on the contract of parties in relation to which the trust of the property belonging to the congregational body was constituted, and its legal consequences, which secure those strictly adhering to it from being affected in their rights by the acts of those who would innovate upon its terms and purposes. There being a majority of the congregation opposing the union, may bespeak for their resistance a more ready acceptance. But it can go no farther. It cannot form a fact essential to the opposition being successful without the proof of departure in fundamentals on the part of those advocating a union and desiring to drag others into it along with them. On the contrary, the principle takes the case out of the class to be ruled by the voice of a majority. According to its obvious spirit, the like circumstances and reasons which are of sufficient potency to entitle an adhering and resisting majority to refuse to join a minority in a union with another religious body, without its being necessary to establish that the minority by the union would be departing from original principles, must also be available to an adhering and resisting minority."

And the present Court now gave its own adherence to this principle.

"But supposing that difference" (of its being here a minority) "to preclude the decision in Craigie *v.* Marshall, or the opinions delivered, from being founded on as of authority to the effect contended for by the pursuers, we are of opinion that, on principle, and for the reasons we have already assigned, the views that there received effect ought equally to be adopted as a ground of judgment, where the opposition to a union is made—as it is here—by a minority. The material thing is the adherence, whether by a majority or minority, to the Church as originally constituted, and the refusal to give up the name of the body and its Testimonies as those of a separate and distinct sect—having characteristic features of its own, and formed for the purpose of independently prosecuting with earnestness certain views in a particular manner held to be of paramount importance, while by a union they would be absorbed into a different ecclesiastical body, not acknowledging their Testimonies, but having Testimonies of their own, and influenced and actuated by their own impressions or convictions of what is necessary to be defended, promoted, or condemned in prosecuting the cause of religion. We therefore hold that the principles and views recognised in Craigie *v.* Marshall are sound in themselves, and, when duly followed out, legitimately lead

to the same result where it is a minority of the congregation that refuse to unite, and thereby sink their distinctive name and Testimonies and very existence in a separate sect, which was arrived at, where it was the majority that did so."

Referring to the terms of the documents of union, it is added:—

"The pursuers contend—and, as it appears to us, with much force and justice—that to a union so brought about, exhibiting in its very basis the consciousness on the part of those who resolved that it should take place, of the existence of a difference, or the possible existence of a difference in principles between the two bodies, rendering necessary such a reservation to secure—as they might imagine it would do—their being precluded from asserting their own principles; or in other words, to provide against their being involved by the union in a dereliction and abandonment of these principles, they (the pursuers) cannot, in justice, be required to concur, at the cost, if they do not do so, of losing all right to the church and other property of the congregation, unless they can instruct a disagreement in some material or essential principles between the Secession and the Free Church. They maintain, on the contrary, that they are entitled to withhold their consent without being driven into any discussion, of whether *de facto* there be such difference in regard to this or that particular doctrine or precept, the apprehension of which difference generally, at least, although in what particular is not specified, was so impressed upon the minds of those by whom the conditions of the union were settled that they found themselves compelled to guard their resolution of approval of it with the qualification in question. Let the case be put, that there was an action at the instance of the defenders to vindicate the property of the church building, by having it declared that the trust of it was now a trust for their behoof,—Could the Court, the pursuers ask, give ear to such a demand, and find in the circumstances, that the pursuers (the defenders in the case put) being a minority of the congregation, could only retain any right in the subject either by concurring in the union, or upon the condition of its being proved that, in some particular doctrines or tenets, there was a positive adversity between the Secession and the Free Church? And if not, then—as the pursuers represent—this is what, in the present action, the case really resolves into; inasmuch as, although the pursuers are *in petitorio*, the issue raised by the defenders' pleas in law is substantially the same as if there were a declarator at their instance concluding to the effect above mentioned.

"Upon this view of the case we shall not farther enlarge. It has indeed, perhaps, been dwelt upon at greater length than was necessary, seeing that we do not consider success in establishing it necessary to the pursuers prevailing in their action, and do not mean that our judgment should be rested on it alone."

The remainder of the judgment, accordingly, is occupied with the second ground, that there is a real and ascertainable difference between the principles of the Free Church and the Secession.

"Assuming that, in order to make out a case against the resolution of the majority of the congregation to unite with the Free Church, it must be instructed that, on some fundamental principle, doctrinal precept, or ecclesiastical arrangement, there is a difference between that Church and the Secession,—that there is an essential disagreement in doctrine, or tenets, or religious views, or forms of ecclesiastical government, so that to join the Free Church would involve a dereliction and abandonment of some of the peculiar principles on which the Original Secession Church was based, we think that such appears to be truly the state of the fact; and that, in so far as the *onus* may rest upon the pursuers (but which, with all the documents before the Court to which the parties respectively appeal, is a point rather of form than substance), they have discharged themselves of it."

In demonstrating this (which we cannot enter into in detail), Lord Wood takes first the Secession *Testimony* of 1736, and then the Free Church Standards, and compares the two on three important points. The first of these points, on which we may quote the judgment, is the *obligation of the Covenants*. On this—

"It is only necessary to compare the Testimonies of the Original Seceders and those of the Free Church, to be at once satisfied that there is a most material variance between them. In regard to the Covenants, the Free Church Standards are really a total blank. In particular, they are not referred to in the Free Church Formula. On the other hand, the Testimonies of the Secession are most full, explicit, and earnest in regard to them. Of the perpetual and descending obligation of the Covenants as being a doctrine or tenet of the Free Church, not a trace is to be discovered. It is not acknowledged by the Free Church. There is nothing which can possibly be construed into an adoption of it, or its consequences as affecting the members of that communion. In short, nothing is to be found from which it can be inferred, and far less which can be said to amount to a direct expression, that by the Free Church the Covenants are looked upon in the same light as by the Secession, and as supporting (or, as it were, enjoining) the same religious views, and the prosecution of the same ends, and in the same manner. And thus the Standards or Testimonies of the two bodies exhibit not an identity, but an entire contrariety in that which has already been shown to be a fundamental principle or doctrine in the Secession Church. Opposition in positive words is not necessary; silence is sufficient.

"And then, passing from the Claim and Protest to the Formula of the Free Church, there is a positive difference in regard to what is required by the Secession to be asserted and affirmed, or evidenced by the ministers and office-bearers as a test in regard to the Covenants. In the questions in the Free Church Formula, no reference whatever is made to the Covenants, which, and their perpetual obligation, are there completely ignored as an article of clerical profession. In the questions in the Formula of the Secession, directly the reverse is the case. Here,

therefore, the Formulas stand in manifest contrast with each other, and the effect of a union would be, that the members of the Secession would become members of a united Church, in which the ministers and the office-bearers would not be qualified in the manner deemed essential by the separate body to which they now belong. For it is impossible to doubt, that by the union with the Free Church the ministers and probationers must be admitted on the Free Church Formula, and that, so far as regards this material point of what has been all along deemed essential as a test in the qualification of ministers, probationers, and office-bearers, the doctrines and system of the Secession will cease to exist, and be sunk in those of the Free Church. This, we are of opinion, is a state of things no member of a Secession congregation can be compelled to submit to, at the cost, if he refuses, of the loss of the property at present vested in it, or in trustees for its behoof."

Again, the Secession Standards are explicit on the divine right of Presbytery, and the necessity of holding it. But—

"In the view of the Free Church, Presbyterian Church government, whether you turn to the authoritative documents or Testimonies, or to the Formula, is merely one agreeable to the Word of God and the only government of this Church; a declaration which will probably find a concurrence by all Presbyterians, and which it may be anticipated would be made by Christian communities in general, in favour of the form of Church government they may have established. Indeed, the question in the Free Church Formula would seem to be designedly framed so as to avoid the doctrine of the exclusive right of Presbytery to be divine and scriptural. The assertion of a particular form is avoided, and still more the assertion that Presbytery is that only form. All that is asserted is, that a government of the Church has been appointed distinct from the civil government, and that the Presbyterian form is founded on Scripture, and agreeable thereto. But the doctrine or principle to which the Secession bears witness, and its members assert, in the terms already noticed, is of a very different complexion. Thus, upon this point, which is earnestly declared and insisted in by the one Church, there is direct opposition, or at least clear non-adoption, by the other. And hence, in our opinion, no congregation or minister of the Secession can unite with the Free Church, without dropping a material part of that Testimony which, by their bond of union and covenant engagements, they are called upon to profess and to maintain inviolate."

The third difference which the Court held to be fundamental and insuperable, was the estimate formed by the two Churches respectively of the Revolution Settlement and the Treaty of Union, which, viewed as sinful by the old Secession, are, if not approved, at least not condemned, and for some purposes founded on, by the Free Church.

It is well to give the carefully framed interlocutor in this case, as showing the result to which the law may bring such a case as this, at the instance even of a small minority of a congregation opposing a union:—

"Recall the interlocutor of the Lord Ordinary reclaimed against: Find and declare that the subjects described in the conclusions of the summons, and also that all other property whatsoever belonging to or vested in trust for behoof of the Associate congregation of Thurso, in connection with the General Associate Synod of Edinburgh, latterly known as the Associate Synod of United Original Seceders, belong to and are held for behoof of the pursuers, and all others who may adhere to them, and form along with them the said Associate congregation, and belong to and are held exclusively for the pursuers, and those who may adhere to them and maintain the principles and doctrines of the body denominated Original Seceders, in connection with the said General Associate Synod of Edinburgh, or Associate Synod of United Original Seceders: Find and declare that the pursuers, members of the said Associate congregation of Thurso, and in connection foresaid, have, for themselves and such others as may adhere to or join them, the sole right and title to the said subjects and kirk, or chapel, or meeting-house, and whole other property, and to the exclusive possession and management thereof; and further, that the managers and trustees who may be appointed by the pursuers, and their said adherents, shall hold the same solely for behoof of them, the pursuers, and their said adherents, and that they alone are entitled to give directions to the said managers and trustees in the premises, free from the control or interference of the defenders; and the Lords likewise decern and ordain the defenders immediately to deliver to the pursuers the whole title-deeds of the said heritable subjects, and to quit possession of the said kirk, or chapel, or meeting-house, and other property foresaid, of the said congregation, and leave the same void and redd, and to deliver up the keys of the kirk, or chapel, or meeting-house, and other property, to the pursuers, in order that they may enter to the premises, and they and their said adherents possess and enjoy the same: And the Lords further interdict, prohibit, and discharge the defenders from attending or voting, or pretending to vote, at meetings of the said congregation, and generally, from molesting and troubling the pursuers and their said adherents in the peaceable possession of the property of the congregation in all time coming: *Quoad ultra* remit the cause to the Lord Ordinary to proceed further therein as may be just: Find the pursuers entitled to the expenses incurred by them since the date of the interlocutor closing the record, and remit, &c.; and reserve all other questions of expenses."

NOTE D.

CASES OF PROPERTY AND CREED IN THE ENGLISH LAW.

There are several reasons why we should not leave the subject of the relation of dissenting Churches and their property to creeds according to the law of Scotland, without taking notice also of the law of England. In the first place, the question is in some respects not so much one of municipal or Scottish, as of imperial and constitutional, law. Secondly, the highest courts of Great Britain, which are courts of appeal for all its parts and dependencies, are sure to have all important questions brought before them in the last resort; and whatever light may be got from the principles of one jurisprudence, will be used by them to illustrate any difficult point sent up by another. In the third place, the principles of law on this subject in England and Scotland are very much, or wholly, the same. And, in the fourth place, while our great leading case of Craigdallie was decided by an English judge on principles which had certainly not been acted on in Scottish law before, that case has in its turn become a precedent and authority and origin of law to the courts of England, Ireland, and America.

The Attorney-General v. *Pearson* is the leading English case.[1] It occurred in 1817, four years after Lord Chancellor Eldon had laid down the principle of the Craigdallie case in the appeal from Scotland, and came before the same judge. It was the case of a Presbyterian congregation in England which had turned Unitarian; and while the only purpose expressed in the titles of the chapel was that it was erected "for the worship and service of God," a minority sought to recover it from the Unitarian majority. After long and able pleading, which is fully reported, the Lord Chancellor gave judgment, pointing out that the case was one of trust, and that the trust was in the first place to be gathered from the deed, but, failing that, could be inferred from the usage of the congregation. "But if it turns out (and I think that this point was settled in a case which lately came before the House of Lords by way of appeal out of Scotland) that the institution was established for the express purpose of such form of religious worship, or the teaching of such particular doctrines, as the founder has thought most conformable to the principles of the Christian religion, I do not apprehend that it is in the power of individuals having the management of that institution at any time to alter the purpose for which it was founded, or to say to the remaining members, 'We have changed our opinions; and you who assemble in this place for the purpose of hearing the doctrines, and joining in the worship prescribed by the founder, shall no longer enjoy the benefit he intended for you unless you conform to the alteration which has taken place in our

[1] Merivale's Chancery Reports, iii. 353.

opinions.' In such a case, therefore, I apprehend—considering it as settled by the authority of that I have already referred to—that, where a congregation become dissentient among themselves, the nature of the original institution must alone be looked to as the guide for the decision of the Court; and that, to refer to any other criterion as to the sense of the existing majority, would be to make a new institution, which is altogether beyond the reach, and inconsistent with the duties and character of, this Court."

In recapitulating the judgment, his lordship again referred to the Craigdallie case: "I must here again advert to the principle which was, I think, settled in the case to which I referred the other day, as having come before the House of Lords on an appeal from Scotland—viz., that if any person seeking the benefit of a trust for charitable purposes should incline to the adoption of a different system from that which was intended by the original donors and founders, and if others of those who are interested think proper to adhere to the original system, the leaning of the Court must be to support those adhering to the original system, and not to sacrifice the original to any change of sentiment in the persons seeking alteration, however commendable that proposed alteration may be."

This *leaning* is well expressed in another part of the judgment, where he says that "the Court will not permit the purpose to be altered, unless it be obvious from the original nature of the institution that it was intended to be capable of such alteration." A trust simply for the worship of God would be held by the Court, in the absence of other information, to be for the Established religion of the country, but not if it could gather (whether from the deed or *aliunde*) that it was for any other purposes. In this case he gathered from the language of the deed itself, compared with the state of the penal law at the time it was written, that for what worship soever this church had been intended, it had certainly not been for Unitarians. And in this negative conclusion he found ground for remitting to the Master to inquire "what was the nature and particular object, with respect to worship and doctrine, for the observance, teaching, and support of which" the funds were raised.

In 1835, eighteen years after, the same chapel was again in court (*Attorney-General* v. *Pearson*, Simons's Chancery Reports, vii. 290), and it was pleaded for the Unitarian congregation in it that the original principle of the founders was liberty of private judgment rather than any particular doctrine, and "that their communion held only one tenet in common, that of absolute freedom in matters of opinion." The Vice-Chancellor, Sir L. Shadwell, however, remarked: "I have heard and read a great deal about the extreme anxiety which was manifested by the Presbyterians, the Independents, and the Baptists (the three principal classes of dissenters), to have their Scriptures unfettered by creeds. I cannot, however, but think that, in their minds, it was of much more importance that their ministers should inculcate certain religious doctrines upon the minds of their hearers, than simply that they should be at liberty

to preach what they pleased, and that they thought that the supporting and inculcating of certain doctrines assumed by them to be religious truths was of more importance than the method by which those truths should be disseminated. They meant, without doubt, that those opinions should be taught which they themselves entertained, but they objected to their being taught by means of a creed."

The great case of *Lady Hewley's Charities* followed upon this, which, commencing in 1830, was decided by the House of Lords in May and June 1839, and May and August 1842 (*Shore* v. *Wilson*, Clark and Finelly's Reports, ix. 355). It had been pleaded before Lord-Chancellor Brougham, but judgment was pronounced by his successor, Lord Lyndhurst. The judges all adhered to the doctrine that the "intent of the founder" was the one rule. Lord Lyndhurst said: "I agree entirely in the principle stated by the learned judges, upon which this case must be decided. In every case of charity, whether the object of the charity be directed to religious purposes or to purposes purely civil, it is the duty of the Court to give effect to the intent of the founder, provided this can be done without infringing any known rule of law. It is a principle that is uniformly acted upon in courts of equity. If, as they have stated, the terms of the deed be clear and precise in the language, and clear and precise in the application, the course of the Court is free from difficulty. If, on the other hand, the terms which are made use of are obscure, doubtful, or equivocal, either in themselves or in the application of them, it then becomes the duty of the Court to ascertain by evidence, as well as it is able, what was the intent of the founder of the charity, in what sense the particular expressions were used. It is a question of evidence, and that evidence will vary with the circumstances of each particular case; it is a question of fact to be determined, and the moment the fact is known and ascertained, then the application of the principle is clear and easy.

"It can scarcely be necessary to cite authorities in support of these principles; they are founded in common sense and common justice; but if it were necessary to refer to any authority, I might refer to the case which has been already mentioned—the case of the Attorney-General *v.* Pearson; and to another case which was cited at the Bar — the case in the House of Lords, Craigdallie *v.* Aikman. Throughout those judgments the principles which have been stated were acknowledged and acted upon by a noble and learned judge, of more experience in courts of equity and in questions of this nature than any other living person. I look upon it, then, that these principles are clear and established—that they admit of no doubt whatever."

The question of what evidence is admissible, and whether any kind of evidence will be taken to prove the intent of the founder, was the one chiefly argued in this case. The opinions of the judges were taken, and six out of seven of them held "that for the purpose of determining the objects of Lady Hewley's Charity, under the terms '*godly preachers*' of Christ's holy Gospel, *godly persons*, and the other descriptions contained

in her deeds, extrinsic evidence is admissible to show the existence of a religious party by whom that phraseology was used, and the manner in which it was used, and that she was a member of that party."

Lord Cottenham and Lord Brougham concurred in this result.

The chief Irish case is *Dill* v. *Watson* (Jones's Exchequer Reports, ii. 48), commonly called the *Clough case*. It is interesting, as being a properly Presbyterian case—being a question between a Trinitarian Synod in Ulster and one of its presbyteries, the majority of which became Arian. The decision in this case with regard to a chapel, the trust-deed of which was in favour of "Presbyterians who, from time to time, shall meet or assemble at the said meeting-house in order to worship God for ever," was that "such trust will be executed in favour of that class of Presbyterians whose religious principles it was the intention of the granter to endow." In pronouncing this judgment in favour of the orthodox Presbyterian Church in Ireland, the Chief Baron Joy went so far as to say that "uniformity of faith in all who are in connection with it is its fundamental principle;" and Baron Smith gave in the following words an eloquent answer to an objection that continually recurs to the founding of a Church upon human creeds:—

"Let me here, with unfeigned respect and admiration, advert to the far better than eloquent argument and effusion—to the manifestly sincere profession of faith of my friend Mr Holmes. I unhesitatingly agree with him, that the Bible is the rule, the only rule of faith; that it is the star which is wanting to guide the wisest amongst us to the true sanctuary, where we should bow down and devoutly offer the incense and worship of the heart. I agree with him, that to appeal from the Word of God to the opinions or decrees of man is, as irrationally as impiously, to withdraw our faith and allegiance from perfection, infallibility, and truth, and transfer them to infirmity, fallibility, and error. And I also agree with him, that we are not to coerce our neighbour into an adoption of our belief. But I at the same time hold, that the Scriptures must be interpreted before they can become a rule of common faith; that men's interpretations of the Bible constitute the foundations of their faith; that the members of a community who, after having searched the Scriptures, all concur in giving one interpretation to their fundamental and essential contents; that these, I say, form one religious body or Church: while those who construe the Scriptures differently from these, but in concurrence with each other, form another distinct religious community or Church. Again, I do not conceive that I appeal from the Word of God to that of man, by proclaiming or attesting by my signature that I concur in the interpretation given by a numerous body of my fellow-Christians to certain passages of Scripture. They agree with me, I agree with them in construction and consequent creed; but neither take their belief upon the authority of those others. Both draw their faith from the Bible as its common source; both consider the Bible as containing the only rule of, and furnishing the only unerring guide to, a true faith; each, with God's assistance, and the sub-

ordinate and pious aid of human instruction, interprets as well as man's infirmity will permit; both coincide in the same interpretation; that interpretation regulates their faith; and all who thus coincide become members of the same religion. And thirdly, we do not coerce our neighbour by calling for his signature to our profession or articles of faith. We leave him free to adopt or repudiate that faith, according as his reason, his conscience, and the grace of God may direct him. We but say to him, If you agree with us, affix your signature to certain articles, or in some way notify your recognition of their truth; or if you disagree, withhold such signature or declaration. And we say of him in the former case, that he *is*, and in the latter case he *is not*, of our religion. We do not compel him to hold our faith: we but ask him to inform us, by certain acts, whether he does hold it or does not; and we ask this, only if he claim to be enrolled as one of our body, and to be in religious communion with us. In the absence of such a test, our establishment would not be a rock cemented into solidity by harmonious uniformity of opinion: it would be a mere incongruous heap of, as it were, grains of sand thrown together, without being united; each of these intellectual and isolated grains differing from every other; and the whole forming a but nominally united, whilst really unconnected mass, fraught with nothing but internal dissimilitude, and mutual and reciprocal contradiction and dissension. *Hic dextrorsum abit; ille sinistrorsum.* This, indeed, I should hold to be, in the language of a late prelate, 'a Church without a religion.'"

The following are recent cases in England:—

In the Chancery case of the Attorney-General *v.* Gould, 20th April 1860 (Beavan's Reports, xxviii. 485), it was decided by Sir John Romilly, the Master of the Rolls, that "each congregation of Particular Baptists has a right to regulate its own practice, except as to essential and fundamental doctrines of their faith," and that the question of open communion or strict communion was not one of that character, but was an open question. The trust in this case had been merely for the use of "Particular Baptists," a doctrinal distinction, and the Court would inquire only into what was essential to being entitled to the name. Usage of the Church is only important where the deed is ambiguous.

In the case of the Attorney-General *v.* Etheridge,[1] the same decision was given by Vice-Chancellor Kindersley on much the same grounds. It was "held that the practice of open, or mixed, or strict communion was a matter of Church order which the body of each Church had a right to regulate and vary as often as they pleased." See also Newsome *v.* Flowers, 30 Beavan, 461.

[1] 8 Law Times, N. S., 14; 32 Law Journal Chanc, 161, 706.

In these later cases the Court looked to Confessions of Faith, when they existed, even in the case of Congregational Churches, as an evidence of the essential tenets of the sect—evidence more important than any other.

In an Irish case, more recent than Dill *v.* Watson—viz., Attorney-General *v.* Miller—the same question occurred as in the Thurso case in Scotland; for upon the union of some Associate Seceding congregations in Ulster with the Free Church (following the majority in Scotland), schisms took place, and the question of property was tried in the High Court of Chancery. The Lord Chancellor delivered judgment on the 10th July 1855, removing trustees who had joined the Free Church, and remitting to the Master to appoint three other trustees who adhered "to the doctrines of the Westminster Confession as explained in the Testimony" of 1827, which the former trustees were held to have abandoned. This case was decided both on a comparison of the standards and documents, and on supplementary affidavits by clergymen and others on both sides supposed to be able to inform the Court.

NOTE E.

AMERICAN LAW ON THE RELATION OF CHURCHES TO CREEDS.

The Scottish lawyer naturally looks with much interest to American law on the difficult questions which have been presented in the latter part of this volume. The absence of an Established Church makes their whole ecclesiastical law bear upon this part of our subject, while the predominance of Presbyterianism gives it also a special interest; and it seems impossible that the eminent jurists of that country should not have contributed much that may be valuable for our future use.

This expectation is only partially fulfilled, owing to certain peculiarities of American Church law. I take the following information chiefly from a recent book on 'The Law of Religious Societies, Church Government and Creeds,' which professes to be the first attempt at "a clear and distinct digest of all the principles, statutes, and adjudged cases" on the subject.[1] The great peculiarity to which I have referred is *the interposing of a corporate body, called a Religious Society, between the Church and the civil law.* These corporations are formed by the members of each congregation according to forms provided by law for the purpose; and thenceforward the law deals exclusively with them. "The only religious

[1] 'American Ecclesiastical Law: The Law of Religious Societies, Church Government and Creeds, Disturbing Religious Meetings, and the Law of Burial Grounds in the United States. With Practical Forms. By R. H. Tyler, Counsellor-at-Law. Albany: 1866.'

societies recognised in law are those which are incorporated, and thereby become bodies corporate by special charters, or under the general incorporating act of a State." "The Church is altogether a different body from that of the society, and we have but little to consider with reference to the Church in its distinctive capacity, in a treatise upon the law of religious societies, though the matter will be referred to in another place, when the discipline and government of the several Churches will be briefly explained. Over the Church, as such, the legal and temporal tribunals do not in general profess to have any jurisdiction whatever, except so far as is necessary to protect the civil rights of others, and to preserve the public peace. All questions relating to the faith and practice of the Church and its members belong to the Church judicatories themselves. (Baptist Church in Hartford *v.* Witherell, 3 Paige, 296.)"

Thus, in the State of New York, whose policy of incorporation of religious societies, adopted in 1784, has become the model for other States, "the legal character of the corporation is not affected by the existence or non-existence, or ecclesiastical connection, doctrines, rites, or modes of government of a Church or Churches formed by the corporators. Religious societies usually maintain public worship according to some specified denominational usage, but the corporation and the Church, although one may exist within the pale of the other, are in no respect correlative. The objects and interests of the one are moral and spiritual; and the other deals exclusively with things temporal and material. The existence of the Church proper, as an organised body, is not recognised by the municipal law. (Petty *v.* Tooker, 21 N. Y. Rep. 267.)"

And the results of this remarkable institution certainly seem to show a complete distinction between the two bodies: "The corporators of a religious society may not only select their own officers, and thus control their own property, but they may change their faith and form of worship, or their discipline, at their pleasure, and there is no legal power to interfere, or to prevent it. They may pass from a Congregational Church to an organisation in connection with the Presbyterian body, and *vice versa*. In a word, the society has the entire control of the question as respects the form of religious worship which shall be promoted by the Church property. In the strong language of the courts, 'it was the intention of the legislature to place the control of the temporal affairs of these societies in the hands of a majority of the corporators, independent of priest, bishop, presbytery or synod, or other ecclesiastical judicatory. This is the inevitable effect of the provision giving to the majority, without regard to their religious sentiments, the right to elect trustees, and to fix the salary of the minister.' (Robertson *v.* Bullions, 11 N. Y. Rep. 243; Parish of Bellport *v.* Tooker, 29 Barb. 256.)"

These religious societies, when incorporated, act by so-called *trustees*, whose position must be carefully distinguished from that of those whom we understand by the name in our law. The trustees are simply the officials of the corporate society. And so "the title to all property acquired by a religious society in the State of New York, whether real

or personal, is vested in the corporation. Whatever possession the trustees or officers have is the possession of the corporation. The trustees do not hold the property in trust, as their name or title of office would imply, but their position respecting the corporate property is the same as though they were denominated directors or managers, and their possession of such property is the same which the directors of a bank bear to the banking-house and other property of a banking corporation. The right of the trustees to intermeddle with the property of the society, is an authority, and not an estate." The trustees, then, must be taken as representing the religious corporation, and their power in this capacity over the property used for religious purposes seems almost unlimited: "The trustees of a religious society can determine, by their control of the corporate property, who shall conduct the religious exercises in the house of worship of the society. The only restraint is in the power of the society, by vote of its members, to fix the salary of the person employed as their minister. The trustees may also make such regulations in respect to the renting and occupation of pews, as to exclude persons holding obnoxious opinions from becoming attendants upon worship, and thereby obtaining a right to vote. This is the only way that the use of the Church property can be restricted to the propagation of any particular form of religious belief, or ecclesiastical organisation, unless there be some express condition affecting the grant of the corporate property. (Petty *v.* Tooker, 21 N. Y. Rep. 267.)

"Persons otherwise qualified do not lose their right as corporators to vote at elections, by reason of their having individually or collectively renounced the doctrines and ecclesiastical government professed and recognised by the religious body in whose worship and service the corporate property had always been employed, and the title of trustees to office and to the control of the corporate property is not impaired by any alteration in doctrine or Church government on their part, or on the part of those by whom they are elected. (Ib.)

"Should a religious society think proper to separate from the Church with which it has previously been connected, and form a connection with another denomination, the trustees have the power to employ such minister as they see fit, and to exclude from the pulpit a minister appointed by the ecclesiastical judicatory with which the society was previously connected. And a court of equity has no power to control their action in the employment or payment of a minister. (Burrel *v.* Associate Reformed Church of Seneca, 44 Barb. 282.)"

These general statements seem to be qualified in the following paragraphs to a limited extent. (The quotations both in our last paragraph and in this refer primarily to the law of New York.) "As has been observed, the temporalities of the Church, congregation, or society, are committed to the charge, care, and custody of the trustees, but it is nevertheless their duty to see that they are fairly and fully devoted to the purposes which the founders had in view when they organised the

same. All authority conferred upon them is necessarily subordinate to this great end; and all exercise of it, beyond the legitimate attainment of this end, is usurpation. Should the trustees, however, violate this plain duty, it is doubtful whether the Church, congregation, or society has any remedy, except to elect others in their places when the term of their office expires. In one case it was held that this duty might be enforced by *mandamus*, but this has been questioned in a later case. It is doubtful even when a conveyance is made to a religious society, without any declaration of trust, whether the trustees might not apply the property to such religious purposes, for the time being, as they deem proper, without the interference of the Court, unless the property had been so long used for a specific purpose as to furnish evidence that it was originally dedicated to that purpose. (Robertson *v.* Bullions, 9 Barb. 64; but see The People *v.* Steele, 2 Barb. 397.)

"But should the trustees of a religious society attempt to divert the funds and property of the society from the purposes for which they were contributed by the original donors, a court of equity would interfere to prevent it. For instance, where property is conveyed to a religious corporation, or to a religious society, which afterwards becomes incorporated, to promote the teaching of particular religious doctrines, and the funds are attempted to be diverted to the support of different doctrines, it is the duty of a court of equity, under its general jurisdiction over trusts, to interpose for the purpose of carrying the trust into execution according to the intention of the donors. (Miller *v.* Gable, 2 Denio, 492.)"

From this it would appear that the corporation's property is not ordinarily made dependent on any particular faith, unless that property has been given in some express or special trust. And also, "When a *Church* is endowed with property for the support of a particular faith, and is *subsequently* incorporated, it is not competent for a majority of the Church, the congregation, or the corporators, or a majority of each combined, to appropriate such property for the maintenance of a different faith. The question of the particular religious faith or belief is not material in such cases, except so far as the Court is called upon to execute the trust, and to that end it merely inquires what was the faith or belief to maintain which the fund was bestowed. The Court does not animadvert upon the religious belief of either party, or assume to determine that either is in itself right or wrong. (Kniskern *v.* The Lutheran Churches of St John's and St Peter's, 1 Sand. Ch. R. 439.)"

The following passages, still referring to the law of the great State of New York, also show a general rule which is rather the converse of our law, with an important exception: "The trustees of a religious corporation cannot take a trust for the sole benefit of members of the Church, as distinct from other members of the society, or for the use of a portion of the corporators, to the exclusion of others. Nor can they take a trust limited to the support of a particular faith or a particular class of doctrines. It would not be compatible with the office and duties of the trustees, that they should take and hold

and administer the revenues of property from the benefits of which a portion of the corporators must be excluded. This would prove an entering-wedge of division, the force of which even Christian charity and forbearance would scarcely be able to resist. Besides, such a trust is not authorised by the statute, and is inconsistent with its general scope and object as well as with its terms. (Robertson *v.* Bullions, 11 N. Y. Rep. 243.)

"When a religious society is organised as a branch or part of an established denomination, and becomes endowed with property given upon the faith of its being so, the trustees at a given time will not be permitted to employ such property in maintaining doctrine and discipline at variance with that of the denomination, even though they might be sustained by a majority of the corporators; and in such a case the intention of the donors is the criterion by which to determine the purposes to which the property of the Church has been dedicated. (The People *v.* Steele, 2 Barb. 397.)"

The law of congregational corporations is found in many other States besides New York; but it does not appear to have been successful (as indeed no mere device or machinery of law can be successful) in wholly getting rid of the questions which have occupied the Scotch courts as to dissenting Churches. Thus in New Jersey the statement of the law is very like that laid down in Great Britain: "The courts of New Jersey cannot inquire into the doctrines or opinions of any religious society for the purpose of deciding whether they are right or wrong; but it is their duty to do it whenever civil rights depend thereon, and then it must be done by such evidence as the nature of the case admits of. The party who would avail himself of the doctrines of any particular denomination must show what they are. If a majority of an ecclesiastical assembly withdraw, however sufficient their reasons may be, that will not deprive those who remain of their ancient name, rights, and privileges, if they retain their ancient faith and doctrines, and adhere to their ancient standards. (Hendrickson *v.* Decow, Sax, Ch. R. 577.)" And yet the courts of this same State seem to have laid down principles strongly in favour of Church unity and subordination: "To constitute a person a member of any Church, two points at the least are essential—a profession of its faith, and a submission to its government. After persons withdraw from a Church they do not continue members simply because they hold the same religious faith. Whomsoever the judicatories of any Church decide to be the spiritual officers thereof, the courts are bound to respect as such. The formation of a new congregation or Church judicatory must be made with the consent and by the authority of the proper ecclesiastical assembly. A portion of the members of a religious denomination, or converts professing its faith, cannot, by their own act, and without the sanction prescribed by the constitution, form a new judicatory within the pale of the Church. (Den *v.* Bolton, 7 Hal. 206.)" In the State of Vermont there seems to have been a different decision: "It has been held that it is both the right and duty of members of the Presbyterian 'Associate Church' to

secede from the prevailing party who may obtain a majority in the judicatories, synods, and assemblies, when, in the opinion of the seceders, the majority have departed from the Word of God and the received standards of doctrine, worship, government, and discipline of the Church; and that when a congregation and their minister thus secede, no violation of any implied contract between the minister and the congregation is involved which will justify a Court of Chancery to treat the connection between them as dissolved. (Smith *v.* Nelson, 18 Vt. R. 511.)" This, however, seems not to have been a case of Church property in the hands of a corporation, but the case of a will "where a testator made a bequest in these words: 'As a testimony of my gratitude to the Giver of every good and perfect gift, I farther will and devise the sum of one hundred and fifty dollars as a donation to the "Associate Congregation of Rygate," to be placed under the direction of the trustees of said society, and the interest thereof to be annually paid to their minister for ever;' and it was held that there was nothing in the terms of the bequest which indicated that the testator had any regard to the connection of the congregation with any other body, or to any future divisions which might occur in the congregation, and that it could therefore have no effect in determining the right to the legacy that the congregation has seceded from the 'Associated Church' to which it belonged at the time of the testator's decease. (Smith *v.* Nelson, 18 Vt. R. 511.)"

In turning from this book on Ecclesiastical Law to one which seems to be of authority on the American Law of Corporations ('Treatise on the Law of Private Corporations Aggregate, by Joseph K. Angell and Samuel Ames. Seventh Edition, by Mr Lathrop. Boston: Little, Brown, & Company. 1861'), the difficulties are not cleared away. These authors say that the jurisdiction in America of all ecclesiastical bodies is only advisory, and that when a civil right depending on Church matters arises the civil tribunal decides. "Therefore, where, as well from the testimony as from the terms of a charter incorporating a church, it is apparent that it was in full connection with a synodical body, and not independent of it, as a congregation, if a portion of it secede, the rest, however small in number, secure their corporate existence and are entitled to all the privileges and property of the corporation" (page 29, and many cases there cited). But how far these cases agree with another quoted, to the effect "that those who adhere to the original doctrines of the Church corporation are entitled to the temporalities of the Church," is not made plain.

It is evident that in the country where the great experiment of freedom has been chiefly tried, the law has adopted a scheme which tends to separate and keep remote the two regions of the civil and ecclesiastical; and it is curious that the method adopted (that of a "*majority* of the corporators, independent of priest, presbytery, or judicatory") should be so nearly identical with that favoured by the early judges of Scotland in their dealing with non-established Churches. We have seen that though this scheme may be generally, it is not invariably, successful in avoiding the difficulties with which in this country we are familiar. And it

remains to be observed that it is not universal. "They have no general laws for the incorporation of religious societies in the States of Rhode Island, West Virginia, South Carolina, and Nevada, and in some of these States the fundamental law actually prohibits the incorporation of religious societies even by the legislature. In all of these States, however, religious societies are recognised, sanctioned, and protected, and in some of them statutes are found granting important rights and privileges to unincorporated religious societies and Christian Churches of different denominations. In several of these States religious societies are incorporated under special charters granted by the law-making power, and in all of them Churches and the institutions of religion may be sustained under the provisions of the common law upholding trusts for pious uses and religious and charitable purposes."[1] And even in the great majority of the States, where the law of ecclesiastical incorporations exists, the old common law of trusts seems to afford "very tolerable facilities" for purposes of religious worship and aggregation.[2] "The law of charities," says Mr Tyler, "was, at a very early period in English judicial history, ingrafted upon the common law, the general maxims of which were derived from the civil law, as modified by the ecclesiastical element introduced with Christianity, and the same principles have been adopted, with more or less force, in all of the United States, and regarded as applicable to trusts for pious and religious purposes. Gifts, donations, and grants may, therefore, be legally made to trustees for the use and benefit of a Christian Church and society, or for the support of the Gospel ministry in connection with any particular Church. Any person capable of disposing of his property can create a trust for such a purpose, and if the trust is properly created, it will not fail for the want of a trustee, as it is a rule in equity to which there is no exception that a court of equity never wants a trustee. This is an important principle, and is often called into requisition in these States, where the religious Churches and Gospel ministry must be sustained without the aid of corporate charters. The institutions of religion being regarded as greatly essential to the well-being of a state, these trusts for pious and religious purposes are looked upon with great favour by the courts."

On the mode and means of *ascertaining* the objects of the trust, the following case seems to show an agreement with the Scotch cases, and still more with such English cases as Lady Hewley's Charities: "It has been held that when a trust is created by deed, for the use of a congregation of Christians, designating such congregation by the name of a sect or denomination, without any other specification of the religious worship intended, that the intent of the donors or founders in that respect may be implied from their own religious tenets, from the prior and contemporary usage and doctrines of the congregation, and from the usage, tenets, and doctrines of the sect or denomination to which such congregation belongs. And further, that in ascertaining the early and contemporary usage and doctrines of such sect, resort may be had to history,

[1] Tyler, 344. [2] See Angell and Ames on Corporations, 146-148.

and to standard works of theology of an era prior to the existence of the dispute or controversy. (Kniskern *v.* The Lutheran Churches of St John's and St Peter's, 1 Sand. Ch. R. 439.)"[1]

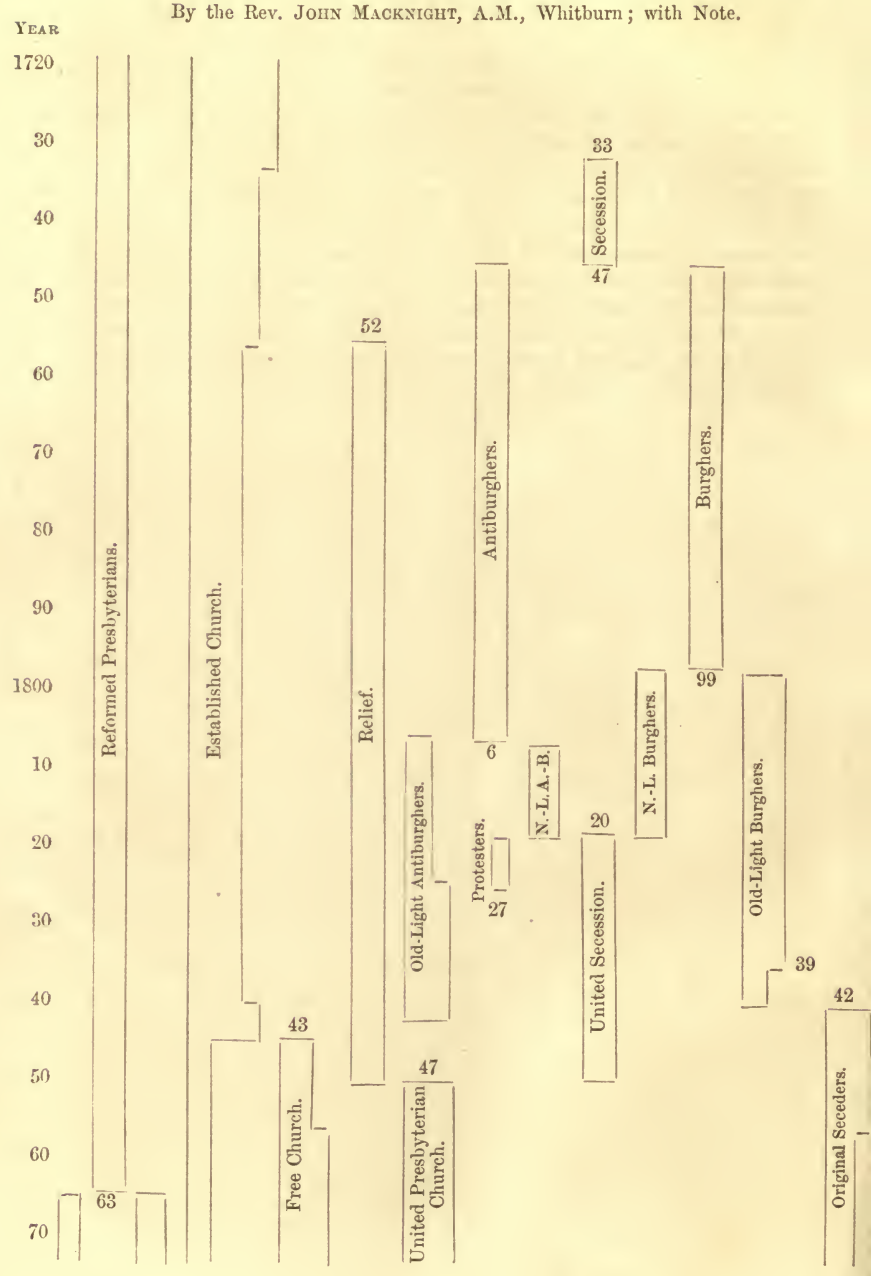
In conclusion, it does not appear that there has been much direct law upon the matter either of Church or creed. That would, indeed, have been inconsistent with the fundamental law of the Federal Constitution, by which "no religious test shall ever be required as a qualification to any civil office or public trust under the United States," and "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" (Art. 6, sec. 3, and Art. 1 of Amendments of 1789). Yet there appears to be a definition of a Church adopted by judicial if not legislative authority: "A Church is defined to be an association of professors of religion, adopting one creed, and organised under the same ecclesiastical government, and using the same ritual and ceremonies. . . . To constitute a member of any particular Church, therefore, there must be *a profession of its faith, and a submission to its government.*" (Baptist Church in Hartford *v.* Wetherell, 3 Paige, 206.)

[1] Tyler, 346.

NOTE F.

SCHEME OF THE DIVISIONS OF THE PRESBYTERIAN CHURCH IN SCOTLAND FROM 1688.

By the Rev. JOHN MACKNIGHT, A.M., Whitburn; with Note.



Description of the foregoing Scheme.—The representation is chronological. From 1688, the era of the Revolution, only two Churches coexist for a time—the National Church and the small party of Cameronians. The latter divides so late as 1863: but the vicissitudes of the former are much more various, for thrice it suffered loss—by the Secession in 1733, the Relief in 1752, and the Free Church in 1843; and once (1839) it recovered a small party from the Secession (Old-Light Burghers). The Free Church has had one change, in the accession (1852) of another small party from the Secession (Original Seceders). The Relief had no divisions, and coalesced with the United Secession in 1847, to form the present United Presbyterian body. The Secession, however, far outstripped the other Churches in the number and variety of its changes; for, first, it divided into two parts, Burgher and Antiburgher, in 1747; and then these two, about the end of the century, were again subdivided into four —a New-Light and an Old-Light section of each party. The tide turned now, and the period of reunions set in. In 1820 the two New-Light sections united to form the United Secession; and in 1842 the two Old-Light sections united to form the Original Seceders. These are the chief movements, but some smaller ones remain to be stated: 1839, a party of Old-Light Burghers returned to the National Church; 1852, a party of Original Seceders were received into the Free Church; and, finally, a minute party of Protesters stood by themselves from 1820 to 1827, being New-Light Antiburghers who disagreed with the union of 1820, and finally coalesced with the Old-Light Antiburghers. J. M.

I have to express my gratitude to my friend Mr Macknight for what I believe to be a most accurate map of a subject which (among many others) he has carefully studied.

Mr Macknight's representation is confined to the Presbyterian Church, and shows well the result to which its passion for unity has led. It has not been generally observed that even the uncouth nomenclature of Scottish schism is a result of Scottish hatred of schism. The Secessions, clinging to the ideal of the one Church of Scotland, refused to take really distinguishing names. When they split about the Burgher Oath, they called themselves by abstract designations, such as "The Associate Synod" and "The General Associate Synod;" but the populace, with rough justice, called them Burghers and Antiburghers; and the convenient nicknames stuck.

The Episcopal and Roman Catholic Churches are not represented on the one hand, nor the many Independent Churches on the other. There were very serious splits and schisms in the Scottish Episcopal Church during last century, and there are many congregations in Scotland outside of it, sprung directly from the Church of England, and holding the ritual and doctrine of that Church. There are a large number of congregations belonging to "The Evangelical Union," which broke off from the Presbyterian Churches on doctrinal grounds—the teaching of their founder, Dr Morrison, being a strong reaction from Scotch Calvinism towards Pelagianism; but their bond of union among themselves seems to be rather like that which unites the Independent Churches here and in England.

CHAPTER VII.

THE POSITION ASSUMED BY NON-ESTABLISHED CHURCHES IN SCOTLAND IN REFERENCE TO THEIR CREEDS.

We have seen in the last two chapters how much the civil law of Scotland has to do with Churches and their creeds, even where neither creed nor Church is established. Having avoided entering into ecclesiastical law proper, even in the case of the Established Church of Scotland, we shall still less enter into it in the case of other Churches, or of the Church throughout all the world, ignored or tolerated by our law. But keeping still to the mid-region of the *relation* between such Churches and our civil law (and that only in respect of doctrine), we may find it useful in this chapter to look at the same legal questions which we have been already considering, but now *from the side of the Church.*

For the Court does not impose a contract upon the Church, but inquires what is the Church contract, and then enforces it. It does not create a trust for the property of the Church, but inquires upon what trust the property is held, and then promotes it. It does not even (speaking generally) insist upon inquiring into and enforcing the Church's trust or contract, farther than the Church's own principles permit and require it.

How far do non-established Churches invite or allow the interference of civil law in the matters of their creed ?

There are many difficulties connected with this, and our first answer may with propriety relate to the external and formal

part of the subject. Questions of creed are most likely to arise upon questions of property. And questions of Church property in Scotland are, as we have seen, embraced under the law of trusts. And when a trust is expressed in a deed, the deed gives the law of the trust. What, then, are the usual conditions of ecclesiastical trust-deeds in the non-established bodies of Scotland?

I. CHURCH TRUSTS AND TENURES.

The early Scottish judges objected to those provisions which seemed intended to confer upon dissenting Churches perpetuity and unity—attributes which they held to be proper to the Established Church alone. There seems, however, no reason to doubt that both of these qualities can be insured by means of the law of trust—a law which is infinitely elastic, and admits of all varieties of ecclesiastical institution. But so far as the former quality—continuity or perpetuity—is concerned, the law has itself interfered to make this a very easy matter, in respect of property at least. By the Act 13 Vict., 13th chapter, entitled "An Act to render more simple and effectual the Titles by which Congregations or Societies associated for the Purposes of Religious Worship or Education in Scotland hold real Property required for such Purposes," it is provided that trusts of heritable property for a "congregation or society, or body of men, associated for religious purposes," or for educational purposes, may be effectually made in names of the office-bearers of such society, and that such an appointment shall "vest the successors in office" perpetually of the individuals presently concerned and named in the deed.[1] The word "church" is avoided in

[1] The following is the leading clause of the enactment: "Whereas it is expedient to render more simple and effectual the titles by which congregations or societies associated together for the purposes of maintaining religious worship or promoting education in Scotland may hold the heritable property required for such purposes: May it therefore please your Majesty that it may be enacted, and be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the autho-

this enactment, and precedence is given to the word "congregation" before any more general one; but "society" and "body of men" seem general enough to provide for the perpetuation of a national sect as well as of a congregation. And the object of the enactment, as stated in the preamble, is expressly "to render more simple and effectual the titles by which congregations or societies associated together for the purposes of maintaining religious worship or promoting education in Scotland *may hold* the heritable property required for such purposes" —thus giving the Church society an equivalent for one of the privileges of incorporation.

But if our law favours Church continuity, it is opposed to

rity of the same, that wherever heritable property, consisting of lands or houses in Scotland, has been or may hereafter be acquired by any congregation or society, or body of men, associated for religious purposes, or for the promotion of education, as a chapel, meeting-house, or other place of worship, or as a manse or dwelling-house for the minister of such congregation, or offices, garden, or glebe for his use, or as a schoolhouse, or schoolmaster's house, garden, or playground, or as a college, academy, or seminary, or as a hall or rooms for the meetings or transactions of the business of such congregation or society, or body of men; and wherever the charter, disposition, conveyance, or lease of such heritable property has been or may be taken in favour of the minister, kirk-session, vestrymen, deacons, managers, or other office-bearers or office-bearer of such congregation or society, or body of men, or any of them, or of trustees appointed, or to be from time to time appointed, or of any party or parties named in such charter, disposition, conveyance, or lease in trust for behoof of the congregation or society, or body of men, or of the individuals composing the same, such charter, disposition, or conveyance, when followed by infeftment duly expede and recorded in terms of law, or such lease, shall not only vest the party or parties named therein, in the lands, houses, or other heritable property thereby feued, conveyed, or leased, but shall also, after the death, or resignation, or removal from office, of such party or parties, or any of them, effectually vest their successors in office for the time, being chosen and appointed in the manner provided in such charter, disposition, conveyance, or lease; or if no mode of appointment be therein set forth or prescribed, then in terms of the rules or regulations of such congregation or society, or body of men, in such lands, houses, or property, subject to such and the like trusts, and with and under the same powers and provisions as are contained in the charter, disposition, conveyance, or lease, given and granted to the parties, disponees, or lessees therein, and that without any transference, assignment, conveyance, or other transmission or renewal of the investiture whatsoever, anything in such charter, disposition, conveyance, or lease, contained to the contrary notwithstanding."

Church unity—at least the decisions given by the Second Division of the Court since 1850, in the Kirkintilloch and other cases, must be held to have that tendency. The principle of these judgments is strongly *congregational* and disintegrant —opposed to that "classic hierarchy" which the illustrious opponent of Presbytery in the days of the Commonwealth imputes to it as its characteristic,[1] and which Scottish Presbytery, at least, has always desired to preserve. The consequence is that, while the older dissenting trusts throughout the country are conceived in terms which have been held in these decisions to be essentially congregational, the larger Presbyterian bodies have now been compelled to adopt new forms of conveyancing to express the unity and subordination which they conceive to be parts of their system.

1. *The Free Church.*—The recent decisions to which we have adverted have all been given since the Disruption of the Established Church. It was, therefore, a legal instinct which led the Free Church, at its full-armed birth in 1843, to revolutionise the system of title-deeds previously in use. The Model Trust-Deed, approved by the Free Church Assembly of 1844, by reference to which, and by incorporation of whose clauses, all local deeds are recommended to be framed, is understood to have received the special care and supervision of Lord Rutherfurd, and of Mr Stirling Murray Dunlop—the author of the great Church documents of 1842 and 1843. There can be no doubt that it is to its provisions that the Lord Justice-Clerk specially alludes in his introductory remarks in the Kirkintilloch case;[2] and the general effect of it is, as his lordship points out, that nearly the whole churches, manses, and other pos-

[1] Milton's Verses "On the New Forcers of Conscience."

Assemblies are declared, by the "Form of Church Government," to be "congregational, *classical*, and synodical."

[2] See the first paragraphs of his speech quoted on p. 375, 376.

sessions of the Free Church are centralised, and held as the property of its General Assembly.

According to the Free Church deed, each property—church, or manse, or school—is vested, as usual, in local trustees (and these may now be the members of the kirk-session or other office-bearers, and their successors in perpetuity), "for the congregation of the body of Christians called the Free Church of Scotland, at present worshipping in , under the pastoral care of the Rev. ." But it is held in trust for the following purposes: that it is to be used "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 religious worship may be, or are in use to be, occupied and enjoyed;" that the worship is to be regulated by the usages of said body; that such persons only shall minister in it as the said body shall appoint by its courts;[1] that

[1] We have quoted in the text the first trust-clause or "purpose" of the deed. The second is as follows:—

"Upon trust, that the said trustees or trustee acting for the time, shall at all times, and from time to time, hereafter permit and suffer to preach and expound the Holy Scriptures, and administer ordinances, and perform the usual acts of religious worship within the said building or place of worship, erected or to be erected, as said is, such person or persons, and such person or persons only, as may or shall from time to time be authorised or appointed so to do, by the said body, or united body of Christians, acting through the medium of its kirk-sessions, presbyteries, provincial synods, and General Assemblies, or according to the form, or forms, in use with the said body, or united body, for the time: providing always, as it is hereby expressly provided and declared, that no person or persons, even holding such authority and appointment as aforesaid, nor any person or persons whatsoever, shall have any right or title to pursue the said trustees or trustee, acting under these presents for the time, in any court of law or justice, for the purpose, or with

deposition or suspension by the said courts shall bar the minister from farther officiating; that no one can sue the trustees for any use of the building without the consent of the

the object and intent, either of obtaining such permission and sufferance as said is, or the continuance thereof, or of obtaining, in any manner of way whatever, liberty or the continuance of liberty to preach and expound the Holy Scriptures, or administer ordinances, or to do or perform any act of religious worship, or other act or thing whatsoever, within the said building or place of worship, erected or to be erected, as said is, or with the object and intent of in any way controlling the said trustees or trustee in reference to the use, occupation, management, or disposal of such building or place of worship, unless with the express consent and concurrence of the General Assembly of the said body or united body of Christians, or of the Commission of such Assembly, previously had, to such pursuit; of which consent and concurrence the only legal or admissible evidence shall be a written certificate, under the hand of the moderator and clerk of the General Assembly of the said body or united body of Christians, or of their then immediately preceding General Assembly, or under the hand of the parties generally known or understood to hold those offices for the time being; which written certificate shall be produced along with the summons or other proceeding commencing such pursuit, otherwise the same shall be utterly incompetent, void, and null, albeit such certificate really may exist: declaring, as it is hereby expressly provided and declared, that in the event of any person or persons, even holding such authority or appointment as aforesaid, or any person or persons whatsoever, pursuing the said trustees or trustee as aforesaid, unless with such express consent and concurrence as aforesaid, previously had to such pursuit, as said is, evidenced as aforesaid, such person or persons shall, immediately on such pursuit being commenced, *ipso facto*, forfeit and lose all and every right, title, and interest, and claim and demand, of whatever description, under these presents, and shall from thenceforward cease to have any concern therewith, or interest therein: and providing further, as it is hereby further expressly provided and declared, that whensoever any person holding such authority or appointment as said is, and enjoying the permission and sufferance foresaid, shall, by a sentence of the said body or united body of Christians, pronounced by one or other of its presbyteries, provincial synods, or by its General Assembly, or Commission of such Assembly, for the time being, or in any other way or manner in use in such matters, for the time, by the said body or united body of Christians, be deposed or suspended from office, or cut off from the said body or united body of Christians, or declared no longer a minister thereof, his authority and appointment foresaid shall, *ipso facto*, cease and determine; and the said trustees or trustee, acting for the time, shall not only be no longer bound, but be no longer entitled, to permit or suffer him to preach and expound the Holy Scriptures, or administer ordinances, or do or perform any act of religious worship, or other act or thing whatsoever, within the said building or place of worship, erected or to be erected, as said is; and shall be bound and obliged to debar him therefrom, aye and so long as he remain deposed or suspended or cut off."

Assembly and certificate of its Moderator; that the trustees may always sue, and that no one may defend except with consent and certificate foresaid; but that the trustees themselves are to be subject, in both management and disposal of the building, to the General Assembly for the time being, whose officers have right to pursue for its interest, and certified copies of whose Acts are to be binding upon all parties. The trustees are appointed and kept up by the congregation; and each trustee and each minister and member of the congregation must be in full communion with the Free Church.

These centralising regulations are qualified by the provision, that if at any future time *a third* of the whole ministers of the Free Church should separate in a body, declaring that they hold "the principles of the Protest of 18th May 1843," and are "carrying out the objects of the said Protest *more faithfully*" than those who remain, and shall form a separate body with presbyteries and General Assembly,—in such a case each congregation in Scotland shall be at liberty to choose which of the two they will adhere to, and the majority of the congregation shall take the church with them if they choose to join the protesters, paying, however, in that case, to the minority adhering to the larger body a proportional share of the value of the property.

The effect, or at least the intention, of this deed is evidently to treat the Church as one; to reserve to this one Church, by its several judicatories, and ultimately in its General Assembly, the power of deciding all ecclesiastical matters; to bind to such decision all property and results as to civil matters; and, by way of removing these decisions from the judgment of the Courts, to make them depend, not on the reasonable, but on the simple and arbitrary, will of the supreme ecclesiastical body. It forms in some respects a contrast to the tenure of the churches and manses of the Establishment, which is so far from being centralised that Erskine even calls it allodial; it is not very consistent with the powers that have been in Scot-

land usually claimed by presbyteries, whose territorial jurisdiction it rather ignores; and it is probably only justified by the constant repugnance which we have seen manifested by the Courts to abandon rights of property to Church authority, unless that authority is expressed in the contract or title in the most absolute and unquestionable terms.

2. *The United Presbyterian Church*, the most important Presbyterian body in Scotland outside the division of 1843, issued some years ago a paper of 'General Directions for the Guidance of Congregations in regard to Title-Deeds,' which is interesting and important. It gives *two* model trust-deeds,[1] either of which forms, this body was advised, "would so regulate the rights of property as in *most cases* to exclude the necessity of any appeal to the courts of law. The object of these conditions is to substitute the ascertainment of *numbers* in cases of division, whether in the congregation or Church at large, for and instead of an inquiry into and ascertainment of *principles and doctrines*." Of these two forms one may be shortly described as a trust for the congregation, the other as more like that of the Free Church, which is rather a trust for the governing body. The former style provides that the majority of the congregation are to have the property, "whatever may be the religious principles they may adopt, or the denomination with which they connect themselves." The latter ties it to the majority of the Synod "in case of any split or division taking place in it, whereby the members composing the said Synod may be separated into two or more parties, or in the event of the said Synod uniting, or resolving to unite, with any other religious judicatory or denomination."

[1] See these in the 'Rules and Forms' of the United Presbyterian Church—an easily accessible publication. The Free Church model deed, on the other hand, is only to be found in the printed Acts of Assembly 1851; but will probably be included in a volume, also of rules and forms, about to be issued by a committee of its Assembly, under the superintendence of the Rev. Sir Henry Moncreiff, Bart.

In both cases these definite rules are intended to bar "the difficult, and to the courts of law uncongenial, task of considering systems of doctrine or rules of Church government." The results of the two forms of tenure, in the event of ecclesiastical or congregational divisions, are very distinctly explained in a statement issued two years after the forms themselves were published in 1858.[1]

The same statement refers to the existing or older titles of the property belonging to this Church. The greater number are stated to have the deeds taken in trust for the congregation; and while "in many of the existing titles there is a

[1] "According to the FIRST form of trust-deed suggested in the printed appendix, the rights of the congregations, in the event of splits occurring, would be as follows:—

"(1.) If, without any change in the Synod of the Church, a division took place in the *congregation*, then if three-fourths of the whole communicants, male and female, resolve to leave the Church and to form a separate congregation, such three-fourths of the communicants would take the property, no matter what doctrines they held or with what Church they chose to connect themselves. If, however, the majority were *less than three-fourths*, the minority adhering to the Synod would retain the property.

"(2.) If a *division* took place in the *Synod*, either on the ground of a union or on any other ground, then the property would go with the *majority of the Synod*, provided one-third of the communicants adhered to such majority, and resolved to remain in connection with it. But if the number of communicants resolving to adhere to the majority of the Synod should be less than one-third, then the property would go wherever the majority of communicants chose, whether to the minority of the Synod or to any other communion.

"According to the SECOND form of trust-deed suggested in the published appendix, the property of the chapel, &c., would be regulated as follows:—

"(1.) If, without any change in the Synod of the Church, a division took place in the *congregation*, the property would belong to those communicants, male and female, who adhered to the Synod, so long as they were *recognised as a congregation* by the presbytery of the bounds. On ceasing to be so recognised, the property would be sold, and, after payment of debts and expenses, the surplus would be handed over to the Synod, to be applied to such of its funds as the Synod might think proper.

"(2.) If a split took place in the *Synod*, or a union was effected with some other body, the property would be held for that section of the communicants who should adhere to the majority of the Synod, or to the united supreme court of which such majority formed a part, so long as such communicants should be recognised by the presbytery of the bounds as forming a congregation. If the presbytery cease to recognise them as a congregation, then the property would be sold, and the free proceeds handed over to the Synod as before."

reference to the Synod of the denomination, this reference is in general merely descriptive, and the titles are in very few cases indeed so conceived as to vest the property in trust for the congregation only while, or so long as, it remains in connection with the governing body specified." The Committee of Synod express the result of titles in this condition by saying that the property is held in trust "for the congregation adhering to the *essential doctrines or principles* set forth and declared in the Standards, Testimonies, or Public Documents of the body indicated by the general name taken." To connect the congregation with the governing body, it is acknowledged, perhaps too strongly, that "the title must unambiguously make adherence to the governing body a proper condition of the right."

3. The other smaller Presbyterian bodies seem to have no common, or at least no authoritative, form of trust. These embrace the *Reformed Presbyterians* or Cameronians, in two sections, the larger part being favourable to union with the Free Church, and the smaller opposed to it; and the *Original Seceders*, being the remains of the Old-Light section of the Secession, after the very serious losses which that originally smaller section suffered by the return of many of their members to the Established Church in 1839, and to the Free Church in 1852. The older titles of these Churches are probably in some such form as those upon which the decisions which we have already recorded and reviewed were given. It may be useful to collate these into one view.

The *Perth* church (Craigdallie *v.* Aikman) was held partly upon an *ex facie* absolute disposition, with a back-letter declaring a trust for the Associate Congregation, and partly by trustees "for and in name of the whole subscribers and contributors" for Mr Wilson's meeting-house, "and the congregation who submit to his ministry, and in name of the whole

contributors towards a stipend, . . . and to the successors of the foresaid contributors."

The *Campbeltown* church was held by certain "trustees and managers, for themselves, and for behoof of the whole other managers and members, both present and to come, of the said Associate congregation," connected with a "Church of Relief" in Campbeltown—the "relief" being originally "the relief of Christians oppressed in their Christian privileges."

The *Kirkintilloch* church was held by "trustees and fiduciaries for behoof of the members of the aforesaid Associated congregation in Kirkintilloch, commonly called Seceders, and presently in connection with the United Secession Church."

The *Thurso* church was in 1776 held by trustees "as managers and trustees of the Associate congregation of Thurso, then in connection with the General Associate Synod of Edinburgh, and then under the ministerial inspection of D., minister of the Gospel in the said congregation, and his successors in office for the time being, in connection with the said General Synod."

4. It does not appear that the *Roman Catholic* and Episcopal Churches in Scotland have authoritatively approved or recommended any particular form of tenure for their property; yet Churches to which unity or centralisation is essential, must find some such device even more a necessity than those Presbyterian bodies which are ever ready to pulverise into their original congregationalism. In the case of the *Roman Catholic Church,* a body which has had an unbroken existence in many parts of Scotland since 1560, the penal laws for many generations must have restrained any expression of a trust for its benefit in deeds which were to be entered upon the public records; and even at the present day many of their buildings seem to be vested in the names of individuals (clergymen or adherents of the Church) and their assignees, but excluding

their legal heirs—without any statement that they are held by them in trust. Latent trusts of this sort must be admitted by the writ or oath of the trustee before they can be enforced; but when the *fact* of a trust is thus established, the *terms* of it may be proved in the ordinary way.[1] It may be taken for granted that reliance is in this case placed not so much on the law as on the internal organisation and discipline which the Romish communion has brought to perfection in the course of centuries. In other cases it appears that the titles are taken in the names of individuals as trustees for the Roman Catholic congregation of a particular place. Here the same sort of trust is raised which we have so often seen in Presbyterian cases; but the nomination of new trustees is more likely to be vested in the Vicar Apostolic, or other ecclesiastical authority, than (as among Presbyterians) in the popular body. It does not appear that any question of property has ever been tried in our Courts arising out of a breach of sentiment or opinion between a Roman Catholic congregation and the Church to which it belongs. In such a case, the principle of the Kirkintilloch decision—that the trust is a trust for the congregation, and that its original principles (doctrines?) must override any supposed authority in the general body of the Church—would come into the sharpest conceivable collision with the Church theory. Lord Eldon's judgment, on which the recent decisions profess to be founded, makes no distinction between Churches which are founded on doctrine, and Churches which are sources of doctrine. Yet there can be little doubt that, in the event of a Scotch congregation and its trustees seceding from the great Latin Church on the ground of its having changed its doctrine (*e.g.*, at the time of the promulgation of the doctrine of the Immaculate Conception[2]), means would be found for proving that the local trust was

[1] See Mr Maclaren on the Law of Trusts, i. 33.

[2] According to the Thurso case, such an action could be brought by a minority of any congregation, however small.

held not so much for a certain doctrine as for a certain institute, and that the trust barred all inquiry into the doctrine after the ecclesiastical institute had pronounced upon it. The question whether the Church is a living organism continually evolving doctrine, or a mere teaching institute uttering doctrine long since fixed, is at the root of most of these questions which law reluctantly discusses. It may have been too rashly assumed that the Protestant Churches are adequately described under the latter category. But there can be no doubt that the Romish Church belongs to the former, and that trusts for behoof of its congregations are trusts not for certain doctrines, but for a certain external authority.

5. *The Scottish Episcopal Church* must go at least as far as the Presbyterians in desiring submission to Church authority; and it is believed that their recent deeds distinctly express this—binding the congregation under the jurisdiction of the particular bishop, and attaching it indissolubly to the Church generally, and to its canons as well as its doctrines. The following clause [1] has been employed for this purpose (though, as we have said, there is no Style which has received ecclesiastical sanction), and many buildings are destined to be used "as a chapel or place of worship, and for the celebration of divine worship, according to the rites, ceremonies, and ordinances of the Episcopal Church in Scotland, and that the present and all succeeding congregations worshipping therein in all time coming be in communion with the said Episcopal Church in Scotland, and subject to the jurisdiction of the bishop exercising episcopal functions in the diocese or district in which the said chapel is situated, and for no other use or purpose." The bishop, and his successors perpetually, are often among the trustees, the nomination and renewal of whom from time to time is indeed sometimes given wholly to him; and when in

[1] For which I am indebted to Mr H. J. Rollo, W.S., Registrar of the Scottish Episcopal Church.

other cases the trustees are appointed by the congregation, the election is to be subject to the episcopal approval. In this case, as in almost all the other Churches, the ceasing of any trustee to be in communion with the Church infers his immediate loss of the trust function—a provision which, of course, is practically of great importance.

6. The *Congregational or Independent Churches* in Scotland are bodies to which much interest theoretically attaches, as the primitive form of Church society (in Scotland at least) to which many influences are continually dragging back all disestablished Churches. Independent Churches, too, have a special interest for us on subjects of creed; for they have always rather declined permanent creeds for particular congregations, while of course they are free from the authority of creeds emanating from a larger body.[1] Yet in the matter of title, with which we are at present dealing, this peculiarity does not appear. On the contrary, by a very curious paradox, Congregational Churches are the only Churches in Scotland of whose title-deeds a creed generally forms an integral part. Presbyterian Churches trust to the authority of their judicatories; Episcopalian Churches to that of their Pope, bishops, or canons; but Churches which have no authority outside of them or over them, must anchor themselves by their faith. Accordingly, in

[1] At the meeting of the Congregational Union of Scotland in 1866, the Rev. Henry Batchelor as chairman gave a clear exposition of the denominational opposition to all authoritative and subscribed creeds ('Inaugural Address,' M'Lehose, Glasgow, 1866). The reasons are not very different from those which we find long ago admirably stated by Episcopius in his preface to the 'Confessio Remonstrantium,' for which we may find room in the Appendix. It does not appear that non-subscription makes, or should make, any difference in a legal point of view, except that it increases the difficulty of proof as to the doctrines actually held. It is more important that the creed is not a standard, and is not authoritative. Theoretically, no Protestant creed has any authority; but the Presbyterian Church in Scotland has naturally enough drifted away from this principle, and periodical revision of the Westminster Confession has recently been opposed expressly on the ground that such a proceeding would tend to deprive it of its "authority."

Scotland as well as in England,[1] the property of Congregational Churches is generally by the terms of the deed astricted to the teaching of certain doctrines, or to the worship of God in connection with certain doctrines; and a short creed, or summary of these doctrines, is commonly embodied in the deed, or appended to it, and referred to, and this in many cases each new minister is bound to subscribe. We give in a note a specimen of one of these;[2] but it is striking that no doctrinal question founded upon a constitution of this sort has yet emerged in our Scotch Courts. The case of Connell *v.* Ferguson (23 D. 683, 6th March 1861), to which we have already alluded, was one in which the Court held that members of a Congrega-

[1] For valuable information on this point I have to acknowledge my obligations to William Morris, Esq., of Lincoln's Inn, Barrister-at-law. A few years ago many Congregational Churches in England, finding that they held nearly the same doctrines, but that each had a separate little creed of its own, attempted to fix upon some one short formula which all might use. There resulted what has often happened before—a long war, and a hopeless divergence and confusion. The Model Trust-Deed, however, with the doctrinal schedule appended, is inserted by the Congregational Union of 1866 in the 'Year-Book' for 1867, as "proposed," though not adopted. In the same volume will also be found their "Declaration of Faith, Church Order," &c.—preceded by a statement that it is not a bond of union, nor a standard, nor to be subscribed, but a mere declaration "for general information."

[2] The following is the trust upon which the church belonging to the late Dr Wardlaw of Glasgow was held: "That the trustees shall be bound to maintain and secure the chapel or place of worship now erected on said ground, and known by the name of the George Street Chapel, for the accommodation of the Church whereof the Reverend Doctor Ralph Wardlaw is at present pastor, and of all others who may choose there to attend the preaching of the Gospel. That the Church so to assemble in said chapel shall in all time thereafter, agreeably to their present views and practice, maintain the exclusive authority and entire sufficiency of the Holy Scripture on all matters of belief and of duty; the doctrines of salvation by free grace, through faith in the obedience and atonement of Jesus Christ God manifest in the flesh, a faith produced and maintained by the influence of the Holy Spirit, the third person in the blessed Trinity, and under the same influence evidencing its reality in all who possess it, by the various fruits of practical godliness in the life: the Independent or Congregational form of Church government, which is understood to imply the residence in the Church alone as a body of the right to choose the pastors and other office-bearers; the practice of infant baptism; and of communion in the ordinance of the Lord's Supper every Lord's-day; and farther, &c." (The other conditions are as to managers, funds, &c.)

tional Church who had subscribed largely for a new building, but had afterwards quarrelled with the majority and been excluded from the Church, had no right to re-claim their contributions or divert them from the purposes for which they were now lying in bank.

II. DECLARATIONS BY NON-ESTABLISHED CHURCHES AS TO THEIR RELATION TO THEIR CREED.

In commencing this volume, it was our intention to include in it a pretty full statement of what, in point of fact, are the Standards and Confessions of Faith of the different Churches in Scotland. The length to which the properly legal part of the volume has extended, is a sufficient reason for not doing this; but even were this disregarded, there are great difficulties in such an enterprise. How much of all the acts and monuments of Scottish Church history is to be held as the present faith of the different bodies concerned, is by no means an easy question. The nature and amount of authority which is to be attributed to the Books of Discipline, the Covenants, the Articles, the Canons, and the Confessions,—not to speak of the later Testimonies, Protests, and Manifestoes of the various bodies,—is by no means always a fixed thing even among the members of the same communion; and the whole subject is overshadowed by the question to which we shall have afterwards to recur, How far these Churches hold themselves entitled to add to, or to diminish, the articles historically adopted by them at particular times of their past history, or even contained in those Confessions which they now unquestionably utter?

We shall therefore content ourselves with a few notices of the more significant acts and utterances of the *larger* non-established Churches on the matter of their creed.

1. *The Free Church.*—We have already seen how strongly

the Free Church is identified with that party in the Church of Scotland which has always insisted on dating the adoption of the Confession of Faith from 1647, and on its having been therefore adopted independently of the State, and with some important qualifications which the State has never acknowledged. In the year 1846 the Free Church passed an Act by the authority both of its Assemblies and presbyteries, which recalls to us this old question, and illustrates at least the power of change. The object of the enactment, which we give in the Appendix,[1] is stated to be to make some formal changes on the questions and formula, suitable to the alteration in the position of the Church from its place as established. But in doing so the Church took occasion, first, to abolish the old statutory formula of 1794, used ever since that date by elders, and to substitute for it "for all office-bearers" the formula of 1711, with certain additions and alterations; and, secondly, 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 this, as in some other cases in Scotland, the Church in question avoids imputing anything worse than ambiguity to the Confession of Faith, and gives not a correction, but an explanation of the doctrine contained in it. At the same time, the Act is seemingly intended to relieve those who would otherwise have scrupled to sign the Confession, by a declaration of the *animus imponentis;* and so far as those

[1] Note A.

who thus subscribe under its authority are concerned, it seems as truly a qualification of the Confession, and therefore an addition to it, as the original Act of 1647 was. What those who sign the Free Church formula seem to sign, therefore, is the Confession of Westminster *plus* the modifications of 1647 and of 1846.[1] We give in the Appendix[2] the questions and formula appointed in this Act to be presented to all probationers, ministers, and office-bearers of the Free Church. These have of course been altered from what they were before, both by omission and addition; but this is theoretically a much smaller exercise of Church power than the Church's directly qualifying its Confession. A Church is probably bound to exact from its teachers as much *or as little* in the way of subscription as appears to it from time to time to be best for the interests of the Church.

The only other serious step which the Free Church has taken in this matter of creeds is the publication of an Act and Declaration in the year 1851, "Anent the Publication of the Subordinate Standards and other Authoritative Documents of the Free Church of Scotland." The earlier and more important part of this Act we give in the Appendix.[3] It contains some noteworthy distinctions between the various Westminster Assembly documents—which are all, however, grouped together under the general head of "subordinate standards"—the documents at and succeeding 1843 being simply characterised as "authoritative."

[1] Strictly speaking, a Confession with an explanation is a new Confession. It has an additional article. Hundreds of the propositions and paragraphs in the Westminster Confession are of the nature of explanation: indeed that document is constructed on the plan of general propositions flowing down deductively (*prono alveo*, as the jurist Heineccius loves to say) from one more general explanation to others more particular. An inference is an addition, and an explanation is equally so. Some may take the Confession with it who could not before, and some may be excluded now who were not before. For an explanation is a definition; and a definition may be a bar, or may be an outgate.

[2] Note A.

[3] Note B.

2. *The United Presbyterian Church.*—It is unnecessary to go back to the changes experienced or professed in respect to creed by the two bodies of the Secession and the Relief, whose union in 1847 formed the present United Presbyterian Church of Scotland.[1] But it is desirable to advert to those which date from that epoch itself. We give in the Appendix the ten articles which form the basis of Union;[2] and it will be observed that while the first, in traditional form, declares the Word of God to be the "only rule of faith and practice," the second, in giving a statement as to Church documents, employs expressions much more obviously in harmony with this general principle than those which the Church of Scotland had previously used. It states "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." A cautious definition of this kind fitly preludes the strong qualification which follows: "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." And it also harmonises with the exercise of the Church's right to change its Confession or subscription in future, much more naturally than the Formula of the Free Church does, with whatever protestations of liberty the latter may be accompanied. Accordingly, the United Presbyterian Church has wholly abolished the Formula of Subscription, which is the strictest, and, on Protestant principles, the most questionable part of the instruments of adherence to creed used by the Established and Free Churches; and has substituted for preachers, ministers, and elders, not even the shorter statutory form of 1693, but the simple statement, that the Confession

[1] And it is a difficult question. We must bear in mind the other presently existing body deriving from the Secession, which, though a minority, claims to represent that Church of Original Seceders whose majority joined the Free Church.

[2] Note C.

and Catechisms are "an exhibition of the sense in which I understand the Holy Scriptures." [1]

3. *The Scottish Episcopal Church.*—The changes of creed of this Church have been still more curious and unexpected than those we have noted. In the time of James VI. and Charles I. its creed was (with a short-lived exception already noticed [2]) the old Scottish Confession of Knox; and though Bishop Burnet seems to say that after the Restoration the bishops permitted the general use of the Westminster Confession, yet the older creed was the only one that had State authority—an important matter for a Church which had been erected upon the doctrine of the royal supremacy. The ritual under Episcopacy continuing almost the same as it had been under Presbytery, even the Apostles' Creed seems not to have been regularly used at this time. After 1688 matters seem to have remained in the same state, but the use of the English Prayer-book gradually crept into Scottish Episcopal congregations. Yet the adoption of the English Articles was very much an accident. In the year 1792 an Act of Parliament was passed relieving this Church from some of the penal restrictions which had been laid upon it after the rebellion of 1745, and after the second reading the peers who supported it against the strong opposition of the Lord Chancellor Thurlow, agreed that it would be impossible to carry it through except upon condition of the Scottish Church adopting the English Articles. The Bishop of Aberdeen, who, as Primus, was watching the progress of the bill, strongly objected; but found it would otherwise be impossible that the bill should pass. Accordingly, on 15th June 1792 the Act passed, ordaining that all Episcopal ministers should, under penalties, sign the Thirty-Nine Articles; and the Primus (Dr Skinner), calling a Convention of clergy and delegates on his return to Scotland, explained that "the inconvenience and apparent impropriety

[1] Note D.

[2] See page 38 for the Bishops' Creed of 1616.

which some might ascribe to the ecclesiastical anomaly of one Church being required, whether her clergy would or not, to subscribe the Articles of another, could be prevented by the Episcopal Church in Scotland adopting as her own the Articles of the Church of England, in like manner with the Liturgy of that Church."[1] This, however, was not done till the year 1804, when, after a good deal of discussion in Convocation as to the Calvinistic aspect of several of the Articles (a protest against which the Primus was desirous to insert into the subscription by way of preamble), they were subscribed, in terms of the Act, "willingly and *ex animo*." (The preamble which *was* written gives as a reason for the adoption, that no public Confession of Faith had been handed down; which was so far true that the old Confession was now superseded in the Established Church by another possessing the royal authority.)

Since 1804 there have been no direct or important changes with regard to the creed of the Episcopal Church. An important organic change was effected in its legislative body in 1811, when the Presbyters were admitted along with the Bishops to a share in the government and a seat in a second chamber. At this time, too, the Code of Canons of the Church was prepared, to subsequent changes upon which we have already had occasion to advert. In the Appendix we give such extracts from the Articles, the Canons, and the preamble to the Canons, as seem to bear most on the questions as to creed which have been raised.[2]

III. THE RIGHT TO CHANGE A CONFESSION OF FAITH.

Behind the title-deeds, by which non-established Churches generally try to exclude the law from the region of their creed, and the declarations which from time to time they put

[1] Mr Grub's Ecclesiastical History of Scotland, iv. 111. This valuable work treats the history of Scotland with great fairness and candour, though always from an Episcopalian point of view.

[2] Note E.

forth with regard to that creed, there remains the great and grave question of their right to change it. Do they claim such a right? Have they such a right?

That they claim such a right in words, and claim it very loudly and persistently, there can be little doubt. We may on this matter select a foremost example. We have already seen that the attention of the Free Church had been concentrated on this point soon after its great contest in 1843, and that it then prided itself on not being like others who were "tied to their Confession by civil enactments."[1] Last year the question of Confessions was found to be of interest here as elsewhere, and the Moderator of the Free Church Assembly devoted his inaugural address to a statement upon the subject (the chief part of which we give below[2]), which was

[1] Page 150.

[2] The Moderator (the Rev. Mr Wilson of Dundee, by no means an extreme or unrepresentative man) stated the case as follows: "The question occurs, and may properly be put, Whether such a representation of our freedom as this is true to our actual position? Are we thus free to ascertain and to act out the Lord's will? On the contrary, do we not meet here under well-defined and severe restrictions, and these, moreover, of human imposition? If we have been set free from those limitations which a power standing outside of the Church imposes, have we not fastened a yoke upon ourselves, and imposed limitations upon our own liberty? Have we not our forms of process, and, above all, a Confession of Faith? And are we not bound, instead of looking directly into the perfect law of liberty, to guide our procedure and our declarations of truth by these human documents? Have we not thus entangled ourselves with a yoke of bondage which prevents us from walking in all the breadth of the Divine statutes? At such a time as this, when such questions are being agitated around us, it may not be inappropriate, however briefly, to furnish an answer to them. The questions really resolve themselves into one, which is this, What is the relation in which the Church stands to her Confession of Faith?"

To this he answers generally: "Our Confession of Faith is the basis of our organisation. We do not meet as men who for the first time are looking into the Word of God, beginning to form and to express our beliefs of what it contains. We meet as men who have searched the Scriptures, who have examined the testimony they bear to the things which pertain to the common salvation, who have come to the conclusion that those truths recorded in our Confession are verily truths of God's Word. We meet, not to lay again the foundations, but on a common basis of established truth."

And again: "But the Confession of Faith is not merely a bond of fellowship and union within the Church; it is, moreover, a testimony to those

received by the Assembly with unanimous acquiescence or applause. In it he raises the question in the broadest way, whether the Church is indeed free from her Confession,

who are without. It is a declaration to the whole world of what we understand to be the mind of God in His Word. It is a banner which God has given us to be displayed because of His truth."

The answer, however, to the doubt proposed, is in the following passage: "But in all this there are two things implied, which we must be careful never to lose sight of.

"1. That the Church finds the Confession to be in accordance with her present beliefs, to be an adequate expression of her present attainments in divine knowledge. No Confession of Faith can ever be regarded by the Church as a final and permanent document. She must always vindicate her right to revise, to purge, to add to it. We claim no infallibility for it, or for ourselves who declare our belief in the propositions which it contains. We lie open always to the teaching of the Divine Spirit, nay, we believe in the progressive advancement of the Church into a more perfect knowledge of the truth. It is the Word of God only which abideth for ever. In the Bible we have a complete revelation, but we are slow of heart to apprehend all that God has taught us there, and the experiences and errors of the past, as well as the better materials now provided for an intelligent investigation of Scripture truth, may possibly advance the Church and the world to such a position, that a protest against some exploded errors may no longer be necessary, and a fuller statement of some truth may be desirable. It is open to the Church at any time to say, We have obtained clearer light on one or other or all of the propositions contained in this Confession, we must review it; the time has come for us to frame a new bond of union with each other, a new testimony to the world. If this freedom do not belong to us, then indeed we are in bondage to our Confession, and renounce the liberty wherewith Christ has made us free. I speak thus in vindication of a great principle, and not at all in sympathy with those who profess already to have found that the Confession of Faith is not an adequate or true representation of the truth which they find in the Word of God. It is not by vague allegations to that effect that the Church is to be moved from her position, but by a demonstration from the Scriptures that we have misapprehended and mis-stated some truth which our Confession declares to be in the Bible, and which is not to be found there.

"But, 2d. It is implied in all that I have been stating, that we are not at liberty to hold forth a Confession which we do not believe. For in such a case the Church is absolutely without a Confession. A Confession which is not a confession of our faith can serve none of the purposes for which such a document is designed. It can neither certify to the world what truth the Church teaches, and holds to be divine, nor does it indicate on what terms the office-bearers of the Church are associated. It ceases to be either a bond of union or a public testimony. It is lawful for the Church to revise her Confession, and adjust it to her present attainments and inquiries; it is lawful for her altogether to abolish or dispense with a Confession, if, indeed, without one any compacted organisation were possible; but to retain a Confession which has ceased to be believed can never be lawful."

holding this to be an important part of that "liberty with which Christ makes free." And he answers that "it is lawful for the Church to revise her Confession, and adjust it to her present attainments and inquiries:" it is open to her to change "one or other or all of the propositions contained in the Confession;" she must "always vindicate her right to revise, to purge, to add to it;" or even "altogether to abolish or dispense with a Confession, if, indeed, without one any compacted organisation were possible." The language is quite in accordance with what we have seen already claimed in the Free Church Catechism; and it expresses the feeling of the United Presbyterian Church of Scotland, at least as much as it does that of the Free Church itself. And yet, it leaves great difficulties.

It is obvious that the right claimed is not merely the right of changing one document for another document, with exactly the same propositions in it. It is a power to "purge" or to "add to" the Confession—*i. e.*, to vary the contents of it. And this at once raises the difficulty. How far does this power of change go? Does the Free Church claim the right to give up the divinity of Christ next year? Can the United Presbyterian Church at its next Synod declare the Old Testament to be uninspired? Are there no doctrines fundamental to a Church? Are there no doctrines fundamental to these Churches? Can they get rid of everything in their Confessions? *Do they claim this?*

It is impossible to answer this in the affirmative. The party in the Scottish Church which so loudly proclaims its right to change its Confessions, is that which has always coveted and obtained the reputation of orthodoxy (nay, which, to do it justice, has always desired to live in orthodoxy, and upon occasion has been ready to die for it[1]); and amid all

[1] "Well might men prize their *credo*, and raise stateliest temples to it and reverend hierarchies, and give it the tithe of their substance—it was worth living for and dying for."—THOMAS CARLYLE.

such verbal proclamations, there is visible in these bodies practically the strongest dislike to change any of their doctrines or modify any of their standards. Without a dissentient voice they claim the right to change their Confession—to revise and to purge it; and this necessarily implies the right to change the whole expression of their belief, and to alter at least the details of their doctrines. But they would hesitate to claim the right to change their doctrine generally, and it is probable that they would absolutely reject the right to abandon all their doctrines.

There is a sense in which it is open to an *individual* to reject all doctrine. It may be wrong to do so. But there is a sense in which every man has a right to do what is wrong. It is within the power of his responsible will, and no one can restrain him if he chooses. It is otherwise with a Church. There are some acts which a Church cannot do. If there is any doctrine essential to a Church—fundamental to it—the right to abandon such a doctrine is a contradiction in terms. It is suicidal and impossible.

And if the Free Church, or any other non-established Church in Scotland, were to claim such a right, it is plain that the civil courts would not allow it. The decisions traced in the last two chapters are conclusive as to this, if indeed they do not go a great deal farther. It remains to be seen whether the Court will grant to these bodies the right of departing from their actual Confession of Faith—by no means an easy question. It may well be, notwithstanding all the protestations of the Free Church, that the Court will find, that though not "tied to its Confession by civil enactment," though "set free from those limitations which a power standing outside of the Church imposes," it has yet as effectually "fastened a yoke upon itself." In cases of property, and cases of civil right, the question for the Court will not be, What does this Church say about itself and its doctrinal principles? but, What are, in point of fact, the doctrinal principles of this Church? The Court will not

hold itself precluded from farther inquiry by any utterances which these Churches may make about their principles, like those various and inconsistent ones of the Free Church and its party in 1851, and 1846, and 1647, and at innumerable intervening times. Still less will the Court hold itself precluded from inquiry (for civil purposes) by the mere protestation of a Church that it is free from its Confession, and that therefore the civil law has no right to bind it to it; for it remains to be seen how far this protest has any sincerity, or indeed any meaning. The tendency of the Church of Scotland from the earliest times (and the historical Church of Scotland is best represented by the Free Church) has been to claim a maximum of freedom and immunity from all without, and to allow a minimum to all within. And in its dealing with the civil court its bearing has been equally ambiguous. No Churches on earth would be so indignant as the nonconformist Churches of Scotland at the courts of law asserting a right to tie them to their present doctrines; none would so loudly assert their freedom to change, as a great and fundamental principle. Yet, in the event of any change—certainly any serious change—being actually proposed, none would be so ready not only to resist it, but to resist it as a change of the constitution, a subversion of the principles, of the Church.

Now one thing is certain, they cannot have both these inconsistent rights. One of them must be abandoned, or both must be limited. If there is an absolute right to change all doctrine, then no doctrine can be fundamental. If, on the other hand, all the doctrines of a Church are fundamental, are principles, then the Church has no right to change any one of them, even in the event of her being convinced of its falsehood, but in doing so would lose her existence and identity. The only escape from this dilemma is by holding that *all doctrines are not principles*—that some are fundamental and others are not.

There is an essential difference on this point between a Church established and a Church not established—a difference to which the Free Church (to which we still adhere for illustration) has not yet become habituated. In the passage from its Catechism already quoted[1] it says of an Established Church: "It is one thing for the civil privileges and endowments of a Church to be tied to a Confession by civil enactments, and quite another thing for a Church itself to be so. In the former case, the Church, when she finds that any articles of her Confession are unscriptural, is at liberty to renounce them, being only bound, if she do, to resign her temporalities." It is conceivable that a similar distinction might present itself to the minds both of churchmen and lawyers, as applicable to non-established Churches and their property. Would it not satisfy the claims of a *free* Church with regard to the articles of its Confession, to hold that "it is at liberty to renounce them, being only bound, if it do, to resign its temporalities" to those who do not renounce them? There is no doubt that this is enough to save the "freedom" of the Church, in the sense of 1843 (which indeed is in no way imperilled, whatever the result of the legal question may be); and this method of cutting the knot has been alluded to on the Bench already, and seemingly by Lord Cranworth in the last important ecclesiastical case.[2] The objection to it is not on the side of the Church (at least the Free Church would probably accept this undesirable solution as soon as any other), but on the side of

[1] Page 150.

[2] See page 319 (Forbes *v.* Eden). "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 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." —Lord Cranworth. See also Lord Barcaple's note to the interlocutor in the Outer House in the same case.

the legal principle. The principle which we have had the responsibility of tracing through the last two chapters as applicable to non-established Churches, is essentially a principle of equity. According to it the property of non-established Churches is tied to these bodies, not by an arbitrary bond (like the statutory enactment in the case of an established Church), but by the mere doctrine of trust and honesty. For the Court does not create a trust; it only enforces that which exists. It does not impose principles upon a Church; it only carries out existing principles into their civil consequences. If the Court at any time holds that a non-established Church (or congregation) has forfeited its property by change of doctrine, it is only because it holds that it had no *right* to make that change of doctrine. And conversely, if the Court should in any case be satisfied that a Church had right to make a specific change of doctrine, in that case there would be no forfeiture of its property consequent upon the act. There is, therefore, no room for anything so monstrous as a Church which by her constitution is free to change her Confession, but under the risk of civil penalties if she do so. The ecclesiastical rights, and their civil results, stand or fall together. The importance of the recent Burntisland case is, that it shows that the Courts will not control or interfere with the doctrinal or Church acts of a non-established Church directly; it will only, in any case, interfere with the civil consequences—a concession which, if it had been granted to the Church of Scotland before 1843, would have saved it, and averted the Disruption. But this case does not show that the Courts will not inquire into and deal with the doctrine of a non-established Church, and with its powers about doctrine, when such an inquiry is necessary to enable it to deal with civil consequences *which have actually occurred.* The whole drift of the cases shows that it will do so, and that as on the one hand it will not be restrained from doing it by any mere protestations of doctrinal freedom on the part of a Church, so on the other, if that free-

dom is proved to be actually a principle of the Church, and its property appears to be truly held under such a condition, the Court will, questionless, give effect to the condition, acknowledge the principle, and fulfil the trust.

But it is plain enough, from this consideration of these utterances of the Free Church, that in dealing with it and its associates we must not confine ourselves to the mere question, Does it *claim right* to change its creed? We must put the question in the other form, *Has it* a right to change its creed? That is, Is this right one of its principles, and part of its constitution?

It is no part of the plan of this work, which deals merely with principles of law, to anticipate the answers that may be given to such a question on behalf of the different ecclesiastical bodies in Scotland. And what little we find it possible to say must have reference to the historically allied group of non-established Presbyterian Churches.

Before coming to them, however, it should be remarked, with regard to the Scottish Episcopal Church, that the declaration as to doctrine, which we have already had occasion to quote,[1] may not necessarily be inconsistent with a right to change the creed. Doctrine is there opposed to practice; and when it is said to be *immutable*, what is meant may be merely that truth is immutable, while practice varies. In this way no statement would be contained in it as to the immutability of expressions of truth; nor is there necessarily any denial of the power of the Church, in Synod or General Synod, to vary, enlarge, or diminish that expression. It must be remembered, on the one hand, that the right of change has historically been exercised by this Church to a more startling extent than by, perhaps, any other in Scotland; and on the other, that all hierarchical Churches, especially if they lay stress on Church continuity and succession, make much more of their liberty from time to time to deliver new doctrine to the people than

[1] Pages 314 and 466.

of any obligation upon them to be bound under that doctrine when delivered. It is probable indeed that the right not to be legally bound by or to declarations of doctrine would be insisted upon quite as strongly by a very *high* Church, which has uttered many creeds, as by a Congregational Church in which there is no authoritative, or permanent, or subscribed creed, and no standard. And by none would it be put forth more certainly than by the Catholic Church of Rome, notwithstanding its many creeds and its claim of dogmatic infallibility. Lawyers, indeed, will probably find the mass of Churches in all ages rather on the side of a complete Church freedom and authority with respect to their creeds; and the primitive Church had probably no creeds in the modern sense at all.[1] The Presbyterian Churches in Scotland are in some respects on this point in the most doubtful position of all. For they, based originally upon private judgment, and now the loudest in their claim of freedom from Confessions, have so anchored themselves to their doctrines in time past as to make it doubtful what that claim means.

With regard to these Presbyterian non-established Churches only one thing seems to be tolerably clear.

1. *They are not founded on any documents.* With regard to the Free Church, the manifestoes of 1843 (which for this reason mainly we have included in this work), as well as the whole history of the Church controversy there summarised, show that there is no particular document, civil or ecclesiastical, and no particular external constitution, upon which it is based. The Church of Scotland, in its conflict with the Court, argued keenly that both the Revolution Settlement in 1688,

[1] "I avow my belief that freedom from symbols and articles is abstractedly the highest state of Christian communion, and the peculiar privilege of the primitive Church." Yet creeds are now necessary. "To attempt comprehensions of opinion, amiable as the motive frequently is, is to mistake arrangements of words, which have no existence except on paper, for habits which are realities." —Dr John Henry Newman on 'The Arians of the Fourth Century' (Rivingtons, 1833), p. 41.

and the previous Establishment a hundred years before, recognised her supposed liberties. But this was a subordinate part of the argument. What it contended with far more earnestness, and what it was of far more importance for it to contend, was that, whether its reading of the Revolution Settlement and the other legal constitutions was right or not, *the Church was not founded on them*, and could not be bound by them in opposition to the Church principles on which it was originally and inalienably based.[1] There can be no doubt that it is on this principle that the Free Church is now founded, and that the other non-established *Presbyterians*, whether Voluntaries or not, all agree with it emphatically on this point. And it seems to be implied in these utterances of 1843, that a Church can no more be founded on a mere ecclesiastical document than on a civil one. We have seen how strongly this is corroborated by the history of the Confessions, by far the most important documents with which the Church has had to do—by the many differences between the old creed of the Church (the Scottish Confession) and that for which it was changed (the Westminster Confession); and by the various subsequent modifications which have been approved of by the different bodies now nonconformist—modifications either upon the contents of the Confession itself, or upon the formula of adherence to it by office-bearers.

Whatever the claim by these bodies of a right to change their Confessions may mean, and whether under it they can get rid of the doctrines contained in these documents or not, they certainly seem not only to claim, but to have a right at any moment to get rid of *the documents themselves* in whole or in part.

2. But behind this there lies a far more difficult question.

[1] By far the most powerful argument of the Court was, "It may be very true you are a Christian Church, but you are also the Church of Scotland, and must obey the conditions of establishment." (See p. 136, 179, 181, and 258.) The answer was, "We are not primarily or essentially the Church of Scotland, but a Church of Christ." The rejoinder was too obvious.

These Churches are bound by their principles, as distinguished from their documents. Are they bound by their *principles as distinguished from their history?* On this question it is impossible to give any answer, for different tendencies are struggling in the bodies concerned; and the question, if it is a soluble one at all, is far from solution. In great crises, the Church party in Scotland has always fallen back upon the original principles of a Christian Church, has held itself bound only by these, and has denounced all interference with it, while standing upon these, as something worse than mere ordinary injustice. But in its usual and more peaceful times, the tendency of the Church has been to add to this a part, or a great part, or the whole, of its previous history. And it is only where, from circumstances, both could not be held together, that a separation has been consented to. Thus in 1843 the Free Church cast off establishment as a *fact* of its history which had become inconsistent with the *principle* of freedom. But the United Presbyterian Church has in like manner cast off the *doctrine* of establishments as inconsistent in its view with the same higher principle. For it must be remembered that the holding of a doctrine, at least of a subordinate doctrine, *is a fact,* a fact which may come into collision at any moment with a higher principle, just as a matter of practice (a fact of another kind) may do. Thus the question, whether non-established Churches in Scotland are bound to their history, includes the question formerly raised, whether they are bound to all their doctrines. For if a doctrine held is not an essential of the Church—is not fundamental to its existence—it comes to be nothing more than a piece of its history. But it may be an important and venerable part of its history: And then the question arises, Whether history is not binding? Does the past of a Church not leave obligations upon those who succeed to that inheritance? Especially, are not the doctrinal attainments which were the result of that past binding upon succeeding generations? Is each generation free to revise or purge its

creed (outside the fundamentals), with as much freedom as if the generations before had not committed themselves to all the articles contained in it? Has the Church no continuity? Is the present generation not bound to realise its unity with those before it? Is not the *onus probandi* on those who reject the doctrines which have been already received and professed? Or is it upon those who acknowledge that these doctrines are not *de fide* of the Church universal?[1]

The question for law would come to be, Can you arrive at a separate knowledge of a Church's *principles*, disentangling them from, first, its documents; second, its history; and third, its doctrines?

It is impossible to avoid such questions when Churches which are passionately attached to doctrine claim so boldly the right to revise, purge, or abolish the Confession of their Faith; and when there is so much, both of reason and authority, to be urged on both sides.

[1] See Note F in the Appendix, on the Theory of the Church and its Creed.

APPENDIX TO CHAPTER VII.

NOTE A.

ACT OF THE GENERAL ASSEMBLY OF THE FREE CHURCH OF SCOTLAND ANENT QUESTIONS AND FORMULA.[1]

Edinburgh, 1*st June* 1846. *Sess.* 24.

Whereas it has become necessary, in consequence of the late change in the outward condition of the Church, to amend the Questions and Formula to be used at the licensing of probationers, and the ordination of deacons, elders, and ministers respectively, the General Assembly, with consent of a majority of the presbyteries, enact and ordain that the following shall be the questions so to be used; and considering that the Formula to this Act subjoined embodies the substance of the answers to the said questions, the Assembly appoint the same to be subscribed by all probationers of the Church before receiving licence to preach the Gospel, and by all office-bearers at the time of their admission. 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.

I. ELDERS AND DEACONS.

Questions to be put before Ordination.

1. Do you believe the Scriptures of the Old and New Testaments to be the Word of God, and the only rule of faith and manners?

2. 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?

3. Do you own and acknowledge the Presbyterian Church government of this Church, by kirk-sessions, presbyteries, provincial synods, and general assemblies, to be the only government of this Church; and do you engage to submit thereto, concur therewith, and not to endeavour, directly or indirectly, the prejudice or subversion thereof?

[1] General Assembly 1846, Act 12.

4. Do you believe that the Lord Jesus Christ, as King and Head of the Church, has therein appointed a government in the hands of church-officers, distinct from, and not subordinate in its own province to, civil government, and that the civil magistrate does not possess jurisdiction or authoritative control over the regulation of the affairs of Christ's Church; and do you approve of the general principles embodied in the Claim, Declaration, and Protest adopted by the General Assembly of the Church of Scotland in 1842, and in the Protest of ministers and elders, commissioners from presbyteries to the General Assembly, read in presence of the Royal Commissioner on 18th May 1843, as declaring the views which are sanctioned by the Word of God, and the standards of this Church, with respect to the spirituality and freedom of the Church of Christ, and her subjection to Him as her only Head, and to His Word as her only standard?

5. Do you promise to observe uniformity of worship and of the administration of all public ordinances within this Church, as the same are at present performed and allowed?

6. Do you accept of the office of an elder [deacon] of this congregation, and promise, through grace, faithfully, diligently, and cheerfully to discharge all the duties thereof?

II. PROBATIONERS.

Questions to be put to Probationers before they are Licensed to preach the Gospel.

1. Do you believe the Scriptures of the Old and New Testaments to be the Word of God, and the only rule of faith and manners?

2. Do you sincerely own and believe the whole doctrine of the Confession of Faith, approven by the General Assemblies of this Church, to be the truths of God, contained in the Scriptures of the Old and New Testaments; and do you own the whole doctrine therein contained as the confession of your faith?

3. Do you sincerely own the purity of worship presently authorised and practised in this Church, and also own the Presbyterian government and discipline; and are you persuaded that the said doctrine, worship, and discipline, and Church government, are founded upon the Holy Scriptures, and agreeable thereto?

4. Do you believe that the Lord Jesus Christ, as King and Head of the Church, has therein appointed a government in the hands of church-officers, distinct from, and not subordinate in its own province to, civil government, and that the civil magistrate does not possess jurisdiction or authoritative control over the regulation of the affairs of Christ's Church; and do you approve of the general principles embodied in the Claim, Declaration, and Protest adopted by the General Assembly of the Church of Scotland in 1842, and in the Protest of ministers and elders, commissioners from presbyteries to the General Assembly, read in presence of the Royal Commissioner on 18th May 1843, as declaring the views which

are sanctioned by the Word of God, and the standards of this Church, with respect to the spirituality and freedom of the Church of Christ, and her subjection to Him as her only Head, and to His Word as her only standard ?

5. Do you promise that, through the grace of God, you will firmly and constantly adhere to, and in your station, to the utmost of your power, assert, maintain, and defend the said doctrine, worship, and discipline, and the government of this Church by kirk-sessions, presbyteries, provincial synods, and general assemblies ?

6. Do you promise that in your practice you will conform yourself to the said worship, and submit yourself to the said discipline and government of this Church, and not endeavour, directly or indirectly, the prejudice or subversion of the same ?

7. Do you promise that you shall follow no divisive courses from the doctrine, worship, discipline, and government of this Church ?

8. Do you renounce all doctrines, tenets, or opinions whatsoever, contrary to or inconsistent with the said doctrine, worship, discipline, and government of this Church ?

9. Do you promise that you shall subject yourself to the several judicatories of this Church ? Are you willing to subscribe to those things ?

III. PROBATIONERS AFTER BEING CALLED BY A CONGREGATION.

Questions to be put to Probationers before Ordination (and also to a Minister already ordained, at his Admission to a Pastoral Charge).

1. Do you believe the Scriptures of the Old and New Testaments to be the Word of God, and the only rule of faith and manners ?

2. Do you sincerely own and believe the whole doctrine contained in the Confession of Faith, approven by former General Assemblies of this Church, to be founded upon the Word of God; and do you acknowledge the same as the confession of your faith ; and will you firmly and constantly adhere thereto, and to the utmost of your power assert, maintain, and defend the same, and the purity of worship as presently practised in this Church ?

3. Do you disown all Popish, Arian, Socinian, Arminian, Erastian, and other doctrines, tenets, and opinions whatsoever, contrary to and inconsistent with the foresaid Confession of Faith ?

4. Are you persuaded that the Presbyterian government and discipline of this Church are founded upon the Word of God, and agreeable thereto ; and do you promise to submit to the said government and discipline, and to concur with the same, and not to endeavour, directly or indirectly, the prejudice or subversion thereof, but to the utmost of your power, in your station, to maintain, support, and defend the said discipline and Presbyterian government by kirk-sessions, presbyteries, provincial synods, and general assemblies ?

5. Do you believe that the Lord Jesus Christ, as King and Head of the Church, has therein appointed a government in the hands of church-

officers, distinct from, and not subordinate in its own province to, civil government, and that the civil magistrate does not possess jurisdiction or authoritative control over the regulation of the affairs of Christ's Church; and do you approve of the general principles embodied in the Claim, Declaration, and Protest, adopted by the General Assembly of the Church of Scotland in 1842, and in the Protest of ministers and elders, commissioners from presbyteries to the General Assembly, read in presence of the Royal Commissioner on 18th May 1843, as declaring the views which are sanctioned by the Word of God, and the standards of this Church, with respect to the spirituality and freedom of the Church of Christ, and her subjection to Him as her only Head, and to His Word as her only standard?

6. Do you promise to submit yourself willingly and humbly, in the spirit of meekness, unto the admonitions of the brethren of this presbytery, and to be subject to them, and all other presbyteries and superior judicatories of this Church, where God in His providence shall cast your lot; and that, according to your power, you shall maintain the unity and peace of this Church against error and schism, notwithstanding of whatsoever trouble or persecution may arise, and that you shall follow no divisive courses from the doctrine, worship, discipline, and government of this Church?

7. Are not zeal for the honour of God, love to Jesus Christ, and desire of saving souls, your great motives and chief inducements to enter into the function of the holy ministry, and not worldly designs and interests?

8. Have you used any undue methods, either by yourself or others, in procuring this call?

9. Do you engage, in the strength and grace of Jesus Christ, our Lord and Master, to rule well your own family, to live a holy and circumspect life, and faithfully, diligently, and cheerfully to discharge all the parts of the ministerial work, to the edification of the body of Christ?

10. Do you accept of and close with the call to be pastor of this congregation, and promise, through grace, to perform all the duties of a faithful minister of the Gospel among this people?

IV. FORMULA.

(To be subscribed by Probationers before receiving Licence, and by all Office-bearers at the time of their Admission.)

I, , do hereby declare that I do sincerely own and believe the whole doctrine contained in the Confession of Faith, approven by former General Assemblies of this Church, to be the truths of God; and I do own the same as the confession of my faith; as likewise I do own the purity of worship presently authorised and practised in the Free Church of Scotland, and also the Presbyterian government and discipline thereof; which doctrine, worship, and Church government, I am persuaded, are founded on the Word of God, and agreeable thereto: I also approve of the general principles respecting the jurisdiction of the Church, and her

subjection to Christ as her only Head, which are contained in the Claim of Right and in the Protest referred to in the questions already put to me; and I promise that, through the grace of God, I shall firmly and constantly adhere to the same, and to the utmost of my power shall, in my station, assert, maintain, and defend the said doctrine, worship, discipline, and government of this Church, by kirk-sessions, presbyteries, provincial synods, and general assemblies, together with the liberty and exclusive jurisdiction thereof; and that I shall, in my practice, conform myself to the said worship, and submit to the said discipline, government, and exclusive jurisdiction, and not endeavour, directly or indirectly, the prejudice or subversion of the same; and I promise that I shall follow no divisive course from the doctrine, worship, discipline, government, and exclusive jurisdiction of this Church, renouncing all doctrines, tenets, and opinions whatsoever, contrary to or inconsistent with the said doctrine, worship, discipline, government, or jurisdiction of the same.

NOTE B.

DECLARATION BY THE FREE CHURCH ASSEMBLY AS TO STANDARDS.

"*At Edinburgh, the* 31*st day of May* 1851 *years. Sess.* 19.

"Which day the General Assembly of the Free Church of Scotland being met and duly constituted, *inter alia*,

"The General Assembly, on considering the Report of the Committee to which this matter was referred at a previous diet, unanimously agreed to sanction, as they hereby sanction, the publication of a volume, containing the subordinate standards, and other authoritative documents of this Church. And with the view of directing attention to 'all the way by which the Lord has led us,' as well as to the testimony which He has honoured this Church to bear for the whole truth of God regarding His Church, and His glory therein, the General Assembly did, and hereby do, adopt the following Act and Declaration:—

"When it pleased Almighty God, in His great and undeserved mercy, to reform this Church from Popery by presbyters, it was given to the Reformers, amid many troubles, to construct and model the constitution of the Church, in doctrine, worship, discipline, and government, according to the Word of God, and not according to the will of earthly rulers. Our fathers, accordingly, in singleness of eye and simplicity of heart, without regard to the favour or the fear of man, so applied themselves to the work to which they were called, that they were enabled, with remarkable unanimity, to settle it upon the basis which, by the blessing of God, has continued unaltered down to the present time.

"Of this settlement, besides that profession of the evangelical faith which

is common to all the Churches of the Reformation, the peculiar and essential features are: I. The government of the Church by presbyters alone, or by that order of men which is indicated in the New Testament indiscriminately by the terms presbyters and bishops or overseers—πρεσβύτεροι and ἐπίσκοποι; and, II. The subjection of the Church, in all things spiritual, to Christ as her only Head, and to His Word as her only rule.

"From the beginning these principles have been held as fundamental by the Reformed Church of Scotland; and as such they were recognised in her earliest standards—the First and Second Books of Discipline—adopted by her own independent authority, before the full sanction either of the Crown or of the Parliament was given to the Reformation which God had accomplished on her behalf. For these principles, the ministers and members of this Church, as well as the nobles, gentlemen, and burgesses of the land, from the first united in contending: and on more than one occasion, in the course of these early struggles—as in 1580, when the National Covenant was signed—our reforming ancestors bound themselves one to another, as in the sight of God, to maintain and defend them against all adversaries.

"Farther: while this Church has ever held that she possesses an independent and exclusive jurisdiction or power in all ecclesiastical matters, 'which flows directly from God, and the Mediator, Jesus Christ, and is spiritual, not having a temporal head on earth, but only Christ, the only King and Governor of His Church;' she has, at the same time, always strenuously advocated the doctrine taught in Holy Scripture—that nations and their rulers are bound to own the truth of God, and to advance the kingdom of His Son. And accordingly, with unfeigned thankfulness, did she acknowledge the good hand of the Lord, when, after prolonged contests with the enemies of the Reformation—and, in particular, with certain parties who sought not only to uphold a form of Prelatic government in the Church, but to establish the supremacy of the Crown in all causes, spiritual and ecclesiastical, as well as civil and temporal—a national recognition and solemn sanction of her constitution, as it had been settled by her own authority, according to the Word of God, was at last obtained;—first, in the Act of Parliament 1567, and again, more completely, in the Act of Parliament 1592—then and since regarded by her as the great constitutional charter of her Presbyterian government and freedom.

"Thus the first Reformation was accomplished.

"But before a generation had elapsed, a sad change for the worse took place. Through defection in the Church, and tyrannical invasion of her independence by the civil power, the Presbyterian polity and government were overturned, and manifold abuses and corruptions in discipline and worship were insidiously introduced. A second Reformation accordingly became necessary.

"And here, again, it pleased Almighty God, as in that former Reformation of the Church from Popery by presbyters, to give to our fathers light and grace; so that, taking His Word as their only rule, and owning His Son as their only King in Zion, they were enabled not only to restore the

constitution of the Church as it had stood when her first Reformation seemed to be completed, but to aim also at carrying out more fully the great essential principles of that constitution, and securing more effectually than before the prevalence of these principles over all the land, as well as their permanency through all coming ages.

"In seeking this noble end, our fathers were again led, for their mutual security, as well as for the commending of so righteous a cause to Him by whom it was committed to them, to have recourse to the solemnity of a holy confederation.

"The National Covenant was renewed at the beginning of the contendings for this second Reformation, with an extension of its weighty protests and censures, to meet whatever new fruit the old stock of Prelatic and Erastian usurpation had been bearing. And the Solemn League and Covenant was afterwards entered into, in concert with England and Ireland, 'for the reformation and defence of religion, the honour and happiness of the king, and the peace and safety of the three kingdoms;' and, in particular, for 'endeavouring to bring the Churches of God in the three kingdoms to the nearest conjunction and uniformity in religion, confession of faith, form of Church government, directory for worship, and catechising.'

"Thus religiously bound and pledged to God and to one another, our fathers were enabled to effect the reformation of this Church from Prelacy, even as their fathers in like manner effected its reformation from Popery. In the ever-memorable Assembly held at Glasgow in 1638, as well as in subsequent Assemblies, it was declared that 'all Episcopacy different from that of a pastor over a particular flock was abjured in this Kirk;' and provision was made, accordingly, for its complete removal, and for the settlement of Church government and order upon the former Presbyterian footing.

"In all this work of pulling down and building up, the independent spiritual jurisdiction of the Church, flowing immediately from Christ her only Head, was not only earnestly asserted, but practically exercised. For the whole work was begun and carried on without warrant of the civil power. And it was only after much contending, and with not a little hesitation, that the civil power began to interpose its authority in the years 1639 and 1641, to support and sanction what the Church had, by the exercise of her own inherent jurisdiction, already done.

"Thereafter, for the better prosecution of the work on hand, and in the face of the manifest purpose of the king and his adherents to crush it altogether, this Church, by commissioners duly named by the General Assembly, took part in the Assembly of Divines which met at Westminster in 1643. And having in view the uniformity contemplated in the Solemn League and Covenant, she consented to adopt the Confession of Faith, Catechisms, Directory for Public Worship and Form of Church Government agreed upon by the said Assembly of Divines.

"These several formularies, as ratified, with certain explanations, by divers Acts of Assembly in the years 1645, 1646, and particularly in 1647,

this Church continues till this day to acknowledge as her subordinate standards of doctrine, worship, and government; with this difference, however, as regards the authority ascribed to them, that while the Confession of Faith contains the creed to which, as to a confession of his own faith, every office-bearer in the Church must testify in solemn form his personal adherence, and while the Catechisms, Larger and Shorter, are sanctioned as directories for catechising, the Directory for Public Worship, the Form of Church Government, and the Directory for Family Worship, are of the nature of regulations, rather than of tests, to be enforced by the Church like her other laws, but not to be imposed by subscription upon her ministers and elders. These documents, then, together with a practical application of the doctrine of the Confession, in the Sum of Saving Knowledge—a valuable treatise, which, though without any express Act of Assembly, has for ages had its place among them—have, ever since the era of the second Reformation, constituted the authorised and authoritative symbolic books of the Church of Scotland."

The document goes on to trace the history still farther down, acknowledging some defects on the part of the Church in this second Reformation, such as too much mingling of politics with religion and occasional legislative intolerance, and complaining still more of the defects in the Revolution Settlement as the work of statesmen, though holding that it guaranteed the liberty of the Church. The restoration of patronage, the rise of the secessions, and the conflict of Auchterarder are then narrated, culminating in the Separation of 1843, which this rather diffuse document pithily describes as proceeding upon a "protest that it is her being Free, and not her being Established, that constitutes the real and hereditary identity of the Reformed National Church of Scotland." That the Free Church, or at least this Assembly, did, however, regard the principle of Establishment as an important, if not essential, principle of their body, is plain from this very document. The occasion of its being adopted by the Assembly (it never went to the presbyteries) was the anticipated junction of that body of Original Seceders, a minority of whom we have seen already refusing to join, and in the Thurso case retaining their chapel. And with a view to this junction, which happened in 1852, prominence is given to the previous union between the Church of Scotland and a body of Old-Light Burghers in 1839, when the General Assembly, with consent of presbyteries, passed an Act to the following effect:—

"Whereas proposals have been made by the Associate Synod for a reunion with the Church of Scotland, and a considerable number of overtures have been sent at the same time to the General Assembly from the synods and presbyteries of the Church favourable to that object; and it has been ascertained by a committee of the General Assembly, that the course of study required for a long time past of students in divinity in connection with said Synod is quite satisfactory, and that their ministers and elders do firmly adhere to the Westminster Confession of Faith, the Larger and Shorter Catechisms, and other standards of our Church. And whereas the

members of the Associate Synod do heartily concur with us in holding the great principle of an ecclesiastical establishment, and the duty of acknowledging God in our national as well as our individual capacity; and we, on the other hand, do heartily concur with the members of the Associate Synod in confessing the great obligation under which we lie to our forefathers in the year 1638, and several years of that century immediately following, and the duty, in particular circumstances, of uniting together in public solemn engagement in defence of the Church, and its doctrine, discipline, and form of worship and government. And whereas our brethren of the Associate Synod have declared their willingness, in the event of a reunion, to submit to all the laws and judicatories of this Church, reserving only to themselves the right which the members of the Established Church enjoy of endeavouring to correct, in a lawful manner, what may appear to them to be faulty in its constitution and government, —The General Assembly, with the consent of the presbyteries of this Church, enact and ordain that all the ministers of the Associate Synod, and their congregations in Scotland, desirous of being admitted into connection and full communion with the Church of Scotland, be received accordingly."

NOTE C.

THE UNITED PRESBYTERIAN CHURCH—BASIS OF UNION.

The United Presbyterian Church has issued a 'Summary of Principles,' which is circulated in a cheap form, giving both a short history of their Church and a statement of Christian doctrine in the space of a few pages. But this, though approved of by the Synod as a means of instruction, is expressly declared by it (9th May 1855) as "not to be regarded in any respect as an addition to, or as superseding the recognised subordinate standards of the Church, which remain as stated in the Basis of Union."

The Basis of Union, adopted by the two Churches (Secession and Relief Bodies) uniting on the 13th May 1847, is as follows:—

"1. That the Word of God, contained in the Scriptures of the Old and New Testament, is the only rule of faith and practice.

"2. That the Westminster Confession of Faith, and the Larger and Shorter Catechisms, are the confession 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.

"3. That Presbyterian government, without any superiority of office to that of a teaching presbyter, and in a due subordination of Church

courts, which is founded on, and agreeable to, the Word of God, is the government of this Church.

"4. That the ordinances of worship shall be administered in the United Church as they have been in both bodies of which it is formed; and that the Westminster Directory of Worship continue to be regarded as a compilation of excellent rules.

"5. That the term of membership is a credible profession of the faith of Christ as held by this Church—a profession made with intelligence, and justified by a corresponding character and deportment.

"6. That with regard to those ministers and sessions who may think that the 2d section of the 26th chapter of the Confession of Faith authorises free communion—that is, not loose or indiscriminate communion, but the occasional admission to fellowship in the Lord's Supper, of persons respecting whose Christian character satisfactory evidence has been obtained, though belonging to other religious denominations—they shall enjoy in the united body what they enjoyed in their separate communions, —the right of acting on their conscientious convictions.

"7. That the election of office-bearers of this Church, in its several congregations, belongs, by the authority of Christ, exclusively to the members in full communion.

"8. That this Church solemnly recognises the obligation to hold forth, as well as to hold fast, the doctrine and law of Christ, and to make exertions for the universal diffusion of the blessings of His Gospel at home and abroad.

"9. That as the Lord hath ordained that they who preach the Gospel should live of the Gospel—that they who are taught in the Word should communicate to him that teacheth in all good things—that they who are strong should help the weak—and that, having freely received, thus they should freely give the Gospel to those who are destitute of it—this Church asserts the obligation and the privilege of its members, influenced by regard to the authority of Christ, to support and extend, by voluntary contribution, the ordinances of the Gospel.

"10. That the respective bodies of which this Church is composed, without requiring from each other any approval of the steps of procedure by their fathers, or interfering with the rights of private judgment in reference to these, unite in regarding as still valid the reasons on which they have hitherto maintained their state of secession and separation from the judicatories of the Established Church, as expressed in the authorised documents of the respective bodies, and in maintaining the lawfulness and obligation of separation from ecclesiastical bodies in which dangerous error is tolerated, or the discipline of the Church or the rights of her ministers or members are disregarded.

"The United Church, in their present most solemn circumstances, join in expressing their grateful acknowledgment to the great Head of the Church for the measure of spiritual good which He has accomplished by them in their separate state—their deep sense of the many imperfections and sins which have marked their ecclesiastical management—and

their determined resolution, in dependence on the promised grace of their Lord, to apply more faithfully the great principles of Church fellowship —to be more watchful in reference to admission and discipline, that the purity and efficiency of our congregations may be promoted, and the great end of our existence as a collective body may be answered with respect to all within its pale, and to all without it, whether members of other denominations, or the world lying in wickedness. And in fine, the United Church regard, with a feeling of brotherhood, all the faithful followers of Christ, and shall endeavour to maintain the unity of the whole body of Christ, by a readiness to co-operate with all its members, in all things in which they are agreed."

NOTE D.

UNITED PRESBYTERIAN FORMULÆ.

I. *Questions to be answered by Preachers at Licence.*

1. Do you believe the Scriptures of the Old and New Testaments to be the Word of God, and the only rule of faith and practice?

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; it being understood that you are not required to approve of anything in these documents which teaches, or is supposed to teach, compulsory or persecuting and intolerant principles in religion?

3. Are you persuaded that the Lord Jesus Christ, the only King and Head of the Church, has therein appointed a government distinct from, and not subordinate to, civil government? And do you acknowledge the Presbyterian form of government, as authorised and acted on in this Church, to be founded on and agreeable to the Word of God?

4. Do you approve of the constitution of the United Presbyterian Church, as exhibited in the Basis of Union; and while cherishing a spirit of brotherhood towards all the faithful followers of Christ, do you engage to seek the purity, edification, peace, and extension of this Church?

5. Are zeal for the glory of God, love to the Lord Jesus Christ, and a desire to save souls, and not worldly interests or expectations, so far as you know your own heart, your great motives and chief inducements for desiring to enter into the office of the holy ministry?

6. Is it your resolution, in the strength of the grace that is in Christ Jesus, as a probationer for the ministry in connection with this Church, to preach the Gospel faithfully, not shunning to declare all the counsel of God, and to visit and comfort the afflicted, as far as you have opportunity?

7. Do you engage, in the strength of the grace that is in Christ Jesus,

to live a holy and circumspect life, to rule well your own house, and faithfully, diligently, and cheerfully to discharge all the parts of the work of a probationer for the office of the ministry?

8. Do you promise to submit yourself, in the Lord, to the authority of the Supreme Court of this Church, and of its several presbyteries, under whose inspection you may be called to labour?

9. And all these things you profess and promise, through grace, as you shall be answerable at the coming of the Lord Jesus Christ, with all His saints, and as you would be found in that happy company?

II. *Questions to be answered by Ministers at Ordination.*

1. Do you believe the Scriptures of the Old and New Testaments to be the Word of God, and the only rule of faith and practice?

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; it being understood, that you are not required to approve of anything in these documents which teaches, or is supposed to teach, compulsory or persecuting and intolerant principles in religion?

3. Are you persuaded that the Lord Jesus Christ, the only King and Head of the Church, has therein appointed a government distinct from, and not subordinate to, civil government? And do you acknowledge the Presbyterian form of government, as authorised and acted on in this Church, to be founded on and agreeable to the Word of God?

4. Do you approve of the constitution of the United Presbyterian Church, as exhibited in the Basis of Union; and, while cherishing a spirit of brotherhood towards all the faithful followers of Christ, do you engage to seek the purity, edification, peace, and extension of this Church?

5. Are zeal for the glory of God, love to the Lord Jesus Christ, and a desire to save souls, and not worldly interests or expectations, so far as you know your own heart, your great motives and chief inducements to enter into the office of the holy ministry?

6. Have you used any undue methods, by yourself or others, to obtain the call of this church?

[*The members of the church being requested to stand up, let this question be put to them:—*

Do you, the members of this church, testify your adherence to the call which you have given to Mr A. B. to be your minister? and do you receive him with all gladness, and promise to provide for him suitable maintenance, and to give him all due respect, subjection, and encouragement in the Lord?

An opportunity will here be given to the members of the church of signifying their assent to this, by holding up their right hand.]

7. Do you adhere to your acceptance of the call to become minister of this church?

8. Do you engage, in the strength of the grace that is in Christ Jesus, to live a holy and circumspect life, to rule well your own house, and faithfully, diligently, and cheerfully to discharge all the parts of the ministerial work to the edifying of the body of Christ?

9. Do you promise to give conscientious attendance on the courts of the United Presbyterian Church, to be subject to them in the Lord, to take a due interest in their proceedings, and to study the things which make for peace?

10. And all these things you profess and promise, through grace, as you shall be answerable at the coming of the Lord Jesus Christ, with all His saints, and as you would be found in that happy company?

III. *Questions to be answered by Elders at Ordination.*

1. Do you believe the Scriptures of the Old and New Testaments to be the Word of God, and the only rule of faith and practice?

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; it being understood that you are not required to approve of anything in these documents which teaches, or is supposed to teach, compulsory or persecuting and intolerant principles in religion?

3. Are you persuaded that the Lord Jesus Christ, the only King and Head of the Church, has therein appointed a government distinct from, and not subordinate to, civil government? And do you acknowledge the Presbyterian form of government, as authorised and acted on in this Church, to be founded on and agreeable to the Word of God?

4. Do you approve of the constitution of the United Presbyterian Church, as exhibited in the Basis of Union; and, while cherishing a spirit of brotherhood towards all the faithful followers of Christ, do you engage to seek the purity, edification, peace, and extension of this Church?

5. Are zeal for the glory of God, love to the Lord Jesus Christ, and a desire to save souls, and not worldly interests or expectations, as far as you know your own heart, your great motives and chief inducements to enter into the office of ruling elder?

6. Have you used any undue methods, by yourself or others, to obtain the call of this church?

7. Do you adhere to your acceptance to the call to become ruling elder of this church?

8. Do you engage, in the strength of the grace that is in Christ Jesus, to perform with diligence and faithfulness the duties of a ruling elder, watching over the flock of which you are called to be an overseer, in all things showing yourself a pattern of good works, and giving a conscientious attendance upon the meetings of the session, and also of superior courts, when called to sit as a member in them?

9. And all these things you profess and promise, through grace, as you shall be answerable at the coming of the Lord Jesus Christ, with all His saints, and as you would be found in that happy company?

NOTE E.

DOCUMENTS OF THE EPISCOPAL CHURCH IN SCOTLAND.

I. THE PREFACE TO THE CODE.

"The Code of Canons of the Episcopal Church in Scotland, as adopted, enacted, and sanctioned by a General Synod' in 1862 and 1863, is preceded by an introduction, from which we take the following quotation. The Episcopal Church in Scotland, it says, is—

"A Church in itself completely constituted and organised, in respect of spiritual power and sacred ministration by its own bishops, priests, and deacons. In this character, being in full communion with the United Church of England and Ireland, and adopting as a standard of her faith the Thirty-Nine Articles of Religion, as received in that Church, she claims the authority which, according to the thirty-fourth of those Articles, belongs to 'every particular or national Church, to ordain, change, or abolish ceremonies or rites of the Church ordained only by man's authority, so that all things be done to edifying.'

"The *doctrine* of the Church, as founded on the authority of the Scripture, being fixed and immutable, ought to be uniformly received and adhered to, at all times and in all places. The same is to be said of its *government*, in all those essential parts of its constitution which were prescribed by its adorable HEAD. But in the *discipline*, which may be adopted for furthering the purposes of ecclesiastical government, regulating the solemnities of public worship, as to time, place, and form, and restraining and rectifying the evils occasioned by human depravity, this character of immutability is not to be looked for. The discipline of the Church is to be determined by Christian wisdom, prudence, and charity; and when any particular Church has drawn up a body of Canons for its own use, regard has always been had to its peculiar situation at the time when its discipline was thus regulated. In one country, a pure apostolic Church is found to be legally established, amply endowed, and closely incorporated with the State; while in another, forming a part of the same empire, it is only tolerated by the State; and as to all matters of spiritual concern, derives no support from the civil government.

"Such is precisely the difference of situation between the Established Church of England and Ireland, and the unestablished, the merely tolerated, Episcopal Church in Scotland. In things of a purely ecclesiastical nature, embracing the doctrine and government of the Church, the faith

peculiar to Christianity, and the mode of transmitting an apostolic Episcopacy—in these respects the Reformed Episcopal Church is the same in every part of the British Empire. That system of religious faith and ecclesiastical order, by which it is distinguished in every district of England and Ireland, is also its mark of distinction to the remotest corner in Scotland; and although in this country it is wholly unconnected with the State in the exercise of its spiritual authority, yet does it still depend, under God, on the civil power for peace and protection, in the enjoyment of all its rights and privileges, as a society purely spiritual, and constituted for the purpose of affording the means of grace and salvation to the members of Christ's mystical body.

"Viewing it in this light, the clergy of the Episcopal Church in Scotland declare, in the most sincere and unequivocal manner, that the ecclesiastical commission handed down to them has no relation to such secular powers and privileges as are peculiar to a national Establishment; nor does it in the least interfere with the rights of the temporal State, or the jurisdiction of the supreme civil magistrate. On the contrary, the clergy of this Church, of every rank and order, feel no hesitation in asserting and maintaining that the Queen's Majesty, to whom they sincerely promise to bear true allegiance, is the only 'supreme governor within her dominions, whose prerogative it is to rule all estates and degrees committed to her charge by God, and to restrain, with the civil sword, the stubborn and evil-doers of every denomination, clergymen as well as laymen.'"

II. EXTRACTS FROM THE CANONS.

The Eleventh Canon is as follows:—

"*Of Subscription to the Thirty-Nine Articles of Religion, and Obedience to the Canons and Tribunals of the Church.*

"1. No person shall be received into the ministry of the Episcopal Church in Scotland until he has first subscribed (according to the form in Appendix, No. VIII.) willingly and *ex animo* to the Book of Articles of Religion, agreed upon by the archbishops and bishops of both provinces of the realm of England, and the whole clergy thereof, in the Convocation holden at London in the year of our Lord one thousand five hundred and sixty-two, and hath acknowledged all and every the Articles therein contained, being in number Thirty-Nine, besides the Ratification, to be agreeable to the Word of God.

"2. Every person at his ordination shall promise (according to the form in Appendix, No. IX.) to render due obedience to the Canons, and to the decisions and judgments of the tribunals of this Church, and to show in all things an earnest desire to promote the peace, unity, and order of that part of the Church of Christ in which he shall be authorised to exercise his ministry."

The first two paragraphs of the Eighteenth Canon are as follows :—

"*Of the Admission of Strangers to Officiate in this Church.*

"1. The Episcopal Church in Scotland recognises, as in full communion with herself, the United Church of England and Ireland, the Colonial and other branches of the same, and the Protestant Episcopal Church in America.

"2. No person shall be permitted to officiate in sacred things, permanently or occasionally, in any congregation of this Church, except he shall have been episcopally and canonically ordained, and shall also conform to the doctrine and discipline of this Church."

The Twenty-Eighth Canon relates to General Synods, which are to be called "whenever a majority of the bishops shall decide that the circumstances of the Church require it. These differ from the ordinary Diocesan and Episcopal Synods in (among others) the following important particulars :—

"18. The General Synod shall have no judicial power, either primarily or on appeal, but its functions shall be purely legislative."

"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 recognised constitution of this Church ; and such enactments shall oblige as well the minority in the said Synod as all members of the Church.

"21. No Law or Canon shall be enacted, abrogated, or altered but by a majority of each Chamber."

Appended to the Code of Canons are Formulæ, among which appear—

"1. *Form of Subscription to the Thirty-Nine Articles of Religion.*

"I, , do willingly and *ex animo* subscribe to the Book of Articles of Religion agreed upon by the archbishops and bishops of both provinces of the realm of England, and the whole clergy thereof, in the Convocation holden at London in the year of our Lord one thousand five hundred and sixty-two ; and I do acknowledge all and every the Articles therein contained, being in number Thirty-Nine, besides the Ratification, to be agreeable to the Word of God.

"2. *Form of Subscription promising Obedience to the Canons.*

"I, , do hereby solemnly promise that I will give all due obedience to the Canons of the Episcopal Church in Scotland, drawn up and enacted by the bishops and clergy of that Church in a General Synod holden for that purpose at Edinburgh in the year of our Lord one thousand eight hundred and sixty-three ; and I in like manner promise [that I will pay due and canonical obedience to the Right Reverend the Bishop of , and] that I will show, in all things, an earnest desire to promote the peace, unity, and order of

the said Episcopal Church, and will not appeal from any sentence to any civil court, but render due obedience to the decisions of the ecclesiastical authorities in all questions falling under their spiritual jurisdiction.

"[*The words within brackets to be omitted in the case of a bishop subscribing.*]"

III. THE ARTICLES OF RELIGION.

Among the Thirty-Nine Articles the following seem to be those which bear most nearly upon the subject of our inquiries :—

"VI. *Of the Sufficiency of the Holy Scriptures for Salvation.*

"Holy Scripture containeth all things necessary to salvation ; so that whatsoever is not read therein, nor may be proved thereby, is not to be required of any man, that it should be believed as an article of the faith, or be thought requisite or necessary to salvation. In the name of the Holy Scripture we do understand those canonical books of the Old and New Testament, of whose authority was never any doubt in the Church. . . .

"And the other books (as Hierome saith) the Church doth read for example of life and instruction of manners ; but yet doth it not apply them to establish any doctrine ; such are the following. . . .

"All the books of the New Testament, as they are commonly received, we do receive, and account them canonical.

"VII. *Of the Old Testament.*

"The Old Testament is not contrary to the New; for both in the Old and New Testament everlasting life is offered to mankind by Christ, who is the only Mediator between God and man, being both God and man. Wherefore they are not to be heard which feign that the old Fathers did look only for transitory promises. Although the law given from God by Moses, as touching ceremonies and rites, do not bind Christian men, nor the civil precepts thereof ought of necessity to be received in any commonwealth; yet notwithstanding, no Christian man whatsoever is free from the obedience of the commandments which are called moral.

"VIII. *Of the Three Creeds.*

"The three creeds, Nicene Creed, Athanasius's Creed, and that which is commonly called the Apostles' Creed, ought thoroughly to be received and believed ; for they may be proved by most certain warrants of Holy Scripture."

"XIX. *Of the Church.*

"The visible Church of Christ is a congregation of faithful men, in the which the pure Word of God is preached, and the sacraments be duly ministered according to Christ's ordinance in all those things that of necessity are required to the same.

"As the Church of Jerusalem, Alexandria, and Antioch have erred ;

so also the Church of Rome hath erred, not only in their living and manner of ceremonies, but also in matters of faith.

"XX. *Of the Authority of the Church.*

"The Church hath power to decree rites or ceremonies, and authority in controversies of faith; and yet it is not lawful for the Church to ordain anything that is contrary to God's Word written, neither may it so expound one place of Scripture, that it be repugnant to another. Wherefore, although the Church be a witness and a keeper of Holy Writ, yet, as it ought not to decree anything against the same, so besides the same ought it not to enforce anything to be believed for necessity of salvation.

"XXI. *Of the Authority of General Councils.*

"General Councils may not be gathered together without the commandment and will of princes. And when they be gathered together (forasmuch as they be an assembly of men, whereof all be not governed with the Spirit and Word of God), they may err, and sometimes have erred, even in things pertaining unto God. Wherefore things ordained by them as necessary to salvation have neither strength nor authority, unless it may be declared that they be taken out of Holy Scripture."

"XXXIV. *Of the Traditions of the Church.*

"It is not necessary that traditions and ceremonies be in all places one and utterly like; for at all times they have been divers, and may be changed according to the diversities of countries, times, and men's manners, so that nothing be ordained against God's Word. Whosoever through his private judgment, willingly and purposely, doth openly break the traditions and ceremonies of the Church, which be not repugnant to the Word of God, and be ordained and approved by common authority, ought to be rebuked openly (that others may fear to do the like), as he that offendeth against the common order of the Church, and hurteth the authority of the magistrate, and woundeth the consciences of the weak brethren.

"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.

"XXXV. *Of the Homilies.*

"The second book of Homilies, the several titles whereof we have joined under this article, doth contain a godly and wholesome doctrine, and necessary for these times, as doth the former book of Homilies, which were set forth in the time of Edward the Sixth; and therefore we judge them to be read in churches by the ministers, diligently and distinctly, that they may be understanded of the people."

"XXXVII. *Of the Civil Magistrates.*

"The Queen's Majesty hath the chief power in this realm of England, and other her dominions, unto whom the chief government of all estates

of this realm, whether they be ecclesiastical or civil, in all causes doth appertain, and is not, nor ought to be, subject to any foreign jurisdiction

"Where we attribute to the Queen's Majesty the chief government, by which titles we understand the minds of some slanderous folks to be offended, we give not to our princes the ministering either of God's Word or of the sacraments, the which thing the injunctions also lately set forth by Elizabeth our queen do most plainly testify; but that only prerogative, which we see to have been given always to all godly princes in Holy Scriptures by God himself; that is, that they should rule all states and degrees committed to their charge by God, whether they be ecclesiastical or temporal, and restrain with the civil sword the stubborn and evil-doers.

"The Bishop of Rome hath no jurisdiction in this realm of England.

"The laws of the realm may punish Christian men with death for heinous and grievous offences.

"It is lawful for Christian men, at the commandment of the magistrate, to wear weapons, and serve in the wars."

NOTE F.

NOTES ON THE THEORY OF THE CHURCH AND ITS CREED:

WITH SPECIAL REFERENCE TO "THE DOCTRINE OF THE REFORMED CHURCHES" (ACT 1690, C. 5) AS CONTAINED IN THEIR AUTHORITATIVE CONFESSIONS.

The legal relation of a Church to its creed depends more or less on the true relation of a Church to its creed. Law, in the case of a Church tolerated, and still more in the case of an Established Church, may limit, enlarge, or modify this original idea, but it cannot dispense with it.

I. But what the true and original relation of a Church to its creed is, depends upon our theory of the Church. If we take one of the two great theories which have divided the world, it will lead us to different results as to creed from what we should have arrived at upon the other. The Church of Rome, the grandest and most powerful of human institutions, has always held one idea of the Church, an idea which in the nineteenth century has rapidly spread even among those who reject her claim to be its exclusive embodiment. According to this theory the Church is an external institute—a great visible corporation. It does not consist of the good alone, or of the regenerate, or of those who truly believe; for these are distinctions which only God can observe, and the Church must be before all things visible.[1] It consists of all, good and bad, who, even in hypocrisy or ignorance, *profess* Christianity, and join themselves to the

[1] "Nam cum illi ab omnibus parendum sit, cognoscatur necesse est." — Catechism of the Council of Trent, ch. x. sec. 11.

external institute.[1] For this external institute is the divinely appointed medium of salvation, and age after age dispenses blessing and distributes truth to those who have been received into its fold.

The sixteenth century brought to the human race a passion for individual freedom and for individual access to God; and the immediate result was the formation of the theory of *the invisible Church*. The thoughts of men in one country after another of Northern Europe, at first perturbed by their new riches, soon clarified into theologies, and crystallised into creeds; and as we go from one of these "Confessions"[2] to another, we find that the new idea of the Church everywhere supplants the old. The process is easily understood. One-half of the maxim of Irenæus had been familiar to men for many centuries, "Ubi ecclesia, ibi Spiritus;" but the other was now, for the first time (since Pentecost and Paul), felt and accepted, "Ubi Spiritus, ibi ecclesia." And the result was an idea even more august than that which had so long fascinated the world and may charm it once more—an idea nowhere more adequately expressed than in our own Scottish Confession: "As we believe in one God, Father, Son, and Holy Ghost, so we most constantly believe that from the beginning there hath been, and now is, and to the end of the world shall be, one Kirk—that is to say, one com-

[1] "Hoc interest inter sententiam nostram, et alias omnes, quod omnes aliæ requirunt internas virtutes ad constituendum aliquem in ecclesia, et propterea ecclesiam veram invisibilem faciunt; nos autem et credimus in ecclesia inveniri omnes virtutes, fidem, spem, caritatem, et ceteras; tamen ut aliquis aliquo modo dici possit pars veræ ecclesiæ, non putamus requiri ullam internam virtutem, sed tantum externam professionem fidei, et sacramentorum communionem quæ sensu ipso percipitur."—Bellarmine, De Ecclesia Militante, ch. ii.

[2] The Westminster Confession is declared by our chief statute to contain the sum and substance of the doctrine of the Reformed Churches. Nor is this the only expression which refers us to that doctrine. What it authentically is, is fortunately not difficult to find. We must seek it in the Confessions of and subsequent to the Reformation.

There have been many Harmonies and abridgments of the Protestant Confessions (*Harmonia, Corpus et Syntagma, Sylloge*, &c.), and the "Harmony" is translated into English; but none of these give all the Confessions unabridged. The whole Calvinistic Confessions, however, may be found in one volume, and the whole Lutheran in another; so that the complete "doctrine of the Reformed Churches" may be studied in, *e.g.*—

1. Collectio Confessionum in Ecclesiis Reformatis Publicatarum. By Dr H. A. Niemeyer. Lips. 1840. (See also Collections by Augusti, Mess, and Böckel.)

2. Libri Symbolici Ecclesiæ Evangelicæ (Lutheran). Rec. C. A. Hase. Lips. 1827. (See also Collections by Tittmann, Müller, Francke, and Meyer.)

The following are the names of the chief Confessions of the Reformation:—

I. *Lutheran Confessions*—
1. Augsburg Confession.
2. Apologia Confessionis.
3. Confessio Saxonica.
4. Confessio Wurtemburgica.
5. Articles of Smalcald.
6. Luther's Catechisms.
7. Formula Concordiæ.

II. *Reformed* (*Calvinistic*) *Confessions*—
1. Confessio Tetrapolitana.
2. Zuingle's Fidei Ratio.
3. First Helvetic Confession.
4. Consensus Tigurinus.
5. Consensus Genevensis.
6. Second Helvetic Confession.
7. Formula Consensus Helvetici.
8. Heidelberg Catechism.
9. Confessio Belgica.
10. Confessio Gallicana.
11. Confessio Scoticana.

pany and multitude of men chosen of God, who rightly worship and embrace Him by true faith in Christ Jesus—a Kirk invisible, known only to God, who alone knoweth whom He hath chosen."

Thus, according to the Romish idea, the Church is an external institute for bringing men personally to God; according to the Protestant idea, it is the society of those who have come to God personally already. In the one case, men join the Church in order through its discipline to become true Christians; in the latter, being true Christians individually, they collectively form the Church.[1] We need not pursue the Romish doctrine farther; but it will be of importance to understand how this primary Protestant idea of the invisible Church is connected with the secondary doctrine, which we also find in their Confessions, of the *visible* Church, and at what points in the transition from the one to the other there emerges the necessity for a creed. For all the Protestant Confessions, no less than the doctrines of Rome, acknowledge that the Church in some sense becomes visible; that it is the duty of Christian men to recognise each other, and associate as such; and that communities so formed, though partial, and therefore not identical with the Church universal and invisible, and though mixed and impure, and therefore not coinciding exactly even with any part of it, are yet entitled to the name of Church, and, generally, are bound by the Church's laws, and may claim the Church's rights. But throughout them all it is plain that the invisible Church is the radical and original idea, the archetype upon which the external Church is framed. Indeed, so strong at first was the revulsion from the Romish doctrine, that some of the Confessions avoid any recognition of *one* universal *Church visible*, acknowledging instead *particular* Churches or congregations which are visible. This comes out especially in that of Scotland of 1560, where the chapter as to the universal Church known only to God, is followed by the marks of particular Churches, "such as were in Corinthus and Galatia," and such as we "profess ourselves to have in our cities, towns, and places reformed." A clause, indeed, towards the beginning of this chapter seems to speak of the "notes of *the* true Kirk;" yet there is no attempt to treat of this as of a universal Church visible, more fully or more definitely.[2] The Church

[1] In addition to Cardinal Bellarmine, the most authoritative theologian of Rome, we may quote her celebrated modern defender, Moehler: "The differences between the Catholic and the Lutheran view of the Church can be reduced to a short, accurate, and definite expression. The Catholics teach that the visible Church is first; then comes the invisible: the former gives birth to the latter. On the other hand, the Lutherans say the reverse: from the invisible emerges the visible Church, and the former is the groundwork of the latter. In this apparently very unimportant opposition a prodigious difference is avowed."—Symbolik, ch. xlviii. "The Calvinists adopted Luther's general views respecting the Church without alteration, and solemnly confirmed them in their symbolical writings." — Ch. li. On this distinction, viewed from the Protestant side, see an able treatise, 'The Church of Christ,' by the Rev. E. A. Litton. London: Longmans. 1851.

[2] Moehler remarks the extreme Protestantism of the Scottish Confession on the doctrine of the Church.—Symbolik, ch. li. note.

visible is treated as congregational or aggregational. The unit is the individual, who by his invisible faith is already really united to God and to all other men who have faith, in a universal invisible society; but he can only externally unite with those who are known and accessible to him, and who also seem to his fallible judgment to have the like gift which has been given to himself. And thus we have one invisible Kirk, and particular Kirks visible. This course is not followed in most of the other Confessions, which rather treat of the invisible Church as in some way becoming visible, without any attempt accurately to define the two.[1] For the completed distinction and for a full recognition of a universal Church *visible*, we in this country have to come down a century later to the second standard of Scotland, which on this point exceeds the mass of Reformed Confessions as much as its predecessor fell short of them. The Westminster Confession of Faith, like the others, puts the belief in the true Church invisible foremost. But it goes on immediately to confess a visible Church, Catholic and universal, of which particular Churches are members (reasoning thus, not from the parts to the whole, but from the whole to the parts). This visible Church hath been sometimes more, sometimes less, visible, according to the purity of doctrine and discipline which has existed; but it "consists of all those throughout the world that profess the true religion and their children, and is the kingdom of the Lord Jesus Christ, the house and family of God," and to it (not to the invisible Church) Christ hath given the ministry, oracles, and ordinances of God.[2]

This advance by the Westminster Confession from the position occupied by those of the Reformation might suggest some interesting questions, which must here be waived. But it is necessary to remark that, with all this careful assertion of the place and privilege of the one visible Church, this Confession is deficient in a matter regarding its visibility on which the former creeds are very full and express—*i.e.*, the *notes* or marks of the Church. These notes and marks are seemingly of the *visible* Church or Churches, an invisible Church admitting of none; and the Reformation Confessions are very careful, and, on the whole, very harmonious in giving these tests. In the one which is most interesting to us the Scottish Reformers give the essentials of a Church as, first, the true preaching of the Word; second, the right administration of the sacraments; and, third, ecclesiastical discipline uprightly administered. The difference between

[1] The following are two very good examples:—

"Ecclesiam, sanctam sanctorum omnium collectionem, et immaculatam Christi sponsam, esse tenemus. Quæ quidem quum *solius sit Dei oculis nota*, externis tamen quibusdam ritibus, ab ipso Christo institutis, et verbi Dei velut publica legitimaque disciplina, non solum cernitur cognosciturque, sed ita constituitur, ut in hanc sine his nemo (nisi singulari Dei privilegio) censeatur."—Helvetica Prior Confessio, ch. xv. Niemeyer, 118.

"Ecclesia, quanquam id, unde habet quod vere Ecclesia Christi sit (nempe fides in Christum), videri nequeat, ipsa videri tamen, planeque ex fructibus cognosci potest."—Confessio Tetrapolitana, ch. xv. Niemeyer, 758.

[2] Westminster Confession, ch. xxv. See pages 93, 94.

it and the majority of the Reformed creeds is that, while they all hold the third requisite—the exercise of ecclesiastical discipline—to be binding on a Church, most of them do not hold it to be so essential that the absence of it unchurches the body (as it has been expressed, it is not in the same degree of necessity); and therefore they do not make it a separate note.

II. If these observations, which the writer has gleaned with much self-distrust from an unaccustomed field, are correct, we should now be in a better position to judge what is meant when the Scottish lawyer is asked to deal with "a Church," or "the Church," or "the Church of Christ," and what the essential relation of such a body is to its creed.

It does not appear that, according to the Confessions of the Reformation, we can hold that the Church proper is *founded on doctrine* or truth. It seems rather to be therein founded upon the personal and vital relation of the individual to God through Christ. It is certainly not founded, as all agree, on any particular creed or expressed Confession or formula of doctrine; but neither, according to these authorities, does it appear correct to say that it is founded even upon truth, or that its authority is derived from truth. Properly, its authority is derived from Christ, and it is founded upon Christ. And yet the Church, though not founded upon truth, may be definable and recognisable only by truth. Its connection with God and Christ may *make* the Church, and yet its connection with truth may mark and express it. For, according to the Reformed doctrine, this fundamental and causal relation of the Church to its Author is so far from being independent of truth or of doctrine, that the Church has a constant and necessary relation to both. The Scottish Confessions say that the grace of faith is that "whereby the elect" (*i.e.*, the Church invisible) "are enabled to believe to the saving of their souls;" and "by this faith a Christian believeth to be true whatsoever is revealed in the Word, for the authority of God himself speaking therein," the principal acts of saving faith being those terminating upon Christ. If it be contended that even so, it is the subjective nature of faith that is meant to be the tie between God and the individual, and not the amount of objective truths which happen to have been revealed to it, still it is plain that these objective truths are the proper food of this faith, and are all meant, sooner or later, to be absorbed by it. It may be that in the Church invisible are (exceptionally) those who know little or nothing of truth revealed, and who are members of it by means of the vital grace binding them to the Author of life; but the perfect and completed idea of the Church, even of the Church invisible and individual, seems to be a body living by faith upon God's revelation, and upon Christ the centre of it.

While, therefore, it may be too strong to say that the Church, even the visible Church, is founded on truth or doctrine or creed, it is not too strong to say that, according to the Confessions of the Reformation, there is a necessary connection between the Church and doctrine, and an almost absolute necessity (including, of course, a liberty) for the Church to set

up a creed. Indeed, in the latest of these Confessions, which our law declares to be the sum and substance of the others, the visible Church is *defined* as "those who profess the true religion." Profession of the truth which he has received is by all of them made necessary to the character of every Christian man; and mutual profession or confession of the truth, to some extent at least, is necessary to that mutual recognition which makes a Church visible. Before God, faith; before men, confession, seems the true order; and it is easy to see how, when we come to speak of the recognition of a Church by others, and especially by the law, it should appear (as in Scottish history it does) to be founded on truth rather than on life. For doctrine and the utterance of doctrine, truth and the confession of truth, are essential to a visible Church—are part of its visibility.

III. How far that confession may lawfully go, how far it must necessarily go, and how far it ought to go, are much more difficult questions. The Reformation Confessions have marked their idea of it by the full but not minute way in which they travel over the doctrines involved in that "preaching of the Word," which they make the leading note of a Church. The Westminster Confession, by its still greater exactness, minuteness, and consolidation, has left to us the view of that time as to what those who "profess the true religion" ought to profess. Why, in either case, they give so much, and why they do not go on to give more, is nowhere authoritatively stated. It is plain that it was not their endeavour to ascertain the absolute minimum of confession. On the abstract principles of Protestantism it might seem that mere profession of the name of Christ,[1] as made in baptism, with a promise "to observe all things whatsoever He hath commanded His disciples," might be confession enough to found a visible Church. But all of these documents imply the right of the Church not only to utter, but to demand of its members, more than this. Its right to utter more is plain. The whole of truth, according to their view, is the inheritance and property of the Church—*i.e.*, the Church invisible. It is called to cherish, not a part, but the whole, and, if need be, to confess it. And the members of the Church visible must confess so much at least as to satisfy each other that they "profess the true religion" (according to the Westminster Confession), or, according to the older Confessions, that they do not deny the Evangel.

But when we have got so far as to find that by the doctrine of the Reformed Churches a certain confession of truth is appropriate and necessary, the question how much it ought to include seems to be regulated by the purposes for which it is issued—a matter on which we do not find these Confessions making distinctions. A Confession may be a mere utterance or manifesto emitted at a particular time, but of no value after the occasion has passed away. Or it may be an utterance of a Church at a particular time, which ever after retains an historical value, though no attempt is made to make it a standard, or test, or even a permanent Confession. Or it may

[1] "Qui Christo nomen dederunt."—Zwinglii Fidei Ratio, ch. vi.

be a permanent utterance or *declaratio* by the Church of its belief, valuable to this effect so long as it is not recalled, but not at all made use of as an internal standard to which the views of members are to be conformed, or as a test either of membership or office—a confession, not a standard.[1] Or it may be both a confession and a standard, a dogmatic rule according to which the Church judges all views of sacred truth, and up to the level of which it trains its people and invites its ministers; and yet it may not be made an antecedent test for either the one or the other.[2]

[1] This is the view of the two thousand Congregational Churches of Britain; but we find the distinction skilfully put in an older source.

The preface written by Episcopius to the Confession of the Remonstrants—'Declaratio Remonstrantium'—is interesting on one account at least. His party were strongly opposed to creeds, and had suffered much from that constructed by the Synod of Dort. But a time came when they found it necessary to have one themselves; and to Episcopius was intrusted the delicate task of vindicating the use of creeds on behalf of those who had loudly declaimed against them. In performing this task he has stated some important distinctions.

The three accusations against creeds which he has to meet are—1. That they injure the sole authority of Scripture, and do so increasingly, for it is clear "formulas fere omnes cum ætate nimiæ auctoritatis vires atque incrementa capere;" 2. That they injure the liberty of the Church by degenerating from Confessions of Faith into rules of faith; 3. That they cause and publish and perpetuate divisions, "unde odia deinde, et animorumque studiorumque divortia æterna atque immortalia, non sine maximo Reipublicæ Christianæ dispendio."

His answer is, that these are the abuses, and not the genuine use, of a Confession, which he goes on to define according to its name, as a mere confession or utterance of truth by the Church. The following is one of the most pregnant paragraphs of the treatise:—

"Quare ut hoc imprimis fixum ratumque semper teneat Ecclesia, etiam atque etiam adlaborandum est, ac propterea subinde per occasiones omnes Ecclesiis inculcandum, et in ipsis Confessionum ac Declarationum formulis accurate exprimendum: eas scilicet ne quidem pro certis indicibus, nedum pro judicibus, verorum sensuum, sed tantum pro indicibus sensuum illorum, quos authores earum pro veris habuerunt, recipi debere, eoque fine in lucem editas esse. Id enim si fiat, tum hæc tria vitia sufficienter ac facile vitabuntur. I. Nemo ad formulas illas confugiet ut ex iis certa fide, veluti ex fontibus hauriat ac depromat ea, quæ credenda sunt, proinde nec in dubiis Scripturarum sensibus recurret ad eas, tanquam recti et obliqui indices: nec obscuros aut controversos sensus ad eas tanquam ad lapidem lydium probabit aut explorabit. II. Nemo ad earum sensus adstringetur aut adstringi se patietur alia lege, quam quatenus et quamdiu ipse certo deprehendit atque in conscientia sua convincitur, eas cum Scripturarum sensibus convenire. III. In disputationibus, collationibus, examinibus, ad illas nunquam provocabitur, neque ad illarum incudem revocabuntur fidei controversiæ, sed ad solum verbum divinum, tanquam ad regulam unicam, omni exceptione majorem et veram sanorum sermonum ὑποτύπωσιν, quam unicus Magister noster Jesus Christus et Apostoli ipsius nobis reliquerunt, omnes omnino sine metu aut periculo exigentur et expendentur."—Episcopii Opera, vol. vi. 71.

It need not be said that the Confession of the Remonstrants is not part of the doctrine of the Reformed Churches alluded to in the Act 1690; but these distinctions in the preface to it are in themselves important.

[2] This appears to be the view of Bishop Burnet in the well-known conclusion of the 'History of his own Times:'—

"The requiring subscriptions to the

Again, the subordinate standard may be made to serve the purpose of a test, by an ordinance that those who do not believe in it shall not be admitted to a certain privilege, or to a certain office, or even shall be no members of the Church society at all. And, lastly, this may be enforced, either in the case of ministers or members, by a demand for evidence of this belief, or at least for evidence of this profession of belief, as, for instance, by subscription.

The Church of Scotland has, as we have seen, used in its history all these lines of circumvallation; and used them with the intention of being stronger thereby. Whether they have always been kept duly separate, whether the different purposes of a creed have been justly distinguished, and in particular, whether what is necessary for the being and what is necessary for the well-being of a Church have been discriminated, deserves the consideration of theologians, because it may call for the adjudication of lawyers. Rules which are passed by a Church in the exercise of its legislative power for its own higher wellbeing, may be altered by the power that made them, in the same manner as the by-laws of any other society. But Confessions which are the expression of the essential principles of a Church, occupy quite a different position. Yet the question demands the attention of theologians on far higher grounds than that of possible civil consequences. And of all Churches in the world, those of Scotland are most bound earnestly to consider such questions upon their own merits. Roman Catholics and High Churchmen assume a power in the Church to act on its view of what is expedient in imposing dogmatic truth, and their creeds need no other foundation. But the Scottish Church never claimed autonomy, and it is contrary to its principles. Sincerely or insincerely, it has always disclaimed any right to command, and put forward its obligation to obey; and standing on this more sacred ground, it has never hesitated to utter the holiest words in the face of all earthly authority, and to warn men against interfering with a body regulated only by the will of God. But a Church which claims to be regulated by principle, not expediency—by the will of God, not by the wisdom of men—even in matters of detail, cannot honestly shrink from considering first principles on so important a matter as the use which it makes of its creed. It does not appear that this question has ever been carefully or deliberately considered, much less authoritatively decided, in the past history of Scotland. In the days of the Covenants the Church made individual adherence to the Confession of Faith obligatory on every one of its members, and indeed on every one of the

Thirty-Nine Articles is a great imposition: I believe them all myself; but as those about original sin and predestination might be expressed more unexceptionally, so I think it is a better way to let such things continue to be still the standard of doctrine, with some few corrections, and to censure those who teach any contrary tenets, than to oblige all that serve in the Church to subscribe them: the greater part subscribe without ever examining them; and others do it because they must do it, though they can hardly satisfy their consciences about some things in them. Churches and societies are much better secured by laws than by subscriptions; it is a more reasonable as well as a more easy form of government."

lieges.[1] It had presented that Confession originally as "only necessary to be believed," and it had some years after accepted establishment from the State, on the footing that all its members held that Confession. So far it might seem that the creed of the Church of Scotland was not only a confession of its faith, not only an internal standard of its doctrine, not only a test for its teachers and office-bearers,[2] but a far more important matter, *a test of membership*. But in this matter of membership eminently the Church professes to be regulated by the will of Christ, receiving only those whom He has received, and rejecting only those whom He has rejected—receiving all Christians, and rejecting only those whom it judges not to be so. Only by observing, or professing to observe, this rule, can it be the Church—*i. e.*, the Christian community. If it takes any other rule, it becomes a different society, perhaps larger than the Church, or perhaps smaller, but in either case a human and voluntary society, aiming at the highest and most beneficent objects, but doing so upon a principle of association which it has devised for itself.

IV. A creed which is to be a test of membership must necessarily, as we have seen, be a very limited one, and that for the highest reasons. But every Confession, even a mere Church manifesto, must necessarily be limited, and that on obvious grounds of common sense. It is sometimes said to be the right, or even the duty, of the Church to hold all truth—a position which can only do harm by its ambiguity. It is certainly not always the duty of the Church to confess all truth. For whatever individuals severally may do, the Church, with its one Confession, cannot effect this. Thus, taking it for granted that all the ministers of the Presbyterian Churches hold *ex animo* all the propositions which the Confession of Faith draws from Scripture, it is at least certain that each of these ministers (who has thought of these propositions at all) differs from every other in the meaning, emphasis, order, and relation in which he holds them; and farther, that he differs from every one else in some of the ten thousand minor propositions which are outside the Confession. There is no honest and sane man who will pretend that any proposition in religious truth constructed by others exactly expresses his own view of that religious truth; and though it may be constructed with sufficient care and comprehensiveness to *include* the views of a great number of consentients, it is morally certain that every one of these consentients differs from every other, and from the objective proposition itself, in the exact sense in which he understands it.[3] Confessions are limited, therefore, even when

[1] The "Martyr Renwick," in Ordination Services still extant, took his elders bound to "all the lawful acts of all the lawful General Assemblies of the Kirk of Scotland."

[2] There is a legal difficulty in changing a Confession; but it is a much simpler matter to deal with the adherences required from office-bearers. It seems to be quite in a Church's own power. And ministerial intercommunion to the fullest extent might take place between two Churches without incorporation, provided union is desired.

[3] Hence the natural scruple to sign the Formula that this Confession is "the confession of my faith." Properly speak-

we look to what is attempted to be expressed in them. But this is clearer when we look to what is necessarily left out. The Westminster Confession is large enough; but for every one scriptural proposition there fixed, there are ten left unfixed—the larger the circle of truth ascertained, the larger is the circumference of what is left unascertained outside. No Creed includes everything. For there are no two men who agree in the interpretation of every detail of Scripture, except those who decline to apply their minds to Scripture at all. These truisms are not yet useless in Scotland; and the recollection of them has at least a tendency to remind us that the Church, in drawing the line which *must* be drawn between the truth she confesses and the truths she does not confess, has a difficult work to discharge, and has need of some principle—or at least of some guidance.

The *principle* that most readily occurs is that of fundamentals and non-fundamentals, essentials and circumstantials—*i. e.*, conforming the creed used for purposes of confession, to what must (expressly or implicitly) be used for purposes of membership. A distinction founded on this principle would have the advantage of being unsectarian and catholic, proper to the Church of Christ, simple and reasonable, and seemingly unchangeable and permanent. But it has great disadvantages. One is, that in the past it has been almost impossible to attain, at least wise men have despaired of finding it in any definite or useful form. Another is, that the weight of authority has been against even the seeking of it. In the history of Scotland, and in the Reformed Churches generally, it does not appear that the men who sought for the minimum of truth to confess, were the men who had most of the diviner spirit of truth. The greatest men and the best men (with some exceptions, like Baxter), seem hitherto to have been in favour of full creeds. Churchmen of capacity and earnestness—the men in whose heart the question, *How is* THE KING'S *government to be carried on?* continually burned—have felt their practical need of creeds for keeping the Church together, and have agreed that they are essential, if not to the being (*esse*), at least to the wellbeing (*bene esse*) of the Church.[1] And, on the other hand, the men of tenderness of conscience, and pure heart towards God and men, have leaned not only to the confession of the permanently central truth, but to the eager and solemn confession of whatever truth the time and its trial called for—to its confession not only individually, but by the unanimous and accordant voice of the witnessing Church of Christ.

And this suggests another possible principle, or another variation of the same principle; for if the Church is not to confess all truth, nor only essential truth, it may perhaps properly have to confess the *truth for the*

ing, the Confession is not the confession of the faith of any one who signs it, but of all. None of them exactly agrees with it, but none of them contradicts it. In an important sense all Confessions are negative rather than positive—articles of peace rather than utterances of personal faith.

[1] A Church without creeds is a barrel without hoops. But was not the Church kept together originally by a power from within?

time—i.e., essential or central truth *plus* the truth for the particular time. If the Church has already a creed in which it has attempted to embody the central truth, it is obvious that some separate manifesto is the proper medium for uttering the more transitory applications of it; but there seems, on principle, no serious objection to both being included in the one larger Confession—always provided that that Confession is held open to continual revision, and is actually and in point of fact revised, as soon as the necessity for the addition to it has passed away.

But a different doctrine from this has had great influence in Scotland. A very prevalent, if not the most prevalent idea there, has been that the Church is not only entitled to add to her fundamentals of Christianity any truth the confession of which seems to her called for at the time, but that having done so, she must ever after retain it in her Confession as an *attainment* which she is never to resile from. The creed thus comes to be an historical accumulation or incrustation, many articles in which are binding upon the existing generation solely because they are true, and were appropriately or necessarily confessed by a generation before. Nothing can show the passion of the Scottish Church for historical separatism and national continuity more than the favour which a theory so remote at first sight from all Protestant principle, and so liable to the most damaging *reductio ad absurdum*, has found in this country. The *absurdum* has not been wanting in the accumulating testimonies of two centuries; but the love of Church identity is too strong for all minor difficulties. It requires some crisis of Christian obligation to drive a Church back upon its native[1] and essential principles; and to embolden it, while not declining any duty of the time, to reduce its permanent Confession to that which the universal Church can share.

V. We have said already that there seem important legal reasons why the non-established Churches of Scotland should give attention to the question, what their essential creed (as distinguished from their many historical and actual utterances) is to be. With regard to the Established Church the case is peculiar. No longer standing on the ground of an independent compact with the State, and subjected in many parts of its religious work to the authority of statute, it yet is probably freer in its Church jurisdiction than any Established Church in Protestant Europe, and (as recent decisions in both countries have shown) has a distinct advantage in this respect of the great and powerful Church of England. But whatever steps it may take in the direction of modifying its creed, or of modifying the subscription to it, must be taken through Parliament[2]—

[1] An apostolic father says of the members of the Church, Πᾶσα ξένη πατρίς ἐστιν αὐτῶν, καὶ πᾶσα πατρὶς ξένη.

[2] This is subject to the important observation, which should have been made before, that our Scottish statutes are liable to desuetude—*i.e.*, they are repealable, not indeed by mere disuse, but by a contrary custom. Lord Stair says, "Our statutes, or our Acts of Parliament, in this are inferior to our ancient law, that they are liable to desuetude, which never encroaches on the other. In this we differ from the English, whose Statutes of Parliament, of whatever antiquity, remain ever in force till they be re-

a region where the abstract considerations with which we are here concerned have not so much influence, and where the voice of the Church itself on the question is a voice of persuasion rather than of authority. (Yet it speaks with most legitimate power now, as essentially a national Church —living for the nation and by it, and so entitled to appeal to the nation for every change that furthers its usefulness.)

But with Churches which are free, and which desire to be so in respect of creed, the legal question is an important and pressing one. A Church is only free to hold a creed when it is free to leave it; and it is not free to leave what is essential to its Church existence. The non-established Presbyterian Churches at present are in the awkward position of (popularly) representing all their Confessions as essential, and at the same time of claiming a Church right to change them all. That legal questions must arise sooner or later upon such a state of matters is certain; and the subject may be more calmly and wisely discussed before the collision than after it. The question is perhaps partly a mere question of words, in a race which has a strong vein of paradox;[1] but paradoxes in Scotland, as in that other

> "Noble nation, where
> The idea of a knife cuts real flesh,"

have often drawn blood; and it is probably also, in some degree, an ultimately insoluble problem—especially in the region as to fundamentals of a Church and of individual belief. But between these extremes there seems to lie a large substantial and practical question, so practical that it is not clear how any civil judge could refuse to take it up, and so difficult that it is impossible to say what would be the result.

Yet the old Church Party in Scotland has never been much influenced by considerations of civil law and civil consequences; and for a pure decision on matters so central and sacred, this is perhaps no disadvantage. Besides, its essential conservatism has long since led it to invert what seems to be the Protestant *onus probandi* as to creed,[2] and to hold practically that those who would move towards reducing a Church's creed to the essentials of the Church's faith, must prove their case, and show that this is a duty of the present age. To prove this may be impossible. But considerations like the following fairly raise the question :—

1. It is not a matter of option with a non-established Church whether it shall found on the essentials of Christianity or not. For it has no other sanction. An Established Church *has*—has a sanction which, by the common sense of mankind and the ancient principles of Scotland, is of the greatest importance. A non-established Church has no power but conscience. It is only as representing the catholic Church of Christ

pealed."—Institutes of the Law of Scotland, b. i. title 1. See also Erskine's Institutes, and Morrison's Dictionary of Decisions, p. 1855, 1838.

[1] "Gens ratione ferox, et mentem pasta chimæris."

[2] That is, theoretically, the *onus*. The perusal of the Confessions of the Reformed Churches does not give me the feeling that their framers or students would have been much influenced by such a theory.

that it can draw a single young man to its ministry, or a single member to its congregations. And it is only by doing so broadly and *obviously*, that it can continue to have any power. It must be an awkward thing for such a Church to have a Confession that does not represent the essential creed of the Church of Christ — much more to have a Confession that does not seriously pretend to represent that creed.

2. In former times the Church, as well as the law, of Scotland, seem to have had no difficulty in ignoring or denying the Christianity of those who did not accept the full Confession of Faith—Scottish or Westminster. All members of the Church find it impossible to do so now. Not only innumerable individuals, but whole communities and sects outside it, are warmly recognised as Christian. Probably no man will now assert that the existing Confession supplies a criterion for discriminating between one who is a Christian and one who is not; and certainly no man believes it. But this makes short work of what would otherwise be a very difficult question—turns it from a matter of theology into a matter of common honesty. The fact is acknowledged; only the application remains. The application may, indeed, be difficult; but the burden of proof against communion or union rests unceasingly on those who keep apart from men already acknowledged to be fellow-Christians.

These considerations run rather too exclusively in one line; and as the legal facts which press Churches in general lie in the same direction, it may be well to remind ourselves, in closing, that whatever may be the case with the Church, the individual is unchangeably bound to acknowledge all truth that he knows; that men are bound to seek truth together, and together to hold it; that through truth God saves men; that in their dealings with truth and His Church God tries men; and that the spirit of truth and love, or the want of it, which we show in legislating upon such a matter, or discussing it, lies open to One who with no postponed or uncertain judgment judges according to every man's work.

INDEX OF MATTERS.

INDEX OF CASES.

ABBREVIATIONS.

"S." throughout this volume refers to the Series of Reports of the Court of Session in Scotland which pass under the name of MR SHAW; "D." to the Series which succeeded it about the year 1837, and pass under the name of MR DUNLOP. "M." is *Morrison's* Dictionary of Decisions.

INDEX OF STATUTES.

THE END.

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OPINIONS OF THE PRESS—Continued.

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Times.

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Sunday Gazette.

Of the very great value of the book, however, we can have no doubt, and we hope in this and a succeeding article to set before our readers so many of the points that are most successfully brought out in it as to make them of our opinion.

Scotsman.

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