clearly of opinion that he retained his right. The point is ruled by the elementary rule in conveyancing, that when a deed constituting a security contains *in gremio* a right of reversion, it is a mere incumbrance; but when, on the other hand, the conveyance is *ex facie* absolute, with a reservation in a separate writing, the absolute fee is in the disponee, and the reservation is a mere personal contract, not requiring to be published to the world, and not therefore binding on singular successors.

Tuesday, Nov. 14.

SECOND DIVISION.

SCOTTISH EPISCOPAL CHURCH CASE.

FORBES *v.* EDEN AND OTHERS.

Counsel for the Pursuer—Mr Gordon and Mr Hope. Agent—Mr William Peacock, S.S.C.

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

This is an action at the instance of the Rev. George Hay Forbes, minister of the Scotch Episcopal congregation at Burntisland, against the Right Rev. Robert Eden, D.D., one of the bishops, and primus of the religious denomination known as the Episcopal Church in Scotland, and other clergymen of that Church, as members of a General Synod held in 1862 and 1863. 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. There are also conclusions of 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 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. In the second place, there is a conclusion of declarator that the pursuer is entitled to celebrate divine worship and all the other services, and to administer the sacraments and all the other rites of the 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. In addition to these conclusions, the summons contains a pecuniary conclusion of £120 against the defenders, conjointly and severally, being a sum paid by the pursuer to his curate, the Rev. Mr Wilkinson, to whom the pursuer says a license was wrongfully refused; and a conclusion for £200 for damages, as *solatium* on account of said refusal.

The Lord Ordinary (Barcaple) held that the grounds of reduction libelled, and the pursuer's averments on record, were not relevant to support the conclusions of the action, and assoilzied the defenders. The pursuer reclaimed, and his case was to-day partially opened by Mr D. B. Hope.

Wednesday, Nov. 15.

Mr HOPE resumed his argument on behalf of the pursuer in the case. He began by saying that he wished to point out to their Lordships, as shortly as possible, the exact alterations that had been made on the law of the Church as embodied in the canons, in matters such as the communion service. Then he had to make the inquiry as to whether these alterations were material—that was to say, whether they affected the doctrine of the Church; also, whether the Synod had power to make these alterations; and, lastly, whether these alterations had affected the pursuer in such a manner as to entitle their Lordships to sustain the conclusion of his summons. With regard to the communion service, the position of the pursuer was this—that the form of the English service gave rise to the view held by many of transubstantiation; but whatever the change was, it could only be ascribed to the act of the clergyman in repeating certain words and performing certain acts, while, according to the Scottish office, the change was ascribable to the direct invocation of the Holy Spirit, and to that alone.

The LORD JUSTICE-CLERK—Can you give us any light as to where the first edition of this Scottish communion office is to be found?

Mr GORDON—It was published in London in 1637.

The LORD JUSTICE-CLERK—That is Laud's Prayer-Book.

Lord NEAVES—That is the book that was read in St Giles' Church, and which was objected to by Jenny Geddes. (A laugh.)

Mr HOPE said it was well known that the edition in view of the Synods, in 1811, 1828, and 1838, and sanctioned by them, was the edition revised in 1805.

Lord NEAVES—If you say there was a uniformity regarding the communion office for a century before, it is very odd it should not have been found in any printed form.

Mr HOPE—There were a great many editions, and a great many are extant still.

Lord NEAVES—Can you give us the earliest?

Mr HOPE—I am informed that the edition revised in 1805 was printed first in 1764, and since then it has been in universal use. In the earlier liturgies of the Scottish Episcopal Church prayer for the dead was held in a different sense from that held in the English Church.

The LORD JUSTICE-CLERK—In what sense does the pursuer say the Scottish Episcopalians pray for the dead?

Mr HOPE—I shall endeavour to put it in the precise terms.

Lord NEAVES—Has the Church any doctrine on the subject as to whether the deceased pass into glory or whether they go into an intermediate state?

Mr HOPE—There is no statement in the standards of the Church on the subject; but I shall endeavour to supply your Lordships with a declaration regarding it.

The LORD JUSTICE-CLERK—We must have something very tangible on this point.

Mr HOPE then read a number of extracts from various authorities on the subject, showing that there had always been an acknowledged difference between the two churches, and that a change of the canons had always been deprecated. He might mention a very important fact, which was this, that when Mr Cheyne, in the well-known case at Aberdeen, was tried for heresy, he was tried by the Scottish communion office; and it was from that office that they judged the matter of doctrine. After the canons were changed, Mr Cheyne applied for readmission. Without anything being done, and without any expression of a change of view, he was readmitted by the bishop because the new canons enabled the bishops or those in authority to do so.

Lord NEAVES—Does that appear to be the cause?

Mr HOPE—I put the cause and effect together.

The LORD JUSTICE-CLERK—But put the things in order.

Mr HOPE—There was nothing done in the way of recantation.

Lord NEAVES—Do the present bishops hold that Mr Cheyne is now right?

Mr HOPE—I hold that they have now all changed, and that what was held to be formerly wrong is now held to be right.

The LORD JUSTICE-CLERK—Will you state to us the false doctrine of Mr Cheyne?

Mr HOPE—It was consubstantiation.

The LORD JUSTICE-CLERK—He defended himself on the communion service of the Church of England, and he was convicted on the communion office of the Scottish Episcopal Church?

Mr HOPE—Yes.

The LORD JUSTICE-CLERK—It is very desirable that we should see the discussion on that matter.

Lord NEAVES—Was there a libel against Mr Cheyne?

Mr HOPE—Yes.

The Lord Ordinary did not deal with the question of doctrine at all.

Lord NEAVES—Do you allege that there is erroneous doctrine taught by the communion service of the Church of England.

Mr HOPE—Yes.

Lord NEAVES—Not merely an omission to teach pure doctrine, but the teaching of false doctrine?

Mr HOPE—Both, my Lord.

Lord NEAVES—If we are to deal with this matter we must deal with it as a matter of business. It is true we are not the judges of true and false doctrine, but we will be compelled to compare them.

The LORD JUSTICE-CLERK—If you can bring it to this, that the canons of which you complain alter the standards of your Church, that *prima facie* is at least relevant.

Mr HOPE—That is our contention.

The LORD JUSTICE-CLERK—You must show us that the Scottish Episcopal communion office is quite different from what you have got in its place—that there is an essential difference.

Mr HOPE—When the case came up before the Lord Ordinary he said he would not go into that.

Lord NEAVES—We must know the difference between the two services; and whether it is material or immaterial will be the turning point. There must, at all events, be a palpable and substantial difference shown to us.

Mr HOPE having entered at length into a comparison of the two offices, then quoted the opinions of Bishop Wordsworth, Bishop Forbes, Dean Ramsay, and Archbishop Whately in support of his argument that fundamental alterations had taken place in the doctrine and practice of the Church by the passing of the new canons.

Lord NEAVES—Do you suggest that the Church has been selling her birthright?

Mr HOPE—I rather think it comes to that. This is the painful position which the pursuer feels himself bound to take up, that his superiors have fallen from their duty. Their Lordships would see that he had two objections—one in this way, that the pursuer was now bound to perform services in a certain form in which he was not bound to do before; and he would show that in that way the defenders had altered the doctrine of the Church by putting their stamp and authority on various services containing doctrines which were opposed to its original constitution. It affected his civil rights also in this way, that he might be compelled to leave the Church on account of its doctrines. The Lord Ordinary said that the pursuer might leave the Church if he did not like it, but that would be the same as if he were put out of it. He felt that if their Lordships wished him to go farther into the doctrinal points it would be necessary to give in a written statement. As to the power of the General Synod to make the alterations—they were made under a canon in the old code; and it was quite true that the Synod were entitled to make alterations. But the position he took up was this: That the alterations were not in conformity with the recognised constitution and practice of the Church. Now there must have been some meaning in this limitation. For instance, the Synod were not entitled to alter the canons of the Church so as to abolish Episcopacy and introduce Presbytery; and if he was right in saying that they were to look mainly to the canons themselves for the acknowledged practice, then he was right in holding that the acknowledged practice was against the alterations. Was not the very fact that the defenders had struck out of the canons the words "acknowledged practice," a sort of acknowledgment on their part that the retention of these words would have prevented them from doing what they had done? He contended that it was quite clear that the defenders had committed such a breach of the agreement with the pursuer that he was entitled to say—You have exceeded your powers in altering the canons to that effect.

As to the pursuer's civil rights he was in this position, that he might by these alterations on the canons be interfered with in his position of clergyman of Burntisland. He maintained that the bishop was bound to have granted a license to Mr Wilkinson, the pursuer's curate.

Lord COWAN—Do you blame the bishop?

Mr HOPE—We do not blame the bishop. The bishop was bound to obey the Synod, and the pursuer complained that the bishop had been compelled to do the thing he had done.

Lord NEAVES—Would it not have been more convenient to have brought an action against the person who had done what the pursuer complained of?

Mr HOPE—We admit that we could have brought an action against the bishop, but we submit that the action against the Synod is competent. The bishop is nothing more than the mouth of the Synod.

The LORD JUSTICE-CLERK—Is there any endowment connected with the church at Burntisland?

Mr HOPE—No; the pursuer derives his income from offertories — voluntary contributions, which continue so long as he is minister of that charge.

The LORD JUSTICE-CLERK—I suppose the chapel belongs to the Episcopal communion?

Mr HOPE—It is the pursuer's own property. He has spent a large sum of money in building the chapel and schools.

The LORD JUSTICE-CLERK—Supposing he were deprived of his office to-morrow he could keep the chapel?

Mr HOPE—But the buildings would be of no use to him. It comes to this, that if he is put into the position that he is declared no longer a minister of the Church, he is made a marked man—a man to be avoided. It might be that he would not remain a member of the Church, and therefore he would be put into the position that all the civil rights and status he enjoyed as a member would be lost to him.

Lord COWAN—Do you think that any member of the Church could have raised an action in the same way?

Mr HOPE—I am not aware that the laymen have such a position as would enable them to come forward in the same way as clergymen can.

Mr HOPE had not concluded his argument when the Court rose.

Thursday, Nov. 16.

Mr HOPE resumed his argument on behalf of the pursuer. He began by referring to the way in which the civil rights of the pursuer were affected by the alterations on the canons, and said he had no doubt the Court would see what a serious position the pursuer was in. It was not a mere fancy that had brought him to the Court. He had joined this Church on the footing that a certain state of matters was the rule.

Lord NEAVES—If the judicial body, or whatever it was in this Church, were to degrade the pursuer from the office of priest to the order of deacon, but not affect him in any other way, is that depriving him of a spiritual office?

Mr HOPE—Certainly; because he would be unable to perform certain spiritual services as priest, which bring along with them pecuniary emoluments. He is eligible for certain preferments; he is in receipt of a certain income as priest, but he might not be so if he were a deacon. Besides, the congregation would not then have a person who was able to administer the sacrament, pronounce absolution, and be qualified to perform other duties.

The LORD JUSTICE-CLERK—In the cases which you have referred to as arising in the judicatories of the Established Church this Court always very carefully avoided any interference with the matter of ordination; and while they issued very stringent commands to Presbyteries to do and to refrain from doing certain things, they never would order a Presbytery to ordain. Now the giving and taking away of orders may be a thing with which the civil court will not interfere.

Lord NEAVES—It is a spiritual gift.

The LORD JUSTICE-CLERK—They did in the case of Edwards ordain the Presbytery to induct him, and there was a great deal of argument as to whether that was in effect ordaining. The Court, however, said—It is the fact that induction is a right according to civil law, and we ordain you to give him that which by statute he should get.

Mr HOPE—But apart from the question of deprivation of order, there are other things that might affect the pursuer.

The LORD JUSTICE-CLERK—The difference between this case and those cases in which the Court was formerly engaged is this, that in the latter the Court was simply enforcing statutory rules, while there can be nothing of the kind in Dissenting communions.

Mr HOPE—But I do not know that that effects the principle laid down—that difference applies only to the origin of the right.

The LORD JUSTICE-CLERK—If you can show us that you have a right secured by contract, the law is as much bound to protect that as a statutory right. That is quite true. The only thing I am calling your attention to is that about those other cases there could be no doubt, because they depended on statute. The difficult part of your case is to make out your right and interest.

Lord NEAVES—The deprivation of this pastoral charge could not affect Mr Forbes' right to officiate in his own chapel to those who chose to attend him.

Mr HOPE—Although there is nothing to prevent him performing service in that building, the effect of the deprivation would be to prevent any one going to hear him.

Lord NEAVES—One effect would be that those who believed him to be a representative of the only true Episcopal Church of Scotland would attend his ministrations.

Mr HOPE—But the one must be right, and the other must be wrong. The pursuer would suffer in this respect, that the people would not go to hear him because he is said to be in the wrong, and his patrimonial interests would thereby suffer.

Lord NEAVES—I would leave the communion ; and say to it, If you leave me, I will banish you. I will excommunicate you all. (A laugh.)

Mr Hope referred at some length to a series of cases which he maintained had a material bearing on his case, particularly as showing that the Court would not wait until the effects of an illegal act were visible, but would interfere to prevent the possibility of injury.

Mr HOPE—A great deal of the argument on the other side consisted of ridicule at the circumstance of a single clergyman coming forward against his superiors, and saying—"Because I don't wish a thing done you shall not have it." A minority, if it adheres to the original tenets—even though it should only consist of one as well as a thousand—has the right to come forward in this way. He maintains that if he is compelled to renounce his connection with the Church, it will have the same effect as if he were put out by them. What he says is that he is entitled to enjoy the rights conferred on him at his ordination. Mr Hope then quoted a passage with regard to liberty and obligation, on which

The LORD JUSTICE-CLERK said—That means personal liberty.

Mr HOPE—Personal liberty may be involved, because they deprive him of the opportunity of doing certain things in that denomination, and they may resort to measures to affect his personal liberty ; but if the proceedings here are declared to be right, there can be no redress.

Lord NEAVES—How would it affect his personal liberty ?

Mr HOPE—By excluding him.

The LORD JUSTICE-CLERK—They cannot put him in prison ; that is what is meant by personal liberty.

Mr HOPE—Still it relates to obligation.

The LORD JUSTICE-CLERK—I do not see that that aids you very much. The question is whether you have got the case of a breach of contract.

Mr HOPE—The pursuer maintains and endeavours to show that there has been an alteration—a substantial alteration—of the state of matters that existed at the time he was made a clergyman, signed the canons, and entered on the contract. He has endeavoured to show that there has been an alteration in matters of doctrine of vital importance ; that it is an alteration beyond the power of the parties who made it ; and that it is an alteration which affects his civil rights, his status, reputation, emoluments, and rights that were conferred on him by that contract ; and that being illegally done, he is entitled to come and seek redress in the various modes described in his summons. I therefore ask you to reverse the interlocutor.

The LORD JUSTICE-CLERK—I am exceedingly obliged to you, Mr Hope, for the very able statement you have made in this case ; but there is a thing to which I wish to draw your attention. I do not see that you state anywhere in the record that the doctrine of the English office is false or heterodox, and that you cannot conscientiously attend the holy communion when that office is used.

Mr HOPE—Not except in so far as it is contained in condescendence 15.

The LORD JUSTICE-CLERK—I do not find anything about it there.

Mr HOPE said it might not be said so in words, but it was implied. He also pointed out various other parts of the record which he held bore on that point.

Mr SHAND then addressed the Court on behalf of the defenders. He said that in order that the pursuer might make out a relevant case it must come up to this, that there was a civil and patrimonial right injured. If the case was laid before their Lordships as one in which a member of a voluntary association came to complain to the Court of some change that had been made in the rules of that association, their Lordships would not entertain such an action unless for the purpose of protecting the personal rights and property of the party. He maintained that here no injury had been done to the pursuer, and that his civil rights had not been interfered with. Mr Hope had justly conceded that throughout this discussion it must not be forgotten that they were here dealing with a strictly voluntary association. It was a voluntary association entitled to be treated with the utmost respect by every one who spoke of it—a voluntary association which had been made one of great consideration and importance by the character of the men, and by the purpose for which they were associated — but on the question of legal principle, and dealing with a question such as this, it was not in a higher position than any of the other voluntary associations which existed for many purposes throughout the country. There were associations for social purposes, for literary purposes, for scientific purposes, and the like. Their Lordships might be called upon to interfere and regulate the affairs of such associations to the same extent and to the same effect as in the present case. A number of persons united together and formed an association, and expressed their opinions either in rules of the society or otherwise. It was not the fact that these parties were bound by a never-ending contract that they should never change their views. He quite conceded that if a change occurred in this association by which a party was seeking to divert property to a purpose other than that for which the property was acquired and originally destined, their Lordships would deal with that matter ; or if their was anything that was libellous as to the way in which one member was treated by his fellows, it would be competent to bring an action of declarator to have it found and declared that the parties in such an association were not entitled to alter their rules. But in a case where there was no question as to patrimonial interests, he thought that in the very statement of such a

thing it must be obvious that the Court could never entertain a case of that kind. Besides, there would be no end of such questions if the Court were to deal with this one. Something had been said about status in the course of the argument. He did not quite apprehend that in the case of a voluntary association of this kind any question of status could be made the subject of an action in the way it was done here. He did not desire in the least, as Mr Hope suggested, to redicule this case in any aspect of it, unless to show that it was utterly unfounded in true principle. Was it ever heard that a party, say a member of a temperance society, was entitled to come to the Court and say that he would have this declared to be illegal and that set aside because it affected his status? Status in that case they could not deal with. Men's opinions and minds necessarily changed, and it could not be expected that people would always remain of the same opinion. Mr Shand then proceeded to deal with the various branches of the subject brought forward on the other side: and with regard to the Scottish communion office, he said he could not concede that it was a standard of the Church.

The LORD JUSTICE-CLERK—I want to get at the meaning of "primary authority."

The SOLICITOR-GENERAL—You will never get at that. (Laughter.)

Mr SHAND—No more appeal could be made to the Scottish form than to the English form.

The LORD JUSTICE-CLERK—Although the former is said to be of "primary authority?"

Mr SHAND—Yes; although it is of "primary authority." I maintain that the argument that is founded on any change in the communion office cannot receive any effect in the present action. Then with regard to the opening of a mission in the district, he said that nothing could be found to preclude the Synod, if it thought fit, from opening a mission wherever they chose.

Lord NEAVES—I don't think it would be a *bona fide* mission to send a missionary to preach to the pursuer's congregation.

The LORD JUSTICE-CLERK—Does it mean sending somebody to preach to that congregation?

Mr SHAND — Certainly not. In conclusion, he wished to ask where was the civil wrong that had been done to the pursuer? Had there been any injury to his property, or pecuniary right he possessed, or status, in anything that their Lordships could deal with? He maintained there was not. Take the other matters, of public baptism, the visitation of the sick, the burial of the dead, and other services, and see where there had been any civil wrong done to him. There was no wrong whatever done him. The pecuniary conclusion being out of the case, there was nothing of the nature of wrong done in respect of property in respect of character; and he maintained that the Lord Ordinary's interlocutor should be adhered to.

Friday, Nov. 17.

The LORD ADVOCATE replied to-day for the pursuer. He remarked that his friend on the opposite side had stated that the ministers both of the Scottish Episcopal Church and of the Church of England subscribed the Thirty-nine Articles. That was quite true; but how that could be in favour of his friend's argument, that the offices of the two Churches were the same, he could not see. There might be the widest possible divergence between the two Churches, even although the ministers of both signed the Thirty-nine Articles. That did not effect the matter at all. Then as to the alteration of the canons, it was true that the Church had power to alter them; but it had no right to do anything that was not in accordance with the acknowledged practice of the Church. It had been stated that the Scotch and English services had been alike used; but where the English service was adopted in the Scotch Office, there was special reference made to it. It was referred to as a book that it might be expedient to adopt in particular matters. Everything indicated that the ordinary usages of the Church of England were not as a rule observed in the Episcopal Church of Scotland. The Scottish communion office had been one great barrier between that Church and the Church of England, and the greatest jealousies had existed in regard to it. So jealous were the members of the Episcopal Church of Scotland of their acknowledged practice, that in 1838 they refused to abrogate former canons if they were opposed to it. They had not at that time any prospect of the passing of the law of 1863, by which it was at least possible that a person in orders in the Episcopal Church in Scotland might be transferred to a cure in England. When the Synod came to alter the canons in 1863, after having resolved to invert the acknowledged practice of the Church, they passed a canon which omitted the words "acknowledged practice of the Church," which they did for no other purpose than that they knew they were going against the acknowledged practice as expressed in the code of 1811 and 1838. He had heard it said that there were no patrimonial rights involved in this matter; but he needed hardly to state that every clergyman of the Episcopal Church of Scotland must obey the canons which were in existence for the time, and if he disobeyed them he placed himself under the risk of being deprived of his office. He maintained that there had been a direct breach and violation of contract, and that he was entitled to have redress. The Scottish communion office had been considered, justly considered, the primary authority in the Scottish Episcopal Church; and that, he held, was proved by the opinion of the most distinguished men of that Church. Whatever might have been done for the sake of peace, the Scottish communion office lay at the bottom of the Episcopal community here, and no change could be made in placing the English office over it without striking at the root of the matter altogether. In the opinion of those best qualified to judge, there was not only a divergence in point of expression, but a most serious difference in point of substance. In a matter of this kind, the two offices differed in expression, and in such a case as this expressions were of very great importance. Now, were the new canons made in 1863 in conformity with the acknowledged practice of the Church? No man could affirm that they were. They were known to be discordant with the acknowledged practice of the Church, and they were discordant with the most solemn canons of the Church, which had recognised an opposite office as of primary authority within the communion. There was no doubt that the contract recognised by the canons, and admitted by the bishops in 1849 was broken by the bishops in 1863. Was there any doubt about that, as far as the 33d canon was concerned? None whatever. It was not necessary for him to found absolutely on the differences of doctrine, but he founded on the spirit and object of the canon. There could be no reason in forbidding the Synod to abrogate canons which were not in accordance with the acknowledged practice of the Church, and there could not be any object in omitting the words "the acknowledged practice of this Church," but this, that they were conscious that what they did was against the practice.

Lord NEAVES—Are the Synods exclusively composed of clerical persons?

The LORD ADVOCATE—There are no laymen. The pursuer had suffered a direct injury in the administration of his congregation. The license to the curate had been refused, and he could not go on without a curate. He would not permit the English communion office to be said in his church, for he had conscientious scruples, as he considered it, opposed to what was declared by the Church to be of primary authority. The result of the breach of faith to him would be this, that he would be compelled to leave the communion he had joined under a solemn agreement, or, at all events,

cease to be a presbyter of that communion, because regulations of societies formed into churches before a civil tribunal, he was quite sure of this, that they could not have a case in which it was of more vital importance to a pursuer.

The SOLICITOR-GENERAL replied on behalf of the defenders. He began by saying that if the pursuer had sustained a civil wrong there could be no doubt of the jurisdiction of this Court. According to the opinion of the Episcopal Church of Scotland, according to the opinion of the pursuer himself—and his own opinion was sufficient in this matter—the office of clergyman once conferred could never be removed. The pursuer said that his legal rights under the contract to which he had agreed had been violated by the enactment of the canons of 1863, and that the law of Scotland gave him a remedy for that violation of his supposed legal rights against the members of the Synod by which the canons were enacted. Of course that must be as individuals, because when their duties were fulfilled in the Synod that body was discharged, and the members dispersed and became private individuals as before. He then called attention to the particular canons of 1863, of which the pursuer complained—the enactment of which he said constituted a civil wrong, of which he was entitled to complain in this Court. The first point he would refer to was that which related to missions; and to think that the Episcopal Church of Scotland was to be debarred from appointing a mission in any diocese throughout the length and breadth of the land where they saw reason was so idle a proposition that he should feel it insulting to their Lordships if he dwelt upon it. Then it was said that the omission of the words "acknowledged practice" was a breach of contract. Now, was ever such a proposition made in a court of justice before? He must say that these were very unfortunate words, and that the canons were better without them. It was never intended to be made a jury question whether a particular matter considered to be in accordance with the acknowledged constitution of the Church was so or not. He considered that a great many of these canons were canons binding chiefly as a matter of conscience; and it was never within the contemplation of any human being that it should be submitted to one of the constituted tribunals of the country to say whether such and such an alteration was in accordance with the constitution of the Church. Then, by canon 38, which the pursuer subscribed, and which he therefore must admit to be binding on him, he was required to perform the burial service according to the office as it was found in the Book of Common Prayer, and the service for the visitation of the sick.

The LORD JUSTICE-CLERK—You say that he is required to use these services by canon 38?

The SOLICITOR-GENERAL—I think so.

The LORD JUSTICE-CLERK—I do not read it so. In the visitation of the sick the service is either to be according to the Book of Common Prayer, or in any other way it may be found convenient.

The SOLICITOR-GENERAL—That is an exceptional office. A sick person may not be able to bear it, and you have the same exception to it in the Prayer-Book itself. A minister might be the death of a person by going through the whole service, and that is left to discretion. I have the greatest respect for the pursuer's conscience; but for him to come forward to say that his civil rights are violated because his conscience has become different since he signed the canons is really almost too ridiculous. He maintained that there was no proper case here, and that the Court could not enter upon an inquiry as to the rules of any religious body, except for the purpose of expiscating some matter of civil right.

The Solicitor-General had not concluded when the Court rose; and the case was adjourned till Tuesday.

Tuesday, Nov. 21.

The SOLICITOR-GENERAL resumed his argument to-day on behalf of the defenders. He began by maintaining that the Church had power to ordain, change, or abolish its rules. In the Church of England there was only one form of the communion office, and he believed that was the case with respect to every church having a liturgy, except only the Scottish Episcopal Church, which was singular in this respect, that it had sanctioned two forms for the celebration of the same sacrament. The Episcopal Church of Scotland might ordain now, and begin the present ordination, by abolishing what stood ordained at this moment. Now, what was to be said against that? Anyone might object to what was substituted. They might object to what was ordained for the first time, but not because it was a change. The objection must be upon some other ground; for so far as the mere change was concerned, the Church had as much power to change as it had originally to ordain. After adverting to the objections taken by some to the Scotch communion office, on the ground that it favoured the doctrine of transubstantiation, and to the fact that those who approved of that office denied that they held such a doctrine, he proceeded to speak of the authority which had originally sanctioned the Scottish liturgy. He was informed, and he understood it was not doubtful in the estimation of those most conversant with the subject, that the Scotch office was based on what was found in the Prayer-book of Charles I., which was published in 1637. The edition he held in his hand referred to the fact that the King had consulted his clergy on the subject; and the Scotch liturgy which was there referred to was the Scotch communion office——

LORD NEAVES—Where can you show me authority for that meaning?

The SOLICITOR-GENERAL—When you speak of the liturgy of Edward VI., the liturgy of James, the liturgy of Elizabeth, you mean the communion office.

LORD BENHOLME—What did that authority sanction? Did it not sanction the whole book?

The SOLICITOR-GENERAL—I am giving the information I received from the Primus of the Church, Dean Ramsay, and others, that the Scottish liturgy here undoubtedly means, and has been received as meaning, the Scottish office. In regard to the difference between the Scotch communion office and the English office, he said it appeared that some of the Scotch clergy went to King Charles to have a difference introduced into the book, in order to guard themselves against the charge of slavishly copying the forms of the Church of England, and that the variation which occurred between the two offices was attributable to that. Now there never had been any Scotch communion office different from the office of the Church of England, expressly sanctioned by these canons. There had been no authority of the Church given to any other.

LORD NEAVES—You mean not even in 1811?

The SOLICITOR-GENERAL—What I mean is not that they might not have authorised a thing by the name of the Scotch communion office, but that the Church never sanctioned the terms of the Scotch communion office—never fixed the terms of it as the language and terms of the Prayer-book were sanctioned.

The LORD JUSTICE-CLERK—You mean they never fixed the text of it?

The SOLICITOR-GENERAL—Yes. The Scotch office contained alterations for which the Church never gave any sanction. They were alterations by individual bishops and individual presbyters; and the changes which have been made ever since the edition of 1744 were changes by individual bishops and individual presbyters, entirely on their own authority. These changes, I believe, consisted to a great degree in marginal notes on their copies of the office. Dean Ramsay, whose memory goes back as far as most of the clergy of the Church, informed me that an office which had been used as the Scotch office in his time was one called the Aberdeen or Skinner office. With regard to the office generally in use, there might be a difficulty in interpreting the

words "primary authority;" but it did not occur to him that it was a difficulty in the way of their Lordships judging in this case, or a difficulty to which their Lordships could listen. It was an anomalous thing to sanction two forms for the celebration of the same sacrament; but when that was done the Church must give its authority for the use of each. It was not necessary that the Church should declare her preference for the one or the other, but that might be done; and the very utmost that might be said of these words "primary authority" was that the Church declared a preference. If there was a difference between the two as to the way in which the prayers were expressed, there would be room for a preference. He did not know but that the word "primary" might here be used as meaning only first in time; nor did he know the exact meaning of the word "authority" as it was here used. It might mean estimation, character, weight, or credit. Now, what was the meaning of the declaration in the article quoted in the canons, that it was an inherent power of the Church to ordain or abolish ceremonies or rights, except that the ceremonies and rights which were proper and according to sound policy at one time, and in a certain condition of the Church and men's minds, might not be so at another; and therefore it was in the power of the authority who ordained them to change and abolish them? The one office might be abolished, not because it was bad, but because the Church liked the other better. What was to prevent them forming a different opinion in 1863? The interval was a very great one from 1811 to 1863; and the preference, which was just and right, and according to the best interests of the Church, might be very greatly reversed in 1863. He believed that the expression "primary authority" was introduced in 1804 or 1811 very much as a matter of mere courtesy to two very distinguished men, by whom it was understood the words were first employed — namely, Mr Addison and Bishop Horsley. The Church still sanctioned the use of both offices, but they dropt the expression, which meant a preference of the one over the other; and Mr Forbes said that that was a violation of his civil rights, and that he was entitled to have it reduced as being a civil injury done to him. Now, that was really so idle a proposition on the part of the pursuer that he should not refer to it farther. The difficulty had occurred with respect to new congregations, as to whether they might adopt the English office at first, or adopt the Scotch first, and then apply to the bishop to change it. The Church in 1863, taking the matter into anxious consideration, urged to it by such pamphlets as those proceeding from quarters entitled to weight, such as Dean Ramsay, Bishop Ewing, and others, addressed themselves to the consideration of this matter; and they allowed the use of either the one or the other, according to the opinion of the incumbent and the majority of the congregation. But Mr Forbes said he had a civil interest, not merely that he should be permitted to use that which, on the whole, he preferred, but that he had a civil interest that the whole Church should have a preference for that one also. But the Church, which had a preference in 1811 and 1838 for that form, had not that preference now. The pursuer said that he might be exposed to deposition by the existence of these canons. How? He was going to violate them. He was not going to adopt the Book of Common Prayer of the Church of England—the sealed book adopted by the Scottish Episcopal Church. He was not going to follow it in the baptismal service and some others, and he would thereby be going in the face of the Church which had ordained these things to be used. He might be visited by Church censure. Really, what strange talking this was! Was the Church in 1863 not to be at liberty to ordain any ceremonies and rights it pleased—to ordain ceremonies as recorded in the Book of Common Prayer of the Church of England, instead of preparing new ceremonies and rights for itself? Certainly it was. Their Lordships could not listen to the suggestion that Mr Forbes had it in view to fly in the face of his ecclesiastical superiors; they could not hear him when he ventured to suggest that in this matter of ceremonies and rights ordained by man's authority he would ask their Lordships to interfere for his protection whatsoever. This now left him only one matter to which it was in the least degree necessary to refer; and that was the damages which the pursuer sought in this action, because the bishop of the diocese to which he belonged had refused to license a curate. It was the strangest proposal he had heard in this Court, that the law of Scotland should give him a right to license a curate. It was perfectly lawful, no doubt, to have a curate—lawful in the same way that things in other departments were lawful. There were kindness, courtesy, hospitality, and a great many other things, that were very lawful, very laudable, and very important, which a man might benefit from having, and might suffer from being denied, but in regard to which a court of civil jurisdiction could give him no assistance at all. If the bishop of his diocese had good reasons or bad reasons for refusing to license a curate for him, what in the world had the law of Scotland to do with that? Their Lordships were administering the law of Scotland, and they could not award anything but what the law permitted. It might not be wisdom on the part of a bishop not to license a curate who had a beard, or who did not have a beard, or one who belonged to a temperance society, or who did not belong to a temperance society, or would not subscribe the canons; but with these matters of wisdom or good taste he supposed their Lordships had no concern. Their Lordships might, as members of the public, condemn such conduct; but in this, one of the established tribunals of the country, what had they to do with a curate at Burntisland or whether the Bishop of St Andrews licensed him or not? If it was the misfortune of Mr Forbes to differ so much from his brethren that he would not approve of the canons, what could their Lordships do? They might tell him that they were sorry that his views were not in harmony with those of his neighbours; but they could do nothing for him in a court of law. Their Lordships never could have any concern with the rules of any voluntary ecclesiastical body except when property came to be the question, a man's reputation, or civil rights of any kind. Where a question related to a house, that was a matter of title; if it related to money, that might be a matter of contract; and their Lordships would consider that in the usual way. He concluded by saying that there was no ground for the present action, and that it was quite unmaintainable.

The case was taken to avizandum.

Tuesday, Nov. 14.

SUSP.—PEARSON *v.* LOCKHART.

In this case, which is a suspension of a charge for payment of a sum of money said to be due under a decree of the Court of Session, the Court ordered an issue.

DONALDSON *v.* FINDLAY, BANNATYNE, AND CO.

This case was to-day, after a full argument, taken to avizandum.

FIRST DIVISION.

PETN.—AGNES ELLES AND OTHERS FOR REMOVAL OF A TRUSTEE.

Counsel for Petitioners—Mr Scott and Mr Rhind. Agent—Mr A. Guthrie, S.S.C.

Counsel for Respondent—Mr Burnet. Agent—Mr John Thomson, S.S.C.

This is an application for the removal of Alexander Campbell, Saltcoats, from the office of trustee