rites ordained only by man's authority—*i.e.*, although the eucharist in itself is a divine injunction, the manner of celebrating it is a rite or ceremony of merely human authority, which every church may order or vary as it thinks best. In the face of this declaration it seems impossible to question the right of the Scotch Episcopal Church to deal with the communion office in any manner consistent with sound doctrine; and as I have already shown that both of these offices must here be held to be unexceptionable, I cannot see how we can refuse effect to an enactment which merely alters the relative precedences of these two offices, both of which were already authorised. Reference is made by the pursuer to the 33d canon of 1838, which is said to limit the power of a general synod to alter canons only where the alterations are in conformity with the recognised constitution and acknowledged practice of the Church. But it is part of the constitution that the Church can alter rites and ceremonies, and it is not denied that the Synod represents the Church in this respect. With regard to the acknowledged practice, that can only mean that alterations are not to be at variance with the practice of the Church in essentials. It cannot mean that no practice can be changed, because every change of a canon must infer a change of practice. But what has been the acknowledged practice of this Church as to the communion service? It has been seen that when the Episcopalians formed part of the Established Church in Scotland they had no liturgy or set forms of any kind. Again, after the Revolution, they had no liturgy or settled forms, and when these came gradually to be introduced, it was done in an anomalous and irregular manner by individual bishops and congregations adopting certain forms, among which great discrepancy prevailed down to a very late period; while the form for which the pursuer contends has no sanction of any regular kind, nor any authorised text to which an appeal can be made. The canons of 1811 and 1838 are scarcely intelligible or consistent, and on this matter certainly do not support the pursuer's case. They speak of the authority which introduced the Scotch service, meaning obviously the authority of the King in 1637; but the office for which the pursuer contends, and which, he says, was sanctioned by these canons is not the King's office, but something materially different, and traceable to no authority whatever. The acknowledged practice of this Church indeed in this matter has been not to preserve stability, but to make constant changes in the communion office from time to time—a practice in accordance with the power of change asserted in the canons, however loosely it may sometimes have been exercised. Further, there can be no doubt that, looking to the practice for the period between 1838 and 1863, the tendency has been in the direction of the English office. This is not disputed by the pursuer. The Anglican view has gained ground from the obvious causes already referred to, and the feeling in favour of the Scotch office has diminished in point of extent, although it may not have diminished in point of intensity, where it remained at all. It was not unreasonable in the general synod to give effect to this change of feeling if they had the power to do so, and thus to bring the rule of the Church in conformity with the prevailing feeling. This is the RATIO set forth in the new canons, and not contradicted by the pursuer. The case of the pursuer seems to be that, under the canons of 1838 and in a question with him, the terms and position of the Scotch office were *immutable*. This surely cannot be maintained. It cannot be supposed that any Church would tie up its hands in this manner, in the very same breath in which it declares that every Church has an *inherent* right to alter rites and ceremonies, and that the communion service is one of the things to which that power extends. Suppose that the synod of 1863 had gone back to Laud's office itself, and had annulled all the recent additions and alterations to which it had been subjected by individual bishops or parties in the Church, would that have been *ultra vires* of the synod, or a breach of contract with the pursuer? It would be very strange to say so; and yet the adoption of the English office is only an exercise of the same kind of power, and in the same direction. It may perhaps, indeed, be thought there is more difference between Laud's office and the Scotch office as it now stands than between Laud's office and the English liturgy. It must always, no doubt, be a limitation on the power of the Church or of the synod that any alteration made in the communion office shall be consistent with sound doctrine, and shall not affect the celebration of the sacrament as a divine institution; but if I am right in thinking that the English office must, between these parties, be held to be unobjectionable, no difficulty arises on this head. I can find, therefore, no excess of powers in anything the defenders have here done, and no contract between them and the pursuer which could prevent them from varying the comparative use or relative position of these two services. The utmost that the pursuer could make of this matter seems to be that it is a part of the constitution of this Church that there shall be two authorised services, and not one only; and that individual congregations shall be allowed their choice in this respect. I do not say that even this is clear, but it seems to be the utmost limit to which it is possible to extend the kind of contract on which the pursuer founds. Whether the Church will go farther than they have done in this matter, and seek by some future canon to oust the Scotch office altogether, and deprive it of any authority or observance, is a matter on which it is needless to speculate, and which may depend on whether it may be for the *majus bonum* of the Church that this should be done. It has not been done yet, and the pursuer and others of his way of thinking are by the new canon at full liberty to remain in communion with their brethren and use the Scotch office as long as they can form a congregation of which the majority is in favour of that service. Second, As to the use of the English Prayer Book, which the pursuer complains of having forced upon him in other services, I cannot see that the pursuer is placed by the canons of 1863 in a different position from what he occupied before. With regard to the burial service, many good men have objected to the indiscriminate way in which the deceased person is spoken of as a Christian brother or sister for whom the sure hope of a blessed resurrection may seem to be entertained. But in Scotland, where the pursuer's church is not established, he cannot be called upon to bury any who are not of his own communion, and he cannot surely object to its being supposed that such persons are in a state of acceptance where they have not been excommunicated, but retained in the bosom of the Church. Upon the whole, being clearly of opinion that the pursuer here has not shown any excess of powers, or any breach of contract, I am for adhering to the Lord Ordinary's interlocutor.

Saturday, Dec. 9.

FIRST DIVISION.

BATHIE *v.* BATHIE AND ANOTHER.

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

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

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

Counsel for Pursuer—Mr J. C. Smith. Agent—Mr J. B. W. Lee, S.S.C.

Counsel for Defender—Mr Dundas Grant. Agent—Mr James Barton, S.S.C.

This is an action of divorce at the instance of William Gordon Bathie, sometime a shoemaker in Dundee, against his wife Grace Lamb or Bathie. The ground of action is alleged adultery on the part of the wife, and the alleged paramour was called as a co-detender. Lord Mure held that, although the relative position of the defender and co-defender, as proved in evidence, was unquestionably attended with great suspicion, the adultery alleged was not proved. To-day the Court adhered.

The LORD PRESIDENT, who delivered the judgment of the Court, said—This is a very peculiar case. It appears that the parties were married in 1842. In 1858 they separated. They had been living in Dundee, where the husband was a shoemaker. While they lived together they had eight children. After the separation, the wife appears to have lived first in Clarence Street, Edinburgh, then in Hellisfield Cottage, Leith, and latterly in Springfield Place, Leith Walk. In all these places she lived under the name of Mrs Lamb, which was her maiden name. There does not seem to have been any intercourse or communication of any kind betwixt the pursuer and defender after 1858. In November 1863 this action was raised. The case has some remarkable features. The pursuer's case substantially is this: The co-defender, who is an auctioneer, and apparently an itinerant one, had lodged in the pursuer's house in Dundee before the separation. After the separation, he is found living in the same house as the defender, in Clarence Street, Hellisfield Cottage, and Springfield Place. It is said by the pursuer that they went by the names of Mr and Mrs Lamb. Further, the pursuer says the defender gave birth to a child after the separation. Some witnesses say that this child was called Emma White (being the co-defender's name); others say she was called Emma Lamb, but she was never called Emma Bathie. There is produced an extract from the register of births to the effect that on 4th April 1859 a child was born named Emma Grace White Lamb; that this child was illegitimate; that the mother's name was "Grace Lamb Lady," and the birth is said to have been registered on 8th April by the mother, who signed the register "Grace Lamb." Then the alleged paramour is called as a witness, and he avails himself of his privilege of declining answering questions. This declinature is not positive evidence either one way or the other. But it may have more or less significance in such cases as this according to circumstances. If the party is a friend of the pursuer of the divorce, I could not regard it as proving guilt on the part of the defender. If, on the other hand, he is a friend of the defender, the circumstance is suggestive, and may be one of those circumstances the aggregate of which constitutes circumstantial evidence. It was said in the debate that circumstantial evidence was always only suspicion. I don't agree with that. Circumstantial evidence is a series of suspicious circumstances which when woven together produce conviction. The defender has led no evidence, but says the pursuer has not proved his case. She says she did not separate voluntarily, but that the pursuer became drunken and ill-treated her, and that she had to fly from him. The pursuer, on the other hand, says that she deserted him. Neither party has led evidence as to this matter; but there are circumstances tending to support the defender's version. All the children seem to have gone with the mother. Then she says she had to keep lodgers to support them, and there is evidence that she did so. She had a larger house than was necessary for herself and children alone. She went by the name of Lamb, dropping the pursuer's name because, as she says, she did not wish to be persecuted by him or his creditors. It was not denied in argument that the child was born after the separation. How is that explained? In regard to the extract from the register, I do not feel inclined to give much weight to it. The statute no doubt makes an extract evidence, but that only means that it renders unnecessary the production of the register. Why was there no evidence that the defender made the entry in the register and signed it? I attach, therefore, no weight to the extract. Assuming, then, that a child was born in April 1859, it is said the child must be the co-defender's, as he was living in the house with the defender. We cannot hold that this child was not the pursuer's. The presumption of law is that the child was conceived before the separation. We must therefore hold the child to be the pursuer's. Then it is alleged that they lived as Mr and Mrs Lamb, but this is not sufficiently proved. The servants in the house, who had the best opportunity of observation did not regard them as husband and wife. Then there is no evidence of familiarities indicating impropriety except on one occasion, which is spoken to by only one witness, who is uncorroborated by anyone else. The child seems to have called the co-defender "papa," and he called her his little daughter, and so forth. I don't attach much importance to this circumstance. It only acquires importance if you assume the paternity. But if you suppose that the co-defender was a lodger who had befriended the defender and her children, it is not extraordinary; and one of the defender's sons deponed that the co-defender had acted as a father to them all. It is very strange that although the parties lived so long in the same houses there is no direct evidence of adultery. There is no evidence of their sleeping together. On the contrary, there is evidence that up to January last the defender slept with her eldest daughter. On the whole, therefore, whatever suspicions may attach, there is no sufficient proof to warrant our altering the Lord Ordinary's interlocutor.

ACCOUNTANT IN BANKRUPTCY *v.* A. B.

Bankruptcy—Trustee—Violation of Bankruptcy Act—A trustee on various sequestrated estates censured (on report of accountant) for not lodging money belonging to the estates in bank within the statutory period, and found liable in expenses.

Counsel for Accountant in Bankruptcy—The Lord Advocate and Mr H. J. Moncreiff. Agent—Mr A. Murray, W.S.

Counsel for Trustee—Mr Patton and Mr Scott. Agent—Mr John Walls, S.S.C.

This was a report to the Court under sections 159 and 161 of the Bankruptcy Act, in regard to the conduct of an accountant in Glasgow who was trustee on various sequestrated estates. The complaint against him was that, in contravention of the statute, he had retained the funds of the estate in his own hands, instead of lodging them in bank, for more than the statutory period, and that in one case he had failed to consign in bank a dividend due to a contingent creditor. The trustee admitted the irregularities complained of, and expressed his deep regret that they had occurred; but he explained that the practice was common in Glasgow. It was also explained that the trustee had resigned one of the trusteeships, and had arranged with the creditors on the others for the payment of penal interest.

The LORD PRESIDENT said that this was a violation of the statute which the Court could not refrain from expressing their strongest disapproval of, as it had been reported to them. It is said to be a practice. If so, the sooner it is condemned the better. The trustee seems to be now practically out of office, and it is unnecessary to do anything more than to find that there has been a most improper violation of the statute which would have warranted removal from office, and which the accountant in bankruptcy has quite properly brought under our no-