

Guild on the question raised by the answers; and second, because the town has thought fit to withhold its answer, its opponent will have to pay the expense of a Court of Session litigation. I am against arriving at a conclusion which involves either of these results. I think the proper course is to allow the answers to be received, and to remit them with the case to the Dean of Guild.

LORD ADAM—I am of the same opinion. The Dean of Guild has both administrative and judicial functions, and I can quite understand that in the vast majority of applications the town, or the opposite party, is entitled to rely on the knowledge of the Dean of Guild, assisted if necessary by the advice of the burgh engineer, properly disposing of them, and that it is quite unnecessary for either party to interfere. But that is not the course which has been followed here, because we are informed by counsel for the town that the town did object to the application being granted at the first. If that is so, I agree that it is not fair that the town, having a case to submit, should in the first instance lie by and take the chance of the decision of the Dean of Guild being in their favour, and should not come forward to state their answer to the application until the other party has been obliged to come here.

I agree that we should allow the answers, and I think further that in this class of case we are entitled to have the judgment of the Dean of Guild and to review it, and that the parties should not come here in the first instance. I asked whether the questions raised could be tried in the Dean of Guild Court, or whether the case was such as would from its nature come back to us, and I was informed that it was not a case of that kind.

On the whole matter, therefore, I agree with your Lordship.

LORD M'LAREN—I should have been content, having regard to the practice of the other Division, to hear this case on the petition and answers as stated, and, if a practical question were found to exist, then to remit it for the decision of the Dean of Guild. But the question of making up a record is a matter for the discretion of the Court, and no doubt the course approved by your Lordships is a convenient one to adopt, and will not have the effect of preventing the parties from hereafter obtaining a judgment of this Court on the construction of the statute.

LORD KINNEAR—I concur. The considerations that have weighed with me are, first, that the answers, as we have been informed by the counsel for the respondents, raise questions for the judicial determination of the Dean of Guild, and within his jurisdiction, so that after the decision in the Court of first instance, the case, if it comes here at all, will come only for review; and secondly, that the counsel for the magistrates informs us that the objections taken in the answers were intended to be taken at the original proceedings, and that the

respondents appeared and verbally opposed the petition on these very grounds. But I must observe that this verbal opposition does not appear to have been made known to the other party. Accordingly the magistrates represent themselves as having obtained a judgment on questions which they have abstained from raising in any formal manner until they came to this Court. I agree that this is not a convenient course of procedure, nor altogether fair to the petitioners. The petitioners are entitled to have the Dean of Guild's judgment upon the questions that are raised in the answers; and we on the other hand ought to be informed with more certainty than we are at present whether the deliverance submitted to review was or was not a judgment pronounced after hearing parties.

The Court allowed the answers to be received, remitted the cause to the Dean of Guild to proceed, and found the respondents liable in expenses in this Court.

Counsel for the Petitioners—Clyde. Agent—Lindsay Mackersy, W.S.

Counsel for the Respondents—J. Boyd. Agent—Thomas Hunter, W.S.

Saturday, July 4.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

BANNERMAN AND OTHERS v. MAC-QUEEN (BANNERMAN'S TRUSTEE) AND OTHERS.

Trust—Charitable Trust Purpose—Condition of Bequest—Forfeiture.

A testator directed his trustees to hold a certain sum, and pay the income thereof to the incumbent of a certain church so long as the congregation worshipping therein "shall not be united to, or in connection with," the Scottish Episcopal Church. There followed a declaration that in the event of the said congregation at any time "uniting, or being in connection with," the Scottish Episcopal Church, the incumbent should forfeit his interest in the said provision, and the capital should be divided among the testator's residuary legatees.

Facts and circumstances which held (rev. judgment of Lord Kyllachy—*diss.* Lord M'Laren) to instruct that the congregation in question was "connected with" the Scottish Episcopal Church, and consequently to infer forfeiture of the testator's bequest.

By trust-disposition and settlement Miss Georgina Bannerman, who died in 1876, directed her trustees to set apart the sum of £3000, the capital thereof to be retained by them, and the income arising therefrom to be paid "to the incumbent for the time being of St James' Episcopal Church in Aberdeen, for the purpose of augmenting

his stipend, but that only so long as . . . the congregation worshipping in said church shall not be united to or in connection with the Scottish Episcopal Church." There followed a declaration that in the event, *inter alia*, of the congregation worshipping in said church at any time uniting or being in connection with the Scottish Episcopal Church, "the trustee should be bound to pay over the said capital sum to the residuary legatees of the testatrix, and the incumbent should forfeit his interest in the said provision.

St James' Episcopal Church, Aberdeen, was an offshoot from St Paul's Episcopal Church, Aberdeen, one of those congregations which had enjoyed toleration under the Act 10 Anne, c. 7, upon condition of their clergymen taking the oath to Government, and being in English or Irish orders only, and which even after the Act 3 and 4 Vict. c. 33, held aloof from the communion of the Scottish Episcopal Church, and refused to recognise the authority of its bishops or canons. (For a full account of these "English Episcopal" congregations, see *Dunbar v. Skinner*, March 3, 1849, 11 D. 945.)

St James' was founded in 1854, and by its constitution dated 1867, and entitled "Constitution of St James' English Episcopal Church," it was declared that the said church "shall be used solely and exclusively as and for a church for divine service and the ministration of sacred ordinances in strict conformity with the articles of the United Church of England and Ireland, as by law established, and ritual conform thereto," and that the cure of the said church "shall be held by clergymen having the orders of the said United Church of England and Ireland, and by such only."

The constitution of the church was altered in 1886, but as regards the provisions above cited, only verbally and to the extent rendered necessary by the Disestablishment of the Church of Ireland in 1869.

From the date of its origin, accordingly, down to 1877, the year subsequent to Miss Bannerman's death, the church was independent of the ministrations and authority of the Bishop of the Scottish Episcopal Church, within whose diocese it was situated. Candidates for confirmation were sent to the Bishop of Carlisle and the Bishop of Durham, and although orders conferred by a bishop of the Scottish Episcopal Church were in 1864 fully recognised by the Church of England (27 and 28 Vict. c. 94), the incumbent of St James' was required to have either English or Irish orders, and early in 1877, in consequence of the inconveniences of sending candidates for confirmation to England, and the growing difficulty of finding an English bishop to administer the rite, it was arranged that the administrations of Bishop Beccles, an ex-colonial bishop, should be procured for the English Episcopal congregations in Scotland, the number of which had been increased by several congregations which had seceded at various times from the Scottish Episcopal Church, e.g., St Thomas', Edinburgh. About the same time the

Association of English Episcopalians in Scotland was formed at a meeting at which St James', Aberdeen, was represented by its then incumbent.

In April 1877 the Convocations of Canterbury and York passed resolutions condemning the breach of ecclesiastical order involved in Bishop Beccles' intrusion into the territory of the Scottish bishops.

Thereupon the incumbent of St James' withdrew from the Association of English Episcopalians in Scotland, and accepted a licence from the Bishop of Aberdeen. His successor in the charge did the same, and the present incumbent, who had been ordained by an English Bishop, accepted a licence from the Bishop of Aberdeen on being appointed to the incumbency in 1886. The licence was in the following terms:—"The Rev. Angus Mason Mackay, B.A., having this day appeared before us, exhibited his letters of orders, testimonials, and title for nomination, and having, moreover, in our presence subscribed the thirty-nine articles and code of canons of the Church, is hereby licensed to perform all the duties competent to his order in the Church of St James and the district attached thereto in our diocese.—In testimony whereof, &c., A.G., Aberdeen and Orkney."

In consequence of this licence the incumbent became entitled to a seat on the Representative Church Council and the Diocesan Synod; he was entitled to and did present candidates for confirmation to the Bishop of Aberdeen, and there was a free interchange of pulpits between him and clergymen of the Scottish Episcopal Church.

The congregation of St James' made collections for the Home Mission, Education, and Foreign Mission Funds of the Representative Church Council of the Scottish Episcopal Church, all which contributions were duly entered in the statistical returns from the diocese of Aberdeen and Orkney. In the *St James' Parish Magazine* and relative leaflet, the incumbent repeatedly urged the claims of these funds upon his congregation, recommended them to subscribe to the recognised organs of the Scottish Episcopal Church, intimated from time to time the date of confirmations by the Bishop of the Diocese, and on one occasion announced that in obedience to a new canon of the Church he was about to assume the title of rector.

In these circumstances, General Bannerman and others, residuary legatees of Miss Bannerman, raised an action against (1) John Otto Macqueen, S.S.C., Aberdeen, Miss Bannerman's sole surviving trustee, (2) the Rev. A. M. Mackay, incumbent of St James' Episcopal Church, and (3) W. K. Glover and others, managers of said church, to have the forfeiture of Miss Bannerman's bequest declared.

The pursuers pleaded—"The congregation worshipping in St James' Episcopal Church in Aberdeen having become united to, or at all events in connection with, the Scottish Episcopal Church, or Episcopal Church in Scotland, and Miss Bannerman's bequest mentioned in the summons having been thereby forfeited, the pursuers as

residuary legatees of Miss Bannerman are entitled to have decree in terms of the conclusions of the summons."

The defenders Glover and others, *inter alia*, averred in their answer to art. 14 of the pursuer's condescendence—"The congregation of St James' has never taken the necessary steps required by" the Canons of the Episcopal Church in Scotland "to become connected or united as a congregation with the Scottish Episcopal Church." In particular, they averred (and the averments were not denied) (a) that the congregation had made no formal application to be admitted into connection with that Church (Appendix xxiii); (b) that the incumbent of St James' had neither been "presented" nor "instituted" by the Bishop of Aberdeen to the living (Canon xiii, and Appendices xiv, xvii); (c) that the congregation of St James' had chosen no lay-electors to take part in the election of a bishop (Canon iv); (d) that the Bishop of Aberdeen had made no Episcopal visitation of the congregation (Canon viii. 2); (e) that the title-deeds of St James' had not been deposited with the diocesan registrar (Canon xxvi); (f) that the congregation of St James' had elected no lay representative to act on the Representative Church Council.

The defenders pleaded—"The said congregation not being in connection with or united to the Scottish Episcopal Church, and no forfeiture of the legacy having been incurred, the said capital sum falls to be retained by the defender John Otto Macqueen, for the purpose of augmenting the stipend of the incumbent of said Church of St James."

The Lord Ordinary allowed parties a proof of their respective averments, and the facts disclosed by the proof are summarised above.

The following excerpts from the evidence may be given in addition:—The Rev. Mr Mackay, the incumbent, in cross-examination—" (Q) Have you not become a Scottish Episcopalian by crossing the border?—(A) Yes, I hold myself to be a Scottish Episcopalian personally."

The Bishop of Aberdeen (Douglas) in cross-examination—"I had no negotiations or arrangements with the managers of St James' Church about the matter, viz., Mr Mackay's appointment, whatsoever; anything I had to do that related to St James' was in regard to the licence granted to Mr Mackay and the consequences flowing from it. . . . Mission charges and mission stations both require to their constitution their having been made missions by the Bishop's sanction after certain notice. No such notice has been given as regards St James'. I have no doubt it is not a mission of our Church. . . . I regard the position of St James' and of its ministry as perfectly anomalous. It certainly does not come within any description of any kind as a congregation of the Episcopal Church recognised in the canons."

Mr R. L. Stuart, W.S., gave evidence as to the history of the English Episcopal churches, and as to a "concordat" which

had once existed between St Thomas', Edinburgh, and the Bishop of Edinburgh, and in particular deponed that three English Episcopal congregations existed at the present time, one in Edinburgh, one in Glasgow, and one at Montrose.

On 20th February 1896 the Lord Ordinary (KYLACHY) pronounced an interlocutor assailing the defenders from the conclusions of the action, and finding the defenders other than the defender Macqueen entitled to the expenses of one appearance only, modified as regards the expenses of the proof to one-fourth of the taxed amount.

Opinion.— . . . "The question I have to decide is, whether the congregation of St James' has become 'united to or in connection with' the Scottish Episcopal Church. But really the question is—whether it has become connected with that church in the sense of the settlement; for the pursuers do not, I understand, contend or suggest that there has as yet at least been anything which could be described as *union*.

"Now the term 'connection' is, it must be confessed, a somewhat loose term. It is not a term which is known in ecclesiastical history, or in the history of the Scottish Episcopal Church, or of these particular congregations. In popular language, it is often employed in senses so loose and indefinite as to be quite outside the cognisance of a court of law. It is therefore here necessary to find a sense for the expression which shall satisfy the words of the will, and also be sufficiently tangible to base the forfeiture of a legal right. It was argued for the defenders—and I am inclined to agree with them—that in order to reach a connection in this sense several conditions must at least be satisfied.

"(1) The connection must be between the Scottish Episcopal Church and the congregation—that is to say, the congregation as distinguished from the incumbent.

"(2) It must also be something direct and tangible—something of which a court of law can take cognisance.

"(3) It must also result in some tie—some *vinculum*—stronger or weaker—fettering *pro tanto* the independence of the congregation.

"In short, the connection may be short of union, but it must be something *ejusdem generis* with union—I mean union temporary or permanent.

"Now, what are the facts brought out by this long and tedious proof—a proof which, I must observe in passing, has only served to show that there are no facts of importance in dispute, and that there should have been no difficulty in adjusting a minute of admissions sufficient for the decision of the case.

"There are, in the first place, certain things which are not proved, and indeed not alleged:—1. There has been no change in the constitution of St James' Church. That remains intact.

"There has been no agreement of any kind, written or verbal, between the congregation and the Scottish Episcopal Church. Indeed, no communications,

written or verbal, have ever, so far as appears, passed between the two bodies or their officials,—excepting always certain statistical statements, and contributions to mission schemes, transmitted to Edinburgh, as I shall afterwards notice.

“The case of the pursuers accordingly is, and must be, that the alleged connection exists, and has been established, not by convention, but by a course of action; and the first matter founded on is the acceptance by each of the incumbents of the church since 1877 of a licence from the Bishop of Aberdeen.

“Now that, since 1877, licences have been so accepted is quite true, and the history of the matter seems to be this: Prior to 1877 the English churches in Scotland had no bishop to whom they could apply (for example) for confirmation. Their own incumbents had no licences from the Scottish bishops, and could not therefore present candidates to those bishops. On the other hand, no English bishop could be induced to come to Scotland for the purpose. Up, therefore, to 1877, the young people of the different congregations had to be sent for confirmation to England, and in fact generally were so; but about that time an arrangement was made with a Colonial bishop (Bishop Beckles) that he should perform episcopal functions within the several congregations; and Bishop Beckles accordingly came down to Scotland. In the interval, however—the English bishops having come to consider that the Scottish Episcopal Church was in full communion with the Church of England, and that it was contrary to ecclesiastical order that any Anglican bishop should officiate within the diocese of any Anglican bishop, whether Scottish or English, without that bishop's consent—a resolution was passed by convocation censuring the arrangement with Bishop Beckles, and in effect condemning as contrary to the law and practice of the Anglican Church the position of the incumbents of the several Episcopal Churches in Scotland, of which St Paul's, Aberdeen, was one. These incumbents were clergymen in English orders, performing their sacred functions in recognised bishoprics without the licence of the bishop; and when the question was once raised that position was pronounced to be indefensible.

“The result was that towards the end of 1877, Mr Allan, the then incumbent of St James', declined to recognise Bishop Beckles, and applied for and obtained a licence from the Bishop of Aberdeen; and his two successors, Mr Black and the present incumbent Mr Mackay, took the same course. By doing so, it cannot, I think, be doubted that they became, while they held their licences, to all effects clergymen of the Scottish Episcopal Church. They became bound to obey its canons, and subject to the jurisdiction of the Bishop of Aberdeen; and personally their relation to the bishop and to the Church was not different from that of the other clergy in the diocese of Aberdeen. The licence might, no doubt be renounced, and its renunciation would not affect their incum-

bency; and, of course, to that extent they were in a different position from other incumbents. But so long as they held the bishop's licence they were beyond doubt connected in the most direct and tangible sense with the Scottish Episcopal Church.

“The question, however is, whether the acceptance by successive incumbents of the bishop's licence established in the sense of Miss Bannerman's settlement a connection between the Scottish Episcopal Church and the congregation of St James'. In a loose sense it no doubt did so. The incumbent had relations with the Church, and the congregation had, of course, relations with the incumbent; but as between the Church and the congregation no direct relation of any kind was established. They stood just as they had stood before. The congregation were not parties to the incumbent's action. The members, no doubt, knew of it, and did not object. But if it did not affect their position they had no call to object. The incumbent was not prohibited by the constitution from holding any licence which he thought useful; and all that the congregation could do, if they did object, was to exercise their power under the constitution to dismiss the incumbent. They had that power, and of course they might exercise it. But the fact that they had such a power and could exercise it at any time is itself really conclusive against any change having been made in the congregation's position. They were as independent as ever, and neither gave nor received anything. Their position simply was that they were connected by a tie dissoluble at *their* pleasure with a person (*viz.*, their incumbent) who was connected by a tie dissoluble at *his* pleasure with the Scottish Episcopal Church. Now that, it seems to me, is a connection much too indirect and remote to satisfy the condition expressed in Miss Bannerman's will.

“The pursuers, however, rely upon certain other matters which they say grew out of the incumbent's new position, and directly affected the congregation. I do not refer to the facts that the incumbent from 1877 downwards has been a member of the Diocesan Synod, and the Representative Church Council, and has had all the rights and privileges of a clergyman holding a licence from a bishop, with a definite sphere of duty. I have already dealt with these matters, which, as I have said, I consider personal to the clergyman. But the matters now in question are said to be these:

“1. That the congregation take the benefit of the incumbent's new position by having their young people confirmed by the Bishop of Aberdeen.

“2. That they take the benefit of the exchange of pulpits now possible between their incumbent and the incumbents of the other churches in Aberdeen.

“3. That in the same way they take the benefit of the bishop's assistance in the services of the church, he being now accustomed frequently to officiate, although always upon invitation.

“4. That returns of statistics of member-

ship, &c., are from time to time made by the officials of St James' Church to the offices of the Scottish Episcopal Church, which returns are published in the Year-Books and other books published or recognised by the authorities of the Scottish Episcopal Church.

"5. That collections are frequently made for certain schemes of the Scottish Episcopal Church, and particularly its mission schemes and education scheme.

"I am bound to say that I have had some difficulty as to the combined effect of these several matters. The incumbents and the congregation have certainly so acted as to reduce to a minimum all external manifestations of the differences which divide them from the other Episcopal churches in Aberdeen. They have done so, I have no doubt, from the best of motives, so much so that it occurs to one to ask whether, for the sake of preserving their hold on Miss Bannerman's legacy, it is really worth while to perpetuate those differences. But whatever the motive may have been, the fact remains. And I confess it does seem to me that the congregation entered upon somewhat dangerous ground (with respect I mean to Miss Bannerman's legacy) when they began not only to co-operate with the other Episcopal churches in mission and other work, but to allow their statistics of membership to be included in the statistics of the Scottish Episcopal Church, and their contributions to the schemes of that church to appear without note of distinction in its publications. Still, co-operation is one thing, and union or connection is another; and there is undoubted force in the defender's argument (1) that they are not responsible for the form in which the accounts of the Scottish Episcopal Church are kept; and (2) that there is nothing which they as a congregation do or have done which might not be done by congregations of the Church of England across the Tweed, or by persons accustomed to gather for English service in private chapels or schoolhouses throughout Scotland. There is also, I think, great force in their view that all essential matters—all matters which affect the independence and autonomy of the congregation—the distinctions which have always existed are still maintained. I do not think it necessary to go over those matters in detail. They are very distinctly and correctly recited in the 14th article of the defenders' statement, and also in the evidence of Bishop Douglas. The general result is that in everything which can be called crucial, the congregation of St James' is as separate and unconnected with the Scottish Church as any church of the Anglican communion can be—I mean any church situated within the diocese of a Scottish bishop. So far, of course, some degree of connection is inevitable, and exists. But it is not, I think the kind of connection contemplated by Miss Bannerman's settlement.

"On the whole, therefore, I have found myself unable to come to any other conclusion than that the pursuers have failed to establish the forfeiture which they ask the

Court to declare, and therefore that the defenders are entitled to *absolutor*."

The pursuers reclaimed.

The arguments of the parties sufficiently appear from the opinions of the Judges.

At advising—

LORD PRESIDENT—The question before us is, whether, in the sense of Miss Bannerman's will, the defenders' congregation is now "in connection with the Scottish Episcopal Church." It is convenient, first, to consider what was the position of this congregation during Miss Bannerman's life, and then to see what it is now.

First of all, then, this congregation held all the tenets, and used all the formularies of the Church of England, and none other. By the Constitution St James' Church was to be used for the ministration of sacred ordinances in strict conformity with the articles of the Church of England as by law established, and ritual conform thereto, as the same have been heretofore followed and observed by the said church, and none other, and especially excluding and prohibiting all innovations by individuals or sects. The cure of the church was to be held "by clergymen having the orders of the Church of England as by law established, and the Episcopal Church in Ireland, and by such only." The result is that the congregation held exactly what the Church of England holds, with one added restriction, which made it more English than the Church of England has been since 1864, for this Aberdeen congregation could accept no clergyman who had other than English or Irish orders.

According to its constitution this congregation held to the system of Episcopacy as that is involved in the English Prayer Book. The practical working of that system in relation to an "English Episcopal" congregation in Scotland at once calls attention to its relations to the Scottish Episcopal Church. Side by side with those isolated "English Episcopal" congregations stood the Scottish Episcopal Church equipped with an effective Episcopate. Yet from this Church the English Episcopalians held aloof. Their children were prepared for confirmation, and were told that they would either have to go to England to be confirmed, or to wait till an English bishop was in Aberdeen. In the case of St James,, this indefinite postponement was the course universally followed. The reason was that, owing to a dislike of the Scotch communion office (which is used in some of the congregations of that church), the "English Episcopalians" held themselves apart from the ministrations of the Scottish Bishops. Not the less, however, did the congregation of St James adhere in theory (as by its constitution it was bound) to the rubric in the Prayer Book, which directs that "So soon as children are come to a competent age, and can say in their mother tongue the Creed, the Lord's Prayer, and the Ten Commandments, and can also answer to the other questions of the Catechism, they shall be brought to the bishop."

The next point, as to the position of St

James' in Miss Bannerman's lifetime, is a negative one, but it is of salient importance. The incumbent of St James' held no licence from the Bishop of Aberdeen. The result was that in Miss Bannerman's days St James' congregation had (I shall not use the contentious word "connection") no relation whatever to the Scottish Episcopal Church. It turned its back on the Bishop of Aberdeen, and looked wistfully to England for Episcopal ministrations. What is its present position in that regard?

Since 1877 the successive incumbents of St James' have subscribed the canons of the Scottish Episcopal Church, and received the licence of the Bishop of Aberdeen, and have become in consequence, so far as their personal duties and status are concerned, clergy of that church. Mr Mackay, the present incumbent, like his predecessors, was ordained priest in England, but he holds the Bishop of Aberdeen's licence to officiate in St James'; he is a member of the Diocesan Synod and of the Representative Church Council, and he says, in so many words—"I hold myself to be a Scottish Episcopalian personally." His allegiance to the Bishop of Aberdeen is exactly the same as that of any other clergyman in the diocese. Part of his duty is to prepare and bring to the Bishop those whom he has prepared, for confirmation, and since 1877 the young people of St James' have been taken to the Bishop of Aberdeen and confirmed by him. The confirmations have always and purposely been held in another of the churches, or rather, I should say, in one of the churches of the Episcopal communion.

Thus, through the relation between the clergyman of St James' and the Bishop of Aberdeen, those working in St James' enjoy the ministration of the Bishop in that ordinance which alone brings the laity into direct relation with the Bishop as such.

I have stated generally the position of the incumbent of St James' in relation to the Bishop, but it is necessary to examine this more closely.

It is in accordance with the idea of the solidarity of the Anglican communion all over the world that its bishops should not interfere with one another's dioceses, and that its clergy should subject themselves to the government of the bishop of whatever diocese they propose to minister in. The definitive recognition of the rule by the Church of England in relation to the Episcopal Church of Scotland led to the English clergymen, who have successively been incumbents of St James' since 1877, applying for and obtaining the licence of the Bishop of Aberdeen. The terms of the licence of the present incumbent deserve attention. It will be observed that he is licensed by the Bishop to "perform all the duties competent to his order in the Church of St James', and the district attached thereto in our diocese."

It remains to mention certain incidental results of the Bishop's licence. The incumbent's tenure of the licence makes it permissible for the clergy of the diocese, as well

as for the Bishop himself, to officiate in St James', and in fact Bishop and clergy alike officiate.

There are offertories each year in St James' Church for the Home Mission Fund and for the Education Fund of the Scottish Episcopal Fund. Some minor evidences of rapprochement and co-operation between this congregation and the other Episcopal congregations in Aberdeen were pointed to by the pursuers on the principle *juncta juvant*. They are founded on the leaflets periodically issued to the congregation by the clergyman, and the tone in which "the Bishop," the Education Fund," the Diocesan Council," and various other institutions of the Scottish Episcopal Church are spoken of, in exactly the same way as if St James' were one of the regular congregations of that communion, while, on the other hand, there does not seem to be any mention made of any separate or isolated characteristic of the congregation as distinguished from other Episcopal congregations. The circumstances last enumerated were not dwelt upon by the pursuers as substantively, and still less as separately, constituting a connection with the Scottish Episcopal Church, but rather as illustrating what is, in the understanding of all concerned, the true and real position of the congregation.

On these facts the Lord Ordinary is constrained to say that "in a loose sense" there is a "connection," while in another part of his opinion he had remarked on the word "connection," that it is "a somewhat loose term." If these two passages taken together mean that in the colloquial sense of a colloquial term there is a connection, the defenders' case would seem to be in some danger. Their arguments, however, as condensed in the opinion deserve serious consideration. Their main point is that Miss Bannerman's condition applies to the congregation, that the congregation, as distinguished from the clergyman, must be found to be in connection with the Episcopal Church, and that this congregation has done nothing whatever by way of forming a connection. The congregation, they say, stands where it did. If the formal and overt action of the congregation acting as such be necessary to the existence of a connection, then there is none, for no congregational meeting has been held on the subject. But is any such formal and overt action necessary?

It is not unimportant to notice that while the word "uniting" in the will—I quote from the words declaring the events in which devolution is to take place—does point to action, the word "being" (in connection) points to a state, condition, or relation irrespective of its cause.

The Lord Ordinary says there has been no change in the constitution, but this does not seem to prove much. Without violating any term of the existing constitution that has been pointed out to us, the congregation might have entered into a formal compact with the Bishop of Aberdeen accepting his supervision. They might, as far as I can see, have entered into such a concordat

as was formed between their mother church St Paul's and the Bishop Skinner of the days of Sir W. Dunbar, the terms of which are given in 11 D. 948, or such a concordat as took place in more recent times between Bishop Cotterill and St Thomas', Edinburgh, and is spoken to by the witness Stuart.

Well, now, supposing there had been no Miss Bannerman's legacy, and this congregation had entered into a concordat with Bishop Douglas agreeing that exactly those things should be done which have been done, and no more, and that the agreement should be terminable at pleasure, would that make a connection? I say yes, and the defenders have difficulty in saying no. And is there any difference when the relation is established, not by formal agreement, but by the accepted action of the clergyman. The defenders' argument loses sight of the fact that from the necessary conditions of things in nine-tenths of the matters affecting a congregation, the pastor acts, and the congregation does not act at all. He acts, and necessarily acts, not solely for himself, but as affecting and for the congregation. The clergyman cannot connect himself with the Scottish Episcopal Church by being one of its clergy, without himself constituting a connection between his congregation and that Church. The duties of which his Bishop is the overseer are his duties to the people to whom the Bishop has licensed him to minister. It is quite true that the people who worship in St James' do not constitute a "congregation" in the sense of the canons of the Scottish Episcopal Church, nor yet a "mission," nor yet a "mission charge." As the Bishop of Aberdeen says, the position of St James' is "anomalous," and it has not in the meantime been regularised. The result is undoubtedly that they retain their independence—the Bishop is quite right in law in saying that he could not force his way into the church as he could into those churches whose title-deeds and constitutions provide that they are Scottish Episcopal churches. But all this—all that is set out in the answer to condensation 14 (to which the Lord Ordinary refers)—merely negatives union; I do not think that it negatives connection.

We are to put ourselves in the position of Miss Bannerman by attending to the ecclesiastical position of her congregation during her life and the possible directions in which it might look for alliance in the difficult position in which an Episcopal congregation must necessarily stand which has no bishop. In her days the "English Episcopal" congregations, whose separate existence was grounded on dislike of the Scottish Episcopal Church, extended to the Church of England an affection which was very sparingly returned. All her life, however, there was still the chance of help and countenance from some Bishop Waldegrave, or even some Bishop Beckles, for Convocation did not speak till the year after her death. Accordingly, even if separation from both Episcopal Churches (of England and Scotland) would have been intolerable to Miss Bannerman, the door

was not yet closed on the English side. In forbidding such a connection as now exists, she was therefore not consciously condemning her congregation to independency, although I do not know whether she might not have considered this to be the lesser evil. I go, of course, so far with the Lord Ordinary that it is not every casual or incidental co-operation with the Episcopal Church which was intended to be proscribed. But the connection in which the congregation is now and has been for nearly twenty years is not casual or incidental. The fact that it is terminable does not make it the less a connection so long as it lasts, and the attitude of the congregation in the present action shows that the existing relation between the two bodies is fully known and deliberately adopted by the congregation. While realising that the case is one on which opinion may easily be divided, my judgment is for the pursuers.

LORD M'LAREN—After repeated consideration of this case, I am not satisfied that the Lord Ordinary's grounds of judgment are wrong, and I am unable to concur in the judgment proposed. I do not think there is any material difference between my colleagues and myself as to the facts established by the proof and the productions. The question is, whether these facts amount to a "uniting or being in connection with the Scottish Episcopal Church" on the part of the congregation, so as to bring into operation the conditional destination of Miss Bannerman's legacy to her next-of-kin. The expression "uniting with" the Scottish Episcopal Church I take to denote an agreement by the congregation to become to all effects a congregation of that Church subject to its canons, Church government, and discipline. It was conceded by pursuer's counsel, and it is perfectly clear, that such a union has not in fact taken place. It is more difficult to define what is meant by "being in connection" with a church. I think the most obvious meaning is that by which the expression is to be read as synonymous with or exegetical of the word "uniting." It is not to be overlooked that the word "unite" is properly descriptive of the incorporation of two churches or assemblages of congregations in one rather than of the absorption of an individual congregation in a larger organisation such as that of the Scottish Episcopal Church, and it is quite intelligible that the complex expression "uniting or being in connection with" might be used by the testatrix to describe such an absorption of the congregation in the larger body for want of a single term precisely descriptive of the change which she deprecated, and which was to be the condition of her gift passing to her next-of-kin.

I am the more disposed to favour this reading, because I have experienced the difficulty which the Lord Ordinary felt in attempting to affix a definite meaning to the word "connection" distinct from that which is implied in the term "union." In construing such expressions, especially as used by a testator who is known to have

been an attached member of the congregation to which the legacy is given, I think we may take notice of certain principles of church government which are common to the Episcopalian churches and to many other Christian communities—I mean that the ecclesiastical organisation will not in general make terms with a congregation entering its communion. The congregation must accept the constitution of the church as it exists or remain independent. I have no conception that the Scottish Episcopal Church would enter into a contract with an individual congregation on different terms from those which govern its relations to other congregations, and I think it unlikely that Miss Bannerman should have contemplated any other kind of union or connection than one under which the congregation should accept the Scottish Episcopal Church as its ecclesiastical superior, and submit to be governed by its canons. I think I may call in aid of this view the circumstance that at the time when Miss Bannerman made her will the doctrines and forms of worship of the Scottish Episcopal Church and the congregation of St James' were really identical. The forfeiture therefore was not directed against change of doctrine or worship, but, as I think, against corporate action, and I have difficulty in seeing how the congregation could approximate to or enter into connection with the church in any other way than by being legally incorporated with it. I may also observe that while the Lord Ordinary has considered the possibility of there being a connection short of complete union, he has not been able to figure a concrete case of such a connection, and the criteria which he proposes could not (as I think) be satisfied by any action on the part of St James' under its existing constitution.

I wish to avoid entering upon any topics that are not strictly relevant to the construction of this bequest, but we are entitled to look to the history of the two churches in order to understand the testator's point of view, and without entering into minute details, what I find is that the distinction between the Scottish Episcopal Church and the assemblage of congregations in Scotland calling themselves English Episcopalians has been made always more a political distinction than a distinction founded on differences of doctrine or worship. The distinction throughout the eighteenth century was a very real one, inasmuch as the ancient Episcopal Church in Scotland was subjected to civil disabilities because of its refusal to comply with certain tests that were thought necessary for the security of the State; while the congregations forming the other community accepted these tests and enjoyed the protection of the State. In the early part of this century there was only a difference in the liturgy, and in Miss Bannerman's time that distinction had almost disappeared owing to the very general use of the English Church Service by the congregations of the Scottish Episcopal Church. But it is consistent with experience that historical as-

sociations may have an influence in fixing the attachment of members of religious communities to their churches. Miss Bannerman had been brought up as an "English Episcopalian," and it is to my mind intelligible and indeed most natural that she should desire to continue, and if possible to perpetuate, the separate existence of the congregation to which she was attached, and that she should view with disfavour the project of its absorption into a church which was not her church, though separated from it, perhaps, by a somewhat thin partition. [It is also conceivable that she may have considered that in the event of St James' joining the Scottish Episcopal communion, the congregation would participate in the endowments of that body, and that her gift would not be needed. These considerations lead me to the conclusion that the "union or connection" to which the testatrix referred was neither more nor less than a complete ecclesiastical incorporation of the congregation in the Scottish Episcopal Church. But if I am to assume that "connection" means something different from incorporation, then I am of opinion that in this view also the case of the pursuers fails, because the constitution of St James' Church remains unaltered since the death of the testatrix. In order to bring the substitutionary bequest into operation I think there must be some transformation of the status or corporate character of the congregation tending in the direction of alliance with the Scottish Episcopal Church. But the acts founded on are, as I conceive, acts of the clergyman chiefly, not proved to proceed from the congregation, and not affecting its autonomy. They are briefly, then, that Mr Mackay accepted a licence from the Bishop of Aberdeen, and that he encouraged or advised the young people of the congregation to present themselves to the Bishop for confirmation. As to the first of these acts, I am not satisfied that the congregation could have obtained the services of a qualified clergyman unless he was permitted to hold the Bishop's licence, and it is certain that the clergyman would have exposed himself to the censure of the Church of England (to which this congregation professed allegiance) if he had officiated in Aberdeen without the licence of the Bishop. I infer from the evidence of Bishop Douglas himself (the best authority on such a subject) that the acceptance of the Bishop's licence was regarded as a customary act of respect to the local ecclesiastical authority, and that it created no ecclesiastical relation between the congregation and the Bishop or the church which he represented, but only a personal relation between the Bishop and the clergyman. The Bishop in his evidence disclaims all authority over the congregation, and his action during the period of Mr Mackay's ministry is entirely consistent with his disclaimer. On the second point it is indisputable that the congregation of St James', having accepted the English articles and liturgy, also accepted confirmation as a religious rite, and I think that Mr Mackay

might advise candidates for the rite of confirmation to avail themselves of the spiritual services of the Bishop of Aberdeen without thereby bringing the congregation into connection with the Scottish Episcopal Church. The English Episcopal community in Scotland never had a bishop of its own, and if its members desired confirmation they could only obtain it from the bishop of another communion. In this there was no novelty, because the Bishop of Aberdeen in giving confirmation did not claim to do so as matter of right, any more than the Bishop of Carlisle had done when he acted in a similar capacity in Miss Bannerman's lifetime.

I do not enter upon such minor elements as the inviting subscriptions to church charities, or the reading of the Bishop's pastoral addresses to the congregation of St James', because these acts clearly would not of themselves constitute a connection with the church. But I note in conclusion that the testatrix distinguishes between acts of the clergyman and acts of the congregation, the former being referred to the judgment of her trustees, while as to the latter the forfeiture is unqualified. I am unable to hold that the forfeiture has in fact been incurred, and I think that the action ought to be dismissed.

LORD KINNEAR—I have found this to be a question of difficulty, and my difficulty has been increased by the reasoning of Lord M'Laren and the Lord Ordinary. But upon the best consideration I can give to the case I have come to the same conclusions as your Lordship in the chair, and for the same reasons.

The difficulty lies in determining what the testatrix meant by the two phrases which she uses in her will, when she says that her legacy is to be applied for the purposes of this Episcopal Church so long as the congregation worshipping in the said church shall not be "united to or in connection with" the Scottish Episcopal Church. Now, these words are in no sense technical. They are words of ordinary language, and I do not think that either of them is susceptible of very exact definition. They are, indeed, metaphorical terms, and they may be applied to an indefinite variety of circumstances. It appears to me therefore to be a very unsafe method of construing the will to begin by attempting to give an exhaustive definition either of the term "union" or of the term "connection," and then to proceed to consider whether the concrete facts of a particular case can be brought within the formula which has been antecedently laid down upon purely abstract considerations. I think the true method of construction is, to ascertain in the first place what are the facts of the case, and then to inquire whether the state of things which has been found to exist may or may not be aptly described by one or other of the terms employed by the testatrix.

Now, in considering that question, I agree with your Lordship in the chair that

it is essential to begin by inquiring what was the position occupied by this Episcopal congregation at the time when Miss Bannerman's will took effect. As to that there can be no dispute. It was an Episcopal congregation in sentiment and opinion, but a congregation without a bishop. It owed no allegiance to the Bishop of Aberdeen, but on the contrary rejected his authority; and it had no connection of any kind that I can discover with the ecclesiastical organisation of the Episcopal Church in Scotland. It stood entirely aloof from that Church if it did not assume a position of some antagonism towards it. Now, it appears to me that in reading a will of this kind and considering its application to a church in that situation, *prima facie* the meaning of the testatrix must be taken to be that the church was to retain the benefit of her legacy so long as it continued to remain in that position of isolation and no longer; and the question comes to be, whether it has or has not retained that position of isolation. I am of opinion with your Lordship that it has not. The clergyman who serves the cure of the church is now a member of the Episcopal Church in Scotland. He is subject to the ecclesiastical authority and superintendence of the bishop in exactly the same manner and to the same extent as any other clergyman of the Episcopal Church in Scotland. He is a member of the governing body of that Church, and if there were a vacancy in the Episcopate he would have a voice in the election of a new bishop. In consequence of having accepted the authority of the Bishop of Aberdeen he is enabled to bring the children of the congregation to the Bishop for confirmation, with the right to require the ministrations of the Bishop. There are a variety of other consequences following upon this action which your Lordship has enumerated, and which, as I entirely concur in your Lordship's observations upon them, I think it unnecessary to repeat.

That being the position of the church, the question is whether it may or may not with propriety be described as being united to or in connection with the Scottish Episcopal Church. I agree that it is not united to that Church. Nothing has been done to make the two bodies into one; but I am of opinion, on the other hand, that it is in connection with the Church. I think it impossible to say that a congregation whose minister is a member of the Episcopal Church in Scotland, and subject to the ecclesiastical government and superintendence of the bishops of that Church has no connection with the Episcopal Church in Scotland. And accordingly I think that the Lord Ordinary, and I believe also Lord M'Laren, do not dispute that according to the established use of language it would not be an inaccurate description of the position of this Church to say that it is not united to the Episcopal Church in Scotland, but that it is in connection with it. But then it is said that that is not the kind of connection which the testatrix

contemplated or intended by the use of the term in her will. I have not been able to appreciate, nor have I heard formulated, the reason for so saying. It appears to me to be a very arbitrary limitation of words of ordinary language to say that they are not intended to mean what according to the established use of language they are generally supposed to mean, but must have been used in some special and restricted sense which a court of law may think fit to impose upon them. We have no authority to guide us in the construction of words of ordinary language excepting common usage; and when a testator uses ordinary language, he must be taken to have intended its ordinary meaning. In this sense I cannot assent to the opinion that the words "connected with" are synonymous with, or exegetical of the word "united;" and it seems to me a very unfortunate form of exegesis which interprets a more definite and precise term by a wider and more indefinite term. I am of opinion with your Lordship, for the reasons you have given, that this congregation must be considered as having a connection with the Episcopal Church of Scotland. But there are two considerations of great importance which are urged to the contrary.

It is said in the first place that this is a merely temporary connection which might be severed at the will of the congregation. But then, however temporary, it is still while it lasts a connection between the congregation and the Church, and it is a connection which the congregation has indicated no intention or desire to sever.

In the second place, it is said that, such as it is, it is a connection between the clergyman and the Bishop, and not between the congregation and the Church. I think your Lordship's answer is conclusive. If the congregation has in fact been brought into connection with the Church, it appears to me immaterial that this has not been done by a formal resolution of the congregation, because I agree with your Lordship that we have in this case a complete equivalent for a formal resolution. Everything which the clergyman has done in bringing himself, and through himself those to whom he ministers, into association with the church, has been done with the consent and acquiescence of the congregation. They do not now repudiate his conduct in any way whatever. It appears to me that they could not more formally have established the connection which I think subsists between themselves and the Church than they have done by the attitude which they take up in the defence to this action.

I appreciate the force of one consideration which I think has had weight with both of my brethren, who have arrived at a different opinion, viz., that according to the present relations between the Church of England and the Episcopal communion in Scotland, it would be extremely difficult for this congregation to obtain the services of a clergyman who refused to accept the Bishop's licence. I do not think it would

be impossible. But it is a fair observation that the congregation would be placed in a position of embarrassment and difficulty if they were to reject the Bishop's licence. But then I cannot say that that appears to me a relevant consideration in the construction of this will. The legacy is not forfeited as a penalty for any misconduct on the part of this congregation, but it is one of the conditions of the legacy that the congregation shall remain in a position of complete separation from the Scottish Episcopal Church. If that condition is not satisfied, it appears to me to make no difference whether the failure to satisfy it arises from the voluntary act of the congregation, or becomes inevitable from circumstances over which the congregation has no control.

I desire only to add that I concur in all your Lordship's reasons.

LORD ADAM was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of Lord Kylachy: Find, declare, and decern in terms of the conclusions of the summons: *Quoad ultra* continue the cause: Find the defenders other than the defender MacQueen, entitled out of the trust fund to the expenses of one defence only, subject to the modification set forth in the Lord Ordinary's interlocutor: Find the defender MacQueen also entitled to expenses out of said fund, but only to such as were necessarily incurred in watching the cause."

Counsel for the Pursuers—H. Johnston—Sym. Agents—Robertson & Wood, W.S.

Counsel for the Defender MacQueen—A. J. Morison. Agent—Alexander Morison, S.S.C.

Counsel for the Defender Mackay—Clyde. Agents—Bruce & Kerr, W.S.

Counsel for the Defenders Glover and Others—Mackay—Pitman. Agents—Bruce & Kerr, W.S.