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interest at the rate of 12 per cent. upon the balance of any account which shall appear to have been stated and signed, and which is mentioned in the summons in this action: such interest to be calculated from the date of the account so stated and signed, to the 10th of November 1813, and with interest of the several bonds in the proceedings mentioned, at the rate per cent. which they respectively bore until the times when they were respectively paid and discharged or indorsed away, and value was given for the same, and with interest at the rate of £12 per cent. from and after such times respectively to the said 10th November 1813, when the former appeal was dismissed in this House; but that the appellant is to have proper and just allowances and deductions made in respect of partial payments, if any, which he can instruct to have been made, and in respect of interest thereof, and also a deduction of the charge of remittance to Great Britain, of the consolidated amount of the debt, which shall be constituted against him, up to the said 10th November 1813. And it is further declared, that the appellant is chargeable with interest at £5 per cent. upon such consolidated amount of debt, from the said 10th November 1813 until payment thereof, but with a due deduction of the property-tax upon the amount of the interest of such consolidated amount of of debt, so long, and at such rates as the same were chargeable upon the appellant's property in Great Britain; and it is ordered, that with these declarations the cause be remitted back to the Court of Session, to do therein as is just and consistent with these declarations.

For the Appellant, *James Wedderburn, Wm. Wingate.*

For the Respondents, *Sir Saml. Romilly, James Gordon.*

1820. JAMES CRAIGDALLIE and Others, . . *Appellants;*

CRAIGDALLIE, &C. *v.* AIKMAN, &C. The Rev. J. AIKMAN and Others, . . *Respondents.*

House of Lords, 21st July 1820.

PROPERTY OF CHURCH—SECEDING BODY.—A difference of opinion having occurred in the Associate Synod of Burgher Seceders, in reference to the principles of their Church in regard to the power

of the civil magistrate, and the ordination of ministers, the majority proposed an alteration in the formula, which was alleged to be a departure from the original principles. In a question as to the property of the Church, Held that the pursuers (appellants) had failed to condescend on any acts done, or opinions professed by the Associate Synod, or the respondents, by which they could call on the Court to say that they had deviated from the original principles and standards, and therefore had no right to disturb the defenders (respondents) in possession of the church now in question. Affirmed.

In the former appeal in this case, the House of Lords made a special declaration, remitting back the cause to the Court of Session for re-consideration. *Vide* Dow's App. Cases, vol. i., p. 1.

The circumstances out of which the question of property arose, proceeded from a difference of opinion as to their principles, taking place amongst the body calling themselves the "Associate Burgher Seceders of Perth."

In 1731, when the Established Church was keenly engaged in discussions relative to the mode of appointing to vacant churches, the result of these contentions was, that a great many of the clergy, who refused to give up or conceal their opinions, were expelled from their livings by sentence of the General Assembly.

It was stated by the appellants, that the expelled pastors, with a great body of the people adhering to them, erected places of worship for themselves, and were denominated *Seceders*. This term, they added, was to be carefully distinguished from that of *Dissenters;* for they dissented from none of the religious doctrines of the Church of Scotland; on the contrary, they strictly adhered to the tenets as by law established and recognised, until a party to whom the respondents belong, did actually, though covertly, dissent. Considering themselves as true representatives of the Presbyterian Church, they were of course to be under the direction of certain judicatories, for discipline and order, and, accordingly, had their kirk-sessions, presbyteries, and synods, composed as in the Established Church, of clergymen and lay elders.

The Rev. Mr Jervie was the principal minister of this congregation at the time, and the Rev. Mr Aikman was his colleague.

Dissensions having, however, arisen as to the fundamental

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principles of the secession, the party with whom the appellants co-operated, contended that the standards of their Church were the Westminster Confession of Faith, the Larger and Shorter Catechisms, certain propositions respecting church government and the ordination of ministers, together with the National Covenant of Scotland, and the Solemn League and Covenant of the three nations. The respondents seemed to admit all this, with one exception; they ignored the power of the civil magistrate, and they therefore disavowed the doctrine in the Confession of Faith respecting the power of the civil magistrate, in regard to religion, and the doctrines and declaration in the National Covenant.

A majority of the money contributors, along with the principal minister of Perth, the Rev. Mr Jervie, with a part of his session and congregation, were of the former opinion, adhering to the original principles; the Rev. Mr Aikman, and others, were of the latter, and, adopting the new doctrines, adhered to the Synod.

The Synod ended their deliberations upon the subject by adopting the following Preamble to the Formula: "Whereas "some parts of the standard books of this Synod have been "interpreted as favouring compulsory measures in religion, "the Synod hereby declare, that they do not require an "approbation of any such principle, from any candidate for "license or ordination: And whereas a controversy has "arisen among us respecting the nature and kind of obliga-"tion of our solemn covenants on posterity, whether it be "entirely of the same kind upon us, as upon our ancestors "who swore them, the Synod hereby declare, that while "they hold the obligation of our covenants upon posterity, "they do not interfere with that controversy which hath "arisen respecting the nature and kind of it, and recommend "it to all the members to suppress that controversy, as tend-"ing to gender strife, rather than godly edifying."

Thereafter the Rev. Mr Jervie, with whom the appellants agreed, having taken no part in the proceedings before the Church Court, protested against the proceedings of the Synod, and the preamble adopted by a majority of that Synod; and until this preamble was removed, he declared his intention to decline the authority and jurisdiction of the Associated Burgher Synod, and of all presbyteries subordinate to it, at same time declaring his opinion that he had full authority, notwithstanding, to exercise the duties and func-

tions of the holy ministry, in the place where he had been in use to exercise it.

In consequence of this step, the Presbytery of Newburgh, within which the Perth congregation was held to be situated, declared him no longer a member of their body; they appointed another minister to preach at Perth on the following Sunday.

The appellants, who agreed with him, then brought their action to the Court of Session, for having it declared, that, "The Meeting House and pertinents are the property of the "pursuers, and those who should adhere to them, and their "heirs and successors, for themselves and the other members "of the society of Associate Burgher Seceders of Perth, ad-"hering to and professing the principles of the Original "Burgher Secession, and whose ancestors contributed to the "purchase of the ground, and to the erecting of the buildings "thereon."

A counter action of declarator was brought by the now respondents, to have it declared that the Rev. Mr Jervie, and others (appellants), had, by their disclaiming their connection with the Associate Presbytery and Synod, thereby lost all interest which they, or any of them, had in the said subjects, and, consequently, have now no longer right to interfere with the pursuer, his elders, deacons, and congregation, in the use and exercise of the said Meeting and Session House.

The respondents grounded their action on this, that the opinions held by the appellants were a total departure from the fundamental principles which separated them originally from the Establishment.

In these actions the appellants were made pursuers, and the respondents defenders.

The Court, after much discussion, pronounced the follow- Feb. 21, 1804.
ing interlocutor, which formed the first appeal to the House of Lords: "The Lords find that the property of the subjects "in question is held in trust, for a society of persons who "contributed their money, either by specific subscriptions, or "by contribution at the church-doors, for purchasing the "ground, and building, repairing, and upholding the house, "or houses, thereon, or of paying off the debt contracted for "these purposes, such persons always, by themselves, or "along with others joining with them, forming a congrega-"tion of Christians continuing in communion with, and sub-"ject to, the ecclesiastical discipline of a body of dissenting "Protestants, calling themselves the 'Associate Presbytery

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" and Synod of Burgher Seceders,' and remit to the Lord " Ordinary to proceed accordingly." *

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* Opinions of the Judges :—

LORD PRESIDENT (CAMPBELL) said,—

" There seems to be little doubt that the property in question belongs to, and is held in trust for, a larger description of people, than merely the persons who originally subscribed small sums for purchasing the ground, and raising the buildings upon it, as a great part of the expense was defrayed by after contributions. The establishment, in short, was made for a seceding congregation of a certain description, called the Associated Congregation of Burgher Seceders at Perth; and, of course, the members of that congregation, who either originally contributed, or afterwards acceded, became proprietors of the feudal subject, and they, or a majority of them, in case they differ in opinion, must regulate the management, and dispose of the property, when any dispute arises.

" As to the Associated Synod, the Court can take no notice of any such body of men, as a superior judicature, exercising the rights of control over the congregation, or having any thing to do with the enjoyment, or disposal, of their civil properties. The Court, upon one occasion, ordered the very name assumed by them to be expunged from the record; and, it is clear, from the terms of their own original establishment, that they pretended to nothing but a direction in spiritual matters. The words, " Key of government and discipline," &c., are merely figurative, and have no relation to temporal affairs. Their sentences of deposition of one minister, and appointment of another, cannot be regarded by this Court. Neither can we enter into the dispute and schism among them, about spiritual matters, or speculative doctrines of any kind.

" The sole question is, Who are the majority of this body of individuals, assuming the name of a congregation, and who are the trustees named by them, in whose favour those who are at present trustees were called upon to denude of the property, in order that it may be at the disposal of the persons having right in law to that property, and who may, of course, appoint any person they please to occupy the premises, and to perform worship in their own way, to the people of the congregation? This is a question of a very simple nature, and easily extricated; and it is upon this principle that all the former decisions have rested. Voluntary bodies have not the privileges of lawful incorporations.

" It was for sometime thought that seceding congregations, not being societies known in law, could not maintain action for the

On appeal to the House of Lords, the judgment pronounced was as follows:—"The Lords find, as matter of fact, suffi-

June 18, 1813. These cases do not appear to be reported.

purpose of asserting their just rights. But this was altered in a case from Lanark, Morrison *v.* Struther, in 1757; Wilson *v.* Jobson, 13th December 1771; Allan *v.* M'Rae, 8th March 1793; Smith *v.* Kid, 26th May 1797, &c. But when parties come regularly before a Court, in order to have their differences on points of *civil* right determined, they must found their pleas on common established grounds of law, and the judge cannot listen to the religious doctrines, either of ecclesiastical discipline, or of moral, or political systems, adopted by voluntary associations of men, uniting together for any purpose whatever."

LORD HERMAND.—"I cannot admit the title of the Associate Synod. It is a mere question of civil right, and the property belongs to the majority of contributors."

LORD CRAIG.—"I am of the same opinion. It is said that the trust was for an Associate congregation; and that it must depend on the principles of the Associate Synod, who are entitled to regulate the principles, and, consequently, the rights of the congregation? The congregation has put itself under the Synod, as to ecclesiastical matters alone. They may censure—they may depose, &c., *quoad* their own body; but it is incompetent for them to regulate the civil rights."

LORD MEADOWBANK.—"The New Light Men come nearest to the Church of Scotland. It rejects persecution, heresy, &c. The trustees hold the property for the congregation, or those of it adhering."

At another Advising.

LORD PRESIDENT (CAMPBELL) said,—"The change of opinion and principles is in the Presbytery and Synod, not in the congregation—or at least the majority of that congregation. The continuing together as a congregation, and still more, the subjecting themselves to the control, or inspection, of ecclesiastical superiors of any description, is all a voluntary business. They may dissolve themselves when they please. They may change their principles, and they may put themselves under other superiors. In all such circumstances, we can only count numbers, otherwise we at once convert them into a permanent establishment—a legal incorporation. In the case of Auchinclose, the Synod and the majority of the congregation were at one; and Auchinclose maintaining himself in possession by force. Why alter the terms of the original trust. The same body that exercises the right of patronage, exercises also the power of management and possession of its property."

Mar. 7, 1773; Lord Braxfield's decision unreported.

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"ciently established by proof, that the ground and buildings "in question were purchased and erected with intent that

LORD WOODHOUSELEE.—"The trust was not executed for a few individuals, but for the congregation."

LORD JUSTICE CLERK (HOPE).—"I am of the same opinion. An individual may reserve the right of property, and the right of patronage, to himself when he erects a church. Such persons may also put the management and the right of patronage in another. This congregation did not mean to become independent. They meant to continue the same as before—Presbyterians. The essence of it is subordination. Even when Episcopacy was restored, the presbyterian form continued. If a minister is deposed by his own judicatures, we must give effect to it even *civilibus*. Complete toleration is not substantially different from the Establishment. I have no access to know who are the real Burgher Seceders, but the judicatories themselves. Craigdallie, and those who adhere with him, have seceded from the Burgher Secession: For what? Simply for adhering to their original principles. On the whole, I am for adhering."

LORD HERMAND.—"I am for the contrary. The respondents have committed a violation of the original compact. The society here was formed for exercising constitutional powers."

LORD MEADOWBANK.—"I am for adhering. The mortification was for a legal use. We cannot go into extreme cases. There must be somebody to describe, and ascertain what are the religious principles, or discipline, to be followed in the case of this endowment. The loyalty of these men is not to be doubted. Who can turn out Mr Aikman, who was regularly ordained and placed in this church? Must he be turned out because Craigdallie has changed his mind? I think that would be a hard case."

LORD CULLEN.—"The nature of the trust must be looked to. It was intended to be permanent—even a Professor of Divinity was to be appointed. We cannot invert the purposes of the trust. We cannot review the sentences of their Church Courts, except to be satisfied that they are agreeable to the rules laid down by themselves." (Here his Lordship referred to the opinion of English counsel, in the case of Kirkpatrick). "In cases of removal, &c., of dissenting ministers, the usual inquiry is, Which is right according to their established regulations and principles of the body?"

LORD CRAIG.—"I am for altering. The majority of the body are entitled to alter the original purpose or formula. The Synod having changed their principles, it is a little hard and intolerant to insist that their brethren should change also. Is it meant that if the *whole* congregation should be of one mind they must, never-

" the same should be used and enjoyed for the purposes of " religious worship, by a number of persons agreeing at the " time in their religious opinions and persuasions, and, there- " fore, intending to continue in communion with each other; " and that the society of such persons acceded to a body, termed " in the pleadings, 'the Associate Synod;' and find that it " does not expressly appear, as matter of fact, for what purposes " it was intended at the time such purchase and erections " were made, or at the time such accession took place, that " the ground and buildings should be used and enjoyed, in " case the whole body of persons using and enjoying the " same, should change their religious principles and per- " suasions, or if, in consequence of the adherence of some " other such persons to their original religious principles and " persuasions, and the non-adherence of others of them thereto, " such persons should cease to agree in their original religious " principles and persuasions, and should cease to continue " in communion with each other, and should cease, either as " the whole body, or as to any part of the members composing " the same, to adhere to the body termed in the pleadings, " 'the Associate Synod;' and it is, therefore, ordered and " adjudged that, with these findings, the cause be remitted " back to the Court of Session in Scotland, to review all the " interlocutors complained of in the said appeal; and upon " such review, to do therein what shall appear to them to be " meet and just."

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theless, forfeit their property? This would be an *imperium in imperio*."

LORD ARMADALE.—" We must give effect to the trust, and look to its original purpose, and give the property to the majority."

LORD BALMUTO.—" I am for altering."

LORD BANNATYNE.—" I am for adhering. Jervie has departed from his order."

LORD METHVEN.—" I think the majority is the rule."

LORD GLENLEE.—" I have great difficulty as to the adjection of anything which answers a condition. Yet, upon the whole, I think the majority of those having the *interest* must have the *power* of altering the purpose. Suppose they had inserted the proposed conditions, would they have been of this nature? Suppose an Act of Parliament were to pass about it, would not reasonable clauses have been put in?"

LORD DUNSINNAN.—" I am for altering."

LORD POLKEMMET.—" I am for adhering."—*President Campbell's Session Papers*, vol. cxviii.

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In pronouncing this judgment, Lord Chancellor Eldon spoke as follows :—

"My Lords,*

"I will avail myself of the present opportunity to state to your Lordships what has occurred to me upon a case of very great importance, to which I have given all the attention it has been in my power to bestow, and which was not heard in presence of any of the noble Lords who have attended this House lately. It was a case in respect of the use and enjoyment of a meeting-house in Perth. There were two interlocutors pronounced in the Court of Session, under the circumstances which I shall have occasion to state to your Lordships. One, an interlocutor of the 16th November 1803, on the report of the Lord Ordinary, Lord Armadale, who, I ought to explain to your Lordships, afterwards changed the opinion he had formed when he first made the report, upon which the Court pronounced that interlocutor, when he came to give his opinion as a judge of the Court of Session, at pronouncing another interlocutor, on the 1st of February 1804. The Court affirmed the interlocutor of the 1st of February 1804, by another interlocutor of the 27th June 1805, and another of the 10th February 1806, against all of which the present appeal is brought; and the case has certainly very much distracted the judges of Scotland, because, in addition to the circumstances I have mentioned, that my Lord Armadale changed his opinion when he came to sit in full Court, I think I am justified by the papers before me in representing to your Lordships, that this case has been *now* decided by the narrowest possible majority, namely, by calling in the Lord President, on there being an equality of voices among the other fourteen judges; and I am sorry to observe to your Lordships, that unless I have mistaken the circumstances of this case, in respect of the effect of these circumstances, it would be quite impossible for your Lordships to decline remitting this again to the Court of Session, inasmuch as it seems to the individual who has the honour of addressing your Lordships, that it is perfectly impossible, whichever party is right in point of law, to apply, in fact, any of the interlocutors of the Courts.

"I will beg your Lordships' attention to the first interlocutors of the Court of Session, because the third and fourth are mere affirmances of the second. In the interlocutor of the 16th November 1803, they say, 'that the property of the subjects in ques-'tion, is held in trust for a society of persons, who contributed 'their money for purchasing the ground, and building, repairing, 'and upholding the house or houses thereon, under the name of

* Taken in short-hand by Mr Gurney.

'the Associate Congregation of Perth; and so far repel the de-
'fences against the declarator at the instance of Matthew David-
'son, and others, and find that the management must be in the
'majority, in point of interest, of the persons above described.'
Then they remit to the Lord Ordinary to ascertain what persons are entitled to be upon the list of contributors foresaid, and whether the majority aforesaid, stand upon the one side or the other, and, therefore, to do as to his Lordship shall seem just.

"A reclaiming petition was given in, and, on resuming consideration on the 1st of February 1804, their Lordships altered their interlocutor of the 16th November, which I have just stated, 'and find that the property of the subjects in question is held in 'trust for a society of persons, who contributed their money, either 'by specific subscriptions, or by contributions at the church-doors, 'for purchasing the ground, and building, repairing, and uphold-'ing the house or houses thereon, or for paying off the debt con-'tracted for these purposes, such persons by themselves or along 'with others joining with them, forming a congregation of Chris-'tians, continuing in communion with, and subject to the eccle-'siastical discipline of a body of Dissenting Protestants, calling 'themselves the Associate Presbytery and Synod of Burgher 'Seceders.'

"My Lords, before I state the facts of this case, which I shall take occasion to do shortly, but, I hope, clearly, I would call your Lordships' attention to the differences between these two interlocutors. The property in question is a meeting-house for religious worship. The first of these interlocutors states that it was held, 'in trust for a society of persons who contributed their 'money for purchasing the ground, and building, repairing, and 'upholding the house or houses thereon, under the name of the 'Associate Congregation of Perth.' That interlocutor, therefore, with respect to the persons, with reference to whom it asserts the property to be held in trust, describes those persons to be persons who had even contributed their money for purchasing the ground, and building, repairing, and upholding the house or houses thereon. The next interlocutor, bearing date the 1st February 1804, describes those persons to be, 'persons who contributed 'their money, either by specific subscriptions,' meaning thereby, distinct contributions, 'or by contributions at the church-doors, 'for purchasing the ground, or building, repairing, and upholding 'the house or houses thereon, or for paying off the debt contracted 'for these purposes.' That description of persons, 'paying off 'the debt contracted for these purposes,' your Lordships observe, is not contained in the first interlocutor, and the phrase, 'the 'persons who contributed their money,' is qualified by inserting the words, 'either by specific subscriptions, or by contributions 'at the church-doors.' But the material alteration in this inter-

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locutor, the terms of which I have now stated, is as follows: 'Such persons by themselves, or along with others joining with 'them, forming a congregation of Christians, continuing in com- 'munion with, and subject to the ecclesiastical discipline of the 'body of dissenting Protestants, calling themselves the Associate 'Presbytery and Synod of Burgher Seceders.'

My Lords, before I state the facts of this case, and a very important case it undoubtedly is (though it does not appear to me to bear upon the doctrine of toleration in the way in which it has been supposed to bear upon these doctrines), your Lordships will permit me to state, that between 1733 and 1740, upon an occasion which I shall take the liberty of mentioning more particularly in a few minutes, this meeting-house was built. It was built by persons who subscribed sums of money for the purchasing the ground, and building the meeting-house; and it was also built by the contribution of money at the church-doors. It was also built by the contributions of the remainder of the community, who subscribed towards paying off the debt, a very considerable debt having been contracted in this undertaking; and there appear also to have been subscriptions by persons who were not members of this community, but who wished well to the undertaking as a religious undertaking, though they were not in communion with the society engaged in that form of religious worship. Your Lordships will also find the minister has been from time to time maintained by the contributions at the kirk-door, and the building itself was in some degree erected, and has been from time to time repaired with the produce of those contributions at the church-doors.

"If I have correctly called your Lordships' attention to the words of these interlocutors, I think you will see, in one moment, the extreme difficulty of applying to the statements in point of fact, the questions in point of law. No part of the Court seems to me to have denied that there may be a property vested in individuals, it being the intent of those individuals, and that intent being capable of being denominated a trust, that it should be used for the purposes of religious worship, carried on in communion with those who have not subscribed to the property; but, the determinations of the Court have differed in this respect, and your Lordships will observe the difference is marked out by the second interlocutor. The first interlocutor has said that the property is in those who advanced the money, but that, notwithstanding their advance of the money, they lose the benefit arising from the property, if they cease to be in communion with the persons associating there for religious worship. But, taking it one way or the other, when your Lordships observe in whom the property is stated to be vested, it being represented that these contributions have been made from the years 1733, 1736, or

1740, up to the time of pronouncing this interlocutor, in the present century, about 1806, when the Court directs an inquiry who were the contributors? and states in the first interlocutor the contributors, describing them, with this addition in the second interlocutor, that those who subscribed at the church-door, and those who subscribed towards paying off the debt, are to be considered as contributors. Recollecting that the original contribution was as long ago as the commencement of the building of this meeting-house, and that this contribution has been going on by subscriptions and collections ever since; and this interlocutor, taking no notice of their heirs or representatives, I think it would be extremely difficult for the Lord Ordinary to find out who are the persons in whom the property is, so as to apply the interlocutor to them.

"My Lords, the history of this case is certainly very curious. It appears that, about the year 1732, a schism arose in the Established Church of Scotland, of this nature, that is to say, 'One 'party contended that when the planting of any parish should 'fall into the hands of the presbytery, *tanquam jure devoluto*, the 'election of a minister to supply the vacant charge belonged to 'the congregation at large, and not to the heritors and elders, 'who constituted' (as your Lordships know), 'a very small pro-'portion of their numbers.' By the other party it was contended, 'that the right of electing the pastor in similar circumstances, was, 'in a landward parish, by a call by the heritors and elders in 'conjunct meeting; that in the case of vacancies in royal burghs, 'the call should be given by the magistrates, town-council, and 'elders, in a joint meeting, where there was no landward parish, 'and by the magistrates, town-council, heritors, and elders, where 'there was a landward parish.'

My Lords, to the latter opinion, a great majority of the members of the Established Church of Scotland adhered, and, accordingly, it was established by a General Assembly of the Church of Scotland, that such was a proper mode of election. There were at that time four ministers, a Mr Ebenezer Erskine (who seems to have held a contrary doctrine with great firmness), a gentleman of the name of William Wilson, who was the minister of Perth, in the Established Church of Scotland, at that day; another gentleman of the name of Alexander Moncrieff, and another of the name of James Fisher, and to these they associated afterwards two other persons, of the name of Ralph Erskine and Thomas Mair. They stated themselves to be, what they called, an Associate Presbytery, that is to say, they did not mean to depart in any degree whatever, from the form of the communion in the Established Church, but they differed in this point of the election of pastors, and that difference of opinion between 1732 and the time when these causes were instituted, had given rise to 130 congrega-

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tions of Seceders, who had divided themselves in 1745, into another secession of Burgher Seceders, and of Anti-Burgher Seceders.

"My Lords, these gentlemen having separated themselves from the Established Church, held themselves out to be the only true genuine Presbyterians in Scotland, and it is not necessary for me to point out to your Lordships any other doctrines, in respect of which they differed, in order to explain myself to your Lordships, but simply to state, that they adopted the obligation of what is called the National League and Solemn Covenant in that country, of which your Lordships have heard much, and one of the forms which they used, was this (which they added to the formula used by the Church of Scotland). 'Do you acknowledge the perpetual 'obligation of the National Covenant in Scotland, and of the 'Solemn League and Covenant?' This acknowledgment was a sort of principle upon which their communion was to exist, and it seems that a great deal of difference of opinion has taken place since this Secession was formed, about the period I have mentioned to your Lordships, as to what was meant by acknowledging the perpetual obligation of the National Covenant in Scotland, and the Solemn League and Covenant, and those differences of opinion led to another schism and separation, which gave rise to the present suit, in the year 1799.

"My Lords, in the year 1737, or soon after, the Established Church had ejected the ministers whom I have named as ministers not belonging to the Establishment, they formed themselves, with others, into an Associate Presbytery, and it appears, that, in a very solemn form, in the year 1747, this dissenting church at Perth adhered to what they called the Associate Synod. When the ministers, forming the Associate Presbytery, became more numerous, than could conveniently admit all to meet for the purposes of business, there were subdivisions of the whole into distinct presbyteries, and the meeting of the distinct presbyteries formed the Associate Synod. This meeting-house at Perth, I may unquestionably state to your Lordships, as having been originally built, and the ground unquestionably purchased for the purposes of religious worship, by persons who were agreed in their religious principles and persuasions, and who, actuated by those religious persuasions, meant to continue in communion with each other; and when they adhered to the Synod, I think I may also state it as being very clear in point of fact, that they understood, all of them, that this congregation was still to continue in communion, acting upon the same religious persuasions; and that, though from the kirk-session to the presbytery, and from the presbytery to the synod, there was that recourse which, in the judicature of the Established Church, had the same names, yet it was understood, that as their original formation was for the purposes of their common religious worship, they constituted a part of that society which was called

the Associate Synod, it being understood that every presbytery which was Associate, and the whole synod, formed of the Associate Presbyteries, were to continue in communion, actuated by the same principles and persuasions which had occasioned their separation from the Established Church.

" My Lords, I intimated to your Lordships, that there had been a great difference of opinion between many of the members of this seceding church, as to the solemn league and covenant, and particularly with respect to the authority of the civil magistrates; and in a later period, the particular date of which it does not appear necessary to state to your Lordships, they had meetings to consider this subject. The whole body met at last, and they put an interpretation upon it, which several of them thought not agreeable to the obligations they had come under; and the consequence of that was, some of the ministers refused to abide by the opinion of the majority, and among others, one of the ministers of this church at Perth, a gentleman whose name appears in these papers, and with whom there had been associated another gentleman of the name of Aikman. Mr Aikman, the associate of the clergyman of this church, adhered to the opinions of the majority of the Synod. Mr Jervie, who had been long a minister of this church, was of opinion, that they had broken the league, and forsaken the principles, on which they ought to act, and he refused, and a very considerable part of the congregation of this church, at Perth, refused, any longer to adhere to that Synod; and this circumstance, without entering into any more detail of it, has furnished the question in this cause; that is to say, here was a congregation of persons, who, united in religious opinions, who, by contributions of different sorts—contributions of money—contributions of materials—contributions of labour, and contributions at the church-door—had made this establishment in Perth, meaning, undoubtedly, that it should continue as long as they could agree, who had adhered, in the year 1737, to the Synod of these Seceders, meaning to adhere to it as long as there should be a community of opinion; but, in consequence of this difference of opinion in their ministers, and difference of opinion among themselves, instead of uniting in what they considered the leading article of their religious persuasions, one party said—This meeting-house belongs to us, because we continue connected with the Associate Synod. And without entering into the forms of proceedings in Scotland, I may represent this as a case in which one party and its adherents instituted a suit, insisting that the property was in the contributors of money, not of materials, not of labour, not of stipend, not of contributions at the church-doors, but of money advanced at the time for the purposes of making this building, and that they and their heirs have a right to direct the use of the building, when there is no longer an

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agreement among the congregation for the purposes of religious worship, for which this building was originally made. Mr Aikman and his adherents said, that inasmuch as the congregation at Perth had adhered to the Associate Synod in the year 1737, they had therefore submitted themselves to what they called the ecclesiastical discipline of that Synod, and as the majority of that Synod had declared for the principles and tenets upon this point which Mr Aikman, and that part of the congregation maintained, they were no longer to be considered as a separate meeting-house at Perth, but as one of many associated congregations, whose opinions, according to their way of putting it, the Synod, in some sense, must have a right to direct; and that the Synod, therefore, upholding Mr Aikman's pretensions, wherever the legal property was, it must be held in trust for Mr Aikman and his adherents.

"That appears to have been the state of the question. There has, as I before stated to your Lordships, been a very great difference of opinion. My Lord Armadale, as appears by the papers before your Lordships, states himself to have first thought that the property belonged to the contributors, and, that although the law of Scotland was not so wanting with respect to the principles of toleration, as for it to be conceived that a society of this kind could not exist, yet that there were two views of the question; the one was, In whom the property was? and the law would only give the direction and the use of the property to the majority of persons having the property. The opinions of others of the Judges was, that the property, being held in trust for persons united in a religious society, for the purposes of religious worship, the law would enforce the use of the property to the purposes of that society so associated for the purposes of religious worship. But then, another question arose, which was this, If the contributions were made originally for the purposes of a society professing one general faith, and adopting the same principles,—if that society did not remain in the adoption and profession of the same principles, but broke into pieces in respect of their opinions, a difficulty there arose, for whom the property was to be held? and there was a vast deal of argument, in respect both of the English and the Scotch law. With respect to the English, perhaps, I may take the liberty of stating, that they seem, by the papers before the House, to have been somewhat mistaken; and with respect to Scotch law, many of the judges, who concurred in the interlocutor, admitted very distinctly, I think, that the decision was not according to the former decisions in their Courts, but, that at present they ought to entertain more liberal views; and in respect to others again, they contended that the decision was according to the former decisions, and that they were only enforcing that doctrine, which they had laid down in antecedent cases. One question, which seems to have been pressed, and upon which

most of the judges delivered their opinions, was this, Supposing the whole of this congregation at Perth, had thought proper to alter their opinions, could it then have been contended, that the Synod could have prohibited the use of this meeting-house, which was a meeting-house formed for the purpose of carrying on religious worship according to the notions of those who contributed? The only answer which has ever been given to that question, as far as I can find one in these papers, is, that whenever that question arises, they will dispose of it. But, my Lords, it is a question which I am afraid must be disposed of, before we can be quite sure what is the right decision in the present case, because, though it is putting a strong case, you must determine what the decision upon that would be, before you can decide, whether the decision is right in the present case. At present we do not know where the majority is, but we must take it in all its stages. Supposing the congregation should be equally divided, if my Lord Ordinary has to apply this interlocutor, what can be done then? Supposing the whole congregation had altered its opinion, or that it should be found that ninety-nine in a hundred of them had altered their opinion, is it to be contended that those ninty-nine hundredths had forfeited, not only their right to be a part of the congregation, but their property in the place?

"My Lords, when I come, therefore, to look at these interlocutors, I protest I find it impossible in any view of the case, to abstain from most respectfully submitting again to the consideration of the Court of Session, not only the nature of the opinion, but the application of the principle they have stated to be contained in these interlocutors. Mr Maconochie, in the paper I have in my hand, contends that the contributors are not only the persons who supplied the specific money, but those who supplied the materials, who supplied the labour, who supplied the contributions at the church-doors, and who have, from time to time, contributed to the stipend of the minister. That the contribution to the stipend of the minister he insists upon very largely, and very ably, and I observe the present Lord President, who was then Lord Justice-Clerk, insists in his judgment very ably upon the point, that those who contributed to the minister's stipend, are to be reckoned among the contributors; but there is not one single syllable of this in the judgment of the Lord Ordinary; and if he and others were of opinion, that those who contributed to the stipend were to be considered as contributors; and if your Lordships look at the terms of the interlocutor, and see that such persons are absolutely excluded, there arises a new difficulty for the Lord Ordinary.

"But, in another way of putting it, when you consider that this body for religious worship was formed so long ago, as between the year 1730 and 1740; that between 1730 and 1740, the sums

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which were subscribed for the purposes of the building were subscribed, and that the individuals of that day, every one of whom must have contributed towards the carrying on the worship there, when you consider, that those contributions at the church-doors, which are spoken of in the seeond interlocutor, have been made almost quarterly from that time—when you consider, that the stipend has been from time to time supplied through all this vast course of years—when you connsider, that the debt which was contracted, and which the last interlocutor says 'every per-'son contributing towards the payment of is entitled,' &c.—and when you consider, who are meant to be described in this interlocutor, I think I may ask your Lordships, whether you can solve the difficulty which you would find yourselves under, if it was referred to you to state who are the persons who contributed their money, either by specific subscriptions or by contributions at the church-doors, for purchasing the ground, and building, repairing, and upholding the house or houses thereon, or for paying off the debt contracted for these purposes, that debt having been paid off many years ago, and then to state who are the majority of them, with a view for the Court to determine for whose benefit this place is to be considered as held by the survivors of four sons, to whom it was conveyed between the years 1730 and 1740. My Lords, it does appear to me, that in any way of looking at these interlocutors, independently of the great importance of the principle which is involved in them, the house will find itself utterly unable to apply the interlocutors, according to the terms they have used, so as to execute them; and, therefore, independently of all other considerations, I do not see how it is possible to refuse to remit this case for further consideration. If, on further consideration, the learned judges adhere to the principle, that this place was vested in trustees for the benefit of the society adhering to certain religious principles, and that because that society adhered to the Synod in 1737, that Synod, at the sametime, possessing certain religious doctrines, and certain religious principles, the property is now to be held not for those of that congregation who adhere to their original principles, and the original doctrines to which they agreed, but in trust for those who do not adhere to the original doctrines and the original principles, but to that change, as they call it, of doctrine, which the Synod has introduced—propositions of law, in my opinion, extremely difficult to be maintained; if they shall adhere to those propositions, I conceive, there is an utter impossibility in applying that principle by interlocutors worded as these are.

"My Lords, upon the doctrine itself I will only state, with respect to the English law, to which the attention of the Court of Scotland has been called in some degree, I have no doubt if it leaves an estate in trustees to be used for the purposes of religious

worship, the Courts of this country acting upon the principles of toleration, will enforce those persons to permit the property to be used for the purposes of that religious worship to which it was devoted. If the instrument contains in it a provision for the case of schism and separation among the members themselves, I apprehend the Courts themselves will act according to the provisions so contained; but I have not yet met with a case that authorises me to say, that it is as clear as the Court of Scotland appears to think it, that if we have an instrument of trust, devoting property to purposes of religious worship, and making no provision for the case of schism or separation, that property being acquired by the trustees, at the expense of the *cestui que trusts*, and being acquired for the benefit of the *cestui que trusts* in matters of religious worship, in which they are all interested, I have not found a case which authorises me to say, that if that society should separate from each other in point of religious opinion (and I particularly beg my learned and noble friends attention to this), a court in this country would enforce the trust for the benefit of those, not who have adhered to what was originally the religious principle upon which they founded the church, but for the benefit of those who appear to be a mere majority (if they were a majority), much less if they were a minority, much less for the benefit of those if they were not one to ten (which is the principle which must be considered as running through these interlocutors), not adhering to the principles upon which the society was formed, but departing from them, and that in point of pecuniary interest, those who adhered to their original principles, should forfeit all their property, and those who departed from their original principles should, notwithstanding that departure, not only have their own property in the meeting-house, but the property of the other original subscribers. I have found no case whatever which authorises such a decision. If it can be made out, that this society originally said this, We will contribute our money for the purposes of building a meeting-house, and we will place ourselves under the jurisdiction of the Associate Presbytery, and afterwards of the Associate Synod; and placing ourselves under the jurisdiction of the Associate Synod, we agree that the Associate Synod shall direct the application of this place so built, that is matter of law, and the contract will apply to the law. But I have found no such contract, and upon the fullest consideration I have been able to give to the subject, I propose, when we meet on Wednesday morning, to move your Lordships that this should be sent back to the Court of Session, with two findings, which the circumstances of the case, I think will authorise me to propose to your Lordships; the one, that it appears in matter of fact, that this house and ground was originally purchased and built, and the property vested in four persons, for the purposes of religious worship, by indi-

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viduals united in their religious principles and persuasions, and proposing to continue united in such principles and persuasions; but, *secondly*, that it does not expressly appear as matter of fact (I will not say impliedly, for that must be left to the Court, but that it does not expressly appear) to what purposes it was the interest of all these individuals, or any of them, should be applied if they should happen to differ in opinion; and with these findings, the one affirmative, and the other negative, I shall propose to your Lordships to remit these two interlocutors, upon which I have observed, to the Court of Session.

"My Lords, I am the more anxious that this course should be taken, because I have stated to your Lordships that many of the judges in Scotland consider this decision as directly contrary to all their former decisions, and because some of them admit the extreme difficulty of reconciling this to their former decisions, who still concur in it; and lastly, because, I think your Lordships will see the nature of the case itself renders it a case of great importance, and from the nature of the question which the case furnishes, it has this peculiar importance about it, that it naturally engages the feelings of the persons who are interested in the question in such an extreme degree, that it is extremely important it should be as satisfactorily settled as it can be. Under these circumstances, and meaning to propose these findings to your Lordships on Wednesday morning, move the further adjournment of this appeal to that time."

The Lord Chancellor read his note of the judgment on Wednesday, and then proceeded thus:—

"I will not again repeat the grounds which I stated very fully to your Lordships on Monday, for this form of judgment. I have nothing to add but this, that on reconsidering the matter, it does not appear to me, that if this were a case of an English trust, and I mention English trust again, because I see there is a great deal of discussion in the Court of Session, upon what they consider the English law, with reference to trusts of such a subject. I do apprehend, there is no case that we have had, that would authorise me to say, that if persons had subscribed to the building a meeting-house for religious worship, and if those persons afterwards disagreed in opinion, you would compel the execution of the trust for the purpose of carrying on the religious worship of those who had changed their opinion, instead of executing that trust for the benefit of those who had adhered to their religious opinions. I know of no case which has gone that length. When I speak of religious opinions in such a case, I would state that the Court here would examine what were the religious opinions, merely as a matter of fact, not for the purpose of stating which of them con-

tained more, and which of them contained less, of sound doctrine, but as mere matter of fact, in order to get at the intent and purpose with which the property was purchased, and the building was erected; and when it got at that intent and purpose, it would either effectuate that intent and purpose, or say that it failed altogether. With these few words with respect to our own law, I propose to your Lordships the judgment in the form in which I now read it."

When the cause returned, the appellants presented a petition to the Court of Session to have the judgment applied. This being done, a condescendence was lodged, which, being followed by answers, replies and duplies, the Court pronounced this interlocutor:—"The Lords find that the pursuers, James Feb. 21, 1815.
"Craigdallie and others, have failed to condescend upon any
"acts done, or opinions professed by, the 'Associate Synod,'
"or by the defenders, Jedidiah Aikman and others, from
"which this Court, as far as they are capable of understand-
"ing the subject, can infer, much less find, that the said
"defenders have deviated from the original principles and
"standards of the Associate Presbytery and Synod. Farther,
"find that the pursuers have failed in rendering intelligible
"to the Court on what ground it is that they aver, that there
"does at this moment exist any *real* difference between their
"principles and those of the defenders; for the Lords further
"find, that the Act of Forbearance, as it is termed, on which
"the pursuers found, as proving the apostacy of the defenders
"from the original principles of the Secession, and the new
"formula, were never adopted by the defenders, but were
"either rejected or dismissed as inexpedient, and that the
"preamble to the formula, which was adopted by the Associate
"Synod, in the year 1797, is substantially, and almost ver-
"batim, the same as the explication which the pursuers pro-
"posed in their petition of 13th April 1797, to be prefixed
"to the formula; and to which, if it would have satisfied
"their brethren, they declared they were willing to agree;
"therefore, on the whole, find it to be unnecessary now to
"enter into any of the inquiries ordered by the House of
"Lords, under the supposition that the defenders had de-
"parted from the original standards and principles of the
"Association, and that the pursuers must be considered
"merely as so many individuals who have thought proper,
"voluntarily, to separate from the congregation to which
"they belonged, without any assignable cause, and without
"any fault on the part of the defenders, and, therefore, have

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" no right to disturb the defenders in the possession of the " place of worship, originally built for the profession of prin- " ciples, from which the pursuers have not shown that the " defenders have deviated, therefore, sustain the defences, " and assoilzie; and in the counter action of declarator, at " the instance of the defenders, J. Aikman and others, " decern and declare in terms of the libel, but find no ex- " penses due to either party."

Against this interlocutor the present appeal was brought by the pursuers to the House of Lords.

Pleaded for the Appellants.—What points it was your intention that the Court below should take into consideration upon your remit, it is for your Lordships now to say, but, till corrected, the appellants must hold that the Court has completely misunderstood the judgment. By the interlocutor appealed from, it appears that the Court thought it within their province to consider whether there were substantial grounds for difference in opinion between the parties, in matters of religion and church discipline, and they declared that, according to their understanding, there were not. But, the appellants conceive, that your Lordships could have no such idea. It being indisputable, that the body had split, that some of them did adhere to their original principles and persuasion, and others of them did not, and at any rate that they had ceased to continue in communion with each other, and had in part ceased to adhere to the Associate Synod, the Court could do nothing but pronounce what was law on the facts so established, or how these facts were to operate on the question as to the right to the property. It was not the object of the respondents to be intelligible to others; and in fact they succeeded in not being understood for a time by their own people, but their real aim came soon to be seen. They did not pass a formal Act of Forbearance, *but they recommended their presbyteries to forbear*, and when they tacked to the formula what is called the preamble, they *covertly* did all originally proposed to be done *openly*.

In the *second* place, throughout the whole of these proceedings, your Lordships must be satisfied that the appellants, and those who have acted with them, were invariably the advocates of the existing order of things; that they sought for no change or alteration upon the existing bond of the society; that they were not the authors or abettors of controversy; and that they sought for nothing more than to be allowed to remain in the undisturbed possession of that

common faith which had been transmitted to them by the founders of the Secession, and which, by those founders themselves, had been derived from what was regarded as the purest and most prosperous era of the Scottish Church. Indeed, it was never at any time seriously pretended that the appellants aimed at anything more than a strict adherence to their own established standards.

In the *third* place, it is said that this preamble must surely be innocent, and can import no change, since it is really no more than equivalent to that explanation which the Associate Session of Perth had proposed in their petition of 1797. Without going back to the history of that document, it may be sufficient to the appellants to show, that between the preamble and the proposed explanation, there is a most essential difference. It is to be kept in mind that the main pretence for altering the established formula, as it related to the powers of the civil magistrate, in matters ecclesiastical and religious, was, that it might be made to countenance persecution for conscience' sake, in its most odious and intolerable forms. Now, without abandoning a single iota of the Confession of Faith, or the existing formula, no well-informed Seceder could hesitate a moment to disavow so gross and malignant a construction, and, instead of abandoning and altering the standards, he was only disencumbering, and vindicating them from a gross and stupid calumny. In short, under the vague and comprehensive name, compulsory measures in religion, a direct blow was aimed at the authority of the magistrate, in all matters ecclesiastical and religious. The respondents, therefore, having thus departed from the established standards of the Secession Church, while the appellants adhered to them, the appellants ought to have right to the meeting and session houses, as the only body remaining in communion, and adhering to the original principles of the Associate Burgher Seceders. These principles were identical with the ecclesiastical establishments of the Scottish Church, as set forth in its own standard books, from which they never *dissented* at the time they seceded from that church.

Pleaded for the Respondents.—1st, It is established by the existing judgment of this House, "That the ground and buildings in question were purchased and erected, with intent "that the same should be used and enjoyed for the purposes "of religious worship, by a number of persons agreeing at "the time in their religious opinions and persuasions, and, "therefore, intending to continue in communion with each

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"other; and that the society of such persons acceded to a "body termed in the pleadings, 'the Associate Synod.'"

2d, The appellants are no longer in communion with this body, but have thrown off their submission to, and connection with it, and have thus lost all title to derive benefit from the trust question.

3d, The respondents, on the contrary, have all along been, and still continue, in communion with the Associate Synod.

4th, The Associate Synod has not openly renounced or directly deviated from any of the original principles of the Secession; but, on the contrary, the proposed alteration of the formula, which is the only ground for inferring a change of religious persuasion, against this body, was expressly rejected. Although the preamble was adopted, this prefatory explanation was perfectly consistent with the strictest principles of the Burgher Association, and was proposed and supported by the appellants themselves, who, consequently, are debarred from converting the adoption of this explanation, as a ground of preference to them over the respondents.

After hearing counsel,

It was ordered and adjudged that the interlocutor be, and the same is hereby affirmed.

For the Appellants, *Ar. Colquhoun, Tho. Thomson, Fra. Horner.*

For the Respondents, *Alex. Maconochie, H. Cockburn.*

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GOVERNORS OF HERIOT'S HOSPITAL. v. ROSS.

[Ross' Land Rights, vol. ii., p. 193.]

GOVERNORS OF GEORGE HERIOT'S HOSPITAL, ... *Appellants;*

JOHN COCKBURN ROSS, Esq., . . . *Respondent.*

House of Lords, 24th July 1820.

SUPERIOR AND VASSAL—SUB-FEUS—COMPOSITION ON ENTRY.

This was an action raised by the respondent, who had purchased, many years ago, the ground now covered by Shandwick Place and Queensferry Street. Originally he had obtained charter from the appellants, his superiors, on paying a composition of £32, being the sum corresponding to the real rent of the ground and houses erected thereon.