The result is that the case must proceed as if there had been no delay in lodging the printed record.

LORD KINNEAR — I entirely agree with the exposition of the Act of Sederunt given by Lord Adam. I only add to what his Lordship has said that when the different clauses of the 5th section of the Act of Sederunt are read in connection with one another it will be found that one of them at least involves an appeal to judicial discretion, and that others allow of no such appeal. It is obvious that there is no appeal to judicial or quasi-judicial discretion when the clerk is ordered to record the failure to lodge prints by a note on the interlocutor sheet, and just as little when it is directed that the cause shall be deleted from the roll. The words are distinct and imperative. The only question that can be raised is as to whom they are addressed, but whoever it is that is to carry out that direction, the direction itself is imperative. I agree, however, with your Lordships that the Act of Sederunt requires the deletion to be made by the clerk to the process, because it is a purely ministerial act which cannot be performed by anybody else. The Act of Sederunt has not been carried out. I think it is clear that this was due to no failure of duty on the part of the clerk, because he has only followed decisions and practice in the Outer House. Nevertheless, though it was no fault of his, his statutory duty has not been performed. It follows that the opportunity which the Act gives to the party who has been put out of Court by the agents' failure to lodge prints has not arisen. He cannot ask the case to be restored since it has not been struck out, and therefore the condition on which the Lord Ordinary is required to dismiss the case does not exist.

As we are all of one opinion as to the construction of the Act of Sederunt, the only question which arises is, whether we are now to treat the pursuer as being in default, and recal the Lord Ordinary's interlocutor and dismiss the action, or whether we are to adhere to the Lord Ordinary's interlocutor and allow the action to proceed. If there had been any just ground for blaming the party or his agent for the default there might have been difficulty. But Mr Clark candidly conceded that if the cause had been deleted from the roll and the action dismissed it would have been right to repone the pursuer. That being so, the only question is whether the circuitous procedure should be followed out of dismissing the action and reponing, or whether we should allow the case just to proceed as it stands in the procedure roll.

The Court refused the reclaiming-note and remitted to the Lord Ordinary to proceed with the cause.

Counsel for the Defenders and Reclaimers — James Clark. Agents — Strathern & Blair, W.S.

Counsel for the Pursuer and Respondent —J. B. Young. Agents—M'Nab & M'Hardy, S.S.C.

HOUSE OF LORDS.

Monday, August 1.

(Before the Lord Chancellor (Halsbury), Lords Macnaghten, Davey, Robertson, Lindley, James of Hereford, and the Lord Chief-Justice (Alverstone.)

GENERAL ASSEMBLY OF THE FREE CHURCH AND OTHERS *v.* LORD OVERTOUN AND OTHERS.

YOUNG AND OTHERS *v.* MACALISTER AND OTHERS.

(In the Court of Session July 4, 1900, 4 F. 1083 and 1117, 39 S.L.R. 793.)

Church — Dissenting Church — Trust — Power to Alter Doctrine — Union with Other Church—Declaratory Act 1892 — *Uniting Act* 1900.

Property held by, or by trustees for, a body of persons associated as an independent and unincorporated church, is, in the absence of any express power to alter the doctrine or the constitution of the church or any special provisions in any particular trust-deed, destined for the benefit of persons maintaining the doctrines professed by the Church at its inception, so far as these doctrines are fundamental and essential. In the event of a schism in the Church, arising through a majority adopting new standards of doctrine, or ceasing to maintain as part of the standards of the Church any essential or fundamental doctrine, the property remains with the minority, and the majority forfeit all beneficial interest therein.

Documentary evidence on which *held* (*rev.* judgment of the Second Division of the Court of Session—*diss.* Lords Macnaghten and Lindley) that the maintenance of the principle of Establishment, *i.e.*, of the right and duty of the State to maintain and support the establishment of religion, was an essential and fundamental principle in the Free Church of Scotland, and that the majority of that Church by uniting with the United Presbyterian Church to form the United Free Church on terms which left that principle an open question had violated the conditions on which the property of the Free Church was held, and had forfeited all right thereto.

Question—Whether the terms of the Declaratory Act passed by the Free Church in 1892 in reference to the doctrine of predestination amounted to a departure from the original standard of that Church as contained in the West-

minster Confession of Faith, such as to involve forfeiture of property held in trust for the Church.

Question — Whether in substituting in the formula for ordination of ministers an affirmation of "the doctrines of the Church set forth in the Confession of Faith approven by Acts of General Assemblies" for the previously existing formula, which required affirmation of "the Confession of Faith approven by former General Assemblies of this Church," the Free Church of Scotland had made an alteration in its doctrinal standards in a fundamental and essential particular.

Church — Statute—Act of Assembly—Implied Power to Alter Doctrine—General Words in Procedure Act — Barrier Act 1697.

An Act of the General Assembly of the Church of Scotland passed in 1697, and known as the Barrier Act, which was adopted by the Free Church of Scotland, provided a method of procedure "for preventing any sudden alteration or innovation or other prejudice to the Church in either doctrine or worship or discipline or government thereof now happily established," whereby any Acts of Assembly "which are to be binding rules and constitutions in the Church," should be first considered by the various presbyteries. *Held* that the adoption of this Act did not amount to an assertion in the original constitution of the Free Church of power to alter its doctrinal standards.

These cases are reported *ante ut supra.*

In the case of the General Assembly of the Free Church *v.* Lord Overtoun and Others the pursuers appealed.

The case of Young and Others *v.* Macalister and Others was an action at the instance of the United Free Church and the trustees in whose name the Free Buccleuch and Greyfriars Church, Edinburgh, was held, against the Rev. D. M. Macalister, minister of that church, and others, containing declaratory conclusions that the said church belonged to the pursuers, and that the defenders (who had refused to join in the Union with the United Presbyterian Church) had no right or title therein. A similar question was raised in other actions with regard to the churches at Aultbea, Kyleakin, and Culter. All these churches were held under titles framed in terms of the Model Trust Deed adopted by the Free Church of Scotland in 1844. An excerpt from this deed containing the passages material to the present report is printed *infra*, p. 746. The Court of Session having decerned in terms of the conclusions of the summons, the defenders appealed. The cases were heard together.

The following is a narrative of the leading facts in both cases, under reference to the preceding report:—On 30th October 1900 the General Assembly of the Free Church of Scotland passed an Act providing for the Union of the Free Church and the United Presbyterian Church. A Declaration with a similar object was also adopted by the Synod of the United Presbyterian Church, and on the 31st October the General Assembly and the Synod, meeting together, passed an Act known as the Uniting Act, providing for the Union of the two Churches. This Act declared that the Free Church and the United Presbyterian Churches should henceforth constitute one United Church under the name of the United Free Church.

This Union was the result of negotiations between the two Churches which had been in progress since 1896. In the Free Church it had been preceded by an Overture anent Union, which in terms of the Barrier Act 1697 was transmitted to the various presbyteries of the Church for their opinion. The presbyteries, by a majority of 70 to 4, approved of the Overture, and an Act in terms of the Overture was adopted by the Assembly.

In the United Presbyterian Church the Declaration in favour of union was adopted unanimously. In the Free Church the Act with that object was carried by a majority of 643 to 27. The minority did not join in the meeting with the United Presbyterian Church on 31st October, but held a meeting in continuation, as they alleged, of the sederunt of the Free Church Assembly, at which they appointed from their own number a moderator, clerk, and other officials, on the footing that the majority by the proceeding above narrated had severed their connection with the Free Church. They also appointed a Law and Advisory Committee, with power to take such legal proceedings as might be necessary to maintain the interests of the Church. At their instance the legal proceedings now reported were taken in order to determine the rights of the majority or minority to the property held by the Free Church prior to the Union.

The leading action relating to the property of the Free Church, other than the Churches and Manses, was brought at the instance of the Free Church and the Rev. Colin A. Bannatyne, minister of the parish of Cullen, the Moderator of Assembly appointed on 31st October 1900, as such Moderator and as a member of the Law and Advisory Committee, and the other members of that committee. The defenders called were—(1) Lord Overtoun and others, as general trustees of the Free Church prior to 30th October 1900; (2) the general trustees of the United Free Church; (3) the Moderator, Clerks and Members of the General Assembly of the United Free Church. The other actions, four in number, related to the right to the Churches and Manses held in trust for congregations. Of these actions (which all raised the same question) the one ultimately appealed to the House of Lords related to the Free Buccleuch and Greyfriars Church, Edinburgh. It was brought at the instance of the trustees in whom the property of that Church was vested, and of the Rev. Robert Rainy, Moderator of the United Free Church, and the other

officials of that Church, against the Rev. Donald Macalister and the Rev. Robert Gordon, ministers of the Church, and certain office-bearers and members, all of whom adhered to the minority.

This was a test case, as the Church in question was held by trustees under an instrument known as the Model Trust Deed drawn up in 1844, under which practically all the heritable property of the Free Church was held. Its terms, so far as material to the present report, are quoted *infra*.

The claim put forward by the pursuers in the leading action, shortly stated, was that they and those who adhered to them alone represented the Free Church of Scotland, and were alone entitled to the whole funds and property of the Free Church, which were held for behoof of the Church by its General Trustees. Their alternative claim was to share in these funds with the United Free Church in such proportion as the Court might decide. The funds in question amounted to considerably over a million sterling. The third and sixth conclusions of the action were in the following terms:—"(3) That the said United Free Church of Scotland has no right, title, or interest in any part of the said lands, property, or funds. (6) That the pursuers and those adhering to and lawfully associated with them conform to the constitution of the Free Church of Scotland are and lawfully represent the said Free Church of Scotland, and are entitled to have the whole of said lands, property, and funds applied according to the terms of the trusts upon which they are respectively held for behoof of themselves and those so adhering to and associated with them, and their successors, as constituting the true and lawful Free Church of Scotland, and that the defenders . . . the general trustees foresaid, or the defenders second enumerated, or those of the defenders in whose hands or under whose control the said lands, property, and funds may be for the time being, are bound to hold and apply the same for behoof of the pursuers and those adhering to and associated with them as aforesaid, and subject to the lawful orders of the General Assembly of the said Free Church of Scotland . . . and in particular that they are bound to denude themselves of the whole of said lands, property, and funds in favour of such parties as may be nominated as general trustees by a General Assembly of the Free Church of Scotland, but subject always to the trusts upon which the said lands, property, and funds were respectively held by the said defenders for behoof of the Free Church of Scotland as at 30th October 1900."

The ground on which the dissentient minority relied in support of these claims was that the United Free Church was an association whose constitution did not recognise or provide for maintaining certain principles which, as they alleged, were essential and fundamental principles in the Free Church of Scotland. From this they drew the conclusion that the majority in joining the United Free Church had forfeited all right to the property vested in trustees for the Free Church. The "essential and fundamental" principles referred to were two—(1) The principle of Establishment, and (2) The maintenance of the Westminster Confession as an essential standard of belief. With regard to these doctrines they made the following averments:—"The said Free Church of Scotland is a voluntary association or body of Christians associated together under a definite contract involving the maintenance of definite principles. That contract is constituted by the foresaid Claim of Right, Declaration and Protest of 1842, Protest of 1843, and Act of Separation and Deed of Demission of 1843, and the Acts of Assembly of the Church of Scotland in so far as not modified thereby. The foresaid contemporaneous documents, viz., the Act of Assembly of 1846, cap. 12, and the questions and formula thereby sanctioned, and the Act of Assembly of 1851, cap. 9, are in accord therewith and expository thereof. Said constituting documents recognise as an essential principle of the Free Church the assertion of the duty of the State 'to maintain and support an establishment of religion in accordance with God's Word,' and as an essential standard of her belief the Westminster Confession.

"The contract of association or constitution of the said Free Church of Scotland under which it was first associated contains no provision for any alteration being made in the essential principles of the said constitution and standard of belief, or for union with any other Church or association of Christians holding different principles or recognising a different standard of belief, by any mere majority, however large, of the members for the time being of the said Free Church of Scotland.

"In course of its existence the Free Church of Scotland has from time to time acquired lands, moneys, and other property which belong to it for application to various purposes in connection with it as a church existing under the contract of association or constitution as hereinbefore specified. Said contract of association or contract or constitution does not provide for or admit of any majority of the members of the Free Church of Scotland thereby constituted diverting the said property from the uses of said Church to the uses of any other Christians or association of Christians, and particularly to the uses of any such church or association holding principles and standards of belief differing from those of the said Free Church of Scotland as originally constituted. The individual pursuers became members, ministers, or office-bearers of the said Free Church of Scotland under and in reliance upon its constitution as hereinbefore defined,

"As already stated, one of the essential principles recognised by those who associated themselves to form the Free Church of Scotland, emphasised by their leaders in their utterances at the time of the Disruption, and embodied in the contract of association or constitution of said Church as hereinbefore defined, is that it is the

duty of the civil magistrate to maintain and support an establishment of religon in accordance with God's Word; and the said Church as originally associated recognised and maintained the propriety and advantage of the endowment of pastoral charges and the promotion of religious education by the State. The principle of the duty of the recognition of religion by the State by means of the establishment and, where possible, endowment of a national church, was moreover impliedly involved in the position claimed by the Free Church as being the Church of Scotland freed merely from the control of the civil court in matters spiritual. The said principle formed an essential principle of the Free Church of Scotland, and its maintenance was one of the main reasons for the formation of that Church as a separate association or body of Christians, distinct and apart from those who professed themselves to be 'voluntaries.' There were several such associations of seceders from the Establishment Church of Scotland in existence at the time of the Disruption of 1843, holding views practically identical with those of the founders of the Free Church in matters of doctrine and as to the encroachments of the civil courts, but differing from them as regarded the duty above referred to. In regard to this, these bodies were 'voluntaries' in the sense of holding such action of the State to be unlawful. The foundation of the Free Church was a protest against the position of such churches on the one hand, just as it was against the encroachments of the civil power on the other." . . .

"But it is not merely in regard to the Establishment principle that the appellants maintain that the Union involves departure from fundamental principles of the Free Church. They aver that in 1892 and 1894, as part of the scheme which culminated in the Union, Declaratory Acts were passed by the majority of the Assembly, which were however dissented from by the party whom the appellants represent, and were consequently expressly declared not to be compulsory upon any member of the Free Church; and that these Acts and a relative Declaratory Act of the United Free Church have been definitely recognised and imposed upon office-bearers of the United Church as an integral part of the forms of ordination to office. These Acts, they contend, involve essential departures from the former doctrinal Standards of the Free Church. Without entering into detail, it is sufficient in this place to say that it is impossible to see how the provisions of the Declaratory Act of 1892 and of the United Presbyterian Declaratory Act of 1879 are reconcilable with certain of the chapters of the Confession of Faith, and especially with chapters 3, 5, 9 and 10, and 16, of the Confession.

"The objection of the appellants, however, goes deeper than merely to specific alteration; for whereas the formula adopted by the Free Church by Act xii, 1846, accepted the Confession of Faith in its entirety by requiring ministers, &c., to subscribe affirmatively to the question—'Do you sincerely own and declare the Confession of Faith approven by former General Assemblies of this Church to be the confession of your faith; and do you own the doctrine therein contained to be the true doctrine which you will constantly adhere to?' the United Church, in requiring the subscription to the similar questions appended to the Act of 31st October 1900, merely requires acceptance of '*the doctrine of this Church* set forth in the Confession of Faith approven by Acts of General Assemblies,' and an acknowledgment of the said doctrine 'as expressing the sense in which you understand the Holy Scriptures,' or, in the case of deacons, an acceptance of 'as in accordance with Holy Scriptures, the system of evangelical truth taught in this Church and set forth in the 'Westminster Shorter Catechism.' Any departure is thus rendered possible in the new Church from the former doctrinal standards of the Free Church, for which is substituted merely so much of that doctrine as is approven by the Church for the time being. This is, moreover, emphasised by the liberty claimed for the new Church in the first of the express Declarations in view of which the Union was authorised, and which undoubtedly forms a term of the constitution of the new Church."

In their defences the United Free Church denied that the principle of Establishment was a fundamental or essential principle of the Free Church or that it had ever formed part of the doctrine or tenets binding on its ministers, office-bearers or members. It was not a term or condition of the trust on which the property of the Free Church was held that the Church should hold or maintain the doctrine put forward by the minority with regard to the civil magistrate. The question of Establishment, they averred, had always been in the Free Church an open one on which liberty of opinion was allowed, or at all events was a minor point, and not a fundamental or essential part of the creed. They also denied that the United Presbyterian Church had ever regarded opposition to Establishment as part of the creed or doctrine of the Church. They maintained that, looking to the terms of the Uniting Act, they had not in any way departed from the standards of doctrine of the Free Church or ceased to recognise the authority of the Westminster Confession; and they also maintained that "the Free Church as a voluntary association of persons united together for religious purposes possessed from the beginning the right at common law to control and regulate its own affairs, and, if it saw fit, to change its own doctrines or tenets by virtue of the legislative power inherent in the General Assembly—its Supreme Court—acting by a majority of its members."

The documents relating to the standards professed by the Free Church before and after the Disruption of 1843 are quoted in the preceding report (39 S.L.R. 793) and in the opinions of the Judges, *infra*. The Model Trust Deed, after a narrative of the

events leading to the Disruption, and a recital of the Protest of 1843, declares that the subjects therein described are held upon, *inter alia*, the following trust purposes:—"*First*, Upon trust, that the building or place of worship erected, or in the course of being erected upon the ground hereby disponed, or any building or place of worship that may hereafter be built and be erected thereon, with the appurtenances thereof, shall in all time coming be used, occupied, and enjoyed as and for a place of religious worship by a congregation of the said body of Christians called the Free Church of Scotland, or of any united body of Christians composed of them, and of such other body or bodies of Christians as the said Free Church of Scotland may at any time hereafter associate with themselves under the foresaid name of the Free Church of Scotland, or under whatever name or designation they may assume, and to be made use of by such congregation occupying and enjoying the same for the time being, in the way and manner in which, by the usages of the said body or united body of Christains, places of religious worship may be or are in use to be occupied and enjoyed." "*Ninth*, It is hereby specially provided and declared that if at any time hereafter one-third of the whole ordained ministers having the charge of congregations of the said body or united body of Christians, or any larger number of the said ordained ministers having charge, as aforesaid, shall simultaneously, or within a consecutive period not exceeding three calendar months, not only publicly separate from the said body or united body of Christians, but at the same time publicly claim and profess to hold truly and *in bona fide* the principles of the Protest of 18th May 1843, hereinbefore recited, and to be carrying out the objects of the said Protest more faithfully than the majority of the ministers of the said body, or united body of Christians, and shall unite in forming one body of Christians, having kirk-sessions, presbyteries, Provincial Synods, and a General Assembly, then in that case, and anything herein to the contrary notwithstanding, it shall be competent to and in power of the majority of the congregation in the use, occupation, and enjoyment of the said building or place of worship for the time, to provide and declare, by a deed of declaration and appointment under their hands to that effect duly executed, that the ground hereby disponed, and building, or place of worship then upon the same, shall from henceforward be held in connection with the body of Christians adhering to the ministers who shall have separated as aforesaid."

The Barrier Act 1697 enacts — "The General Assembly, taking into their consideration the overture and Act made in the last Assembly concerning innovations, and having heard the report of the several commissioners from presbyteries to whom the consideration of the same was recommended, in order to its being more ripely advised and determined in this Assembly, and considering the frequent practice of former Assemblies of this Church, and that it will mightily conduce to the exact obedience of the Acts of Assembly that General Assemblies be very deliberate in making of the same, and that the whole Church have a previous knowledge thereof and their opinion be had therein, and for preventing any sudden alteration or innovation or other prejudice to the Church in either doctrine or worship or discipline or government thereof now happily established; do therefore appoint, enact, and declare that before any General Assembly of this Church shall pass any Acts which are to be binding rules and constitutions to the Church, the same Acts be first proposed as overtures to the Assembly, and being by them passed as such, be remitted to the consideration of the several presbyteries of this Church, and their opinions and consent reported by their Commissioners to the next General Assembly following, who may then pass the same in Acts, if the more general opinion of the Church, thus had, agree thereunto."

In view of the course of the argument in the House of Lords the following documents are printed in addition to those quoted in the previous report:—

"Excerpt from the Westminster Confession of Faith, 1647.

"Chap. III.—*Of God's Eternal Decree.*

"III. By the decree of God, for the manifestation of his glory, some men and angels are predestinated into everlasting life, and others foreordained to everlasting death.

"IV. These angels and men, thus predestinated and foreordained, are particularly and unchangeably designed; and their number is so certain and definite, that it cannot be either increased or diminished.

"V. Those of mankind that are predestinated unto life, God, before the foundation of the world was laid, according to his eternal and immutable purpose, and the secret counsel and good pleasure of his will, hath chosen in Christ unto everlasting glory, out of his mere free grace and love, without any foresight of faith or good works, or perseverance in either of them, or any other thing in the creature, as conditions or causes moving him thereunto; and all to the praise of his glorious grace.

"Chap. IV.—*Of Creation.*

"I. It pleased God the Father, Son, and Holy Ghost, for the manifestation of the glory of his eternal power, wisdom, and goodness, in the beginning to create or make of nothing the world, and all things therein, whether visible or invisible, in the space of six days, and all very good.

"Chap. V.—*Of Providence.*

"VI. As for those wicked and ungodly men, whom God as a righteous judge, for former sins, doth blind and harden, from them he not only withholdeth his grace, whereby they might have been

enlightened in their understandings, and wrought upon in their hearts; but sometimes also withdraweth the gifts which they had, and exposeth them to such objects as their corruption makes occasion of sin; and withal, gives them over to their own lusts, the temptations of the world, and the power of Satan: whereby it comes to pass, that they harden themselves, even under those means which God useth for the softening of others.

"Chap. VI.—*Of the Fall of Man, of Sin, and the Punishment thereof.*

"IV. From this original corruption, whereby we are utterly indisposed, disabled, and made opposite to all good, and wholly inclined to all evil, do proceed all actual transgressions.

"VI. Every sin, both original and actual, being a transgression of the righteous law of God, and contrary thereunto, doth, in its own nature, bring guilt upon the sinner, whereby he is bound over to the wrath of God, and curse of the law, and so made subject to death, with all miseries, spiritual, temporal, and external.

"Chap. IX.—*Of Free Will.*

"III. Man, by his fall into a state of sin, hath wholly lost all ability of will to any spiritual good accompanying salvation, so as a natural man, being altogether averse from that good, and dead in sin, is not able, by his own strength, to convert himself, or to prepare himself thereunto.

"Chap. X.—*Of Effectual Calling.*

"I. All those whom God hath predestinated unto life, and those only, he is pleased, in his appointed and accepted time, effectually to call, by his word and Spirit, out of that state of sin and death in which they are by nature, to grace and salvation by Jesus Christ; enlightening their minds spiritually and savingly to understand the things of God; taking away their heart of stone and giving unto them an heart of flesh; renewing their wills, and by his almighty power determining them to that which is good; and effectually drawing them to Jesus Christ; yet so as they come most freely, being made willing by his grace.

"III. Elect infants dying in infancy are regenerated and saved by Christ through the Spirit, who worketh when, and where, and how he pleaseth. So also are all other elect persons, who are incapable of being outwardly called by the ministry of the word.

"IV. Others not elected, although they may be called by the ministry of the word, and may have some common operations of the Spirit, yet they never truly come unto Christ, and therefore cannot be saved: much less can men not professing the Christian religion be saved in any other way whatsoever, be they ever so diligent to frame their lives according to the light of nature, and the law of that religion they do profess; and to assert and maintain that they may is very pernicious and to be detested.

"Chap. XVI.—*Of Good Works.*

"VII. Works done by unregenerated men, although, for the matter of them, they may be things which God commands, and of good use both to themselves and others; yet because they proceed not from an heart purified by faith; nor are done in a right manner, according to the word; nor to a right end, the glory of God; they are therefore sinful, and cannot please God, or make a man meet to receive grace from God. And yet their neglect of them is more sinful and displeasing unto God.

"Chap. XXIII.—*Of the Civil Magistrate.*

"I. God, the supreme Lord and King of all the world, hath ordained civil magistrates to be under him over the people for his own glory and the public good, and to this end hath armed them with the power of the sword for the defence and encouragement of them that are good, and for the punishment of evil-doers.

"II. It is lawful for Christians to accept and execute the office of a magistrate when called thereunto: in the managing whereof as they ought especially to maintain piety, justice, and peace according to the wholesome laws of each commonwealth, so for that end they may lawfully now under the New Testament wage war upon just and necessary occasions.

"III. The civil magistrate may not assume to himself the administration of the word and sacraments, or the power of the keys of the kingdom of heaven, yet he hath authority, and it is his duty, to take order that unity and peace be preserved in the Church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered, and observed. For the better effecting whereof he hath power to call synods, to be present at them, and to provide that whatsoever is transacted in them be according to the mind of God.

"IV. It is the duty of the people to pray for magistrates, to honour their persons, to pay them tribute and other dues, to obey their lawful commands, and to be subject to their authority for conscience sake. Infidelity or difference in religion doth not make void the magistrates' just and legal authority, nor free the people from their due obedience to him, from which ecclesiastical persons are not exempted; much less hath the Pope any power or jurisdiction over them in their dominions or over any of their people, and least of all to deprive them of their dominions or lives if he shall judge them to be heretics, or upon any other pretence whatsoever."

By the Declaratory Act, passed by the General Assembly of the Free Church in 1892, it was enacted—"Whereas it is expedient to remove difficulties and scruples which have been felt by some in reference to the declaration of belief required from persons who receive licence or are admitted

to office in this Church, the General Assembly, with consent of Presbyteries, declare as follows:—

"That in holding and teaching according to the Confession the Divine purpose of grace towards those who are saved, and the execution of that purpose in time, this Church most earnestly proclaims, as standing in the forefront of the revelation of Grace, the love of God—Father Son, and Holy Spirit—to sinners of mankind, manifested especially in the Father's gift of the Son to be the Saviour of the world in the coming of the Son to offer Himself a Propitiation for sin, and in the striving of the Holy Spirit with men to bring them to repentance.

"That this Church also holds that all who hear the Gospel are warranted and required to believe to the saving of their souls, and that in the case of such as do not believe but perish in their sins, the issue is due to their rejection of the Gospel call. That this Church does not teach, and does not regard the Confession as teaching, the foreordination of men to death irrespective of their own sin.

"That it is the duty of those who believe, and one end of their calling by God, to make known the Gospel to all men everywhere for the obedience of faith. And while the Gospel is the ordinary means of salvation for those to whom it is made known, yet it does not follow, nor is the Confession to be held as teaching, that any who die in infancy are lost, or that God may not extend His mercy for Christ's sake, and by His Holy Spirit, to those who are beyond the reach of these means, as it may seem good to Him, according to the riches of His grace.

"That in holding and teaching according to the Confession of Faith the corruption of man's whole nature as fallen, this Church also maintains that there remains tokens of His greatness as created in the image of God; that he possesses a knowledge of God and of duty; that he is responsible for compliance with the moral law and with the Gospel; and that, although unable without the aid of the Holy Spirit to return to God, he is yet capable of affections and actions which in themselves are virtuous and praiseworthy.

"That this Church disclaims intolerant or persecuting principles, and does not consider her office-bearers, in subscribing the Confession, committed to any principles inconsistent with liberty of conscience and the right of private judgment.

"That while diversity of opinion is recognised in this Church on such points in the Confession as do not enter into the substance of the Reformed Faith therein set forth, the Church retains full authority to determine, in any case which may arise, what points fall within this description, and thus to guard against any abuse of this liberty to the detriment of sound doctrine, or to the injury of her unity and peace."

The formulæ for ordination of ministers, after and before the Uniting Act of 1900, were in the following terms—"2. Do you sincerely own and believe the doctrine of this Church set forth in the Confession of Faith approven by Acts of General Synods and Assemblies; do you acknowledge the said doctrine as expressing the sense in which you understand the Holy Scriptures, and will you constantly maintain and defend the same, and the purity of worship in accordance therewith?" The corresponding question prescribed by the Free Church formula in 1846 was as follows:—"Do you sincerely own and declare the Confession of Faith approven by former General Assemblies of this Church to be the confession of your faith; and do you own the doctrine therein contained to be the true doctrine which you will constantly adhere to?"

In the Inner House of the Court of Session both parties renounced probation, and the cases were heard as on concluded proofs.

In the House of Lords the cases were heard in November and December 1903 before the Lord Chancellor (Halsbury), Lords Macnaghten, Davey, Robertson, Lindley, and Shand.

In consequence of the death of Lord Shand a rehearing was ordered.

The following is a summary of the argument:—

For the appellants—The general contention was that the majority in joining the United Presbyterians, and in the course of action leading up to that Union, had departed from principles which were essential to the Free Church, and had therefore forfeited all right to the property, which was held in trust for persons professing and upholding these principles. A Church which was not established by the State was regarded in law merely as an association of individuals united for certain purposes and bound by certain conditions. The continuity of such an association depended on the observance of the conditions under which it existed, and one of these was the adherence to the doctrine which at its inception it professed to uphold. Such an association represented itself to the public as a body holding certain principles, and obtained its property from donors who approved of these principles. The maintenance of these principles was the purpose for which the trust property was held. The association could not desert the principles under which it entered into existence without losing its identity. In theory a voluntary Church could not alter its fundamental and essential principles, even by the unanimous voice of all its members, though there might be difficulty in seeing how in that case the question could be brought up in a court of law. But where the alteration was not unanimous the result was that the minority who adhered to the original principles which the majority deserted became the Church, and were therefore entitled to the property belonging to the Church. The right to property given to a Church, in the event of internal dissension, was not now raised for

the first time. It was fully established by decisions that the question was to be solved not by counting the number of adherents either party might have, but by inquiring which party—majority or minority—represented the original tenets of the Church—*Craigdallie* v. *Aikman*, 1820, 6 Paton's App. 618; *Couper* v. *Burn*, 1859, 22 D. 120; *Forbes* v. *Eden*, 1865, 4 Macph. 143, 5 Macph. (H.L.) 36; *Dill* v. *Watson*, 1836, 2 Jones' Exch. Cas. (Irish) 48; *Pearson* v. *Attorney-General*, 3 Merivale 347, *per* Lord Eldon, p. 418 (*Lady Hewley's Charities*); *Craigie* v. *Marshall*, 1850, 12 D. 523. The principle was exactly the same as that which confined the trustees of a charitable trust to those objects which the truster intended to benefit. Any other view would lead to the conclusion that the majority of a Christian Church might declare it to be non-Christian, or that the majority of a Presbyterian Church might join the Church of Rome, and thus devote property given to it to purposes which the donors intended to discourage and defeat.

It might be true that a Church could at its inception reserve to a majority the power to alter its standards of belief. In that case the donor of property might be assumed to make his gift in the knowledge that he was endowing a body with a varying and alterable standard. But it was by no means clear that such a reserved power would justify an alteration in essential doctrines—*Forbes* v. *Eden*, 1867, 5 Macph. (H.L.) 36. That question, however, did not arise here, because no such power of alteration had been reserved in the Free Church. That could be demonstrated, whether the powers of the Free Church were those of the Church of Scotland, which it claimed to represent, or whether they were to be gathered from the declarations on which its founders left the Established Church at the Disruption of 1843.

Historically, the Church of Scotland had never held or claimed the right to alter its standards of belief, and the Free Church had in this respect simply adopted the position of the Church they left. The General Assembly was a governing and judicial, not a legislative body. It was true that the Church adopted John Knox's Confession in 1560, but the right to adopt a standard of belief (which must necessarily belong to every Church) did not involve the right to alter it. In adopting the Westminster Confession in 1647 the Church did not in any way alter its standards. In all doctrines which could be considered essential the two Confessions were agreed. A survey of the later history of the Church of Scotland would show no attempt in any way to interfere with the standards of doctrine thus adopted. The only possible exceptions that could be pointed to were the Chapel Act and the Veto Act, both passed shortly before the Disruption, and these had been held to be *ultra vires* of the Church—Stewarton Case, *Cunninghame* v. *Presbytery of Irvine*, 1843, 5 D. 427; Auchterarder Case, *Earl of Kinnoull* v. *Presbytery of Auchterarder*, 1838, 16 S. 661, *aff.*; M'Lean and Robinson's Reports, 220.

The Second Division had largely proceeded on the terms of the Barrier Act of 1697, which, the respondents maintain, was adopted by the Free Church. The fact of adoption was disputed; assuming it to be proved, the Act, fairly read, would not bear the meaning put upon it by the Court below. It was not an Act conferring expressly or by implication any power of alteration; it was merely a procedure Act, limiting the General Assembly in the exercise of the powers it already possessed, for the purpose of preventing hasty innovations in matters of discipline. The Act was open to the same construction as was given to Acts of Parliament or other deeds of its date. It was therefore legitimate and necessary to look to contemporary opinion in order to see what meaning the framers of the Act intended to convey by the language they used. Using this canon of interpretation, it was impossible to conceive that the Act was intended to sanction alteration of doctrine provided that certain forms were observed. No one in 1697 held that the doctrine of the Church, once ascertained, would be altered by declaratory Acts or otherwise, to suit the state of public opinion in religious matters.

If then the Church prior to 1843 possessed no power to alter its standards, it was submitted that nothing which took place at the Disruption could be pointed to as conferring that power on the Free Church, The Protest in 1843 declared that its framers left the Church "maintaining with us the Confession of Faith and standards of the Church of Scotland as heretofore understood." No document or resolution could be pointed to implying that the standards so adopted could be altered at the will of the majority.

Assuming then that any alteration of its fundamental and essential doctrines was *ultra vires* of the majority of the Free Church, and would have the effect as to property above contended for, the remaining question was, whether the majority in uniting with the United Presbyterian Church had in fact made such an alteration? The minority maintain that they have done so in two respects—(1) In uniting with a body holding voluntary principles—holding, that is to say, the principle that the establishment of a Church by the State was wrong—they had abandoned the principle of Establishment, which was a principle both fundamental and essential in the Free Church. (2) In the Uniting Act, and in the Declaratory Act of 1892, they had adopted doctrines opposed to the Confession of Faith, and had substituted a fluctuating for a fixed standard of belief.

The principle of Establishment—that it was the duty of the State to uphold and maintain the Church—was a fundamental and essential part of the constitution of the Free Church. It was the principle which distinguished the Free Church from other bodies existing outside the Establish-

ment. This principle was contained in the Westminster Confession, and was abundantly recognised in the documents which set forth the position of the Free Church party at the Disruption. It was in fact vital to their position; it was their defence against the charge of schism. Thus in the Claim, Declaration, and Protest of 1842 the recognition of the propriety of Establishment on the part of those who ultimately founded the Free Church is distinct; and the same may be said of the Protest of 1843. No doubt in these documents the principle of Establishment is not expressly said to be fundamental, and indeed is referred to parenthetically, but that was clearly due to the fact that it was not the point then in question. Again, in the address by Dr Chalmers, as the Moderator of the Free Church, there is an express repudiation of the principle of voluntaryism, which is described as a sin. That address was not to be regarded merely as an expression of opinion by an individual, it was adopted by the Church. It was the prospectus on which persons favourable to the views there expressed were invited to contribute money for the support of the Church. The reason why the principle of Establishment was regarded by Dr Chalmers and his followers as fundamental and essential was, that it was the only point upon which the Free Church differed from the other voluntary churches then existing in Scotland. There were other churches recognising the Confession of Faith, the Headship of Christ, and the principle of non-intrusion. In its support of Establishment, though outside the Established Church, the Free Church stood alone. The recognition of that doctrine was therefore part of the identity of the Free Church as such; a body which professed voluntary principles was not the Free Church, but something quite different.

The Union involved the surrender of the Establishment principle. True, that was not expressly stated in the Uniting Act, but the whole history of the United Presbyterian Church showed that they were in doctrine voluntaries, and would not have united with a body holding the views which the Free Church held in 1843.

(2) Apart from the question of Establishment, the proceedings of the majority in the Union and in what led up to it involved a departure from the standards of the Free Church in matters of doctrine. That Church was founded with the Westminster Confession of Faith "as heretofore understood" as an unalterable standard. It had been infringed in two ways. First, in the alteration of specific doctrines. For that the appellants looked to the Declaratory Act of 1892. That Act was passed with a view to union by bringing the standard of doctrine in the Free Church into agreement with that adopted by the United Presbyterian Church by their Declaratory Act of 1879. The doctrine laid down in 1892 with regard to predestination was absolutely irreconcilable with the terms of the Confession of Faith. The Confession of Faith set forth the Calvinistic, the Declaratory Act the Armenian, view of the subject. It was idle to say that this was mere interpretation; such interpretation would eat away any standard. Whether or not the two views of predestination might be reconcilable by regarding both as mysteries incomprehensible to the finite mind, there was no doubt that the framers of the Westminster Confession regarded them as irreconcilable and a subject of the bitterest controversy. The Declaratory Act therefore involved a departure from the most fundamental doctrines of the Free Church.

It was no doubt said that the appellants had acquiesced in the Declaratory Act, and could not therefore now raise this point. As a matter of fact, as individuals they had protested against it. They could do nothing more—no question of property was involved on which they could obtain the opinion of the Court as to its competency. Having protested, they were not bound to take the extreme step of leaving the Church. But even if they were held to have acquiesced for the moment, that did not bar their right now to object. They were beneficiaries in the trusts on which the property of the Free Church was held, and a beneficiary, though he might condone a breach of trust, was not thereby bound to allow that breach of trust to continue.

But the contention of the appellants goes beyond any question of departure from specific doctrines. They maintain that by the formula adopted for ordination by the Uniting Act of 31st October 1900 a new and fluctuating standard of belief has been adopted. That declaration substitutes for an expression of adherence to the Confession of Faith an expression of adherence to "the doctrine of this Church set forth in the Confession of Faith approven by Acts of General Assemblies." That made the standard of belief of the Church one subject to constant fluctuation, as successive Assemblies might happen to approve or disapprove of particular doctrines. It was entirely inconsistent with the position of the Free Church in 1843.

Argued for the respondents—The judgment of the Court below ought to be sustained. The fallacy of the appellants' argument lay in treating continuity of doctrine as the sole element in the identity of a church. Continuity of doctrine was one element; there were others—continuity of membership and of organisation. An analogy was the case of a club, which might alter its rules and objects without ceasing to be the same club. Two churches might hold identical doctrines; it surely did not follow that they formed only one church. There might be limits; doctrines with which the life of the Church was so thoroughly bound up that it would be an act of suicide on its part to abandon them. In such cases, as, for instance, if a Christian Church became Mohammedan, it might fairly be contended that it had lost its character as a Church, and become something entirely different. But it by no

means followed that a Church might not alter its tenets in minor details or explain its doctrine. Therefore when any question arose as to the competency of any change in a particular Church, the point for inquiry must be, What were the fundamental doctrines of that Church, doctrines which it could not abandon without apostacy? In the case of the Free Church these doctrines were the Infallibility of the Bible, the Headship of Christ, and the Presbyterian form of government.

On an appeal to history it was contended that the Free Church had at least the modified power of alteration of standards above indicated. Nothing that occurred at the Disruption gave any colour to the supposition that the Free Church claimed less power in that respect than the Church of Scotland possessed. If necessary to the argument, the fact that the Free Church separated on the question of spiritual independence involved an assertion of higher powers in the Church than the Church of Scotland had been held to possess. But it was quite sufficient for the respondents to contend that the Free Church inherited the powers of the Church of Scotland. That Church had an inherent power to alter its doctrines, subject perhaps to the limits already indicated. That was shown first by the adoption by the inherent power of the Church of John Knox's Confession in 1560. The right to adopt a standard involved the right to modify it. But the legislative power inherent in the Church was shown much more conclusively by the substitution in 1647 of the Westminster Confession for that of John Knox. That was an act of legislation involving the alteration of the standard of doctrine by the inherent power of the Church alone. The two Confessions, though no doubt bearing a strong resemblance to each other, were not identical in doctrine, and the substitution of the one for the other would, on the principles for which the appellants contend, have been an act *ultra vires* of the Church. Later history showed other examples of the exercise of legislative powers—for instance, the Chapel Act and the Veto Act, referred to by the appellants. It was true that these Acts were held to be invalid, but the decision did not proceed upon the absence of legislative powers in the Church, but on the ground that the particular Acts were violations of the conditions of Establishment.

Again, the theory of inherent legislative power in the Church was confirmed by the terms of the Barrier Act 1697, which had been adopted by the Free Church. That Act was passed "for preventing any sudden alteration or innovation or other prejudice to the Church in either doctrine or worship or discipline or government thereof," and went on to provide a method by which such innovations might be legally made. The Act was meaningless if, as the appellants contended, no innovations were within the powers of the Church.

If then the Church of Scotland possessed the power to make innovations in doctrine, and the Free Church was constituted with the same powers, no breach of trust was committed by any alterations in doctrine provided that these were within the limits under which that legislative power existed. Donors to the Free Church gave their money to a body possessed of these legislative powers, and must be held to have had in contemplation the possibility of their exercise.

The question then came to be whether the allegations of the appellants set forth anything beyond the limits of the legislative powers of the Church. In other words, Had they established alterations in doctrines so fundamental and essential as to be immutable? It was submitted that these allegations fell far short of this.

Dealing first with the question of the principle of Establishment, it was denied that that principle formed an element of doctrine in the Free Church. It was a matter of private opinion, on which all members of the Church might exercise the right of private judgment. It was matter of decision that it was not laid down as a canon in the Confession of Faith—*Smith* v. *Galbraith*, 1843, 5 D. 665. It was true that it was recognised in the Claim, Declaration, and Protest of 1842 and the Protest of 1843, but even then only parenthetically, and as a matter of opinion. In the Model Trust-Deed (which, rather than any other document, was analogous to the prospectus of the Free Church) it was not mentioned at all. But even if it was conceded to the appellants that Establishment was a principle of the Free Church in 1843, it was not so in 1900. None of the documents referred to by the appellants treated it as other than a minor point. The subsequent history of the Free Church showed that it had been totally disregarded. It was a principle which the Church had done nothing, and could do nothing, to promote. It was not a principle requiring the performance of any duty by the Church or individual member. It was a speculative opinion as to the duty of a third party —the State. It was, in the words of Lord Medwyn in *Smith* v. *Galbraith*, 5 D. 665, not a principle "influencing conduct as men or Christians in a state of separation.' Such a principle was not essential, it was one which the Church had the power to abandon.

A further answer to the charge of abandoning the principle of Establishment was that no such abandonment had taken place. Voluntaryism, *i.e.*, the doctrine that the connection between Church and State was wrong, was no part of the standard of the United Free Church, although no doubt a prevalent opinion among its members. But it was now a point on which each member of the United Free Church was free to form his own opinion. It would still be perfectly competent for a majority of the United Free Church, acting according to prescribed forms, to unite with the Established Church. In doing so they would not infringe any standard or rule of the Church.

Passing to the question as to the alleged alteration in the standards of belief, the appellants were not entitled to object to the Declaratory Act 1892. Individually some of them may have protested, as a body they had accepted the Act by remaining in the Church, and were bound by its provisions. But the Declaratory Act was perfectly within the power of the Church. The primary standard of the Free Church was the infallibility of the Bible. The Confession of Faith was a subordinate standard, expressly bearing to be binding only in so far as it was consonant with scripture. Such a Confession must necessarily be subject to interpretation, for in no other way could it be ascertained whether it was consonant with Scripture or not. The Declaratory Act did no more than interpret the Confession of Faith, and that was within the powers of the Church. The particular point to which the appellants objected was the statement regarding predestination. But, rightly regarded, the Declaratory Act in that respect did not differ from the Confession. Predestination and free will were held by theologians to be a mystery, involving an antinomy, or apparent contradiction. Both sides of the question, though apparently irreconcilable, were to be found explicitly taught in the Bible; both were laid down in the Confession of Faith. Statements regarding such questions must not be regarded as if they were statements regarding the ordinary affairs of daily life; such an attitude involved the error of regarding the Divine mind from an anthropomorphic point of view. The accepted view of theologians was that we must be content to believe, as a matter of faith, that predestination and free-will were reconcileable on a higher plane of thought. He who said that the exposition of predestination and free-will in the Declaratory Act was inconsistent with that in the Confession of Faith merely showed that he was looking at the question as if it were a point in mercantile law. What the Church by the Declaratory Act did was to guard against any misconception that might arise from the terms used in the Confession of Faith. It did no more than had already been done in 1846 when the Church declared that it repudiated the doctrine that persons holding erroneous views ought to be proceeded against by the civil magistrate. That declaration, like the Declaratory Act, was the interpretation of a passage in the Confession which the Church thought was open to misconstruction.

Lastly, the respondents denied that the change in the ordination oath resulted in the substitution of a fluctuating for a fixed standard of belief. The new form merely expressed, what had always been implied, that the candidate for ordination accepted the Confession of Faith in the sense in which it was interpreted by the Church.

At delivering judgment—

The Lord Chancellor—In this case the pursuers complain of a breach of trust, the trust being for the behoof of the Free Church of Scotland, and the breach of trust alleged being the use of certain property being, as alleged, no longer used for the behoof of the Free Church of Scotland, but for the maintenance and support of another and a different body, namely, the United Free Church. That body was formed in 1900, and consisted of a certain number of those who professed to belong to the Free Church of Scotland and others who, up to the time of the union, had belonged to the United Presbyterian body. They purported to unite and to exclude from their Communion, or at all events from all participation in their organisation, those who refused to unite in the new body, and have of course used the funds of which they claim to be the beneficial owners for the use of the new united body.

This is the breach of trust complained of, and the question is whether that complaint is well founded.

Now, in one sense there can be no doubt what was the original purpose of the trust. It was for the maintenance and support of the Free Church of Scotland.

What was the Free Church of Scotland in 1843 can hardly admit of doubt. The reasons of those who then separated themselves from the Established Church of Scotland—which they then gave for their separation—are recorded with distinctness and precision, and I do not think there can be any doubt of the principles and faith of those who came out from the Church of Scotland and described themselves as the Free Church of Scotland. Their name was significant; they claimed to be still the Church of Scotland, but freed from the interference by the State in matters spiritual.

It was to the persons thus describing themselves that funds in dispute were given, and until the Union of 1900 with the other body we do not hear of any difficulty having arisen in the administration of the trust.

Now, however, the new body has established a new organisation; it is alleged to profess new doctrines; and its identity with the Free Church, for whose behoof the property was settled, is disputed; and it accordingly becomes necessary to consider in what consists the identity of the body designated by the donors of the fund as the Free Church of Scotland.

Speaking generally one would say that the identity of a religious community described as a Church must consist in the

unity of its doctrines. Its creeds, confessons, formularies, tests, and so forth, are apparently intended to ensure the unity of the faith which its adherents profess, and certainly among all Christian Churches the essential idea of a creed or Confession of Faith appears to be the public acknowledgment of such and such religious views as the bond of union which binds them together as one Christian community.

If this be so there is no lack of material from which to deduce the identity of the Free Church of Scotland. Its founders left their Claim, Declaration, and Protest to stand for all time as a clear exposition both of their reasons for leaving the Church of Scotland when they did leave it and as a profession of their faith as the true Church of Scotland though separated from the Establishment, which in their view was itself heretical from its submission to the temporal power in what they regarded as exclusively spiritual.

Now, in the controversy which has arisen it is to be remembered that a Court of Law has nothing whatever to do with the soundness or unsoundness of a particular doctrine. Assuming there is nothing unlawful in the views held—a question which of course does not arise here—a Court has simply to ascertain what was the original purpose of the trust.

I do not think we have any right to speculate as to what is or is not important in the views held. The question is what were in fact the views held and what the founders of the trust thought important.

Fortunately your Lordships have the authority of most learned Judges—their decisions now reaching back for something like a century—which I shall quote somewhat copiously, as principles upon which such questions as are now in debate should be determined :—

Lord Eldon with regard to the English law on this subject in England, and Lord Moncreiff in Scotland commenting upon Lord Eldon, have expressed themselves on similar questions in a manner which I think can be well applied to the matter now in debate—*Craigdallie and Others*, Appellants; *Aikman and Others*, Respondents (Scottish Seceders (Dissenters)), 1813, 1 Dow 1, at p. 16.

Lord Eldon said—"With respect to the doctrine of the English law on this subject, if property was given in trust for A, B, C, &c., forming a congregation for religious worship; if the instrument provided for the case of a schism, then the Court would act upon it; but if there was no such provision in the instrument, and the congregation happened to divide, he did not find that the law of England would execute the trust for a religious society, at the expense of a forfeiture of their property by the *cestui que trusts*, for adhering to the opinions and principles in which the congregation had originally united. He found no case which authorised him to say that the Court would enforce such a trust not for those who adhered to the original principles of the society but merely with a reference to the majority; and much less if those who changed their opinions, instead of being a majority, did not form one in ten of those who had originally contributed, which was the principle here. He had met with no case that would enable him to say that the adherents to the original opinions should under such circumstances for that adherence forfeit their rights.

"If it were distinctly intended that the Synod should direct the use of the property, that ought to have been matter of contract, and then the Court might act upon it; but there must be evidence of such a contract, and here he could find none. He proposed, therefore, that the cause should be sent back with two findings of this nature– 1st. That the ground appeared to have been purchased and the house built for a society united and proposing to continue united in religious opinion. 2nd. That it did not in point of fact appear how this property was to be applied in case the society should happen to differ and separate."

Then Lord Moncreiff (*Craigie* v. *Marshall* (*Kirkintilloch* case), 1850, 12 D. 523, at p. 560), commenting upon Lord Eldon's judgment which I have just read, and repeating parts of it, said — "'If it were distinctly intended that the Synod should direct the use of the property, that ought to have been matter of contract, and then the Court might act upon it; but there must be evidence of such a contract, and here he could find none.' He therefore proposed to remit the cause with two findings. Accordingly it was remitted with very precise findings, importing that it appeared sufficiently as matter of fact that the ground was purchased and was to be used for religious worship, 'by a number of persons agreeing at the time in their religious opinions and persuasions, and therefore intending to continue in communion with each other;' and that the society had acceded to a body called the Associate Synod; but that it did not appear as matter of fact 'for what purpose it was intended at the time such purchase and erections were made, or at the time such accession took place, that the ground and buildings should be used and enjoyed, in case the whole body of persons using and enjoying the same should change their religious principles and persuasions, or if in consequence of the adherence of some such persons to their original religious principles and persuasions, and the non-adherence of others thereto, such persons should cease to agree in their original prin-

ciples and persuasions, and should cease to continue in communion with each other, and should cease, either as to the whole body, or as to any part of the members, &c., to adhere to the Associate Synod.' With these findings the cause was remitted for further consideration.

"There is no ambiguity in the principles on which Lord Eldon made this remit. Under the remit the Court ordered a condescendence with a view to the ascertainment of the matters of fact—whether there was a real difference in the religious principles or not; and afterwards pronounced an interlocutor, the result of which was that the Court found that the pursuers 'have failed to condescend upon any acts done or opinions professed by the Associate Synod, or by the defenders, from which this Court, as far as they are capable of understanding the subject, can infer, much less find, that the defenders have deviated from the original principles and standards of the Associate Presbytery and Synod; and farther find that the pursuers have failed to render intelligible to the Court on what ground it is that they aver that there does exist at this moment any real difference between their principles and those of the defenders,' and therefore found it unnecessary to enter into the inquiries which had been directed by the House of Lords, under the supposition that the defenders had departed from the original standards and principles of the Association." . . .

Then Baron Smith, in Ireland, on the same subject, said — *Dill* v. *Watson*, 2 Jones, Rep. 91, Court of Exch. (Ireland) 1836—"Again, I do not conceive that I appeal from the word of God to that of man by proclaiming or attesting by my signature that I concur in the interpretation given by a numerous body of my fellow Christians to certain passages of Scripture. They agree with me, I agree with them in construction and consequent creed; but neither take their belief upon the authority of those others. Both draw their faith from the Bible as its common source; both consider the Bible as containing the only rule of and furnishing the only unerring guide to a true faith; each, with God's assistance and the subordinate and pious aid of human instruction, interprets as well as man's infirmity will permit; both coincide in the same interpretation; that interpretation regulates their faith; and all who thus coincide become members of the same religion. And thirdly, we do not coerce our neighbour by calling for his signature to our profession or articles of faith. We leave him free to adopt or to repudiate that faith, according as his reason, his conscience, and the grace of God may direct him. We but say to him, if you agree with us affix your signature to certain articles, or in some way notify your recognition of their truth; or if you disagree withhold such signature or declaration. And we say of him, in the former case that he is, and in the latter case that he is not of our religion. We do not compel him to hold our faith; we but ask him to inform us by certain acts whether he does hold it or does not; and we ask this only if he claim to be enrolled as one of our body and to be in religious communion with us. In the absence of such a test our Establishment would not be a rock, cemented into solidity by harmonious uniformity of opinion; it would be a mere incongruous heap of as it were grains of sand thrown together without being united; each of these intellectual and isolated grains differing from every other; and the whole forming a but nominally united while really unconnected mass; fraught with nothing but internal dissimilitude and mutual and reciprocal contradiction and dissension. *Hic dextrorsum abit; ille sinistrorsum.* This indeed I should hold to be, in the language of a late Prelate, 'a Church without a Religion.'"

The principles for decision thus propounded have been recognised and acted upon ever since, and it would seem that it may be laid down that no question of the majority of persons can affect the question, but the original purposes of the trust must be the guide.

Under these circumstances, it would seem to reduce the question in dispute to an examination of the evidence as to what is the difference between them, if any, and if that difference does or does not accord with the original purpose of the trust; but in examining this question one has to bear in mind not what we or any other Court might think of the importance of the difference, but what the donors of the trust fund thought about it, or what we are constrained to infer would be their view of it if it were possible to consult them."

The first point in dispute is very plainly set forth by the pursuers in the 13th Condescendence.

After pointing out in the 10th Condescendence that the Free Church of Scotland was a voluntary association or body of Christians associated together under a definite contract involving the maintenance of definite principles, the 13th Condescendence proceeds thus:—"As already stated, one of the essential principles recognised by those who associated themselves to form the Free Church of Scotland, emphasised by their leaders in their utterances at the time of the Disruption, and embodied in the contract of association or constitution of said Church as hereinbefore defined, is that it is the duty of the civil magistrate to maintain and support an establishment of religion in accordance with God's Word; and the said Church as

originally associated recognised and maintained the propriety and advantage of the endowment of pastoral charges and the promotion of religious education by the State. The principle of the duty of the recognition of religion by the State by means of the establishment, and, where possible, endowment of a national Church, was moreover implicitly involved in the position claimed by the Free Church as being the Church of Scotland freed merely from the control of the civil courts in matters spiritual. The said principle formed an essential principle of the Free Church of Scotland, and its maintenance was one of the main reasons for the formation of that Church as a separate association or body of Christians, distinct and apart from those who professed themselves to be 'voluntaries.' There were several such associations of seceders from the Established Church of Scotland in existence at the time of the Disruption of 1843, holding views practically identical with those of the founders of the Free Church in matters of doctrine and as to the encroachments of the civil courts, but differing from them as regarded the duty above referred to. In regard to this, these bodies were 'voluntaries' in the sense of holding such action of the State to be unlawful. The foundation of the Free Church was a protest against the position of such churches on the one hand, just as it was against the encroachments of the civil power on the other."

In reply to this the defenders say:—"The Confession of Faith does not contain or set forth the said alleged principle in respect to the rights and duty of the civil magistrate in regard to Establishments of Religion as an article of faith or doctrine or belief. It teaches that nations and their rulers are bound to own the authority of Christian truth, but the Free Church has always held that the teaching of the Confession in this matter is to be read and understood in harmony with the principle (which the Confession also teaches) that the Christian Church has an independent government and jurisdiction in matters spiritual, distinct from the civil magistrate, and also in harmony with the view that the Confession is not to be accepted as favouring intolerance or persecution or interfering with liberty of conscience. The alleged principle as to the right and duty of the civil magistrate to maintain and support an Establishment of Religion has always been in the Free Church an open question in regard to which liberty of opinion has been permitted and exercised, and as to which wide differences of opinion have all along prevailed." These, then, are the two contentions upon which the first part of the controversy depends.

I cannot doubt that upon this head there is an overwhelming body of evidence in favour of the pursuers. Indeed, two of the learned Judges have stated in express terms that originally the Free Church did profess what has been conveniently called the Establishment principle, though, for reasons which will be dealt with hereafter, they do not think that those who now represent the Free Church are bound by that original opinion.

I am unable to understand by what test I am to ascertain what the donor of a fund has made essential to his gift unless it is by what he has said or written, and when I find that the Free Church invited support by the circulation of Dr Chalmers' Address, what can I say but that he then expresses the views of the Church that he represents?—"By giving up your connection with the State, and thus separating yourselves from the worldly advantages of such a connection, you may be said to have withstood a great temptation to sin in one form; but such is the deceitfulness of the human heart that, without the heedfulness and the humility which apostles of old so pressed upon the early converts, there is danger of being carried away by temptation in another form—and temptation, too, to the very same sin. Rather than be seduced from one of your greatest principles, you have given up one earthly dependence; but let principle have its perfect work, and have a care lest you be tempted from even the best of your principles by the promises and the allurements of another earthly dependence. Rather than compromise the authority of Christ over the affairs of His own Church, you have forfeited the countenance of men in power, that is, who have the power of this world's authority on their side. Beware of compromising another of your doctrines or articles of faith; and in the defence of which the Church of Scotland did lately signalise herself over the authority of Christ, over the kings and governments of earth, and the counterpart of this government, to uphold religion in the world—beware, we say, of making any compromise or surrender of this your other principle, and this too, to gain the countenance of those who may still be called the men in power, that is, who have the power, if not of authority and office, have at least the power of numbers on their side. This may be termed a less principle than the other, of inferior consideration in itself, and inferior consequence to the vital or spiritual well-being of Christ's Church upon earth. But let us not forget what the Bible says of those who break even the least of the commandments, that they shall be called least in the kingdom of heaven. The men who stand opposed to us on this second, or, as many choose to term it, this secondary question might, with all the hay and stubble and wood of this, and it may be of other errors, be reposing on the like

precious foundation with ourselves. They might be men with whom we differ and yet with whom we can agree to differ. They might be coadjutors in the great work of evangelising the people of our land—brethern with whom we can hold sweet and profitable counsel on the *capita fidei* or weightier matters of the law, having one faith, and one Lord, and one baptism. But we shall not, even for their friendship, violate the entireness of our principles, or make surrender of the very least of them. It is not for those ministers of Christ whom I am now addressing, and who, on the altar of principle have just laid down their all—thus quitting, and for the sake of one principle, the friendship of men who have the power of office—it is not for them to give up another principle for the sake of courting the friendship of men who have the power of numbers. We must not thus transfer ourselves from one earthly dependence to another. We have no other dependence than God. We acknowledge the authority and will submit to the influence of no other guide than His eternal and unalterable truth as seen in the light of our own consciences. To be more plain, let me be more particular. The Voluntaries mistake us if they conceive us to be Voluntaries. We hold by the duty of government to give of their resources and their means for the maintenance of a Gospel ministry in the land; and we pray that their eyes may be opened so as that they may learn how to acquit themselves as the protectors of the Church, and not as its corrupters or its tyrants. We pray that the sin of Uzziah, into which they have fallen, may be forgiven them; and that those days of light and blessedness may speedily arrive when kings shall be the nursing fathers and queens the nursing mothers of our Zion. In a word, we hold that every part and every function of a commonwealth should be leavened with Christianity: and that every functionary, from the highest to the lowest, should, in their respective spheres, do all that lies in them to countenance and uphold it. That is to say, though we quit the Establishment, we go out on the Establishment principle — we quit a vitiated Establishment, but would rejoice in returning to a pure one. To express it otherwise, we are the advocates for a national recognition and a national support of religion, and we are not Voluntaries."

It would probably be admitted by all that the authority of Dr Chalmers as an exponent of the views of the Free Church could hardly be overrated, but it was not his personal view merely. The words were addressed by him as Moderator, and were adopted unanimously, and directed to be circulated by the Assembly.

I am reluctant to render longer what I have to say by literal quotations from authoritative declarations of the Free Church, but though I summarise, I am actually using the language which originally, and for a long period afterwards, those who spoke on behalf of the Free Church have said and written as follows:—

"The Free Church has ever highly valued her connection with the State. Firmly asserts the right and duty of the Civil Magistrate to maintain and support an establishment of religion in accordance with God's word. They" (the Free Church) "reserve to themselves and their successors to strive by all lawful means to secure the performance of this duty. The State was bound to establish and endow the Church. The Free Church has not in the least degree altered its views respecting the lawfulness and the desirableness of a right connection between Church and State. History and experience have convinced us (the Free Church) that there is a form of alliance which is at once practicable and agreeable to Scripture, and highly beneficial."

I cannot doubt that each of the utterances I have quoted are important, and to my mind conclusive, evidence that originally at all events the views of the founders of the trust were in favour of the Establishment principle. The question whether they were fundamental or susceptible of being changed demands a separate treatment, which as it is applicable to both questions in debate must be reserved for the present.

Now, the views of the United Presbyterian Church cannot be more definitely or more shortly stated than in their own language authoritatively stated by themselves and before their union with the Free Church:—"It is not competent," they say, "to the Civil Magistrate to give legislative sanction to any creed in the way of setting up a Civil Establishment of religion, nor is it either his province to provide for the expense of the ministration of religion out of the national resources. It is Jesus Christ as sole King and Head of His Church who has enjoined upon His people to provide for maintaining and extending it by free will offerings; that this being the ordinance of Christ it excludes State aid for these purposes, and that adherence to it is the true safeguard of the Church's independence."

In my view what follows does not at all qualify this passage, but in fairness it ought to be added:—"Moreover, though uniformity of opinion with respect to civil establishments of religion is not a term of communion in the United Presbyterian Church, yet the views on this subject held and universally acted upon are opposed to these institutions."

Here, then, we have the two bodies which are supposed to establish identity of religious belief, the one asserting the right

and duty to maintain and support an establishment of religion, the other asserting that Christ's ordinance excludes State aid; each of them therefore treats the question as one of religious belief and obligation, and not one from which religious duties may be excluded.

The second question in debate is the difference between the two bodies as to the two doctrines known as the Calvinistic and the Arminian doctrine of Predestination. I use these two phrases, subject to more ample exposition hereafter, in order to summarise what I have to say, as preliminary to the discussion of the subject itself.

I regret very much that we have not any opinion from the learned Judges whose judgments we are called upon to review. I am afraid, speaking for myself, I do not think it is competent to me to avoid dealing with it. It is included in the allegation of a departure from the doctrines which is complained of in the summons, and it has been argued before your Lordships with great learning and ability. One observation made by the learned counsel I entirely agree to, namely, that in discussing this subject one cannot ignore the contemporaneous theological discussions at the time the Confession of Faith was compiled.

Now the doctrine in dispute was the subject of a copious amount of literature all through the seventeenth century.

Looking then at the history of the particular dispute which is brought into debate, it cannot be said that the language of the Confession of Faith was lightly drawn or arrived at without long debate and deliberation.

Indeed, it may be said of the Westminster Confession as a whole it was composed with a deliberate and careful scrutiny which may be regarded as hardly equalled in any theological discussion, and though councils of the Church have lasted longer, yet if one regards the composition of the Assembly itself, the original parties to the discussion, the presentation of its different portions to Parliament, the adoption of it by Parliament, and afterwards by the Church of Scotland, give these things an overwhelming sanction to it, and at all events to its original meaning by those who were content to accept it as a test of the unity of their religious belief.

If this observation is true and applicable to the Confession of Faith as a whole (the minute report of its deliberations has been deciphered by the distinguished Director and Principal Librarian of the British Museum), the particular doctrine debated as part of the code of belief which the Free Church adopted in 1843, and which it is alleged that the United Free Church has abandoned, can hardly be said to be one which any Christian Church could regard as a matter of indifference. It divided the Dutch Reformed Church at the beginning of the seventeenth century. It proved the subject of debate at the Hague in 1611, and at Delft in 1613.

An edict of the States of Holland sought to put an end to the controversy, but in vain; and finally, in 1619, at the Council of Dort, ten years after the death of Arminius, or Hermanson, as was his real name, the Arminian heresy, as it was described, was publicly condemned. Its professors were denounced as liars and deceivers, and those who participated in it were deprived of their civil rights unless they retracted.

James the First is said to have procured the exile of Conrad Vorstius, one of the protagonists of the Arminian doctrines, and afterwards he wrote a pamphlet against him, and argued that he ought to be put to death for his unchristian doctrines, while on the other hand the Councils of Constantinople in 1642 and the Council of Jerusalem in 1672 pronounced the following opinions:—

Treating of what they describe as the Calvinistic doctrine—Council of Constantinople, 1642—Cap. 3:—

τὸν Θεὸν ὑποτίθησιν ἀδικώτατον, τυραννικῇ χρώμενον ἐξουσίᾳ, μόνῃ λέγων τῇ θελήσει αὐτοῦ τοὺς μὲν εἰς δόξαν προορίσαι, τοὺς δὲ ἀποβάλλειν εἰς κόλασιν, μηδαμῶς τὰ ἔργα αὐτῶν σκοπούμενον. οὗ τί ἂν γένοιτο ἀσεβέστερον;

Deum facit iniquissimum, tyrannica potestate utentem, aiens eum sola sua voluntate alios prædestinare ad gloriam, alios in pœnam mittere, nulla operum habita ratione. Quo quid magis impium proferri possit?

The Synod of Jerusalem in 1672 said:—

ἀλλὰ καὶ τὸ τὴν θείαν θέλησιν αἰτίαν εἶναι τῶν κατακρινομένων οὕτως ἁπλῶς καὶ ἀναιτίως ποίαν οὐκ ἔχει μανίαν; ποίαν οὐκ ἐπιφέρει κατὰ τοῦ Θεοῦ συκοφαντίαν, καὶ ποίαν εἰς τὸ ὕψος οὐ λαλεῖ ἀδικίαν, καὶ βλασφημίαν; ἀπείρατον μὲν γὰρ κακῶν τὸ θεῖον, καὶ πάντων ἐξ ἴσου ἔθελον τὴν σωτηρίαν; ὡς μὴ ἐχούσης χώραν τῆς προσωποληψίας παρ αὐτῷ οἴδαμεν τοῖς βεβήλοις γενομένοις σκευέσι διὰ μοχθηρὰν αὐτῶν προαίρεσιν, καὶ ἀμετανόητον καρδίαν, ὡς δίκαιον παραχωρεῖν τὴν κατάκρισιν ὁμολογοῦμεν. κολάσεως δ' αἰωνίου, ὠμότητός τε καὶ ἀσπλαγνίας, καὶ μισανθρωπίας αἴτιον, οὔποτε, οὔποτε φαμὲν τὸν Θεὸν, τὸν χαρὰν γίνεσθαι ἐν οὐρανῷ ἐπὶ ἑνὶ μετανοοῦντι ἁμαρτωλῷ ἀποφηνάμενον· μὴ γένοιτο ἡμᾶς οὕτως ἢ πιστεῦσαι, ἢ ἐννοῆσαι ἕως ἂν ἑαυτῶν ἐσμὲν· ἀναθέματι δὲ αἰωνίῳ καθυποβάλλομεν τοὺς τὰ τοιαῦτα καὶ λεγοντας, καὶ φρονοῦντας, καὶ χείρους πάντων ἀπίστων γινώσκομεν.

Sed et hominum ita simpliciter ac sine caussa damnatorum auctorem statuere divinam voluntatem, insania quanta? quæ major Deo calumnia inferatur? quanta in supremum Numen injuria, quanta blasphemia? quippe intentatorem malorum non esse Deum, et omnium ex æquo salutem velle, ceu apud quem personarum acceptio nulla est, cognoscimus: et his qui pravis voluntatis suæ moribus ac secundum impœnitens cor se se vasa in contumeliam effecere, damnationem juste decerni confitemur. Æternæ autem punitionis, im-

manitatis, duritiæ et inhumanitatis nusquam, nusquam decimus auctorem esse Deum, super uno peccatore pœnitentiam agente esse in cœlo gaudium, afferentem. Absit a nobis ita cogitare, nedum credere, quamdiu nostri compotes sumus: immo vero talia dicentes ac sentientes anathemati sempiterno subjicimus, et cunctis infidelibus pejores agnoscimus.

I quote from the edition of the Councils of the Church published by two Jesuit Fathers in 1728, who have appended to the originals their own Latin translation, and published in Venice.

It was in this state of the controversy agitating the Christian Church throughout the world that the Confession of Faith was adopted by the Church of Scotland on the 27th of August 1647, and the approval and adoption of it was made in a form which was intended to prevent cavil as to its being agreed upon without objection or doubt. It recites that the Confession was twice publicly read over, examined, and considered, that copies were printed that it might be sedulously perused by all members of the Assembly, unto whom frequent intimation was publicly made to put in their objections and doubts, if they had any; and the said Confession being, upon due examination thereof, found by the Assembly to be most agreeable to the word of God, and in nothing contrary to the received doctrines, worship, discipline, and government of this Kirk, it proceeds to adopt it as a Confession of Faith for the three Kirks of God in the three kingdoms.

I think it is only necessary to put in juxtaposition the language of the Confession of Faith itself and the statement of doctrine set forth by one component part of the supposed united body united in one faith and doctrine.

The Confession of Faith—("CHAP. III—*Of God's Eternal Decree*):—III. By the decree of God, for the manifestation of his glory, some men and angels are predestinated into everlasting life, and others foreordained to everlasting death. IV. These angels and men, thus predestinated and foreordained, are particularly and unchangeably designed; and their number is so certain and definite that it cannot be either increased or diminished."

Now then for the Act—Act declaratory anent Confession of Faith made 26th May 1892:—"That this Church also holds that all who hear the Gospel are warranted and required to believe to the saving of their souls; and that in the case of such as do not believe, but perish in their sins, the issue is due to their own rejection of the Gospel call. That this Church does not teach, and does not regard the Confession as teaching, the foreordination of men to death irrespective of their own sin."

It has been argued with great ingenuity that inasmuch as the doctrine of Predestination as treated of in the Scriptures, is a mystery, and that various opinions have been held in respect of it, that it cannot be made a test doctrine, since another doctrine may be held with it not to human intelligence reconcileable with it, but equally derived from and established by Scriptural authority. If the Scottish Church, or the Westminster Confession as one of its declarations of doctrine, had simply declared that predestination was one of its doctrines, there might be something in the argument, but the argument ignores the fact that the Westminster Confession purports to explain, and does explain, in language which does not admit of doubt, what is meant. Each party well knew what they meant. It is not a question of metaphysical subtleties or ambiguous language. Each meant to exclude and denounce the doctrine of the other.

I am therefore led to the conclusion that upon this second question the appellants are entitled to succeed.

But another question is raised which in one sense, as affecting the law of trusts and their administration, is more important than the abstract importance of either.

The Dean of Faculty boldly argued for the inherent power of every Christian Church to change its doctrines, and Lord Young has based his judgment upon this proposition.

Apart from some mysterious and subtle meaning to be attached to the word "Church," and understanding it to mean an associated body of Christian believers, I do not suppose that anybody will dispute the right of any man, or any collection of men, to change their religious beliefs according to their own consciences, but when men subscribe money for a particular object and leave it behind them for the promotion of that object, their successors have no right to change the object endowed.

In this case it is suggested that the terms of what is called the Barrier Act suggest such licence to change.

I am not able to concur in such an inference.

It is obvious that dealing with such a subject as formularies, books of religious instruction, and the like, that many things might be done, written, and taught, which might touch doctrine, and for the purpose of preventing any alteration in doctrine, the precautions insisted upon by the Barrier Act were thought necessary to prevent and render impossible any departure from the orthodox standards. It provides that "before any General Assembly of the Church shall pass any Acts which are to be binding Rules and Constitutions to the Church [observe "binding Rules and Constitutions,"] the same Acts be first proposed as overtures to the Assembly."

Many things might be proposed as "binding Rules and Constitutions" which might touch doctrine, or worship, or discipline, or government, but that the Church of Scotland in 1697 might change its faith or permit it to be changed is a suggestion which to one acquainted with its history either then or even a very long time after is not very plausible. It is only just to Lord Young to say that he adds:—"I desire to say that there is, in my opinion, no rule of law to prevent a dissenting Church from abandoning a religious doctrine or principle, however essential and fundamental, or from returning to it again with or without qualification or modification. Whether or not a property title is such that a forfeiture of property will follow such abandonment or return is another matter."

Yes, but that is the whole question now before your Lordships, and as it appears to me that there is nothing in calling an associated body a Church that exempts it from the legal obligations of insisting that money given for one purpose shall not be devoted to another. Any other view, it appears to me, would be fatal to the existence of every Nonconformist body throughout the country.

But there is another and a further ground upon which I think the appellants are entitled to succeed, and that is that the so-called Union is not really a union of religious belief at all. The united body has united in its organisations. It has established its various administrative arrangements, has declared its authority as the United Free Church, and in that name has absorbed the various bodies of the United Presbyterians and the Free Church as originally constituted, but Has it agreed in the doctrines of either of them, and if so, which is it that has given way?

I am bound to say that after the most careful examination of the various documents submitted to us, I cannot trace the least evidence of either of them having abandoned their original views. It is not the case of two associated bodies of Christians in complete harmony as to their doctrine agreeing to share their funds, but two bodies each agreeing to keep their separate religious views where they differ, agreeing to make their formularies so elastic as to permit persons to accept them according as their respective consciences will permit.

Assuming as I do that there are differences of belief between them, these differences are not got rid of by their agreeing to say nothing about them, nor are these essentially diverse views avoided by selecting so elastic a formulary as can be accepted by people who differ and say that they claim their liberty to retain their differences while purporting to join in one Christian Church.

It becomes but a colourable union, and no trust fund devoted to one form of faith can be shared by another communion simply because they say in effect there are some parts of this or that confession which we will agree not to discuss, and we will make our formularies such that either of us can accept it.

Such an agreement would not in my view constitute a Church at all, or, to use Sir William Smith's phrase, a Church without a religion. Its formularies would be designed not to be a Confession of Faith but a concealment of such part of the Faith as constituted an impediment to the union.

I am disposed to quote one passage from what was said by William Willson from the Moderator's Chair in 1866, and which I find in Mr A. Taylor Innes' most excellent Treatise on the Law of Creeds in Scotland. Speaking of the freedom of the Church as to Confessions of Faith, he says:—"We are not at liberty to hold forth a confession in which we do not believe. For in such a case the Church is absolutely without a Confession. . . . It ceases to be either a bond of union or a public testimony. It is lawful for the Church to revise her Confession and adjust it to her present attainments and exigencies; it is lawful for her altogether to dispense with a Confession, if indeed without one any organisation were possible, but to retain a Confession which has ceased to be believed can never be lawful."

He is speaking of course of the Christian conscience, and as he says at an earlier part of his discourse that when the Church has arrived at the conclusion that its Confession must be altered "the time has come for us then to frame a new bond of union with each other, a new testimony to the world."

This would certainly not be done by making formularies ambiguous or elastic, or authorising its votaries to put different meanings upon a set of words the function of which was intended to be a test of the unity of their faith.

That this is the principle upon which the so-called Union has been arrived at is proved by the declaration of the United Church, in which they claim in effect to retain their own separate views either in the United Presbyterian or in the Free Church, or in either of the bodies which originally composed the united body which afterwards became the United Presbyterian Church—"(1) The various matters of agreement between the Churches with a view to union are accepted and enacted without prejudice to the inherent liberty of the United Church as a Church of Christ to determine and regulate its own constitution and laws as duty may require, in dependence on the grace of God and under the guidance of his word. . . . (Thirdly)

As this Union takes place on the footing of maintaining the liberty of judgment and action heretofore recognised in either of the Churches uniting, so, in particular, it is hereby declared that members of both Churches, and also of all Churches which in time past have united with either of them, shall have full right, as soon as they see cause, to assert and maintain the views of truth and duty which they had liberty to maintain in the said Churches."

For these reasons I think the judgment ought to be reversed, and I so move your Lordships; but I cannot conclude without expressing how much we are indebted to the learned Counsel on both sides for their most able and learned argument.

LORD MACNAGHTEN—I am unable to agree in the conclusion at which your Lordships have arrived. I do not differ from any of your Lordships as to the law; at least I think not. I accept the principles laid down in this House in *Craigdallie* v. *Aikman* and the other cases referred to during the argument. I accept those principles loyally and entirely, however much I may err in their application.

Everyone, I think, must feel that the consequences of your Lordships' decision to-day for good or evil will be far-reaching and of momentous importance,—graver, I think, and more serious than the consequences of any decision in which it has been my lot to take part. And the argument addressed to your Lordships has been worthy of the occasion. But after all the question at issue is one of a very ordinary description. It is alleged on the one hand, and denied on the other, that there has been a breach of trust in the disposition of property. The complaint is that funds contributed and set apart for one purpose have been diverted to another and a different purpose. Such questions are of everyday occurrence, and the problem in each case must be solved by the ordinary commonplace inquiry,—What was the purpose for which the funds in dispute were collected? What was the original trust?

The funds in question in the present case represent moneys contributed for the support of the Free Church of Scotland. They represent property dedicated to the use of the Church body or voluntary association of professing Christians founded by those Ministers of the Established Church of Scotland who in 1843, on the memorable occasion known as the Disruption, withdrew from the establishment; or, according to their own view of the transaction, separated from the State, carrying with them the greater part of the office-bearers of the Established Church and at least one half of her members in full communion, asserting all the while for themselves and their followers in time to come the character of the ancient and true Church of Scotland. Setting forth with these lofty pretensions, they declared their adherence to the principles and practice of the Church of Scotland as regards doctrine, worship, discipline, and government untrammelled and unfettered by connection with the State and purged of every taint of Erastianism.

The question therefore seems to me to be this:—Was the Church thus purified—the Free Church—so bound and tied by the tenets of the Church of Scotland prevailing at the time of Disruption that departure from those tenets in any matter of substance would be a violation of that profession or testimony which may be called the unwritten charter of her foundation, and so necessarily involve a breach of trust in the administration of funds contributed for no other purpose but the support of the Free Church—the Church of the Disruption? Was the Free Church by the very condition of her existence forced to cling to her subordinate standards with so desperate a grip that she has lost hold and touch of the supreme standard of her faith? Was she from birth incapable of all growth and development? Was she (in a word) a dead branch and not a living Church?

This I think is the real and only question. But, if I may venture to say so without offence, it has been rather pushed aside and obscured by a very interesting preliminary search after a principle, if it be a principle, called for the sake of convenience and not I think for the sake of clearness "the Establishment principle," which in my humble judgment partakes rather of the elusive attraction of an *ignis fatuus*, which means much or little just as you may choose to interpret one of the most obscure passages in the Westminster Confession, which in one aspect no Christian man I think, or very few, would hesitate to accept, but which in the mouth of an adherent of the Church that has abandoned Establishment and separated from the State, can only mean a counsel of perfection unattainable in this world, at least until the advent of the Millennium.

Your Lordships have been furnished with a print of many Scottish statutes and a bulky volume containing the Acts of the General Assembly of the Church of Scotland. I have read those documents and many others to which the attention of the House was directed with much interest and some care. I can only say that they have confirmed me in the opinion I entertained at the conclusion of the first argument—no doubt erroneously—that the judgment under appeal was right and ought to be affirmed.

I do not propose to trouble your Lordships by tracing the history of the Church of Scotland in its connection with the State from the date of the first Reformation to the time of the Disruption; that was done very ably and fully by the learned counsel

at the Bar. It is enough for me to say that during the whole period of the existence of the Church of Scotland there was a constant assertion of spiritual independence—of the right as it was termed of the Lord Jesus to reign in his own house. I will only give one instance—I might give many—and I will give an instance that occurred almost on the eve of the Disruption. On the 23rd of May 1838 the General Assembly of the Church of Scotland passed this resolution, which is called "Resolution anent the Independent Jurisdiction of the Church of Scotland:—The General Assembly having heard and considered the overtures on the Independent Jurisdiction of the Church of Scotland, agreed, by a majority, to the following resolution—'That the General Assembly of the Church of Scotland, while they unqualifiedly acknowledge the exclusive jurisdiction of the Civil Courts in regard to the civil rights and emoluments secured by law to the Church and ministers thereof, and will ever give and inculcate implicit obedience to their decisions thereanent, do resolve, That, as is declared in the Confession of Faith of this National Established Church, "The Lord Jesus as King and Head of His Church hath therein appointed a government in the hand of church officers distinct from the civil magistrate;" and that in all matters touching the doctrine, government, and discipline of this Church her judicatories possess an exclusive jurisdiction, founded on the Word of God, "which power ecclesiastical" (in the words of the Second Book of Discipline) "flows immediately from God and the Mediator Jesus Christ, and is spiritual, not having a temporal head on earth, but only Christ, the only spiritual King and Governor of his Kirk;" and they do farther resolve, that this spiritual jurisdiction, and the supremacy and sole Headship of the Lord Jesus Christ on which it depends, they will assert and at all hazards defend by the help and blessing of that Great God, who in the days of old enabled their fathers, amid manifold persecutions, to maintain a testimony, even to the death, for Christ's kingdom and crown; and, finally, that they will firmly enforce submission to the same upon the office-bearers and members of this Church by the execution of her laws, in the exercise of the ecclesiastical authority wherewith they are invested.'"

Thus while the Church was in connection with the State she took upon herself to declare emphatically that what she claimed was nothing less than an exclusive jurisdiction, founded on the Word of God, in all matters touching the doctrine as well as the government and discipline of the Church. The fact that this resolution was passed by a majority shows that it was carried by the vote of the party which five years later went out as the Free Church.

During the period when the Church which had passed through the furnace of two Reformations was approaching her last and greatest trial, there grew up in the Church two parties—the Moderates and the Evangelicals. It was to the Evangelicals in later days that the Free Church of Scotland owed her separate existence. For a long time the Evangelical party was in a minority, and matters then went on tolerably smoothly between Church and State. Ultimately the Evangelicals gained the ascendancy. They were the party of progress, reform, and Church extension. They planted religion in remote and half-civilised districts in Scotland. They founded missions in all parts of the world. Their zeal and fervour were, as their adherents boasted, in striking contrast to the apathy and lukewarmness of the Moderates. When they became the dominant party they carried matters with a high hand. They passed Acts in the Assembly—the Veto Act and the Chapel Act—which were altogether beyond the competence of the Church as established by law; they censured and deposed ministers who obeyed the decrees of the Court of Session—they held those decrees to be encroachments on the true liberties of the Church, and actually pronounced them illegal. The State refused to admit their claims. The strong arm of the law restrained their extravagances. They still maintained that their proceedings were justified and required by the doctrine of the Headship of Christ, which was common to all the Reformed Churches, but to which they attached peculiar and extraordinary significance. Then came the protest of 1842, "the unanswered and unanswerable protest," as they called it.

It was followed by a cold and chilling reply from the Government in power, and then it became evident to all thinking men that as the State would not give way, the leaders of the Assembly and those who adhered to them would have to retract their pretensions and own themselves defeated or quit the Establishment altogether. No one who knew the courage and temper of the leaders of the Assembly, no one who had caught the note of defiance and triumph sounded by Dr Chalmers at the close of the Edinburgh Convocation, could doubt what the issue would be. And now, in passing, I would call your Lordships' attention to one fact which seems to me not unworthy of notice when Dr Chalmers' sermon, preached before the first Free Church Assembly, is relied upon as a sort of prospectus on the faith of which the funds of the Free Church were collected, as if the Free Church were a joint-stock concern and that sermon an invitation to the public to put their money in it. Months before the Disruption actually took place, when all Scotland was looking forward

with feverish anxiety to the last act of the drama, the leaders of the Evangelical party, with Dr Chalmers at their head—a great divine and an eloquent preacher, who had a wonderful faculty of organisation and something of the genius of a statesman—set about collecting funds for the needs of the Church. "Before the meeting of the General Assembly"—(I am now quoting from a book which I believe is of recognised authority—Ecclesiastical History of Scotland by George Gent, vol. iv, p. 226)—"the members of the popular party had arranged their course of proceeding. Associations were formed throughout the whole of Scotland, and subscriptions were collected for the purpose of building churches and providing a maintenance for the ministers who were soon to lose the benefits of the national endowments. Dr Chalmers presided over the general finance committee and acted with an energy and success which amazed even those who had best known his labours for a similar purpose in the cause of the Establishment. The thousands of circulars which he dispersed bore the following mottoes: 'Surely I will not come into the tabernacle of my house, nor go up into my bed; I will not give sleep to my eyes, nor slumber to mine eyelids until I find a place for the Lord, an inhabitation for the mighty God of Jacob. The God of Heaven He will prosper us; therefore we His servants will arise and build.'"

That was the origin of the fund. Those were the winged messengers by which the ground was prepared and the good seed sown. And when the Disruption took place, and when appeals were made in every parish, in every nook and corner of Scotland, calling upon the people to stand by the Church of their forefathers, denouncing the tyranny of the State, describing in harrowing terms the sufferings of ministers, old and young, driven from their homes with their wives and children, and forced to seek shelter in sheds and hovels while they faithfully ministered to their flocks, some of them actually dying of want and exposure, money came in abundantly in answer to the call. Dr Chalmers' sermon to the first Free Church Assembly was but one of a thousand—I might say, of a million—similar discourses. It was eloquent, of course. It was stirring. But I rather take leave to doubt whether the warning that I find there against Voluntaryism and against Anarchy—an evil, as the preacher truly says, more to be dreaded than Voluntaryism—was very stirring or likely of itself to evoke a generous response. The negation of dangerous principles does not as a rule rouse enthusiasm. Of what is called the Establishment principle as a tenet or opinion of the Free Church I shall have a word to say presently. All I want to impress upon your Lordships at this moment is that when that sermon was preached by Dr Chalmers, on an occasion more eloquent and stirring than any appeal in words could be, the fund was already in full swing.

Then for whom and with what purpose was the money collected? Except as regards sums devoted to special purposes and special objects, the fund was all one fund. It was collected for the needs of the Free Church of Scotland. And what was the Free Church? Did it go out as a sect or a persuasion or a connection with peculiar tenets cut and dried, and defined in the precise language of a conveyancer?

Nothing of the kind. Those who went out went forth declaring that they were not a sect but the National Church, that they were still the Church of Scotland. "We are," they said (to quote the words of Dr Candlish, who was only second—if he was second — to Dr Chalmers himself), "we are still the Church of Scotland—the only Church that deserves the name, the only Church that can be known and recognised by the maintaining of those principles to which the Church of our fathers was true, when she was on the mountain and on the field, when she was under persecution, when she was an outcast from the world. And, believing that we are not seceders from the Church, but are the Church separated from the State—believing that we are not a sect separated from the Established Church, but that we are the Church of Scotland separating from the State, we hold ourselves entitled, without any disparagement to other religious bodies, to assume and act upon the principle that we are to maintain the character of the National Church of Scotland." An impossible position, it may be said, in point of law! They went out not as a Church but as individuals separating from the Church, and they united again in a voluntary body of professing Christians. That may be so. But to themselves and to their adherents, and I may add to other religious bodies which were not of their communion, they supported the character of the National Church of Scotland. And supporting that character which they assumed, rightly or wrongly, they must be taken, I think, in regard to their own body, to have all the powers of a National Church.

Speaking for myself, I cannot form a conception of a National Church untrammelled and unfettered by connection with the State which does not at least possess the power of revising and amending the formulæ of subscription required of its own office-bearers, and the power of pronouncing authoritatively that some latitude of opinion is permissible to its members in regard to matters which, according to the common apprehension of mankind, are not matters of faith. I agree that a sect may

erect any point or any punctilio however trifling and absurd it may be into an article of faith. My point is, that the Free Church were not a sect, and that they never made the Establishment principle an article of faith.

But I go further. This Establishment principle, whatever it is, can have no higher authority than the article of the Westminster Confession in which it is supposed to be embedded. If the Church has power to amend her Confession she can of course take occasion to declare that the Establishment principle is to be regarded as an open question in reference to which every man is at liberty to exercise his private judgment. Now it seems to me clear that the Free Church when it came into existence claimed the power of altering and amending her Confession of Faith.

On the second argument the Dean of Faculty called your Lordships' attention to a Catechism on the Principles and Constitution of the Free Church of Scotland issued by authority of the General Assembly. The preparation of this work was taken in hand in 1843. It was issued in December 1845 by authority of the Publications Committee. In 1847 the General Assembly approved generally of this Catechism "as containing a valuable summary of this Church's history and exhibition of her distinctive principles from the beginning of the Reformation to the present time." And at the same time the Assembly earnestly recommended its general use; so that it has an unquestionable claim to be considered a contemporaneous document. Mr Taylor Innes in his valuable work on The Law of Creeds in Scotland, quotes from it as a book of authority, but speaks of it as an intensely polemical volume. So it is. From beginning to end it attacks and flouts and belittles the Established Church, but the very bitterness of its tone shows that it was composed in the earliest days of Disruption. I will not weary your Lordships by quoting from it at any length, but I may remind your Lordships that it points out that the Church of Scotland as a Church on its own authority adopted the Westminster Confession, and that at the very time when Knox's Confession had the sanction of the State. The Catechism deals at some length with "Church power." It explains that the power is the power of the Keys. It declares that it is divided into four parts, and that the first part is "the Dogmatic power, in virtue of which the doctrine and laws of the Word are declared and religious controversies are determined." It asks—"When is the Dogmatic power abused?" The answer is—"When it is made the pretext for a claim of infallibility and employed to subvert the right of private judgment, and when that implicit submission which is due only to the Word is demanded for Church formularies and decrees."

In an earlier passage, in a note quoted by Mr Taylor Innes, there is a sly hit at the Established Church and a sharp contrast drawn between the view of the Evangelical party and the view of the Moderates as to the position of the Church, not altogether I need hardly say to the advantage of the latter. "It is one thing," say the authors of the Catechism, "for the civil privileges and endowments of a Church to be tied to a Confession by civil enactments" (that was the contention of the Evangelicals) "and quite another thing for a Church itself to be so;" (that according to this Catechism was the servile bondage of the Established Church). "In the former case the Church when she finds that any articles of her Confession are unscriptural is at liberty to renounce them, being only bound if she do to resign her temporalities. In the latter case the law allows no relief whatever for the Church in her corporate capacity when she discovers errors in her Confession, which of course is as much as to say that the Church is bound always to go absolutely upon the supposition of its soundness and to interpret the Word of God agreeably to its declarations. Under these circumstances the supreme and ultimate Standard of Doctrine is—not the Bible—but the Confession of Faith." I greatly fear that that is the position into which the Free Church will be driven if Mr Johnston's argument prevails.

I could easily multiply quotations from this Free Church Catechism, but I think I have quoted enough to prove that to the fathers of the Free Church movement the notion of altering the Westminster Confession of Faith was not so very shocking.

If the view which I have roughly indicated is correct, I think it is enough to dispose of this case in both its branches. But there are two points on which a great deal of argument was bestowed, and on which I should like to say a few words. There is the Establishment principle as it is called, and there are those higher mysteries which were dealt with boldly but reverently by the learned counsel who spoke second for the Free Church.

As regards the Establishment principle, I know that that very distinguished man to whom I have already referred, and who, after Dr Chalmers, was the leader of the Free Church, doubted to the last whether the principle of a national establishment of religion was a principle at all. He maintained that throughout the whole of the Church's history there was no event that proclaimed formally and directly that the principle of a national establishment of religion was a vital principle which the Church was bound to maintain. Speaking for myself, I do not altogether take

that view. I think it must be admitted that the Establishment principle, as it may be gathered from the somewhat obscure language of the Westminster Confession, was the generally received opinion in the Church. It was necessarily the received, though unexpressed, opinion of the Church before the Disruption. When the Disruption took place circumstances were altered, and then I think there was a diversity of opinion on the subject.

Lord Trayner says that it appears to him "difficult to hold that a mere opinion as to what some third person was bound to do, which he might neglect or refuse to do, and which the Church would not compel him to do, could in any way be an essential part of the constitution of the Church which held that opinion." Well, that was exactly Dr Candlish's opinion at the very time of the Disruption. I refer to his opinion, not as the opinion of a person authorised to speak on behalf of the Church, but as the opinion of a very leading man, whose opinion a great many others would probably follow.

At the General Assembly held in Glasgow in the autumn of the year of Disruption, Dr Candlish, speaking about the Establishment principle, and pointing out that the refusal of the State to establish the Church on the only terms to which the Church would consent, left them a great degree of liberty as to the terms on which they should stand with other Churches, puts the case thus:—"Is the division and schism of the Christian Church to be kept up by a question as to the duty of another party over whom we have no control? Let it be that we maintain our different opinions as to the duty of the State to support the Church, and the duty of the Church to receive support from the State when it is given consistently with spiritual freedom, still, shall that question, which has become a mere theoretical question in the Church of Christ, and which so far as we can judge seems destined to be a mere theoretical question till the time when the kingdoms of this world shall become the kingdoms of Our Lord and of His Christ—shall that question prevent cordial co-operation and harmony among ourselves, and our united action in defence of one common Protestantism against the common foe?"

I have no doubt that the opinions which Dr Candlish expressed so eloquently at the time of the Disruption must have been held by many adherents of the Free Church. And as time went on, and the splendid voluntaryism of the Free Church on a basis and a scale never before understood or attempted, placed the Free Church on a level with the Established Church at home, and in a position certainly not inferior as regards missionary labours abroad, the natural tendency, I think, even among those who were disposed to regard the Establishment principle as a sacred principle (if any such there were) must have been in the direction of the conclusion that the Church of Scotland, whether Established or Free, could exist not only without an Establishment, but even without the profession of the Establishment principle.

Speaking for myself, and with the utmost deference to the great majority from whom I have the misfortune to differ, I think this question about the Establishment principle is a very small question indeed, and that it occupied a great deal too much of the argument to the exclusion of far weightier matters.

I cannot call the matters that were discussed by Mr Haldane small or insignificant. They are mysteries into which I do not think it is our province to intrude. And, speaking for myself, I am not quite sure that at the conclusion of Mr Haldane's argument I had gained a clearer insight into these matters than I had before. At any rate, I am happy to think that it is not necessary to enter into these questions at all. If the Church has power to relax the stringency of the formulæ required from her ministers and office-bearers so as to avoid offence to the consciences of the most conscientious and to keep within her fold the most able and enlightened of her probationers, that is all that is required. That she has that power I cannot doubt. These formulæ were imposed by Act of Parliament. If they owe their force and efficiency in the Established Church to Acts of Parliament, the Free Church has rejected the ordinances of men and the authority of Parliament and is free to regulate her own formulæ. If in the Established Church they owe their force wholly or in part to the antecedent recognition of the Church, the Free Church, as it seems to me, claiming to act and recognised by her adherents as acting in the character of a National Church, and proceeding regularly in accordance with the constitution of the Church, may do now what the Church did in the 17th century.

Owing to the vast importance of this case and the very able and learned arguments of the learned counsel at the Bar, I have thought it right to state in my own language the reasons which have led me to the opinion I hold. Under ordinary circumstances I should have been content to express my concurrence in the opinions delivered by the learned Judges in Scotland, and specially with the opinions of the Lord Ordinary and Lord Trayner.

It is impossible in my opinion to overrate the importance of the issue awaiting decision. I do not agree with the learned counsel for the appellants that the United Free Church is a changeling, a creature of a composite nature, with a double face and

two voices. Though the name is slightly altered I think the Free Church has preserved her identity. I think she is entitled to as much respect—I had almost said as much veneration—as when she went forth, casting off for conscience sake the fetters and the advantages of State connection. I do not think she has forfeited any of her rights by receiving into her bosom a reformed and presbyterian Church, one with her in faith, in baptism, and all essential points of doctrine. And for my part I should hesitate long before I could give my voice for a decision which will I fear compel, or at anyrate direct, her to subordinate the Scriptures to the Westminster Confession of Faith.

LORD DAVEY—The subject-matter of the action out of which this Appeal has arisen is certain heritable and moveable property of great value, which is held by trustees, who are the first respondents, in trust for the Free Church of Scotland. That Church is a voluntary and unincorporated association of Christians united on the basis of agreement in certain religious tenets and principles of worship, discipline, and Church government. The pursuers and present appellants were in the year 1900, and claim to be still, members of the Free Church, and their complaint, so far as it is cognisable by a Civil Court, is that their trustees, at the bidding of other members of the Free Church, but in breach of their trust, have applied, and threaten and intend to apply, the trust property to purposes which are alien to the purposes of the trust, and for the benefit of persons who have no title to call themselves members of the Church. In fact, the appellants say that they alone hold in their integrity the tenets and principles of the association for whose benefit the trust was founded.

The law on this subject is free from doubt. It has been settled by numerous decisions of the Courts both in Scotland and in England, and has been affirmed by Judgments of this House. The case of *Craigdallie* v. *Aikman* came twice before this House. In the second appeal, heard in 1820, and reported in 2 Bli. 529, Lord Eldon thus stated the principle on which the House proceeded:—"When this matter was formerly before the House we acted upon this principle, that if we could find out what were the religious principles of those who originally attended the chapel we should hold the building appropriated to the use of persons who adhere to the same religious principles." And after stating the result of the inquiries directed by the former judgment, Lord Eldon said, "Supposing that there is a division of religious opinions in the persons at present wishing to enjoy this building, the question then would be which of them adhered to the opinions of those who built the place of worship, and which of them differed from those opinions? Those who still adhered to their religious principles being more properly to be considered as the *cestui que* trusts of those who held this place of worship in trust, than those who have departed altogether from the religious principles of those who founded this place, if I may so express it."

In an English case (*Attorney-General* v. *Pearson*, 3 Merivale, 353), decided in 1817, and therefore between the two appeals in the *Craigdallie* case, Lord Eldon, referring to that case, expounded the principle acted on by the House more at large. "But if," he said, "on the other hand, it turns out (and I think that this point was settled in a case which lately came before the House of Lords by way of appeal out of Scotland) that the institution was established for the express purpose of such form of religious worship, or the teaching of such particular doctrines as the founder has thought most conformable to the principles of the Christian religion, I do not apprehend that it is in the power of individuals having the management of that institution at any time to alter the purpose for which it was founded, or to say to the remaining members—'We have changed our opinions, and you, who assemble in this place for the purpose of hearing the doctrines and joining in the worship prescribed by the founder, shall no longer enjoy the benefit he intended for you, unless you conform to the alteration which has taken place in our opinions.' In such a case, therefore, I apprehend—considering it as settled by the authority of that I have already referred to—that when a congregation become dissentient among themselves, the nature of the original institution must alone be looked to as the guide for the decision of the Court, and that to refer to any other criterion as to the sense of the existing majority would be to make a new institution, which is altogether beyond the reach and inconsistent with the duties and character of this Court."

I disclaim altogether any right in this or any other Civil Court of this realm to discuss the truth or falseness of any of the doctrines of this or any other religious association, or to say whether any of them are based on a just interpretation of the language of Scripture, or whether the contradictions or antinomies between different statements of doctrine are or are not real or apparent only, or whether such contradictions do or do not proceed only from an imperfect and finite conception of a perfect and infinite Being, or any similar question. The more humble, but not useless, function of the Civil Court is to determine whether the trusts imposed upon property by the founders of the trust are being duly observed. I appreciate, and if I may properly

say so, I sympathise with the effort made by men of great intelligence and sound learning to escape from the fetters forged by an earlier generation. But sitting on appeal from a Court of Law, I am not at liberty to take any such matter into consideration.

The question in each case is, what were the religious tenets and principles which formed the bond of union of the association for whose benefit the trust was created. I do not think that the Court has any test or touchstone by which it can pronounce that any tenet forming part of the body of doctrine professed by the association is not vital, essential, or fundamental, unless the parties have themselves declared it not to be so. The bond of union, however, may contain within itself a power in some recognised body to control, alter, or modify the tenets and principles at one time professed by the association. But the existence of such a power would have to be proved like any other tenet or principle of the association.

I do not propose to travel through the numerous documents which state the grounds of the great Disruption in 1843 and the principles held and professed by the founders of the Free Church, The result, in my opinion, is that the Free Church took with it the doctrine, government, and discipline of the Established Church, freed from the fetters and conditions imposed on that Church by its connection with the State. The Free Church adopted as its standards the Westminster Confession and the other subordinate standards of the Established Church. It also adopted the provisions of the Barrier Act and any other provisions affecting the constitution of the Church or the powers of its General Assembly. In fact, the founders of the Free Church claimed that "in doctrine, polity, and discipline they truly represented the Church of their fathers," and that "it is her being free and not her being established that constitutes the real historical and hereditary identity of the Reformed National Church of Scotland."

There is, however, one document which should be more particularly referred to, viz., the Protest put forth as their first act by the members of the General Assembly of the Established Church who withdrew from that Assembly on the historical 18th May 1843. This Protest was ordered to be recorded by the several Presbyteries of the Free Church at the beginning of their Presbytery books as the ground and warrant of their proceedings, and it may fitly be called the Charter of the Free Church. It is at once an apologia and an affirmance of the position taken up by the founders of the Church. In vindicating in vigorous terms their right and duty to separate from the Establishment—maintaining the Confession of Faith and other standards of the Church of Scotland as heretofore understood—they are careful to firmly assert the right and duty of the Civil Magistrate to maintain and support an establishment of religion in accordance with God's Word.

It is a matter in dispute whether it was a tenet of the Established Church that it is the duty of the State to establish and endow a National Church. It has been said by learned Judges in the Court of Session that it was not required that the principle of a religious establishment in connection with and endowed by the State should be professed as an article of faith. It was pointed out that the article on the Civil Magistrate admits of other constructions, and that a civil ruler may perform the duty ascribed to him in that article in other ways than by establishment and endowment. But, however this may be, I think it is plain from their public utterances that the founders of the Free Church considered that the Establishment principle was part of the body of doctrine which they brought with them from the Established Church, and that they held and stated it in the clearest terms. It is impossible in my opinion to get rid of the explicit statement of the doctrine in the Protest of 18th May 1843 by calling it "parenthetical," or a matter of opinion. The affirmance of the doctrine may be said to derive strength from the form of the sentence. For it shows that the authors of the Protest regarded it as of so much importance that they go out of their way to state it, and thus define more clearly their position, and avoid the imputation that by separating from the Established Church they had become Voluntaries. Again, in the Act of 1846 "anent questions and formula," while disclaiming intolerant or persecuting principles, "the Church firmly maintains the same Scriptural principles as to the duties of nations and their rulers in reference to true religion and the Church of Christ for which she has hitherto contended." And (not to multiply evidence of what is not really disputed) in the address of Dr Chalmers, which was incorporated in a manifesto issued by direction of the General Assembly of May 1843, and entitled "The Affectionate Representation of the Free Church of Scotland," that eminent person expressed himself in language which I will not repeat, as it has been read by my noble and learned friend on the woolsack.

I cannot bring myself to doubt that a doctrine thus "firmly" asserted and maintained, and officially put forward, was a distinctive tenet of the Free Church of Scotland, and formed a link in the bond of union between the members of that association. The Lord Ordinary and the learned Judges in the Inner House treated it as neither fundamental nor essential,

and they seem to have regarded it as a pious opinion, held, indeed, by the founders of the Church, but destitute in the circumstances of any practical importance. I have already said that I have no means of testing the fundamental or essential character of the doctrine apart from the utterances of the parties themselves. They certainly were as far as possible from treating it as an open question, and that attitude was maintained for many years after the foundation of the Church. The doctrine of the independence of the Church under the headship of Christ alone was the very foundation of their position, and was necessarily put forward by them as fundamental, but that is no proof that they did not regard other tenets also as essential or distinctive articles of belief.

The questions therefore in my opinion come to be whether it was a term in the compact or bond of union that the General Assembly should have power to alter or vary the doctrines of the Church, and what are the limits (if any) of such a power. I was impressed (as I believe all your Lordships were) by the powerful argument of the Dean of Faculty. If I understand the learned Dean correctly, he maintained that the General Assembly of the Church of Scotland had by its constitution an inherent power of plenary legislation over all matters ecclesiastical, including doctrine, subject only to the conditions imposed by the Act of Assembly called the Barrier Act. And he carried his argument so far as to maintain that the General Assembly of the Free Church, exercising the inherent powers of the Established Church, but freed from the fetters imposed by Acts of Parliament, might derogate from or even reject the Confession of Faith itself.

The freedom of the Church from the control of the civil power *in spiritualibus*, which is asserted by the Free Church, does not appear to me to warrant any *à priori* inference of the existence of such a plenary power of legislation in the General Assembly. It is, indeed, almost a truism that an unestablished religious association is free from State control as regards doctrine, government, and discipline. But that freedom which differentiates a voluntary association from an established church is not inconsistent with the adoption by the association of certain tenets which distinguish it from other similar bodies. The right of the Assembly to impose any innovation from established doctrine on a dissentient minority, and the limits of such right (if any), must be found in the constitutional powers of that body, and must be proved by evidence. The historical argument of the learned Dean appears to me on examination to afford but little assistance on this crucial point. Knox's Confession of Faith was not adopted by the General Assembly of the Church, for at that time the Presbyterian form of church government was not established, and there was no such body. It was presented by the Barons and others to Parliament, and then passed into law. The Statutes of 1638 and the subsequent years were passed during the period which is called in Scotch ecclesiastical history the Second Reformation, and appear to be in the nature of protests against the action of the King's Government, and in some instances the King's Commissioner is supplicated to obtain the ratification by Parliament of the Acts of the Assembly. The Westminster Confession was adopted by an Act of the General Assembly in 1647, and did not, it is true, receive Parliament's sanction until 1692, after the period of disturbance between the Restoration and the Revolution of 1688 had passed away. It is to be observed, however, that in the Act of 1647, approving the Westminster Confession, it is expressly stated that the said Confession was found by the Assembly to be "in nothing contrary to the received doctrine, worship, discipline, and government of this Kirk." The Assembly therefore did not consider itself to be introducing into the Church any innovation in doctrine. The Westminster Confession was intended to be an eirenicon or basis of union between the Churches in the two kingdoms, and the adoption of it by the Scottish Assembly was as much a political as an ecclesiastical act. The "Chapels Act" and the "Veto Act," which were the forerunners and indirectly the cause of the great Disruption, can hardly be cited as evidence of the power of legislation which is claimed. These Acts were said by their authors to be declaratory only of existing rights, and although they involved the assertion of the larger principle for which the majority in the General Assembly were then contending, the particular subjects dealt with would seem to come within the scope of the internal management of an unestablished Church. They were held in the Court of Session and in this House in the course of the litigation which ensued to be of no effect, because their provisions (it was held) were at variance with those of Acts of Parliament. It was not necessary, therefore, for the learned Judges to give any decision as to the abstract power in the General Assembly to pass them. But the dicta of the learned Judges were not favourable to the respondent's contention (see the opinions in the first *Auchterarder* Case, 2 Robertson's Report, p. 25 *et seq.*).

Counsel referred to chap. vii. of the Second Book of Discipline. The sections numbered from 6 to 8 describe the powers of all assemblies from kirk-session to an Ecumenical Council, and do not relate specially to the General Assembly. It does not appear to me that any of these sections either confer or recognise the

existence of a power in the General Assembly to impose new doctrines on the Church, for that is what is claimed. They seem to be directed to the preservation and maintenance of established doctrine and the reform of abuses. Sections 21 to 26 describe the powers of what is there called the National Assembly, corresponding to what is now designated the General Assembly. There are large powers for the protection of the spiritual jurisdiction, the patrimony of the Kirk, and generally concerning "all weighty affairs that concerns the well-being and good order of the whole Kirks of the realm." But nothing is said as to doctrine. Counsel did not in fact bring to your Lordships' attention any work of recognised authority in the Presbyterian Churches in which it is clearly laid down that the General Assembly possesses this plenary power of legislation over doctrine. And I cannot say that it has been proved to my satisfaction that either by inherent right or by usage or by contract the General Assembly of the Free Church has any such power.

But I think that the learned Judges of the Court of Session relied principally on the provisions of the Barrier Act 1597. The first observation is that that Act is a procedure Act and not an enabling Act. It does not purport to confer any new powers whatever, but it regulates the exercise of such powers as the General Assembly may possess. It is said, however, that the provisions of the Barrier Act contemplate and imply the existence of a power in the General Assembly to make some innovations or alterations in (amongst other things) doctrine. I think this would be true if after the word "existence" you added the words "or the possible exercise by the Assembly." The Act may have been passed for the purpose of preventing a majority from making sudden innovations and alterations which it was expected or feared might be attempted without very carefully weighing what the strict constitutional powers of the Assembly were. But let it be assumed that the language of the Act does imply the existence of some power. Certainly it is not necessarily an unlimited or general power, and the question then is, what is the extent or what are the limits of the power? It has been said that it is a power to legislate in any manner not inconsistent with the continued existence of the Church. But applying that to the case now before us, what, it may be asked, is the Church but an organised association of Christians holding certain doctrines and principles in common. I was at one time disposed to think that a sound limitation might be found if the power were confined to the interpretation of formularies. But further reflection has satisfied me that if your Lordships were so to hold, you would only be making a more or less plausible but wholly unverified assumption. I also think that not only an accepted interpretation of Scripture, but an accepted interpretation of or inference from a subordinate standard may just as well be an article of faith as any other opinion, and there is no solid distinction for this purpose between one religious principle or opinion and another. I do not think, for example, that you advance the argument by calling the Establishment principle a question of polity only. I have come to the conclusion that it would be contrary to all principle to infer from the provisions of the Barrier Act, unsupported by any evidence of usage or other evidence, a power in the General Assembly, or the majority, to vary the trusts upon which this property is held to the prejudice of a dissentient minority. I think the Dean of Faculty was logically right in contending for an unrestricted power of legislation. But if the property was intended to be held in trust for a body of Christians holding such doctrines as the majority, acting through the General Assembly, might from time to time approve, such an intention should be made clear beyond the possibility of question.

Now, what is it that the General Assembly has done? I shall content myself by referring to three documents. In 1867 there was a movement in the Free Church for union with the United Presbyterian Church. In a report of a Committee of the Free Church of that year on union with other Churches there is contained a statement of the United Presbyterian Church Committee under the heading of "Distinctive Articles."—"That it is not competent to the Civil Magistrate to give legislative sanction to any creed in the way of setting up a Civil Establishment of religion, nor is it within his province to provide for the expense of the administrations of religion out of the national resources; that Jesus Christ, as sole King and Head of His Church, has enjoined upon his people to provide for maintaining and extending it by free-will offerings; that this being the ordinance of Christ it excludes State aid for these purposes, and that adherence to it is the true safeguard of the Church's independence. Moreover, though uniformity of opinion with respect to Civil Establishments of religion is not a term of communion in the United Presbyterian Church, yet the views on this subject held and universally acted on are opposed to these institutions." I will only ask your Lordships to contrast this language with the views on this subject expressed by Dr Chalmers, and put forward by the founders of the Free Church in their Manifesto entitled "The Affectionate Representation of the Free Church of Scotland, 1843," to which I have already referred. In fact, the voluntary principle, *i.e.*, the unlawfulness of accept-

ing aid in any form from the State was put forward as one of the most distinctive principles of the United Presbyterian Church in a tract published by authority on the Jubilee of that Church in the year 1897.

By an Act of the General Assembly of the Free Church, dated 30th October 1900, after a recital that a union of the Free Church of Scotland and the United Presbyterian Church of Scotland was in contemplation, and was about to be consummated, it was enacted and ordered (amongst other things) that all property held by trustees for behoof of the Free Church of Scotland should belong to and be held for behoof of the United Free Church of Scotland.

On the following day the Act of Union was passed, and certain declarations were adopted by the United Assembly defining the basis of union; the third of which is as follows:—"As this Union takes place on the footing of maintaining the liberty of judgment and action heretofore recognised in either of the Churches uniting, so in particular is it hereby declared that members of both Churches and also of all Churches which in time past have united with either of them, shall have full right as they see cause to assert and maintain the views of truth and duty which they had liberty to maintain in the said Churches."

In other words the Establishment principle and the doctrine as to the duty of the Civil Magistrate towards the Church which was maintained and firmly held by the founders of the Free Church are henceforth to be open questions for members, ministers, and office bearers, and the property which was placed in trust for the Free Church is henceforth to be held in trust for the maintenance of a Church in the pulpits of which distinctive tenets of the Free Church may or may not be held, and, indeed, doctrines at variance with them, and directly contradictory of the Establishment principle, may lawfully be maintained and taught. The appellants also say that in the constitution of the United Free Church another distinctive principle of the Free Church as declared by the Founders of that Church has been abrogated, viz., the unqualified acceptance of the Westminster Confession. They point to the change in the language of the question relating to the Confession which candidates are required to answer in the United Free Church. They say that this change, accompanied and explained by the declaration contained in the preamble to the Act prescribing these questions, has the effect of substituting for a belief in the whole doctrine of the Confession of Faith belief in such portions thereof only as the General Assembly may from time to time determine to be of the substance of the Reformed Faith, or (in other words) such portions as the Assembly may from time to time approve. This is not a mere question of interpretation of formularies, and I am disposed to think that on this point also the argument of the appellants is well founded. The learned Dean of Faculty rightly said that the substantial question was, whether the United Free Church has preserved its identity with, and is the legitimate successor of the Free Church. I find myself quite unable to answer that question in the affirmative.

The other two cases relate to the trusts of buildings held for particular Free Church congregations on trust-deeds which are in the form of the Model Trust-Deed approved by the General Assembly of the Free Church. The terms of this trust-deed were much relied on by the counsel for the respondents, not only with reference to these congregational trusts, but also on the general question. The trust is that the building shall be enjoyed as a place of religious worship by a congregation of the said body of Christians called the Free Church of Scotland, or of any united body of Christians composed of them, and of such body or bodies of Christians as the Free Church may at any time hereafter associate with themselves under the aforesaid name of the Free Church of Scotland, or under whatever name or designation they may assume. The operative part of the deed is preceded by a long historical narrative, which is interesting and appears to me rightly to define the position and constitution of the Free Church, but it does not appear to me to carry the case further than the facts themselves do. Nor do the terms of the trust seem to affect the general question beyond showing that it was in the contemplation of the parties that the Free Church might unite with some bodies of Christians. With regard to the congregational property, I feel more difficulty. I think the soundest view, however, is to hold that there is a general overriding trust for the purposes of the Free Church, and it was not intended that the majority controlling the Free Church might by subverting the basis of that Church divert the trusts of the congregational property. I think, therefore, that the union here contemplated must be taken to be one with other Churches which might properly be made without detriment to the distinctive tenets of the Free Church. More than one union of that character has, in fact, been made without objection.

For the reasons I have given, I am of opinion that all the three appeals should be allowed.

LORD JAMES OF HEREFORD — In the cases before your Lordships for decision the secular Courts have been appealed to for the purpose of determining differences

that have arisen between two sections of the Church until lately known as the Free Church of Scotland.

The jurisdiction of the Courts, and therefore of your Lordships, to determine such differences proceeds from the fact that property held by trustees upon certain trusts has lately been dealt with, or sought to be dealt with, for the purpose of carrying out a union between the Free Church of Scotland and another body known as the United Presbyterian Church, and the pursuers in the Court below—the appellants before your Lordships—allege that the application of the properties in question to the purposes of the Churches thus united constitutes a breach of the trusts under which the properties are held.

It is obvious that the first step towards the elucidation of the question before your Lordships' House is to determine the nature of the trusts controlling the properties in question.

In order to do so a brief reference to facts, some of which have become historical, is necessary.

Prior to 1843 the Presbyterian Church of Scotland was in existence as the Established Church. But grave questions deeply affecting the minds and opinions of some of its members had come into existence. The Protest of the General Assembly of the Free Church, dated 18th May 1843, complains:—"That the courts of the Church by law established, and the members thereof, are liable to be coerced by the civil courts in the exercise of their spiritual functions, and in particular in the admission to the office of the holy ministry and the constitution of the pastoral relation, and that they are subject to be compelled to intrude ministers on reclaiming congregations in opposition to the fundamental principles of the Church and their views of the word of God—and to the liberties of Christ's people."

On this ground, and apparently on this ground only, a large number of the members of the Established Church seceded from it and formed themselves into a new body under the name of the Free Church. As far as I know the seceding body adhered to all the tenets and views of the Establishment, excepting upon the above question of secular interference with the spiritual affairs of the Church.

Upon the Free Church thus constituted as a whole, and upon certain congregations of it, considerable property has been conferred by different settlers and donors.

The case set up by the pursuers is that these properties are held under certain trusts; that those who conferred the properties upon the Free Church intended that they should be applied for the purposes of that Church as it existed at the time when the transfers of property were made. It is also alleged that the Free Church having united with another body known as the United Presbyterian Church, has so varied its conditions as to cease to retain its original identity. In the Courts below reliance in support of this contention was almost entirely placed upon the argument that a fundamental difference existed between the two Churches in this—that the Free Church acknowledged and asserted the principle of an Established Church, whilst the United Presbyterian Church condemned that principle, and was to the fullest extent a voluntary church, accepting Voluntaryism as a necessary and fundamental article of its faith.

Such being the case presented in the Courts below and at the Bar of your Lordships' House by the pursuers, it is necessary first to determine to what extent the Free Church was based upon the principles of Establishment. But before entering upon such inquiry it is I think worthy of remark that the Church is not a positive defined entity, as would be the case if it were a corporation created by law. It is a body of men united only by the possession of common opinions, and if this community of opinion ceases to exist the foundations of the Church give way. But difference of opinion to produce this result must be in respect of fundamental principles, and not of minor matters of administration or of faith.

The basis of the Established Presbyterian Church was the Westminster Confession of Faith. At the time of the Disruption in 1843 full adhesion to the principles of this important document was declared by the seceders. Article III of Chapter XXIII of the Westminster Confession is as follows:—"The civil magistrate may not assume to himself the administration of the Word and Sacraments or of the power of the Keys of the Kingdom of Heaven; yet he hath authority, and it is his duty, to take order that unity and peace be preserved in the Church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered, and observed. For the better effecting whereof he hath power to call Synods, to be present at them, and to provide that whatsoever is transacted in them be according to the mind of God."

It seems that this article clearly enunciates the principle of an Establishment, and that this principle, as distinguished from its application, has never been repudiated by those who formed the Free Church.

But the opinion of anyone on that point at the present day is of but little importance compared with the views expressed by those who founded that Church. Clear and distinct expression of those views can be found.

In the first place, in the Claim, Declaration, and Protest issued by the General Assembly of the Free Church on May 30, 1842, it is stated:—"Whereas it is an essential doctrine of this Church and a fundamental principle in its constitution as set forth in the Confession of Faith thereof, in accordance with the Word and Law of the Most Holy God, that there is no other Head of the Church but the Lord Jesus Christ (Chapter XXV., section 6), and that while God, the supreme Lord and King of all the world, has ordained Civil Magistrates to be under Him over the people for His own glory and the public good, and to this end hath armed them with the power of the sword (Chapter XXIII., section 1), and while it is the duty of people to pray for Magistrates, to honour their persons, to pay them tribute and other dues, to obey their lawful commands, and to be subject to their authority for conscience' sake, from which ecclesiastical persons are not exempted (Chapter XXIII., section 4), and while the Magistrate hath authority, and it is his duty in the exercise of that power which alone is committed to him, namely, 'the power of the sword' or civil rule as distinct from the 'power of the keys' or spiritual authority expressly denied to him, to take order for the preservation of purity, peace, and unity in the Church, yet 'The Lord Jesus as King and Head of his Church hath therein appointed a government in the hand of Church officers distinct from the Civil Magistrate (Chapter XXX., section 1), which government is ministerial, not lordly, and to be exercised in consonance with the laws of Christ and with the liberties of His people.'"

And again in the same document there appears as follows:—"And whereas this Church, highly valuing as she has ever done her connection on the terms contained in the statutes hereinbefore recited with the State, and her possession of the temporal benefits thereby secured to her for the advantage of the people, must nevertheless, even at the risk and hazard of the loss of that connection and of these public benefits—deeply as she would deplore and deprecate such a result for herself and the nation—persevere in maintaining her liberties as a Church of Christ."

Then in the Protest of May 18, 1843, we read:—"And finally, while firmly asserting the right and duty of the Civil Magistrate to maintain and support an establishment of religion in accordance with God's Word, and reserving to ourselves and successors to strive by all lawful means as opportunity shall in God's good providence be offered, to secure the performance of this duty according to the Scriptures," yet the document proceeds to announce separation.

Again, in the Pastoral Address issued by the General Assembly of the Free Church on the same day, May 30, 1843, it is stated:—"Long was it the peculiar distinction and high glory of the Established Church of Scotland to maintain the sole headship of the Lord Jesus Christ, His exclusive Headship in the Church which is His Kingdom and House, it was ever held by her indeed that the Church and the State being equally ordinances of God, and having certain objects connected with His glory and the social welfare, might and ought to unite in a joint acknowledgment of Christ, and on the employment of the means and reasons belonging to them respectively for the advancement of His cause. But while the Church in this manner might lend her services to the State, and the State give its support to the Church, it was ever held as a fundamental principle that each still remained, and ought under all circumstances to remain, supreme in its own sphere and independent of the other. On the one hand, the Church having received her powers of internal spiritual government directly from her Divine Head, it was held that she must herself at all times exercise the whole of it under a sacred and inviolable responsibility to Him alone, so as to have no power to fetter herself by a connection with the State or otherwise in the exercise of her spiritual functions. And in like manner, in regard to the State the same was held to be true, on the same grounds and to the very same extent, in reference to its secular sovereignty. It was maintained that as the spiritual liberties of the Church bequeathed to her by her Divine Head were entirely beyond the control of the State, so upon the other hand the State held directly and exclusively from God, and was entitled and bound to exercise under its responsibility to Him alone its entire secular sovereignty, including therein whatever it was competent for or binding upon the State to do about sacred things, or in relation to the Church, as, for example, endowing and establishing the Church, and fixing the terms and conditions of that Establishment."

But perhaps the most explicit declaration on the subject of the principle of Establishment is to be found in the words of Dr Chalmers, rendered authoritative by the orders of the General Assembly of May 1843 (these are the words read by my noble and learned friend on the woolsack):—"The Voluntaries mistake us if they conceive us to be Voluntaries. We hold by the duty of government to give of their resources and their means for the maintenance of a gospel ministry in the land; and we pray that their eyes may be opened, so as that they may yet learn how to acquit themselves as the protectors of the Church, and not as its corrupters or its tyrants. We pray that the sin of Uzziah, into which they have fallen, may be for-

given them; and that those days of light and blessedness may speedily arrive when kings shall be the nursing fathers and queens the nursing mothers of our Zion. In a word, we hold that every part and every function of a commonwealth should be leavened with Christianity; and that every functionary, from the highest to the lowest, should, in their respective spheres, do all that lies in them to countenance and uphold it. That is to say, though we quit the Establishment, we go out on the Establishment principle—we quit a vitiated Establishment, but would rejoice in returning to a pure one. To express it otherwise, we are the advocates for a national recognition and a national support of religion, and we are not Voluntaries."

To these declarations of Dr Chalmers I feel great importance should be attached. Apart from the fact that they were issued under the authority of the General Assembly, Dr Chalmers was specially appealing for material support for the Free Church as a seceding body—and I know nothing more likely to influence the generosity of doners than the eloquent appeal of such a man as Dr Chalmers. From him those who gave would seek both guidance and information as to the body upon which their gifts would be conferred.

Then in December 1843 the Assembly of the Free Church, replying to the address from the Congregational Churches of North Wales, said:—"But you misapprehend the nature of the movement we have made in supposing that we have in the least degree altered our views respecting the lawfulness and desirableness of a right connection between Church and State."

That the Establishment principle was adhered to by the Free Church seems to have been accepted in the Courts below. Lord Trayner in his judgment says:—"It is not open to doubt that the Free Church from its constitution in 1843, down at least to its union with the United Presbyterian Church, professed the Establishment principle."

Even the separation from the Established Church was apparently intended to be of a temporary character only, because we find in the Claim and Protest of May 30th 1842 the following statement:—"But that it shall be free to the members of this Church or their successors at any time hereafter when there shall be a chance of obtaining justice to claim the restitution of all such civil rights and privileges and temporal benefits and endowments as for the present they may be compelled to yield up in order to procure to their office-bearers the best exercise of their spiritual government and discipline and to their people the liberties of which respectively it has been attempted so contrary to law and justice to deprive them."

Such being the declarations of the seceders at the time of the Disruption, I can find no departure from such views at any time before the union with the United Presbyterian Church. On the contrary, between the years 1842 and 1900 repeated declarations of adhesion to the principle of Establishment were made on behalf of the Free Church.

I have thus dealt at length with the position accepted by the Free Church in relation to Establishment, and the result seems to be that the seceders of 1843, having belonged to the Established Church, seceded from it, not because it was an Established Church, but because the principle of the Establishment within it had become vitiated. To the principles of Establishment the seceders still fully adhered—and to the Established Church itself they would gladly have returned as soon as there was any discontinuance of the interference with spiritual government which they regarded as vitiating the true principles of Establishment.

It still has to be considered whether the principle was essential and fundamental or a mere matter of policy. It is difficult to define any positive standard between an essential and a non-essential principle. But surely there is a great gulf between the principle of Establishment and that of Voluntaryism. It seems to me, having read the declarations of the General Assembly and the distinct utterances of Dr Chalmers, that scant justice would be done to the eloquent leaders of the secession movement of 1843 if we construed them as treating the Establishment principle as being non-essential or unimportant.

Still more important is it to consider what was the view of the importance of the principle entertained by those donors who, may be, listened to the appeal of Dr Chalmers. Would they have regarded it as non-essential? Would they have endowed a church pledged to Voluntaryism? I think not.

It is a much easier task to gather the views of the United Presbyterian Church on the subject of Establishment. That Church came into existence in the year 1847 by virtue of the union of two Churches which had previously seceded from the Established Church. It is not denied that from first to last the United Presbyterian Church has existed without connection with the State and as a voluntary Church accepting as a fundamental principle that of Voluntaryism. A most emphatic declaration in favour of that principle was made as late as the year 1897 in a Tract, Number XXV., issued by the United Presbyterian Church. Again I quote Lord Trayner's authority in the Court below. He says that it is not open to doubt "that the United Presbyterian Church throughout the whole period of its existence has repudiated the

principle of Establishment and professed instead the principle of Voluntaryism."

Entertaining these different views the Free Church and the United Presbyterians have taken steps, seemingly correct in form, to become united under the name of the United Free Church. And this union is sought by the majority who support it to be imposed on the minority who object to become members of the new United Church, and to take effect upon property held by the Free Church so as to transfer it to the new body—the United Church.

Apparently it was sought to make the Union subject to a reservation, so as to leave an independent and different judgment to members of the two Churches. Clause 3 of the Declaration of the United Assembly is as follows:—"As this Union takes place on the footing of maintaining the liberty of judgment and action heretofore recognised in either of the Churches uniting, so in particular it is hereby declared that members of both Churches, and also of all Churches which in time past have united with either of them, shall have full right as they see cause to assert and maintain the views of truth and duty which they had liberty to maintain in the said Churches."

But this freedom to differ, whilst admitting the differences, does not lessen or remove them. The United Free Church as a whole holds within it neither the principle of Establishment nor of Voluntaryism; such questions were to be open questions. But the man who, as a member of the Free Church, had accepted the views of a Church which claimed Establishment as one of its fundamental principles, may well object when he is told that he shall no longer belong to a Church holding that principle—but that he must, under compulsion, join a Church wherein members of it may think as they will on this broad subject, and must, whether he wishes it or not, be in communion with the supporters of the voluntary system to the same extent as if they had been adherents to the principle of Establishment in accordance with the tenets of the Free Church.

We must recollect that we are dealing with property applied to the use of men in return for services rendered as ministers of the Free Church—to the use of men who have adhered to the tenets of that Church—who have changed nothing, who have varied nothing. From an answer I received from counsel at the Bar I learnt that the refusal of these ministers to become members of this mixed body was treated as a matter of discipline, and so the sentence for thus adhering to an old unaltered faith apparently amounts to deprivation.

That this is so seems to proceed from the effect of the Act of 30th October 1900, whereby it was resolved that the whole property of the Free Church should be transferred to and belong to the United Free Church. The assertion that the dissenting minority by so dissenting ceased to be members of the Free Church, and lost and forfeited all their rights and privileges as members thereof, is to be found at Statement 15 of the defenders' case. The sentence thus imposed upon the ministers who adhered to their old opinions is somewhat Draconic:—"They separated and cut themselves off from the said Church," says the Statement of the defenders, "and by so doing lost and forfeited all their rights and privileges as members thereof. They do not constitute or represent the Free Church of Scotland, and they have no right or title to any property which belonged to the said Free Church of Scotland." They are not members of the United Free Church of Scotland, and they have no right or title to any property belonging to it."

There are one or two subjects that must be referred to. Lord Trayner in his judgment says:—"But *esto* that the Establishment principle had been explicitly declared in 1843 to be an essential principle of the Free Church, I think the Church had the power to abandon that principle, and to that extent alter that principle."

From this view I differ, because, regarding essential as meaning fundamental, I do not think that a Church can change such fundamental principle and yet at the same time preserve its identity. As I understood, it was admitted at the Bar this power of change is restricted so as to keep the Church within the limits of identity. The retention of the name does not preserve identity, and yet the change of principles might be so great as to leave nothing but the name of the Church. I think, too, it was admitted by way of example that if change had introduced the doctrines of the Church of Rome the identity of the Free Church would be lost—and surely this view brings us back to the question whether there has been any change of a fundamental or vital principle of the Church, and to this an answer has been given.

An important document — the Model Trust Deed of November 1844 has also to be dealt with. The respondents naturally rely upon it as showing that at the very time of the secession it was contemplated that the Free Church might unite with other churches. I agree that this is so, for the Deed sets out a trust in favour of the congregations "of the said body of Christians called the Free Church of Scotland, or of any united body of Christians composed of them, and of such other body or bodies of Christians as the said Free Church may at any time hereafter associate with themselves."

Even if the Model Deed contained no such reference to union with other churches

I should regard the power as existing, for I agree with Lord Young when he says in his judgment that "any two or more churches may lawfully unite so as to form one church, and that nothing more is necessary to the union than their own consent, which they are respectively free to give or withhold."

Doubtless that is so in respect of the mere legality of the act of uniting, but different considerations are raised in these suits. We have to deal with the rights of property, with the execution of trusts, and we have to see that the objects the donors had in view are carried out. Such being the case I do not think that the Model Trust Deed gives greater power of union than the Free Church possessed without it. The Church may unite, and so says the Model Deed, but if property is sought to be transferred to the new body, the identity of that new body, that is, the Free Church, after the union must be maintained, and nothing in the Deed gives a power to unite so as to bring into existence a Church incapable of identity with the Free Church. And if this be so, we are recalled to the consideration of the main question argued in this case.

Great stress was laid at the Bar upon the effect of an Act passed in the year 1697, called the Barrier Act. It was argued that this Act conferred legislative powers upon the General Assembly in respect of matters of doctrine or worship, discipline or government within the Church. I cannot agree in this view. The Act is entitled "An Act anent the method of passing Acts of Assembly of general concern to the Church and for preventing of innovations." It is a procedure Act regulating the exercise of the existing powers of the Assembly, but conferring no new jurisdiction and increasing no powers. Doubtless the Assembly had before the passing of the Acts certain powers in respect of the matters referred to—and it was thought desirable to enact that such powers should only be exercised after full notice given. That is all the Barrier Act did. Certainly nothing within it gives any power to alter the identity of the Church.

I have not thought it necessary to enter upon any detailed statement of the law affecting the application of property left in trust for a voluntary body such as the Free Church was. It seems enough to say that sufficient guidance on that subject is to be found in the case of *Craigdallie* v. *Aikman*, the decision in which case supplies principles applicable to the present.

I probably have already conveyed to your Lordships the result I have arrived at. After very earnest consideration of the facts before this House, and of the very able arguments presented at the Bar, I have come to the conclusion that the appellants are entitled to the judgment of your Lordships. That conclusion is founded upon the grounds I have above referred to. I am thus relieved from dealing with the second ground upon which the union of the Churches is attacked, and I am glad that there is no necessity for me to deal with that interesting but difficult problem presented by the alleged difference of doctrine existing in the two Churches.

I am aware that your Lordships' duty is only to give judgment upon the strict issues raised before you—and that that judgment must lie where it falls—but even at the risk of exceeding my duty I venture to express the sincere hope that some way will be found to avoid the capture by either litigants of any spoils of war, and that hope is confident, because I believe that the primary, indeed the only, object of those who have united, and those who have dissented, has been to promote the interests of the Church, and that equally now will it be their care that the Church as a whole and the individual members of it shall in no degree suffer from the events with which your Lordships have had to deal.

Lord Robertson—In the elaborate arguments submitted to the House many questions have been discussed which involved difficult theological and historical inquiries. I have, as in duty bound, carefully considered those various aspects of the controversy, and I have come to the conclusion that the case admits of decision, and ought to be decided, upon grounds much more palpable and certain.

The question is to whom does certain property now belong which was given to the denomination of Christians which called itself the Free Church of Scotland? That body was founded in 1843; it consisted of ministers and laity who seceded from the Established Church of Scotland on certain questions of Church polity, but who professed to carry with them all the doctrine and system of the Established Church, only freeing themselves by secession from what they regarded as intolerable encroachments by the Law Courts upon the Church's spiritual functions. Rightly or wrongly, the theory of the Free Church was that they, and not the Established Church, were the Church of Scotland,

The Church thus set up was endowed by the liberality of its members with the property now in dispute. Two competitors now claim it. Of the respondents, the first remark to be made goes to the very root of their claim. They are not, either in name or composition, the Free Church of Scotland. They are not even the majority of the Free Church, but the assignees of the majority of the Free Church; they are a body formed in 1900 by the fusion of the majority of the Free Church with another body of Presbyterian Dissenters,

the United Presbyterian Church. The property of the Free Church is claimed by this composite body, which, to the extent of a third or some large proportion (for the particulars are not before us and are unimportant), is composed of United Presbyterians. Of this new body it may be affirmed nearly as truly that it is United Presbyterian as that it is Free Church, and its name, the "United Free Church," suggests the fact.

Now I do not attach conclusive importance to the name; but it is important and still more significant. In any view, the change of name and the fact of fusion put it on the respondents to prove their identity with the original beneficiaries. They have to do this, too, not in a question with the heirs-at-law of the founders, but in competition with an existing body of ministers and members of the original Free Church, who have simply stayed where they were, and about whose pedigree there is no dubiety.

For reasons to be afterwards stated, it is not too lightly to be assumed that such unions are within the competency of any majority, however large, even if there existed no essential differences between the uniting bodies. The present, however, is not a case in which (as in some instances which will presently be examined in detail) the Free Church has absorbed smaller Presbyterian bodies holding all her own pristine principles, and has done so without any change of her name or formularies. The United Presbyterian Church treated with and joined the Free Church, not only formally but in fact, on at least equal terms. The two bodies which met to consummate the Union enacted and declared that the Free Church and the United Presbyterian Church "do and shall henceforth constitute one United Church, that the name of the United Church shall be the United Free Church of Scotland, and that its supreme court shall be designated The General Assembly of the United Free Church of Scotland." From these proceedings it resulted that, so far as the respondents were concerned, the Free Church judicatories ceased to exist, their place being taken by Kirk-Sessions, Presbyteries, Synods, and General Assemblies of the new Church, composed in part of gentlemen who were formerly United Presbyterians, and in part of gentlemen who were formerly Free Churchmen.

On the 30th October 1900 the General Assembly of the Free Church made over the whole property of the Free Church to the United Free Church. On the following day—31st October 1900—the General Assembly of the new Church proceeded to set up a new formulary for the admission of their preachers, which had been preconcerted and made matter of treaty. Whereas a probationer of the Free Church used to be required to affirm his belief that "The whole doctrine of 'the Confession of Faith' is 'the truths of God,' the United Free Church probationer requires to affirm his belief in "the doctrine of this Church" (*i.e.*, the United Free Church) "set forth in the Confession of Faith." (The elasticity of "the doctrine of the United Free Church," which is thus made the object of belief, is ascertained by the fact that the various matters of agreement between the Churches with a view to union were declared by the United Assembly to be "accepted and enacted without prejudice to the inherent liberty of the United Church as a church of Christ to determine and regulate its own constitution and laws as duty may require, in dependence on the grace of God, and under the guidance of His Holy Word.") The United Free Church probationer has also to affirm the general principles of the (United Presbyterian) "Basis of Union, 1847," as well as those of the (Free Church) "Claim of Right of 1842" to be principles sanctioned by the Word of God and the subordinate standards of the Church. I do not at present comment on the importance of such changes, but note them as showing that the constitution of the new Church is a new constitution enacted not by the Free Church but by the new and composite body, and adapted to the exigencies of the United Presbyterians.

Another matter of salient importance demands attention. One of the recitals in the Act of General Assembly of the Free Church by which they authorised the Union is that "the Committees of the two Churches having met and communicated to one another the existing doctrinal standards, rules, and methods of the two Churches, it appeared that in regard to doctrine, government, discipline, and worship therein set forth a remarkable and happy agreement obtained between them, and also in particular in the views of the two Churches in respect to the spirituality and freedom of the Church of Christ—her subjection to Him as her only Head and to His word as her supreme standard, and that an Incorporating Union might harmoniously be accomplished." There is no profession of identity, but of an "agreement" having been "obtained," which is described as "remarkable." Now the steps and stages of these long negotiations are before the House, and from these it appears that on this question of Establishment there were in 1863 and in 1867 sharp differences. The tenets of the two bodies are printed in parallel columns in the printed papers, and I am going shortly to refer to them.

Nothing before the House shows or suggests that the United Presbyterians departed by an iota from their own doctrine. On the other hand there is no avowal by

the Free Church that she departed from the position formulated in the parallel columns. What was done was simply to drop the subject and unite.

While such is the name and such the composition of the respondents' body, the position of the other competitor, the appellants, is very much simpler. They are those ministers and laity of the Free Church who did not concur in the Union of 1900, but protested against it; they have done nothing but remain where they were, holding to the letter all the doctrines of the Free Church, adhering to it as an institute, and continuing its existence according to the measure of their powers. They say that in the event which has happened they are the Free Church—their brethren having left them for this new Church — just as those brethren might have left them for the Establishment or for the Episcopalians. They have, however, been declared by the respondents no longer to be of their communion, and their manses and churches have been formally claimed by the respondents for their own exclusive use. The adherents of the appellants are numerically few—some few thousands—but it has not been suggested that this introduces any legal difference from the situation as it would have been had they been more numerous. Since the days of Cyrus it has been held that justice is done by giving people not what fits them but what belongs to them.

Such being, in sketch, the relative positions of the two claimants to this property, it is plain that the respondents can only succeed by making out that it was an inherent quality of that Free Church to which this property was given that it could transform itself in the way that I have described, and oust from the property those who desire to remain where they were in principle, doctrine, and organisation. For let it not be forgotten that the contention of the respondents necessarily involves that the majority is entitled not merely themselves to retain the property, but also (1) to introduce the United Presbyterians as beneficiaries, and (2) to oust the dissentient minority from the benefits of the foundation. This is why I protested at the outset against the too ready acceptance of the doctrine that "union" is competent to a majority.

In considering this contention I steady myself by dwelling on an observation very frequently repeated by the Dean of Faculty in his able speech for the respondents. "This case," said the Dean, "differs from all previous cases in the same region of law in this—this is a gift to a Church," not to a congregation, nor for the promotion of certain doctrines, but to a Church named and designated. I think there is great force in this, but in another way from that intended. This property was given to the Free Church, an existing Church, complete within itself as an ecclesiastical organism and separate from other Churches. This becomes extremely clear when it is remembered that there were already existing, at the moment of the Disruption, the two dissenting Presbyterian bodies which now form this very United Presbyterian Church, and that the incorporation of those two into the United Presbyterian Church took place in 1847, during those early years of the Free Church when this property was being accumulated. Those dissenting bodies were, so far as worship, doctrine, discipline, and government were disclosed in their standards, exactly the same as the Free Church which was set up side by side with them. Accordingly, even if we knew nothing to corroborate the inference which this gives rise to, the broad fact is that the Free Church was set up as an independent Church separate from those with whom the recent Union has now been effected. Therefore, with the Dean of Faculty, I say this property was given to a particular Church, and it is very difficult to see that it will do to end that Church, and then, picking up most of her doctrines, come forward to claim that United Presbyterians and Free Church alike shall share as members of a body which is not even called the Free Church.

When the history of the foundation of the Free Church is more closely examined, we see that it was not fortuitously or from mere love of separation that the Free Church was founded and endowed as a Church separate from the two confluents of the United Presbyterian Church.

Those existing dissenting bodies held opinions about Church government and Church and State which were inherited and carried forward by the United Presbyterian Church; and in 1843 they, as after 1847 their successor, the United Presbyterian Church, were the exponents in Scotland of voluntary principles. By this, as it ought to be unnecessary to say, I mean not merely that in fact they were not endowed by the State, but that they were opposed on principle to the endowment of religion by the State. It is honourable to the United Presbyterian Church that, in good times and in bad, it has never used ambiguous language, or nicely balanced phrases, about this matter, and has never sailed under false colours. All through the negotiations with the Free Church, as before them, it was strenuous and busy in "diffusing a knowledge of the voluntary principles of the Church"; it year by year upheld "the Church's testimony on the proper relations of Church and State, and in favour of religious equality by dis-establishment and disendowment," and "renewed the testimony of 1847, constantly maintained, 'That it is not within the province of Civil Government to provide

for the religious instruction of the subject.'"

In order, once for all, to ascertain precisely the true position of the United Presbyterian Church upon these subjects, it is convenient to read the statement of their distinctive principles made by their committee when negotiating for union with the Free Church in 1867; and the passage has a special value, because in the circumstances it was not likely to contain overstatements on controversial points. It stands out also as a landmark, because it has never to this day been abandoned by the United Presbyterian Church, either before, in, or after their union with the Free Church. Here is what is said:—"That it is not competent to the Civil Magistrate to give legislative sanction to any creed in the way of setting up a civil establishment of religion, nor is it within his province to provide for the expense of the ministrations of religion out of the national resources; that Jesus Christ, as sole King and Head of His Church, has enjoined upon His people to provide for maintaining and extending it by freewill offerings," and so on.

All of this declaration is very clear, but the closing sentence has a special significance in regard to the whole of the present case. On paper the United Presbyterian Church held just the same general doctrines as the other Presbyterian Churches; like them she held the Scriptures to be the only rule of faith; as with them, so with her, the Westminster Confession and Catechism were her confession and catechism. None of her formularies made mention of Voluntaryism, or exacted the profession of that principle from her office-bearers or members. The learned Judges whose decision is now under review would, I suppose, have thought that this fact removed all ground of division between the voluntary bodies and the Free Church bodies in 1843. But the founders of the Free Church were not content with these criteria of the distinctive notes or testimonies of a Church, and they declined to coalesce with Voluntaries, although Voluntaryism was not then, any more than now, a term of communion in those bodies. "The Affectionate Remonstrance of the Free Church of Scotland 1843," is conclusive on this point, and it has a peculiarly direct authority and relevance in the present controversy. It has been called, and I think accurately, "the Prospectus" of the new Church, and it states the grounds and principles on which support was asked for it. Now this manifesto or prospectus discusses this very question of the proper relations of the Free Church to the Dissenters, who now form the United Presbyterian Church. The manifesto seems to anticipate the not unnatural objection to the formation of a new Church, that here were existing orthodox Presbyterian Churches — why not join them? The answer is conclusive — That would be against our principles. And in two very eloquent pages—for the writer was Dr Chalmers—the Establishment principle is urged upon those addressed, in the most peremptory terms, as being still binding on them as "a doctrine or article of faith"—the Voluntaries are warned that they mistook the Free Church if they conceived them to be Voluntaries—and it is emphatically asserted for the Free Church that "though we quit the Establishment we go out on the Establishment principle; we quit a vitiated Establishment, but would rejoice in returning to a pure one."

The same attitude is politely but firmly expressed in the General Assembly's replies to the various bodies of Voluntaries who addressed the Free Church with congratulations at the time of the Disruption. They are all asked not to mistake the Free Church for Voluntaries.

The conclusion which I draw from all this is that it was of the essence of the foundation to which this property belongs that it should be a Church separate from Voluntary Dissenters. On broader grounds, though closely connected, it is difficult to see how the pretensions of the Free Church, such as they were, could have been embodied in anything but a Church of her own. Her theory was that she was, amid right-hand and left-hand defections, the Church of Scotland—the Church of the first and the second Reformations—the burning bush, never consumed. With all Presbyterians this is a noble claim to allegiance; nor was it the less inspiring in 1843 because the Church had been (as she held) unjustly deprived of the benefits of Establishment, and her loyalty to the principle of national religion was proving itself to be of the sort that is true although it be not shone upon.

Now, in dealing with the question before your Lordships' House it is necessary from the outset to bear firmly in mind that the Establishment principle can be held by Churches that in fact are unconnected with the State, and are in fact supported by voluntary contributions alone. I should have thought this the necessary hypothesis of the whole question, as we have to do with a Dissenting Church; but in two passages of the learned Judges' opinions, afterwards to be adverted to, this seems to be forgotten.

Again, the intrinsic importance of any particular doctrine, in relation to the general body of Christian teaching, is no criterion of whether it is or is not an essential or fundamental doctrine in a particular Church, and least of all, in Scotland. It is not its own importance, but the place assigned to it in the foundation of the new Church that has got to be

ascertained. I dwell on this for a moment, and illustrate it from the case in hand. Whether the Establishment principle is or is not a fundamental doctrine of the Free Church is the dispute in this case, but there is no doubt at all that the claim of the Free Church as against the law courts (I put it shortly) is of the essence of her foundation. This question is settled, not because the Judges or your Lordships so appraise that doctrine, in comparison with all the various doctrines of faith and morals set out in the Confession of Faith, but because that was the undoubted ground on which the new Church was set up. Now, I observe in Lord Low's very able judgment, that he makes much of the fact that here were two Churches identical in doctrine, worship, and form of government, and they were working together in the same field, so that their agencies overlapped and their efforts were to some extent wasted. And his Lordship goes on to speak of the duty of unity among Christians.

This is all very true, but then these considerations were full in the view of the founders of the Free Church. This is not a case where the new Church was set up in Scotland to preach the Gospel to people who were not within reach of the common doctrines of Christianity or even of Calvinistic Christianity. In the theory of the founders of the Free Church it was intolerable that their adherents, although agreeing in all other matters, should continue to worship along with those who were content that the Court of Session should force the Presbytery to ordain the patron's presentee, and do all the various things which led to the Disruption. In fact, again, they set up their churches side by side with those of the other Presbyterian bodies who also held exactly the same doctrinal standards. And the evil consequences of having two separate Churches, instead of one, which Lord Low adverts to, being palpable and flagrant, then as now, the just inference seems to be that the founders of the Free Church deemed the difference between themselves and the Voluntaries so vital that the duty of Christian unity must give way to the more imperious duty of Christian fidelity to truth. In the same fashion the older secessions had taken place on questions, not about any of the doctrines of personal religion or of theology, but about Church polity. Questions of polity had, in short, been in Scotland often made the causes of separation between Churches, and in 1843 this unquestionably was again the case. The only question is, was the doctrine of polity on which the Free Church was founded solely what was called spiritual independence or did it not also comprehend the Establishment principle.

I am, of course, not to be understood as speaking in praise of separation, (or of any doctrine on one side or another of this dispute), but no one will understand the present case unless he receives into his mind the possibility of people valuing separation as a safeguard for doctrines which they hold intensely, and as to which they know that the surrounding world is indifferent or hostile. And the error of the respondents seems to me to be that, shutting their eyes to the extremely special and limited *raison d'être* of the Free Church, and contemplating themselves as a Christian Church, they measure the importance of any doctrine in relation to Christianity as a whole and not with reference to their own distinctive origin.

Another fallacy must be guarded against. To prove that spiritual independence is more important than the Establishment principle is only to prove that the latter is in importance subordinate to the former, but it does not entitle us to call the Establishment principle a principle of subordinate importance. The true question, as I view the matter, is whether the two doctrines (spiritual independence and Establishment) have not been made by the founders of the Free Church complementary parts of one doctrine.

The instrument of the highest and most direct authority, as evidencing the position of the Free Church, is the Protest of 1843. It was by Act of Assembly enjoined on the Presbyteries to record this protest together with the Act of Separation and Deed of Demission at the beginning of their Presbytery books, as the ground and warrant of their proceedings. The Protest seems to me, on the face of it, amply to support the Affectionate Remonstrance (already referred to) in the assertion that "we come out on the Establishment principle." The Protest is that it shall be lawful to them, in the circumstances in which they are placed, to withdraw from the existing Establishment (as if this act required defence); but they make this Protest "while firmly asserting the right and duty of the Civil Magistrate to maintain and support an Establishment of religion in accordance with God's Word, and reserving to ourselves and our successors to strive by all lawful means, as opportunity shall in God's Providence be offered, to secure the performance of this duty agreeably to the Scriptures." Your Lordships have doubtless read the document as a whole, and there is nothing in the context which detracts from the significant and solemn emphasis of what I have quoted. They had come to the conclusion that in the circumstances in which they found themselves "a free Assembly of the Church of Scotland as by law established cannot at this time be holden," and therefore, and therefore only, they came out.

The Claim, Declaration, and Protest of 1842 is referred to in the Protest of 1843 as setting forth the true constitution of the Church. Now, Lord Low, admitting that in this document also the Establishment principle is affirmed, remarks that it is "in a parenthetical way." The simple explanation of the form of the sentence and of the lesser saliency of the position assigned to that principle in this paper, is that it is a manifesto from and by an Established Church. The motive of the paper is to protest against interference with the judicatories of that Church. Accordingly, the hypothesis is that Establishment as a principle requires no vindication or assertion; and it in fact only enters the argument when the loss of Establishment is referred to as one of the national dangers impending. But the references in this connection are of unmistakeable import.

The unqualified language of the Protest of 1843, the document which, as we have seen, each Presbytery was to take as the warrant of its proceedings, stands witness therefore of the distinctive principles of the Free Church. I have already spoken of the Affectionate Remonstrance of 1843 as the manifesto on which endowment was invited, and these two historical papers are those which bear most directly on the question, what are the trusts of this foundation.

There are a number of authoritative documents of the General Assembly in following years; and having examined them all, I find them all to bear out the statements made to the public in the Affectionate Remonstrance. The degree of prominence attached to the one or the other of the Church's doctrines of course depends on the occasion of the pronouncement, and it would be unfair to isolate any statement from its motive and context. I shall mention three utterances as instructive in more ways than one, especially as the first of these is founded on by the respondents.

In 1851 (the matter in hand rendering this appropriate) it is spiritual independence that is put into the "parenthesis" and the Establishment principle that is substantively asserted. "While this Church has ever held that she possesses an independent and exclusive jurisdiction or power in all ecclesiastical matters," and so on, "she has at the same time always strenuously advocated the doctrine taught in Holy Scripture that nations and their rulers are bound to own the truth of God and to advance the Kingdom of His Son." The Assembly goes on, in a historical review of Scottish history, to illustrate how this had been done and how it had not been done, the first instances approved being the Statutes establishing the Church in 1567 and 1592. Now in this paper there occurs a passage which has been founded on by the respondents, in which the Assembly says that "it is her being free and not her being established that constitutes the real historical and hereditary identity of the Reformed National Church of Scotland." Of course it is not the fact of her being established that constitutes the identity, or the Free Church claim would be impossible. But I entirely fail to see what this has to say to the principle of Establishment. This argument of the respondents is merely another instance of the recurring fallacy which confuses the fact of a Church being established with the holding by a Church of the Establishment principle.

The "Act VII 1853" is "anent the principles of the Church;" it is short and unequivocal, and it contains an authoritative exposition or gloss of the Claim, Declaration, and Protest of 1842 and the Protest of 1843. It "declares that this Church maintains unaltered and uncompromised the principles set forth in the Claim, Declaration, and Protest of 1842 and the Protest of 1843 relative to the lawfulness and obligation of a scriptural alliance between the Church of Christ and the State." It will be remembered that in the Protest the protestors reserved to themselves and their successors "to strive by all lawful means to secure the performance of the duty of the State to support an Establishment of religion in accordance with God's word." So now the General Assembly goes on to explain that there is not in 1853 any "present call" to take steps in that direction. This, the return to a purified Establishment, was the only "union" ever thought of by the old Free Church.

The only other Act of Assembly of the Free Church to which I need refer is that of 1873, in which, in full view of the United Presbyterians, for the Act relates to the mutual eligibility of their ministers, the Assembly "declare their adherence to the great fundamental principles of this Church regarding, first: The sole and supreme authority of the Lord Jesus Christ" (I need not quote this in full, it is the doctrine of spiritual independence), "and secondly, the prerogative of the Lord Jesus Christ as head over all things to His Church and supreme over nations and their rulers, who are consequently bound collectively and officially as well as individually and personally to own and honour His authority, to further the interests of His holy religion, and to accept the guidance of His word as making known his mind and will." We are now, in 1873, entering the zone of negotiation, and the language is becoming a little general; but the important thing is that the doctrine about the State, whatever it was, is put abreast of the doctrine about spiritual independence, the two being declared "great fundamental principles of the Church." And what the second of these doctrines was in 1843 is not in doubt.

What has now been said relates to authoritative declarations of the Free Church herself; and now a word must be said of her inherited standards. I shall put the argument very low indeed when I say that the Confession of Faith, on the face of it, is consistent with the high place given by the Disruption leaders to the Establishment principle. It is quite certain that

the Confession of Faith is inexorably opposed to the theory of religious equality, which is, as we have seen, to this day avowed by the United Presbyterians who now form part of the respondents' Church. The notion that the State is to stand neutral between good religions and bad, which is what is meant by religious equality, is diametrically opposed to the whole teaching of John Knox. Upon this subject, and on this occasion, I cannot do better than quote from one of the Disruption leaders themselves, the historian of "The Ten Years' Conflict" (1876 edition, pp. 39 and 41 of Vol I.). "Knox," says Dr Robert Buchanan, "and his enlightened and able associates were clear and decided about these two things, first that no State can, without grievous sin, lend its countenance to the Roman Antichrist or to any false religion whatever; and second, that every State is bound to embrace, acknowledge and encourage the true religion." And in another passage he says—"In Scotland, as everywhere else, at the period of the Reformation, the duty of the State to own and uphold the true religion was looked upon as a first principle, which did not require and hardly admitted of discussion." To those who realise the high theocratic views of the sixteenth and seventeenth centuries in Scotland it is easy to understand that the autonomy of God's Church and the duty of the State to support it were but two essential parts of the one great conception of a Christian nation. And this is in truth the clue to the Disruption documents.

On the specific question about the 23rd chapter of the Confession of Faith, I own that I read with some surprise that doubts had been entertained by learned Judges as to the effect of the words that it is the duty of the civil magistrate to "take order that" "the ordinances of God" be "duly settled, administered, and observed." I must still take leave to think that those words do describe what we call Establishment; and I observe that in the Campbeltown case, where these observations were made, the question before the Court was State endowment, which is a different thing.

On all the grounds which I have stated I come to the conclusion that the doctrine of Establishment was one of the distinctive and fundamental doctrines of the Free Church.

I shall now mention one or two points in the judgments in the Court of Session, so far as relating to that question, which demand attention. Lord Trayner, whose judgment is most clear, has stated a very curious objection to the likelihood of the Establishment principle being a fundamental doctrine of a Church. His Lordship finds it "difficult to hold that a mere opinion as to what some third person was bound to do, which he might neglect or refuse to do, and which the Church could not compel him to do, could in any way be an essential part of the constitution of the Church which held that opinion." This difficulty really arises out of the time-honoured personification of the State as the civil magistrate. It would certainly not have been admitted by John Knox, even when Queen Mary represented the civil magistrate. And in these latter days of popular power the civil magistrate sits in every pew and his religious duty may be preached from every pulpit.

Again, Lord Trayner thinks that "the history of the Free Church shows that as a Church, apart from the opinions of individual members it did not regard the Establishment principle as one of its fundamental principles." I pause to observe that I have founded in no instance on the opinion of individual members, but on the collective and official declarations of the Church. Now his Lordship's first point is, "It was from the commencement and down to the date of its Union a Church conducted and maintained in point of fact according to the Voluntary principle. If in theory it was something else, the theory did not square with the fact." This comes to no more than that the Free Church had not in fact State endowment, which is the hypothesis without which no question could rise. His Lordship's next point is that the Free Church not only did nothing to give effect to the Establishment principle, but, on the contrary, devoted much of its time and energy to bring about, if it could, the Disestablishment of the Church of Scotland. Now this agitation took place only in the later and, as the appellants would say, the backsliding days, when union with the Voluntaries also came in view. The important correction to be made is that nothing of this kind took place in times which in any possible view can be looked to as evidencing the principles of the Church set up in 1843, and therefore as fixing the scope of this foundation.

I find in Lord Trayner's judgment an antithesis set up between matter of faith (and sometimes the Latin equivalent is used) and matter of polity. This can only be important if what is matter of polity, as distinguished from matter of faith, cannot be made by a Church one of its distinctive and fundamental doctrines in the sense of this controversy. I have already given my reasons for thinking this untenable, and the distinction therefore inconclusive.

The Lord Justice-Clerk attaches very great, and Lord Trayner great, importance to the decision in the *Campbeltown* case, to which I have already alluded. Now, that decision was that the principle of State endowment was not an essential or fundamental doctrine of a particular congregation in Campbeltown. It was not a Free Church congregation at all, and the question arose before 1843. The Judges thought that its mere adherence to the Confession of Faith did not pledge that congregation to the doctrine of State endowment. But what in my judgment ties the Free Church to the doctrine now in question are acts with which the Campbeltown congregation had nothing to do, and the doctrine is State establishment.

I must add that the grounds upon which the Lord Justice-Clerk comes to the conclusion that the principle of Establishment was in the early days of the Free Church treated as "subordinate" do not seem very cogent. In the first place, he quotes, as proving the doctrine of the "early days," two documents which belong to the later days, 1871 and 1873, and must be read in the light of their dates. But further, to say that in 1843 the "principle" of Establishment was "repudiated" is to ignore the whole theory of the appellants' case and the argument it gives rise to.

Lord Low decided the case on the ground that the Establishment principle was not so essential that the General Assembly could not depart from it. He expresses a cautious and guarded view as to its power to deal with what he deems more essential doctrines. The Lord Justice-Clerk seems to take much the same view, but he rates very high the "legislative" power of the Church. Lord Trayner, however, takes a much bolder position—"*Esto* that the Establishment principle had been explicitly declared in 1843 to be an essential principle of the Free Church, I think the Church had the power to abandon that principle, and to that extent alter the original constitution." Lord Trayner's view was argued at your Lordships' bar with great vigour and confidence.

Before proceeding to consider this argument I ought to point out that the judgment of Lord Young is wholly rested upon the ground, stated in very sweeping terms, that there is nothing to prevent a dissenting Church from abandoning a religious doctrine, however essential and fundamental, and that an *ex facie* absolute property title cannot be limited by reference not expressed to "the essential doctrines and fundamental principles in the constitution of the Church." It is unnecessary to say more of this ground of judgment than that it is in flat contradiction of the decision of your Lordships' House in the case of *Craigdallie*.

The more plausible theory of the respondents is that there are to be found inherent in the Free Church some extremely elastic powers of altering her constitution. Those powers, it is said, were as much a quality of the Free Church when it received the endowments now in dispute as the doctrine of Establishment, and anyone giving to the Church gave on that footing. This must mean, if it has any effect on the present controversy, that such alterations may be made by a majority of the General Assembly with the consent of a majority of Presbyteries. The extent of the powers so claimed is shown by the respondents' counsel having avowed that they held that the Free Church could do away with the Confession of Faith as one of her standards, and Lord Trayner is not prepared to say that the doctrine of the Divinity of Christ does not stand in the same precarious position.

I shall state in advance the answers to this view, and then examine the opinions of the Court in a little more detail.

First, the learned Judges have greatly overrated the "legislative" power of the Church, misled by what I think an erroneous construction of the Barrier Act. Second, putting this legislative power as high as you choose, it is a power affecting the internal affairs of the Church, and has no relation at all, and for historical reasons could not have, to such operations as this Union of 1900. Third, the Lord Justice-Clerk has been completely misinformed as to the tenets of the three dissenting bodies whose unions with the Church of Scotland in 1839 and the Free Church in 1853 and 1876 his Lordship regards as precedents, and this error brings to the ground the argument from actual practice.

The main ground of the respondents' argument is the Barrier Act of 1697. It is an Act of the General Assembly, and Lord Trayner says that it "confers" on the Assembly a certain legislative power. Now if the Barrier Act be examined it will be seen that it does not "confer" or purport to "confer" any legislative power. What it does is, it imposes certain checks on sudden alterations or innovations in doctrine, worship, discipline, or government. The respondents' argument is that this implies that the General Assembly has unlimited power of legislation in the matters named. I do not think this a legitimate deduction. The Act, on the contrary, rather hints that some recent Acts had been of questionable legality, or at least had not commanded "exact obedience." It names doctrine, worship, discipline, and government, not as being the ambit of the Assembly's power, but as the regions of apprehended attack. When all this is read in the light of contemporary history, the motive of the Barrier Act is obvious as a desire to ward off incursions of the Episcopalians. And I do not think that at the very most it comes to more than furnishing some evidence that the General Assembly either had been dealing or might be induced to deal with those high matters. The respondents' argument incidentally called attention to a prior Act of Assembly about innovations, which is instructive in the same direction. For this Act, August 6, 1641, forbids novation in doctrine to be brought in or practised in the Kirk, unless it be first propounded, examined, and allowed in the General Assembly. The inference from this, if the respondents' argument were applied to it, must be that, according to use, novations in doctrine had formerly been brought in by the inferior courts or officers of the Church, and that this was the law.

But on the question of historical fact there is no need to rely on the implications (for they are no more) of one Act of Assembly. Where is the Act, where are the Acts, which evidence the actual exercise of those powers? The respondents' appeal to the Act of 1560, adopting John Knox's Confession of Faith, entirely fails them—it was adopted by the estates, as Mr Taylor Innes very justly observes in a passage

which appears in the first, though not in the second, edition of his admirable work on Creeds. "Nothing," he says, "can be clearer than that the doctrine was not adopted in any way upon the authority of the new-born or Reformed Church; all the forms of free and deliberate voting of the doctrine of truth, as the creed of the Estates, not of the Church, were gone through." Of the other most extreme instances of independent action which were cited, it may be observed that the Book of Discipline was not an alteration of an existing creed, except to the indirect extent to which an added standard usually affects the authority of the old, even if (as here) both old and new were consentaneous; that the adoption of the Covenant was a revolutionary act in a revolutionary time; that the Westminster Confession of Faith, while it was adopted by the General Assembly (with certain qualifications), was the offspring of Parliamentary action, initiated before the General Assembly took it up. Of the two modern instances, the Chapel Act and the Veto Act, the Chapel Act was held by its authors to be so clearly declaratory that it was not sent down to Presbyteries under the Barrier Act, and the whole theory of the Free Church party was that neither Act was an alteration of the constitution of the Church, so much so that the Assembly hesitated before sending the Veto Act to the Presbyteries.

The case of the respondents, therefore, on the Barrier Act does not stand the test of examination, and does not support their theory that in giving to the Free Church the pious founders of the Free Church were knowingly giving to a Church one of whose inherent qualities was that she could alter her essential principles. Neither history nor law make this out.

The House is in a much better position to deal with this question after the rehearing than before it, because of the complete presentation in print of the historical documents relied on. In my own case a very careful study of those papers has largely increased my confidence in rejecting the respondents' argument. I find nothing from beginning to end which supports the theory that the Church of Scotland exercised or claimed the right to alter doctrines which she had asserted to be scriptural. (I am not now, of course, speaking of the doctrine of Establishment, which is in dispute, but of doctrine generally, and more especially of the Confession of Faith.)

Amid the mass of documents the Second Book of Discipline has been confidently relied on by the respondents. Conceding, as I think is their right, that this book was an adopted standard of the Free Church, I fail to discover in it any help in their present trouble. That it stood them in good stead about non-intrusion is certain, but this is not *hujus loci*. What strikes anyone who reads the book through is that it is not, and does not purport to be, a picture of an existing institution, and even as an ideal it is vague. As matter of fact it was promulgated before the system of Presbyterian government had been systematised and set up in Scotland. It is not surprising, therefore, that beyond negativing the theory of Episcopacy it contains no recognisable description of the Scotch Presbyterian Kirk as an ecclesiastical organism, and more particularly it never confronts the question with which your Lordships have to deal, viz., what control has that ecclesiastical organism, even when taken as a whole (and still less when examined in its parts), over her doctrine? The truth is that here, as throughout the case, the respondents mistake the emphatic denial of the right of the State to meddle with those matters for an assertion of the right of the Church to absolute power over her own declared doctrine. The passage mainly relied on (Chapter VII, head 8) proves too much, for it applies to all the four kinds of Assemblies; but on the face of it it deals with ordinances depending for their utility on circumstances of time and place, and this cannot possibly include doctrine. The only hint or reference to the subject of doctrine in relation to a judicatory (in VII, 25) would rather imply that œcumenical councils are the bodies to declare doctrine; but this is not clear, and it is enough to say that the subject now before us is not dealt with in relation to the Scotch Kirk.

One admitted fact, indeed, in what may be called the consuetudinary law or common law of the Established Church and the Free Church, directly negatives this theory of the unrestricted command of the Church over her creeds. The General Assembly itself is made up of Commissioners, and each commission is in writing. By immemorial custom this commission bears that the Commissioners are to repair to the Assembly, "and there to consult, vote, and determine in all matters that come before them, to the Glory of God and the good of the Church according to the Word of God, the Confession of Faith, and agreeably to the constitution of the Church, as they shall be answerable." Now, I must own my inability to see how it would fall within this mandate to do away with, or help do away with, the Confession of Faith as a standard of the Free Church; and I mention this as testing the argument for the unlimited power of the General Assembly under the Barrier Act.

It has, indeed, been attempted to use one remark of Lord Cranworth in *Forbes* v. *Eden* as implying that in all Churches there is a legislative power. The case was that of a specific change in one of the Canons of the Scotch Episcopal Church made by the Synod of that body, and I do not think it was laid down as law that powers of legislation are necessarily inherent in every dissenting body, this being in each case really a question of fact. But Lord Cranworth's remarks make perfectly clear that what he is speaking of is entirely internal regulation, and it is here that the whole argument of the respondents about legislation falls short of the required conclusion.

To revert to the Presbyterian Church of

Scotland. It may be a merit or a demerit, but the original and historical theory of the Reformed Church of Scotland was that within and not outside her pale was truth to be found. Without were Prelatists and Papists. When, later on, some Presbyterians had held aloof from the Revolution settlement, and, still later, others had made the several secessions of the eighteenth century, their attitude and the attitude of their parent Church never raised the question of comprehension, the seceders in more than one instance having been deposed. The single instance which we were referred to in pre-Disruption days of a dissenting body coming back into the Church was the return of the Associate Synod in 1839, and it is enough to say that while the Act of Assembly is called "Act anent Reunion with Seceders," each office-bearer of the Associate Synod was required, before taking his seat as a member of Presbytery, to subscribe the Westminster Confession of Faith and the formula of the Church of Scotland, and this being done they were "received," and were declared to enjoy all the rights and privileges of ordained ministers and elders of the Church of Scotland. In passing, it may be noticed that one of the recitals in the Act is "whereas the members of the Associate Synod do heartily concur with us in holding the great principle of an ecclesiastical establishment and the duty of acknowledging God in our national as well as our individual capacity." The only reservation made by the returning dissenters was "reserving only to themselves the right which the members of the Established Church enjoy, of endeavouring to correct in a lawful manner what may appear to them to be faulty in its constitution and government." If it had been desired to furnish an illustration of a contrast to the Union now in question, it would have been difficult to picture one more complete than is thus supplied by history.

The second case of "union" is that of the Original United Seceders, another of the bodies who held by the Covenanting traditions. They in 1852 had come to be satisfied that "we may, with honour and consistency, drop our position of secession and maintain our principles in communion with the Church of Scotland," *i.e.*, the Free Church. Accordingly they were "received and admitted" by the Free Church "as pastors, congregations, and kirk-sessions of the Free Church of Scotland."

The other case of union took place in 1876, also in the days of the Free Church. It is founded upon by the Lord Justice Clerk in his judgment under a misapprehension which unfortunately enters pretty deeply into his Lordship's judgment. The Lord Justice-Clerk says of the Reformed Presbyterian Church that it "certainly did not hold the Establishment principle;" and for this surprising statement he gives as his reason that since 1689 they declined to become members of the Church of Scotland as established, abode by their objections to the Revolution settlement, and did not "commit" themselves "to an approval of an alliance of the Church with the British State as at present constituted, having in view especially the unscriptural character of its ecclesiastical relations." Now, so far from the Reformed Presbyterians not holding the Establishment principle, they were the ecclesiastical heirs of the Covenanters, who held it passionately, and they represented the extreme right in Presbyterian orthodoxy. But they washed their hands of the Revolution settlement, because the same State which established the Presbyterian Church in Scotland ignored the "second Reformation," and established in England the Prelatical Church, against which woe had never ceased to be denounced by the Church of the second Reformation. Accordingly, the attitude of the Reformed Presbyterians on the Establishment question was exactly analogous to that of the Free Church; holding the Establishment principle, they held aloof from the existing Establishment because, as they held, constituted on wrong terms. The statement of the Lord Justice-Clerk, therefore, can only be supported, if his Lordship means that men do not hold the Establishment principle if they decline to join the Establishment as constituted at the time. And if this be sound, it furnishes (as already pointed out) a very simple end of the present case.

The net result then of the history of these unions is this, and nothing more, that where the General Assembly have been satisfied about Presbyterian bodies that they held the same standards as themselves, and were sound on the Establishment principle, those bodies have been admitted with full honours.

I have hitherto discussed the case relating to the general property of the Free Church, and I have come to the conclusion that the appellants are entitled to prevail. The other action only differs because of the Model Trust-Deed. Of it I have only to say that it is, and was treated in its inception as, a conveyancer's instrument; that its clauses about union seem to me to apply necessarily only to such unions as were competent to the Free Church; and that they are entirely satisfied, and were probably suggested, by such cases as had occurred. It is not in such a deed that you can look for constitutional changes, or for new powers not hitherto possessed.

Regarding the whole of the property now in dispute, I cannot see how, in law or in fairness, a majority of the men who acquired it on the representations made in the Affectionate Remonstrance could have been allowed, say in 1850, to carry off the property to the Voluntaries and come forward, arm in arm with the Voluntaries, and claim it for the fused body. And after all the argument we have heard, I have discovered no reason which makes that fair and lawful in 1900 which would not have been so 50 years earlier.

A serious and weighty argument was

addressed to your Lordships on both sides of the bar, relating to the Confession of Faith. That argument treated of two separate matters, which in my judgment, must be separately considered.

The first is whether the respondents have not deposed the Confession of Faith from its place of authority as a standard of the Church, and whether this of itself does not take them outside the trusts under which the property is held. The second and quite separate question is whether on one specific doctrine, viz., Predestination, the new formulary is not contradictory of the Confession of Faith.

On the former of these questions my judgment is in favour of the appellants. First of all, I put aside any confusion which may arise from the substitution of the Westminster Confession for John Knox's Confession. It is with the Westminster Confession that we have to do, and it seems to me that if anything is certain it is that the Free Church was pledged to the doctrine of the Westminster Confession as her doctrine and the doctrine of her office-bearers. Through all her history, and at every crisis of her history, assuming her identity with the historical Church of Scotland, she proclaimed this on the house-tops, and in the most solemn and deliberate of her testimonies. Freed from State interference in 1843, she proceeded to fasten on herself the old obligations. Of her rights in judicial cases to construe the Confession of Faith there is no need to speak. But that the Confession of Faith is "the truths of God" was solemnly attested to be the personal belief of all who signed it. That this was found to be a hard yoke is credible, and has been asserted. Of the means at the command of the Free Church to alleviate this pressure I do not know. But what she has now done is to substitute a belief in "the doctrine of the Church as expressed in the Confession of Faith," and the general words in the first of the declarations adopted by the United Assembly on 31st October 1900 make it plain that the doctrine of the Church as part of her constitution is intended to be mutable. This places the Confession of Faith in a precarious instead of a stable position, and in my opinion this is an abandonment of an essential characteristic of the Free Church.

Such being my opinion on the more general question as to the Confession of Faith, I deem myself absolved from the necessity of entering on that one of its articles which has been separately discussed, viz., Predestination.

I am of opinion that in both cases the judgments ought to be reversed.

LORD LINDLEY—In the year 1900 the Free Church of Scotland (which the pursuers and appellants claim to represent) and the United Presbyterian Church united and formed the United Free Church of Scotland. Property previously held by trustees in trust for the Free Church was transferred to trustees in trust for the united body, *i.e.*, the United Free Church, and the question raised by the first appeal is whether this transfer of property was or was not a breach of trust and invalid, although sanctioned by the General Assembly of the Free Church and by the great majority of the members thereof. The Court of Session decided this question against the pursuers, and they have appealed to your Lordships' House against this decision.

The second appeal relates to property conveyed to trustees for particular congregations of the Free Church, the trusts of which are fully set out in the Model Trust Deed of 1844, which is one of the most important documents in the case. The question raised by the second appeal is whether the trusts declared by that deed are confined to members of the Free Church represented by the appellants, or whether the trusts are wide enough to include all the members of the United Free Church formed in 1900. The Court of Session decided this question also against the appellants.

Both appeals are really based upon the ground that the union of the two Churches could not be legally effected consistently with the constitutions and standards of the Free Church, and that consequently the transfer of the property of that Church to the United Free Church was a breach of trust and invalid; and that as regards the congregational property the benefits of the trusts of the Model Trust Deed can only be enjoyed by persons professing the doctrines which the appellants contend were the unalterable doctrines of the Free Church.

The whole controversy turns on the powers of the General Assemblies of the Free Church. If they have no power to relax the fetters which the appellants contend bound the Free Church hard and fast from its birth, then these appeals ought to succeed. But if, as the Courts in Scotland have held, the General Assemblies of the Free Church have power to do what they have done, then these appeals must fail. I propose therefore to confine my observations entirely to this one crucial question.

The circumstances which led to the secession of the founders of the Free Church from the Established Church, and the views of the seceders, are fully set out in the Claim, Declaration, and Protest of the 30th May 1842, and in the Protest of the 18th May 1843. These documents and the Model Trust Deed, framed on the basis of these documents in 1844, show that whilst the seceders renounced all the benefits derived by the Established Church from its connection with the State, and shook off so far as they could all interference and control by the State, yet they clung tenaciously to the Holy Scriptures, the Westminster Confession, the two Catechisms, and the Second Book of Discipline, and regarded them as determining and regulating their doctrine, worship, discipline, and government. The government of the Church is declared to be in the hand of the Church officers, which means in the last resort the General Assembly. The powers of this body, as originally established, are to be found in

the Westminster Confession and in the Second Book of Discipline; but the Free Church greatly enlarged these powers in 1843 and 1851, as will be seen presently. The Claim, Declaration, and Protest above referred to treat the immunity of the General Assembly from all State control as a fundamental principle of the Church of Scotland; and the Free Church was formed in order to secure this immunity more completely than the Civil Courts had declared to be possible for members of the existing Established Church. Freedom from all State control in spiritual matters, as understood by Free Church men, is the *raison d'être* of the Free Church. The Address to Her late Majesty (30th May 1842), the Act of Separation and Deed of Demission by Ministers (23rd May 1843), and the Deed of Demission by Elders (30th May 1843) which followed it, all put this as the great object of the whole movement. At the same time the claims of the seceders are declared to be based on the constitution and standards of the Church of Scotland as heretofore understood; and in particular they considered it the duty of the State to promote religion as inculcated in the Westminster Confession and the other standards of the Established Church. By the expression "heretofore understood," I think is meant understood by the Church of Scotland unfettered by legislation and by legal decisions based upon it.

I must now invite your Lordships' attention to the powers of a General Assembly of the Church of Scotland, as declared in the Second Book of Discipline (1578), the Westminster Confession (1643, ratified by Statute 7th June 1690), and the Barrier Act (1697).

The Second Book of Discipline is referred to in the Claim, Declaration, and Protest of 1842 as one of the Church's authorised standards, and in the Act and Declaration of 1851 (which will be hereafter mentioned) as one of her earliest standards. It is a work of great authority. Speaking of Assemblies, it is laid down (Chapter VII, section 8)—"They have power also to abrogate and abolish all statutes and ordinances concerning ecclesiastical matters that are found noisome and unprofitable and agree not with the time, or are abused by the people." This is a very large legislative power exercisable by General Assemblies of the whole Church but not, I should think, by smaller Assemblies, whose functions are more circumscribed.

The Westminster Confession is, next to the Holy Scriptures, the most authoritative document of all for members of the Scotch Church. It is plain from the language of this Confession that its framers laid no claim to infallibility for themselves, and disclaimed infallibility for the Synods and Councils of the Church which should adopt that Confession. But although infallibility is denied them, great power is conferred upon them; for Synods and Councils are to determine controversies of faith and to make rules for public worship and government of the Church. Their power is limited to ecclesiastical as distinguished from civil affairs. It is also declared in the Confession itself that the Holy Scriptures are the foundation of the doctrine contained in the Confession, and are to be the foundation of the doctrines of the Church which adopts it. In all controversies of religion the Church is finally to appeal unto the Holy Scriptures.

Chapters 1 and 31, when read together, appear to me to confer upon Synods or Councils the power of interpreting the Holy Scriptures and the various articles of the Confession when controversies arise as to their meaning; and as infallibility is disclaimed, it follows that an interpretation put by a Synod or Council on Scripture or the Confession is not binding for all time, but may be modified, or even rejected and be replaced by another interpretation adopted by a later Synod or Council, and declared by it to be in its judgment the true meaning of the Scriptures or Confession upon the matter in controversy.

I take it to be clear that there is a condition implied in this as well as in other instruments which create powers, viz., that the powers shall be used *bona fide* for the purposes for which they are conferred. If therefore a Synod or Council, under colour of exercising their authority, were to destroy the Church which they were appointed to preserve, or were to abrogate the doctrines which they were appointed to maintain, their acts would be *ultra vires* and invalid in point of law; and it would be the duty of every court in the United Kingdom so to hold if the question ever involved a controversy as to civil rights and so arose for judicial decision. For all persons who are members of the Church of Scotland its General Assembly is the highest Council of the Church, and it is difficult to limit the powers conferred upon it by the foregoing documents except by an appeal to the implied condition to which I have referred.

I cannot agree with those who contend that the powers of the General Assembly as declared in these documents are unlimited; but I am not able myself to define the limits of its authority more accurately than above stated. It is probably impossible to draw a sharp line clearly dividing all acts of a General Assembly which are within its power from all acts which are beyond it. But it does not follow that it is impossible, or indeed difficult, to decide in the great majority of cases whether a particular act is within its power or beyond it. Great as the powers are they are limited by what can be found in the Scriptures. The Church must be a Christian Church and a Reformed Protestant Church. So far all is plain. I should myself think that it must be a Presbyterian Church. But this question is disputable and happily does not arise.

That very extensive but not accurately defined power both as to doctrine and government are vested in a General Assembly of the Scottish Church is apparent from the Act of Assembly of 1697, commonly called the Barrier Act. Exten-

sive but undefined power is there unmistakeably assumed and recognised; no limit is set to it; but very important machinery is provided for its future exercise to prevent hasty decrees. In that respect the Act is a restrictive Act, for unless the prescribed machinery is adopted, an Act of Assembly cannot become a "binding rule and constitution of the Church." But the restriction only affects procedure: the wide powers of the General Assembly are not curtailed. This Act is in my opinion clearly applicable to the General Assemblies of the Free Church. It was included in what was adopted when that Church was created.

If the case now before this House had to be decided on the documents to which I have already alluded, and without reference to any Acts of Parliament or other Acts of Assembly, I should hesitate long before I came to the conclusion that what the appellants mainly complain of was beyond the power of the General Assembly of the Free Church. Any interpretation of Scripture or of the subordinate standards *bona fide* adopted by a General Assembly, and held by them better to express the doctrine intended to be expressed by the language used in the Confession itself, cannot, in my opinion, be treated as beyond their power, but is well within it.

But there are other documents which have to be considered, and especially the Model Trust-deed, prepared in 1844 under the instructions of the General Assembly of the Free Church and formally approved and adopted by it in 1851. It is therein recited that it was at all times an essential doctrine of the Church of Scotland that it should have a government in the hands of Church officers distinct from the civil magistrate or supreme power of the State, and that this government comprehends "the whole power of the Keys," which expression, I understand, includes those wide powers to which I have already referred in all matters touching the doctrine, worship, discipline, and government of the Church. Then it recites the secession from the Established Church and the formation of "the General Assembly of the Free Church of Scotland" and the claim of the Free Church to all the powers and privileges and the same internal government, jurisdiction, and discipline according to the true and original principles of the Church of Scotland before the separation. The model deed then gives a form of conveyance of property to trustees upon trusts declared at great length, but which may be shortly summarised as trusts for the use as a place for religious worship by members of the Free Church. These trusts clearly contemplate the Union of the Free Church with "other bodies of Christians as the said Free Church of Scotland may at any time hereafter associate with themselves," and provision is made for worship by such united bodies. The fourth trust is very important. It is to the effect that the trustees shall at all times be subject, in the management and control of the trust property, and in all matters and things connected therewith, to the regulation and direction of the General Assembly for the time being of the said body or united body of Christians. Provision is made for the event of a secession from the Church, which will be found in the ninth trust.

These trusts are confined to the congregational property, which is the subject of the second appeal, but no one suggests that as regards the constitution of the Free Church and the powers of the General Assembly there is any difference between one set of members and another. In my opinion the Model Trust-Deed emphasises and makes plain much that is obscure when the subordinate standards alone are looked at, especially when the legislation affecting them is borne in mind.

In the year 1844 trustees were appointed to hold any property which might be bequeathed or conveyed to them for the Free Church, and also such places of worship as might be erected on sites granted to trustees nominated by the General Assembly, and also such other places of worship as persons might wish to convey to them on the terms of the Model Trust-Deed.

I pass on to consider what was done as regards the union of the Free Church with the United Presbyberian Church. Union with other Presbyterian Churches was apparently desired some fifty years ago, but in order to effect union with the United Presbyterians several arrangements of importance had to be made, particularly with reference to the mutual eligibility of the ministers and other officers of the two bodies to Church offices, and to adjustment of the different views held by the two Churches respecting predestination, and respecting their relation to the State, and the duties of the State as regards religion. It took many years to settle these preliminary matters. In 1892 the General Assembly of the Free Church passed "the Declaratory Act anent Confession of Faith," and although a small minority of members protested against it, I am quite unable to discover any valid ground for holding this Act to be one which a General Assembly of the Free Church had no power to pass. It no doubt relaxes the excessive stringency of certain Articles of the Westminster Confession if construed literally, but it imposes no new fetters, and in relaxing the old ones, and so rendering them more acceptable to many earnest Presbyterians desirous of remaining in the Church or becoming members of it, the General Assembly were honestly attempting to preserve the Free Church and its fundamental doctrines, and there is no pretence for saying that they were false to their trust and were endeavouring to destroy any doctrines which it was their duty to preserve.

I can understand that an ordinary member of the Free Church, brought up from childhood to regard the Confession as an inspired document to be construed literally and in the same sense for all time, may think some of the doctrines set forth in

this Act unorthodox, but that is not the question on which this appeal turns. The question is Whether it is competent for the governing body of that Church, *i.e.*, the General Assembly, complying with the conditions of the Barrier Act, to declare that the Confession properly understood does not require absolute uniformity of belief on the matters dealt with by the Declaratory Act? This is the great question at issue between the parties to this appeal, and I have come to the clear opinion that on this question the appellants are wrong, I come to this conclusion after a careful examination of the powers of the General Assembly as contained in the documents before referred to. These powers are in my opinion as fundamental in the constitution of the Free Church of Scotland, and as essential to its preservation, as any of the doctrines in the Confession or other subordinate standards.

The appellants made a great point of the alteration made by this Declaratory Act in the fundamental doctrine of the Free Church respecting the principle of Establishment, by which I understand is meant the duty of the State to promote religion, and especially the Presbyterian religion as set forth in the Westminster Confession, and sanctioned by Parliament as already mentioned. Chap. 23, Art. 3, of the Confession declares what in the view of the Church of Scotland is the duty of the State. Its language is very general, and leaves the State to determine in what manner it will perform such duty. Some, at all events, of the founders of the Free Church attached great importance to this principle of Establishment which was not held by all Scotch Presbyterian Churches. But it does not follow that this principle was to be tenaciously adhered to for all time, and that no future General Assembly should have power to modify or relax it if owing to changes of opinion or other circumstances the General Assembly of the Free Church deliberately came to the conclusion that the preservation and healthy growth of the Free Church required the principle to be reconsidered.

I cannot come to the conclusion that the view taken in 1843 of the duty of the State was a fundamental doctrine admitting of no explanation or modification. Dr Chalmers' address, adopted by the Free Church, shows that he and its then members would have strenuously opposed the change made, but it does not follow that he or they would have denied the power of a future General Assembly to make such change after due deliberation.

As I understand the matter, the Free Church can and does fulfil all her spiritual functions without any State aid, and the attempt to obtain aid from the State, whilst repudiating all State control, has proved a failure. This doctrine as to the duty of the State, whether best described as a political or a religious doctrine, is a doctrine which the General Assembly could, in my opinion, repeal or modify as might be expedient.

In 1900 the Act uniting the two Churches was passed by the Free Church of Scotland after complying with all the conditions of the Barrier Act. The Act was dated the 31st October 1900, and the two Churches were then formed into one under the name of the United Free Church of Scotland, and its supreme governing body was designated the General Assembly of the United Free Church of Scotland. Having regard to the constitution of the Free Church, I cannot agree that this union could only be legally valid if assented to by all the members of the Free Church.

As part of this transaction the property held for the Free Church by its trustees was ordered to be conveyed to a new body of trustees for the United Free Church, and this was done; but a dissentient minority protested.

This transfer is complained of by the pursuers, and is sought to be set aside. But having regard to the trusts on which the property of the Free Church was held, and to the powers of its General Assembly, the pursuers have, in my opinion, completely failed to prove any breach of trust or misapplication of the property of the Church. The United Free Church is the Free Church lawfully enlarged; the individuals entitled to the use and enjoyment of the Church property are lawfully more numerous than before. The pursuers in the first appeal have not been unlawfully excluded from such use and enjoyment. There is no evidence that any person has been deprived of the use and enjoyment of any property held in trust for the Free Church or the United Free Church, or any congregation of either, except a few ministers represented by the appellants in the second appeal, who repudiate the authority of the General Assembly of the Free Church to make the changes complained of, and who by their own conduct have deprived themselves of their right to the benefits of the trusts on which such property is held. Both appeals are based on the erroneous view that the Free Church had no freedom, but that it was bound hard and fast to certain doctrines expressed in language admitting for all time of only one meaning. I am quite unable so to regard it. The struggle for liberty was not so abortive as that.

In the course of the argument many statutes and decisions were referred to. Those which related to conflicts with the Established Church of Scotland are not so important for the present purpose as those which relate to disputes between members of non-established Churches. The decisions relating to the Established Church (viz., the *Auchterarder* case and other Scotch cases referred to in argument) would be all important if your Lordships had to consider the validity of acts done by the General Assembly of the Established Church of Scotland; for that Church is governed not only by the Westminster Confession and Acts of Assembly, but also by statutory enactments which make reform in her doctrines, worship, discipline,

and government difficult if not impossible without legislation. But the Free Church is emancipated from these fetters.

As formed in 1843, the Free Church was purely a voluntary religious association, both Christian and Protestant, and believed by its founders to be divinely instituted, professing doctrines based on the Scriptures and the old subordinate standards, governing itself by certain rules, and providing a representative assembly of its own for explaining its doctrines and for preserving the association by making such change in its worship, discipline, and governmens as might be found expedient after consulting the whole body as required by the Barrier Act. A trust for the Free Church is, in my opinion, a trust for such persons as shall hold the doctrines and submit in ecclesiastical matters to the government and discipline adopted by the founders of the Free Church, with such modifications as may be made from time to time by the General Assembly of that Church, provided the conditions required by the Barrier Act are observed, and provided the Church is preserved as a Reformed Church with Presbyterian Government.

There is no statutory or other law which makes such an association illegal or which compels it to accept the Westminster Confession, whether with or without modification. The founders of the Free Church did accept it, but only subject to the powers which they insisted were vested in the General Assembly of that Church. So long therefore as the General Assembly does not exceed those powers or act contrary to some statutory or other law of Scotland, or commit any breach of trust as above explained, it is not the function of any Civil Court to interfere with it. This I regard as settled by the decision of your Lordships' House in *Craigdallie* v. *Aikman* (1 Dow, 1 and 2 Bligh, 529); *Forbes* v. *Eden* (L.R. 1 Sc. and Div. App, 568); and is in entire accordance with the general law of trusts applicable to such associations as the Free Church (*see A. G.* v. *Pearson*, 3 Mer. 353; *Milligan* v. *Mitchell*, 3 M. and Cr. 72; *Long* v. *Bishop of Cape Town*, 1 Moo. P.C. N.S., at p. 461).

The distinction between an erroneous decision by a body having jurisdiction to deal with a particular subject-matter, and a decision by a body having no jurisdiction over the matter decided, is familiar to all lawyers, and must be steadily borne in mind in this case. In passing the Declaratory Act of 1892 and the Act of Union of 1900, I can discover nothing *ultra vires* or contrary to any law. Still less can I discover anything *ultra vires* or contrary to law in the interpretation put by the General Assembly of the Free Church on some of the Articles in the Westminster Confession, or in the alterations made in the declarations and forms to be made and signed by the ministers and the officers of the Church. It follows that, in my opinion, the transfer of property which is complained of (and which was simply consequential on the Acts of Assembly of 1892 and 1900) was neither *ultra vires* nor contrary to any law, and cannot therefore be successfully impeached.

The foregoing observations apply to both appeals; but the second appeal appears to me to present less difficulty than the first. I regret that any ministers should have been excluded from their offices; but the trusts declared by the Model Trust Deed are clear and explicit, and their validity cannot be questioned by those who have no title to the property to which it applies except under the provisions of that deed. There has been no breach of the trusts declared by the Model Trust Deed.

I might have contented myself with saying that I concurred in the decision of the Court of Session, but the question between the parties is of such great importance, and its solution requires a careful study of so many documents, statutes, and decisions, that I considered I should not be adequately discharging my duty to this House if I did not set forth as clearly as I could the reasons which have induced me to give my voice for the dismissal of both appeals with costs.

LORD ALVERSTONE—Inasmuch as I am differing in a Scotch Appeal from the judgment of the Lord Ordinary, affirmed unanimously by the Second Division of the Court of Session, I think it only right that I should state my reasons for the judgment which I am about to give.

The question raised by these appeals is whether funds invested in the names of trustees, and real property held on trust for the behoof of the Free Church of Scotland, have been dealt with in a way which constitutes a breach of trust. Both classes of property are now being applied, or it is proposed to apply them, for the purposes of the United Free Church, being a body of Christians formed by a union, or attempted union, of a great majority of the ministers and elders of the Free Church of Scotland with the ministers and elders of the United Presbyterian Church of Scotland, and the point to be decided is whether, having regard to the purposes for which the money and property were originally subscribed, given, bequeathed, or conveyed, such application constitutes a breach of trust.

The union, or attempted union, was assented to and approved of by a very large majority of the ministers and elders and congregations of the Free Church; the actual numbers are not material, but as I understand, all, except some 30 of the ministers, approved of the proposed union; but the dissenting minority represent a very considerable body of adherents to congregations of the Free Church who do not approve of, and some of whom have protested against, the proposed union.

The law applicable to funds which have been given for the purpose of a voluntary association such as the Free Church is well settled, and it is not necessary for me to do more than refer to the decision of your Lordships' House in *Craigdallie* v. *Aikman*

to show that such funds, in the absence of express provision, must be applied for the benefit of those who adhere to the original principles of the founders. If the terms of the foundation of the trust provide for the case of schism the Courts will give effect to them, but if there be no such provision the *cestui que trust* are those who adhere to the fundamental principles upon which the association was founded.

The Free Church of Scotland was formed in the year 1843 by what is called "the Disruption," or, in other words, the secession from the Established Church of Scotland of a large body of the ministers of the Established Church, who renounced entirely the pecuniary benefits of their connection with the Establishment in maintenance of a Protest which they had made against the interference by the Civil Courts with rights which they considered to be the rights of the Church.

It is not necessary to trace the history of the Established Church down to 1843, or the history of the various secessions which had taken place before that date, but it is sufficient to say that those who founded the Free Church separated from the Established Church, not upon any question of doctrine, but solely upon the ground which I have just mentioned, and which ground is in no way inconsistent with the principle of Establishment.

The United Presbyterian Church was not then in existence; it was formed in the year 1847 by the union of two Churches which had separated from the Established Church many years before, and were known as the United Associated Synod and the Relief Church.

It is necessary to consider carefully what was the constitution of the Free Church in so far as it throws light upon the question raised for your Lordships' decision, viz., what were the trusts upon which the property in dispute in this action was held?

The first, and in fact the most important, question which arises on this part of the case may be stated as follows. It is maintained by the appellants, and denied by the respondents, that the principle of Church Establishment was adopted as a fundamental or essential principle of the Free Church of Scotland; and that its founders made that principle one of the main grounds for refusing to join other existing voluntary Churches. It cannot, I think, be doubted that this principle was regarded as being fundamental by the founders of the Free Church, and was put forward as one of the main inducements in the appeals for pecuniary aid, in response to which a very large proportion of the funds and property now held in trust for behoof of the Free Church was given. Upon this part of the case I might content myself with adopting the view which is expressed by the Lord Ordinary and by more than one of the Judges of the Court of Session. Lord Low in his judgment expressed himself as follows:—"There is no doubt that the founders of the Free Church, when they left the Established Church in 1843, did so declaring that they adhered to the principle of an Established Church, and that they seceded only because as the law then stood the Church did not possess that independence in what they regarded as matters spiritual which in their view was essential in order to give effect to the cardinal doctrine of the headship of Christ." And later on — "The Establishment principle (to use a convenient short phrase) was one which was regarded as of great importance by the Free Church at the commencement of its history, and naturally so, because in the first place it justified the action of those who had seceded by proclaiming that they were not schismatics, and in the second place the founders of the Church hoped that a change in the law might be effected which would enable them to return to the Establishment."

And Lord Trayner says, in even more emphatic language — "The Free Church, from its constitution in 1843 down at least to its union with the United Presbyterian Church, professed the Establishment principle." And—"It was the feature of the Free Church (prior to the union) which distinguished it from all other presbyterian churches in Scotland that it was the only presbyterian church not connected with the state which professed to hold the Establishment principle."

I am aware their Lordships in other parts of their judgments expressed the view that the principle either cannot be regarded as fundamental or was one from which the General Assembly of the Free Church had power to depart, but I refer to these passages at present only for the purpose of showing that, having regard to the views held by the founders of the Free Church with reference to the Establishment, their union with the two then existing churches, which subsequently united to form the United Presbyterian Church, would not at that date, 1843, have been possible.

In view, however, of the great importance of the question, and inasmuch as opinions have been expressed that the principle of Establishment cannot be regarded as fundamental, I think it right as briefly as possible to examine the question for myself, and to state the reasons which have led me to the conclusion that it was regarded as a fundamental and essential principle of the Free Church at its foundation, for very many years afterwards, and, as I think, down to the time of the union with the United Presbyterian Church in 1900. Reliance was placed by the appellants upon the language of Article III of Chapter XXIII of the Westminster Confession, which is as follows:—"The Civil Magistrate may not assume to himself the administration of the Word and Sacraments or of the power of the Keys of the Kingdom of Heaven; yet he hath authority, and it is his duty, to take order that unity and peace be preserved in the Church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented

or reformed, and all the ordinances of God duly settled, administered, and observed. For the better effecting whereof he hath power to call Synods, to be present at them, and to provide that whatsoever is transacted in them be according to the mind of God."

It was strongly urged by the respondents that that article does not enunciate the principle of Establishment or Endowment. As regards Endowment the observation is probably well founded, but even taking the article by itself, in my opinion it distinctly embodies the principle of Establishment. Whether this be so or not is not very material upon the point of view which I am at present considering; the more important question is, How was it regarded by the founders of the Free Church?

The first important document is that of the 30th May 1842. This was a Claim, Declaration, and Protest made by then Ministers of the Established Church before their secession; it is therefore not to be expected that the references to Establishment would be very distinct, but a passage occurs which has not been quoted and which is in the following words—"And whereas this Church, highly valuing as she has ever done her connection on the terms contained in the statutes hereinbefore recited with the State, and her possession of the temporal benefits thereby secured to her for the advantage of the people, must nevertheless, even at the risk and hazard of the loss of that connection and of these public benefits, deeply as she would deplore and deprecate such a result for herself and the nation, persevere."

This passage of the Declaration which follows, and the concluding words of the Protest, show that even in a document in which a claim was being made by members of an Established Church to spiritual independence they thought it right to point out the importance which the signatories attached to the principle of Establishment. The principle is, moreover, emphatically enunciated in the document entitled "The Protest of the Commissioners to the General Assembly, on the 18th May 1843." This being the first Assembly of the then newly formed Free Church, the words are of such importance that I think it right to quote them—"And finally, while firmly asserting the right and duty of the Civil Magistrate to maintain and support an establishment of religion in accordance with God's Word, and reserving to ourselves and our successors to strive by all lawful means as opportunity shall in God's good providence be offered, to secure the performance of this duty agreeably to the Scriptures and in implement of the statutes of the kingdom of Scotland and the obligations of the Treaty of Union as understood by us and our ancestors, but acknowledging that we do not hold ourselves at liberty to retain the benefits of the Establishment while we cannot comply with the conditions now to be deemed thereto attached."

It is in my opinion significant, and to be borne in mind, that this Protest was one of the first official acts of the Free Church. As far as I know there is no document or evidence which suggests that there was at the time of which I am speaking, viz., the year 1843, any doubt or difference of opinion as to that which was understood by the expression the Establishment principle, but it is sufficient for my purpose to quote two passages from the Pastoral Address of the 30th May 1843, which was embodied in an Act of the Assembly of the Free Church, and to which the ministers were directed to call the attention of their people on the 15th June 1843. These passages from that address state the principle as follows:—"It was ever held by the Established Church indeed that the Church and the State being equally ordinances of God, and having certain common objects connected with His glory and the social welfare, might and ought to unite in a joint acknowledgment of Christ, and in the employment of the means and resources belonging to them respectively for the advancement of His cause."

And later:—"So upon the other hand the State held directly and exclusively from God, and was entitled and bound to exercise under its responsibility to Him alone its entire secular sovereignty, including therein whatever it was competent for or binding upon the State to do about sacred things or in relation to the Church, as, for example, endowing and establishing the Church and fixing the terms and conditions of that establishment."

These passages show clearly what was understood by the founders of the Free Church as the Establishment principle.

I will not quote again the passage from Dr Chalmers' speech in 1843, to which such frequent reference was made, but it is impossible to read it without being satisfied that he at least made the principle of Establishment one of the fundamental principles of the Free Church, and that his view was adopted unanimously by the Assembly on the 20th May, who directed that an account of the proceedings of the previous meeting should be sent to the ministers and friends, which account should contain Dr Chalmers' address as Moderator. It should be noted in passing that the Protest of the 18th May 1843 was directed to be recorded at the commencement of the Presbytery books, and I have not the slightest doubt that those documents to which I have referred were regarded by the ministers and members of the Church as formulating the essential principles upon which the Free Church was founded. It was a time of great excitement, and the attention of the Free Church ministers and their congregations and friends throughout the country would be closely directed to these important documents, and I doubt not that every line would be closely criticised and considered.

There is, moreover, a remarkable confirmation of this view in the language used in reply to the addresses received from other Congregational Churches in other

parts of the kingdom in the year 1843. I need scarcely point out that in replying to such addresses the Elders of the Free Church would have no object in criticising, still less of traversing, any opinions which had been expressed in addresses of a friendly character transmitted to them, and this gives greater force to the language used in reply to such addresses of which I would cite the two passages set out in the documents before us—"But you misapprehend the nature of the movement which we have made in supposing that we have in the least degree altered our views respecting the lawfulness and the desirableness of a right connection between Church and State." "History and experience have convinced us that there is a form of alliance which is at once practicable and agreeable to Scripture and highly beneficial. We have renounced the temporal advantages of the Scottish Ecclesiastical Establishment not in consequence of any alteration in our views on this subject, but because the Civil Courts had violated our constitution, and Parliament, under the guidance of an infatuated Government, had sanctioned that violation."

I pause here to notice an argument strongly urged before us on behalf of the respondents, and which appears to have had weight with the Lord Ordinary and the Judges of the Second Division, viz., that the passages in the documents leading up to the foundation of the Free Church, and in the Preamble to the Act of 1846, to which I shall refer, were parenthetical, and related to the action of third persons, viz., the Civil Magistrates, and not of the Church itself. So far from weakening the force of the Declaration couched in the terms in which it is, the fact, in my opinion, gives it additional weight. The separation was in no way promoted because the dissenting ministers objected to the principle of Establishment; that principle was not attacked by the claims of the Courts against which they had protested, and yet its recognition is considered of such great importance as to receive the prominent notice which I have quoted. Then with reference to the argument that it relates to the action of third parties, also strongly pressed upon us, I am unable to see how such an argument assists the respondents. It seems to me also to give additional weight to the firm assertion of the right and duty of churches to support the State in the performance of its duty towards religion by the medium and through the agency of an Established Church, which assertion the protesting ministers were making.

It seems to me, moreover, that a brief consideration of the Establishment principle as contrasted with the principle of Disestablishment is sufficient to show its fundamental or essential character. The one seeks to enforce the paramount duty of the State in its official capacity, to recognise religion, to maintain and support the Church, the other desires to see all connection between the State and the Church broken down and destroyed, and to prevent the State from exercising any control whatever over the Church in any capacity, and of course from endowing or assisting to maintain a Church, and if, as I shall point out later, the United Presbyterian Church certainly considered any civil Establishment of religion unscriptural and unjust, it is difficult to understand how such a distinction between the views held by two Churches can be regarded as otherwise than fundamental and essential.

Nor does it seem to me that the suggestion made by Lord Trayner that the different view taken on this question by the Free Church and the United Presbyterian is a matter of polity and not as a matter of faith makes any substantial difference. In one sense the questions on which the Free Church separated from the Establishment were not matters of faith, but in my opinion the difference between the Free Church and the United Presbyterian was a difference not on a mere matter of detail, but on a fundamental principle.

For these reasons, I have arrived at the conclusion that the founders of the Free Church regarded the Establishment principle not only as one of the very greatest importance but as fundamental and essential, and at that date union between the Free Church and either of the Churches subsequently forming the United Presbyterian Church would have been out of the question.

If I am right in this view its bearing on the question raised before us is of the greatest importance. It cannot in my opinion be questioned that the documents to which I have referred and the principles which they embody were the documents upon the basis of which the donors of a very large proportion of the trust funds, the application of which is in question in this case, made their gifts and donations, and upon the faith of which also the real property in question was conveyed.

This conclusion leads one to consider whether the history of the Free Church since 1843, and events since that date, support the view that property held for its behoof may without breach of trust be applied for the purposes of a Church which supports the principle of Disestablishment. I pass therefore to consider briefly the history of the Free Church upon this point from 1843 to 1900.

In the year 1846 we find the Church thinking it right to declare that she "firmly maintains the same scriptural principles as to the duties of nations and their rulers in reference to true religion and the Church of Christ for which she has hitherto contended." I regard this as a distinct recognition of the Establishment principle, and as in no way weakened by the words following, which disclaim intolerant or persecuting principles. Five years later—in the year 1851—in a formal Act and Declaration of the Assembly, the principle of Establishment is again recognised as of the highest importance; the words used are:—"Holding firmly to the last, as she holds still, and

through God's grace will ever hold, that it is the duty of civil rulers to recognise the truth of God according to His Word, and to promote and support the kingdom of Christ without assuming any jurisdiction in it or any power over it, and deeply sensible, moreover, of the advantages resulting to the community at large, and especially to its most destitute portions, from the public endowment of pastoral charges among them."

Again, in the year 1853, the Church in emphatic language reaffirms the principle, calling special attention to that of Establishment:—"That this Church maintains unaltered and uncompromised the principles set forth in the Claim, Declaration, and Protest of 1842, and the Protest of 1843, relative to the lawfulness and obligation of a Scriptural alliance between the Church of Christ and the State, and the conditions upon which such an alliance ought to be regulated."

In the year 1864, when the question of union between the Free Church and the United Presbyterian Church was actually under discussion, the committee of the Free Church stated, as one of its distinctive principles, that, as an act of homage to Christ, it is the duty of the Civil Magistrate, when necessary or expedient, to employ the national resources in aid of the Church; and again, in the year 1867, the principle is enunciated in even stronger language:—"As an act of national homage to Christ the Civil Magistrate ought, when necessary and expedient, to afford aid from the national resources to the cause of Christ, provided always that in doing so, while reserving full control over his own gift, he abstain from all authoritative interference in the internal government of the Church."

Later, in the year 1873, when dealing with the question of eligibility of ministers, the General Assembly declared that it adhered to the great fundamental principle of the Church under two heads, the second of which was as follows:—"Secondly, the prerogative of the Lord Jesus Christ as head over all things to his Church, and supreme over nations and their rulers, who are consequently bound collectively and officially as well as individually and personally to own and honour His authority to further the interests of his holy religion."

These passages from the proceedings of the Free Church satisfy me that for a period of 30 years after the Free Church was founded the Establishment principle was regarded as fundamental, and I doubt not that during that period, and in reliance on that principle, a considerable part of the property in question was given and conveyed to trustees for behoof of the Free Church.

It was suggested by the respondents that the union of the Free Church with the Church known as the United Original Seceders in the year 1852, and with the Reformed Presbyterian Church in 1876, afforded arguments in support of the union with the United Presbyterian in the year 1900. I am wholly unable to follow that argument. I do not propose to trace the history of the two Churches with which the Free Church united beyond saying that, as far as I can gather from the papers, the Free Church in uniting with them in no way abandoned or altered any one of the principles which it had professed in the year 1843, but, on the contrary, both the united Churches represented that they were in complete sympathy with the Free Church. As regards the United Original Seceders, it is only necessary to examine the Representation and Appeal made by the Synod of that Church in the year 1852 to see that their union with the Free Church was based upon and only consistent with the view that the Free Church still maintained the Establishment principle. In the case of the Reformed Presbyterian Church the statement in the Act of Union that the United Churches accept the preamble to article xii of the Free Church Assembly, 1846, which I have already cited, proves in my opinion that the maintenance of the Establishment principle was the basis of union between the Free Church and the Reformed Presbyterian.

The action of the Free Church in the years 1892 and 1894, though it must be considered when considering the question of the powers of the General Assembly, has in my opinion very little, if any, bearing upon the point which I am at present discussing. In the first place, these acts were objected to, and I would point out that although the Act of 1892, which is undoubtedly of great importance in connection with the second branch of the case, has no direct bearing upon the question of Establishment; one of the main grounds of objection and protest was that stated in the following terms: "Because under the head which refers to intolerant and persecuting principles which is to take the place of the present preamble to the Formula, all reference to the duties of nations and their rulers to true religion and the Church of Christ as therein set forth is wholly omitted."

It now becomes necessary to consider the position of the United Presbyterian Church in reference to the Establishment principle. The possibility of a union of the Free Church with other bodies of Christians was undoubtedly contemplated by its founders; two such unions have in fact taken place; it becomes therefore of importance to consider whether or not the United Presbyterian Church was a Church with which the Free Church could properly unite, and whether it would be a breach of trust to apply funds held in trust for behoof of the Free Church as originally constituted to the purposes of the united body, now the United Free Church. In my opinion this matter does not admit of serious doubt. I am aware it was argued by the respondents that the United Presbyterian Church between the years 1847 and 1900 might without breach of trust have united with the Establishment, or applied its funds in

aid of Establishment, and it was contended by Mr Haldane that the United Free Church could do so without impropriety. Without referring to all the documents which I think contradict this view, I would call attention to the view held by the United Presbyterian Church as stated in the Report of 1864, which seems to me to be wholly contrary to this view:—"That inasmuch as the Civil Magistrate has no authority in spiritual things, and as the employment of force in such matters is opposed to the spirit and precepts of Christianity, it is not within his province to legislate as to what is true in religion, to prescribe a creed or form of worship to his subjects or to endow the Church from national resources, that Jesus Christ as sole King and Head of His Church has enjoined upon His people to provide for maintaining and extending it by free will offerings, and this being Christ's Ordinance it excludes State aid for these purposes, and that adherence to it is the true safeguard of the Church's independence."

And again in 1867:—"That it is not competent to the civil magistrate to give legislative sanction to any creed in the way of setting up a civil establishment of religion, nor is it within his province to provide for the expense of the ministrations of religion out of the national resources, and Jesus Christ as sole King and Head of His Church has enjoined upon His people to provide for maintaining and extending it by free will offerings, and this being the ordinance of Christ it excludes State aid for these purposes, and that adherence to it is the true safeguard of the Church's independence. Moreover, though uniformity of opinion with respect to civil establishments of religion is not a term of communion in the United Presbyterian Church, yet the views on this subject held and universally acted upon are opposed to these institutions."

Further, I am wholly unable to reconcile this argument with the statement proved in evidence and made on behalf of the United Presbyterian Church. In 1897 a Tract, Number xxv., prepared by the Committee of the United Presbyterian Church on the disestablishment and disendowment of the Established Churches of England and Scotland, was issued by the United Presbyterian Church and sent to all the ministers of the Free and Established Churches. In that Tract not only is it stated that the United Presbyterian Church maintains as one of its most distinctive principles that it is not the province of the State to establish and endow the Christian Church, but that civil establishments of religion are unscriptural and unjust. In the face of these documents it seems to me impossible to adopt the contention of the respondents; but here again I should be justified in relying upon the opinion of their Lordships in the Scotch Court. In the course of his judgment Lord Low said—"On the other hand, it seems to me to be equally certain that the United Presbyterian Church never read the Confession of Faith as laying down that it is the right and duty of the civil magistrate to maintain and support an Established Church. There does not appear to be any material difference between the two Churches upon the point so far as their standards are concerned, but the view of the United Presbyterian Church as a whole has always been that it is not within the province of the civil magistrate to endow the Church out of public funds, and that the Church ought not to accept State aid but ought to be maintained by the free-will offerings of its members." Lord Trayner moreover states in emphatic terms that the United Presbyterian Church had throughout the whole period of its existence repudiated the Establishment principle.

With reference to the attitude of the United Free Church and the possibility of its adopting a different view, the statements in the resolutions of the Assembly of the United Free Church, passed in the years 1901 and 1902, to the effect that the Establishment was objectionable on principle, and recording its testimony in favour of disestablishment of the Established Church of Scotland, which statements were not attempted to be qualified by the counsel for the respondents, are, in my opinion, conclusive against any such contention.

The only argument on this point remaining to be noticed is that which was founded upon the documents agreed to by the Assembly of the Free Church and the Synod of the United Presbyterian Church at the time of Union.

These documents transfer and convey all the property and funds of the Free Church of Scotland to the united body, but it was said that the modified forms of questions formulated by the General Assembly of the United Free Church in the year 1900 were not inconsistent with the principle of Establishment in so far as that was a fundamental principle of the Free Church, and that office-bearers were left free to hold their own individual views on this question.

If I am right in the view which I have endeavoured to express, that the principle of Establishment was regarded by the founders of the Free Church as a fundamental principle of that Church, and was so maintained for a period of more than thirty years after its foundation, the fact that the Free Church of Scotland, in uniting with a Church pledged to disestablishment principles, and regarding civil establishments of religion as unscriptural and unjust, had agreed to treat the matter as an open question, seems to me entirely beside the mark for the purposes of the present discussion. The respondents must justify not only a nominal union but the claim to apply the trust funds to the purpose of the united body, and to dispossess, as they have attempted to do, the Free Church ministers who have declined to join the United Free Church, from the possession of their manses and churches. Unless the respondents can make good their point that the application of the moneys for the

purpose of the united body does not amount to a breach of trust, the fact that they agreed for the purpose of the union not to raise any question cannot afford a justification.

The only remaining point which requires notice upon this part of the case is the argument that the terms of the Model Trust-Deed, which was settled by a Committee of the Free Church and approved by the Assembly in 1844, justifies the transfer of the property to the united body. This argument is based mainly upon the first and fourth trusts and incidentally upon the ninth trust. The object of this trust-deed was undoubtedly to ensure that the property should be held for the purposes of the Free Church as originally constituted. It proceeds upon a general outline of the history of the Established Church, the Disruption, and the subsequent formation of the Free Church. The first trust was in my opinion a provision not unnatural from a conveyancing point of view, that the trust should not cease in the event of the Free Church of Scotland uniting with themselves other bodies of Christians. It would in my judgment be contrary to every rule of law applicable to such a case to hold that it gave the Assembly of the Free Church power by mere union to divert the funds to a body which did not conform to the fundamental principles of the Free Church.

Still less can the respondents rely upon the fourth trust, which was the natural sequence of the recital as to the continuation of the form of Church government by Kirk-Sessions, Presbyteries, Provincial Synods, and General Assemblies, and bestowed upon the General Assembly of the Free Church the same powers as those which had been enjoyed and claimed by the Assembly of the Established Church. The ninth clause not only affords no argument for the respondents, but incidentally supports the contention of the appellants. The majority who consented to the union with the United Presbyterian Church did not purport to carry out the object of the Protest of the 18th May 1843 more faithfully than the appellants, who are the minority. Clause 9 only contemplates an apportionment or division in the event of a section not less than one-third of the whole of the ordained ministers claiming to be carrying out the objects of the Protest more faithfully than the others. In my opinion this accentuates the extreme importauce attached by the Church at its foundation to the Protest of the 18th May 1843, and would make it entirely *ultra vires* of a section of ministers purporting to act under the ninth trust, to disregard the assertion of right and duty therein made, and to claim under this clause to associate itself with a body which was openly promoting Disestablishment.

It is contended by the respondents—and this is really the foundation of the judgment of Lord Young—that the General Assembly had power to legislate in such matters, and to abandon the Establishment principle, even though and notwithstanding that it may have been one of the fundamental principles of the Free Church. This question has a bearing upon the second ground relied upon by the appellants, viz., that the Assembly of the Free Church had departed from the Westminster Confession and the standard of the Church, and had made changes in doctrine inconsistent with the fundamental principles of the Free Church. The powers of the Assembly of the Free Church were, in my opinion, no greater in relation to the fundamental principles upon which that Church was founded than were the powers of the Assembly of the Established Church. If I am right in the view which I have ventured to express, that paragraph 3 of Art. 23 of the Westminster Confession, and the documents to which I have referred as showing the fundamental principles upon which the Free Church was founded, did make—to adopt once more the language of the Act of 1873—the Establishment principle one of the great fundamental principles of the Church, I am wholly at a loss to understand upon what ground it can be said that the Assembly either of the Established Church or of the Free Church had the right to permit its ministers and elders to depart from that principle. I agree that the Barrier Act, upon which so much reliance was placed by the respondents, though it confers no new powers, recognises that the General Assembly possesses some powers of alteration with reference to doctrine, worship, discipline, and government, but they do not, in my opinion, include a power to subvert or destroy fundamental and essential principles of the Church.

I have now to say a few words upon the second point upon which reliance was placed by the appellants, to the effect that the Free Church by its Acts of 1892 and 1894, and the Assembly of the United Free Church by their Acts of October 1900, with reference to the questions and formulæ to be used in the ordination and induction of ministers and office-bearers, have departed from the fundamental principle of the Free Church in the matter of doctrine, and particularly in relation to the doctrine of Predestination and Free Will as set forth in the Westminster Confession.

For reasons which I will briefly state, had this been the only ground upon which exception could be taken to the action of the Assembly of the Free Church, I am not at present satisfied that it has acted in excess of its powers.

I do not wish to express a final opinion, as I do not consider it necessary for the purpose of determining the legal rights of the parties to these appeals, and further consideration might satisfy me that the objection by the appellants that the Assemblies of the Free Church and the United Free Church have released their ministers and office-bearers from adherence to the Westminster Confession, as such, has more weight than I am at present disposed to attach to it. On the other hand,

the argument of the Dean of Faculty and Mr Haldane satisfied me that there are passages in the Westminster Confession and in other standards of the Church which might require such explanation and exposition as would fairly come within the words used in the Barrier Act—"alteration in doctrine." I do not feel myself competent, at any rate upon the information at present before me, to express any final opinion upon such a point, and I do not therefore propose to base my judgment upon the second ground which was urged before us on behalf of the appellants.

It only remains to consider the position of the appellants and their rights as a minority of the ministers and elders of the Free Church representing congregations or portions of congregations who are not prepared to join the United Free Church. It is not contended that they have changed their principles; it is not urged that they have departed from any fundamental or essential principle of the Free Church; it is not alleged that they are not faithfully carrying out the objects of the Protest of the 18th May 1843. The respondents are threatening to attempt to eject them from their churches and manses, and to deprive them of any right to participate in any funds of the Church, simply on the ground that they decline to become members of the United Free Church. The decisions of the Court of Session in *Craigie* v. *Marshall*, and *Couper* v. *Burns*, unless overruled by your Lordships' House, are wholly inconsistent, in my opinion, with any such right on the part of the respondents, and I am unable to support a judgment which would deprive the persons forming a minority of their rights simply upon the grounds that they are unwilling to become members of a body which has not only abandoned a fundamental principle of the Church to which they belong, but supports a principle essentially different from that on which that Church was founded.

For these reasons I am of opinion that the appeal should be allowed.

The LORD CHANCELLOR then moved "That the Order appealed from be reversed, and that the respondents pay to the appellants the costs both here and below." In the action *General Assembly of the Free Church of Scotland and Others and Lord Overtoun and Others*—"The cause to be remitted to the Court of Session to declare in terms of the third and sixth declaratory conclusions of the summons, and for any necessary consequential proceedings." In *Macalister and Others and Young and Others*—"The cause to be remitted to the Court of Session to assoilzie the defenders from the conclusions of the action."

This motion and procedure were agreed to.

Counsel for the Appellants—H. Johnston, K.C. — Salvesen, K.C. — Christie. Agents—Simpson & Marwick, W.S., and Deacon, Gibson, Metcalf, & Marriott, Solicitors, London.

Counsel for the Respondents — Dean of Faculty (Asher, K.C.)—Haldane, K.C. — Guthrie, K.C. — Orr. Agents — Cowan & Dalmahoy, W.S., and Grahames, Currey & Spens, Solicitors, Westminster.

COURT OF SESSION.

Thursday, July 7.

SECOND DIVISION.

[Lord Pearson, Ordinary.

WEST HIGHLAND RAILWAY COMPANY AND ANOTHER *v.* COUNTY COUNCIL OF INVERNESS AND OTHERS.

Railway — Valuation — Statute — Casus omissus in Statute — West Highland Railway Guarantee Act 1896 (59 *and* 60 *Vict. c.* 58), *sec.* 2.

The West Highland Railway Guarantee Act 1896 enacted, section 2—"During the period . . . for which the whole or any part of the interest or dividend guaranteed by this Act shall be payable by the Treasury, the railway shall not be assessed to any local rate at a higher value than that at which the land occupied by the railway would have been assessed if it had remained in the condition in which it was immediately before it was acquired for the purpose of the railway." The Act conferred no power and imposed no duty on the Assessor of Railways or the county assessors to give effect to section 2 in making up the valuation roll. The railway having been valued and assessed in terms of the statutory provisions appropriate to railways in general, while payments were being made by the Treasury under the Guarantee Act—*held* (*aff.* judgment of Lord Pearson) that the West Highland Railway Company was entitled to declarator in terms of section 2 of the Act, and that the valuation which had been entered in the valuation roll was not that on which the company were liable to be assessed for rates, but further (*diss.* Lord Young, *revers.* judgment of Lord Pearson) that the Court had no jurisdiction to ascertain by proof the value at which the railway should be assessed in terms of section 2.

This was an action at the instance of the West Highland Railway Company and the North British Railway Company, the sole workers of the railways of the former company, against the County Councils of the counties of Inverness and Argyll, certain parish councils, the Assessors of Lands and Heritages in the said counties, and the Assessor of Railways in Scotland, concluding for declarator in the following