press him for payment at the end of the three months, but would expect the defender to pay interest on the loan.

On the first hypothesis I think that the defence is irrelevant because it is contradictory of the defender's written obligation, and it is an established rule of pleading that a party cannot avoid his written obligation by merely averring and offering to prove that it was not binding on him. The second alternative amounts to this, that Mr Gibson was willing to give his debtor indulgence. But such an arrangement not reduced to writing, and especially when it is wholly inadequate as to time, is not binding on executors, whose duty is to ingather the estate which they are administering with the least possible delay.

To say that the arrangement was to bind the executors, and that the loan could only be terminated on the defender's initiative, is just another way of saying that the defender was not legally compellable to pay his bill, and for the reason stated I think that this is an inadmissible defence.

I do not think it is necessary to consider the provisions of the Bills of Exchange Act as to the admissibility of parole evidence to prove facts relevant to the defender's liability.

The question may hereafter arise whether it would be open to an obligant to prove a verbal agreement that a bill should be renewable for a definite time or that the debt should subsist for a definite time, the bill being treated as a mere security for its ultimate payment. I offer no opinion on the competency of proving such an agreement qualifying the obligation on the bill. But on the most liberal reading of the enactment it cannot be held to authorise the admission of proof to set aside the bill altogether, which, as I think, is the effect of this defence. I am accordingly of opinion that the Lord Ordinary's interlocutor allowing a proof should be recalled; that the defence should be repelled, and that decree should be granted in favour of the pursuer for the principal sum and interest at the rate of 5 per cent., no higher rate of interest being now asked.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court recalled the interlocutor of the Lord Ordinary, repelled the defences, and granted decree in favour of the pursuers.

Counsel for the Pursuers—Clyde. Agent—Andrew Gordon, Solicitor.

Counsel for the Defender — Anderson. Agent—G. Brown Tweedie, Solicitor.

Thursday, January 30.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

SKERRET *v.* OLIVER AND OTHERS.

Church — United Presbyterian Church — Minister — Sentence of Deprivation — Status — Patrimonial Interest — Restoration—Damages.

Courts of law take no concern with the resolutions of voluntary associations except in so far as they affect civil rights.

An action at the instance of a minister of the United Presbyterian Church, who had been suspended from the ministry and deprived of his charge, concluded (1) for declarator that what was charged against him was not an ecclesiastical offence according to the law of the church, and that this being so, the prosecution was illegal; (2) for reduction, "in case it may be necessary," of the sentence of suspension and deprivation; (3) for interdict against his charge being treated as vacant, and filled up by the appointment of another minister.

At the hearing of the case in the Inner House the pursuer did not insist in the conclusions for declarator or interdict but only in the conclusion for reduction.

Held that the action was irrelevant in respect (1) that the conclusion for reduction was ancillary to the other conclusions of the summons which had been abandoned; and (2) that the reduction of the sentence would not *per se* reinstate the pursuer, or result in the establishment of any patrimonial right, and that no further remedy was asked.

Held (by the Lord Ordinary, Kincairney) that the professional status of a minister of a voluntary church, although giving rise to no legal claim for any stipend or emolument is a patrimonial interest, but that the appropriate remedy for the illegal deprivation of this status is damages as for breach of contract, and not specific performance by restoration.

Process — Church — United Presbyterian Church — Synod — Title to Sue and be Sued.

Held (by the Lord Ordinary, Kincairney, and acquiesced in) that in an action by a minister of the United Presbyterian Church, who had been suspended and deprived of his charge, for restoration of his status and emoluments, it was sufficient to call as defenders (1) the prosecuting members of the presbytery, (2) the members of a commission to whom the decision of the case had been remitted by the Synod, and by whom the sentence against the pursuer had been pronounced, and (3) the Synod as represented by its office-bearers.

This was an action at the instance of the Reverend Joseph Skerret, designed in

the summons as minister of the United Presbyterian Church, Cathedral Square, Glasgow, against the Reverend Dr Oliver, moderator of the United Presbyterian Church, and other officebearers of the Synod as representing the Synod, and others (see *infra*). The summons concluded (1) for declarator that "the defenders were not entitled by virtue of the rules of the United Presbyterian Church to suspend the pursuer from his office of minister of the United Presbyterian Church, Cathedral Square, Glasgow, or from the status or emoluments of the said office," by reason of their finding proved a certain charge against the defender; (2) for declarator that the libelling of the pursuer in respect of this charge, with a view to depriving him of his office, was contrary to the laws of the association; (3) "and in case it may be necessary, for reduction of a judgment or suspension" passed by certain of the defenders "suspending the pursuer from his office as minister of the said church *sine die*, dissolving his connection with the congregation of Cathedral Square, and declaring the charge vacant;" (4) for interdict against the defenders filling up the pursuer's office.

On 19th January 1895 the Lord Ordinary (KINCAIRNEY) repelled the defences against satisfying production.

The averments and pleas of the parties appear from the note to this interlocutor, which was as follows:— . . . "There is no conclusion for damages or other petitory conclusion. The only redress asked is restoration of status, with its 'emoluments.' It would have been convenient to consider the declaratory conclusions first; but the defenders have thought fit to lodge preliminary defences applicable to the reductive conclusions, and that step, according to our forms of process, necessitates the consideration, in the first place, of the conclusions of reduction, with the preliminary defences against satisfying production. It is now customary in practice to dispense with a preliminary defence in reductions, as, generally speaking, a merely formal and superfluous step of procedure, and to give in defences applicable to the whole cause, under reservation of right to maintain the pleas that purport to exclude consideration of the merits. That practice tends certainly to simplify and shorten procedure, and does not seem attended with inconvenience; and I think it to be regretted that the defenders could not see their way to adopt it. I think that all substantial objections to it might have been overcome by adequate reservation. They have, however, adopted the course of pleading which was followed in the well-known case of *M'Millan* v. *The Free Church of Scotland*, 22 D. 290, 23 D. 1314, 24 D. 1282, 2 Macph. 1444, and which occasioned in that case so much unnecessary and regrettable delay and expense. The defenders were, however, in their right in lodging preliminary defences against satisfying the production, and the only question now to be decided—a question of form not of substance—is whether they shall be ordained to produce the sentence pronounced on 24th May.

The proceedings complained of are narrated by the pursuer as follows:—"He says that a libel was served on him by certain members of the Glasgow Presbytery of the United Presbyterian Church, appointed by the Presbytery to prosecute. The libel is certainly a remarkable document; but it is not necessary to quote it at length, and I do not think it my duty to criticise it minutely. It sets forth in the major proposition that by the word of God and the laws of the Church, the holding of private meetings by a married man with a young woman, especially under certain circumstances particularised, is culpably and censurably imprudent, and gives occasion for scandal, brings reproach on religion, and is fitted to destroy the usefulness of a minister who so acts; and it proceeds to charge the pursuer with having been 'guilty of the said offence,' in so far as on three several occasions, at the places and under the circumstances stated, he held private meetings with a young woman, a member of his congregation. The offence charged is not crime or immorality, but culpable and censurable imprudence. The pursuer states that he objected to the relevancy of this libel, but that his objection was overruled; and after a proof, the Presbytery, on 26th April, found the whole counts proved. It is not stated that the Presbytery followed up their finding by any sentence.

"The pursuer then appealed to the Synod. He avers that on 10th May 1894 the Synod took up the appeal, but that, instead of disposing of it, they delegated their powers to a commission consisting of certain of their members, with power to dispose finally of the appeal; that the commission on 24th May found the first count of the libel not proved, and the second and third proved, and pronounced the sentence now complained of. It is said that they did this without hearing the pursuer, and that some of the members of the commission had not been present when the pursuer was heard before the Synod. The pursuer, however, does not aver that he asked to be heard before the commission. He avers certain other irregularities of procedure of less importance.

"The pursuer's record is by no means satisfactory. His pleas are merely general, and it is not easy to gather, either from the condescendence or pleas, the precise points of his complaint. But I think he may be held to formulate these four objections — (1) That the libel was irrelevant, because the behaviour which it charged constituted no offence under the constitution of the Church, and was, in truth, absolutely innocent; (2) that the averments, though proved, inferred no offence whatever, and warranted no punishment; (3) that the remit to a commission was unauthorised and incompetent, and that the commission had no power to deal with the case or to pronounce the sentence—in short, that the tribunal by which he was sentenced was not a court or authorised

tribunal of the Church; and (4) that the commission dealt with the cause illegally and unfairly in the particulars specified.

"The pursuer avers that this sentence was in breach of the contract between him and the Church, and that he had been thereby deprived of his livelihood, and had sustained serious damage in his profession, feelings, and reputation, for which he reserved all claims. In an earlier part of his record he avers that by the call from the congregation of the church in Cathedral Square and his induction, the United Presbyterian Church became bound to confer upon him the status of a minister of that association, and through the congregation 'to supply him with suitable maintenance, . . . and to maintain him in the enjoyment of the said status and the emoluments thereof.' He makes no other statement about these emoluments.

"The Court appears to be in possession of the contract to which the pursuer appeals. He avers that it is contained in certain documents printed in Nos. 7 and 9 of process, and the defenders do not object to the appeal to these documents. I shall assume that the contractual relations between the pursuer and the Church or association and its tribunals are contained in these documents.

"In their statement of facts the defenders pitch their defence somewhat high, and arrogate for their Church a spiritual character and Divine authority which exempts them in questions regarding their order and government from the control of law and courts of law; and they aver that 'the civil magistrate is forbidden by Divine authority to interfere with congregations or Church Courts in the management of their ecclesiastical affairs, whether of doctrine, worship, or government.'

"At the debate, however, these transcendental topics were not alluded to, and it was conceded on both sides that the case raised nothing but a question as to the contractual relations between the pursuer and the United Presbyterian Church, and depended on principles of law applicable to contracts. It was treated as now settled that the case must be considered on the footing that the tribunals of this Church were not, strictly speaking, courts of law, and that they possessed no authority which could be correctly described as jurisdiction, and no authority over the pursuer, except what was conferred by the constitution of the Church and the voluntary adhesion of the pursuer thereto.

"This view of the nature of the constitution of the Church and of the relation of the parties, of course, limits the grounds of defence. It excludes the defence that the sentence is unchallengeable as the judgment of a supreme court or of a spiritual court. But it limits also the grounds of attack, because it is nothing to the purpose to say that the tribunal which pronounced the sentence committed an error of judgment, however extravagant. The judgment cannot be reviewed, for the reason—if for no other—that it is not the judgment of a court, and cannot be impeached to any extent, unless to the extent to which it amounts to a breach of contract.

"Reverting for a moment to the grounds of this action, I do not know that it is disputed that among the offences of the office-bearers of the Church, of which the tribunals of the Church have cognisance, must needs be offences which amount to no more than acts of imprudence; they must be entitled to safeguard the reputation of the office-bearers of the Church, and in particular of the ordained ministers of the Church. If so, it must belong to these tribunals to judge whether any particular line of conduct be imprudent or no, and if a line of conduct be considered imprudent, *prima facie* it would seem to be for the tribunal to mete out the appropriate punishment. The libel is not happily expressed—very much the reverse—and it may be that a rigorous and technical criticism might give it the appearance of sheer absurdity. Still, it is at least debateable that it was for the tribunal to determine with what latitude it should be read, and whether it fairly indicated — if it did not skilfully express—culpable imprudence.

"Again, it at first sight appears that suspension from the office of minister of his church was a very harsh punishment on the pursuer for conduct of which no more could be predicated than imprudence. But while that consideration may induce sympathy for him, can it entitle this Court to say that that punishment exceeded the powers of the tribunal—if the commission was a tribunal of the Church at all—and on that account was a breach of contract?

"Again, when the pursuer's averments as to the irregularities of the procedure by the commission are examined, a first impression suggests that they fall very far short of such irregularities as would warrant the interference of the Court.

"I do not think it out of place to indicate my present impressions on these points, although I do not mean to express any final judgment about them, because, in truth, it is not the pursuer's grounds of challenge that I have to decide on, but the defenders' pleas, by which they seek to exclude consideration of all grounds of challenge. I think it worth while to indicate that it appears to me that the pursuer's most formidable ground of challenge is his assertion that the commission by which he was sentenced was not really a tribunal of the Church which had, by his adherence to the constitution, any authority over him. I have formed the opinion that this ground of challenge must be considered, and therefore, in further consideration of the case, I leave out of view all the pursuer's grounds of challenge except that one.

"With regard to that ground of challenge I have to observe that I have not been able to find in the rules and regulations of the Church any clear authority for the delegation by the Synod to a selected number of their members, of the power and duty of reviewing the judgment of the presbytery, and of pronouncing sentence on the pursuer. I have been referred to two clauses only.

"The one is in cap. 5, sec. 4, par. 10, and is quoted by the pursuer on record. It is—'When the cause comes before the superior court, the court may, if it see fit, send it to a committee, which shall travel in the cause and prepare a deliverance which it shall recommend the court to adopt.'

"Under this clause the power to be given to a committee is not a power to decide, but only to report, and the deliverance, whatever it might be, would be a deliverance of the superior court and not of the commission. The defenders did not maintain that that authorised the sentence on the pursuer.

"The other clause was referred to by the defenders. It is in cap. 6, sec. 4, par. 31, and is thus expressed—'In special circumstances the Synod may originate proceedings against an office-bearer, and may either itself conduct the case to a termination or remit it to the presbytery or to a commission of its own members.'

"The pursuer argued that that clause is equally inapplicable, because it is confined to proceedings originating with the Synod, while the proceedings against him originated with the Presbytery.

"But the defenders have averred that the appointment of and remit to the commission was in accordance with the practice of the Church, and was consented to by the pursuer, and I do not question the relevancy of these averments, all the less because this case raises no question about the jurisdiction of the tribunal which pronounced judgment, but only about the consent of the pursuer to submit to it, and that might be evidenced by his acts as well as by the constitution of the Church.

"The defenders point out that there is no conclusion to reduce the remit, but I am not satisfied that that was necessary.

"Indeed, I am not satisfied as at present advised that it may not appear in the end that no reduction is absolutely necessary.

"I turn now to the defender's pleas, by which they seek to exclude the case from the consideration of the Court. These pleas, which are numerous, seem to cover the whole defence, but only some of them are applicable at the present preliminary stage. Unless I have misunderstood the clear and able argument for the defenders, I think their positions may be summarised as follows:—

"They maintained that the defences against satisfying the production should be sustained, and that the conclusions for reduction should *de plano* be dismissed (1) because all parties were not called; (2) because the action did not submit to the Court any question of civil right, seeing that the sentence sought to be reduced was an ecclesiastical act by a court of the Church within its own sphere, and no damages were claimed and no patrimonial interest was involved; (3) because the Court was not competent to grant the only redress demanded, viz., restoration of status; and (4) because recourse to the Civil Courts was excluded by the contract.

"These are not the usual pleas in defences against satisfying the production. They do not involve an objection to title. Yet I think they are such defences as may be entertained at this stage, an opinion which seems warranted by the case of *Ramsay* v. *Bruce*, 30th November 1849, 12 D. 243, quoted by the defenders. I shall therefore proceed to consider these pleas as defences against satisfying the production.

"I. I am not prepared at this stage to sustain the plea that all parties are not called. A very large number of defenders are called, somewhat indiscriminately, and there may be some of these who need not have been called. It appears to me that the only necessary contradictors at that stage are (1) the prosecuting members of the Presbytery of Glasgow; (2) the members of the commission by whom the sentence complained of was pronounced; and (3) the Synod. There is no doubt that the prosecuting members of the Presbytery are among the defenders called; and I did not understand it to be disputed that the members of the commission are called, at least no member of the commission was named who is not called. But the defenders maintained that the Synod is not called effectually or competently, and that the Church and the Presbytery of Glasgow ought to have been called and are not duly called.

"I agree that the United Presbyterian Church has not been duly called. I think that this sufficiently appears from the judgment of Lord Jerviswoode in the third case of *M'Millan* v. *The Free Church*, 20th July 1864, 2 Macph. 1444, which appears also to show that it is not possible to convene such a body. But if it be impossible to call it, it cannot be necessary to do so; and I see no reason to think that the pursuer was bound to call the United Presbyterian Church. It acts and is, I think, represented by its duly appointed tribunals and administrative and executive bodies.

"I am not prepared to dismiss the reductive conclusions at this stage on the plea that the Presbytery of Glasgow has not been duly called. The Presbytery is not at this stage the proper contradictor. The Presbytery did not pronounce the sentence sought to be reduced, has no control over it, and cannot produce it. It is fitting that the Presbytery should be called for its interest; but I think that in that view it is sufficiently represented by those who are called, and I do not know any authority for the proposition that when a presbytery is to be called for its interest it is necessary to call all its members—see *Clark* v. *Stirling*, 14th January 1839, 1 D. 955; Mackay's Practice, 1st ed., vol. i. 326. The moderator, clerk, and treasurer are called, and I think they may at this stage be held as sufficiently representing the Presbytery. It is true that they are not said to represent the Presbytery in their official capacity, but only as members; but I think it is dealing too strictly in a formal question of this kind to hold that they are not called as representing the Presbytery officially. A large number of members of the Presbytery are also called—I understand not the whole of them—but I think that at present the Presbytery may be held to have been ade-

quately apprised of the action and invited to appear for its interests if that were thought proper.

"The defender's principal point under this plea was that the Synod was not called. I agree that the Synod is the proper, perhaps the only essential defender—at least the only defender in a position to satisfy production. But I have come to be of opinion that the Synod has been sufficiently called. The moderator, the clerks, the treasurer, and the agents have been called as representing the Synod, and I think that the Synod may be called by calling its office-bearers as its representatives. In that manner the General Assembly of the Established Church sues and is sued—*Cruickshank* v. *Gordon*, 10th March 1843, 5 D. 909. I do not see any good reason for refusing to apply the same rule to the Synod of the United Presbyterian Church. The Synod of the United Presbyterian Church is not, it is true, a legal *persona*, but it is a body consisting of definable individuals. It is not in all points similar to the General Assemblies of the Established and Free Churches, which are ephemeral bodies and fluctuating in their membership. I understand that the Synod is a permanent body, and although not in permanent session, capable of being convened whenever necessary for special business.—(Forms of Procedure, sec. 23.) It consists (see Forms of Procedure, cap. 3, sec. 1) 'of all the ministers on the roll of presbyteries, the elders commissioned by sessions, and missionaries when at home who have been ordained under the formula of the home Church.' Thus its clerical members are not representative, and cannot vary very much from time to time, although it is possible that the lay element may fluctuate. Most of its members, at all events its clerical members, may be readily known, but some of the members may be difficult of ascertainment.

"I do not know the number of the members of the Synod, but the defenders aver that they were upwards of 1200. Now, it would be manifestly a cumbrous, difficult, and expensive process, besides being absolutely useless in a case like this, to call each member of that large body, and there are some members whom it might not be easy to ascertain; and I think that where the members of a voluntary association are very numerous, and especially where there may be difficulty in ascertaining the whole of them, a relaxation of the general rule, which requires that all the members be called, has been sanctioned; and it would be very unreasonable, inexpedient, and unjust if it were not so. There may be a necessity for calling all the members of such an association in an action of damages, but not in an action like this. *The General Assembly of the General Baptist Churches* v. *Taylor*, 17th June 1841, 3 D. 1030; *Somerville* v. *Rowbotham*, 27th June 1862, 24 D. 1187; and *Renton Football Club* v. *M'Dougal*, 13th March 1891, 18 R. 670, are cases in which strict adherence to the ordinary rule was not required.

"The defenders maintained that the point had been decided in their favour by Lord Jerviswoode in the case of *M'Millan* already referred to. But that is not so, for that judgment related to the calling of the Free Church, and not of the General Assembly of that Church, and the reasons in the Lord Ordinary's note do not apply to this case. In *Aitken* v. *Harper*, 16th November 1865, 4 Macph. 36, an action against the Moderator, Clerk, and House Committee of the United Presbyterian Synod, as such and as individuals, concluding that they should pay an assessment, was dismissed, because they were not called as representing the Synod, which was held to be liable for the assessment. There are observations in the opinion of Lord Neaves which are apparently to the effect that these officials could not represent or bind the Synod in an action for money. These observations appear to have been *obiter dicta*, and are not directed against the competency of a device for avoiding the great inconvenience of calling all the members, by calling the officials of the Synod, in an action like the present, not concluding for payment of money.

"In the final advising of *M'Millan* v. *The Free Church*, the Lord President expressed the opinion that it was not competent to convene the General Assembly of the Free Church in an action of damages, but he does not say—nor do I think he implies—that the General Assembly could not be called in an action of declarator or reduction. I think that the fair implication of the latter part of his judgment is the reverse. Lord Curriehill does not adopt that ground of judgment, and Lord Deas dissents from it. It may be that if this had been an action of damages the Synod could not have been convened by calling its officials, but not being so, I am of opinion—following, as I think, the cases to which I have referred—that the action should not be thrown out at this stage in respect of defective instance.

"II. I have always felt the defender's second point the most formidable. I hold that it has been decided that an action against an ecclesiastical body, concluding for reduction of a sentence of suspension or deposition, with an averment of consequent pecuniary loss, and a conclusion for damages, may be entertained by the Court, and that redress might be given in such an action by reduction of the sentence and damages. I hold that so much was decided by the first and second advisings in *M'Millan* v. *The Free Church*, 23rd December 1859, 22 D. 219, and 19th July 1861, 23 D. 314. That is the purport of the opinions of all the Judges, and none of them expressed any change of opinion in the final advising. These judgments do not, however, decide that the reduction of these sentences would do anything but clear the way for the claim of damages.

"But then this case differs from the case of *M'Millan* inasmuch as there is here no claim of damages; and it was very plausibly urged that the final judgment of *M'Millan* is a conclusive authority in favour of the defenders, because when it was discovered

that the claim of damages could receive no effect, then the case of *M'Millan* became the same as this case, and then the whole action was at that stage dismissed. But while this argument is of weight, I am unable to regard that judgment as conclusive of this question. For the Judges in the majority, the Lord President and Lord Curriehill, did not treat the conclusions of reduction separately, nor regard them as independent, but treated them as merely ancillary to and dependent on the conclusions for damages. Lord Deas, holding that the conclusions for reduction were not necessarily merely ancillary to the conclusions for damages, dissented, and was of opinion that there ought to be inquiry. I am disposed to think that that judgment leaves this question, — viz., Whether the conclusions of reduction can be entertained without a conclusion for damages?—undecided.

"Further, the defenders maintained that this case differed from that of *M'Millan* in this also, that Mr M'Millan alleged, and indeed certainly suffered, a pecuniary loss by the sentence inflicted, and that here there was no pecuniary loss. In support of this last assertion, it was stated that the pursuer had no manse, which was admitted; and also that he had no right to stipend. In proof of this latter statement, the defenders referred to Rule IV., 9, 6, which provides that a minister shall have no right to prosecute for stipend in the Civil Courts, 'it being a principle recognised in the Church that the high and sacred claim which Christ has given ministers on the consciences of their people for a suitable maintenance is a security perfectly adequate, and excludes any appeal to a Civil Court for enforcement.'

"The pursuer has averred that the Church had, through his call and induction, become bound to supply him with suitable maintenance.

"The form of the call is given in the Rules at pp. 131-2, and it bears that the congregation promised 'to contribute to your suitable maintenance as God may prosper us.' There are also in the Rules provisions as to the manner in which insufficient stipends are to be augmented (p. 108), and also as to the provision of annuities for aged ministers.

"I suppose that the pursuer's call was in the usual terms, and it might be a question whether it conferred on him an enforceable right to a stipend.

"The defenders referred to the case of *Arneil* v. *Robertson*, 6th July 1841, 3 D. 1150, 9th June 1843, 5 D. 400, as deciding that it did not. But that case was decided by the verdict of a jury after an inquiry into the practice of a different voluntary association, viz., the United Secession Church, and evidently it cannot be safely applied in this case.

"The position of a minister of a church in connection with the United Prssbyterian Church as to this matter seems to be this, that he has a moral right to a stipend from his congregation, but cannot recover it by action. He is able, however, to affirm, with almost absolute certainty, that his position will secure him a livelihood. His deprivation of that office deprives him of that chance or moral certainty of emolument.

"So the position of a minister without a church is that he is eligible for offices or engagements from which pecuniary emoluments in fact result. In that respect he is in no different position from a member of the bar, who exercises a profession from which pecuniary benefits arise, although he also cannot enforce payment of his fees by a law-suit. But who would say that on that account the professional status of an advocate was not of pecuniary value, or that his interest in it was not a patrimonial interest?

"The pursuer maintains further that even if no legal or enforceable right to a stipend is attachad to his office, still his professional status is, apart from its pecuniary advantages, a patrimonial interest of tangible and considerable value, and that loss of it is a patrimonial loss capable of being roughly measured in money. This is a position which has been a good deal canvassed, and different opinions have been entertained about it. I confess that I cannot doubt that the pursuer's view on this matter is correct, and I think that a relevant statement by a minister that he had been illegally deprived of his professional status might warrant an action of damages.

"I consider that the balance of authority is in favour of that view. In the case of *Forbes* v. *Eden*, 8th December 1865, 4 Macph. 143, the Lord Justice-Clerk (Inglis) observed —'The possession of a particular status, meaning by that term the capacity to perform certain functions or hold certain offices, is a thing which the law recognises as a patrimonial interest, and no one can be deprived of its possession by the unauthorised or illegal act of another without having a legal remedy.' In the House of Lords (5 R., H.L., 47) the Lord Chancellor (Chelmsford) expresses his concurrence in this opinion. These important *dicta* were challenged by the defenders as merely *obiter*. They were not, perhaps, essential to the judgment, but bore on it closely, and, apart from the great authority they necessarily carry, I venture to think they commend themselves as consistent with reason, justice, and law.

"In *Forbes* v. *Eden* Lord Neaves, in less absolute language, indicates a like opinion, and throughout the very lengthy opinions delivered at the three advisings of *M'Millan* v. *The Free Church*, there are, I think, expressions of opinion to a like effect (see in particular 23 D. 1229, per Lord President Colonsay), and I confess I find it very difficult to conceive that the Court would give redress for the illegal deprival of an office to which a salary of a few pounds was attached, but not for deprival of a professional status enabling the holder of it to earn perhaps ten or a hundred times as much, besides affording him credit and respect in the community.

"Take the case of an advocate disbarred through some mistake or some false accusation, could it be maintained that the Court

would refuse to remedy that wrong because no right to recover money attached to the status, although his livelihood depended on it, and it made him eligible for lucrative and honourable offices? I cannot think so.

"So, to take an example put for the pursuer, if a ship captain were illegally deprived of his certificate, the Court would certainly remedy that wrong, although the ship captain had at the time no appointment, and was deprived of nothing but his position in his profession and his eligibility for an appointment.

"I cannot see the slightest difference in principle between these cases and the case of a minister, whether of the Established Church or of a voluntary church, illegally deprived of orders or his charge.

"I am disposed to think that even if it could be proved that a man could suffer no loss of money by illegal deprivation of office or status, yet if he thereby lost consideration or respect, the Court would be slow to refuse redress.

"III. The defenders, however, maintain that, whether the pursuer had relevantly averred pecuniary injury, or patrimonial injury, or not, and whether or not such loss of status, as this case involves, would warrant a claim for damages, this action must be dismissed *de plano*, because the only redress which the pursuer asks is restoration of status and a corresponding interdict, and because restoration of status cannot competently be given by the Court. There is certainly a great deal to be said in favour of this contention, and there are not wanting opinions, or at least indications of opinions, of great authority in favour of it; and if it can be affirmed to be sound, I think it follows, from the final judgment in *M'Millan's* case, that decree of reduction cannot be pronounced, and that the action will have to be dismissed. I have felt, and still feel, much difficulty on this point, but it seems to me that I cannot safely decide it at this stage. I am not sure that restoration, either total, or, if not total, partial, cannot be given. It may, perhaps, be out of the power of the Court to restore the pursuer to his charge in Cathedral Square, and yet it may conceivably be possible to restore his eligibility for office.

"The pursuer's case, as already observed, is this, that the commission by which he was sentenced was not a tribunal of the Church, sanctioned or authorised by the constitution by which he admits he is bound. He is ready to be judged by, and to submit to, the judgment of the kirk-session, or of the presbytery, or of the Synod, but not the sentence of some other body. Seeing that I cannot find any contradiction of the pursuer's statements in the documents forming the constitution of the Church, I must assume them to be true. Doing so, the pursuer has been deprived of his office by a number of persons who have no power over him at all. If this were distinctly made out, I think it maintainable—it is unnecessary to go further at present—that the apparent sentence could not really affect his status, and that if it were reduced as null, his former status would remain to him or be restored to him unaffected by the sentence. It is as if a number of the members of the Synod had met ultroneously and deposed him without any authority. It seems the same in principle as if it were alleged that the vote had been miscounted. If that had been so, and if the Church had refused, or had by its constitution been unable to give redress, could it be maintained that the Court could not do so? To do so would not be to challenge but to confirm the authority of the Church, and I suppose that if such a case should occur, and if it were shown in such a case that the vote had been erroneously counted, the Church would gladly give effect to the judgment of the Court. It may be impossible that such a case should occur. I put it only for the purpose of illustration.

"Suppose it should appear in this case that the commission was without any authority under the constitution of the Church, and if the sentence of 24th May was on that account reduced, I see no reason for assuming that the United Presbyterian Church would disregard that judgment, especially if, on giving it dispassionate consideration—which all the members of it would certainly do—they should come to agree with it. These suppositions are, of course, on the assumption that the pursuer's averments are true, and the defenders' averments untrue, which is necessarily the condition of the argument.

"If, on the contrary, the defenders' averments are found to be true—and they have a high probability in their favour—then, of course, these consequences would not follow.

"The defenders referred to a class of cases which it is necessary to notice. I allude to cases in which a member of a trade-union sought redress on account of his alleged illegal expulsion. These are *M'Kernan* v. *The United Operative Miners' Association*, 9th February 1874, 1 R. 453; *Shanks* v. *The United Operative Miners' Association*, 11th March 1874, 1 R. 823; *Aitken* v. *The Associated Carpenters and Joiners of Scotland*, 4th July 1885, 12 R. 1206; *Rigby* v. *Connel*, 1880, 14 Ch. Div. 482. These cases may seem to favour the contention that the Court will not entertain an action which complains of anything but injury to civil rights or loss of money, and the defenders naturally founded especially on the important opinion of Lord Lee, who decided the case of *Aitken* as Lord Ordinary. Still I think that these decisions turn mainly on the provisions of the statute by which trades unions were legalised; and I consider also that there is not attached to the position of a member of a trade-union a status of the same character as is here in question.

"The pursuer, on the other hand, referred to certain English cases, as to which I do not require to express an opinion. I mean cases in which the aid of the Court has been invoked by and accorded to individuals unduly expelled from clubs—*Forbes* v. *Keen*, 2nd December 1878, 11 Ch. Div. 353; *Labouchere* v. *Wharncliff*, 13 Ch

Div. 346; *Dawkins* v. *Antrobus*, 23rd June 1879, 17 Ch. Div. 615; *Seton*, 22nd November 1889, 5 Times Law Reports 309; and *Andrews*, 27th April 1888, 4 Times Law Reports, were referred to. Generally speaking, the bearing of these cases is in favour of the pursuer's argument; but I reach the conclusion which I have expressed without their aid. I would feel some difficulty in following them, because it may be doubted whether their application is sufficiently close, and also whether the earlier cases did not go further than it would be safe to follow.

"For the reasons expressed, I am unable to hold the pleas which I have discussed sufficient to support the defence against satisfying the production.

"IV. The defenders further plead that this action is excluded by the provisions in the rules of the association prohibiting appeal to the Civil Courts. By Rule II. 9, 2, it is declared that every minister 'is bound to submit, in the matter of temporal support, as in all other matters connected with his office, to the decision of presbytery or Synod, and has no right to prosecute for stipend in the Civil Court;' and Rule IV. 1, 6, provides that 'members are not to have recourse to the civil authorities against the decisions of the courts of the Church or against resolutions adopted at congregational meetings.' These rules are perfectly lawful, and might exclude consideration by the Court of any decision of a Church tribunal within the scope of its authority. But here it is said that the act complained of was not the act of any Church court, and was wholly outwith the contract. To acts and judgments of that kind I am of opinion that these rules cannot apply, and that if it be established that the sentence complained of was unauthorised by the contract or by the practice of the Church, or by the pursuer's consent, such remedy against it may be granted as may be suitable and possible in the circumstances."

The defenders accordingly produced the sentence pronounced on 24th May, and by interlocutor of 13th February the production was held to be satisfied.

By an interlocutor of 18th July the Lord Ordinary found that, "assuming that the sentence complained of involved a breach of contract between the pursuer and the United Presbyterian Church, yet the pursuer is not entitled to the remedy craved," and dismissed the action.

Note.—"By interlocutor of 19th January the preliminary defences to this action were repelled as such, and it was decided that the judgment called for, in order to its reduction, must be produced and considered. In compliance with this interlocutor, the defenders have produced an excerpt of a 'Minute of Synodical Commission of the United Presbyterian Church containing Sentence on the Pursuer.' The pursuer was content with this production, and accordingly, by interlocutor of 13th February, the production was held to be satisfied. A new record has been prepared and closed, and parties have been heard in the Procedure Roll. The pursuer moved for a proof. The defenders maintained that on the pleadings and without inquiry they were entitled to judgment.

"The principles and questions involved are in my opinion of extreme importance, and if proof before answer were allowed, it might happen that the necessity of deciding them might be avoided. But I have come to think that the defenders are entitled to ask a judgment on their pleas; and although with considerable hesitation, that in my judgment should be in their favour.

"In my opinion, expressed when disposing of the preliminary defences, I adverted to the various questions which had been discussed. It is possible that I then said more than was then necessary, and therefore more than was expedient. But what was then said must be read with reference to the stage of the cause which had then been reached.

"From the excerpt produced it appears that the Synodical Commission recalled the judgment of the Presbytery so far as it found the first count in the libel against the pursuer proven, and *quoad ultra* affirmed the judgment of the Presbytery, finding the second and third counts of the libel proven; and that, further, the Synodical Commission resolved 'that Mr Skerret be suspended from the office of the ministry *sine die*, and from the privilege of full communion as a minister of the Church, dissolves his connection with the congregation of Cathedral Square, and declares the charge vacant.'

"The remedy which the pursuer demands is reduction of this sentence, with corresponding interdict. He prays that it be declared to be null and void, and that the pursuer be restored against it *in integrum*. This is not an action of damages, although right to claim damages is reserved on record. If reduction were granted as craved, the result would necessarily be that the pursuer would be restored to the position in which he was before it was pronounced; that is to say, that his suspension from the ministry would cease, and he would be restored to the privilege of full communion and to his connection with the congregation of Cathedral Square. Reduction of the sentence might have other effects besides these. It might, for example, facilitate a claim for damages,—it might rehabilitate the pursuer's character,—it might make him eligible for other pastoral charges. But decree could not be pronounced without causing, as a necessary consequence, supercession of his suspension from the ministry, and restoration to full communion and to his connection with his congregation.

"The defenders have repeated their pleas directed to the pursuer's title to sue, to the jurisdiction of the Court, and to the defective character of the instance. These pleas are still open, but they were dealt with in the previous judgment. The argument in support of them or against them was not resumed, and I do not think it necessary to add more on these points. I am not prepared to throw out the action on these pleas.

"The recent argument mainly regarded what may be called the merits of the

action. It proceeded on the mutual concession or assumption that the question was not a question about the jurisdiction of the United Presbyterian Church, but was a question of contract, and that there existed a contract, the parties to which were the pursuer on the one hand and the United Presbyterian Church, acting by its synods, presbyteries, and kirk-sessions, on the other part.

"I think that this condition of the argument is not based on a legal or logical fiction, but on a fact, and that there does exist such a contract.

"The sixth and seventh pleas-in-law for the defenders seem, at least in part, to be based on the view that the courts of the United Presbyterian Church are possessed of jurisdiction. But as I have said, that view was not argued, and the legal authority against it is ample and conclusive.

"Both parties referred to Nos. 7 and 9 of process as containing the contract, the latter (being for the purposes of this argument the more important) containing the rules and forms of procedure of the Church. The pursuer maintained that the contract of the parties is to be found in these documents, and this is admitted by the defenders, who, however, appeal also to the practice of the Church.

"The pursuer's action is based on alleged breach of this contract. That is expressed in his third plea, and the first question is, whether a breach of the contract has been relevantly averred. If I rightly understood the pursuer's argument, he maintained, in the first place, that a breach of the contract was involved in his trial under the libel prepared by the Presbytery, because the libel, as he maintained, did not charge any crime or offence cognisable by the Church under the rules and regulations.

"The rules and regulations on this point are contained in chapter 6 of the book entitled Rules and Forms of Procedure, which treats of Church discipline. In section 1, sub-section 1, of that chapter, it is said 'that the proper ground of Church discipline or censure is a sin or offence which, on account of its publicity, is a scandal, and is calculated to bring a reproach on religion.' There is no definition of the word offence. The language is of great generality, and I think it impossible to contend that it does not cover offences by ordained ministers against propriety, prudence, or decorum, as well as offences of greater gravity. The libel, which I need not quote, is certainly not a model of legal or logical statement. The major proposition, with its involved aggregation of particulars, describes conduct which might be laudable, or simply indifferent, or blameably imprudent, or in a very high degree culpable, according to circumstances. Still I think that, fairly read, it must be held to charge the pursuer with such behaviour, in reference to the female member of his congregation alluded to, as was imprudent, and calculated to give occasion for scandal. There is no doubt that it was so intended and understood, and I have no doubt that the trial of a minister by the proper tribunal for conduct of that kind is well within the power conferred by the contract on the Church, and of course the mere criticism that the libel is badly expressed could involve no violation of contract if no miscarriage of justice resulted. I am satisfied that no ground of reduction can be rested on the language of the libel.

"The pursuer maintained, secondly, that the facts found proved, stated in the second and third counts of the libel, inferred no fault of any kind, and were consistent with absolute innocence, and that there was no power under the contract to inflict any punishment on account of that finding. It was maintained that what was found to be proved was no more than that the pursuer had on two occasions walked with a female member of his congregation at ten and nine o'clock at night, without any suspicious quality or circumstances connected with these meetings, and that it was highly ridiculous to censure or punish conduct so innocent. It is possible, however, that there might have been circumstances attending these meetings of which the Synodical Commission were entitled to take notice, which might have made them objectionable and open to misconstruction, and I am not prepared to say that it was absolutely necessary to embody these in the finding. It was for the recognised tribunal to judge of the quality of the pursuer's acts. The commission may have judged amiss, possibly with too much rigour and suspicion and with too little charity and good nature. Still, if the judgment was pronounced *in bona fide* by an authorised tribunal within its powers, it is clear that no error in the judgment could constitute a breach of the contract.

"It is impossible for this Court to review or rescind the sentence on the ground of excess. Perhaps it was not really so severe as it appears at first sight to be, and might, had the pursuer submitted and acknowledged his error, have amounted practically to little more than a censure. But in any case it was clearly for the Church, through its appropriate tribunal, to award the punishment for the offence proved within the limits of the constitution, and it cannot be shown that in this case the sentence exceeded these limits.

"It is averred on record that the Synodical Commission acted irregularly in various particulars enumerated. None of these, however, are of much importance or could imply any denial of justice, or amount to an allegation of neglect of the ordinary principles of equity, and they afford, in my opinion, no sufficient ground for supposing that the trial of the pursuer was so conducted as to be a breach of the constitution.

"Thus far, therefore, I find no relevant averment of breach of contract. But the pursuer avers another breach of a different kind. It is averred that when the pursuer appealed against the judgment of the Presbytery to the Synod, he was, under the rules and regulations, entitled to a judgment by the Synod on his appeal; that the Synod did not, in fact, decide on his appeal,

but remitted to a Synodical Commission, not to examine into the cause and to make a report on it to the Synod, but to decide the cause, and that the Synodical Commission did so decide it; the sentence under review, being a judgment of the Commission, although the Synod authorised it, have adopted it, and now maintain it. Parties are at issue as to the power of a Synod to make this remit to the Synodical Commission, and as to the power of a Synodical Commission to decide. I do not find that these questions can be solved by a reference to the rules and regulations, in which there is no reference to a Synodical Commission, and if they should require to be solved, that could only be done by a proof as to the practice of the Church, and also as to the consent of the pursuer. I have not been able to resist the conclusion that the pursuer has relevantly averred that on this ground the sentence of which he complains was *ultra vires* and unauthorised by the contract, and in breach of it.

"If it be said that this objection relates merely to matters of procedure in the exercise of Church discipline, which were necessarily under the control of the Synod, and could not be considered by the Court, the answer seems to be that the breach of contract complained of in the case of *M'Millan* v. *The Free Church of Scotland* was to a large extent of the same character, and was alleged to consist in the entertainment by the General Assembly of charges which had not been competently brought up on appeal. But the objection was considered relevant.

"On the whole, it appears that on these special points, viz., the power of the Synod to remit to the Synodical Commission, and the power of the Synodical Commission to review the judgment of the Presbytery and to decide the cause, the pursuer has made a relevant averment of breach of contract. It might, of course, turn out on inquiry that there had been no breach of contract, or that the pursuer was barred from objecting to the judgment of the Synodical Commission; but these points could not be determined without a proof, and therefore for the purposes of this judgment breach of contract must be assumed.

"But the defenders contend that they are still entitled to judgment, and they have supported that contention on various grounds.

"It is maintained that appeal to the Civil Courts is renounced and excluded by the contract. This contention is expressed in plea 9. On this point I refer to the last paragraph of my former opinion, to which I adhere. I think that inquiry is not excluded by contract.

"It was further urged that the Court could not entertain this action because it involved no question of civil right or patrimonial interest. This argument is embraced in plea 6. On this point I refer to my previous opinion and have little to add. It may be correct to say that the Court will not entertain a question as to the breach of a contract which has no relation to civil or patrimonial rights. No doubt that is a sound proposition; but I have not been able to think that that principle applies in this case. I think that this case involves questions as to the pursuer's status or position in society, his eligibility for office, and the emoluments attending his office and forming his livelihood, any of which would be sufficient to warrant the Court in entertaining the action.

"There is no doubt, I suppose, that in point of fact the pursuer has been deprived of his stipend by the sentence. He enjoyed a stipend before. He does not enjoy a stipend now. That difference in his circumstances was occasioned by the sentence. It is true that the stipend could not be recovered by an action. But it none the less existed, and it is none the less true to affirm that the pursuer has lost it. Had it been recoverable at law there would have been no doubt that it was a patrimonial interest; its character as such does not seem to me to be destroyed by the circumstance that the pursuer could not sue for it. I need not repeat the references to the cases which were quoted at the debate on the preliminary defences. The pursuer referred, in addition, to *Murray* v. *Burgess*, 1866, 1 P. .C. Appeals 362; *Long* v. *Bishop of Cape Town*, 1863, 1 Morris, P.C., N.S. 411; *Bishop of Natal* v. *Gladstone*, 1866, 2 L.R., 3 Eq. 1; *O'Keefe* v. *Cullen*, 7 C.L. Irish Rep. 319. These are certainly cases of great importance in regard to the grounds on which courts of law will interfere or decline to interfere with the sentences of voluntary churches. I doubt, however, whether they are material to the present question, because I think in all of them it was more obvious and undeniable than it is in this case that interests of a patrimonial character were directly involved, except in the case of *O'Keefe*.

"In that case, however, the questions were raised in the form of an action of damages, which of itself undoubtedly brought the case within the jurisdiction of the Court.

"In the earlier English club cases the Court seemed to interfere on the ground of gross injustice to the expelled member who was complaining. But I rather think that in the more recent cases the title to invoke the aid of the Court has been based on the proprietary right of the member complaining in the club-house, or on his right to use or occupy it. The contention that such interests as the pursuer can here qualify are not sufficient to warrant the interference of the Court may certainly be supported by important authority. But having reconsidered the cases, I remain of the opinion already expressed, that the weight of authority is, on this point, on the side of the pursuer.

"The defenders further argued that the Court should refuse to entertain this action on the principle that it will not pronounce a decree which it cannot enforce, for that here the United Presbyterian Church would pay no regard to a decree of reduction of the sentence of suspension, and would (so I understand the argument) disregard an interdict in terms of the conclu-

sions for interdict. The pursuer could not, it was maintained, be restored through the decree of the Court to his former relations with the Cathedral Square congregation, or to his right to officiate in the church connected with that congregation, and the defenders could not be restrained from appointing another minister to officiate there.

"It is quite true that a Court will refuse to pronounce a decree which it cannot enforce. That principle was affirmed in the case of *Aitken* v. *The Associated Carpenters and Joiners of Scotland*, 4th July 1885, 12 R. 1206; but in that case the inability of the Court to give an effectual decree as demanded arose from express statutory provision, and not from any arrogation of independence of the Courts of the country. I think that principle does not apply in this case. No claim or pretence of the kind can be put forward or recognised. I consider that if decree of reduction of the sentence complained of were pronounced, and if interdict were granted as concluded for, there would not be wanting means for securing that such decrees would receive due legal effect, that they could be enforced, and that the defenders would have neither right nor power to resist them. I am therefore unable to dismiss this action on the ground that it is absolutely impossible for the Court to give practical effect to the decrees concluded for if they were pronounced.

"On the whole, it appears that the pursuer has relevantly averred a breach of contract causing an injury which is of a patrimonial character, or of a character equivalent to patrimonial; that appeal to the Court is not effectually excluded by the contract; and that there exists no ground for refusing this action complaining of that breach, and no absolute inability to grant and make effectual the remedy demanded.

"Up to this point I am not prepared, as at present advised, to reject the pursuer's arguments. But the question remains, whether the remedy demanded, viz., the remedy of reduction and of restoration to the position existing before the sentence of suspension was pronounced, is a remedy which the Court ought to grant or is in use to grant in similar cases.

"That question I have now come to think should be answered in the negative. It is a remedy which has not yet been granted in Scotland in any question about the sentence of a voluntary church. It was asked in *M'Millan* v. *The Free Church*, and it was refused. It is possible that this refusal depended to some extent on the pleadings. But in the advisings there were various expressions of opinion against the competency or expediency of granting the remedy of reduction and restoration. In the second advising the Lord President (Colonsay) says —'The Court may not have the power to repone and restore the pursuer to the ministry, but it does not thence follow that the Court may not repone and restore him to the effect of depriving the sentence of which he complains of any validity as an obstacle to the prosecution of his civil rights and interests whatever they may be.'—23 D. 1329.

"On the same occasion Lord Curriehill observed that, on the assumption of the truth of the pursuer's averments, the sentence pronounced 'was *ultra vires* of the defenders, and the party aggrieved is entitled to have the nullity of the sentence judicially declared by the Court. But still no action is competent in this Court in reference to that sentence, except for the purpose of setting it aside as a nullity and awarding indemnification for such damage, if any, as the proceeding may have caused to the pursuer.'—p. 1338.

"Lord Deas, p. 1345, says—'If the sentences complained of shall be found to carry with them no presumption of validity, and so not to stand in the way of a claim of damages, there may be no necessity for any reduction of them. But if they are to be reduced, it has never occurred to me, and I do not think it has been suggested by any of your Lordships, that such reduction could go further than removing them out of the way as an apparent obstacle to patrimonial redress. Nobody contemplates that the defenders are to be ordained to receive the pursuer back into their association, to allow him to sit and vote in their presbyteries, synods, and general assemblies, or that the Free Church congregation at Cardross are to be compelled either to listen to his sermons or to absent themselves from the church and leave him to preach to empty benches. The principle on which we should decline to take that course is a very ordinary principle. If a master unwarrantably dismisses his servant, we give pecuniary redress, but we do not compel the master to take his servant back into his service. If I engage a teacher in any department of science, literature, or art, the law will compel me to pay him, but the law will not compel me to be taught by him;' and he proceeds to state the principle—'It is simply because the Court deals only with civil and patrimonial interests and consequences, and while vindicating or giving redress for these, refuses to go beyond them.' That is to say, as I think, that the Court will remedy the patrimonial wrong done by a dismissal from service by an award of damages, but will not reinstate the servant in the position from which he was dismissed. His Lordship (Lord Deas) deals with the same point somewhat differently on the third advising in the case.

"The remedy sought in this case is of the nature of specific performance. That clearly appears from the conclusions for interdict. Now, there are many contracts of which specific performance will not be ordered. Possibly the most obvious and familiar example is a promise of marriage, which of course is not enforceable, and there are the whole classes of contracts of hiring and service referred to by Lord Deas in the passage quoted, which, generally speaking, will not be enforced specifically, but which will support only a claim of damages in the event of non-fulfilment. It seems open to doubt whether Lord Deas' statement of the reason for which the Court refuses to entertain such actions is entirely exhaustive. The principle is, I humbly think, more

satisfactorily expressed by Lord Justice Fry in his treatise on Specific Implement under this suggestive heading—'Where the enforced performance of the contract would be worse than its non-performance.' The 'relation' he says, 'established by the contract of hiring and service is of so personal and confidential a character, that it is evident that such contracts cannot be specifically enforced by the Court against an unwilling party with any hope of ultimate and real success, and accordingly the Court now refuses to entertain jurisdiction in regard to them' (section 110); and again at section 112 he says—'It is not for the interests of society that persons who are not desirous of maintaining personal relations with one another should be compelled to do so.' I refer to the whole passage in which the principle is more fully developed and supported.

"I apprehend that these are substantially the reasons for which our Courts will refuse in general to compel specific performance of contracts of hiring and service, and of various other contracts of a like nature. See also Lord Fraser on Master and Servant, 162, where the law is similarly laid down.

"It appears to me that that principle should be applied in the present case, in which the right of the pursuer stands only on personal contract, and is not based on any position created and protected by the law, such as that of a minister of the Established Church, the teacher of a parish school, or an official holding an independent position. It appears to me that the relation in which the pursuer stood to the United Presbyterian Church, so far as it was constituted by contract, was substantially that of a servant, and that the contract has all the qualities of a contract of hiring and service. The pursuer thereby agreed to perform certain services on behalf of the Church, and the Church, on the other hand, put him in a position of consideration and influence, and (substantially) ensured his stipend, although it is true that neither the Church nor anyone else is liable to be sued for it. It was nevertheless the pursuer's wage for which his services were rendered. Of course I do not mean that a minister is not actuated also by motives of a totally different kind, but these are motives into which no element of civil contract enters.

"If this view be sound, then I apprehend that decree of reduction cannot, or ought not, to be pronounced in this case; for it would be a mere contradiction in terms to affirm that a sentence suspending the pursuer from his office of the ministry, and dissolving his connection with Cathedral Square congregation, was null, and yet to affirm that he still remained suspended from the office of the ministry, and that he had not the connection with the congregation which he enjoyed before the sentence. If regard be had to the unlimited terms of the conclusions of reduction, to the conclusions of declarator, the conclusion for interdict, and to the pleas-in-law, I am unable to regard this action as anything but an action for restoration of the pursuer to his former position; and I cannot think that a mere general reservation of a claim of damage can affect the true character of the action. It has not been brought to enable him to raise an action of damages. It is not needed for that purpose. It is not an action to vindicate the pursuer's character, Our practice does not admit of an action for that purpose except in the form of an action of damages.

"This action raises the question quite purely whether the Court will set aside a sentence of a voluntary church suspending or dismissing a minister, which was avoided in the case of *M'Millan*, and which has never been decided in Scotland. In this connection it may be proper to notice the case of *Murray* v. *Burgess*, *supra*, in which a sentence of suspension of the Dutch Reformed Church in the Cape of Good Hope was set aside in the Privy Council, with the effect, I suppose, of restoring the appellant. In that case no question as to the jurisdiction of the Court was raised, that having been determined in the Court below by a judgment not brought up for review. The minister's position seems also to have depended on certain ordinances by the Government, so that the Church seems to have been semi-established.

"I think the precedent in that case cannot be safely followed in the present case, in which all pleas are open, and which is not complicated by a State connection of any sort.

"It seems not out of place to consider that, if the present action was sustained for the purpose concluded for, the Court might, on similar grounds, be called on to determine other similar questions connected with the administration of the United Presbyterian Church. Probably it could not be called on to decide any disputed question as to the election of elders as being wholly void of patrimonial interest. But it might, perhaps, be called on to deal with questions as to the moderation of a call, and I think it clear that such a question could never be sustained to the effect of declaring that a call was refused or sustained, and that for the reasons stated by Justice Fry, above quoted and referred to. Such a case would be closely analogous to the present.

"On this last ground, therefore, I have come to be of opinion that the reductive conclusions and the conclusion for interdict ought not to be entertained. For similar reasons I think that the conclusions for declarator should not be entertained. I think, however, besides, that these conclusions are not well framed, and could not be adopted in any case."

The pursuer reclaimed.

In the course of the debate in the Inner House the pursuer gave up all the conclusions in the summons with the exception of that for reduction.

Argued for reclaimer—A conclusion for reduction with a reservation of the right to sue for patrimonial loss was the appropriate remedy in the present case—*Goldie* v. *Christie and Petrie*, March 3, 1868, 6 Macph. 541. What the pursuer wished to

obtain was not restitution to a particular charge, but to his status, and that he would obtain *ipso facto* by the removal of the sentence. The Lord Ordinary's opinion was based upon a misconception of the remedy asked. It was not "specific implement" or "specific performance" to the effect of restoring the pursuer to his church, but it would merely restore him to a position of being eligible for vacancies. This remedy had been granted in the case of an established church, and there was no distinction in principle, whether the contract broken was a statutory or conventional one—*Cruickshank* v. *Gordon*, March 10, 1813, 5 D. 909, at 921. In the cases of *Long* v. *Bishop of Cape Town*, February 13, 1863, 1 Moore's P. C. App., N. S., p. 411, and *Murray* v. *Burgess*, November 13, 1866, 1 P. C. App. p. 362., the Court had interfered with the judgments of voluntary societies as craved here. The position of the pursuer here was practically that of a man with a judgment of an arbiter against him, or that of a sheriff who had overstepped his jurisdiction, which might be competently reduced in this manner. In the case of *M'Millan* v. *Free Church*, December 23, 1859, 22 D. 290, July 19, 1861, 23 D. 1314, July 9, 1862, 24 D. 1282, there were opinions showing that the reduction was the only competent remedy here—23 D., at pp. 1329. 1334, 1338, 1344.

Argued for respondents—The Court would not grant a decree of simple reduction in such a case as this, there being no conclusion of a petitory nature. The effect of a simple reduction would be to put the pursuer in a position of having been found guilty, but without any sentence having been inflicted, and he would still be under the interdict, which the libel *ipso facto* put upon him, and so it could not be said that he would have his status restored. There were only two classes of cases where the Court would interfere in the actings of voluntary associations such as this church —(1) Where a right of property or to emolument depended upon these actings, and a question of patrimonial right thus arose, which might be covered by an action of reduction. (2) Where there might be no such right, but a pursuer averred that he had suffered damage by an erroneous act, and accordingly raised an action of damages. The present case fell under neither of these heads, and was accordingly irrelevant. If the pursuer did obtain decree as desired, the judgment of the Court would be inoperative, and accordingly it would not pronounce such a decree—*Aitken* v. *Associated Joiners of Scotland*, July 4, 1885, 12 R. 1206; *Forbes* v. *Eden*, December 8, 1865, 4 Macph. 143, at 165, April 11, 1867, 5 Macph. (H. of L.) 36, at 47. The case of *M'Millan* was really in favour of this contention. It settled that the Court would look to the ultimate issue of the case to see if some patrimonial question would arise directly from the reduction craved—*M'Millan*, 24 D. at 1294. This was the principle upon which the Court had granted reduction in certain cases brought before them without any petitory conclusions. In the foreign cases quoted by the pursuer patrimonial rights were directly at stake. But in the present case the pursuer did not even venture to ask for restoration of his status, and accordingly there was no patrimonial right arising directly out of the decree craved, and there was no precedent for the Court granting such decree.

At advising—

LORD PRESIDENT—The pursuer conceded in debate that the only conclusion of the summons which he can support is the conclusion for reduction. The terms of that conclusion, and still more an examination of the whole summons, show, that in the conception of that writ, the demand for reduction was not made as for an independent and substantive remedy, but merely as ancillary to a more effective decree.

The proceedings against the pursuer in the ecclesiastical courts were directed to his being punished for having, under certain specified circumstances, met and walked with a young lady. For having done so he was, in the end, deprived of his charge as minister of the Cathedral Square congregation in Glasgow, and suspended from the office of licentiate of the United Presbyterian Church; and this was done by the sentence of a committee or commission of the United Presbyterian Synod exercising powers which were *de facto* delegated to it by the Synod.

The scope and purpose of the present action as laid is unambiguous. At the time when it was raised the ecclesiastical authorities had not yet taken steps for inducting another minister to the Cathedral Square charge in the room of the pursuer. The prevention of this step was in truth the practical object of this action. The summons begins by asking for declarator that what was charged against him was not an ecclesiastical offence according to the law of this religious body, that this being so the prosecution was illegal, and (I omit in the meantime the reductive conclusion) he ends by asking that the ecclesiastical authorities shall be interdicted from following up these illegal proceedings by treating his charge as vacant and filling it up. Incidentally to all this, and quite logically and coherently, the draftsman, confronted with what on paper at least is a sentence of deprivation of the office in question, says, "and in so far as is necessary" sentence of reduction shall be pronounced, (of the illegal proceedings), and the pursuer shall be reponed and restored thereagainst.

It thus appears that the conclusion for reduction in this summons is, alike in expression and in substance, merely an incidental step of procedure towards the vindication of the office of minister of the Cathedral Square congregation in Glasgow. If anyone—this is the tone of the summons —shall vainly seek to set up this pretended sentence as a barrier in the pursuer's path to what he demands, let it, if need be, be formally set aside.

The action, as it now stands, is altered in two essential respects. First of all, the

Cathedral Square charge has now been filled up by the induction of another minister; and the pursuer accordingly gives up his conclusion for interdict as now inappropriate. He gives up the idea of ousting his *de facto* successor and recovering the charge for himself. Second, his counsel ultimately gave up the attempt to persuade the Court to pronounce on the goodness or badness of the libel about walking with the lady named.

In the end, therefore, the sole illegality founded on is the delegating to a committee the disposal of the pursuer's appeal, and the sole decree asked is reduction.

The question is—Can we, in this action, give a decree which begins and ends with reduction?

Now, standing these words "and in case it may be necessary," and looking to the substance of the action to which these words are relative, it would be difficult to pronounce a decree of reduction alone, the other conclusions being no longer insisted in. A broader view, however, leads to the same practical conclusion.

Courts of law, as I understand, take no concern with the resolutions of voluntary associations except in so far as they affect civil rights. If a man says merely, "such and such a resolution of an ecclesiastical body is a violation of its constitution, on the faith of which I became a member or a minister," and stops there, the Court will have nothing to do with his case, and will not declare the illegality or reduce the resolution. But if the same man says, "I have been ejected from a house, or have been deprived of a lucrative office, under colour of this illegal resolution, and I ask possession of the house, or I ask £500 of damages," then the Court will consider and determine the legality of the resolution, on its way to the disposal of the demand for practical remedy. There is there a specific claim of a specific remedy for invasion of patrimonial rights. If and in so far as a decree of reduction may be necessary to effectuating such remedy, the Court will pronounce it.

In the present case the pursuer asks no specific remedy. He has abandoned his claim to be retained in the position of a minister of the Cathedral Square congregation. He does not ask damages; on the contrary, he reserves all claims of damages. He does not now (although he did formerly) ask to have restored to him his status of licentiate, for his senior counsel, by giving up the contention that we could declare (as he asked in his first conclusion) that walking with this young lady was no ecclesiastical offence in the United Presbyterian Church, leaves standing the original suspension, which (according to the written laws) automatically resulted from the institution of the libel. The only practical result, therefore, of reduction would be to leave the pursuer in the position of a suspended licentiate, with an appeal not disposed of, and (for anything he tells us or asks us to do) not likely to be disposed of. I do not think that such a predicament can be described as a status in any sense in which the word is relevant to the present question, or has ever been used in this juridical relation.

None of the cases in which (with obvious soundness) reduction has been granted, without any further decree, have been thus resultless. They have led, directly and by their own force, to the establishment of patrimonial right or to immunity from patrimonial claim.

The conclusion which I come to is, that this action has rightly been dismissed, because the averments are not relevant to support the conclusion for reduction, or any conclusion for reduction, no further remedy being sought. I am therefore not called upon to pronounce on the question whether the Synod acted illegally in delegating to a committee the power to dispose of the pursuer's appeal and to sentence him. That must necessarily depend on what was in fact the law, written or unwritten, to which the pursuer is to be held as having committed himself as a minister of this Church. These matters would only be examinable—and they would be examinable—in an action concluding for a specific civil remedy appropriate to the facts alleged. It is because no such remedy is even proposed that I think that this action should be thrown out.

The two opinions of the Lord Ordinary cover a wide range of discussion, and for this reason, I think it well to say that some of the matters which he has so ably discussed are not involved in my present judgment.

LORD M'LAREN—It is, I think, indisputable that the governing bodies of voluntary churches or religious associations are responsible for non-fulfilment of their obligations towards their members in the same degree as the directors of associations constituted on a secular basis are responsible. But it results from the history of the decisions, and especially from that of the *M'Millan* case, that the Courts, in cases of this description, will hold the pursuer of the action strictly to the subject of his original complaint, especially where the action is one for restitution or specific relief. This policy of the law may be justified on the general ground that a defender ought not to be called on to answer charges of which notice has not been given in the prescribed form. But there is another element, namely, the qualified privilege which I think is accorded to the proceedings of ecclesiastical bodies professing to act judicially, that their proceedings are protected from review in the same degree as the proceedings of arbiters are protected.

Now, the pursuer in this case came into Court complaining of a substantial injury, viz., that he had been tried and condemned upon a libel which did not amount to a relevant statement of an ecclesiastical offence.

We did not think that his ground of action was well-founded; because the laws of the United Presbyterian Church do not define the offences of which its courts take cognisance, and it might well be that mere

levity of conduct or indiscretion on the part of a minister of religion would be a proper ground for the exercise of Church discipline in the form of a trial on libel before the Presbytery.

The pursuer then objected that on appeal to the Synod that body had remitted his case to a committee or commission with power to dispose of it finally. I agree with your Lordships that this is not the true cause of action as disclosed in the summons, and that it would not be fair to the defenders that their counsel should be called to answer it in this action. I will not attempt to anticipate all the defences which might be stated to an action on this ground. One obvious answer would be that the pursuer did not appeal to the Synod, as he might have done, from the deliverance of the commission, and ask their decision on the merits of his case. Another defence might be (I do not of course mean to indicate an opinion) that the pursuer had submitted to the jurisdiction of the commission.

In dismissing this action I do not wish to be understood as concurring in an opinion which is held by many, that in no circumstances ought a court of law to cut down a decree or sentence professing to emanate from a voluntary church court or ecclesiastical authority. There might be a usurpation of jurisdiction so flagrant that the Church itself might be compelled to resort to the civil courts for its protection against the acts of persons professing to represent it and acting in its name.

In the view we take of this case the question of the right of the pursuer to specific relief does not arise.

LORD ADAM and LORD KINNEAR concurred.

The Court recalled the Lord Ordinary's interlocutor, and *simpliciter* dismissed the action.

Counsel for the Pursuer and Reclaimer—Ure—Crabb Watt. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defenders and Respondents—Shaw, Q.C.—Younger. Agent—William Robson, S.S.C.

Thursday, January 30.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MURDISON *v.* THE SCOTTISH FOOTBALL UNION.

Reparation—Slander—Privilege—Association for Sport—Football Match—Referee.

Held (*aff.* judgment of the Lord Ordinary) that a referee at a football match between members of two clubs belonging to the Scottish Football Union, was privileged in making a complaint to the committee of the Union that a player had "used offensive language" to him during the match, and in giving evidence in support of his complaint to the committee.

Reparation — Slander — Association for Sport—Publication of Resolution—Privilege—Title to Sue and be Sued.

The pursuer in an action of damages for slander called as defenders (1) the members of committee of the Scottish Football Union, "as such committee and as representing the said Union"; (2) the members of the committee as individuals. The pursuer averred that the committee, acting upon a complaint by a referee at a football match between members of two clubs belonging to the Union, and in which the pursuer was a player, adopted a finding that the pursuer had used offensive language to the referee, and passed a resolution that he be severely censured, and be ordered to apologise to the referee, and that this finding and resolution were published in certain newspapers upon the instructions of the committee. *Held* (1) that the pursuer was not entitled to an issue against the committee as representing the Scottish Football Union, the ground of his action being that the committee, in the matter of which he complained, had acted without the authority of the Union; and (2) (*rev.* judgment of the Lord Ordinary) that the pursuer was entitled to an issue of slander against the members of committee individually, and that, having regard to the allegations as to publication, the pursuer's averments did not necessarily imply privilege or require that malice should be put in the issue.

Form of issue approved.

Reparation—Patrimonial Loss—Resolution of Association for Sport—Relevancy.

Held (*rev.* judgment of the Lord Ordinary) that a resolution of the committee of the Scottish Football Union suspending a member of a club belonging to the Union from playing, did not entitle him to an issue that the said resolution had been "wrongfully, incompetently, and unwarrantably passed and caused to be published by the committee, to his loss, injury, and damage," the alleged wrong not being one which affected any question of property or patrimonial right, and the appropriate issue, so far as it affected reputation, being an issue of slander. *Blasquez* v. *The Lothians Racing Club*, June 29, 1889, 16 R. 893, *distinguished.*

Expenses—Amendment of Record.

An amendment of record in the Inner House which did not involve any radical alteration of the pleadings, or a change of the ground of action, *allowed* on payment of expenses in the Inner House. *Morgan, Gellibrand, & Co.*, December 9, 1890, 18 R. 205, *distinguished.*

The facts of this case are narrated as follows by the Lord Ordinary:—"The Scottish Football Union is composed of all the football clubs in Scotland playing the game