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Per Curiam. It is not necessary to express any definite opinion upon the question sought to be raised in this case. Even if the contention is well founded, the learned Judge might properly have directed the jury that on the evidence they ought to find as a fact that the intention of the woman was proved. If they had not so found, they would have gone in the face of the evidence. It is not therefore a case where any substantial injustice can be suggested. Under these circumstances special leave to appeal ought not to be given.

Solicitors for applicant, *McGrath & Hunter* (for *D. Carey*, Rockhampton).

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Dist *Permanent Trustee Nominees (Canberra) Ltd. Re* [1989] 1 QdR 314

Appl *Avellino v All Aust Netball Assoc* (2004) 87 SASR 504

[HIGH COURT OF AUSTRALIA.]

MACQUEEN AND OTHERS . . . . APPELLANTS; DEFENDANTS,

AND

FRACKELTON . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *April* 30; *May* 3, 4, 5, 6, 7, 13.

Griffith C.J., O'Connor and Isaacs JJ.

Voluntary association — Presbyterian Church — Presbytery — General assembly — Jurisdiction of Church tribunals — Discipline — Dismissal of Minister — Ordination vow — Action against Church tribunals and members thereof — Breach of rules of voluntary association — Consensual agreements — Jurisdiction of Civil Courts — Mandamus — Injunction — Infringement of civil rights — Costs — Liability of individual members of a Church tribunal for costs — Queensland Rules of Court, Order IV. r. 11 — Declaration of right.

The Presbyterian Church of Queensland is, in the eye of the law a voluntary association of persons, the members of which are bound by the

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terms of the mutual compact into which they have entered, and the Court has jurisdiction to enforce that compact so far as regards civil rights confirmed by it.

The Presbytery of Brisbane, a Court of the Presbyterian Church of Queensland, adopted the report of a Commission appointed by them to inquire into a certain alleged unsatisfactory state of affairs in connection with the Ann Street Church, of which the plaintiff was the minister. This report contained certain findings of fact, and concluded with a recommendation that the plaintiff be called upon to resign his office. The Presbytery requested him to resign, and, on his refusal, resolved to report the whole of the circumstances to the General Assembly, the supreme court of the Church in Queensland, with a recommendation that that body should dissolve the pastoral tie between the plaintiff and his congregation. The plaintiff and other members of the Presbytery dissented, and gave notice of appeal from this resolution to e General Assembly.

The plaintiff then brought an action against all the members of the Presbytery of Brisbane except himself to restrain any proceeding upon the resolution as being contrary to the rules prescribed by the Constitution of the Presbyterian Church, and for a declaration that those rules had been infringed. The report of the Presbytery, together with the dissents and appeals of the plaintiff and others therefrom, was forwarded to the General Assembly, and placed on the business paper. Before it was considered, the General Assembly cited the plaintiff to appear before them and make answer whether the writ of summons in the said action had been issued by his authority, and on the plaintiff's admission that the writ had been so issued, the General Assembly resolved that he be suspended from office for six months, a sentence which, under the rules of the Church, involved a dissolution of the pastoral tie and loss of his ministerial emoluments. The decision of the General Assembly was carried into effect by the Presbytery; by reason of this decision, the reference and appeals with respect to the resolution of the Presbytery were discharged from the business paper of the General Assembly.

The plaintiff thereupon brought an action against the General Assembly and the Presbytery jointly for a declaration that the sentence passed upon him was illegal and void, and for a mandamus to restore him to office.

The actions were consolidated and tried before *Cooper* C.J., who entered judgment for the plaintiff on all the issues arising in both actions. On appeal to the Full Court of Queensland, the appellants were successful in the first action and the respondent in the second. Leave to appeal in the first action was refused by the High Court on the ground that up to the issue of the writ in that action no civil right of the plaintiff had been infringed.

Held, on the construction of the terms of the consensual compact existing between the members of the Church in Queensland, that the respondent had submitted himself to the control of the Presbytery and General Assembly only in matters within their jurisdiction under the compact, that the General Assembly

had acted in breach of the compact in summarily suspending the plaintiff from office and thus depriving him of emoluments to which he was entitled; and that therefore the suspension was illegal and null and void.

Judgment of Supreme Court of Queensland, *Frackelton* v. *Macqueen and others*, 1909 St. R. Qd., 89, affirmed.

Held also, that if an action for damages will lie, it is not material that they are not formally claimed, and that a declaration of right only is asked for. Under the rules (*Queensland Rules*, Order IV., r. 11) an action is not open to objection on the ground that the only relief asked is a declaration of right.

Held, further (*Isaacs* J. dissenting), that the issue of the writ in the first action was not a violation of the plaintiff's vow of submission to the jurisdiction of the Courts of the Church.

The Supreme Court directed that the plaintiff should be at liberty to apply for such relief by way of mandamus, injunction or otherwise as he might be advised.

Held, that the word "mandamus" should be omitted from the order of the Supreme Court as suggesting an order in the nature of an order for specific performance of an agreement for the establishment of personal relations between parties.

Order of Supreme Court of Queensland, *Frackelton* v. *Macqueen and others*, 1909 St. R., Qd., 89, varied.

APPEAL from a judgment of the Supreme Court of Queensland.

The facts appear sufficiently in the judgments hereunder and in the head note.

Lukin, *Macgregor*, *A. D. Graham* and *Macleod*, for the appellants. There were originally two actions, one against the Presbytery of Brisbane alone, and the other against the Presbytery and the General Assembly of the Presbyterian Church in Queensland. The actions were consolidated, and *Cooper* C.J. gave judgment for the plaintiff in both. The Full Court of Queensland set aside the judgment in the first action, and leave to appeal was refused, so that it is only with the second action that this Court is now concerned. The General Assembly and the Presbytery of Brisbane should not be parties to the action at all, but the members of the congregation of the Ann Street Church should have been the defendants. The Church, in matters regarding discipline, has exclusive jurisdiction over

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its members, both by legislative enactment and consensual agreement. The plaintiff in his induction took a vow by which he acknowledged the Presbyterian forms of government by Sessions, Presbyteries and General Assemblies to be founded upon the word of God, and agreeable thereto; and promised to submit himself to the government and discipline established and practised in the Church, to concur with the same, and never to endeavour, directly or indirectly, the subversion or prejudice of the same; he engaged to the utmost of his power to maintain, support, and defend the said government and discipline; and he promised to the utmost of his power and opportunity to maintain unity and peace of the Church against error and schism, and that he would follow no divisive courses from the present established doctrine, worship, discipline, and government thereof: [*Presbyterian Church Act* 1900; *Presbyterian Church Temporalities Act* 1840; *Ann Street Presbyterian Church Act* 1889.] Everybody entering the Church is bound by the exclusive consensual jurisdiction conferred on the Church Courts by the rules and laws of the Church. The plaintiff did not obey the rules of the Church; the Church Courts were moved, and from them, being in a position analogous to that of arbitrations, no appeal can be made to the Civil Courts. The only Court to which plaintiff had any right to appeal was the General Assembly of Australia. Furthermore, the plaintiff had no right to appeal to the State Courts because—(*a*) no civil right of his had been infringed by the action of the Assembly; (*b*) at the time he brought his action he had not exhausted his right of appeal in the ecclesiastical Courts; and (*c*) he had sustained no damage by the action of the defendants—his stipend being derived from the members of the Ann Street Church congregation and not from either the Presbytery or Assembly. The Full Court of Queensland was wrong in giving the plaintiff leave to apply for relief by way of mandamus, as mandamus will not lie to an ecclesiastical Court. The plaintiff should, in fact, have brought his action for damages; he cannot get a declaration of right such as was made by the Supreme Court.

[The following cases, &c., were referred to by counsel:—*Lang* v.

Presbytery of Irvine (1); *O'Keefe* v. *Cullen* (2); *Murray* v. *Burgess* (3); *Macalister* v. *Young* (4); *Chase* v. *Cheney* (5); *Watson* v. *Jones* (6); *Merriman* v. *Williams* (7); *Long* v. *Bishop of Cape Town* (8); *Skerret* v. *Oliver* (9); *McMillan* v. *Free Church of Scotland* (the *Cardross Cases*) (10); *Lockhart* v. *The Presbytery of Deer* (11); *Bruce* v. *Commonwealth Trade Marks Label Association* (12); *Forbes v. Eden* (13); *Barron* v. *Burnside* (14); *Security Mutual Life Insurance Co.* v. *Prewitt* (15); *Baird* v. *Wells* (16); *Brooking* v. *Maudslay, Son, & Field* (17); *Barraclough* v. *Brown* (18); *Offin* v. *Rochford Rural Council* (19); *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.* (20); *Williams* v. *North's Navigation Collieries* (1889) *Ltd.* (21); *Stevenson* v. *Watson* (22); *Chambers* v. *Goldthorpe* (23); *Pappa* v. *Rose* (24); *Halsbury, The Laws of England*, vol. I., p. 459; *Taylor Innes, Laws of Creeds in Scotland*, p. 266; *The Westminster Confession of Faith*; *The Books of Discipline*; *The Rules and Forms of the Presbyterian Church of Australia in Queensland.*]

Lilley and *Wassell*, for the respondent. The Church is a voluntary association, and having made rules, those rules are mutually binding on the Church tribunals and members. It is merely a voluntary association resting on a consensual basis, and its Courts must act within the provisions laid down by the rules and according to the principles of natural justice. The Courts of law have power to see that the Church Courts do so act and to enforce the carrying out of the contract mutually entered into by the parties: *Long* v. *Bishop of Cape Town* (8); *Murray* v. *Burgess* (3); *Brown* v. *Curé of Montréal* (25); *Forbes* v. *Eden* (13); *McMil-*

(1) 2 M., 823.
(2) I.R. 6 C.L., 452.
(3) L.R. 1 P.C., 362.
(4) (1904) A.C., 515.
(5) 11 Am. Rep., 95.
(6) 13 Wall., 679.
(7) 7 App. Cas., 484.
(8) 1 Moo. P.C.C. N.S., 411.
(9) 23 R., 468.
(10) 22 D., 290; 23 D., 1314; and 24 D., 1282.
(11) 13 D., 1296.
(12) 4 C.L.R., 1569.
(13) L.R. 1 H.L. (Sc.), 568; 4 M., 143.
(14) 121 U.S., 186.
(15) 202 U.S., 246.
(16) 44 Ch. D., 661.
(17) 38 Ch. D., 636.
(18) (1897) A.C., 615.
(19) (1906) 1 Ch., 342.
(20) (1906) 1 Ch., 324.
(21) (1904) 2 K.B., 44.
(22) 4 C.P.D., 148.
(23) (1901) 1 K.B., 624.
(24) L.R. 7 C.P., 525.
(25) L.R. 6 P.C., 157.

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lan v. *Free Church of Scotland* (1); *Skerret* v. *Oliver* (2); *Lang* v. *Presbytery of Irvine* (3); *Halliwell* v. *Synod of Ontario* (4). The *Cardross Cases* (1) and *Long* v. *Bishop of Cape Town* (5) show that the Church tribunals have not a jurisdiction such as excludes any recourse to a State Court. The rules of procedure laid down for the Church tribunals to follow were not observed, and the plaintiff suffered loss of the emoluments of his office as a result of the illegal act of the Assembly. The plaintiff was not bound to sue for damages; he is entitled to a declaration of right: *Queensland Rules*, Order IV., r. 11.

Even if the Church tribunals are in a position similar to that occupied by an arbitrator, they are not protected if they do something contrary to the rules and amounting almost to misconduct.

Mandamus will lie: *Brown* v. *Curé of Montréal* (6).

The Supreme Court made the order as to costs so that they could only be recovered out of the property (if any) of the General Assembly of the Presbyterian Church of Australia in Queensland and the Presbytery of Brisbane, and not against the defendants or any individual members of those bodies personally. This should be varied so that the costs could be recovered from the individual defendants. See *Reg* v. *St. Saviour's, Southwark*, (7); *The King* v. *Land Court and Thomas Province* (8). Counsel also referred to *Scott* v. *Avery* (9); *Cruickshank* v. *Gordon* (10); *Middleton* v. *Anderson* (11); *Angus* v. *Redford* (12); *Russel on Arbitration*, 7th ed., p. 498.

Lukin, in reply, referred to *Porter* v. *Clarke* (13); *Macalister* v. *Young* (14); *Hodge* "*Church and its Polity*," p. 408; "*Free Church of Scotland*," p. 192; *Stewart* "*Laws of Church of Scotland*," p. 241.

Cur. adv. vult.

May 13

GRIFFITH C.J. This is an appeal from a judgment of the

(1) 22 D., 290; 23 D., 1314; 24 D., 1282.
(2) 23 R., 468.
(3) 2 M., 823.
(4) 7 Ont., 67.
(5) 1 Moo. P.C.C. N.S., 411.
(6) L.R., 6 P.C., 157.
(7) 7 A. & E., 925.
(8) 1904 St. R. Qd., 253.
(9) 5 H.L.C., 811.
(10) 5 D., 909.
(11) 4 D., 957.
(12) 11 M. & W., 69.
(13) 2 Sim., 520.
(14) (1904) A.C., 515.

Supreme Court of Queensland, by which it was declared that the suspension of the respondent from his position as a minister of the Presbyterian Church of Queensland by the General Assembly of that Church made on 10th May 1907, and a declaration made by the General Assembly on the same day that the charge of the Church of which the respondent was the minister was vacant, and also a declaration made by the Presbytery of Brisbane on 12th May 1907, are respectively illegal and null and void. Liberty was reserved to the respondent to apply for such relief by way of mandamus, injunction or otherwise as he might be advised.

The plaintiff (respondent) was in 1907 a minister of the Presbyterian Church of Queensland, and had the charge of a Church called the Ann Street Presbyterian Church, from which he was in receipt of a regular stipend. The defendants (appellants) are members of the General Assembly of the Presbyterian Church of Queensland and of the Presbytery of Brisbane respectively, and are sued (under an order of the Court, the validity of which is not attacked) on their own behalf and on behalf of all the other members of the General Assembly and Presbytery respectively.

The facts necessary to the understanding of the case made by the plaintiff are fully set out in the admirable judgment of the Supreme Court, from which I will read some extracts, first premising that the Presbyterian Church, like any other religious body in Australia, is in the eyes of the law a voluntary association, the mutual relations and obligations of the members of which are regulated by the terms of an agreement or consensual compact to which they are parties.

"At an assembly of members of various Presbyterian congregations held in Brisbane on the 25th November 1863, certain Articles of Union were adopted for the purpose of associating these congregations together by voluntary compact as an ecclesiastical body, under the name of 'The Presbyterian Church of Queensland.' These Articles of Union constituted the Confession of Faith which formed the basis of the Association. The second clause provided 'that the Westminster Confession of Faith, the Larger and Shorter Catechisms, the Form of Presbyterian Church Government, the Directory for Public Worship,

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and the Second Book of Discipline, are the subordinate Standards and Formularies of the Church.'

"Clause 4 provided as follows:—'That this Church asserts to itself a separate and independent character and position, and possesses supreme jurisdiction over its subordinate judicatories, congregations, and people.'

"In May 1874, Rules and Forms of Procedure in the Courts and Congregations of the Presbyterian Church of Queensland were adopted by the General Assembly of the Church in Queensland.

. . . . . .

"The Rules of 1874 contained provisions for the government and administration of the affairs of the Presbyterian Church of Queensland according to a scheme similar to that usually adopted by Presbyterians in all parts of the world—that is to say, by means of Church Sessions, or lower Courts, each composed of the minister and elders of a single congregation (see Rules, Part VIII., beginning with Rule 46); Presbyteries or superior Courts composed of the ministers of the several congregations within certain geographical bounds, together within one elder from the Church Session of each of such congregation (Part IX., beginning with Rule 54); and a General Assembly or supreme Court, composed of all the ministers of the several Presbyteries, together with a representative elder from each of the Church Sessions (Part X., beginning with Rule 62). Rule 61 provided that the decisions of the General Assembly should be final, and could not be protested against, or appealed from.

"The management of the temporal affairs of each congregation was, by the Rules, committed to the Deacons' Court, or a committee of management, consisting of members elected by the congregation, together with the members of the Church Session, and the minister as President (Rules 25 *et seq.*). The procedure for the appointment of a minister is to be found in Rule 88 and those immediately following it.

"According to these rules, the congregation is to apply by petition to the Presbytery, which, after taking steps to discover the person desired by a majority of the congregation for their minister, is to consider his fitness for the office, and if it approves

of him, is to ordain or induct him to the pastoral charge of the congregation.

"Under Rule 91, the members of the congregation signing the prescribed invitation to the proposed minister are required to 'engage to contribute to (his) suitable maintenance as God may prosper (them).' But the rules also seem to contemplate that some more definite engagement will be entered into with reference to the minister's stipend; for Rule 35 provides as follows:—'When a congregation feels unable to raise the sum it has engaged to pay its minister, and as soon as the deficiency becomes apparent, the congregation must lay before the Presbytery a statement of the circumstances which have caused it. The Presbytery then makes the necessary inquiry, and deals with it accordingly.' And under Rule 33 the minister's stipend is to be a first charge on the funds of the congregation; no expenditure whatever beyond what is absolutely necessary for the maintenance of public worship is to be made while the stipend is in arrear; and the stipend is to be payable monthly. Rule 99 required the proposed minister to give satisfactory answers to certain questions put to him by the Presbytery, which questions include the following:—(3). 'Do you own and believe the whole doctrine contained in the Subordinate Standards of this Church, as enumerated and defined in the Articles of Union, as an exhibition of the sense in which you understand the Holy Scriptures; and—as such—a confession of your faith? And do you engage firmly and reasonably to adhere thereto, and to the utmost of your power assert, maintain, and defend the same, and the purity of worship as presently practised in this Church?' And, (4). 'Do you acknowledge the Presbyterian form of government by Sessions, Presbyteries and General Assemblies, to be founded upon the Word of God, and agreeable thereto? And do you promise to submit yourself to the government and discipline established and practised in this Church, to concur with the same, and never to endeavour, directly or indirectly, the division or prejudice of the same? And do you engage to the utmost of your power to defend, support, and maintain the said government and discipline? And do you promise to the utmost of your power to maintain the unity and peace of this Church against

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error and schism. And that you will follow no divisive courses from the present established doctrine, worship, discipline, and government thereof ?'

"Part XVII. of the Rules, beginning with Rule 112, was intituled 'Discipline,' and included under this heading Rule 119, to which we shall have to refer again when we come to deal with the questions raised in the first action; otherwise the rules contained in Part XVII. need not be further examined, because in 1905 the General Assembly adopted other Rules of Discipline."

. . . . . .

"On 28th December 1900, *The Presbyterian Church of Australia Act* 1900 (Queensland) was passed. From the recitals to this Act, it appears that the Presbyterian Churches in the several Australian States, including the Presbyterian Church of Queensland, had resolved to unite and form an association to be called 'The Presbyterian Church of Australia,' on the terms and conditions prescribed in the Basis of Union and Articles of Agreement set forth in the Schedule to the Act, and that the assent of the Parliaments of the several States was judged necessary to effect this object. The Act accordingly provided that two months after 7th November 1900, the Basis of Union, and Articles of Agreement set forth in the Schedule, should have the full force and effect of law; but that, except as in the Basis of Union and Articles of Agreement provided, nothing done in accordance with their provisions should have the effect of divesting the Presbyterian Churches of any of the States, or any congregation, body, or person, of any property situated within Queensland, or subject to the jurisdiction of Queensland, which was or should be held in trust for any of the said Churches, or for any congregation or body in connection therewith.

"Sec. II. of the Basis of Union provides as follows:—'The Subordinate Standard of the United Church shall be the Westminster Confession of Faith, read in the light of the following declaratory statement.' The only portions of this declaratory statement which need, we think, be mentioned are the following:—(5) 'That liberty of opinion is allowed on matters in the Subordinate Standard not essential to the doctrine therein taught, the Church guarding against the abuse of this liberty to the

injury of its unity and peace.' And (6) 'That with regard to the doctrine of the civil magistrate and his authority and duty in the sphere of religion, as taught in the Subordinate Standard, the Court holds that the Lord Jesus Christ is the only King and Head of the Church, and Head over all things to the Church which is His Body.' It disclaims, accordingly, intolerant or persecuting principles, and does not consider its office bearers, in subscribing the Confession, as committed to any principles inconsistent with the liberty of conscience and the right of private judgment, declaring in the words of the Confession that 'God alone is Lord of the conscience.'

"The Articles of Agreement provide, amongst other things, as follows: (1) That there shall be a Supreme Court of the Church, which shall be called the General Assembly of the Presbyterian Church of Australia. (3) Which Court shall consist of an equal number of ministers and elders, each State Assembly being represented by a number equal to one-fourth of its members, elected, as to three-fourths by the Presbyteries, and as to one-fourth by the State Assembly. (4) That the General Assembly shall have functions, legislative, administrative, and judicial, supreme with regard (amongst other things) to the doctrine, worship, and discipline of the Church. (5) That the judicial functions of the General Assembly in the cases thereafter stated shall be delegated to a Commission, which shall hear and finally decide all appeals from State Assemblies in cases where a judicial process has been proposed, and all references made in such cases, after evidence has been taken in the lower Court; and that the decisions of the Judicial Commission shall be final, and shall not be subject to review.

"The 11th clause provides that the State General Assemblies shall retain their present names, and that their autonomy should not be further interfered with than is necessary to give effect to the Basis of Union and Articles of Agreement.

"On 6th May 1905 the General Assembly of Queensland (the State General Assembly) adopted . . . . certain Rules of Discipline of the Federal General Assembly, as the Rules of Discipline of the State General Assembly. These Rules of Discipline begin by declaring it to be the duty of the Courts of

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the Church (which expression—according to the definition of the word 'Court' in the Standing Orders—means the Federal General Assembly, or a State General Assembly, or a Presbytery, or a Church Session) to exercise discipline over such of its members as have committed offence which call for the exercise of discipline; and go on to prescribe a most elaborate form of procedure for the purpose of ensuring a fair trial to persons accused of such offences. Every charge has to be brought before the Court empowered to deal with the offence by an accuser, who, unless he is a member of the Court, has to state it in writing (Rule 2). Accusations against ministers are to be investigated by the Presbytery of which they are members (Rule 3), and a minister is entitled to seven days' notice in writing of the intention to make an accusation, and may require the accusation to be put into writing (Rule 5). In entertaining an accusation of unsoundness of doctrine, or of conduct tending to destroy the order, unity, or peace of the Church, great caution is required to be used (Rule 6). If the Court decides to go on, a preliminary inquiry is instituted, the accused being allowed ten days at least to prepare his defence (Rule 8), unless he admits the charge, in which case the Court comes to a decision without further inquiry (Rule 9). The preliminary inquiry may proceed in the absence of the accused (Rule 10). If the Court making the preliminary inquiry finds the charge frivolous, or unsupported, further action is stayed, and the minutes taken on the inquiry are destroyed (Rule 11). If, on the other hand, the Court finds the charge 'apparently well substantiated,' the accused is formally cited to answer it, and all the evidence taken down on the preliminary inquiry is read to him (Rule 13). Cases involving only a sentence of admonition or rebuke can then be dealt with summarily, But in other cases the Court must proceed by judicial process, with or without libel (Rule 14), in which case two members of the Court are appointed to act as prosecutors, and are thereafter debarred from deliberating or voting on the case; and the accused is furnished with the names of the witnesses who are to give evidence against him, and a copy of the evidence taken on the preliminary inquiry (Rule 16). If the Court proceeds by libel, the accused can object to its relevancy—*i.e.*, that it alleges no offence requiring to be dealt with

by judicial process; and that the facts alleged, if proved, would not sustain the accusation. The question of relevancy has to be determined by the Court in the first place, and the Court's decision can be appealed from (Rule 18). If the relevancy of the libel is sustained, the Court fixes a date, not less than twenty-one days thereafter, for the accused to lodge his defence, and a date for the hearing of the case (Rule 20). The accused is then formally cited (Rule 21). In a judicial process, without libel, the Court, after resolving to proceed, fixes a day for the hearing of the case, and formally cites the accused to appear (Rule 22). An accused who disregards the citation is guilty of contumacy, but such contumacy cannot be punished until a second citation has been served on him; and persons found guilty of contumacy in neglecting a citation, or in any other respect, in the course of any proceedings, may be dealt with summarily (Rule 25). Before proceeding with a judicial investigation the Court must be satisfied that the accused has been properly cited, and in a proceeding without libel the accused is entitled to object to the relevancy of the charge, and to have this question decided before anything else (Rule 26). The subsequent proceedings are very similar to those of an ordinary Court of Law. Witnesses are not examined in the presence of each other; and the accused and the prosecutors have the right of cross-examination, and re-examination (Rule 30). Rule 33 prescribes, in an ascending scale, the sentences which may be pronounced for various offences, namely, Admonition, Rebuke, Suspension from Office, Suspension from Privileges, Deposition, and Excommunication,—Suspension from Office being the sentence pronounced when it is found, after due investigation, that the continued exercise of the office will be injurious to religion, and Suspension from Privileges being the sentence pronounced on a person who has brought scandal on the Church. Rule 33 concludes by declaring that it shall be competent for the Federal General Assembly, or a State General Assembly, to declare a minister or elder no longer a minister or elder of the Church. Rule 34 provides that no sentence of suspension from privileges or from office, or excommunication, shall be passed until after judicial process, and no sentence of deposition until after judicial process with libel,

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unless the offence has been confessed by the accused, or committed in the presence of the Court, or has been an act of contumacy. And Rule 36 provides that suspension from office, *sine die*, or for any period exceeding three months, pronounced upon a minister, involves a dissolution of the pastoral tie. Finally, under Rule 42, no general rule or standing order shall be held to override the express provisions of these rules of discipline:" *Frackelton* v. *Macqueen* (1).

I add that the Rules of the Presbyterian Church of Queensland contained, in the chapter headed "Discipline," the following Rule (119):—"When disputes arise between a minister and his session or congregation or any part thereof, the Presbytery inquires into the same, and endeavours to promote peace; but when the Presbytery finds that a minister's usefulness is, through any means, lost, the circumstances are reported to the next meeting of the General Assembly, which may dissolve the pastoral tie."

The plaintiff was regularly inducted to the pastoral charge of the Ann Street Church in September 1896, when he made the promise in the terms above set out. Before 1907 disputes and differences had arisen between the plaintiff and some members of the Ann Street congregation. The Presbytery of Brisbane, to which it was attached, appointed a Commission to investigate the matters in question, and on 4th December 1906 the Commission presented to the Presbytery a report which contained the following passages:—

(1) "That the Presbytery express their unqualified disapproval of the action of the minister in commencing a meeting of the Church Session without a quorum being present, he being well aware that in doing so he was acting in an unconstitutional manner.

(2) "That the Presbytery condemn the action of the minister in summoning a meeting of the congregation, knowing as he did, that the holding of the meeting was contrary to the expressed wish of a majority of the Church Session.

(4) "That in regard to the disappearance of the Communion Roll, the Presbytery declare, that by virtue of his own statement, Mr. Frackelton, after dealing very questionably with the book,

(1) 1909 St. R. Qd., 80, at pp. 120-8.

has by his silence misled the Presbytery, and his own Session, and has been guilty of conduct unworthy of a minister of the Gospel; and that the Presbytery record with pain their profound sorrow that one of their number should have stooped to such procedure.

(5) "That remembering all these matters, and in view of the fact set forth in the Commission's former report that there exists serious friction for which the Presbytery believes the minister to be mainly responsible, and being firmly convinced that a better state of affairs is not likely to be brought about so long as he remains as minister, Mr. Frackelton be requested to place his resignation in the hands of the Presbytery."

On 5th February 1907 the Presbytery of Brisbane adopted a resolution that, as the plaintiff had not followed the Presbytery's recommendation to resign, the Presbytery should report the whole matter to the General Assembly with a recommendation that, taking a conjunct view of all the circumstances, the General Assembly should dissolve the pastoral tie between the plaintiff and the Ann Street congregation. This action was apparently taken under the powers assumed to be conferred by Rule 119. The General Assembly was appointed to meet on 7th May. On 19th April the plaintiff issued a writ in the Supreme Court against all the members of the Presbytery of Brisbane except himself, claiming an injunction to restrain the defendants "and each of them as members of the Presbytery of Brisbane of the Presbyterian Church of Australia in the State of Queensland from removing or purporting to remove the plaintiff from his office as minister of the Ann Street Presbyterian Church at Brisbane until they shall have taken proceedings against him with respect to his conduct in the said office in accordance with the rules relating to the procedure with regard to discipline in force in the Presbyterian Church of Australia in the State of Queensland, and unless they have found in accordance with such rules that circumstances have occurred warranting such removal, and until the plaintiff shall have had an opportunity of being heard in accordance with such rules in reply to any charge made against him, and to further restrain the defendants and each of them as members of the said Presbytery from proceeding or further proceeding with or upon

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a resolution of the said Presbytery of 5th February 1907, and from reporting or forwarding the said resolution to the General Assembly of the Presbyterian Church of Australia in the State of Queensland."

On 8th May the Presbytery of Brisbane presented a supplementary report to the General Assembly reporting the issue of the writ, whereupon it was resolved, on the motion of the respondent Macqueen, that the plaintiff should be cited to appear at the bar of the House on the following day to make answer whether the writ was issued by his authority. On the 9th he appeared in answer to the citation, and on being asked whether the writ was so issued replied in the affirmative. Some proceedings, apparently intended to be of a conciliatory nature, were then taken, but on 10th May the General Assembly resolved, on the motion of the same respondent, as follows :—

"That the Rev. W. S. Frackelton has, by his own admission in the face of this Assembly, invoked the aid of the Civil Court to restrain the Courts of the Church from exercising their lawful spiritual jurisdiction, and has therein been guilty of an act of insubordination against the authority of the Church, and has violated the vows which he took upon himself on his induction to the ministry of the Ann Street Church, in which he promised to submit himself to the government and discipline established and practised in this Church; to concur with the same, and never to endeavour, directly or indirectly, the subversion of the same; therefore the General Assembly resolves that he be suspended for six months from this day from his position as a minister of the Presbyterian Church in Queensland, and declares him to be suspended accordingly, and the Ann Street Church to be vacant."

The plaintiff was then placed at the bar, and the Moderator in the name of the Assembly declared him to be suspended for six months from his position as a minister of the Presbyterian Church of Queensland. It followed under Rule 36 of the Rules of Discipline, already quoted, that the pastoral tie between him and his congregation was *ipso facto* dissolved, and his right to receive his stipend came to an end. This resolution having been duly communicated to the Presbytery of Brisbane, they issued an edict of vacancy to be read before the Ann Street congre-

gation on the 12th. This was accordingly done, and the plaintiff was *de facto* excluded from the enjoyment of the position and emoluments of minister of the Ann Street Church.

On 8th May 1908 the plaintiff issued his writ in the present action claiming relief not substantially different from that given by the Supreme Court.

The first and second actions were subsequently consolidated, and came on for trial together before *Cooper* C.J., who gave judgment for the plaintiff in both actions. The judgment in the first action was set aside by the Full Court, and leave to appeal from that decision was refused by this Court on the ground that up to the issue of the writ in that action no civil right of the plaintiff had been infringed.

Upon this state of facts the question for determination is whether the plaintiff is entitled to maintain the second action. The appellants contended before the Supreme Court that under the *Presbyterian Church Act* 1900 the so-called Courts of the Church are independent judicial institutions of the State whose proceedings cannot be called in question in the Supreme Court. They further contended that, apart from that Statute, the civil authorities have no jurisdiction over a spiritual body such as the Church. These contentions were fully dealt with by the learned Judges of the Full Court in reasoning in which I fully concur, and as they were not pressed before us it is unnecessary to refer to them in detail. It is sufficient to say that the only way in which the respective rights of the parties can be regarded in a Court of law is in the aspect of rights arising under a consensual compact, the interpretation of which it is for the Court, and not for the parties to the contract, to determine.

Before this Court the appellants maintained, in substance (1) That the issue of the writ in the first action was a breach of the vow taken by the plaintiff on his induction as a minister of the Ann Street Congregation and an act of insubordination; (2) That the decision of the General Assembly of 10th May was final and conclusive, whether it was given in conformity with the provisions of the consensual compact or not; and (3) That the plaintiff had not shown any infringement of a civil right.

The plaintiff's vow or promise was that he would submit him-

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self to the government and discipline established and practised in the Church, to concur with it and never to endeavour directly or indirectly its division or prejudice, and further that he would to the utmost of his power defend, support and maintain the said government and discipline. It is difficult, at first sight, to see how an invocation of the Civil Courts to maintain the discipline of the Church according to the terms of the compact by which it is prescribed can be called an act subversive of that discipline, unless, indeed, we accept the contention which was boldly put forward by the appellants that the General Assembly is not only the supreme authority to determine matters brought before it in accordance with the terms of the compact, but is also the supreme interpreter of the terms of the compact, and of the extent of the powers which it confers. Such a contention is, in substance, both a denial of the right of a Civil Court to entertain a complaint of breach of the compact, and an assertion that the compact confers no rights cognizable in a Court of law. The Civil Court does not, of course, exercise functions of a Court of Appeal from a decision of the domestic tribunal made under the powers conferred upon it by the compact.

Here I would remark that the doctrine of the absolute supremacy of the so-called Church Courts does not appear to be a doctrine of the Church of Scotland as by law established. For the Westminster Confession itself, in the Chapter (XXIII.) "Of the Civil Magistrate," declares (paragraph III.) that it is "the duty of the civil magistrate to take order that . . . all abuses in . . . discipline be prevented or reformed." *A fortiori* it cannot be effectually asserted of a purely voluntary association which adopts that Confession of Faith as one of its standards.

The powers of a Court of law to interpret and give effect to such a compact when any civil right depends upon its terms are too well established to need any citation of authority to support them. The contrary contention, translated into plain English, is that a minister of the Presbyterian Church, by adhering to the Constitution of the Church, in effect enters into a contract not substantially distinguishable from the submission made by members of another well known ecclesiastical organization, every member of which is required to take a vow that he will in his

relations to his religious superiors be *perinde ac cadaver*. In other words, the minister surrenders all his future prospects in life into the hands of an infallible General Assembly. It is impossible, in my judgment, to hold that the Constitution, with its elaborate provisions for the protection of accused persons and for securing them a fair trial set out in the Rules of Discipline, can be summed up as a compact by which a minister holds his office and emoluments at the will of the General Assembly.

I proceed, therefore, to consider whether the issue of the writ in the first action was a breach of the compact. The general rule is that a stipulation, which, if effectual, would oust the jurisdiction of Courts of law to determine questions arising under a contract, is void, as being contrary to the policy of the law. The only case in which it appears that such a question has been raised in connection with an ecclesiastical organization is the *Cardross Case* (1), in which the notion that appealing to a Court of law for redress against a breach of the consensual compact entered into by members of the Free Church of Scotland was a breach of the ordination vow (in all respects similar to that taken by the plaintiff) was rejected by the Court of Session. In my opinion it cannot be supported. It is not necessary to determine whether, apart from the failure to establish an actual infringement of a civil right, the first action could have been successfully maintained, but I will say a few words on that point. It was at least arguable that Rule 119, under which the Presbytery of Brisbane purported to act, had been wholly repealed by necessary implication by the adoption by the Church in Queensland of the new rules of discipline of the Presbyterian Church of Australia in 1905. Assuming that it had not been so repealed, it might be contended with great force that, if that rule ever authorized a Presbytery to present to the General Assembly a charge of grave misconduct (such as that involved in paragraph 4 of the Report of the Commission) without an accusation properly made and properly tried, it was, at any rate, repealed *pro tanto* by the positive provisions of the new rules already quoted. If this is the true view, it was a breach of the consensual compact for the Presbytery of Brisbane to invite the General Assembly

(1) 22 D., 290.

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to dissolve the pastoral tie between the plaintiff and his congregation by a proceeding not authorized by the compact, a thing which was not unlikely to be injurious to him, and it might be contended with much force that such a breach of contract might be restrained by injunction. It is no more to the purpose to say that the General Assembly might not have acted on the recommendation than to say that an inferior Court of law should not be restrained by prohibition before trial because it might itself decline jurisdiction.

The case of *Macalister* v. *Young* (1) determined that the question whether a particular matter is a matter of doctrine or not is one for the decision, in ultimate result, of the civil Court. So, the question whether a particular act can be an act of insubordination or a breach of a vow of submission is one for the decision of the Civil Court upon its construction of the compact and of the terms of the vow.

In my opinion, for the reasons I have given, the issue of the writ in the first action was not a breach of the compact entered into by the plaintiff. It does not fall within the express words of the documents embodying the compact, and, in my judgment, the asserted term cannot be read into the compact by any necessary implication.

But, the appellants say, the General Assembly are the supreme judges of that question. I have already dealt with this argument, and will only add that it is exactly analogous to the claim of the House of Commons to be the judges not only whether a man has been guilty of contempt, but also of what is contempt. Indeed, the action of the General Assembly now complained of is very like a summary punishment for contempt.

It follows that the action of the General Assembly complained of in the second action was a conviction for doing a lawful act not forbidden by the Constitution of the Church, and was a breach of the compact between the plaintiff and the other members of the Church.

There is, however, another fatal objection to the action complained of. Assuming that the General Assembly is supreme within the terms of the Constitution, that provision is not an

(1) (1904) A.C., 515.

overriding provision, swallowing up all the other terms of the compact. There is nothing in the documents presented to us to show that the General Assembly has direct original jurisdiction to punish ministers for offences, nor has any instance been cited in which a General Assembly has asserted such a power, except the *Cardross Case* (1), where the action taken was held invalid. The Rules of Discipline are a carefully framed code securing to accused persons a fair and deliberate trial before they are condemned. The charge against a minister must be made to the Presbytery, which must investigate it according to a procedure calculated to secure the utmost fair play and full deliberation; and, for further precaution, an appeal lies from their decision to the General Assembly, where the accusers cannot take part in the hearing of the appeal. The summary proceeding adopted in the present case disregarded all the provisions agreed to for the protection of the accused. This, in my judgment, was not a mere error in procedure, but went to the root of the authority of the Assembly to pronounce a sentence of suspension. Reference was made to Rule 34 of the Rules of Procedure, which provides that a sentence of suspension may be passed without judicial process if the offence has been confessed by the accused, but it cannot be seriously disputed that that Rule applies only to sentences passed by a Court competent to pass them.

It remains to consider whether the plaintiff has established that he has, by reason of the action complained of in the second action, suffered any infringement of a civil right, or, in other words, sustained any loss of money or property. The actual and necessary result of the action complained of was that he was not only deprived of his emoluments as minister of the Ann Street Church, but prevented from exercising his functions as a minister elsewhere in Queensland, and so possibly earning some remuneration.

In *Forbes* v. *Eden* (2) Lord *Chelmsford* L.C. said :—"The appellant in this case has not been disturbed either in his charge of the congregation at Burntisland, or in his legal position of a minister of the Scotch Episcopalian Church. If he had been, though in this latter respect only, I should have considered, with the Lord Justice

(1) 22 D., 290.

(2) L.R. 1 H.L. Sc., 568, at p. 575.

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Clerk, that 'the possession of a particular status, meaning by that term the capacity to perform certain functions, or to hold certain offices, is a thing which the law will recognize as a patrimonial interest, and that no one can be deprived of its possession by the unauthorized or illegal act of another without having a legal remedy.'" See also *Murray* v. *Burgess* (1).

The general rule of law is that an action will lie for any breach of contract, if only for nominal damages. If the natural and actual result of a breach of contract is to create actual pecuniary loss, there is no doubt that an action will lie, and the measure of damages is the amount of the loss actually sustained, provided that such loss was in the contemplation of the parties to the contract as the natural result of a breach. It is quite immaterial whether the plaintiff could have recovered his stipend from the Ann Street congregation by action or not. Unless, therefore, the appellants can invoke some exceptional rule to protect them, an action will lie against them for damages. It is suggested that the General Assembly are in the position of arbitrators, against whom an action will not lie in the absence of malice or fraudulent misconduct. This rule does not, however, extend to protect an arbitrator from the consequences of an act done by himself or at his instance in execution of an award upon a matter not submitted to him. Such an action, moreover, is not founded on contract. There is ordinarily no contract, express or implied, between the parties to a submission and the arbitrator. I do not know of any rule of law which requires malice to be proved in an action for breach of contract. So far as the Presbytery of Brisbane are concerned, the action complained of is that they excluded the plaintiff from the enjoyment of the emoluments of his office in execution of an order of the General Assembly which was a breach of the compact to which they were parties, as they must have known. If an action for damages will lie, it is not material that they are not formally claimed. Under the Rules of Court (Order IV., r. 11) an action is not open to objection on the ground that the only relief asked is a declaration of right. I agree that this must be taken to mean a declaration of some right to which the Court could give effect if

(1) L.R. 1 P.C., 362, at p. 370.

asked to do so. But the plaintiff may, if he likes, waive his claim for damages. I express no opinion on the question whether if nominal damages only were recoverable the action could be maintained.

The Club cases were all cases in which the power of the Court to give specific relief as to property was the foundation of the jurisdiction invoked, and do not determine the point.

It was also urged that in any case an action would not lie until the plaintiff had exhausted all his rights under the compact, namely, by appealing to the General Assembly of Australia. In my opinion it is no answer to a breach of contract to say that the plaintiff might have obtained redress for the breach in some other way, unless there is an express or implied stipulation that failing to obtain redress in that other way shall be a condition precedent to the right to complain of the breach. I can find no such stipulation, express or implied, in the compact now under consideration. The same view was taken by the Judicial Committee in the case of *Long* v. *Bishop of Cape Town* (1).

In my opinion, therefore, the declaration of right made by the Supreme Court was right and ought to be affirmed.

The appellants, however, ask that the liberty to apply for further relief should be omitted, at any rate so far as it gives leave to apply for a mandamus. There is no doubt that the Court will not grant specific performance of an agreement for the establishment of personal relations between parties, and a mandamus to restore the plaintiff to the ministry of the Ann Street Church would be in the nature of an order for specific performance. Such relief could not, therefore, be granted, and the liberty to apply for it is ineffectual and would be better omitted. But this objection does not apply to the liberty to apply for an injunction to prevent the defendants from doing anything in contravention of the rights declared by the Court.

With regard to costs, the Full Court ordered the costs of the appeal to be paid by the defendants, but only out of the property of the General Assembly and the Presbytery, neither of whom, it is said, have any, and they appear to have thought that they could not order the costs to be paid by the individual defendants.

(1) 1 Moo. P.C.C. N.S., 411.

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In support of that view they referred to the case of *R.* v. *St. Saviour's, Southwark* (1). In that case, however, the Court of Queen's Bench held, not that they could not order, but that under the circumstances they ought not in their discretion to order, the defendants to the mandamus to pay the costs personally. Still, the Full Court did not order the defendants in the present case to pay the costs personally, and, considering that the present appellants obtained a substantial success in their appeal to the Full Court (complete as to the first action) it would, I think, have been a hard measure to have ordered them to pay the costs of that appeal personally. I think, therefore, that the order for costs should not be disturbed.

The result is that the order appealed from should be varied by omitting the word "mandamus," and in other respects affirmed. The appellants must pay the costs of this appeal.

O'CONNOR J. I agree that the judgment of the Supreme Court should be affirmed with the slight variation of form mentioned by my learned brother the Chief Justice, and I might perhaps have contented myself with adopting as my reasons the clear and convincing arguments so admirably expressed in the judgment of the learned Judges. But I think it is due to the parties, and to the large section of the community to whom the questions raised are of interest and importance, to state the reasoning by which I have arrived at my conclusion. It was not seriously contended before us that the tribunals of the Church have any public status as Courts. It must be recognized that we have not to deal here with a State Church, and it is beyond dispute that public authority is in no sense behind the bodies whose acts and decisions are called in question in these proceedings. It has long been settled by British Courts that a religous body not being a State Church is merely a voluntary association bound together by a consensual compact—that the rights of its members *inter se* depend entirely on the terms and conditions of the compact; that the terms and conditions constitute a contract in which every member binds himself to the whole body and to every other member to act in accordance with its provisions. If, as is generally

(1) 7 A. & E., 925.

the case, the Church has by its Constitution created bodies clothed with executive and judicial powers for managing and controlling its spiritual disciplinary and business interests, the Civil Courts will not in general interfere with their acts and decisions. It is only when such bodies exceed their powers, and assume to themselves an authority which the contract has not given them, that the Civil Courts will intervene, and then, only, when the party complaining of the wrongful act or decision establishes the fact that he has thereby been injured in his property or in the exercise of some civil right. Any member who has been so injured may obtain redress in the Civil Courts, and his proceedings must be directed against those of his fellow members who have contrary to the contract assumed anthority to do the act or give the decision which has caused him injury. If his complaint is against a body of members, such as the General Assembly of the Presbyterian Church of Queensland, he is not bound to join each member as a party. He may, as in the present case, proceed against individuals selected by the Court to represent the whole body for the purpose of the proceedings: *Skerret* v. *Oliver* (1). In pursuance of these well-established principles, the plaintiff has in the first action proceeded against certain members of the Presbyterian Church of Queensland representing the Presbytery of Brisbane, and in the second action against certain members representing the General Assembly of the Presbyterian Church of Queensland, and the Presbytery of Brisbane. His complaint against both bodies is that they have, in breach of the contract which binds them and him as members of the Church, acted beyond their jurisdiction in making against him the declarations and orders which have caused him the injuries which he comes to the Court to have redressed. On the argument before this Court an important question was raised as to the defendants' liability irrespective of their jurisdiction. Can such bodies as the General Assembly and the Presbytery be made answerable in a Court of justice even when they have exceeded their jurisdiction unless malice or *mala fides* is proved against them? Mr. *Lukin*, in the course of his able argument, contended that there attaches to them the same immunity as attaches to Judges exercising a

(1) 23 R., at p. 475, *per* Lord *Kincairney* (Lord Ordinary).

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limited jurisdiction, who are not liable for acts done in excess of their powers unless they knew or ought to have known of the want of jurisdiction. But the considerations of public policy which throw that protection around those who exercise a public office in the administration of justice cannot apply to persons whose status is merely that of arbitrators. An arbitrator has the judicial power which the parties by agreement have given him; in other respects he stands in the same position as any other member of the community. So long as he keeps within his jurisdiction his judgments and acts cannot in general be questioned. But if he exceeds his jurisdiction and does some act not justified in law, causing injury to another, he is liable to that other in the same way as any other individual would be liable. The case, indeed, cannot be considered apart from jurisdiction. However far afield the controversy may extend, the determination of the substantial issues raised between the parties must depend upon the answer to be given to the question—have these bodies exceeded the jurisdiction which the contract confers on them? I did not gather from the argument of defendants' counsel that that position was seriously disputed. Very high claims were made by them on behalf of the judicial bodies of the Church—claims of jurisdiction substantially unlimited and powers not to be questioned. But the claims were based on the contract and on the accustomed practice of Church government and discipline to be found in the numerous documents that go to make up the contract. The accepted issue, therefore, of both sides is the interpretation of the contract. In the Court of first instance the action against the Presbytery alone and that against the General Assembly and the Presbytery jointly were consolidated. The plaintiff was successful in both. The Supreme Court, however, set aside the judgment as to the first action, and on that part of the order there has been no appeal. We have, therefore, no further concern with the first action except to note its initiation as the most important fact in the second action. It was the issuing of the writ in the first action that was the head and front of Mr. Frackelton's offending.

I turn now to the second action, founded, as I have pointed

out, entirely on contract, and I propose to consider—(1) What was the contract? (2) Whether the defendants have committed a breach of it? (3) Whether the plaintiff has thereby suffered damage to his property or civil rights which will justify the Civil Courts in granting him redress? The consensual contract by which the members of the Presbyterian Church of Queensland are united is contained in the Articles of Union adopted at the foundation of the Church in November 1863 and amended in May 1878, incorporating by reference the Westminster Confession of Faith, the Larger and Shorter Catechism as the Subordinate Standards and Formularies of the Church, as also the form of Presbyterian Church Government, the Directory for Public Worship, and the Second Book of Discipline as of the nature of General Directories. Later a Deed of Union, a code of procedure in regard to discipline, and from time to time other bodies of Rules and Formulae have been duly adopted, the whole of which taken together form what I shall describe as the Constitution under which the members of the Church are united in a voluntary association. The Queensland Presbyterian Church joins with the Presbyterian Church of the other States in forming the Presbyterian Church of Australia. That Union is recognized by the *Presbyterian Church Act* 1900, which gives the force of law to the various provisions which go to make up the Constitution of the Presbyterian Church of Queensland. It is with that body of provisions only that we have to do in this action. They constitute, as I have before pointed out, the terms of the contract which the plaintiff and each member of the Presbytery and of the General Assembly have promised each other to fulfil. The contract is to be construed as any other contract, reading it as a whole and giving effect as far as possible to every part of it. The plaintiff in his induction as minister took a vow by which he acknowledged the Presbyterian form of government by Sessions, Presbyteries, and General Assemblies, to be founded upon the Word of God, and agreeable thereto; and promised to submit himself to the government and discipline established and practised in the Church, to concur with the same, and never to endeavour, directly or indirectly, the subversion or prejudice of the same; he engaged to the utmost of his power, to maintain, support,

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and defend the said government and discipline; he promised to the utmost of his power and opportunity to maintain the unity and peace of the Church against error and schism, and that he would follow no devisive courses from the present established doctrine, worship, discipline, and government thereof. Having regard to the many safeguards which the Constitution of the Church provides for securing a fair hearing of complaints and accusations, and the limited scope of what may be described as Church matters as compared with the ordinary interests and activities which must necessarily fill the life of a minister, it is impossible to construe the plaintiff's vow as amounting to more than a submission to the government and discipline established and practised in the Church in respect of matters within the jurisdiction of Church authorities under and in accordance with the terms of the compact. The defendants have contended that the oath means much more; that it binds the plaintiff to submit himself absolutely to the Presbytery and General Assembly in every matter which they shall determine to be a matter of Church government or discipline. That he thereby undertakes to accept without question their interpretation of the contract in all respects, that he agrees that it shall be for those tribunals alone to decide what is and what is not within their jurisdiction, and, no matter how they may exceed the jurisdiction actually conferred by the contract or to what extent they may deprive him of the rights which it has given him, his only remedy is to appeal from one tribunal of the Church to another. But the defendants' claim to unlimited authority does not stop there. They contend further—and acting on that contention they have committed the wrong of which the plaintiff complains—that the mere act of submitting the question of jurisdiction to the Civil Courts for determination is not only a breach of the vow, but an act of insubordination. A voluntary association might certainly bind its members by a contract stipulating that the interpretation of the terms and conditions of association should be exclusively in the hands of a judicial body empowered to decide without question the limits of its own jurisdiction. It might further provide that the penalty of questioning the decisions of that tribunal should be expulsion from the association or a temporary loss of its benefits. Men may thus, if

they think fit, submit themselves absolutely to the will and pleasure of the association which they have voluntary created. If they do so they have no right to complain of any exercise of power so long as it is not malicious. But there is no such self-surrender or abnegation of rights to be found in this contract. On the contrary it abounds in provisions for securing to members the preservation of rights and the fair trial of accusations. No word of the contract gives colour to the contention that any member of the Church has debarred himself from the exercise of that right which belongs to every person who enters into a contract with others—the right of appealing to the Courts to have the contract interpreted when the other parties to it are acting to his injury beyond the scope of the contract. In another way the defendants' counsel endeavoured to find in terms of the contract the unlimited jurisdiction that has been claimed. The plaintiff, it is urged, promised by his vow to submit himself "to the government and discipline established and practised in the Church." It was contended that the Presbyterian Church had always exercised unlimited control over its members in matters of Church government and discipline, and that it was to the government and discipline so established and practised that the plaintiff had submitted himself. But two answers at once suggest themselves. Whatever may have been the government and discipline practised in the Church in other times, there are numerous provisions of the present disciplinary codes that are entirely contradictory of the position that the minister's rights are at the absolute mercy of the Presbytery or the General Assembly. But the alleged foundation of fact is wanting also. The Church, since it has ceased to be a State Church, has not exercised without question the unlimited powers now claimed. The issues involved in the *Cardross Case* (1) and other cases cited in argument show that the right to such unlimited and unquestioned power has never been recognized by the Civil Courts. I take it, then, as established that it is open to this Court to examine the terms of the contract which gives jurisdiction to the judicial tribunals of the Church, and to determine whether the General Assembly could on the materials before it find that the plaintiff had been guilty of insubordination

(1) 22 D., 290.

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or had committed a breach of discipline. I assume for the present that they had jurisdiction to try him, and that their mode of proceeding was authorized by the Constitution of the Church. It is not necessary to decide for this purpose whether the plaintiff was right or wrong in his view as to the powers of the Presbytery in dealing with the disputes between him and his congregation. It is clear that he honestly believed they were acting beyond their jurisdiction, and he sought the intervention of the Civil Court to protect him from what he believed to be a violation of his rights. As I have already pointed out, the law gave him a right to raise the question of the true interpretation of the contract, and to raise it in that way. It is clear, therefore, that the General Assembly could not legally come to the conclusion that the plaintiff's exercise of a legal right was a breach of discipline and an act of insubordination. But there is another ground of objection which is equally fatal. The code of procedure in regard to discipline, which constitutes the Prebytery—not the General Assembly—the tribunal to try accusations, provides a procedure to be followed which is calculated to ensure a fair trial. That procedure applies only to a trial by the Presbytery. If the defendants' contention is right, an accused person may be tried by the General Assembly without any opportunity of defence beyond that which the tribunal may chose to give him. It is clear to my mind that the compact does not contemplate the Assembly having any jurisdiction in respect of offences, except on appeal from those tribunals of the Church on which is expressly conferred the power to deal with them in accordance with the Rules of Procedure, which give an opportunity of fair trial. The last paragraph of sec. 33 of the Code was also relied on by the defendants, but the general power there conferred can apply only to cases in which the General Assembly takes action on what amounts to an accusation of an offence. Rule 34 expressly provides that no sentence of suspension from privileges or from office, &c., shall be passed until after judicial process has been followed unless the offence has been confessed by the accused or committed in the presence of the Court, or has been an act of contumacy. The Court there referred to must mean the Court which has power to try and sentence the accused, which

can only be the Presbytery. There is, indeed, no part of the present Constitution of the Church which empowers the General Assembly to try an offence in the first instance. In my opinion, therefore, the General Assembly had no power to entertain the charge of insubordination, and I am further of opinion that if they had there was no evidence before them on which they could find him guilty. Their action, declaring him guilty of insubordination not being justified by the contract, was, as against the plaintiff, a violation of its provisions, illegal and void, as also was the sentence of suspension founded on it and the action in pursuance of the sentence and in obedience to it afterwards taken by the Presbytery.

The next question is, what is the remedy, if any, for the illegal declaration and sentence which thus, in violation of the Constitution to which he had submitted himself, deprived the plaintiff of his stipend, dissolved the pastoral tie between him and his congregation, deprived him of his status as member for six months, made the obtaining of employment in his Church after that period a difficult and precarious matter, and sent him forth amongst the members of his Church branded as a minister who had been guilty of insubordination and a breach of his vow. The defendants' reply is that his only remedy is an appeal to the Federal Assembly of the Presbyterian Church of Australia. But where is there anything in the contract by which the plaintiff has given up his rights to have recourse to the Civil Courts? As I have before pointed out, the plaintiff has not by the contract submitted himself to the control of the Presbytery or General Assembly in all matters, but only in matters within their jurisdiction under the contract. As they assumed an authority to deal with him which they did not possess under the contract, there is, in my opinion, fortunately left to him the right of appealing to the Civil Courts for redress provided he can show that he has been so injured in the exercise of a civil right as to justify their interference. On this part of the case I concur entirely in view of the facts expressed in the following words by the learned Judges in the Court below:—"Now, in the present case, there cannot be much doubt as to the 'moral certainty of emolument' of which the plaintiff has been deprived by the defendants'

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illegal exercise of power. He enjoyed a stipend before, he does not enjoy it now, and that difference in his circumstances has been occasioned by their illegal exercise of power by the Church Court, to whose jurisdiction, when legally exercised, he admits his subjection, and against whose sentence he admits himself to be powerless, so long as they stand unreversed:" *Frackelton* v. *Macqueen* (1).

The authorities cited in the judgment of the Supreme Court clearly support the conclusion at which they have arrived, that the injury to the plaintiff's civil rights is such as to justify his claim to redress in the Civil Courts. On all the matters in issue before this Court I am therefore of opinion that the Supreme Court came to a right conclusion in affirming and upholding the decision in the plaintiff's favour in the form set forth in their judgment. As to costs and also as to the variation in the liberty to apply by striking out the word "mandamus," I agree with my learned brother the Chief Justice.

ISAACS J. The judgment of the Supreme Court and that of the learned Chief Justice so clearly narrate the facts of the case, that I find it unnecessary to recapitulate them. I shall, therefore, address myself at once to the questions of law which have been raised by the parties.

There are certain recognized and well defined propositions which govern the consideration of this case, and these may be conveniently grouped together and stated at the threshold, as they appear to me to be deducible from the cases cited at the bar, in the course of the very able arguments on both sides.

The first is this: that in the ascertainment and enforcement of rights and liabilities among its members, a Church is regarded by the law in precisely the same light as any other society of men who have entered into association for lawful purposes. Whether the objects be sacred or secular, whether for friendly, literary, scientific, or religious purposes the social compact is at once the source and the measure of the rights of those who compose the body. It is a pure question of contract, and contracts of this nature must be construed by the same methods as those by which

(1) 1909 St. R. Qd., 98, at p. 158.

all other contracts are interpreted. It may take various forms, it may be embodied in one instrument like a Constitution, or in many; these instruments if more than one may have varying importance, there may with the express written word be incorporated usages or unwritten practices, but these circumstances are incidental to all agreements, and when once the terms of the compact are collected, interpretation on ordinary lines follows, and determines the legal relations of the parties.

The second proposition is of high importance having regard to some of the arguments presented. The contract must be looked to not merely to see what rights are granted to a member, but also to ascertain whether they may be lost, under what conditions and by what means.

It was gravely, though as it appeared to me not confidently, argued that, inasmuch as the rights claimed by the respondent originated and existed entirely within the confines of the religious association, and could not possibly be exercised or enjoyed beyond the limits of the Church, they were *ex natura* entirely under the jurisdiction of the Church authorities, a jurisdiction unchallengeable in a Court of law. Needless to say no authority can be found to support so sweeping a contention. It is a universal claim for exclusive jurisdiction in the Church Courts. But these tribunals, though conveniently enough styled "Courts," are not Courts in the legal sense. They have no jurisdiction properly so termed. The law invests them with no coercive power, with no authority to issue process, or to declare, determine, or enforce rights, and they are strictly dependent for such so-called jurisdiction as they possess upon the consent of the parties who are subject to it. In this respect the Act of 1900 makes no difference. That Act merely gives legal effect to an agreement for federal union, and bestows no changed character on the tribunals then already existing in the several States beyond subordinating them to the final decision and paramount authority of the Federal Assembly.

All powers exerciseable by the association, legislative, judicial, or administrative, if intended to bind its own members, must spring from their consent and do not arise from the authority of the general law.

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An elaborate and illuminative exposition of this principle may be found in the various cases of *M'Millan* v. *The Free Church of Scotland* (1), called the *Cardross Cases*. I particularly call attention to the following passages: by the Lord President (2); by Lord *Curriehill* (3); and by Lord *Deas* (4); by the Lord President (5); by Lord *Ivory* (6); and by Lord *Curriehill* (7). It is unnecessary to refer in detail to the observations of these learned Judges, because we have a decisive authority laying down the principles upon which a Court of law must proceed in order to determine whether a Church tribunal lawfully possess the jurisdiction it assumes. In *Long* v. *Bishop of Cape Town* (8) the Judicial Committee had to consider whether Mr. Long had been lawfully suspended and deprived by the Bishop, and they proceeded to inquire:—1. Whether Mr. Long had contracted to obey the Bishop in respect of matters commanded; 2. Whether the Bishop possessed coercive power or jurisdiction by law to determine the guilt or innocence of a minister *in invitum*; 3. Whether in this instance he obtained the necessary jurisdiction by voluntary submission. Their Lordships came to the conclusion that the terms of the oath of canonical obedience did not extend to the matters referred to.

They further agreed with the Court below that the Bishop's powers irrespective of consent did not enable him to bind Mr. Long in a matter which was in fact outside his oath of obedience, and lastly, that the conduct of Mr. Long had not amounted to consent.

And Lord *Kingsdown*, in the course of the judgment, made some observations which require close attention before their full significance is apprehended. He said (9):—"But a majority of Judges below held that the defect of coercive jurisdiction under the letters patent had been supplied by the voluntary submission of Mr. Long, and that he is on that principle bound by the decision of the Bishop. This point we have next to consider.

"The Church of England, in places where there is no Church established by law, is in the same situation as any other religious

(1) 23 D., 1314.
(2) 22 D., 290, at p. 313.
(3) 22 D., 290, at p. 319.
(4) 22 D., 290, at p. 323.
(5) 23 D., 1314, at p. 1328.
(6) 23 D., 1314, at p. 1333.
(7) 23 D., 1314, at p. 1339.
(8) 1 Moo. P.C.C. N.S., 411.
(9) 1 Moo. P.C.C. N.S., 411, at p. 461.

body—in no better, but in no worse position; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them.

"It may be further laid down that, where any religious or other lawful association has not only agreed on the terms of its union, but *has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation*: the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice.

"In such cases the tribunals so constituted are not in any sense Courts: they derive no authority from the Crown; they have no power of their own to enforce their sentences; they must apply for that purpose to the Courts established by law, and such Courts will give effect to their decision, as they give effect to the decisions of arbitrators, whose jurisdiction rests entirely upon the agreement of the parties.

"These are the principles upon which the Courts in this country have always acted in the disputes which have arisen between members of the same religious body not being members of the Church of England."

This leads me to the third proposition, namely, that the consensual compact may extend so far as to authorize the domestic tribunal in the words of Lord *Kingsdown* "to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation."

That is quite different from a mere consent that the constituted tribunal shall have power to act only in the event of there being an actual violation of the compact; and if the agreement goes so far as the case suggested by Lord *Kingsdown*, it would be useless for the member affected by the decision of that body to appeal to the judgment of a Court on the ground that in reality there was no violation of the compact. He would be referred to his own

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voluntary submission, as Mr. Long would have been had he so consented, notwithstanding the fact that his canonical oath did not in fact, and as the Court of law construed it, include obedience in respect of the matters demanded of him. And, further, in the sentence last quoted from the judgment of the Privy Council, the power of the tribunal to determine consequences of the violation may be as validly agreed to as any other incident of the contract. If, for instance, it be found on examination of the compact in any case not only that the *forum domesticum* shall have the right of finally interpreting the contract, but also that in any adverse adjudication based on that interpretation he shall suffer whatever loss of privileges or status that forum shall determine, he is bound to stand by the result, and he cannot withdraw from his convention in part, namely, the adverse finding and determination, and yet adhere to the rest, that is, cling merely to so much as is beneficial to himself. He cannot approbate and reprobate. He must bear the disqualifications as well as the qualifications prescribed by the contract. The Court cannot make a new bargain for him; and with one exception to which I shall presently refer, he must take his benefits *cum onere*. The words of Lord *Kingsdown* carry the matter in my opinion to the full extent; but lest there should be any hesitation in accepting this interpretation of them, I think it quite worth while to quote some observations specially directed by the Scottish Judges to the point, in the *Cardross Cases* (1), one of which, the first, was cited to the Privy Council in *Long's Case* (2). In the first *Cardross Case*, the Lord President, after stating the pursuer's claim, observes:—"The defenders say—'No, you are wrong as to the facts; but first, our constitution precludes you from seeking redress.' It is possible," continues the learned Lord President, "when the constitution is examined, that it may be of a character which the pursuer alleges. It is possible that it may show these things were not within the power of the parties and that they have violated the constitution. On the other hand, it is possible that the constitution may show that he had subjected himself to be suspended, or expelled, or found guilty of immorality without being heard. It

(1) 22 D., 290, at pp. 314-5. (2) 1 Moo. P.C.C. N.S., 411.

is possible that he had precluded himself from seeking redress, however great the wrong that might be inflicted on him, and however gross the violation of their own rules. That may be a part of the constitution. But in order to ascertain whether it is so or not, both parties appeal to the constitution, and we must examine it. We must look into the contract. It is truly a question of contract—of the laws or bye-laws of a body or association. We must look into it to see which party is speaking right." And so per Lord *Curriehill* (1); an opinion repeated by the same Judge in the second case (2). And see the case of *Dr. Snape* v. *The Bishop of Lincoln* (3).

The one exception is where the Constitution contains some provision contrary to law; and every such provision must be disregarded, for the law is not so inconsistent as to enforce what it forbids. A provision, therefore, which requires a member to abstain from litigating existing rights in a Court of law does not abrogate the jurisdiction of the Court. Jurisdiction which the law gives to a public tribunal for the general welfare cannot be annulled at the will of the parties; and just as consent cannot create such a jurisdiction, neither can consent abolish it. But that is quite distinguishable from a provision that rights are to be dependent on or to be measurable or determinable by the opinion of a designated organ of the general body, conveniently called a domestic tribunal. The two positions are quite distinct, and are clearly differentiated in that numerous class of cases of which *Scott* v. *Avery* (4) is the leading example and *Spurrier* v. *La Cloche* (5) a recent instance. And if in a compact such as we are now considering there were inserted an express clause denying the right of a member of the association to appeal to the Courts of the land for the protection of his rights, no Court would regard that declaration as of the slightest force as a bar to its jurisdiction. You cannot lawfully exclude a legal remedy for a legal wrong.

On the other hand, it must be borne in mind that if the bond of the association provided that, in the event of any appeal to the

(1) 22 D., 290, at p. 321.
(2) 23 D., 1314, at p. 1337.
(3) 1 Barn K.B., 83 and 122; 94 E.R., pp. 64, 84.
(4) 5 H.L.C., 811.
(5) (1902) A.C., 446.

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ordinary Courts, the person so appealing should thereupon cease to be a member, or should be subject to expulsion, there is no principle which in my opinion vitiates such a term of the agreement.

Future rights and future status may clearly be made dependent upon any condition, affirmative or negative. A man may lawfully contract not to exercise a legal right; his exercise of that right, notwithstanding his agreement, may nevertheless be lawful; but he breaks his agreement all the same. Then comes the force of Lord *Kingsdown's* observation in *Long's Case* (1) that the compact may go so far as to authorize the domestic tribunal to determine whether the rules of the association have been violated, and also to determine the consequences of such violation. His Lordship, in the passage already quoted, places the tribunal in the position, not of a Court whose authority comes from the Crown, but of arbitrators whose jurisdiction rests on the agreement of the parties. Arbitrators cannot, nor can these tribunals exceed the limit of their jurisdiction; but their jurisdiction depends absolutely on the terms of the submission, and those terms may include the determination of the question, what constitutes a violation of the social contract. If authority be desired for what seems to me an obvious principle, it is found in the opinions of two great Judges, Lord *Selborne* L.C., and *Sir George Jessel*. In *Willesford* v. *Watson* (2) the Lord Chancellor said:—"It struck me throughout that the endeavour of the appellants has been to require this Court to do the very thing which the arbitrators ought to do—that is to say, to look into the whole matter, to construe the instrument, and to decide whether the thing which is complained of is inside or outside of the agreement. The plaintiffs, in fact, ask the Court to limit the arbitrators' power to those things which are determined by the Court to be within the agreement." His Lordship conceded that in most of such cases the real question between the parties is whether the matter in dispute is within or without the agreement. He then proceeded to examine the terms of the submission, and found that wherever there was a dispute between the parties as to whether the instrument, according to its true

(1) 1 Moo P.C.C. N.S., 411. (2) L.R. 8 Ch., 473, at p. 477.

construction, does or does not warrant the particular thing to be done, they have agreed that that dispute shall be referred. "Surely then," said the Lord Chancellor, "it would be extravagant to say that if the Court thinks that, according to the true construction of the instrument, the thing ought not to be done, therefore it is not to be referred." *James* L.J. and *Mellish* L.J. agreed with Lord *Selborne*.

In *Piercy* v. *Young* (1) *Jessel* M.R. said:—"Of course persons can agree to refer to arbitration not merely disputes between them, but even the question whether the disputes between them are within the arbitration clause."

It follows, then, that a religious association may similarly agree, and that a consequence may also be affixed for not permitting such a reference to proceed. In neither case would the jurisdiction of the Court be ousted from enforcing rights that can be shown to exist, and to have been violated; but that does not affect the point now dealt with.

A very clear instance of the distinction I have adverted to between the action being lawful according to paramount law, and yet the lawful cause of a disability contracted for, is found in the American case *Security Mutual Life Insurance Co.* v. *Prewitt* (2) where it was held that, although a State law cannot validly prevent a foreign corporation from entering the Federal Courts, it may validly enact that, if the corporation does so, it forfeits its rights to trade in the State.

The fourth proposition is this: That although the powers which may be consented to are practically illimitable, yet these powers are, upon ordinary principles, only to be exercised subject to any condition upon which they have been granted.

Again, Lord *Kingsdown's* words are explicit. He says (3):—"The decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and if not, has proceeded in a manner consonant with the principles of justice."

This was quoted with approval by *Sir Robert Phillimore* speaking again for the Privy Council in *Brown* v. *Curé de Mon-*

(1) 14 Ch. D., 200, at p. 208.
(2) 202 U.S., 246.
(3) 1 Moo P.C.C. N.S., 411, at p. 461.

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tréal (1) :—" If the act (of the bishop) be questioned in a Court of Justice, that Court has a right to inquire, and is bound to inquire, whether that act was in accordance with the law and rules of discipline of the Roman Catholic Church which obtain in Lower Canada, and whether the sentence, if any, by which it is sought to be justified was regularly pronounced by an authority competent to pronounce it."

It will be observed that both in *Long* v. *Bishop of Cape Town* (2) and *Brown* v. *Curé de Montréal* (3) the Judicial Committee insist upon three things as essential to validity—competency of the Court, regularity of its proceedings, and limitation of the subject matter to the ambit of the compact.

Both sides have the one standard to which they may justly appeal—the Constitution. The Church can formulate the degree of submission it requires, but once formulated, the terms are decisive.

This is fully and emphatically elaborated in the first *Cardross Case* (*Nicholson* v. *Free Church of Scotland* (4)), by the Lord President; and in the second, by Lord *Ivory* (5). As the last-mentioned Judge forcibly observed, the Court, in setting aside any determination which is inconsistent with the Constitution, is no invasion of the freedom of the Church, it is a defence of the Church and a protection of its Constitution. Says the learned Judge :—" A Constitution under which no party knows what is to happen to him to-morrow, who is to sit over him in judgment, and what is to become both of his spiritual and temporal rights is no Constitution at all." The Lord President said in the same case (6) :—" A party may in the exercise of an absolute right, exercise it in an unlawful manner, so as to give a right of redress to the party in whom it is exercised." It is always and in every phase a question of what is the contract?

But it is not to be assumed that every mode of procedure is of equal importance, or constitutes in every instance a condition of jurisdiction. The word "condition" correctly indicates the quality of a provision the observance of which is essential to a

(1) L.R. 6 P.C., 157, at p. 209.
(2) 1 Moo. P.C.C. N.S., 411.
(3) L.R. 6 P.C., 157.
(4) 22 D., 290, at p. 314.
(5) 23 D., 1314, at p. 1334.
(6) 23 D., 1314, at p. 1330.

valid sentence: *Forbes* v. *Eden* (1). Provided natural justice is not offended, it is not every departure from rules of procedure which are prescribed as formalities in the course of exercising the jurisdiction that constitutes a want of jurisdiction.

Some elasticity must in any case be afforded to the methods of a tribunal of the nature intended, and regard must be had to the fact that it is frequently part of its jurisdiction to interpret the very rule which is said to be violated. If so, the misconstruction and misapplication of the rule, in the eye of a Court of law, is nothing, because, though error may have crept in, there is no want of jurisdiction, and appeal does not lie to the Civil Court.

But if on inspection of the consensual agreement it is found, as said by Lord *Deas* in *Lang* v. *Presbytery of Irvine* (2), "a civil contract prescribes a mode of procedure, as preliminary to a certain forfeiture or penalty, that mode must be followed substantially if not literally, otherwise the procedure is not within the contract, and if not within the contract there is no privilege or protection."

The fifth proposition may be stated thus—no Court of law will take any cognizance of a breach of the contract except to protect a right of property. The expressions "civil right" and "temporal right" are sometimes used, but it is always directly or indirectly in relation to property actually or potentially within the enjoyment of the person complaining: see *per* Lord *Cramworth* in *Forbes* v. *Eden* (3), *per* Lord *Westbury* in *Murray* v. *Burgess* (4); *Rigby* v. *Connol* (5). If that foundation be wanting I think that Civil Courts, which are established for the purpose of protecting temporal rights, would decline to take any cognizance whatever of the matter, and as *ex hypothesi* no civil right is invaded, no damage, not even nominal damage, can be presumed.

As to what constitutes a civil right of property is a matter of fact in each case, and more properly comes into consideration presently.

(1) L.R. 1 H.L., Sc. 568, at p. 575.
(2) 2 M., 823, at p. 837.
(3) L.R. 1 H.L., Sc. 568, at p. 581.
(4) L.R. 1 P.C., 362, at p. 370.
(5) 14 Ch. D., 482.

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Except as to parties, which may be more conveniently referred to later on, these propositions deal with the main general principles so ably debated on both sides during the arguments.

It remains for me to apply the conclusions of law as I have stated them to the facts of the case. This action (the second) was commenced to declare illegal the suspension and declaration by the General Assembly on 10th May 1907, and the consequent action of the Presbytery on 12th May, and for a mandamus to restore the plaintiff to his office and emoluments. The suspension and declaration impeached as invalid were the final result of proceedings detailed in the judgment under appeal, and one question of very great, probably of the greatest importance to Church government under the Articles of Agreement, is this: Was the act of the respondent in issuing the writ of 19th April a violation of his compact with the general body of the Church of which he was a minister? I am putting this question at present on the basis that it is one for the determination of this Court, and altogether apart from any consideration whether its decision was by agreement left to the General Assembly. Now, the writ of 19th April was issued to restrain the Presbytery from reporting to the General Assembly its views and recommendation regarding the condition of affairs in connection with the Ann Street congregation. Was this a breach of his ordination vow? That vow was an affirmative answer to the following question:—"Do you acknowledge the Presbyterian form of government by Session, Presbyteries and General Assemblies to be founded in the Word of God, and agreeable thereto: do you promise to submit yourself to the government and discipline established and practised in this Church, and never to endeavour, directly or indirectly, the subversion or prejudice of the same; and do you engage to the utmost of your power to maintain, support and defend the said government and discipline?"

No assistance as to the interpretation of this vow can be obtained from the *Cardross Case* (1). As was pointed out by Lord *Deas* in the second case (2) it was on the pleadings up to the last a disputed question of fact whether it was a rule of the Free Church that a minister who complains to the civil Courts,

(1) 22 D., 290.

(2) 23 D., 1314, at p. 1343.

as the pursuer did there, of an ecclesiastical sentence, which he conceived to have been incompetently pronounced, becomes liable to instant deposition, and on the ground that the parties were not agreed as to the terms of the Constitution, certain pleas were reserved. (See the *Law of Creeds in Scotland*, by Mr. Taylor Innes, at p. 268). The terms of the respondent's vow must be considered without any authoritative guidance.

Without attempting to recapitulate the succession of events leading up to the resolution of 5th February, the following leading features are beyond controversy. Friction had arisen between Mr. Frackelton and his congregation as far back as 1901, and at his own request the Presbytery held an inquiry into the position of affairs. During the Commission the Church communion roll disappeared. In 1906 friction between the minister and his congregation again demanded attention, and this time it was the latter who requested the Presbytery to inquire into the unsatisfactory condition of affairs. The Presbytery accordingly again appointed a Commission which inquired and reported to the Presbytery. It reported that friction existed, and blamed both sides, but particularly the minister. Then a member of the congregation lodged what was considered to be an accusation, and steps were taken to institute judicial process. The member disclaimed any intention to make any charge whatever; and the Presbytery at once, and very properly as I think, discontinued preparations for the judicial process. But the Presbytery's inquiry was still incomplete, and the Commission by direction renewed its examination by further inquiry as to the communion roll, and presented a supplementary report which severely condemned the minister. This resulted in a resolution of the Presbytery on 5th February 1907 that the Presbytery should report the whole matter to the General Assembly with a recommendation that taking a conjunct view of all the circumstances the General Assembly should dissolve the pastoral tie between the plaintiff and the congregation.

In all this there was no accusation, no judicial process; no sentence, no deprivation; no interference with the minister, or his position, or emoluments; nothing but an inquiry, a report to the Presbytery, and a resolution to report to the General As-

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sembly with a recommendation, which the Assembly might or might not have the power or the inclination to adopt.

It is beyond controversy that no action could be entertained in a Civil Court to restrain or in any way interfere with this resolution. It stands so decided between the parties, and that decision is clearly right. (See per Lord *Chelmsford* in *Forbes* v. *Eden* (1)).

But still it is argued by the respondent that the Presbytery's action was unwarranted by the compact. The appellants claim that the Presbytery was justified, *inter alia*, by rule 119. That rule is in these terms :—" When disputes arise between a minister and his session or congregation, or a part thereof, the Presbytery inquires into the same, and endeavours to promote peace ; but when the Presbytery finds that a minister's usefulness is, through any means, lost, the circumstances are reported to the next meeting of the General Assembly, which may dissolve the pastoral tie." This is certainly the strongest ground of justification for the Presbytery.

It was said that this rule had been abrogated by the adoption of the new rules of procedure, but it appears to me that cannot be maintained. Rule 119 is not a rule of procedure but a substantive enactment of jurisdiction to meet any possible case of discord between a minister and his congregation, and empowers, and indeed enjoins, the Presbytery to inquire into the dispute, and if *through any means*—it matters not whose fault it is or what the fault may be or whether there is no fault at all—the *usefulness* of the minister is lost, to report the circumstances to the Assembly. When one remembers that the fundamental conception of the association is the advancement of religion, the effective leadership of congregations in the way of spiritual life, it is not difficult to see how essential is the power to eliminate discord at all hazards. An occasion may arise when, apart from offence, a severance of the tie is imperative, unless the personal interests of an individual are to be preferred to the cause of religion, and even where an offence may possibly exist or is believed to exist, it may be considered for many reasons preferable to lay aside the question of punishment, of stigma,

(1) L.R. 1 H.L. Sc., 568 at p. 575.

or degradation, and to regard the position as affecting the welfare of the congregation, or through them of the whole Church, rather than the status of the minister, and with this view to act under the inquiry powers of Rule 119 instead of exercising the punitive powers of judicial process.

"Dispute" is a wide term, and comprehends every disagreement between a minister and his congregation. Rule 119 is found in a Chapter which deals with discipline. The Second Book of Discipline (still a general Directory of the Church in Queensland) declares in Chapter 6, Article 8:—"The final end of all Assemblies is first to keep the religion and doctrine in purity, without error or corruption, next to keep comeliness and order in the Church."

And when friction manifested itself so sharply as in the case of the Ann Street congregation, how could it be said there was no dispute between the minister and his congregation? "Constant friction" cannot exist without disputes of some kind, and of a very acute and persistent kind.

Two objections have however been urged to the applicability of Rule 119 to the circumstances. First, that "dispute" excludes everything in the nature of an offence for which punishment may be awarded, because an accusation is in that case to be brought; and next, that in substance an accusation was brought and therefore there should have been judicial process and not a report, the latter being illegal.

I am unable to yield to either objection. Offences are not defined, they are not even indicated with any degree of precision, and as appears to me they cannot be in such a case. Their nature does not easily permit of it. But it is plain from Rule 33 that they may vary from errors of judgment to the most heinous and hardened sin. But what is an offence which has arisen through an error of judgment—and is sufficiently met with admonition?

Rebuke indicates that the accused person had been guilty of sin. But where is "sin" defined? Is the Court prepared to define it, so as to say whether any given conduct constitutes sin within the terms of the Constitution? Suspension from office is the sentence when it is found after due investigation that the

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continual exercise of office by the accused will be injurious to religion. When does that occur? Is it to be "injurious to religion" as understood by the Court or by the Presbyterian body? It does not necessarily, as it seems to me, involve any particular act or "offence" in the ordinary sense. It may, as is evident from Rule 6 of the procedure rules, be an opinion held in the most perfect honesty, but unsound in doctrine according to the received tenets of the Church. That is an offence within the meaning of the rules, but it is not an act or conduct implying moral degradation. I am quite unable to see why, in case the members of the congregation differ with their minister upon some question of doctrine as he declares it from the pulpit, they should not invoke the Presbytery to make inquiry, and why the latter should not report the circumstances to the General Assembly. Unless that course is open it seems to me a serious blow is struck at the internal regulation of the Church. But heresy is an offence and involves deposition. In every such dispute no one may desire harsh proceedings if they can be avoided, and it may be eminently a case in which the highest State Assembly should take early cognizance of the circumstances. What course the General Assembly must pursue to preserve the needs of natural justice if it desires to exercise its disciplinary power under Rule 119 is another question. But in the meantime the matter has to reach that body. And Mr. Frackelton endeavoured to prevent it reaching the Assembly. Was that consistent with his vow to maintain, defend and support to the utmost of his power the government and discipline of the Church?

To say that the proceeding was in the nature of an accusation is to my mind to obscure the position. It was not so in form, it was not part of a judicial inquiry, it was not a sentence, it did not deprive, and is not intended to deprive, the minister of anything. The Presbytery lawfully embarked upon the inquiry and was duly seized of the position, and if they had found nothing but some comparatively unimportant fact with respect to the minister, as, for instance, that he spent too much time in his sermon in repetition of what he said before, or began it too late in the day, or used terms that were over scholastic, or did not frequently enough visit prisoners in gaol, all of which are not

conjectural but are specifically mentioned in Stewart's Laws of the Church of Scotland, as questions to be inquired by a Presbytery at a visitation concerning the minister, no one would have thought of contesting its right to report its dissatisfaction to the General Assembly. But if in some of the more important questions referred to by the same writer, namely, as to doctrine or neglect of the sick and poor, or dissoluteness, or looseness of behaviour or language, their hand is to be at once stayed, their action paralysed, then the greater the need of acquainting the General Assembly with the circumstances, the less the authority to do so. I do not doubt the Presbytery *could* have instituted judicial process, but because they had that alternative course open, why were they *bound* to adopt it? I do not think they were, and am of opinion their action was quite justified by the rules, and was perfectly legal.

The writ of 19th April was, as I think, a breach of Mr. Frackelton's vow, even if it be the duty of the Civil Court alone to interpret Rule 119.

But the matter does not rest there. Assuming that a Civil Court would interpret Rule 119 differently, how far does the case fall within the third proposition—and answer the condition postulated by Lord *Kingsdown* in *Long* v. *Bishop of Cape Town* (1)? In order to answer that question I regard the subject matter, a Church, which however indefinite its tenets, or doctrines, however elastic the bonds uniting its members, still presents one feature sharply indicating the intention of its members to distinguish it from most other voluntary associations. I mean the sacred character of its objects. Though the law knows no distinctions among voluntary associations, so far as relates to their subjection to its commands and supervision, yet when we are considering the true meaning of the compact by which a religious association is formed and gathering the intention of the parties, we cannot lose sight of the fact that men are extremely jealous of outside interference in connection with their doctrines of faith and forms of worship, and this, to my mind, is a material consideration, as affecting the import of the actual words in which the parties have chosen to couch their agreement. The same words

(1) 1 Moo. P.C.C. N.S., 411.

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may have a more or less strict signification according to the subject matter. Now, remembering the nature of the organization, I turn to general Rule 4, p. 4 of Exhibit 1, which is in these terms:—"Every member of the Church has a right of access personally or by petition or complaint to the Session of his own congregation, and, through the Session, by petition, overture, reference, complaint or appeal to the Presbytery, and thence to the General Assembly; and every inferior Court, or member of any inferior Court, has the right of access, in the same manner, to the next superior Court, and upwards to the General Assembly, on all matters concerning discipline, worship, doctrine, or government." I also examine rule 56, the duties of the Presbytery, particularly sub-rules (18) and (19), which are:—"(18) Order, when circumstances require it, a presbyterial visitation of any congregation of the bounds. (19) And generally interpose in any matters in which the welfare of any of its congregations demands interference," and rule 119 already read.

I then read rules 62 and 63 as to the General Assembly, and as a general directory, Rule 8 of the Second Book of Discipline. These are in the amplest form. To these must now be added the extremely large provisions of the Articles of Federal Union and Agreement scheduled to the Act of 1900. I have already adverted to the general nature of the word "offence" which seems to rest rather in opinion and application than in definition, and I am forced to the conclusion that, as to what is true doctrine or what is departure from it, as to what is sin or heinous or hardened sin, as to what is error of judgment tending to disunite the Church, as to what is injurious to the Church, and as to what is or is not necessary discipline, and what is a subversion of recognized government and discipline, in order to serve the one great end of spiritual welfare aimed at by the whole organization, the power committed by agreement to the tribunals of the Church in their several spheres and ordinary sequence is practically unlimited. Of course, the power must be exercised *bonâ fide*, and for the purpose given, and not so oppressively and outrageously that no reasonable person would say the acts challenged were within the scope of the authority conferred. But subject to this, I entertain no doubt personally that, given the competent

tribunal and essential procedure, a determination that the issue of the writ of 19th April was an infraction of the ordination vow would have been within the terms of the respondent's submission, and have satisfied the third proposition.

I do not overlook the reference by learned counsel for the respondent to the following passage in the judgment in the Privy Council in *Long* v. *Bishop of Cape Town* (1):—"We think that even if Mr. Long might have appealed to the Archbishop, he was not bound to do so; that he was at liberty to resort to the Supreme Court; and that the Judges of that Court were justified in examining, and, indeed, under the obligation of examining, the whole matter submitted to them."

But it must be remembered that their Lordships had already determined that Mr. Long had not consented to the Bishop's jurisdiction and that none existed by law. There may have been an opportunity to have the Bishop's wrongful act overridden by the Archbishop of Canterbury. But it was as if a workman had been without authority turned out by a foreman in contravention of the agreement made with the employer and had complained of it by legal process. He might perhaps have gone to the manager and had the foreman's improper act reversed, but he was not bound to. The quoted observations of the Privy Council have therefore no relevancy here.

The next question is, was the sentence valid, having regard to the fourth proposition, as having been pronounced by a competent Court, and under the stipulated conditions?

Rule 119 is out of the question. The ground of the suspension was the violation of the vow in issuing the writ against the Presbytery—not against the congregation. It constituted no dispute with the congregation, and therefore fell entirely outside Rule 119 in subject matter, as it also fell in point of time outside the inquiry entered upon by the Presbytery. That rule, therefore, cannot afford protection. Besides, the Assembly did not purport to act under that rule because the declaration it made was not a mere severance of the pastoral tie between Mr. Frackelton and the Ann Street congregation on the ground of lost usefulness, which would have left his status and eligibility

(1) 1 Moo. P.C.C., N.S., 411, at p. 466.

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otherwise unimpared, but it was a punishment and deprivation of all status for six months, with a *consequent*—not an original or independent—loss of his charge. That could only be sustained under Rule 36 of the rules of procedure, and required formal judicial process.

Nor can it be maintained that the Assembly acquired jurisdiction by "reference" from the Presbytery. Rule 110 makes it clear that "reference" means the reference of a "case" pending before the Presbytery, and which, in accordance with well known analogies, the inferior Court thinks it desirable to transfer at once to the higher Court. Nor does the supplementary report of the Presbytery by which the question reached the Assembly answer the description of complaint or charge. See Rule 55 (6), Rule 63 (3) and Rule 111.

To meet these objections it was contended that the Assembly possessed original judicial jurisdiction in such a matter; and in support of that contention various rules, such as 33 (last paragraph) and others were pointed out as necessarily indicating the original jurisdiction because sentence by the Assembly is distinctly provided for. But Rule 53 is express, and requires a complaint against a minister to be made directly to the Presbytery. It may then be referred under Rule 4, and if referred, the Assembly may proceed. Or there may be a complaint (Rule 111), or an appeal against an acquittal, or a too lenient sentence. There the Assembly may also act, and in this way the rules may be read harmoniously without nullifying any of them, but giving to each provision its full and necessary force.

The fourth proposition was therefore, in my opinion, not satisfied, and the respondent is right in his contention of invalidity.

The appellants, however, maintain that, as the respondent's suspension ended before the action was commenced, it is incompetent to the Court, or at least it would be absurd to declare it unlawful, because there is no present right thereby interfered with, and his charge at Ann Street may be resumed if he is correct.

But that overlooks certain important considerations. In the first place, he was evicted.

And again the natural and probable consequences of the suspension and deprivation still remain—namely, the continued eviction of the respondent from the Ann Street Church. That congregation is not a stranger to the Assembly and Presbytery, it is under their control, and unless it were to set it itself in open defiance of those bodies, its continued submission to the rejection of the respondent is a direct, and in a sense, necessary result of the act complained of. Until the wrong has been undone it continues.

A question which in some circumstances might present considerable difficulty was raised as to the parties. The Queensland Presbyterian Church is a corporation, and the validity of an act which suspended a minister from office—that is the office of minister generally—concerns the whole body and not merely any one or more of the organizations which are merely functionaries of the general body for specified purposes: see also *McSwaine* v. *Lascelles* (1).

It is true that in the Scottish Cases the General Assembly and the Presbytery are frequently considered sufficient to represent the general body. That, however, as explained by Lord *Deas* in the third *Cardross Case* (2) appears to be the recognized practice in the Church of Scotland and apparently to be regarded as part of the contract between the parties that it should be so. The fact that the action is *inter familiam* is held to justify this course. But however that may be as a general rule, in this case the individual parties who did the wrong are present, and although no claim for substantive relief as to temporal rights, if any exist, is made against them in this action, it might have been perhaps with, and perhaps without further allegations of fact, as to which I offer no opinion. The declaration asked for might, and may still for all I know, be useful to the respondent as against the very persons who are parties to the action, and therefore it falls within the jurisdiction of the Court under Order XXV., provided the respondent has proved the existence of a claim in relation to property.

A pertinent ruling by the Privy Council on the question of the Presbytery's liability in view of their subordination to the

(1) (1895) A.C., 618.

(2) 23 D., 1,314, at p. 1,303.

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Assembly is found in *Brown* v. *Curé de Montréal* (1). Their Lordships said :—"It is, however, suggested that the denial took place, in fact, by the order of the bishop or his vicar-general ; that the respondents are bound to obey the orders of their ecclesiastical superior ; and, therefore, that no mandamus ought to issue against them. Their Lordships cannot accede to this argument. They apprehend that it is a general rule of law in almost every system of jurisprudence that an inferior officer can justify his act or omission by the order of his superior only when that order has been regularly issued by competent authority."

I think a claim as to property is sufficiently evidenced. The observations of Lord *Westbury* in *Murray* v. *Burgess* (2) ; of Lord *Chelmsford* in *Forbes* v. *Eden* (3) ; of the Lord President in the second *Cardross Case* (4) ; and of Lord *Deas* (5) clearly support the position that without deciding more, the loss of status, and of the consequent opportunity to obtain his emoluments or to secure the moral certainty of obtaining them, is a sufficient interest in property to satisfy the rule.

I am therefore of opinion with my learned brothers that this appeal should be dismissed.

I desire to add one observation only in justice to the Assembly. They acted, though illegally, yet in perfect good faith, and as they thought in consonance with the law of the Church. The respondent complains that he was not heard. It is of the essence of any adverse proceeding, in the absence of some express provision to the contrary, to hear the person charged and give him a full and fair opportunity to make good any defence he may have. That however as I think was afforded him. He was cited ; he was asked if he issued the writ ; he said yes ; he knew the object of the citation ; he met the committee appointed to confer with him ; after the committee passed its resolutions, he submitted to the Assembly dealing with the matter so far as to pass those resolutions ; he asked for them to be taken as a whole, and his request was agreed to ; he attended at the Assembly, and spoke there on the subject of the agreement with the committee, he could have

(1) L.R. 6 P.C., 157, at p. 218.
(2) L.R. 1 P.C., 362, at p. 370.
(3) L.R. 1 H.L. Sc., 568, at pp. 575-6.
(4) 23 D., 1314, at p. 1329.
(5) 23 D., 1314, at p. 1345.

spoken on the motion for the suspension; he waited till it was passed, and then he spoke in objection to it, and said he would take the matter into Court. To a certain extent he took the chance of a favourable issue at the Assembly. He did not submit so far as to agree to any resolution they might arrive at—and therefore he escapes the position of voluntary submission to the Assembly's jurisdiction to suspend him, but he cannot in my opinion justly charge the Assembly with condemning him unheard.

I agree with what the learned Chief Justice has said on the question of costs.

Order appealed from varied by omitting the word "mandamus," in other respects affirmed. Appellants to pay the costs of the appeal.

Solicitors, for appellants, *Atthow & McGregor.*
Solicitor, for respondent, *Arthur H. Pace.*

H. V. J.

[HIGH COURT OF AUSTRALIA.]

DEEGAN . . . . . APPELLANT;
APPLICANT,

AND

THE LICENSING BENCH FOR THE LICENSING DISTRICT OF HOBART } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

Licensing—Application for certificate for licence—Procedure before Licensing Bench—Evidence—Counsel—Appeal—Case stated—Jurisdiction of the Supreme Court—Review of findings of fact—Licensing Act 1902 (*Tas.*) (2 *Edw. VII. No.* 32), *secs.* 32-72-85.

On an application to a Licensing Bench for a certificate for a licence under sec. 31 of the *Licensing Act* 1902 (Tas.), the Bench may take evidence and