Deduct from the loading the amount of the coal used as dunnage, and it is conceded that the loading of the ship did not exceed her registered tonnage, and the jury have found that the excess beyond her registered tonnage was used as dunnage, and I have no doubt it was properly so used.

Beyond doubt the ship-owner in ballasting his chartered vessel may take freight-paying merchandise for that purpose, provided the merchandise occupies no more space than the ballast would have done if ordinary ballast had been used instead of merchandise paying freight, and I am of the opinion that the same rule should be applied in respect to the dunnage used in stowing the cargo.* Such was also the opinion of the Supreme Court of Massachusetts in a suit between these same parties which arose out of an insurance on the same voyage.†

Much discussion of the question is unnecessary, as the views which I entertain and the authorities to support them are very fully given in that opinion and in the opinion of the district judge, in which I also concur.

WATSON v. JONES.

1. When in courts of concurrent jurisdiction, the pendency of a suit in one is relied on to defeat a second suit in the other, the identity of the parties, of the case made, and of the relief sought, should be such that if the first suit had been decided it could be pleaded in bar as a former adjudication.
2. In such cases, the proceedings in an appellate court are part of the proceedings in the first court, and orders made by it to be enforced by the court of primary jurisdiction are, while unexecuted, a part of the case in the first suit, which may be relied on as *lis pendens* in reference to the second suit.
3. Hence an unexecuted order of this kind, made by a State court to restore possession to the parties who had been deprived of it by a decree which had been reversed, cannot be interfered with by another court by way of injunction, especially by a court of the United States, by reason of the act of Congress of March 2d, 1793. (1 Stat. at Large, 334, § 5.)

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* Towse v. Henderson, 4 Exchequer, 890.

† Thwing v. Great Western Insurance Co., 103 Massachusetts, 401.

4. But the nature and character of the possession so decreed to be delivered may be inquired into by another court, and if it was of a fiduciary character, and the trust was not involved in the first suit, a second suit may be sustained in any court of competent jurisdiction, to declare, define, and protect the trust, though the first suit may be still pending.
5. Controversies in the civil courts concerning property rights of religious societies are generally to be decided by a reference to one or more of three propositions:

   (1st.) Was the property or fund which is in question, devoted by the express terms of the gift, grant, or sale by which it was acquired, to the support of any specific religious doctrine or belief, or was it acquired for the general use of the society for religious purposes, with no other limitation?

   (2d.) Is the society which owned it of the strictly congregational or independent form of church government, owing no submission to any organization outside the congregation?

   (3d.) Or is it one of a number of such societies, united to form a more general body of churches, with ecclesiastical control in the general association over the members and societies of which it is composed?
6. In the first class of cases the court will, when necessary to protect the trust to which the property has been devoted, inquire into the religious faith or practice of the parties claiming its use or control, and will see that it shall not be diverted from that trust.
7. If the property was acquired in the ordinary way of purchase or gift, for the use of a religious society, the court will inquire who constitute that society, or its legitimate successors, and award to them the use of the property.
8. In case of the independent order of the congregation, this is to be determined by the majority of the society, or by such organization of the society, as by its own rules constitute its government.
9. In the class of cases in which property has been acquired in the same way by a society which constitutes a subordinate part of a general religious organization with established tribunals for ecclesiastical government, these tribunals must decide all questions of faith, discipline, rule, custom, or ecclesiastical government.
10. In such cases where the right of property in the civil court is dependent on the question of doctrine, discipline, ecclesiastical law, rule, or custom, or church government, and that has been decided by the highest tribunal within the organization to which it has been carried, the civil court will accept that decision as conclusive, and be governed by it in its application to the case before it.
11. The principles which induced a different rule in the English courts, examined and rejected as inapplicable to the relations of church and state in this country, and an examination of the American cases found to sustain the principle above stated.

APPEAL from a decree of the Circuit Court for the District of Kentucky, made May 11th, 1869.

This was a litigation which grew out of certain disturbances in what is known as the "Third or Walnut Street Presbyterian Church," of Louisville, Kentucky, and which resulted in a division of its members into two distinct bodies, each claiming the exclusive use of the property held and owned by that local church. The case was thus:

The Presbyterian Church in the United States is a voluntary religious organization, which has been in existence for more than three-quarters of a century. It has a written Confession of Faith, Form of Government, Book of Discipline, and Directory for Worship. The government of the church is exercised by and through an ascending series of "judicatories," known as Church Sessions, Presbyteries, Synods, and a General Assembly

The Church Session, consisting of the pastor and ruling elders of a particular congregation, is charged with maintaining the spiritual government of the congregation, for which purpose they have various powers, among which is the power to receive members into the church, and to concert the best measures for promoting the spiritual interests of the congregation.* This body, which thus controls in each local church, is composed of the pastor and ruling elders. The number of elders is variable, and a majority of the Session governs. It acts, however, but as representing the congregation which elects it. The elders, so far as the church edifice is concerned, have no power to dispose of its use except as members of the Session.

Connected with each local church, and apparently without any functions in essence ecclesiastical, are what are called the "Trustees;" three persons usually, in whom is vested for form's sake, the legal title to the church edifice and other property; the equitable power of management of the property being with the Session. These Trustees are usually elected biennially; they are subject to the Session, and may be removed by the congregation.

The Presbytery, consisting of all the ministers and one

* Form of Government, chap. 9, § 6.

ruling elder from each congregation within a certain district, has various powers, among them the power to visit particular churches for the purpose of inquiring into their state, and redressing the evils which may have arisen in them; to ordain, and install, remove, and judge ministers; and, in general, power to order whatever pertains to the spiritual welfare of the churches under their care.*

The Synod, consisting of all the ministers and one ruling elder from each congregation in a larger district, has various powers, among them the power to receive and issue all appeals from Presbyteries; to decide on all references made to them; to redress whatever has been done by Presbyteries contrary to order; and generally to take such order with respect to the Presbyteries, Sessions, and people under their care as may be in conformity with the word of God and the established rules, and which tend to promote the edification of the church.†

The General Assembly, consisting of ministers and elders commissioned from each Presbytery under its care, is the highest judicatory of the Presbyterian Church, representing in one body all the particular churches of the denomination. Besides the power of receiving and issuing appeals and references from inferior judicatories, to review the records of Synods, and to give them advice and instruction in all cases submitted to them in conformity with the constitution of the church, it is declared that it "shall constitute the bond of union, peace, correspondence, and mutual confidence among all our churches."‡ "To the General Assembly also belongs the power of deciding in all controversies respecting doctrine and discipline; of reproving, warning, or hearing testimony against any error in doctrine or immorality in practice, in any Church, Presbytery, or Synod; . . . of superintending the concerns of the whole church; . . . of suppressing schismatical contentions and disputations; and, in general, of recommending and attempting reformation of

* Form of Government, chap. 10, § 8.

† Ib., chap. 11, § 4.

‡ Ib., chap. 12, §§ 1, 2, and 3.

manners, and the promotion of charity, truth, and holiness through all the churches under their care."*

The Walnut Street Presbyterian Church, of which we have spoken, was organized about 1842, under the authority and as a part of the Presbyterian Church in the United States, and, with the assent of all its members, was received into connection with and under the jurisdiction of the Presbytery of Louisville and the Synod of Kentucky. It remained in such connection and under such jurisdiction, without any disturbance among its members, until the year 1865, when certain events took place in Kentucky which will be stated presently.

After the organization, to wit, in 1853, the said local church purchased a lot of ground in Louisville, and a conveyance was made to the church's trustees to have and to hold to them, and to their successors, to be chosen by the congregation.

In 1854 the trustees of the church were incorporated with power to hold any real estate then owned by it; the property to pass to them and their successors in office. By the act it was declared that the trustees, to be elected by the members of the congregation, should continue in office two years, and until their successors were elected, "unless they shall sooner resign, or refuse to act, or cease to be members of the said church." The trustees were charged by the act with the duty of providing for the comfort and convenience of the congregation, the preservation of the property, and passing such regulations relative to the government and control of the church property as they might think proper, not inconsistent with the Constitution of the United States and the laws of Kentucky.

Though neither the deed nor charter said this in terms, it was admitted that both contemplated the connection of the local church with the general Presbyterian one, and subjected both property and trustees alike to the operation of its fundamental laws.

* Form of Government, chap. 12, § 5.

We now pass to some history of the disturbances to which we have referred as matter to be related.

With the outbreak of the war of the insurrection, and the action of it upon the subject of slavery, a very excited condition of things, originating with and influenced by that subject, manifested itself in the Walnut Street Church. One of the earliest exhibitions of the matter was in reference to the re-engagement as minister of a certain Reverend *Mr. McElroy*. The members of the church were asked by a majority of the Session, at this time composed of three persons, named *Watson*, *Galt*, and Avery,* to make a call upon *Mr. McElroy* to become the pastor, but at a congregational meeting the majority of the members declined to make the call. The majority of the Session (that is to say, *Watson* and *Galt*) renewed, notwithstanding, the engagement of *Mr. McElroy* for six months. In August, 1865, the majority of the congregation asked the Session that on the expiration of the then current six months of *Mr. McElroy's* engagement no further renewal thereof should be made. In connection with these efforts of the majority of the Session (*Watson* and *Galt*) to maintain *Mr. McElroy* as preacher, charges were preferred against three members of the congregation, named B. F. Avery, T. J. Hackney, and D. McNaughtan, who had cooperated with the majority of it in the movements to obtain another minister. And about the same time, by way of counteraction, apparently, charges were preferred by some of the majority against *Watson* and *Galt*. While these troubles were existing, some of the members of the church appealed to the Synod of Kentucky, which body, on the 20th of October, 1865, appointed a committee to visit the congregation, "with power to call a congregational meeting for the purpose of electing *additional* ruling elders, calling a

* To assist the reader, as far as possible, in a controversy and case perplexed by a multitude of names, to keep in his mind a distinct conception of who were on one side and who on the other, the Reporter, all through his statement of the case, has put the names of those who were on one side (and which for mere convenience may be distinguished as the pro-slavery or conservative side), in *italic* letter, and those on the other in Roman.

pastor, or choosing a stated supply, and doing any other business competent to a congregational meeting that may appear to them, the said congregation, necessary for their best interests." The synodical committee thus appointed called a congregational meeting for the purpose of the election, in January, 1866. *Watson* and *Galt* refused to open the church for the meeting, but the majority organizing themselves on the sidewalk, elected a certain J. A. Leach, with B. F. Avery and D. McNaughtan (which last two names have already appeared in our history), additional ruling elders, who went through what they deemed a valid process of ordination and instalment. The other admitted elders were *Watson*, *Galt*, and Hackney. The trustees of the church were *Henry Farley*, *George Fulton*, and B. F. Avery, and they had the actual possession of the church property. *Fulton* and *Farley*, uniting with *Watson* and *Galt*, denied the validity of the election of Avery, Leach, and McNaughtan, and refused to allow them any participation *as elders* in the control of the church property. Hackney admitted the validity of such election, and recognized Avery, Leach, and McNaughtan as lawful elders.

In this state of things, Avery and his associates filed a bill, on the 1st of February, 1866, in the Louisville Chancery Court, against *Watson*, *Galt*, *Fulton*, and *Farley*, for the purpose of asserting the right of Avery, Leach, and McNaughtan, *as elders*, to participate with the other elders in the management of the church property for purposes of religious worship.

In the progress of that case the three trustees, *Farley*, *Fulton*, and Avery, were appointed, on the 20th of March, 1866, receivers "to take charge of the church building, and all property belonging to the said church," during the pendency of the suit, or until the further order of the court; and they were "ordered to keep and preserve the said property, and keep it in repair to the best of their ability, and to open the various portions of the building ready for worship, and other services of said church, according to the laws and usages of the Presbyterian Church; and not to prevent any

part of the congregation from attendance upon the meetings of said church, and enjoying the use thereof according to their rights and privileges as members thereof."

At a subsequent date—June 15th, 1866—the chancellor delivered an opinion recognizing Avery, Leach, and McNaughtan as elders, and entered an order that the trustees, *Farley*, *Fulton*, and Avery, now receivers, open the church for divine worship and congregational meetings whenever ordered to do so by the Session of the church, constituted of the said Avery, Hackney, and McNaughtan, Leach, *Watson*, and *Galt*, or a majority thereof.

The execution of this order was, apparently, so far interfered with by *Watson*, *Galt*, *Fulton*, and *Farley* as practically to prevent religious services in the church edifice. At all events, on the 23d of July, 1866, it was ordered:

"That the MARSHAL OF THIS COURT do take possession of the church property until the further order of the court, and that the same be opened: 1. For Sunday-schools and other like purposes. 2. For the meeting of the Session when notified thereof. 3. For public worship, and such using of the pulpit and the house generally as the Session shall order. And it is ordered that he be respectful to the order of the Session, as this court said on the 15th of June. The Session, according to the decision of the General Assembly, at Peoria, Illinois, has control of the church buildings, &c. The keys of the church, &c., are ordered to be delivered to the marshal."

The marshal took possession by virtue of this order. Thenceforward *Watson*, *Galt*, *Fulton*, and *Farley* abandoned connection with the property and participation in its control.

Thus matters stood, so far as the church property was concerned, up to the final decree in *Avery et al.* v. *Watson et al.*, made May 7th, 1867, when it was decreed that Leach, Avery, and McNaughtan, *with* Hackney, *Watson*, and *Galt*, were ruling elders that constituted the Session of the Walnut Street Church, and the management of the said property for the purpose of worship and other religious service *was committed to their care, under the regulations of the Presbyterian Church in the United States of America:* and it was ordered

that the defendants, *Watson* and *Galt*, pay to the plaintiffs their costs.

It will be observed that the marshal was not, by the terms of the decree, directed to give up his possession; nor was any motion or order afterwards made requiring him to give up or discharging him as receiver. Nor did he, *in fact*, so far as appeared from the record, ever *abandon possession*, although the property continued, as it had been since July 23d, 1866, subject to the exclusive *control* of Avery and his associates.

From this final decree an appeal was taken to the Court of Appeals of Kentucky, but *Watson and his friends* did not supersede that decree, nor take other step to prevent its immediate execution.

The decree of the chancellor was reversed by the Court of Appeals of Kentucky.* The language of the order of reversal was thus:

"And the judgment of the chancellor, *which commits the management and control of said church property* to said Avery, McNaughtan, and Leach, in conjunction with said *Watson*, *Galt*, and Hackney, is therefore deemed erroneous. Wherefore the judgment is reversed, and the cause remanded for proper corrective proceedings respecting the possession, control, and use of the church property, and for final judgment in conformity to this opinion."

As to the nature of the issues in this case of *Avery* v. *Watson*, the Court of Appeals of Kentucky said:†

"As suggested in the argument, and apparently conceded on both sides, this is *not* a case of *division or schism in a church*, nor *is there any question as to which of* TWO BODIES *should be recognized as the Third or Walnut Street Presbyterian Church;* nor is there any controversy as to the authority of *Watson* and *Galt* to act as ruling elders; but the *sole* inquiry to which we are *restricted*, as we conceive, is whether Avery, McNaughtan, and Leach are ALSO ruling elders, and therefore members of the Session of the church."

* 2 Bush, 363.

† Ib. 346.

On the 21st of February, 1868, the opinion and mandate of the Court of Appeals was filed in the Louisville Chancery Court, and the defendants moved the court "to restore to them, and those entitled under the said opinion, the possession, use, and control of the church building and property, which was taken from them by the marshal of the court, under orders of court, during the pendency of the action, and to dismiss the plaintiffs' petition with costs."

On the 28th of February, 1868, the complainants in the case of *Avery* v. *Watson* filed a petition in equity against the defendants, and moved the court for an injunction "enjoining them from any further prosecution of their said motion made on the 21st of February, 1868, and from all proceeding by motion, suit, or otherwise to obtain possession, control, or use of the property of the Walnut Street Presbyterian Church of Louisville."

The petition in equity thus presented averred that subsequent to the original decree of the chancellor, *Watson, Galt, and the others adhering to them*, had voluntarily withdrawn from the Walnut Street Presbyterian Church, and from the Presbyterian Church in the United States of America, and had thereby ceased to be members of the said church, or to have any interest in the property held by that church; that the plaintiffs in that injunction suit, together with those united in interest with them, constituted at that time the only beneficiaries of the trust property; and that therefore the attempt of *Watson and his friends*, under a mere order of *restitution*, based upon the reversal by the appellate court of the chancellor's decree, to obtain the possession of the property, *as elders and trustees*, was a fraud upon the rights of the beneficiaries of the property. And it charged that *Watson and his friends* intended to use the property as the property exclusively of their party and to deny the rights of all others as members.

On the 20th day of March, 1868, the chancellor granted upon this petition an injunction against the defendants in the action, enjoining them from any further proceeding on their motion made on February 21st, 1868; the former de-

cree being at the same time so far reversed that *the original petition was dismissed*, and costs awarded to the defendants.

Watson and his friends now obtained from the Court of Appeals of Kentucky a summons against the chancellor of the Louisville Chancery Court "to appear and show cause why he has refused to carry into effect the mandate of said court," and the chancellor having appeared, an opinion upon the rule was delivered.*

In the last-named case it was decided:

1. That the opinion and mandate in the previous decision in the appellate court,† imported a direction to restore to the defendants such rights of possession, control, and use of the property as the former judgment had erroneously taken or withheld from them.

2. That "no undecided question was reserved for further litigation in the court below."

3. That the Chancery Court must enter the proper order directed by the Court of Appeals; and "if there be any equitable reason for not coercing the order or decree for *restitution*, it should be made available as a ground for *enjoining*, and not for preventing or modifying, the *order of restitution*."

4. That the petition in equity of Avery and others, although intended to operate both as a written defence to the action of the court sought by the defendants in the old suit, and at the same time as the initial pleading in a new one, was to be regarded, so far as the action of the chancellor was concerned, as a response of the plaintiffs, interposed to prevent the rendering of a judgment in conformity to the decision and mandate of this court.

5. That if any equitable reasons existed for not enforcing restitution, they should be asserted in a *new suit*, enjoining the enforcement of the order of restitution after such order had been entered.

Accordingly the Court of Appeals, June 26th, 1868, on this rule against the chancellor, ordered that the latter make an

* 3 Bush, 646.

† 2 Id. 348.

order "restoring the possession, use, and control of the church building and property to the parties entitled thereto *according to the said opinion*, and so far as they were deprived thereof by the marshal of the Chancery Court under its orders."

The parties in whose favor, according to the opinion, the order of restitution was to be made were of course *Watson*, *Galt*, and Hackney, ELDERS, and *Fulton*, *Farley*, and Avery, TRUSTEES.

After this last decision of the Kentucky Court of Appeals, the petition for injunction filed in the Louisville Chancery Court on the 28th of February, 1868, was, on *the motion of those who filed it*, dismissed without prejudice.

The present suit in the Circuit Court was begun July 17th, 1868.

Subsequently, on the 18th of September, 1868, the chancellor directed the marshal of the Chancery Court "to restore the possession, use, and control of the church building and property . . . to *Farley*, *Fulton*, and Avery, or a majority of them, *as trustees*, and to *Watson*, *Galt*, and Hackney, or a majority of them, as *ruling elders* of the said church, and to report how he had executed the order;" reserving the case for such further order as might be necessary to enforce full obedience.

Thus far as to the controversy in the Walnut Street Church, involved in the particular case of *Watson* v. *Avery*, in the State courts of Kentucky.

We have already adverted to the war of the insurrection, its action on the subject of slavery, and the feeling engendered by this action in the special congregation of the Walnut Street Church.

We now speak of the same subject of the war, of slavery, &c., in its more general relation with the judicatories above that local church, and of the way in which this local church was affected by and identified itself with the action of the more general church. From the beginning of the war to its close, the General Assembly of the Presbyterian Church at its annual meetings expressed in Declaratory Statements

or Resolutions, its sense of the obligation of all good citizens to support the Federal government in that struggle; and when, by the proclamation of President Lincoln, emancipation of the slaves of the States in insurrection was announced, that body also expressed views favorable to emancipation, and adverse to the institution of slavery. At its meeting in Pittsburg in May, 1865, instructions were given to the Presbyteries, the Board of Missions, and to the Sessions of the churches, that when any person from the Southern States should make application for employment as missionary or for admission as members, or ministers of churches, inquiry should be made as to their sentiments in regard to loyalty to the government and on the subject of slavery; and if it was found that they had been guilty of voluntarily aiding the war of the rebellion, or held the doctrine announced by the large body of the churches in the insurrectionary States which had organized a new General Assembly, that "the system of negro slavery in the South is a divine institution, and that it is the peculiar mission of the Southern church to conserve that institution," they should be required to repent and forsake these sins before they could be received.

In the month of September thereafter the Presbytery of Louisville, under whose immediate jurisdiction was the Walnut Street Church, adopted and published in pamphlet form, what it called "*A Declaration and Testimony against the erroneous and heretical doctrines and practices which have obtained and been propagated in the Presbyterian Church of the United States during the last five years.*" This Declaration denounced, in the severest terms, the action of the General Assembly in the matters we have just mentioned, declared an intention to refuse to be governed by that action, and invited the co-operation of all members of the Presbyterian Church who shared the sentiments of the Declaration, in a concerted resistance to what they called "the usurpation of authority" by the Assembly.

The General Assembly of 1866, denounced in turn the Declaration and Testimony and declared that every Pres-

bytery which refused to obey its order should be *ipso facto* dissolved, and called to answer before the next General Assembly; giving the Louisville Presbytery an opportunity for repentance and conformity. The Louisville Presbytery divided, and the adherents of the Declaration and Testimony sought and obtained admission, in 1868, into "the Presbyterian Church of the Confederate States," a body which had several years previously withdrawn from the General Assembly of the United States and set up a new organization.

In January, 1866, the congregation of the Walnut Street Church became divided in the manner stated above, each asserting that *it* constituted the church, although the issue as to membership was not distinctly made in the chancery suit of *Avery* v. *Watson* already so fully described. Both parties at this time recognized the same superior church judicatories.

On the 19th June, 1866, the Synod of Kentucky became divided, the opposing party in each asserting respectively that *it* constituted the true Presbytery and the true Synod; each meanwhile recognizing and professing to adhere to the same General Assembly. Of these contesting bodies *Watson and his party* adhered to one, those whom he opposed to the other. The Presbytery and Synod to which these last, that is to say, Avery or Hackney and his party, adhered, being known respectively as the McMillan Presbytery and the Lapsley Synod.

On the 1st of June, 1867, the Presbytery and Synod recognized by *Watson and his party*, were declared by the General Assembly to be "in no sense a true and lawful Synod and Presbytery in connection with and under the care and authority of the General Assembly of the Presbyterian Church in the United States of America;" and were permanently excluded from connection with or representation in the Assembly. By the same resolution the Synod and Presbytery adhered to by those whom *Watson and his party* opposed were declared to be the true and lawful Presbytery of Louisville, and Synod of Kentucky.

The Synod of Kentucky thus excluded, by a resolution adopted the 28th June, 1867, declared "that in its future action it will be governed by this recognized sundering of all its relations to the aforesaid revolutionary body (the General Assembly) by the acts of that body itself." The Presbytery took substantially the same action.

In this final severance of Presbytery and Synod from the General Assembly, *Watson and his friends* on the one side, and those whom he opposed on the other, continued to adhere to those bodies at first recognized by them respectively. This latter party now included, among many others, a certain William Jones, with his wife, and one Eleanor Lee, who had been admitted into membership by the Hackney, &c., Session.

The reader will now readily perceive, if he have not done so before, how in the earliest stages of this controversy it was found that a majority of the members of the Walnut Street Church concurred with the action of the General Assembly, while *Watson* and *Galt* as ruling elders, and *Fulton* and *Farley* as trustees, constituting in each case a majority of the Session and of the trustees, with *Mr. McElroy* the pastor, sympathized with the party of the Declaration and Testimony of the Louisville Presbytery. And how this led to efforts by each party to exclude the other from participation in the Session of the church and the use of the church property; as well as to all that followed.

The grounds on which the Court of Appeals reversed the chancellor's decision were, of course, that the General Assembly, Synod, and Presbytery of the Presbyterian Church, were all subject, in the exercise of their functions, to Constitutions (the standards mentioned at the beginning of this report); that when they violated these, their acts were beyond their jurisdiction and void; that whether they had violated them or not, was a matter which the civil courts, on an examination of the Constitutions, could properly pass on; and deciding further and finally as fact, after an examination by the court itself of these standards, that in their Declaratory Statements and Resolutions and other

deliverances enforcing loyalty, they had violated them; and that their acts were accordingly void.

Thus things stood in July, 1868; and the term for which the old trustees had, in more peaceful times, been elected having expired, the persons worshipping in the Walnut Street Church and so in possession, elected as new ones three persons whose names now first figure on our report. These persons were named McDougall, McPherson, and Ashcraft.

The newly elected elders and the majority of the congregation adhered to and had been recognized by the General Assembly as the regular and lawful Walnut Street Church and officers. *Galt* and *Watson*, *Fulton* and *Farley*, and a minority of the members, had cast their fortunes with those who adhered to the party of the Declaration and Testimony.

In this state of things, Jones, his wife, and Lee, *on the* 21*st July*, 1868, *three months before the mandate of September* 18*th to the Chancery Court*, mentioned at page 690, filed a bill in chancery in the Circuit Court of the United States for the District of Kentucky against *Watson* and *Galt*,* *Fulton*, *Farley*,† and Avery, the church corporation, and McDougall, McPherson, and Ashcraft, as trustees. The complainants alleged that they were citizens of Indiana; and that each of the natural persons already named were residents of Louisville and citizens of Kentucky, and that the church corporation was a corporation created by Kentucky and doing business in that State. They alleged further that they were members in good and regular standing of the said church, attending its religious exercises under the pastorship of the Rev. J. S. Hays, and that the defendants, *Fulton* and *Farley*, who pretended without right to be trustees of the church, supported and recognized as such by the defendants, *Watson* and *Galt*, who also pretended without right to be ruling elders, were threatening, preparing, and about to take unlawful posses-

* Watson and Galt, the reader will remember, had been declared by the Court of Appeals of Kentucky elders of the church.

† The same court had declared these two persons to be trustees.

sion of the house of worship and grounds belonging to the church and to prevent Hays, who was the rightful pastor, from ministering therein, refusing to recognize him as pastor, and to recognize as ruling elder, Hackney, who was the sole lawful ruling elder; and that when they should obtain such possession they would oust Hays and Hackney, and those who attended their ministrations, among whom the complainants represented themselves to be.

They further alleged that Hackney, whose duty it was as elder, and McDougall, McPherson, and Ashcraft, whose duty it was as trustees to protect the rights thus threatened, by such a proceeding in the courts as would prevent the execution of the threats and designs of the other defendants, refused to take any steps to that end.

They further alleged that the Walnut Street Church, of which they were members, now formed and had ever since its organization in the year 1842, formed a part of the Presbyterian Church of the United States of America, known as the Old School, which was governed by a written constitution that included the Confession of Faith, Form of Government, Book of Discipline, and Directory for Worship; and that the governing bodies of the general church above the Walnut Street Church, were, in successive order, the Presbytery of Louisville, the Synod of Kentucky, and the General Assembly of the Presbyterian Church of the United States; that while the complainants and about 115 members who worshipped with them, and Mr. Hays (the pastor), Hackney (the ruling elder), and McDougall, McPherson, and Ashcraft (the trustees), were now in full membership and relation with the lawful General Presbyterian Church aforesaid, *Watson* and *Galt*, *Fulton* and *Farley*, with about 30 persons formerly members of the said church, worshipping under one *Dr. Yandell* as pastor, had seceded and withdrawn themselves from the Walnut Street Church, and from the General Presbyterian Church in the United States, and had voluntarily connected themselves with and were now members of another religious society, and that they had repudiated and did now repudiate and renounce the authority

and jurisdiction of the various judicatories of the Presbyterian Church of the United States and acknowledge and recognize the authority of other church judicatories which were disconnected from the Presbyterian Church of the United States and from the Walnut Street Church. And they alleged that *Watson* and *Galt* had been, by the order of the General Assembly of the said church, dropped from the roll of elders in said church for having so withdrawn and renounced its jurisdiction, and that the Assembly had declared the organization to which the plaintiffs adhered as the true and only Walnut Street Presbyterian Church of Louisville.

The prayer of the bill was that "*Watson*, *Galt*, *Fulton*, and *Farley* be restrained by an injunction issuing out of the Circuit Court, from taking, or attempting to take, possession of the house of worship and other property of the Walnut Street Church, and from interfering with REV. J. S. HAYS PREACHING IN SAID HOUSE OF WORSHIP; also that *Watson* and *Galt* be restrained in like manner from controlling, or attempting to control or manage, the said property in the capacity of elders of the church; also, that *Fulton* and *Farley* be restrained in like manner from controlling, or attempting to control or manage, the said property as trustees of said church; . . . and that the complainants have generally *such other and further relief as the nature of their case required.*"

The answer having alleged that pending the final process in the Chancery Court two persons, named Heeter and Given, had been elected additional ruling elders, and that one Polk had been elected trustee, in the place of Avery, the complainants amended their bill accordingly, and by agreement the answer of the original defendants was made the answer of the new parties.

The defendants, Hackney, McDougall, McPherson, and Ashcraft, answered, admitting the allegations of the bill, and that though requested they had refused to prosecute legal proceedings in the matter, because as they thought any effort to that end in the courts of the State of Kentucky would prove useless.

The defendants *Watson* and *Galt*, *Fulton* and *Farley*, answered, and after declaring their belief that the complainants were lately citizens of Kentucky and that their citizenship in Indiana was merely for the purpose of filing this bill in the Federal court, denied almost every allegation of the bill. They set up that though they had been deprived of their former actual possession of the church edifice and property by the illegal and now overruled decree of the Louisville Chancery Court, they had nevertheless maintained and kept up a regular and valid organization of the Walnut Street Presbyterian Church—the only regular and valid organization that had been kept up; that *they* were the lawful officers of that church, and that they and those whom they represented were its true members. They denied having withdrawn from either the local or the general church, and denied that the action of the General Assembly cutting them off was within its constitutional authority. They represented that the plaintiffs were not and never had been lawfully admitted to membership in the Walnut Street Church, and had no such interest in it as would sustain this suit, and they set up and relied upon the suit in the Chancery Court of Louisville, which they represented was still pending, and which they stated involved the same subject-matter, and was between the same parties in interest as the present one. They alleged that in that suit they had been decreed to be the only true and lawful trustees and elders of the Walnut Street Church, and that an order had been made to place them in possession of the church property, which order remained unexecuted, and that the property was still in the possession of the marshal of that court as its receiver. These facts were relied on in bar to the present suit.

The case coming on to be heard, the Circuit Court declared that it seemed to it that the complainants were members of the Third or Walnut Street Presbyterian Church in Louisville, and as such had a beneficial interest in the church building and other property in the pleadings mentioned.

That the Reverend J. S. Hays was pastor; Hackney, Avery, McNaughtan, and Leach, ruling elders; and McDou-

gall, McPherson, and Ashcraft, trustees; and that they were respectively entitled to exercise whatever authority in the said church, or over its members or property, rightfully belonged to pastor, elders, and trustees, respectively, in churches in connection with "The Presbyterian Church in the United States of America," Old School, and according to the regulations and usages of that church.

That McDougall, McPherson, and Ashcraft, trustees, were in regular succession from the trustees named in the deed of conveyance of the church property in 1853, and likewise in regular succession from the trustees named in the act of incorporation, and that as such trustees they were entitled to the exclusive control of the church building and other property of said church for the purposes of worship by the members of the said church, in accordance with the regulations and usages of the Presbyterian Church in the United States.

That those only were to be recognized as members of the Walnut Street Church who adhered to and recognized the authority of the Presbyterian Church in the United States of America, and the various church judicatories which submit to its jurisdiction; and in determining what was the true Presbytery of Louisville, and true Synod of Kentucky, having jurisdiction over the said Walnut Street Presbyterian Church, its officers and members, *this court and all other civil tribunals were concluded by the action of the General Assembly of said Presbyterian Church in the United States of America.*

That those members of the Walnut Street Church who worshipped statedly at the church edifice [position in the city of Louisville described], in said city, who had as their pastor the Reverend J. S. Hays, and who recognized Hackney, Avery, Leach, and McNaughtan as ruling elders, and McDougall and McPherson as trustees, including all those connected with them, who had been received into said church since January 1st, 1866, under Hackney, Avery, Leach, and McNaughtan as elders, or under the ministration of Hays as pastor, constituted the Third or Walnut Street Presbyterian Church in Louisville, and the sole benefici-

aries for whose use the property mentioned in the pleadings was dedicated; and that the said persons, together with their pastor, elders, and trustees, had the exclusive right to use the same according to the regulations and usages of the Presbyterian Church of the United States of America.

It seemed further to the court that the *Rev. Dr. Yandell* was not pastor of the said Third or Walnut Street Presbyterian Church, nor were *Galt*, *Watson*, *Heeter*, and *Given*, or either of them, elders in the said church. And that *Fulton*, *Farley*, and *Polk* were not trustees.

That all those persons who pretended to be members of the said church, but who did not recognize Hays as pastor, or Hackney, Avery, Leach, and McNaughtan as elders, or McDougall, McPherson, and Ashcraft as trustees, and who recognized *Watson*, *Galt*, *Given*, and *Heeter* as elders, and *Fulton*, *Farley*, and *Polk* as trustees, and worshipped separately and apart from those hereinbefore declared to be the sole beneficiaries of said property, and who denied the authority of Hays as pastor, and also the ecclesiastical authority of the McMillan Presbytery of Louisville, and of the Lapsley Synod of Kentucky, did not have any connection with, nor were they members of, the Third or Walnut Street Presbyterian Church, for whose use the property in question was conveyed and dedicated, nor had the said persons, or any of them, any beneficial interest in it, nor were they entitled to the use of it in any way whatever as members of the said church.

It was thereupon decreed:

1st. That the defendants, *Heeter*, *Given*, and *Polk*, be enjoined from taking possession of, and from using or controlling the church edifice and other property of the Walnut Street Church, except as they, or any one of them, may choose to attend religious worship, or other religious exercises, in the same manner as other persons not officers or members of said church.

2d. That the defendants *Watson*, *Galt*, *Fulton*, *Heeter*, *Given*, *Polk*, *Farley*, and all others, be enjoined from so using or controlling the said church edifice, or other property of the

church, as in any wise to interfere with the ministrations therein of Hays as pastor, or with the exercise by him and by Hackney, and others, recognized as elders in the said church by those herein declared to be sole beneficiaries of said property, of any authority in the said church or over its property or members which rightfully belongs to the pastors and elders of the churches in connection with and according to the usages of the Presbyterian Church of the United States of America.

3d. That the defendants *Watson*, *Galt*, *Heeter*, *Given*, *Fulton*, *Farley*, and *Polk*, and all others, be enjoined from using or controlling the church edifice and property in any other manner than as the property exclusively of the persons hereinbefore declared to be the Third or Walnut Street Presbyterian Church of Louisville, and the sole beneficiaries of said property, having Hays as pastor, and recognizing Hackney, Avery, Leach, and McNaughtan as elders, and McDougall, McPherson, and Ashcraft as trustees. And that they, and all others, be enjoined from interfering in any manner with the use of the said property by the members of the said church hereinbefore declared to be such, and by such as might be hereafter admitted into said church according to its forms, and who are or might become connected with and under the care and authority of the General Assembly of the Presbyterian Church in the United States of America, and the several judicatories which submit to the authority of said Assembly; and from hindering or preventing any one from worshipping in said church, or participating in any of its religious exercises according to the usages of said church.

From this decree *Watson and the other defendants* appealed.

Mr. T. W. Bullitt, for the appellants:

I. The Circuit Court had no jurisdiction, because,

1. The complainants had no such interest in the subject of litigation as would enable them to maintain the suit. Membership in the Walnut Street Church is of course essential to give the requisite interest. But they are not mem-

bers. By the constitution of the Presbyterian Church the Session admits to membership. In *Avery* v. *Watson* the direct issue was whether Avery, Leach, and McNaughtan were elders; and it was decided that they were not. The body which, if they *had* been elders, would have been a Session, was, from the fact that they were not elders, not a Session.

But the Circuit Court had no jurisdiction, because,

2. The Louisville Chancery Court had exclusive jurisdiction over the property in controversy, and over the present parties. A series of cases involving the relations of State and Federal courts have established this rule, to wit: that where property has been once lawfully taken possession of under process of a court, such court has exclusive jurisdiction over the *thing*, and that this jurisdiction extends to every question or claim of title, interest or use touching such property, of whatever nature or origin, *or in whose hands soever it may subsist.* It is not material that such claim be wholly different from or that it is prior or subsequent in date, or even paramount to any or all the claims pending before the court. The jurisdiction is exclusive over the thing itself, and such claim must be asserted, if at all, in the court having such possession and jurisdiction. Conceding that the matters alleged in the present bill constitute a controversy different from and subsequent in date to that made before the chancellor, yet, so long as the chancellor's possession or exclusive jurisdiction of the property or *thing in controversy continued*, any decree by the Circuit Court touching that property was without authority and void. Any alleged claims touching that property should have been asserted before the chancellor or their assertion delayed, until by execution of final process he had voluntarily and completely yielded up his jurisdiction over it.

In *Hagan* v. *Lucas*,* the claim asserted by the claimant in the Federal court was wholly different from and independent of the controversy pending in the State court. In *Peck* v. *Jenness*,† the case was similar. In *Taylor* v. *Carryl*,‡ the

* 10 Peters, 402. † 7 Howard, 624. ‡ 20 Id. 594.

plaintiffs claimed under a *maritime lien* for seamen's wages. The claims were not only asserted by strangers, but were conceded by this court to be paramount to all claims pending before the State court; and yet, in each case, by reason of the possession of the State court through its officers, it was declared to have exclusive jurisdiction of the thing, capable alone of entertaining any question touching its possession, title, or use, and that the process of the Federal court was void. *Freeman* v. *Howe** is in coincidence with all these cases.

But independently of this, the delivery to the trustees and elders of the body of which the Avery or Jones party are members, of the possession of the church building cannot be granted in this suit, nor can the other side be enjoined from taking possession as prayed for in the bill, because the property is in the actual possession of the marshal of the Louisville Chancery Court as its receiver, and because there is an unexecuted decree of that court ordering him to deliver the possession to the defendants.

The marshal did never in form or fact abandon his possession. The only argument could be that his possession was that of a receiver, and that his appointment was superseded by the final decree. But it is text-book law that a receiver is never discharged by final decree.† It is unimportant, however, whether the marshal did or did not either under order of court or otherwise abandon his possession. The just construction of the rule we conceive to be, that property once taken possession of by a court, and disposed of under its order, remains in custody of the law, subject to the exclusive jurisdiction of the court (into whose hands soever it may pass), until by the execution of its final decree, the jurisdiction of the court is completely exhausted.

II. We come then to the great question of the case; one touching the character and extent of jurisdiction vested by our law in those voluntary associations sometimes called

* 24 Howard, 450.

† Daniel's Chancery Practice, 2003.

ecclesiastical courts, and how far they are independent of control by the civil,—a question of magnitude every way; one which determines the relations of the church to the state in this country, and whether the church in relation to its civil interests is organized under the authority of law or above it.

The case shows two contesting organizations, each asserting itself to be the true Walnut Street Church mentioned in the deed and charter. The question for decision, therefore, is strictly one of identity and of lawful organic succession.

A number of cases of church litigation are reported in New York and New England; but they are inapplicable to the questions arising herein, because in New England the cases refer to congregational or independent churches, and in New York to incorporated religious *societies*, wherein the whole body of the congregation, whether *members of the church* or not, are members of the corporation; and where disputed questions touching property or other rights are determined strictly on the principles applicable to corporations.*

The Pennsylvania cases of *Presbyterian Congregation* v. *Johnston*, and *Commonwealth* v. *Green*,† present some points of contrast with the questions in this cause, especially the latter, which relates mainly to questions of property held by the governing body as distinguished from that of a congregation part of a larger organization.

In Kentucky, *Gibson* v. *Armstrong*,‡ gives a case which assists us. *Shannon* v. *Frost*,§ is inapplicable in this cause, by reason of the *congregational* character of the Baptist Church in which it arose.

The great field for litigation of this nature has undoubtedly been Scotland, the native home of the Presbyterian faith and form of church government.

Prior to about the year 1813 the courts seemed not to

* See Petty v. Tooker, 21 New York, 267; Burrell v. Associated Ref. Synod, 44 Barbour, 282; Robertson v. Bullions, 9 Id. 64.

† 1 Watts & Sergeant, 37; 4 Wharton, 603.

‡ 7 B. Monroe, 481.

§ 3 Id. 256.

have settled upon any definite rule by which church controversies were to be adjudged. Their unwillingness, however, coupled with doubts as to their power to handle ecclesiastical matters inclined them generally to refer every question involving such matters exclusively to the decision of the Church itself. But there were difficulties in the application of the principle, and a confused idea that in case of schism the organic *succession* necessarily remained with the majority of the local society, counterbalanced by the idea that its *identity* could not be preserved except in connection with the general body of which it formed a part, caused a singular vacillation in judicial decision. The earlier decisions, accepting as a conclusive test of right the action of a majority of the local congregation, afforded an easy and simple rule, so long as applied to independent churches; but when it came to be applied to societies organized as a part of larger bodies, where the majorities in the local and general organizations might be different, it was found not to be founded on just or practicable principles. For a time the courts vacillated in its application, as their views happened to lean most strongly towards congregational independence or towards ecclesiastical connection and subordination. Finally, about the year 1813, came up the case of *Craigdallie* v. *Aikman*,* a case bearing in some points a striking analogy to the present. In it both of these conceptions were brought out at different times; and an appeal to the House of Lords drew from Lord Eldon an announcement of the principle which was at once recognized and has since been uniformly accepted as the true governing rule in all cases of this nature.

In the case we speak of, property had been acquired and was held in trust for a congregation forming part of a larger body known as Burgher Seceders, the highest judicatory in the church being the Synod. That body having passed certain resolutions alleged to be a departure from one of the articles of their confession, a minority protested, congregations became divided, and among other cases, the question

* 2 Bligh, 529; 1 Dow., 1.

arose as to which of the two parties in this congregation was entitled to its property. It was made a test case and received the most careful consideration. Upon its first hearing in the Scotch Court of Session, the "majority (in interest) in the congregation" were held to be entitled. But under the forms of their proceeding the cause came again before the court, and some of the judges being changed, it was now declared that the property was held for a "society of persons, . . . such persons *always* . . . *continuing in communion with and subject to the ecclesiastical discipline* of a body of dissenting Protestants calling themselves the Associate Presbytery and Synod of Burgher Seceders." The effect of these decisions was to make the question of identity or organic succession, in the one case to attach solely to a majority of the local congregation, in the other to depend upon a continued connection with the general body. On appeal to the House of Lords both of these views were rejected and the following principle, first announced by Lord Eldon, was adopted, viz.: That property conveyed for the use of a society for purposes of religious worship, is a *trust*, which is to be enforced *for the purpose of maintaining that religious worship for which the property was devoted*, and in the event of schism (the deed making no provision for such case), its uses are to be enforced, not in behalf of a majority of the congregation, nor yet exclusively in behalf of the party adhering to the general body, but in favor of that part of the society *adhering to and maintaining the original principles upon which it was founded.*

This case, followed and recognized by that of *Attorney-General* v. *Pearson*,* has been accepted in all cases of this nature in England, Scotland, and America.

The principle of this case, so simple and just in itself, was yet not so fully or clearly expressed as to remove all difficulty in its application. Several important questions were at once presented; and,

1. To the maintenance of which of the various principles

* 3 Merivale, 353.

of the society does the implied trust especially refer? Does it relate mainly to the fundamental doctrines of religious truth, the standards of faith, or does it embrace equally all the principles of doctrine, form, and order? Does it bind the society permanently and exclusively to the same principles and to the same connections with and relations to other societies which existed at the date of conveyance, or does it recognize the right of change inherent in the body by general consent, or perhaps incorporated as an original principle in the fundamental law of the organization? Does it recognize that by unforeseen events beyond the control of the society, its original connections may be changed or broken up without its own act or assent? All of these questions under varying forms and circumstances have been presented, and discussed, and adjudged; and this general principle may be considered as settled, viz.: That where property is conveyed "for the use" or "benefit" of a designated "church," or "religious society" (the deed containing no special limitations), such property, by operation of the law of trusts, is held for the use of such society, *subject to the entire body or system* of doctrines, rules, or principles, whether of faith, form, or order, held and recognized by the society at the time of conveyance; that it binds such society to a permanency of religious faith and a continuance of subsisting connections, or recognizes a right of change in doctrine, or a lawful severance of its connections, *so far and no farther* than it is bound to or released from such permanent or continuing state, by or in accordance with the fundamental laws of the organization; that wherever the use or control of property depends upon adherence to or a change from original doctrines, or upon a continuance or severance of connections with a particular judicatory, or upon an alleged title to office in the church, or upon any act, judgment, or proceeding of an ecclesiastical tribunal, in every case the exclusive standard by which the conflicting claims are to be judged is the CONSTITUTION of the church itself.

These views are recognized and brought out with force in

the American cases of *Gibson* v. *Armstrong* and *Sutter* v. *The First Reformed Church.**

2. Another question, more serious and difficult than the last, remained in determining the application of this rule of the law of trusts, viz.: In these matters of religious doctrine, discipline, and church order, who is to be the judge? Who has the right to say conclusively, in case of controversy, that one or the other party has departed from the doctrines of the church? Who shall determine upon the validity of an act or judgment of a church court; upon the status of a member or officer; upon the legality or otherwise of a voluntary or enforced severance of a part from the body of the general organization?

This question was promptly raised upon the earliest application of the principle stated by Lord Eldon, and has been decided with a frequency and uniformity rarely met with upon any important question. Yet the court below assumed that these matters, being of an ecclesiastical nature or arising upon a construction of the law of the church, are subject to exclusive cognizance and jurisdiction by the ecclesiastical courts, whose judgments thereon must be accepted as conclusive by the civil courts. The position assumed does not stop with asserting that, *if* the decision of the question in controversy has been committed by the constitution of the church to a particular tribunal, or *if* the act or judgment in question has been performed by such tribunal in pursuance of a power vested in it by the constitution, *in such case* the act or judgment is conclusive on the civil court. It asserts an exclusive right in the General Assembly to determine conclusively the extent of its own powers and duties under the constitution; to determine in every case, whether it has itself violated the constitution or abandoned the principles of the faith. It asserts that the announcement of a particular doctrine or the imposition of a duty on the church, or

* *Supra*, 703. To the same effect, see Smith *v.* Nelson, 18 Vermont, 511; Kniskern *v.* Lutheran Church, 1 Sandford's Chancery, 439; Miller *v.* Gable, 2 Denio, 492.

the performance, rendering, or approval of an act or judgment by the General Assembly, is itself a conclusive evidence, *probatio probata*, that such doctrine or duty, act or judgment, has been imposed, rendered, or performed, in accordance with the constitution of the church; and that the church itself and the civil courts have no power to examine or question what has been so settled by the supreme tribunal of the church.

If the principle of the decree herein is affirmed, it sweeps away all limitations imposed upon church courts by their fundamental laws and renders it impossible that churches can be organized under rules or limitations which shall bind the judicatories of their own creation.

Hitherto the question has received but one solution. It devolves upon this court authoritatively to settle it. Let us examine the history of judicial decision.

In *Galbraith* v. *Smith** (the first case coming before the Scotch Court of Session after the judgment of the House of Lords in *Craigdallie* v. *Aikman*), the position contended for by the appellees was accepted and announced from the bench. Lord Meadowbank, construing that judgment, said that it would have been competent for the party adhering to the Synod to have shown as matter of fact that it having been a fundamental rule of the sect that in the supreme judicatory alone was vested the power of determining all questions of doctrine and discipline, so the judgment of the Synod was to be received as *probatio probata* of their adherence to their original principles; it being incompetent for the civil court to review the decisions in such matters of the ecclesiastical judicatories. He then stated as a general proposition, that

"It is a legal object of such a trust, that it may profess to be constituted with a view to perpetuity, even by placing in the hands of a recognized body the right of controlling and modifying those rules and regulations in conformity with the fundamental principles of the sect of dissenting Christians to which

* 15 Shaw, 808, decided A.D. 1837.

those constituting the trust may have professed to adhere; and that the civil court will not take cognizance of the proceedings and determinations of those judicatories, as they may be termed, upon matters of doctrine and discipline, but hold them to be *probatio probata* of the principles of the sect."

This was manifestly throwing the question back upon the doctrine of the second judgment in the Craigdallie case. Accordingly, on the next occasion calling for a review of the principle by the Court of Session, the view taken in *Galbraith* v. *Smith* was overruled. The court say that the principle of the judgment of the House of Lords had been "wholly misunderstood;" that Lord Meadowbank's view "takes adherence to the Synod as *conclusive* and *excludes* inquiry into the original opinions or doctrines, if opposed to the declaration made by the Synod, as to what those doctrines are, and is precisely the error in the Craigdallie case again brought out and in more absolute terms." The error, the court say, was "founded on the assumption that connection with a dissenting Synod was as decisive a criterion by which to determine property and civil rights as adherence to the established church. The mistake consisted in taking as decisive what was only one element, and it might be an element of no importance in the inquiry, what was the original trust and which party maintains the principles;" and in answer to the suggestion that "submission to the judicatories may be one of the original principles," the court say "then you must prove that. It is not *probatio probata.* It is not even a presumption of law."*

The cases above referred to, relate especially to the power of the civil courts, to examine and decide (as matter of fact) upon questions of *doctrinal differences* where rights of property depend upon adherence to doctrines. But the great contest for complete ecclesiastical independence and exclusive jurisdiction was made upon another point, viz.: as to the right of the civil court to examine and pass directly upon the title of persons claiming *official status* in the church, or

* Craigie v. Marshall, 12 Dunlop, 523, A.D. 1850.

upon the validity of proceedings in church courts, where civil rights may depend on such status, or may be affected by such proceedings. This contest, beginning about the year 1838, in the Scotch Court of Session, several times brought before the House of Lords, may be considered as terminating in the celebrated Cardross Case.* Its great importance and the deep interest excited by it, occasioned the most profound investigation into the principles which should regulate civil courts in their relations to the churches; and the results have been valuable to the law. An examination of them will show these general principles to have been settled:

i. That the church (non-established) stands before the law, in relation to all civil interests acquired or claimed by it, precisely as every other voluntary society for moral or scientific or other purposes, subject in the same manner and extent to the jurisdiction of civil authority.

ii. That in so far as the law can regard them, the powers of the church judicatories are derived solely from the consent of the members of the church, as expressed in their fundamental law; that they are not "courts" and have no "jurisdiction" in the strict sense of the terms—these terms necessarily implying the existence of a power conferred by and vested in functionaries of the state. They are not "courts" except of the parties' own choosing.

iii. That in so far as the fundamental laws of the church confer powers on its tribunals, the civil courts will recognize them, and where civil rights are involved, will give effect to their exercise without inquiring into the motives or grounds of action of the ecclesiastical tribunal; and will enforce with the same respect the action of the inferior tribunal acting within its sphere, as they will that of the supreme court of the church.

iv. That the jurisdiction of civil courts being confined to "civil actions," they may not take cognizance of purely spiritual or ecclesiastical questions, *as such;* just as they may not take cognizance of any moral or scientific questions for the purpose of determining upon their abstract truth; but that in every case

* See McMillan v. General Assembly of the Presbyterian Church, 22 D., 270, decided 23d Dec., 1859.

of controversy, where a right of property depends upon an adherence to religious doctrine, or is affected by an act or judgment of an ecclesiastical tribunal, the civil court will *examine* into such doctrine *as matter of fact*, for the purpose of determining which party maintains the original principles of the society, and will examine into the act or judgment of the ecclesiastical court, for the purpose of determining whether it is in *contravention* of the fundamental law of the church, or without authority from it; in which latter case, such act or judgment will be esteemed void and be disregarded. In these several cases the exclusive standard of judgment is the CONSTITUTION of the church itself.

These principles, first announced with reference to the high claims of the Established Church of Scotland, were afterwards repeated with equal deliberation in reference to the Free Church, which having withdrawn from the Establishment on account of these decisions, reasserted in its voluntary character its claim to ecclesiastical independence. A reference to the Cardross Case will show how it was presented, and met. A Presbytery having tried a minister for misconduct, adjudged (partially) against him; and the Synod on appeal reversed its action. Upon appeal to the General Assembly, that body took up the case *de novo* and passed a sentence more extensive than that of the Presbytery. The minister, whose civil rights were affected by this judgment, applied to the civil court for its "*reduction*," on the ground that the Assembly being confined to an appellate power by the constitution of the church, had transcended its authority by passing an original sentence upon him. The General Assembly among others filed the following pleas:

1st. "That the sentences complained of, being spiritual acts, done in the ordinary course of discipline of a Christian Church tolerated and protected by law, it is not competent for the civil court to reduce them, and the actions should therefore be dismissed."

2d. "As the actions, so far as they conclude for a reduction of the sentences complained of, do not relate to any question of civil right, they cannot be maintained."

Upon argument and a full review of all the cases, both of these pleas were overruled. The cause did not reach a hearing upon the pleas touching the actual powers of the Assembly under the constitution; but those decided are alone important in this discussion.*

If then the controlling principles of law touching this matter have been correctly stated, it follows in this Walnut Street Church case, that if it shall appear that the majority have abandoned, while the minority adhere to the original principles of the society, the judgment must go in favor of the minority.

The General Assembly is not excepted from the obligation of the rule. If a doubt upon this point should otherwise exist, it would be removed by a consideration of the *commission* under which alone its members act and hold their places, and by which they are severally restricted to sit, consult, vote, and determine, on all things that may come before that body "according to the principles and constitution of this church, and the word of God." Even those general clauses in the Form of Government touching the powers of Assembly to "decide controversies," and to "suppress schismatical contentions and disputations," are to be exercised not wantonly, but in accordance with the fixed provisions elsewhere stated. They contemplate controversies, contentions, and disputations, to which there may be *parties* and *proceedings*, by which these matters may be constitutionally brought before the Assembly.

[The learned counsel then having stated in detail the particulars of the schisms in the Presbyterian Church, set

* For a continuous history of this controversy, see Earl of Kinnoul v. Presbytery of Auchterarder (Feb. 27th, 1838), 16 Shaw, 661; McLean & Robinson, 320; Clark v. Sterling (June 14th, 1839), 1 D. 955; Dunlap, 330; Presbytery of Strathbogie (1839 and 1840), 2 D. 258, 585, 1047, 1380; 15 F. 605, 1478; Dunlap, 64, 330; Edwards v. Cruikshank (December, 1840), 3 Dunlap, 283; Presbytery of Strathbogie (May, 1842), and other cases occurring near the same period in reference to the Established Church. Also Dunbar v. Skinner (March 3d, 1849), 11 D. 945; Long v. Bishop of Capetown, Ecclesiastical Judgments of Privy Council, 310; Murray v. Burger's Ib. (February 6th, 1867); Forbes v. Eden, 38 Jurist, 98.

out generally in the Reporter's statement of the case, went into a very interesting examination of the constitution and fundamental principles of that church, and sought to show that those Declaratory Statements or Resolutions "whereby the church had pledged herself, in her ecclesiastical capacity, to an unabated loyalty to the civil government, and one great section of the church was prejudged as traitors," were in violation of its fundamental principles; and a departure from those sacred standards which declare that the "visible church, which is also catholic or universal (and *not confined to one nation* as before, under the law), consists of all those throughout the world that profess the true religion" whereof "there is no other head but the Lord Jesus Christ;"* that the Assembly in making such a departure had imposed upon ministers, members, and judicatories, the duty of resistance to its edicts; and that the Presbytery of Louisville, in its "Declaration and Testimony"—its Declaration against the principle of these deliverances; its Testimony of *refusal* to "sustain or in any manner assist in the execution" of them, stood immovably on the constitution.

The conclusion to which this court arrived, as to its competence to pass in this case on such questions, renders that able argument, so interesting in some aspects, comparatively without interest here, on which account it is omitted.]

Messrs. B. H. Bristow and J. M. Harlan, contra.

The case having been held under advisement since the last term, when the argument was had,

Mr. Justice MILLER now delivered the opinion of the court.

This case belongs to a class, happily rare in our courts, in which one of the parties to a controversy, essentially ecclesiastical, resorts to the judicial tribunals of the State for the maintenance of rights which the church has refused to acknowledge, or found itself unable to protect. Much as such dissensions among the members of a religious society should

* Confession of Faith, chapter 25.

be regretted, a regret which is increased when passing from the control of the judicial and legislative bodies of the entire organization to which the society belongs, an appeal is made to the secular authority; the courts when so called on must perform their functions as in other cases.

Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints. Conscious as we may be of the excited feeling engendered by this controversy, and of the extent to which it has agitated the intelligent and pious body of Christians in whose bosom it originated, we enter upon its consideration with the satisfaction of knowing that the principles on which we are to decide so much of it as is proper for our decision, are those applicable alike to all of its class, and that our duty is the simple one of applying those principles to the facts before us.

The first of the points arising in the case concerns the jurisdiction of the Circuit Court, which is denied; first, on the ground that the plaintiffs have no such interest in the subject of litigation as will enable them to maintain the suit, and, secondly, on matters arising out of the alleged proceedings in the suit in the Chancery Court of Louisville.

The allegation that the plaintiffs are not lawful members of the Walnut Street Church is based upon the assumption that their admission as members was by a pastor and elders who had no lawful authority to act as such. As the claim of those elders to be such is one of the matters which this bill is brought to establish, and the denial of which makes an issue to be tried, it is obvious that the objection to the interest of the plaintiffs must stand or fall with the decision on the merits, and cannot be decided as a preliminary question. Their right to have this question decided, if there is no other objection to the jurisdiction, cannot be doubted. Some attempt is made in the answer to question the good faith of their citizenship, but this seems to have been abandoned in the argument.

In regard to the suit in the Chancery Court of Louisville, which the defendants allege to be pending, there can be no doubt but that that court is one competent to entertain jurisdiction of all the matters set up in the present suit. As to those matters, and to the parties, it is a court of concurrent jurisdiction with the Circuit Court of the United States, and as between those courts the rule is applicable that the one which has first obtained jurisdiction in a given case must retain it exclusively until it disposes of it by a final judgment or decree.

But when the pendency of such a suit is set up to defeat another, the *case* must be the same. There must be the same parties, or at least such as represent the same interest, there must be the same rights asserted, and the same relief prayed for. This relief must be founded on the same facts, and the title or essential basis of the relief sought must be the same. The identity in these particulars should be such that if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties.

In the case of *Barrows* v. *Kindred*,* which was an action of ejectment, the plaintiff showed a good title to the land, and the defendant relied on a former judgment in his favor, between the same parties for the same land; the statute of Illinois making a judgment in such an action as conclusive as in other personal actions, except by way of new trial. But this court held that as in the second suit the plaintiff introduced and relied upon a new and different title, acquired since the first trial, that judgment could be no bar, because that title had not been passed upon by the court in the first suit.

But the principles which should govern in regard to the identity of the matters in issue in the two suits to make the pendency of the one defeat the other, are as fully discussed, in the case of *Buck* v. *Colbath*,† where that was the main question, as in any case we have been able to find. It was

* 4 Wallace, 399.

† 3 Id. 334.

an action of trespass, brought in a State court, against the marshal of the Circuit Court of the United States for seizing property of the plaintiff, under a writ of attachment from the Circuit Court. And it was brought while the suit in the Federal court was still pending, and while the marshal held the property subject to its judgment. So far as the *lis pendens* and possession of the property in one court, and a suit brought for the taking by its officer in another, are concerned, the analogy to the present case is very strong. In that case the court said: "It is not true that a court, having obtained jurisdiction of a subject-matter of suit and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and in some instances requiring the decision of the same question exactly. In examining into the exclusive character of the jurisdiction in such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits." And it might have been added, to the facts on which the claim for relief is founded. "A party," says the court by way of example, "having notes secured by a mortgage on real estate, may, unless restrained by statute, sue in a court of chancery to foreclose his mortgage, and in a court of law to recover a judgment on his notes, and in another court of law in an action of ejectment for possession of the land. Here, in all the suits, the only question at issue may be the existence of the debt secured by the mortgage. But, as the relief sought is different, and the mode of proceeding different, the jurisdiction of neither court is affected by the proceedings in the other." This opinion contains a critical review of the cases in this court of *Hagan* v. *Lucas*,* *Peck* v. *Jenness*,† *Taylor* v. *Carryl*,‡ and *Freeman* v. *Howe*,§ cited and relied on by counsel for the appellants; and we are satisfied that it states the doctrine correctly.

The limits which necessity assigns to this opinion forbid

* 10 Peters, 402. † 7 Howard, 624. ‡ 20 Id. 594. § 24 Id. 450.

our giving at length, the pleadings in the case in the Louisville Chancery Court. But we cannot better state what is, and what is not, the subject-matter of that suit or controversy, as thus presented and as shown throughout its course, than by adopting the language of the Court of Appeals of Kentucky, in its opinion delivered at the decision of that suit, in favor of the present appellants. "As suggested in argument," says the court, "and apparently conceded on both sides, this is not a case of division or schism in a church; nor is there any question as to which of two bodies should be recognized as the Third or Walnut Street Presbyterian Church. Neither is there any controversy as to the authority of Watson and Galt to act as ruling elders; but the sole inquiry to which we are restricted in our opinion is, whether Avery, McNaughtan, and Leach are also ruling elders, and therefore members of the session of the church."

The pleadings in the present suit show conclusively a different state of facts, different issues, and a different relief sought. This *is* a case of a division or schism in the church. It *is* a question as to which of two bodies shall be recognized as the Third or Walnut Street Presbyterian Church. There *is* a controversy as to the authority of Watson and Galt to act as ruling elders, that authority being denied in the bill of the complainants; and, so far from the claim of Avery, McNaughtan, and Leach to be ruling elders being the sole inquiry in this case, it is a very subordinate matter, and it depends upon facts and circumstances altogether different from those set up and relied on in the other suit, and which did not exist when it was brought. The issue here is no longer a mere question of eldership, but it is a separation of the original church members and officers into two distinct bodies, with distinct members and officers, each claiming to be the true Walnut Street Presbyterian Church, and denying the right of the other to any such claim. This brief statement of the issues in the two suits leaves no room for argument to show that the pendency of the first cannot be pleaded either in bar or in abatement of the second.

The supplementary petition filed by the plaintiffs in that

case, after the decree of the Chancery Court had been reversed on appeal, and which did contain very much the same matter found in the present bill, was, on motion of the plaintiffs' counsel, and by order of the court, dismissed, without prejudice, before this suit was brought, and of course was not a *lis pendens* at that time.

It is contended, however, that the delivery to the trustees and elders of the body of which the plaintiffs are members, of the possession of the church building cannot be granted in this suit, nor can the defendants be enjoined from taking possession as prayed in the bill, because the property is in the actual possession of the marshal of the Louisville Chancery Court as its receiver, and because there is an unexecuted decree of that court ordering the marshal to deliver the possession to defendants.

In this the counsel for the appellants are, in our opinion, sustained, both by the law and by the state of the record of the suit in that court.

The court, in the progress of that suit, made several orders concerning the use of the church, and finally placed it in the possession of the marshal as a receiver, and there is no order discharging his receivership; nor does it seem to us that there is any valid order finally disposing of the case, so that it can be said to be no longer in that court. For, though the Chancery Court did, on the 20th March, 1868, after the reversal of the case in the Court of Appeals, enter an order reversing its former decree and dismissing the bill, with costs, in favor of the defendants, the latter, on application to the appellate court, obtained another order dated June 26th. By this order, or mandate to the Chancery Court, it was directed to render a judgment in conformity to the opinion and mandate of the court, restoring possession, use, and control of the church property to the parties entitled thereto, according to said opinion, and so far as they were deprived thereof by the marshal of the Chancery Court under its order.

In obedience to this mandate the Chancery Court, on the 18th September, three months after the commencement of

this suit, made an order that the marshal restore the possession, use, and control of the church building to Henry Farley, George Fulton, B. F. Avery, or a majority of them, as trustees, and to John Watson, Joseph Galt, and T. J. Hackney, or a majority of them, as ruling elders, and to report how he had executed the order, and reserving the case for such further order as might be necessary to enforce full obedience.

It is argued here by counsel for the appellees that the case was, in effect, disposed of by the orders of the Chancery Court, and that nothing remained to be done which could have any practical operation on the rights of the parties.

But if the Court of Appeals, in reversing the decree of the chancellor in favor of the plaintiffs, was of opinion that the defendants should be restored to the position they occupied in regard to the possession and control of the property before that suit began, we have no doubt of their right to make such order as was necessary to effect that object; and as the proper mode of doing this was by directing the chancellor to make the necessary order, and have it enforced as chancery decrees are enforced in his court, we are of opinion that the order of the Court of Appeals, above recited, was in essence and effect, a decree in that cause for such restoration; and that the last order of the Chancery Court, made in accordance with it, is a valid subsisting decree, which, though final, is unexecuted.

The decisions of this court in the cases of *Taylor* v. *Carryl*,* and *Freeman* v. *Howe*,† and *Buck* v. *Colbath*,‡ are conclusive that the marshal of the Chancery Court cannot be displaced as to the mere actual possession of the property, because that might lead to a personal conflict between the officers of the two courts for that possession. And the act of Congress of March 2d, 1793,§ as construed in the cases of *Diggs* v. *Wolcott*,‖ and *Peck* v. *Jenness*,¶ are equally conclusive against any injunction from the Circuit Court, forbidding the defend-

* 20 Howard, 594. † 24 Id. 450. ‡ 3 Wallace, 334.
§ 1 Stat. at Large, 334, § 5. ‖ 4 Cranch, 179. ¶ 7 Howard, 625.

ants to take the possession which the unexecuted decree of the Chancery Court requires the marshal to deliver to them.

But, though the prayer of the bill in this suit does ask for an injunction to restrain Watson, Galt, Fulton, and Farley from taking possession, it also prays such other and further relief as the nature of the case requires, and especially that said defendants be restrained from interfering with Hays, as pastor, and plaintiffs in worshipping in said church. Under this prayer for general relief, if there was any decree which the Circuit Court could render for the protection of the right of the plaintiffs, and which did not enjoin the defendants from taking possession of the church property, and which did not disturb the possession of the marshal of the Louisville chancery, that court had a right to hear the case and grant that relief. This leads us to inquire what is the nature and character of the possession to which those parties are to be restored.

One or two propositions which seem to admit of no controversy are proper to be noticed in this connection. 1. Both by the act of the Kentucky legislature creating the trustees of the church a body corporate, and by the acknowledged rules of the Presbyterian Church, the trustees were the mere nominal title-holders and custodians of the church property, and other trustees were, or could be elected by the congregation, to supply their places once in every two years. 2. That in the use of the property for all religious services or ecclesiastical purposes, the trustees were under the control of the church session. 3. That by the constitution of all Presbyterian churches, the session, which is the governing body in each, is composed of the ruling elders and pastor, and in all business of the session the majority of its members govern, the number of elders for each congregation being variable.

The trustees obviously hold possession for the use of the persons who by the constitution, usages, and laws of the Presbyterian body, are entitled to that use. They are liable to removal by the congregation for whom they hold this trust, and others may be substituted in their places. They

have no personal ownership or right beyond this, and are subject in their official relations to the property, to the control of the session of the church.

The possession of the elders, though accompanied with larger and more efficient powers of control, is still a fiduciary possession. It is as a session of the church alone that they could exercise power. Except by an order of the session in regular meeting they have no right to make any order concerning the use of the building; and any action of the session is necessarily in the character of representatives of the church body by whose members it was elected.

If then, this true body of the church, the members of that congregation, having rights of user in the building, have in a mode which is authorized by the canons of the general church in this country elected and installed other elders, it does not seem to us inconsistent or at variance with the nature of the possession which we have described, and which the Chancery Court orders to be restored to the defendants, that they should be compelled to recognize these rights, and permit those who are the real beneficiaries of the trust held by them, to enjoy the uses, to protect which that trust was created. Undoubtedly if the order of the Chancery Court had been executed, and the marshal had delivered the key of the church to the defendants, and placed them in the same position they were in before that suit was commenced, they could in any court having jurisdiction and in a case properly made out, be compelled to respect the rights we have stated, and be controlled in their use of the possession by the court, so far as to secure those rights.

All that we have said in regard to the possession which the marshal is directed to deliver to the defendants, is equally applicable to the possession held by him pending the execution of that order. His possession is a substitute for theirs, and the order under which he received that possession, which we have recited, shows this very clearly.

The decree which we are now reviewing seems to us to be carefully framed on this view of the matter. While the rights of the plaintiffs and those whom they sue for, are ad-

mitted and established, the defendants are still recognized as entitled to the possession which we have described; and while they are not enjoined from receiving that possession from the marshal, and he is not restrained from obeying the Chancery Court by delivering it, and while there is no order made on the marshal at all to interfere with his possession, the defendants are required by the decree to respect the rights of the plaintiffs, and to so use the possession and control to which they may be restored as not to hinder or obstruct the true uses of the trust, which that possession is intended to protect.

We are next to inquire whether the decree thus rendered is based upon an equally just view of the law as applied to the facts of this controversy.

The questions which have come before the civil courts concerning the rights to property held by ecclesiastical bodies, may, so far as we have been able to examine them, be profitably classified under three general heads, which of course do not include cases governed by considerations applicable to a church established and supported by law as the religion of the state.

1. The first of these is when the property which is the subject of controversy has been, by the deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument devoted to the teaching, support, or spread of some specific form of religious doctrine or belief.

2. The second is when the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority.

3. The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some su-

preme judicatory over the whole membership of that general organization.

In regard to the first of these classes it seems hardly to admit of a rational doubt that an individual or an association of individuals may dedicate property by way of trust to the purpose of sustaining, supporting, and propagating definite religious doctrines or principles, provided that in doing so they violate no law of morality, and give to the instrument by which their purpose is evidenced, the formalities which the laws require. And it would seem also to be the obvious duty of the court, in a case properly made, to see that the property so dedicated is not diverted from the trust which is thus attached to its use. So long as there are persons qualified within the meaning of the original dedication, and who are also willing to teach the doctrines or principles prescribed in the act of dedication, and so long as there is any one so interested in the execution of the trust as to have a standing in court, it must be that they can prevent the diversion of the property or fund to other and different uses. This is the general doctrine of courts of equity as to charities, and it seems equally applicable to ecclesiastical matters.

In such case, if the trust is confided to a religious congregation of the independent or congregational form of church government, it is not in the power of the majority of that congregation, however preponderant, by reason of a change of views on religious subjects, to carry the property so confided to them to the support of new and conflicting doctrine. A pious man building and dedicating a house of worship to the sole and exclusive use of those who believe in the doctrine of the Holy Trinity, and placing it under the control of a congregation which at the time holds the same belief, has a right to expect that the law will prevent that property from being used as a means of support and dissemination of the Unitarian doctrine, and as a place of Unitarian worship. Nor is the principle varied when the organization to which the trust is confided is of the second or associated form of church government. The protection which the law

throws around the trust is the same. And though the task may be a delicate one and a difficult one, it will be the duty of the court in such cases, when the doctrine to be taught or the form of worship to be used is definitely and clearly laid down, to inquire whether the party accused of violating the trust is holding or teaching a different doctrine, or using a form of worship which is so far variant as to defeat the declared objects of the trust. In the leading case on this subject, in the English courts, of the *Attorney-General* v. *Pearson*,* Lord Eldon said, "I agree with the defendants that the religious belief of the parties is irrelevant to the matters in dispute, except so far as the King's Court is called upon to execute the trust." That was a case in which the trust-deed declared the house which was erected under it was for the worship and service of God. And though we may not be satisfied with the very artificial and elaborate argument by which the chancellor arrives at the conclusion, that because any other view of the nature of the Godhead than the Trinitarian view was heresy by the laws of England, and any one giving expression to the Unitarian view was liable to be severely punished for heresy by the secular courts, at the time the deed was made, that the trust was, therefore, for Trinitarian worship, we may still accept the statement that the court has the right to enforce a trust clearly defined on such a subject.

The case of *Miller* v. *Gable*† appears to have been decided in the Court of Errors of New York on this principle, so far as any ground of decision can be gathered from the opinions of the majority of the court as reported.

The second class of cases which we have described has reference to the case of a church of a strictly congregational or independent organization, governed solely within itself, either by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government; and to property held by such a church, either by way of purchase or donation, with no other specific

* 3 Merivale, 353.

† 2 Denio, 492.

trust attached to it in the hands of the church than that it is for the use of that congregation as a religious society.

In such cases where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations. If the principle of government in such cases is that the majority rules, then the numerical majority of members must control the right to the use of the property. If there be within the congregation officers in whom are vested the powers of such control, then those who adhere to the acknowledged organism by which the body is governed are entitled to the use of the property. The minority in choosing to separate themselves into a distinct body, and refusing to recognize the authority of the governing body, can claim no rights in the property from the fact that they had once been members of the church or congregation. This ruling admits of no inquiry into the existing religious opinions of those who comprise the legal or regular organization; for, if such was permitted, a very small minority, without any officers of the church among them, might be found to be the only faithful supporters of the religious dogmas of the founders of the church. There being no such trust imposed upon the property when purchased or given, the court will not imply one for the purpose of expelling from its use those who by regular succession and order constitute the church, because they may have changed in some respect their views of religious truth.

Of the cases in which this doctrine is applied no better representative can be found than that of *Shannon* v. *Frost*,* where the principle is ably supported by the learned Chief Justice of the Court of Appeals of Kentucky.

The case of *Smith* v. *Nelson*,† asserts this doctrine in a case where a legacy was left to the Associate Congregation of Ryegate, the interest whereof was to be annually paid to their minister forever. In that case, though the Ryegate

* 3 B. Monro, 253.

† 18 Vermont, 511.

congregation was one of a number of Presbyterian churches connected with the general Presbyterian body at large, the court held that the only inquiry was whether the society still exists, and whether they have a minister chosen and appointed by the majority and regularly ordained over the society, agreeably to the usage of that denomination. And though we may be of opinion that the doctrine of that case needs modification, so far as it discusses the relation of the Ryegate congregation to the other judicatories of the body to which it belongs, it certainly lays down the principle correctly if that congregation was to be treated as an independent one.

But the third of these classes of cases is the one which is oftenest found in the courts, and which, with reference to the number and difficulty of the questions involved, and to other considerations, is every way the most important.

It is the case of property acquired in any of the usual modes for the general use of a religious congregation which is itself part of a large and general organization of some religious denomination, with which it is more or less intimately connected by religious views and ecclesiastical government.

The case before us is one of this class, growing out of a schism which has divided the congregation and its officers, and the presbytery and synod, and which appeals to the courts to determine the right to the use of the property so acquired. Here is no case of property devoted forever by the instrument which conveyed it, or by any specific declaration of its owner, to the support of any special religious dogmas, or any peculiar form of worship, but of property purchased for the use of a religious congregation, and so long as any existing religious congregation can be ascertained to be that congregation, or its regular and legitimate successor, it is entitled to the use of the property. In the case of an independent congregation we have pointed out how this identity, or succession, is to be ascertained, but in cases of this character we are bound to look at the fact that the local congregation is itself but a member of a much

larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments. There are in the Presbyterian system of ecclesiastical government, in regular succession, the presbytery over the session or local church, the synod over the presbytery, and the General Assembly over all. These are called, in the language of the church organs, "judicatories," and they entertain appeals from the decisions of those below, and prescribe corrective measures in other cases.

In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

We concede at the outset that the doctrine of the English courts is otherwise. In the case of the *Attorney-General* v. *Pearson*, cited before, the proposition is laid down by Lord Eldon, and sustained by the peers, that it is the duty of the court in such cases to inquire and decide for itself, not only what was the nature and power of these church judicatories, but what is the true standard of faith in the church organization, and which of the contending parties before the court holds to this standard. And in the subsequent case of *Craigdallie* v. *Aikman*,* the same learned judge expresses in strong terms his chagrin that the Court of Sessions of Scotland, from which the case had been appealed, had failed to find on this latter subject, so that he could rest the case on religious belief, but had declared that in this matter there was no difference between the parties. And we can very well understand how the Lord Chancellor of England, who is, in his office, in a large sense, the head and representative of

* 2 Bligh, 529.

the Established Church, who controls very largely the church patronage, and whose judicial decision may be, and not unfrequently is, invoked in cases of heresy and ecclesiastical contumacy, should feel, even in dealing with a dissenting church, but little delicacy in grappling with the most abstruse problems of theological controversy, or in construing the instruments which those churches have adopted as their rules of government, or inquiring into their customs and usages. The dissenting church in England is not a free church in the sense in which we apply the term in this country, and it was much less free in Lord Eldon's time than now. Laws then existed upon the statute-book hampering the free exercise of religious belief and worship in many most oppressive forms, and though Protestant dissenters were less burdened than Catholics and Jews, there did not exist that full, entire, and practical freedom for all forms of religious belief and practice which lies at the foundation of our political principles. And it is quite obvious, from an examination of the series of cases growing out of the organization of the Free Church of Scotland, found in Shaw's Reports of Cases in the Court of Sessions, that it was only under the pressure of Lord Eldon's ruling, established in the House of Lords, to which final appeal lay in such cases, that the doctrine was established in the Court of Sessions after no little struggle and resistance. The full history of the case of *Craigdallie* v. *Aikman*, in the Scottish court, which we cannot further pursue, and the able opinion of Lord Meadowbank in *Galbraith* v. *Smith*,* show this conclusively.

In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of

* 15 Shaw, 808.

any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

Nor do we see that justice would be likely to be promoted by submitting those decisions to review in the ordinary judicial tribunals. Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian churches), has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.

We have said that these views are supported by the preponderant weight of authority in this country, and for the reasons which we have given, we do not think the doctrines of the English Chancery Court on this subject should have with us the influence which we would cheerfully accord to it on others.

We have already cited* the case of *Shannon* v. *Frost*, in which the appellate court of the State where this controversy originated, sustains the proposition clearly and fully. "This court," says the Chief Justice, "having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline. Our only judicial power in the case arises from the conflicting claims of the parties to the church property and the use of it. We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church."

In the subsequent case of *Gibson* v. *Armstrong*,† which arose out of the general division of the Methodist Episcopal Church, we understand the same principles to be laid down as governing that case, and in the case of *Watson* v. *Avery*,‡ the case relied on by the appellants as a bar, and considered in the former part of this opinion, the doctrine of *Shannon* v. *Frost* is in general terms conceded, while a distinction is attempted which we shall consider hereafter.

One of the most careful and well-considered judgments on the subject is that of the Court of Appeals of South Carolina, delivered by Chancellor Johnson in the case of *Harmon* v. *Dreher*.§ The case turned upon certain rights in the use of the church property claimed by the minister notwithstanding his expulsion from the synod as one of its members. "He stands," says the chancellor, "convicted of the offences alleged against him, by the sentence of the spiritual body of which he was a voluntary member, and whose proceedings he had bound himself to abide. It belongs not to the civil power to enter into or review the proceedings of a spiritual court. The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority. The judgments, therefore, of

* *Supra*, p. 725.

† 7 B. Monro, 481.

‡ 2 Bush, 332.

§ 2 Speer's Equity, 87.

religious associations, bearing on their own members, are not examinable here, and I am not to inquire whether the doctrines attributed to Mr. Dreher were held by him, or whether if held were anti-Lutheran; or whether his conduct was or was not in accordance with the duty he owed to the synod or to his denomination. . . . When a civil right depends upon an ecclesiastical matter, it is the civil court and not the ecclesiastical which is to decide. But the civil tribunal tries the civil right, and no more, taking the ecclesiastical decisions out of which the civil right arises as it finds them." The principle is reaffirmed by the same court in the *John's Island Church Case.**

In *Den* v. *Bolton*,† the Supreme Court of New Jersey asserts the same principles, and though founding its decision mainly on a statute, it is said to be true on general principles.

The Supreme Court of Illinois, in the case of *Ferraria* v. *Vasconcelles*,‡ refers to the case of *Shannon* v. *Frost* with approval, and adopts the language of the court that "the judicial eye cannot penetrate the veil of the church for the forbidden purpose of vindicating the alleged wrongs of excised members; when they became members they did so upon the condition of continuing or not as they and their churches might determine, and they thereby submit to the ecclesiastical power and cannot now invoke the supervisory power of the civil tribunals."

In the very important case of *Chase* v. *Cheny*, recently decided in the same court, Judge Lawrence, who dissented, says, "We understand the opinion as implying that in the administration of ecclesiastical discipline, and where no other right of property is involved than loss of the clerical office or salary incident to such discipline, a spiritual court is the exclusive judge of its own jurisdiction, and that its decision of that question is binding on the secular courts." And he dissents with Judge Sheldon from the opinion because it so holds.

* 2 Richardson's Equity, 215. † 7 Halstead, 206. ‡ 23 Illinois, 456.

In the case of *Watson* v. *Farris*,* which was a case growing out of the schism in the Presbyterian Church in Missouri in regard to this same Declaration and Testimony and the action of the General Assembly, that court held that whether a case was regularly or irregularly before the Assembly was a question which the Assembly had the right to determine for itself, and no civil court could reverse, modify, or impair its action in a matter of merely ecclesiastical concern.

We cannot better close this review of the authorities than in the language of the Supreme Court of Pennsylvania, in the case of the *German Reformed Church* v. *Seibert*:† "The decisions of ecclesiastical courts, like every other judicial tribunal, are final, as they are the best judges of what constitutes an offence against the word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline, and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt which would do anything but improve either religion or good morals."

In the subsequent case of *McGinnis* v. *Watson*,‡ this principle is again applied and supported by a more elaborate argument.

The Court of Appeals of Kentucky, in the case of *Watson* v. *Avery*, before referred to, while admitting the general principle here laid down, maintains that when a decision of an ecclesiastical tribunal is set up in the civil courts, it is always open to inquiry whether the tribunal acted within its jurisdiction, and if it did not, its decision could not be conclusive.

There is, perhaps, no word in legal terminology so frequently used as the word jurisdiction, so capable of use in a general and vague sense, and which is used so often by men learned in the law without a due regard to precision in its application. As regards its use in the matters we have

* 45 Missouri, 183. † 3 Barr, 291. ‡ 41 Pennsylvania State, 21.

been discussing it may very well be conceded that if the General Assembly of the Presbyterian Church should undertake to try one of its members for murder, and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else. Or if it should at the instance of one of its members entertain jurisdiction as between him and another member as to their individual right to property, real or personal, the right in no sense depending on ecclesiastical questions, its decision would be utterly disregarded by any civil court where it might be set up. And it might be said in a certain general sense very justly, that it was because the General Assembly had no jurisdiction of the case. Illustrations of this character could be multiplied in which the proposition of the Kentucky court would be strictly applicable.

But it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character,—a matter over which the civil courts exercise no jurisdiction,—a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them,—becomes the subject of its action. It may be said here, also, that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted; and, in a sense often used in the courts, all of those may be said to be questions of jurisdiction. But it is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the *criteria* by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, would open the way to all the evils which we

have depicted as attendant upon the doctrine of Lord Eldon, and would, in effect, transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions.

And this is precisely what the Court of Appeals of Kentucky did in the case of *Watson* v. *Avery*. Under cover of inquiries into the jurisdiction of the synod and presbytery over the congregation, and of the General Assembly over all, it went into an elaborate examination of the principles of Presbyterian church government, and ended by overruling the decision of the highest judicatory of that church in the United States, both on the jurisdiction and the merits; and, substituting its own judgment for that of the ecclesiastical court, decides that ruling elders, declared to be such by that tribunal, are not such, and must not be recognized by the congregation, though four-fifths of its members believe in the judgment of the Assembly and desired to conform to its decree.

But we need pursue this subject no further. Whatever may have been the case before the Kentucky court, the appellants in the case presented to us have separated themselves wholly from the church organization to which they belonged when this controversy commenced. They now deny its authority, denounce its action, and refuse to abide by its judgments. They have first erected themselves into a new organization, and have since joined themselves to another totally different, if not hostile, to the one to which they belonged when the difficulty first began. Under any of the decisions which we have examined, the appellants, in their present position, have no right to the property, or to the use of it, which is the subject of this suit.

The novelty of the questions presented to this court for the first time, their intrinsic importance and far-reaching influence, and the knowledge that the schism in which the case originated has divided the Presbyterian churches throughout Kentucky and Missouri, have seemed to us to justify the careful and laborious examination and discussion which we

have made of the principles which should govern the case. For the same reasons we have held it under advisement for a year; not uninfluenced by the hope, that since the civil commotion, which evidently lay at the foundation of the trouble, has passed away, that charity, which is so large an element in the faith of both parties, and which, by one of the apostles of that religion, is said to be the greatest of all the Christian virtues, would have brought about a reconciliation. But we have been disappointed. It is not for us to determine or apportion the moral responsibility which attaches to the parties for this result. We can only pronounce the judgment of the law as applicable to the case presented to us, and that requires us to affirm the decree of the Circuit Court as it stands.

DECREE AFFIRMED.

The CHIEF JUSTICE did not sit on the argument of this case, and took no part in its decision.

Mr. Justice CLIFFORD, with whom concurred Mr. Justice DAVIS, dissenting.

I dissent from the opinion and decree of the court in this case, and inasmuch as the case presents an important question of jurisdiction, I deem it proper to state in a few words the grounds of my dissent.

Before this suit was commenced, a suit in respect to the same subject-matter and substantially between the same parties had been instituted in the Chancery Court of Louisville, by parties representing the same interests as those prosecuted in this case by the appellees, and they obtained a final decree in their favor against the respondents therein, representing the same interests as those defended by the present appellants. Whereupon the respondents in that suit appealed to the Court of Appeals of that State, where the decree of the Chancery Court was in all things reversed and the cause remanded for proper corrective proceedings respecting the possession, control, and use of the property

in controversy, and for final judgment in conformity with the opinion of the appellate court.*

On the twenty-first of February, 1868, the present appellants filed in the Chancery Court the mandate of the Court of Appeals, together with a copy of the opinion of the appellate court, and moved that an order issue for the restitution of the property and for judgment in conformity with the opinion of the court. Pending the consideration of that motion the defeated party filed an original bill in equity against the then appellants, praying that they be restrained from all further prosecution of their motion for restitution and from all proceedings, by action, suit, or otherwise, to obtain possession or control of the property in controversy, and the chancellor, instead of executing the mandate of the appellate court, granted the injunction prayed by the losing party in the original case. Feeling aggrieved by that proceeding the then appellants applied to the Court of Appeals for a rule to compel the chancellor to carry the mandate of the appellate court into effect, and upon that hearing the Court of Appeals decided that the chancellor had exceeded his jurisdiction in granting the injunction prior to the entry of their mandate, and rendering a final decree in conformity therewith, and peremptorily required him to render a judgment of restitution of the property to the appellants, in so far as they had been deprived thereof by his previous orders †

Those orders of the appellate court were not executed, but the unsuccessful party immediately dismissed their bill of complaint to enjoin the appellants from executing the decree of the Court of Appeals, and on the twenty-first of the same month filed in the Circuit Court of the United States the bill of complaint in this case, before the second mandate of the appellate court commanding the chancellor to execute the first mandate was filed in the subordinate court.

Beyond all question jurisdiction was assumed by the Circuit Court in this case by virtue of the fact that the parties are citizens of different States, in which case the Judiciary Act provides that the Circuit Courts shall have original cog-

* Watson et al. v. Avery et al., 2 Bush, 332. † 3 Id. 635.

nizance concurrent with the several States. Indeed, jurisdiction in the case is claimed solely upon the ground that the Circuit Court of the United States possesses concurrent and co-ordinate jurisdiction with the State court in such a controversy.

In view of these considerations, as more fully set forth in the record and in the opinions given in this case by the Court of Appeals, I am of the opinion that the Circuit Court had no jurisdiction to hear and determine the matter in controversy, as there were two courts of common law exercising the same jurisdiction between the same parties in respect to the same subject-matter, within the same territorial limits, and governed by the same laws.

Neither court had any peculiar jurisdiction over the property in question nor of any peculiar right or lien upon it claimed by either party. Originally the State court had the same power with the Circuit Court to hear and decide any and every question that might arise as to the rights of property of either party in the course of the litigation. State courts and Circuit Courts in such cases are courts of concurrent and co-ordinate jurisdiction, in respect to which the principle is that "whenever property has been seized by an officer of the court, or put in his custody by the process of the court, the property will be considered as in the custody of the court and under its control for the time being, and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises."* Decided cases asserting that principle and enforcing it are very numerous in the reported decisions of this court, and also in the reported decisions of other courts of the highest respectability.†

* Buck v. Colbath, 3 Wallace, 341.

† Hagan v. Lucas, 10 Peters, 400; Taylor v. Carryl, 20 Howard, 594; Freeman v. Howe, 24 Id. 450; Payne v. Drewe, 4 East, 523; Peck v. Jenness, 7 Howard, 612; Evelyn v. Lewis, 3 Hare, 472; Noe v. Gibson, 7 Paige, 513; Russell v. East Anglian Railway Co., 3 McNaughton & Gordon, 104.

Remarks to show that the suit in the State court was pending and undisposed of when the bill was filed in the Circuit Court are unnecessary, as the fact is admitted, and in view of that fact I am of the opinion that the Circuit Court had no jurisdiction of the case.

Being of the opinion that the case ought to be reversed and dismissed for the want of jurisdiction, I do not think it necessary or proper to express any opinion upon the merits of the case.

THE MABEY.

A commission from this court to take testimony refused, on an appeal in a collision case in admiralty, where the party moving had in the District Court the same witnesses whom he proposed to examine here, and did not examine them only because he had agreed with a co-defendant (who was apparently as between themselves alone liable—he, the co-defendant, having led the other defendant into the fault for which the libel had been filed,—) that he, the *co*-defendant, would manage the whole case and pay the sums awarded by any decree (the purpose of this agreement having apparently been to keep from the court below a full knowledge of the case), and where especially the party now moving did not appeal from the decree of the District Court.

ON motion, the owners of the Chapman had libelled in the District Court at New York, the steamtug Mabey and the sailing vessel Cooper, which the tug had been towing out to sea, for injuries caused to the Chapman by collision on the way out. The owners of both the tug and sailing vessel appeared in the District Court with their witnesses, but the owners of the tug soon withdrew from court, and gave no evidence in defence of the tug. This course, it appeared, had been done upon a written agreement between the owners of the tug and sailing vessel, that the owner of the tug should take no active part in the conduct of the suit; that no evidence should be offered in behalf of the tug, and that the owners of the sailing vessel would assume the whole defence for both, and would pay whatever damages should be awarded against either or both; for the performance of