exposed to pecuniary consequences in respect of the position in which he is placed with reference to the refusal of a license to his curate. That is a question which may yet have to be tried between him and his curate, if either of them fails to fulfil the contract which has been entered into between them; but at present we cannot go into that question. It is not a matter which is properly raised here, and therefore I apprehend there is no relevancy in this action as regards that demand; and there being no relevancy in this action as regards that demand, I apprehend that we cannot go into those further questions of reduction and declarator which are made, as it were, the prelude to dealing with that petitory conclusion.

My Lords, if we were to go into these questions, I think that the conclusion which has been arrived at by my noble and learned friends who have already addressed the House is irresistible. The whole case of the appellant rests upon this, that the Synod had no power to do what they have done; and that they had no power to do so, because by the 33d canon of the Code of 1838 there was a prohibition against the alteration of anything which was according to the recognised or established practice. That is the whole case set up by the appellant, that the canons of 1863 were *ultra vires* of the Synod, because the Synod was restrained by that clause in the canons of 1838.

Now, the canons of this Church are, according to the recital in the canons of 1838, matters applicable to the discipline of the Church, which it is declared that the Church has power to alter from time to time; and the recital of the canons of 1838 bears that the Church has from time to time altered and repealed some of those canons. There must be some supreme authority; and looking at the power of the Synod in the mode in which my noble and learned friend who last addressed the House put it, I think the Synod, which is the supreme authority in this Church, had the power to regulate and change those matters ordained (as the canon expresses it) by man's authority, which the recital of the canon of 1838 declares that every Church has power to regulate and change. I cannot, therefore, hold that it was *ultra vires* of the Synod of 1863 to make that alteration.

If, my Lords, we were to go into the particulars of the alterations that have been made, I cannot say that I differ from the observations that have been made by your Lordships. It does not appear to me that there is any great infringement made upon any position which the present appellant occupies by the new canons of 1863. The use of the English Communion Service does not appear to me to be a matter of novelty in this Church. On the contrary, the canons of 1838 recognise it. They allow the two modes, the two services; but although they allow the two services, it is not to be inferred that these are two things which are incompatible in the estimation of the church. On the contrary, it is repugnant to reason to hold that these two services are incompatible, or that the doctrines discovered now to be contained in them are things which were regarded by the Church as incompatible with each other. It could not have been a united Church, or union of Churches, if it were so. Such a thing would be a contradiction in terms. You might as well have a united Christian and Mohammedan Church. I therefore hold that it is quite plain that there was not that repugnance between the two services, and that these canons which are now complained of do nothing more than substitute the more comprehensive Communion Service of the English Church for the Communion Service of the Episcopal Church of Scotland—a thing which, as it appears to me from the recital of these canons of 1838, it was perfectly within their power to do. Therefore I entirely concur in the proposition which has been made, that this judgment should be affirmed.

Appeal dismissed with costs.

Agents for Appellant—William Peacock, S.S.C., and William Robertson, Westminster.

Agents for Respondents—Ronald & Ritchie, S.S.C., and Connel & Hope, Westminster.

COURT OF SESSION.

OUTER HOUSE.

LORD ORMIDALE.

CRAIG *v.* M'LENNAN & ROSS.

Poor—Settlement—Casual or Accidental Birth. In an action by a relieving parish against the parish of birth (there being no residential settlement) and the parish in which the pauper's parents had a settlement, which latter parish was called in consequence of a plea by the former parish that the birth took place fortuitously on the occasion of an accidental visit to a market in that parish, Held (per Lord Ormidale, and acquiesced in) that the parish of actual birth was liable.

This was an action at the instance of the parish of St Cuthbert's against the parishes of Contin and Lochbroom, in Ross-shire, to be relieved of the support of certain paupers, who are the widow and children of a man named Roderick M'Lean or M'Kenzie, who was born in 1823, and who never acquired a residential settlement. He was admittedly, *de facto*, born in the parish of Contin, but that parish denied liability on the ground that his birth there was "fortuitous," his mother having been at the time on an accidental visit to a market at Contin, and not having had either before or afterwards any connection with Contin. The parish of Lochbroom was the settlement of Roderick's father and mother, and that parish, besides maintaining that Contin was the parish liable in respect of the birth having taken place in it, maintained, alternatively, that if Contin was to be relieved of liability the result was to throw the liability not on Lochbroom, where the mother's settlement was, but on Dingwall, where the mother had been residing for some time before the birth, and where she would have been had she not gone to the market at Contin. Dingwall, however, had not be called by the pursuer as a party. A proof was led, and after a debate, the Lord Ordinary pronounced the following interlocutor, which was acquiesced in:—

Edinburgh, 12th March 1867.—The Lord Ordinary having heard counsel for the parties, and considered the argument, the proof, and whole proceedings, Finds as matters of fact (1) that Roderick M'Lean or M'Kenzie mentioned in the record was born in the parish of Contin in or about 1823, and that he had no residential settlement at the time of his death, which took place in or about February 1863; (2) that at the date when Ann Kay or M'Kenzie, the widow of the said Roderick M'Lean or M'Kenzie, applied to the pursuer for parochial

relief, being on or about the 2d of March 1863, and during the period embraced by the account sued for, she and her children were proper objects of parochial relief, and that the amount of relief sued for is reasonable; (3) that the requisite statutory notice was given to the parish of Contin on 3d March 1863; (4) that the three children in question of the said Roderick M'Lean or M'Kenzie and Ann Kay or M'Kenzie were in pupillarity and had no settlement separate from that of their parents during the period embraced by the account or claim sued for at the date when said statutory notice was given to Contin, and when the present action was instituted; and also finds (5) that facts and circumstances have not been established sufficient to show that the parish of Contin, in which the said Roderick M'Lean or M'Kenzie was born, ought not to be held to be the parish of his settlement. Therefore finds in point of law, that the parish of Contin, as the parish in which the said Roderick M'Lean or M'Kenzie was born, is liable in payment of the sums of money, principal and interest, as concluded for in the summons against that parish at the instance of the inspector of the poor of the parish of St Cuthbert's, and decerns therefor accordingly; assoilzies the inspector of the poor of the parish of Lochbroom, as representing that parish, from the conclusions of the action against him at the instance of the inspector of the poor of and as representing the parish of St Cuthbert's, and decerns: Finds the inspector of the poor of, and as representing the parish of Contin, liable in expenses of process incurred both by the parish of St Cuthbert's and the parish of Lochbroom; allows accounts of these expenses to be lodged, and remits them, when lodged, to the auditor to tax and report.

(Signed) R. MACFARLANE.

Note.—The matters of fact referred to in the first three heads of the interlocutor have been expressly admitted by all the parties; and that referred to in the fourth head of the interlocutor was not only not disputed but assumed to be, as it truly is, indisputable, regard being had to article first of the pursuer's condescendence and the answers thereto.

The only question which was raised and discussed at the debate is that referred to in the first plea in law for Contin, to the effect, whether the birth in that parish of Roderick M'Lean or M'Kenzie, the husband and father of the widow and children in question, "having been purely fortuitous, and his parents having at the time their settlement in another parish," Contin is not liable. What is meant by "fortuitous" is explained in article second of the statement of facts for Contin. It will be observed from that statement that it is said Roderick M'Kenzie's mother had her ordinary place of residence in Lochbroom; that when far gone with child she went to Strathkia in the parish of Dingwall on a visit to her brother Alexander Robertson; "that happening to go to Contin market, which came round at the time, she was suddenly seized, while there, with the pains of labour, and was delivered of her child before she could be removed to her brother's house," and that "when able to travel, she, taking her child with her, joined her husband at Nairn, or at the place in that part of the country where he was then working."

It has not only been admitted that Roderick M'Kenzie, who was about 40 years old at the time of his death, and had been seventeen years a soldier, going from place to place, had no residential settlement; but it was also assumed by all the parties that his parentage settlement—unless it could in the circumstances be held to have been constructively his own birth settlement—was out of the case, and could not be resorted to. In short, it was assumed that his own birth settlement could alone be looked to; but it was contended for Contin, that Lochbroom, where it was said his parents resided, and had their settlement at the time he was born, must be held constructively to have been his birth settlement, and not Contin, where he was actually born—that circumstance having been "purely fortuitous," by which the Lord Ordinary understood the Inspector of Contin to mean that the mother of Roderick M'Kenzie was at the time in that parish casually or by chance.

Now, supposing it had been clearly established in point of fact that the presence of Roderick M'Kenzie's mother in Contin parish at the time of his birth might be fairly said to have been casual or by chance—although what that precisely means may not be quite clear—the Lord Ordinary could not, in the circumstances of the present case, consider it sufficient to prevent that parish being his birth settlement. No authority in support of such a conclusion was cited; for the Lord Ordinary cannot hold the case of *Dalmellington* (22d Jan. 1822, 1 Sh. p. 259) to be one. The report of that case is very meagre, and does not disclose the precise ground of judgment. But enough appears to shew that it was materially different in its circumstances from the present. In that case the mother of the party whose place of birth was in question, had gone from Dalmellington parish to a neighbouring one for the purpose of being delivered of her child "in secret," and having accomplished that purpose she immediately left it, and returned to Dalmellington, where she had her permanent residence. In no view, therefore, can the birth in that case be said to have been "purely fortuitous," as it is said to have been in the present instance, for the mother went to the place where she was delivered of her child, expressly for the purpose of having that done "in secret." But in the present case it is not pretended, and there is no reason whatever for supposing, that the mother of Roderick M'Kenzie had gone to Contin parish to be delivered of her child "in secret," or that she acted under any compulsion in going into that parish, or that in doing so there was any object or design to relieve one parish at the expense of another. The Lord Ordinary does not require therefore to say how such cases, or that of a birth during a rapid transit by railway—a case suggested in the course of the debate—would fall to be dealt with, for the present is clearly not one of them.

In the present case, while it is certain, being expressly admitted by the parties, that Roderick M'Kenzie was born in Contin parish, it is by no means clear that there was anything fortuitous about his birth therein, or in what parish his mother, or indeed his father, had her or his residence or house at the time, or whether they had any particular home or residence at all. It is not clear indeed that his father had not lost his birth settlement in Lochbroom and acquired a residential one elsewhere. As regards the father, the proof is very vague and indistinct, amounting to nothing more, in the Lord Ordinary's appreciation of it, than that he at the time of his son Roderick M'Kenzie's birth, resided somewhere —although the particular place or parish does not appear—in Morayshire or Nairnshire. And as to Roderick's mother, the Lord Ordinary thinks the proof shows that she had no particular residence or home, living as she appears to have done occasion-

ally in her mother's house at Crofton, Lochbroom, occasionally with her brother at Strathkia, parish of Dingwall (see in particular on this point evidence of Roderick Morrison, Mrs Catherine Cameron or Monro, and James Robertson, p. 4., pp. 6 and 7, and p. 12 of proof for Lochbroom) and sometimes away for half a year "on harvest and other work" (evidence of Mrs Cameron or Monro, p. 7 of proof for Lochbroom, letters F. G.) and at other times in Killin, parish of Contin (Alexander Robertson, p. 14 of proof for Lochbroom, and Margaret M'Lean, p. 10 of proof for Contin).

Such being the import of the proof, and it being impossible to discover with certainty where the parents of Roderick M'Kenzie had their home or permanent residence or settlement at the time of his birth, while, on the other hand, it is certain that he was born in the parish of Contin, the Lord Ordinary has been unable to arrive at any other conclusion than that the parish of Contin, as the parish in which Roderick M'Kenzie was born, ought in the circumstances to be held to have been the parish of his settlement, and consequently also the settlement of his widow and pupil children. The Lord Ordinary must own that it would require circumstances much more special and peculiar than the present case presents, to satisfy him that an individual's birth settlement should be held to have been constructively in a parish different from that in which he was actually born.

The Lord Ordinary may explain, that he thinks it must be assumed, and he accordingly has proceeded on the assumption, that Roderick M'Lean or M'Kenzie was the offspring of the marriage betwixt his mother Ann Robertson and John M'Kenzie; although at the same time he does not consider that it could have affected the judgment had it been proved that he was an illegitimate son of Ann Robertson. And he has also to explain, that the parties did not insist in any of the appeals which were taken in the course of the proof.

(Initd.) R. M'F.

Counsel for St Cuthbert's—Mr Gifford and Mr Marshall. Agent—Ebenezer Mill, S.S.C.

Counsel for Lochbroom—Mr Fraser and Mr Burnet. Agents—G. H. Cairns, W.S.

Counsel for Contin—Solicitor-General and Mr Watson. Agents—Adam & Sang, S.S.C.

Tuesday, May 14.

SECOND DIVISION.

PATRICK *v.* M'CALL.

Lease—Submission—Decree-Arbitral—Reduction.

Circumstances in which held that a decree-arbitral was conform to the matter remitted by the submission.

This is a question between Mr Patrick, proprietor of the estate of Benmore, in Argyleshire, and his tenant, Mr James M'Call. In the adjusted lease between landlord and tenant there was the following clause:—"The proprietor shall have power to resume any part or parts of the subjects hereby let, for the purpose of fencing or planting, forming roads, straightening marches, or for any other purpose that the proprietor may desire; the proprietor binding himself and his foresaids to fence any lands resumed for any of the above purposes, and being bound to make a reasonable allowance to the tenant for such land as he may resume, or for any injury and damage he may occasion through the foresaid operations, according as the same may be determined by two arbiters mutually chosen, or by an oversman in the event of their differing in opinion, and the plantation fences being always kept up at the expense of the proprietor."

In exercise of this right, the pursuer on different occasions resumed certain portions of ground; but differences having arisen between the parties, they entered upon a submission, which proceeded on the narrative of the said adjusted lease, and that the pursuer had on three occasions—viz., in September 1863, in October 1863, and in April 1864, the latter date being the date of the submission—resumed possession of certain fields, being part of the lands let to the defender. The submission was in the following terms:—"The said James Patrick on the one part, and the said James M'Call on the other part, have submitted and referred, and do hereby submit and refer, to Alexander Forbes Douglas, Esq., residing at Jerdonfield, and John Kennedy, Esq., of Kirkland, arbiters mutually chosen by the said parties, or, in case of difference of opinion between the said arbiters, to any oversman to be named by them, and which they are hereby empowered to do (such oversman to be named before any procedure shall take place under this submission), to ascertain and determine the amount of the allowance to which the said James M'Call is entitled, in terms of the said lease, for the fields so resumed as aforesaid, it being expressly understood and agreed that all other or further claims, questions, and differences between the said parties are hereby reserved entire." The said deed of submission was registered in the Books of Council and Session on the 8th January 1866.

The arbiters differed in opinion, and they devolved the submission upon an oversman, who pronounced the following award:—"The oversman finds, *First*, that at the dates of the landlord's intimations foresaid, the tenant, the said James M'Call, was in the profitable possession and occupation, as part of the farms let to him, of the ground, intimation to resume which was thereby made, and that it is admitted by the parties that the ground so sought to be resumed by the landlord, and agreed to be surrendered by the tenant, consisted of sixty-eight acres of low ground and certain portions of the hill; *Second*, that from the dates of the landlord's intimations foresaid, the tenant has been deprived of the profitable possession and occupation of the said low ground and portions of the hill; *Third*, that the lands, of the profitable possession and occupation of which the tenant has been deprived as aforesaid, are worth to the tenant £153, 12s. sterling per annum; *Fourth*, that the said James M'Call is entitled to an allowance at the rate of £153, 12s. sterling per annum, so long during the currency of the said lease as he has been or shall be deprived of the occupation and possession of the said lands so resumed by the landlord; and I find, ascertain, and determine that the said sum of £153, 12s. sterling per annum is the amount of the allowance to which the said James M'Call is entitled, in terms of the said lease, for the fields so resumed as aforesaid."

The pursuer then brought a reduction of this decree-arbitral, maintaining that it did not decide the matters submitted, and that it was unintelligible, in respect that while it found the defender entitled to an allowance for the lands resumed, from the dates at which they were respectively re-