other materials from the sea beach or sea shore of the bay of Eyemouth, extending from the mouth of the harbour of Eyemouth northward to the Fort of Eyemouth. The defence was that under their Act of Parliament the trustees were entitled to take ballast from the sea shore for the purposes of navigation, as had been done from time immemorial.

Lord JERVISWOODE held that, as the parties were at issue in regard to facts material for the decision of the case, there should be a proof allowed. Against this interlocutor the pursuers reclaimed, and contended that the facts as to which the parties were at issue were not material, the question being one dependent solely on the construction of Mrs Home's titles and the defenders' Acts of Parliament.

To-day, after hearing Mr Millar for the pursuers, the Court adhered to the interlocutor of the Lord Ordinary, with this variation, that the proof to be allowed should be before answer, and under reservation to both parties of all questions of title. The pursuers were found liable in expenses since the date of the Lord Ordinary's interlocutor.

SECOND DIVISION.

SUSP. AND INTER.—THE DUKE OF PORTLAND *v.* MESSRS W. BAIRD AND CO.

Counsel for the Duke of Portland—Mr Patton and Mr Monro. Agents—Messrs Melville & Lindesay, W.S.

Counsel for the Messrs Baird—The Solicitor-General, Mr Gifford, and Mr Hope. Agents—Messrs Horne, Horne, & Lyell, W.S.

Counsel for Trustee—Mr Gordon and Mr Lamond.

This suspension and interdict is directed by the Duke of Portland against the Messrs Baird of Gartsherrie, and its object is to have them prevented from working the seams of coal and the ironstone in certain lands forming part of the estate of Kilmarnock, which were let by the complainer by a tack or lease, dated 29th and 30th November 1852, to Mr Lancaster and Mr Cookney. By the lease of the mineral field in question, the field is let "to the said William Lancaster and James Thomas Cookney, and their heirs and successors, or to their assignees and sub-tenants, but under this condition always, that if the tenants shall desire to assign this lease, or to subset the premises thereby let, the assignation or the subtack shall be, and shall only be, with the written consent of the proprietor, or his successors; and the tenants herein, and their heirs and successors, shall notwithstanding of any assignation or subtack continue bound, along with the assignees and sub-tenants, for the rent or loyalties, and implement of the whole stipulations of this lease." Lancaster & Cookney having carried on the business for some time, dissolved it, and assigned the lease, with consent of the landlord, to Messrs Lancaster & Freeland. This firm having got into difficulties, handed over their interest to a trustee for behoof of their creditors, who assigned the lease to the Messrs Baird—the present respondents. The Duke of Portland refuses to take them as tenants except upon a condition which the Messrs Baird decline—that they shall ship all the iron which they make to Troon, the Duke's port; and the question that arises in the case is whether, under the right which the landlord reserved to himself of withholding his consent in the original lease, he is entitled to annex such a condition as that which the Duke of Portland proposes to impose on the Messrs Baird.

The Lord Ordinary (Kinloch) found that, according to the sound legal construction of the deed of lease in question the consent of the landlord is a necessary condition precedent to any assignation of the lease taking effect; and that the landlord is entitled to give or withhold such consent at pleasure, and without assigning reasons, or having any reason of refusal subjected to the review or control of the Court.

The Messrs Baird reclaimed; and after argument, the case was advised to-day, the Court adhering to the judgment of the Lord Ordinary.

Friday, Nov. 10.

FIRST DIVISION.

CAMPBELL *v.* BERTRAM'S TRUSTEES.

Counsel for Pursuer—The Lord Advocate and Mr Tait. Agents—Messrs Tait & Crichton, W.S.

Counsel for Defenders—Mr Gifford and Mr Thoms. Agents—Messrs Scarth & Scott, W.S.

This action was raised by Sir Archibald Islay Campbell of Succoth, against the trustees of the late James Bertram, engineer and millwright in Edinburgh, for the purpose of declaring the irritancy, under the Act 1757, of a feu-contract of certain subjects in Leith Walk, in respect of the defender's failure to pay feu-duty for two years. The defenders pleaded *inter alia* that the pursuer had no title to sue the action, and the question thus raised was one purely of conveyancing.

It appeared that Alexander Wight, W.S., held the subjects in question under a charter from the town of Edinburgh, as trustees of Trinity Hospital, and that in 1796 he granted a sub-feu to a person named Cooper, and that the defenders were the successors of Cooper. But in 1811 Wight, being then the debtor of a person named Howie to the extent of £600, granted to Howie a deed by which, it was said by the pursuer, he had transferred his right of mid-superiority. If he had divested himself, then it was clear that the superiority had passed to Howie, whose successor Sir Archibald Campbell now was. Lord Jerviswoode repelled the objections to title, and the defenders reclaimed. To-day the Court altered the Lord Ordinary's interlocutor, sustained the objections, and assoilzied the defenders, with expenses.

LORD CURRIEHILL delivered the judgment of the Court. He said that the whole question turned on the nature of the deed of 1811. There was no question that this deed was granted in security of debt; but a person granting a conveyance in security may do so in two ways. He may either grant an absolute conveyance—receiving a back letter or other writing—or he may grant a deed which forms an incumbrance on his property, the radical right remaining in himself. The deed in question differs from the ordinary bond and disposition in security because it contains no personal bond and no power of sale. But it contains a full recital of a debt due by the granter to the grantee. On the narrative of that debt, and in consideration of the creditor agreeing to supersede payment of the debt till 1812, the deed states that the granter had agreed to grant the "disposition and assignation in security underwritten." Then the deed proceeds to sell, alienate, and dispose the subjects to the grantee, but *in gremio* of the dispositive clause are the words, "but under redemption by payment making of the aforesaid sums in manner underwritten." This refers to and incorporates with the dispositive clause a declaration in the precept of sasine that the subjects were to be held redeemably. This is, therefore, a qualification of the dispositive clause. Consequently this is not an absolute disposition, but a qualified one. The words "in security" do not occur in the dispositive clause, but I do not think they are necessary there as a *vox signata*. The obligation to infeft and the procuratory of resignation also refer to the redeemable nature of the right. Mrs Howie was infeft on this disposition so qualified, and that right was confirmed by the superiors. The question therefore is this—Had Wight, when he granted the deed of 1811, ceased to be the vassal of the town of Edinburgh, and the superior of Cooper, or did his right still continue, but burdened with this incumbrance? I am very

clearly of opinion that he retained his right. The point is ruled by the elementary rule in conveyancing, that when a deed constituting a security contains *in gremio* a right of reversion, it is a mere incumbrance; but when, on the other hand, the conveyance is *ex facie* absolute, with a reservation in a separate writing, the absolute fee is in the disponee, and the reservation is a mere personal contract, not requiring to be published to the world, and not therefore binding on singular successors.

Tuesday, Nov. 14.

SECOND DIVISION.

SCOTTISH EPISCOPAL CHURCH CASE.

FORBES *v.* EDEN AND OTHERS.

Counsel for the Pursuer—Mr Gordon and Mr Hope. Agent—Mr William Peacock, S.S.C.

Counsel for the Defenders—The Solicitor-General and Mr Shand. Agents—Messrs Ronald & Ritchie, S.S.C.

This is an action at the instance of the Rev. George Hay Forbes, minister of the Scotch Episcopal congregation at Burntisland, against the Right Rev. Robert Eden, D.D., one of the bishops, and primus of the religious denomination known as the Episcopal Church in Scotland, and other clergymen of that Church, as members of a General Synod held in 1862 and 1863. The leading conclusion of the action is for reduction of certain portions of a code of canons of the Episcopal Church in Scotland, enacted in 1863 by the General Synod. There are also conclusions of declarator—*first*, that it was *ultra vires* of the General Synod to alter, amend, or abrogate any of the canons contained in a previous code in 1838, or to make new canons, except in conformity with the constitution which was recognised and the practice which was acknowledged at the time of the pursuer's ordination, and set forth in the code of canons of 1838, which was then subscribed by him. In the second place, there is a conclusion of declarator that the pursuer is entitled to celebrate divine worship and all the other services, and to administer the sacraments and all the other rites of the Church, in conformity with the canons of 1838, and is entitled to the free exercise and enjoyment of all the privileges conferred on him under these canons, or under the deed of institution in his favour. In addition to these conclusions, the summons contains a pecuniary conclusion of £120 against the defenders, conjointly and severally, being a sum paid by the pursuer to his curate, the Rev. Mr Wilkinson, to whom the pursuer says a license was wrongfully refused; and a conclusion for £200 for damages, as *solatium* on account of said refusal.

The Lord Ordinary (Barcaple) held that the grounds of reduction libelled, and the pursuer's averments on record, were not relevant to support the conclusions of the action, and assoilzied the defenders. The pursuer reclaimed, and his case was to-day partially opened by Mr D. B. Hope.

Wednesday, Nov. 15.

Mr HOPE resumed his argument on behalf of the pursuer in the case. He began by saying that he wished to point out to their Lordships, as shortly as possible, the exact alterations that had been made on the law of the Church as embodied in the canons, in matters such as the communion service. Then he had to make the inquiry as to whether these alterations were material—that was to say, whether they affected the doctrine of the Church; also, whether the Synod had power to make these alterations; and, lastly, whether these alterations had affected the pursuer in such a manner as to entitle their Lordships to sustain the conclusion of his summons. With regard to the communion service, the position of the pursuer was this—that the form of the English service gave rise to the view held by many of transubstantiation; but whatever the change was, it could only be ascribed to the act of the clergyman in repeating certain words and performing certain acts, while, according to the Scottish office, the change was ascribable to the direct invocation of the Holy Spirit, and to that alone.

The LORD JUSTICE-CLERK—Can you give us any light as to where the first edition of this Scottish communion office is to be found?

Mr GORDON—It was published in London in 1637.

The LORD JUSTICE-CLERK—That is Laud's Prayer-Book.

Lord NEAVES—That is the book that was read in St Giles' Church, and which was objected to by Jenny Geddes. (A laugh.)

Mr HOPE said it was well known that the edition in view of the Synods, in 1811, 1828, and 1838, and sanctioned by them, was the edition revised in 1805.

Lord NEAVES—If you say there was a uniformity regarding the communion office for a century before, it is very odd it should not have been found in any printed form.

Mr HOPE—There were a great many editions, and a great many are extant still.

Lord NEAVES—Can you give us the earliest?

Mr HOPE—I am informed that the edition revised in 1805 was printed first in 1764, and since then it has been in universal use. In the earlier liturgies of the Scottish Episcopal Church prayer for the dead was held in a different sense from that held in the English Church.

The LORD JUSTICE-CLERK—In what sense does the pursuer say the Scottish Episcopalians pray for the dead?

Mr HOPE—I shall endeavour to put it in the precise terms.

Lord NEAVES—Has the Church any doctrine on the subject as to whether the deceased pass into glory or whether they go into an intermediate state?

Mr HOPE—There is no statement in the standards of the Church on the subject; but I shall endeavour to supply your Lordships with a declaration regarding it.

The LORD JUSTICE-CLERK—We must have something very tangible on this point.

Mr HOPE then read a number of extracts from various authorities on the subject, showing that there had always been an acknowledged difference between the two churches, and that a change of the canons had always been deprecated. He might mention a very important fact, which was this, that when Mr Cheyne, in the well-known case at Aberdeen, was tried for heresy, he was tried by the Scottish communion office; and it was from that office that they judged the matter of doctrine. After the canons were changed, Mr Cheyne applied for readmission. Without anything being done, and without any expression of a change of view, he was readmitted by the bishop because the new canons enabled the bishops or those in authority to do so.

Lord NEAVES—Does that appear to be the cause?

Mr HOPE—I put the cause and effect together.

The LORD JUSTICE-CLERK—But put the things in order.

Mr HOPE—There was nothing done in the way of recantation.

Lord NEAVES—Do the present bishops hold that Mr Cheyne is now right?

Mr HOPE—I hold that they have now all changed, and that what was held to be formerly wrong is now held to be right.

The LORD JUSTICE-CLERK—Will you state to us the false doctrine of Mr Cheyne?

Mr HOPE—It was consubstantiation.

The LORD JUSTICE-CLERK—He defended himself on the communion service of the Church of England, and he was convicted on the communion office of the Scottish Episcopal Church?

Mr HOPE—Yes.

The LORD JUSTICE-CLERK—It is very desirable that we should see the discussion on that matter.

Lord NEAVES—Was there a libel against Mr Cheyne?