CHRISTIAN DOCTRINE AND JUDICIAL REVIEW: THE FREE CHURCH CASE REVISITED

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1. THE BACKGROUND[1]

In the latter part of the nineteenth century there were attempts to unite the various bodies which had split off from the Church of Scotland in the previous hundred years. In particular, there were great hopes for a union between the United Presbyterian Church [UPC][2] and the Free Church of Scotland [FC].

In many respects this was an unlikely match. The founding fathers of the Free Church at the Disruption of 1843 had been theological conservatives, holding firmly to the *Westminster Confession of Faith*[3] as the principal subordinate standard of faith of the undivided Kirk. Moreover, in spite of their decision to break with the Established Church over the matter of lay patronage and establish 'the Church of Scotland free',[4] those who went out at the Disruption firmly maintained what they termed the 'Establishment Principle'. True to the precept *ecclesia reformata sed semper reformanda*, they sought a renewed national Church in which 'The Crown Rights of the Redeemer' would be fully respected—and which would remain established in accordance with the Treaty of Union 1707. As Thomas Chalmers proclaimed in his Moderatorial address to the first General Assembly of the new Church:

> 'We hold that every part and every function of a commonwealth should be leavened with Christianity, and that every functionary, from the highest to the lowest, should, in their respective spheres, do all that in them lies to countenance and uphold it. That is to say, though we quit a vitiated Establishment, we go out on the Establishment principle; we quit a vitiated Establishment, but would rejoice in returning to a pure one. To express it otherwise: we are the advocates for a national recognition and national support of religion—*and we are not Voluntaries*'.[5]

The UPC, on the other hand, was the most theologically liberal of the Presbyterian Churches.[6] Its original foundation document agreed in May 1847 had qualified sub-

[1] This article began as a paper written for the Cardiff LLM course. I am grateful to Professor Norman Doe for his comments on the original paper and to Professor Francis Lyall for commenting on the article in draft. Any remaining infelicities are my own.

[2] Itself the result of an earlier union between two groups that had left the Church of Scotland over doctrinal differences.

[3] The *Confession* was concluded in 1646 by the Westminster Assembly of Divines–a group of English and Scots Presbyterians called together by the Long Parliament in 1643; unsurprisingly, the theology of the *Confession* is Calvinist. It was adopted by the Church of Scotland on 27 August 1647 and enshrined in statute by the Scots Parliament as the Confession of Faith Ratification Act 1690. To a greater or lesser degree, the *Confession* still remains an important statement of faith for all the Churches that have grown out of the undivided Church of Scotland, both in Scotland itself and throughout the wider Scots diaspora.

[4] The *Proceedings* of the first General Assembly were described simply as those of 'The Church of Scotland', and various names were current at the outset: 'Protesting Church', 'Free Protesting Church', and 'Free Presbyterian Church' were all used. It was not until the autumn of 1843 that the new institution came to be referred to as 'The Free Church of Scotland': Andrew L Drummond and James Bulloch: *The Church in Victorian Scotland* (St Andrew Press, Edinburgh, 1975), p 13.

[5] *Proceedings of the General Assembly of the [Free] Church of Scotland* (1843) p 12: emphasis added.

[6] For example, the UPC was the first Scottish Presbyterian Church to introduce hymns and pipe-organs into its services, at a time when unaccompanied metrical psalms and scriptural paraphrases were the liturgical norm.

scription to the *Westminster Confession* and the *Larger* and *Shorter Catechisms* by declaring that '... we do not approve of anything in these documents which teaches, or may be supposed to teach, compulsory or persecuting and intolerant principles in religion.'[7] Moreover, from its foundation it had been totally opposed to Establishment.

A first attempt at union, begun in 1863, foundered ten years later. By the 1870s, however, support for Establishment was waning outside the Church of Scotland, and in 1875 the FC General Assembly passed a Deliverance '[t]hat the existing connection between Church and State being upheld on an unscriptural basis ought to be brought to an end in the interests alike of national religion and of Scottish Presbyterianism.'[8]

A majority of the FC then agreed to enter into 'talks about talks' with the UPC to see if their other theological differences could be resolved satisfactorily. Given the previous failure of discussions, it was evident to the majority in both Churches that some sort of accommodation about the status of the *Confession* would be fundamental to any reconciliation. In preparation for renewed negotiations, therefore, the UPC Synod passed in 1879 a Declaratory Act setting out a carefully moderate stance towards the *Confession*, including a passage (in section 2) which laid great stress on the free offer of God's grace through His Son and interpreted the doctrines of election and predestination as 'held in connection and harmony with the truth that God is not willing that any should perish, but that all should come to repentance, and that He has provided a salvation sufficient for all'.

The unionist majority within the FC, led by the Principal of New College, Dr Robert Rainy, responded in 1892 by passing in turn a Declaratory Act anent the Confession of Faith designed to allay UPC fears about their theological conservatism, stating that 'this Church does not teach, and does not regard the *Confession* as teaching, the foreordination of men to death irrespective of their own sin'.

It concluded with an echo of the original UPC *Articles* of 1847:

> '... this Church disclaims intolerant or persecuting principles, and does not consider her office-bearers, in subscribing the *Confession*, committed to any principles inconsistent with liberty of conscience and the right of private judgment. While diversity of opinion is recognised in this Church on such points in the *Confession* as do not enter into the substance of the Reformed Faith therein set forth, the Church retains full authority to determine... what points fall within this description'.

It can be argued that both Declaratory Acts relied on a somewhat selective reading of the *Confession*: it all depends what you mean by 'the substance of the Reformed Faith'. Possibly the UPC regarded double predestination merely as a historical relic, while the FC may have been reluctant to lay too great stress on the doctrine for fear of giving offence. The *Confession* itself, however, is totally unequivocal, as Chapter X, *Of Effectual Calling*, demonstrates:

> 'Sect. I: All those whom God hath predestinated unto life, *and those only*, He is pleased, in His appointed and accepted time, effectually to call, by his Word and

[7] *Articles forming the Basis of Union of the United Secession and Relief Churches to form the United Presbyterian Church.*

[8] P Carnegie Simpson: *The Life of Principal Rainy* vol I, p 277 (quoted in Rolf Sjölinder: *Presbyterian Reunion in Scotland, 1907–1921* (T&T Clark, Edinburgh, 1962), p 85).

> Spirit, out of that state of sin and death, in which they are by nature, to grace and salvation, by Jesus Christ'.[9]

And lest anyone should still have the slightest lingering doubt, it concludes:

> 'Sect. IV: Others, not elected, although they may be called by the ministry of the Word, and may have some common operations of the Spirit, yet they never truly come unto Christ, and therefore cannot be saved... And, to assert and maintain that they may, is very pernicious, and to be detested'.[10]

The FC Declaratory Act was sent down to the presbyteries for approval under the Barrier Act[11] and confirmed at the General Assembly of 1893. However, the United Presbyterians' liberalism was anathema to the more conservative elements within the FC, who felt that the Act was merely an exercise in intentional ambiguity designed to accommodate the UPC's misgivings about the theological position of the FC. Indeed, its terms so incensed the Revd Donald Macfarlane of Raasay that he laid a Protest on the Table and, together with two others, left the FC to found the Free Presbyterian Church [FPC] in the same year.[12]

Notwithstanding this minor breach, negotiations between the FC and the UPC were successfully resumed in 1896 and the two Churches joined together in 1900 as the United Free Church [UFC]. But many conservatives had remained within the FC when Macfarlane left in 1893 and at the General Assembly in May 1900 a vociferous minority voted against the Act to effect the union with the UPC and entered a Protest and Dissent against the decision.[13] Moreover, the events following the vote generated a considerable amount of bitterness. The majority voted to adjourn and meet next day in the Waverley Market in union with the United Presbyterians, while the minority resolved to continue what it regarded as the true General Assembly.

> 'On the pretext that the main Assembly Hall was required for a Committee meeting [they] were denied the use of it, but ... foregathered in one of the side rooms to attend to their business. There they were opposed by members of the unionist majority ... They then adjourned to meet again the following day in the Assembly Hall ... When the ... minority arrived ... it was to find that the gates had been locked against them, and that two policemen and an insolent janitor were in charge with instructions to keep them out'.[14]

The scene was thus set for bitter conflict and battle duly commenced in the Court of Session.

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[9] S W Carruthers *ed.*: *The Confession of Faith of the Assembly of Divines at Westminster* (Free Presbyterian Publications, Glasgow, 1978): emphasis added.

[10] *Ibid.*

[11] Act of Assembly ix of 1697, which provides that any Act altering the 'Rules and Constitutions of the Church' may be made only with the consent of a majority of Presbyteries and which is normative for all the bodies descended from the undivided Kirk.

[12] See James Lachlan MacLeod: *The Second Disruption—The Free Church in Victorian Scotland and the Origins of the Free Presbyterian Church* (Tuckwell Press, 2001).

[13] *General Assembly of the Free Church of Scotland v Lord Overtoun: Macalister v Young* [1904] AC 515; (1904) 7 F (HL) 1; 12 SLT 297, hereinafter referred to collectively as the *Free Church Case*. Fraser's report is the less comprehensive; much fuller is Robert L Orr: *The Free Church of Scotland Appeals 1903–04* (Macniven & Wallace, Hodder & Stoughton, Edinburgh & London, 1904).

[14] GNM Collins: *The Heritage of Our Fathers: The Free Church of Scotland: Her Origin and Testimony* (Knox Press, Edinburgh, 1974), chapter 15, paragraph 2.

2. THE LITIGATION

On 14 December 1900 the minority raised an action in the name of the FC General Assembly against the General Trustees both of the pre-union FC and the new UFC, averring that the funds of the pre-union FC had been contributed in trust on the basis of a specific constitution and doctrinal principles to which the UFC did not subscribe, and concluding for declarator that the UFC was not entitled to the lands, property or funds of the pre-union FC.[15] The principal contentions of the pursuers were that the UFC had departed from the 'Establishment Principle' and did not hold the *Confession* in its entirety. They further averred that the majority at the 1900 FC General Assembly had acted ultra vires and contrary to their Commissions in passing an Act which purported to depart from the principles of the *Confession*. The defenders replied that the doctrines of the original FC did not include the 'Establishment Principle' and denied that they had departed from the principles of the *Confession*. The Lord Ordinary [Low] dismissed the action at first instance. The pursuers reclaimed, but the Second Division upheld the Lord Ordinary's decision. The pursuers then appealed to the House of Lords.

At the same time, the UFC trustees of Free Buccleuch and Greyfriars Kirk brought an action against the Revd Donald M Macalister and the Revd Robert Gordon, Ministers of the (continuing) FC, and certain of their office-bearers, seeking declarator that the church building now belonged to the UFC and interdict to prevent the defenders from preaching in the church. Both the Lord Ordinary and, on reclaimer, the Second Division found for the UFC and the pursuers appealed to the House of Lords.

The two appeals were heard together. An Appellate Committee consisting of the Earl of Halsbury LC and Lords Davey, Lindley, Macnaghten, Robertson and Shand concluded the hearing but Lord Shand died while the case was at avizandum.[16] A Committee of seven—the Lord Chancellor, Lords Alverstone CJ, Davey, James of Hereford, Lindley, Macnaghten and Robertson—heard the appeal afresh.[17] Before that hearing they were given copies of all the historical documents which were relied on in argument and which, somewhat surprisingly, had not been provided at the outset.[18] By a majority of five to two (Lords Macnaghten and Lindley dissenting) the House of Lords found for the respondents—the dissident minority—in both cases.

3. THE JUDGMENTS

The Lord Chancellor (Halsbury) began by pointing out that there was no lack of information on the doctrines of the FC as conceived by its founding fathers. The basis of his judgment was that the question before the House turned on the law of trusts:

> 'in the controversy which has arisen, it is to be remembered that a Court of law has nothing to do with the soundness or unsoundness of a particular doctrine. Assuming there is nothing unlawful in the views held ... a Court has simply to determine what was the original purpose of the trust'.[19]

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[15] [1904] AC 519; see also Francis Lyall: *Of Presbyters and Kings—Church and State in the Law of Scotland* (Aberdeen UP, Aberdeen, 1980), p 109.

[16] It was rumoured that Lord Shand, persuaded by the arguments advanced on behalf of the General Assembly, had written a speech to that effect and that, had he not died, the Committee would have divided 3:3: see, for example, Alexander Stewart and J Kennedy Cameron: *The Free Church of Scotland: The Crisis of 1900* (np, Edinburgh 1910, reprinted Knox Press, Edinburgh, 89) p 194. But that is pure speculation.

[17] [1904] AC 519 at 559.

[18] 1904 7 F (HL) 1.

[19] [1904] AC 519 at 613.

He quoted with approval Lord Chancellor Eldon's opinion in *Craigdallie v Aikman*:[20]

> 'With respect to the doctrine of the English law on this subject, if property was given in trust for A, B, C, &c, forming a congregation for religious worship; if the instrument provided for the case of a schism, then the Court would act upon it; but if there was no such provision in the instrument, and the congregation happened to divide, he did not find that the law of England would execute the trust for a religious society, at the expense of a forfeiture of their property by the *cestuis que trust*, for adhering to the opinions and principles in which the congregations had originally united'.[21]

Lord Halsbury placed great weight on Dr Chalmers's Moderatorial address already quoted; not only was it adopted unanimously by the General Assembly,[22] but the FC circulated the text to potential sympathisers in order to invite support.[23] After citing contrary opinions expressed by the UPC,[24] he concluded that the two views were irreconcilable:

> 'Here we have the two bodies which are supposed to establish identity of religious belief—the one asserting the right and duty to maintain and support an Establishment of religion, the other asserting that Christ's ordinance excludes State aid; each of them, therefore, treats the question as one of religious belief and obligation, and not one from which religious duties are excluded'.[25]

Lord Halsbury then turned to the Calvinist and Arminian views of predestination, tracing the sixteenth- and seventeenth-century controversies about eschatology[26] and quoting Chapter III of the *Confession*, entitled *Of God's Eternal Decree*:

> 'Sect. III. *By the decree of God*, for the manifestation of His glory, some men and angels are predestinated unto everlasting life, *and others foreordained to everlasting death.*
>
> Sect. IV. These angels and men, thus predestinated, and foreordained, are *particularly and unchangeably designed, and their number so certain and definite that it cannot be either increased or diminished*'.[27]

He rejected the argument that predestination was a mystery which could not finally be settled by human intellect, concluding that the *Confession* was couched in language which did not admit of doubt.[28] He therefore found for the minority on the doctrinal issue.

His Lordship then considered the extent to which, if at all, a confessional Church was permitted to change its doctrines. Again, the issue turned on the law of trusts:

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[20] (1813) 1 Dow, 1, 16.
[21] [1904] AC 519 at 613.
[22] [1904] AC 519 at 620.
[23] [1904] AC 519 at 617 ff.
[24] [1904] AC 519 at 617.
[25] [1904] AC 519 at 621.
[26] Some of which, it should be said, are of doubtful relevance. For example, *all* strands of the seventeenth-century Kirk—Episcopalian as well as Presbyterian—would have dismissed the deliberations of the 1672 Synod of Jerusalem as mere heretical ramblings.
[27] [1904] AC 519 at 624: emphasis in original. One might well ask, 'So why bother with Christianity at all?'
[28] *Ibid.*

> 'I do not suppose that anybody will dispute the right of any man, or any collection of men, to change their religious beliefs according to their own consciences; but when men subscribe money for a particular object and leave it behind them for the promotion of that object, their successors have no right to change the object endowed'.[29]

Moreover,

> 'there is nothing in calling an associated body a Church that exempts it from the legal obligations of insisting that money given for one purpose shall not be devoted to another. Any other view, it appears to me, would be fatal to the existence of every Nonconformist body throughout the country'.[30]

Nor did the operation of the Barrier Act procedure legitimise the change.[31]

But it was his final conclusion which was most telling: that

> 'the so-called union is not a union of religious beliefs at all... I cannot trace the least evidence of either of them having abandoned their original views. It is not the case of two associated bodies of Christians in complete harmony as to their doctrine agreeing to share their funds, but two bodies each agreeing to keep their separate religious views where they differ—agreeing to make their formularies so elastic as to admit those who accept them according as their respective consciences will permit. Assuming as I do that there are differences of belief between them, these differences are not got rid of by their agreeing to say nothing about them...'.[32]

In other words, *the Basis of Union was a fudge*.

Like Lord Halsbury, Lord Davey laid great emphasis on the reference to the 'Establishment Principle' in the original Protest of 18 May 1843,[33] and followed Lord Chancellor Eldon in *Craigdallie v Aikman*. In particular, he rejected the argument advanced by the Dean of Faculty [Asher] that the General Assembly of the Church of Scotland had unfettered powers to legislate for the Kirk in all matters, doctrine included, and that under the powers which it had inherited, the FC was therefore competent, subject only to the provisions of the Barrier Act, to reject the *Confession* in its entirety if it so chose: 'the freedom of the Church from the control of the civil power *in spiritualibus*, which is asserted by the Free Church, does not appear to me to warrant any *a priori* inference of the existence of such a plenary power of legislation in the General Assembly.'[34] While he agreed that an unestablished Church, as a voluntary association, was free from State supervision of doctrine, government and discipline, it did not follow from that fact that such an association could impose innovations in doctrine on a dissentient minority.[35]

It had been averred that the use of the Barrier Act procedure had validated the change. Lord Davey, however, pointed out the crucial flaw in that argument: that the Barrier Act was 'a procedure Act, and not an enabling Act. It does not purport to

[29] [1904] AC 519 at 626.
[30] [1904] AC 519 at 627.
[31] [1904] AC 519 at 626.
[32] [1904] AC 519 at 627.
[33] [1904] AC 519 at 646–647.
[34] [1904] AC 519 at 648.
[35] [1904] AC 519 at 648.

confer any new powers whatever, but it regulates the exercise of such powers as the General Assembly may possess.'[36]

Lord Alverstone CJ concurred, concluding that while the Act recognised the power of the General Assembly to make changes in doctrine, worship, discipline and government, it did not include a power 'to subvert or destroy fundamental and essential principles of the Church'.[37]

In a succinct survey of previous unions within the splintered Presbyterian body, Lord Robertson pointed out that when the Associate Synod returned to the Church of Scotland in 1839 its office-bearers were required to subscribe to the *Confession* and that the Act anent Reunion had included reference to 'the great principle of an ecclesiastical establishment', while the Original United Seceders, on uniting with the FC in 1852, had declared that they were prepared to 'drop [their] position of secession and maintain [their] principles in communion with the [Free] Church of Scotland'.[38] Moreover, he dismissed as utterly flawed Lord Justice Clerk Kingsburgh's assertion in the Second Division that the earlier union of the Reformed Presbyterian Church with the FC, in 1876, had invalidated the FC's claim to uphold the Establishment principle:

> 'so far from the Reformed Presbyterians not holding the Establishment principle, they were the ecclesiastical heirs of the Covenanters, who held it passionately, and they represented the extreme right in Presbyterian orthodoxy... [H]olding the Establishment principle, they held aloof from the existing Establishment because, as they held, constituted on the wrong terms'.[39]

For Lord Macnaghten, on the other hand, the key issue was whether the FC was bound so tightly by her subordinate standards—the *Confession* and the *Larger* and *Shorter Catechisms*—that there was no possibility of doctrinal development:

> 'Was the Free Church ... forced to cling to her subordinate standards with so desperate a grip that she has lost hold and touch of the supreme standard of her faith? Was she from birth incapable of all growth and development? Was she (in a word) a dead branch and not a living Church?'[40]

He concluded that this was not the case, and was also much influenced by the fact (which was not at issue between the parties) that the whole history of the Church of Scotland—of whose standards and doctrines the FC claimed to be the true heirs—was an assertion of spiritual independence from the State. He cited in support of this contention the Resolution anent the Independent Jurisdiction of the Church of Scotland passed by the General Assembly in May 1838, five years before the Disruption:

> 'That the General Assembly, ... while they unqualifiedly acknowledge the exclusive jurisdiction of the Civil Courts in regard to the civil rights and emoluments secured by law to the Church, and ministers thereof, ... do resolve, that, as is declared in the Confession of Faith of this National Church, "The Lord Jesus Christ, as King and Head of His Church, hath therein appointed a government in the hands of church officers distinct from the civil magistrate"; and that in all

[36] [1904] AC 519 at 650.
[37] [1904] AC 519 at 719.
[38] [1904] AC 519 at 688–689.
[39] [1904] AC 519 at 689–70.
[40] [1904] AC 519 at 631.

> matters touching the doctrine, government and discipline of this Church, her judicatories possess an exclusive jurisdiction, founded on the Word of God ...'.[41]

—a polite echo of Andrew Melville's famous rebuke to James VI: 'thair is twa Kings and twa Kingdomes in Scotland. Thair is Christ Jesus the King, and his Kingdome the Kirk whase subject King James the Saxt is, and of whase kingdome nocht a king, nor a lord, nor a heid, bot a member.'[42]

If *that* was the doctrine which the FC had inherited, contended Lord Macnaghten, then the power of the General Assembly in matters of doctrine must be paramount as much for the Free Kirk as for the Auld Kirk. Further, if the FC at the Disruption *had* inherited all the powers and responsibilities of the Church of Scotland, then

> 'I cannot form a conception of a National Church untrammelled and unfettered by connection with the State which does not at least possess the power of revising and amending the formulae of subscription required for its own office-bearers, and the power of pronouncing authoritatively that some latitude of opinion is permissible to its members which, according to the common apprehension of mankind, are not matters of faith'.[43]

Moreover, in a veiled reference to the distribution to potential supporters of Chalmers's Moderatorial sermon, he was scathing about what might be termed the 'shopping-list' approach to doctrinal matters: as if the sermon had been 'a sort of prospectus on the faith of which the funds of the Free Church were collected, as if the Free Church were a joint stock concern, and that sermon an invitation to the public to put their money in it.'[44]

Concurring, Lord Lindley noted that the model trust deed prepared in 1844 and adopted by the FC General Assembly in 1851 not only provided that the trustees would at all times be subject to the regulation and direction of the General Assembly, but also made specific reference to the possibility of union with 'other bodies of Christians as the said Free Church of Scotland may at any time hereafter associate with themselves'.[45]

But Macnaghten and Lindley did not carry their brothers with them, and the judgment of the majority has had consequences for the Churches which are still felt to this day.

4. THE CHURCHES (SCOTLAND) ACT 1905

The first and most obvious result of the judgment in the *Free Church Case* was that the UFC found that it was *not*, as it had thought, the successor in title to the property of the pre-union FC: instead, about thirty dissident congregations had scooped the pool. Because the resulting position was clearly untenable, the Government appointed a Royal Commission to inquire into how the matter might be taken forward;

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[41] [1904] AC 519 at 632.
[42] James Melville: *The Autobiography and Diary of Mr James Melville* (Wodrow Society, Edinburgh, 1842) (quoted in Walter R Foster: *The Church Before the Covenants* (Scottish Academic Press, Edinburgh, 1975), p 12, note 18).
[43] [1904] AC 519 at 636.
[44] [1904] AC 519 at 634.
[45] [1904] AC 519 at 634. Lord Alverstone CJ disagreed strongly with this contention: 'It would in my view be contrary to every rule of law applicable to such a case to hold that it gave the Assembly of the Free Church power by mere union to divert the funds to a body which did not conform to the fundamental principles of the Free Church': [1904] AC 519 at 718.

it reported in April 1905.[46] The situation was resolved by the Churches (Scotland) Act 1905, which set up a further Commission to make an equitable allocation of the property between the continuing 'Wee Frees' and the UFC.

Nor were the effects of the *Free Church Case* felt only by the UFC, since the judgment demonstrated that *no* Church in a State governed by the rule of law had unfettered freedom of action.[47] For the Church of Scotland, the obligation on its ministers and elders to subscribe to the *Westminster Confession* had come to be seen as the kind of general assent which Church of England clergy give to the *Thirty-Nine Articles*. Lord Halsbury's judgment, in particular, changed all that. Commenting on the case six years later, Christopher N Johnston, Procurator of the Church of Scotland at the time and one of the architects of the subsequent *rapprochement* between the Kirk and the UFC, explained the problem like this:

> 'The effect of the judgment ... was adverse to any theory of legitimate historical development in doctrine. The standard of the Church is fixed and the terms of subscription to it. If those are to be altered, it must be done deliberately and constitutionally ... The Lord Chancellor was of opinion that the *Confession of Faith* bears, and can only bear, a meaning in regard to predestination which is probably not now held by anybody south of the Grampians'.[48]

The result was an ingenious piece of 'tacking' to the main purpose of the Churches (Scotland) Act 1905. Section 5 conferred on the General Assembly of the Church of Scotland the power to prescribe its *own* formula of prescription to the *Confession*; and the Assembly subsequently used it to restore what they had thought to be the position prior to the House of Lords judgment.

5. THE JUDGMENT TODAY

(*a*) *The Law of Trusts*

The judgment has more general and continuing effects. The then Lord Chancellor, Lord Mackay of Clashfern, argued in 1992 that the Scottish courts recognise the authority of the Kirk in matters spiritual, and that

> '[t]his attitude so far as the courts are concerned extends to other churches than the Church of Scotland itself. The courts do not take upon themselves the responsibility of deciding matters of faith. They may have to decide as a matter of fact what were the beliefs of a particular organisation at a particular time *as those beliefs may define the constitution of the organization for whose benefit monies are held in trust*'.[49]

The definition of 'matters spiritual' in relation to cases of discipline is by no means clear-cut;[50] nevertheless, Lord Mackay's conclusion is totally in line with the judg-

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[46] Stewart and Cameron: *The Free Church of Scotland*, pp 286–297.

[47] For a full discussion of this point, see David M Thompson: 'Unrestricted Conference? Myth and Reality in Scottish Ecumenism' in Stewart J Brown and George Newlands (eds): *Scottish Christianity in the Modern World* (T & T Clark, Edinburgh, 2000), pp 201, 213.

[48] Christopher N Johnston: 'Doctrinal Subscription in the Church of Scotland': *Juridical Review* (1910) XVII 201–220 at p 213. It should be said that Johnston (later raised to the Bench as Lord Sands) had little time for the theology of the *Confession*: 'The *Confession of Faith*, framed according to the harsh ideas of its own bigoted days, seems to adopt as its keynote, "God having out of His mere good pleasure elected some to everlasting life". Any confession which truly represented the living faith of the Christian today would take as its keynote, "God so loved the world that He gave His only-begotten Son." ': *op. cit.* p 210.

[49] James H Mackay [Lord Mackay of Clashfern]: 'The Law, the Word, and the Head of the Kirk' (in Lamont S ed: *St Andrews Rock* (Bellew, London, 1992) p 149): emphasis added.

[50] For a fuller discussion of this point, see Frank A Cranmer: 'Judicial Review and Church Courts in the Law of Scotland': [1998] *Denning Law Journal* p 61.

ment in the *Free Church Case*. Churches other than the Church of Scotland are bound as to doctrine by their trust deeds and may not depart significantly from the doctrines enshrined in their deeds without prior agreement to change the terms;[51] of course, this applies *mutatis mutandis* throughout the United Kingdom.

In the case of a proposed union, it may be preferable to put things on a statutory footing from the outset. No doubt as a result of the judgment in the *Free Church Case*, the reunion that produced the United Methodist Church was effected by the Methodist Church Act 1907. When the Wesleyans, the United Methodists and the Primitives then came together in 1932 to form the modern Methodist Church, the Basis of Union was set out in the Methodist Church Union Act 1929. Section 8(2) of that Act provided that the doctrinal standards of the uniting Church would be those adopted in a Deed of Union to be subscribed by the first Conference of the united Church, and that, thereafter, those standards could not be varied without further legislation. When in the 1970s the Methodist Conference wished to assume responsibility for doctrinal matters it had to seek new legislation: the Methodist Church Act 1976.[52] The modern Methodist Church is therefore wholly a creature of statute.

Most recently, the United Reformed Church, originally established by statute, promoted a further Act in order to unite with the Congregational Union of Scotland (whose property was held in trust by The Congregational Union of Scotland Nominees Ltd, a company limited by guarantee) and to vary the terms of the associated trusts. The purpose of the Act is stated in its Preamble:

> 'WHEREAS—
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> (1) The Congregational Union of Scotland comprising the Evangelical Union and the Congregational Union as existing in 1896 (hereinafter called 'the Union') is a voluntary association ...
> (2) The Congregational Union of Scotland Nominees Limited is a company limited by guarantee having for its main object the holding of property in trust for the Union and local member churches of the Union ...
> (5) Since 1997 representatives of the United Reformed Church and of the Union have held discussions which have culminated in the Proposals for Unification ... which were approved by the General Assembly of the United Reformed Church on 12th July 1998, and by the Annual Assembly of the Union on 4th September 1998.
> (6) The Proposals provide for the unification of the Union with the United Reformed Church if the procedures and conditions defined and declared in the Proposals are satisfied.
> (7) *Such unification must involve the variation of trusts of property held for or for the purpose of the Union, local member churches of the Union and the Scottish Congregational College.*
> (8) It is expedient that the variations of trusts for which provision is made in this Act should be made if such unification takes place...
> (12) The purposes of this Act cannot be effected without the authority of Parliament ...'[54]

[51] When in 1929 the Church of Scotland and the UFC united under the terms of the Church of Scotland Act 1921, provision was made at the outset for the continuance of those UFC congregations that opposed the Union.
[52] For the history of the two Acts, see *HC Deb* (1975–76) 913 cc 411–421.
[53] United Reformed Church Act 1972; United Reformed Church Act 1981.
[54] United Reformed Church Act 2000: emphasis added. The declaration that the purposes of the Act cannot be effected without the authority of Parliament is a necessary prerequisite to the promotion of a Private Bill.

Moreover, under Schedule 2, the five member churches of the Congregational Union that preferred to go their own way were excluded from the provisions of the Act.

(b) The Church of Scotland and the Westminster Confession

Anthony Jeremy has suggested that, in addition to its effects in fettering the power of non-Established Churches throughout the United Kingdom to alter doctrine, the *Free Church Case* also limits the powers of the Church of England and the Church of Scotland in that regard by requiring them to seek the legislative sanction of the State to effect an alteration.[55] The present writer would entirely agree with his analysis so far as England is concerned and the Church of England is fortunate in that its powers to pass Measures gives it considerable freedom to legislate even though such Measures are subject to affirmative resolution by the two Houses of Parliament. For the Church of Scotland, however, the situation is rather less clear.

In 1969, the General Assembly's Panel on Doctrine proposed that the *Westminster Confession* should no longer be the principal subordinate standard of faith: instead, it would be replaced by a new declaration which would describe the *Confession* as an historic statement of the faith of the Reformed Church. Because such a step would have required the amendment of the Articles Declaratory annexed to the Church of Scotland Act 1921, the then Procurator of the Church, W R Grieve QC, was consulted as to whether this was permissible under that Act. His opinion was that the Act had freed the Kirk to abandon the *Confession* if it so wished. At the same time, the National Church Association (which was opposed to any such move) received a contrary opinion from D Maxwell QC.[56] In the event, the proposal was not pursued further, and the validity of the conflicting opinions was never tested at law.[57] Ten years on, Francis Lyall described the situation as one of 'creative uncertainty'.[58]

Reviewing the question some twenty-five years later, Ronald King Murray favoured Maxwell's more cautious view—though he appears to rely as much on arguments from propriety as from the construction of the statute.[59] Charles Davidson concurred, pointing out that Article II of the Articles Declaratory expressly declares the *Confession* to be 'the sum and substance of the Faith of the Reformed Church'.[60] But none of this has been tested in the courts and whether or not the Church of Scotland may change its doctrinal standards without further recourse to Parliament remains an open question.

(c) The Free Church Secession of 2000

So far as other Churches are concerned, the principles enunciated in the *Free Church Case* are of even greater importance, as the following Scottish example indicates.

In the early 1990s the Revd Dr Donald Macleod, a Professor at the FC College, was the subject of continual complaints to his presbytery by those who deplored his

[55] Anthony Jeremy: 'Doctrine and Law in the Anglican Communion': unpublished text of a lecture given at Cardiff Law School on 11 September 1999.
[56] Their opinions are published in Lyall: *Of Presbyters and Kings*, as Appendices III and IV.
[57] The proposal was finally rejected by the General Assembly in 1974. The full story is set out in Andrew Herron: *Minority Report* (St Andrew Press, Edinburgh, 1990), p 323ff. Some years later, the Assembly passed an Act disavowing its affirmation of the most anti-papal clauses of the *Confession*: Act of Assembly v of 1986 [Declaratory Act anent the Westminster Confession of Faith].
[58] Francis Lyall: 'The Westminster Confession: the Legal Position', in Alasdair IC Heron (ed): *The Westminster Confession in the Church Today* (St Andrew Press, Edinburgh, 1982), p 55.
[59] Ronald King Murray [Lord Murray]: 'Church and State': *The Laws of Scotland: Stair Memorial Encyclopaedia* (Butterworths, Edinburgh, 1994), vol 5, para. 700.
[60] Charles K Davidson [Lord Davidson]: 'Church of Scotland': *Stair*, vol 3, para. 1504.

liberal theological stance. His opponents then alleged that he had sexually assaulted several female church members. The allegations were examined by the Procurator Fiscal and in 1996 Dr Macleod was tried under summary procedure[61] at Edinburgh Sheriff Court on charges of indecent assault. Not only were the charges dismissed, but the Sheriff [Horsburgh] sent the papers in the case to Crown Office for possible prosecution of the principal Crown witnesses for perjury and conspiracy to pervert the course of justice—though no further action was taken.

A power struggle then ensued within the FC. Dr Macleod's opponents formed the Free Church Defence Association [FCDA] to maintain what they regarded as the true principles of the Disruption. At the same time, Dr Macleod was appointed Principal of the FC College—which trains intending FC ministers. In January 2000 the Commission of Assembly suspended the ministers who had joined the FCDA with a view to their trial by libel[62] before the General Assembly itself in May. Twenty-two dissident ministers then withdrew from the FC,[63] constituting themselves on 20 January as the Free Church of Scotland (Continuing) [FCS(C)] and appointing as Moderator the senior minister present, the Revd John Angus Gillies. At the first regular session, from 22–25 May, its General Assembly established Committees 'to look into allegations of conspiracy on the part of persons who are now within the Free Church of Scotland (Continuing) and to examine how the Church can in future most appropriately deal with any allegations of sexual impropriety.'[64]

In response, the FC General Assembly endorsed the actions of its Commission of Assembly, called upon the FCDA to disband, declared the charges of the dissidents vacant, and appointed interim moderators to the vacancies.[65]

One of the dissidents, the Revd Graeme Craig, former FC Minister at Lochalsh and Glenshiel, petitioned the Court of Session for judicial review of the decision of the sentence of suspension passed on him by the FC General Assembly. At the interlocutor before the Lord Ordinary [Eassie] the trial diet[66] was fixed for 17 August 2000.[67] However, on the morning of the hearing the parties agreed to settle, on the basis that Mr Craig would withdraw the petition for judicial review, pay the expenses

[61] I.e. without a jury. In the absence of a formal law report, this account is based on contemporaneous reports in *The Scotsman*, June 1996 *passim*. The story is also set out in the Free Church of Scotland *Monthly Record*—March 2000, p 54.

[62] Trial by libel (i.e. on the basis of a written charge) is the traditional mechanism by which complaints against ministers are investigated and adjudicated by presbytery—though the Church of Scotland has recently abolished it in favour of investigation by an independent Presbyterial Commission.

[63] They were subsequently joined by four others. The Report of the Commission of Assembly is summarised in the FC *Monthly Record*—March 2000, p 52.

[64] Free Church of Scotland (Continuing): 'Free Church (Continuing) General Assembly': *Press Release*—31 May 2000.

[65] *Acts of the General Assembly of the Free Church of Scotland 2000*: Act V [Anent the Free Church Defence Association], Act IX [Anent Suspension of Ministers withdrawing from the Church], Act X [Endorsing the Findings of the several Commissions of the General Assembly of 1999]. There is recent precedent for such a split. In 1988, the then Lord Chancellor, Lord Mackay of Clashfern, was suspended for six months from communion and the eldership by the Southern Presbytery of the Free Presbyterian Church: his offence was attending Requiem Masses for two Roman Catholic colleagues, Lord Russell of Killowen and Lord Wheatley. A significant minority of his supporters tabled a formal Protest and left the FPC; shortly afterwards, fifteen ministers and about one-quarter of the total FPC membership formed the Associated Presbyterian Churches [APC], while others joined the FC or the Church of Scotland. The resulting breach in the FPC has never healed. Uncertainties still remain as to the rights over various FPC properties but the present writer is not aware of any litigation arising from the FPC/APC schism.

[66] I.e. hearing.

[67] *Craig (for Judicial Review)* 2000 Court of Session P677/00 6 July (unreported).

of the FC to a limit of £3,500, and put a motion before the Commission of Assembly of the FCS(C) that it accepted that the status of any individual within the Church should not be the subject of an action in the civil courts. In return, the FC agreed to put before its own Commission of Assembly a proposal 'to discuss with representatives of the Free Church (Continuing) in good faith the just and equitable resolution of matters affecting the local congregational properties including local church properties and congregational funds.'[68]

On 12 September the Lord Ordinary [Abernethy] refused to grant an inhibition on the assets of one of the dissidents, the Revd Maurice Roberts, pending payment of what the FC claimed to be rent for his continued occupation of Inverness Greyfriars FC manse.[69]

On 5 October the FC Commission of Assembly:

> 'came to a Finding which envisages discussion with representatives of the self-styled Free Church of Scotland (Continuing), and a Committee was appointed for that purpose ...
>
> [T]he Commission insist that the self-styled Free Church of Scotland (Continuing) must honour its part of the arrangement arrived at in the Court of Session, by having its Commissioners and its office-bearers agree that "the issue of any individual's status within the Church will not be the subject of civil action either joint or individual".'[70]

On 31 October, the Commission of Assembly of the FCS(C) responded that they had resolved to appoint a committee '... to pursue, in good faith, negotiations with a view to a church-wide, just and equitable resolution of matters affecting the local congregational properties including local church properties and congregational funds.'[71]

There, for the moment, the matter rests but the position as regards the churches and manses of the FC which continue to be occupied by the dissidents remains unclear. By no means has the matter been resolved and the Court of Session may well find itself having to adjudicate on the issues raised by Lord Mackay in the opinion quoted above. In particular, at the time of writing[72] litigation was outstanding over the position of the Revd Maurice Roberts and further action remained a distinct possibility[73]—though, presumably, both parties would wish to avoid the complications which resulted from the litigation after the schism of 1900.

6. CONCLUSION

Did the House of Lords determine the *Free Church Case* correctly? Christopher Johnston clearly thought not, arguing that Christian communities had to be free to

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[68] FC: *Monthly Record*—September 2000, p 195. The report to the May 2000 General Assembly of its Finance, Law and Advisory Committee had stated that the Committee was not seeking to instigate litigation, though it was taking legal advice on the possibility of claims against the Free Church.

[69] Unreported: see Free Church of Scotland (Continuing): *Free Church Witness*—October 2000, p 10.

[70] FC: *Monthly Record*—November 2000, p 251.

[71] FCS(C): *Free Church Witness*—November 2000, insert.

[72] December 2001.

[73] The Legal Advice and Property Committee of the FCS(C) announced in November 2001 that it would be bringing an action which, if successful, would 'have the effect of freezing all invested funds held by the [FCS] General Trustees and [would] prevent the sale of property held under the terms of the Trust': FCS(C): *Free Church Witness*—November 2001, p 6.

develop their life and doctrine in accordance with changing needs and circumstances and the promptings of the Spirit. In his view, Churches could not simply be tied to their trust deeds. Francis Lyall, on the other hand, concludes that the judgment 'was both right and legally correct'.[74]

The present writer would agree with Lyall. It is difficult to see how anyone reading Chalmers's original Moderatorial address of 1843 could doubt the commitment of the first FC General Assembly to the 'Establishment Principle'. Nor could anyone prepared to read the plain words of the *Westminster Confession* in an unprejudiced manner be under any illusions about its theology. With hindsight, it is impossible to see how the assertion in the UP Declaratory Act that the doctrine of election was 'held in connection and harmony with the truth that God is not willing that any should perish' could ever have been squared with the classical view of double predestination as taught by the Free Church.

However, the applicability of the judgment to any individual Church, whether Established or not, remains problematical, depending as it does on precisely what constitutes 'doctrine'. In the circumstances of the *Free Church Case*, where the first FC General Assembly had set out its doctrinal stall in such considerable detail, there was enough evidence as to the centrality of the *Confession* and the 'Establishment Principle' to give guidance to a majority of their Lordships. The likely effects of the judgment today therefore depend very much upon circumstances.

If, for example, two Trinitarian Churches decided to unite on the basis of an agreement, *inter alia*, that Jesus was 'perfect man' but entirely and exclusively human, dissidents would probably have a reasonable case for claiming that this was a major subversion of traditional doctrine as expressed in the catholic creeds. If, on the other hand, a Reformed Church were to unite with one from the Wesleyan/Holiness tradition and a minority on either side objected, would any court, north or south of the border, be prepared to get embroiled in the differences between Calvin and Wesley—still less Calvin and Arminius—over church order or eschatology? But the greatest difficulty arises when, as in January 2000, a Church splits over an issue of discipline rather than doctrine, and *both* groups claim to be the legitimate successors of the undivided institution. Probably the safest option in such circumstances is to avoid litigation if at all possible since, though it is almost one hundred years old, the *Free Church Case* still casts a long shadow.

[74] Lyall: *Of Presbyters and Kings* p 109.