Preface

The following paper has been prepared with a twofold purpose: firstly, to set out for all our people the reasons why, on 20th January 2000, there was a disruption within the Free Church of Scotland and why we claim to be the true inheritors of the title and property belonging to the Free Church; and, secondly, to lay out our case in such a way that legal opinion can be sought in bringing our rightful claim to the civil courts.

So far as the first objective is concerned, it is important that our people are made aware of why we exist. It is to be feared that many believe we simply represent the 'conservative' wing of the Free Church of Scotland. If, by conservative, we mean 'keeping to the old paths' then we trust there is substance to this belief. But this, of itself, can be no argument for separating from brethren. To be estranged from brethren with whom we have had fellowship over generations cannot be done on a whim, but must be on the bedrock of principle. This paper seeks to establish that principle and to set it out in a systematic way that will be of benefit to our faithful people.

The primary purpose, however, is to enable us to spread our case before legal minds with a view to litigation in the civil courts. Sadly, the continuing belligerent conduct of the Residual Body (the term used throughout the document when referring to the majority body) makes it plain that recourse to the civil courts is almost inevitable. One would have hoped that it would be otherwise. In seeking to set out our case, I have been conscious of this purpose. I have sought to keep to the facts, and facts that will be relevant to a civil court. Thus, there are many incidents and actions that I have excluded, not because they are of no consequence, but simply because our claim to be the Free Church of Scotland does not rest on them. For example, within the third section of the paper, I have largely confined myself to *Findings* of the General Assembly and her various Commissions.

I would record my grateful thanks to all who have contributed to this work. Rev John MacLeod, Tomatin very kindly went through the Assembly records of 1863 to 1888 and copied out all the relevant findings from that period. Rev Maurice Roberts, Rev William MacLeod, Rev John Harding, Rev Murdo A N MacLeod, Rev David Murray and Mr. John MacPherson (Killin) all gave me accounts of their own personal experiences and records. In some instances this brought back painful memories for them, so I register my appreciation for their valued co-operation.

I now accept responsibility for what appears on the following pages. I have sought to be as clear and as logical as possible in my argumentation, but apologise in advance for where I have, no doubt, failed in this respect. While I am willing to take the responsibility for this work, I am not willing to be responsible for what now happens to it. It will be up to the legal minds that we engage to help us in the way forward, and it will then be up to the wider Church to make its decision, no doubt with the help and advice of the Legal Committee, as to what that way is.

Whatever may transpire, we pray the only Head of the Church - the Lord Jesus Christ - will guide us and be our strength. I believe it is this very point that is at the heart of our case. No church has the right to forbid her office-bearers to speak out against sin. We have been accused of disobedience to church courts and of refusing to bow under the weight of ecclesiastical discipline. This may be so, but it is no sin to disobey church courts when these same courts demand what the Word of God and conscience forbid. Indeed, the right to speak out against sin is a sacred principle embraced within the Practice and Constitution of the Free Church of Scotland.

Thus, in our seeking redress at the civil courts, if this is indeed what we must do, we must put into practice the principle for which we suffered. We do not depend on the arm of flesh, and we do not seek carnal weapons of warfare. We seek to give the Lord Jesus Christ his rightful place as the only Head of the Church. We trust that the Lord will be on our side. *"I will instruct thee and teach thee in the way which thou shalt go: I will guide thee with mine eye." (Psalm 32:8)*

Rev James I Gracie
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24th August 2001

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Case for Litigation

We lay claim to being the true representatives of the Free Church of Scotland of 1843 and 1900. We seek in this interdict to show that at the Commission of Assembly on 20th January 2000, and at their General Assembly on 24th May 2000, the Residual Body [1] departed from us and in effect formed a new denomination distinct from, and separate to, that body of people known as the Free Church of Scotland. By so doing, we would seek to lay claim to the title and property belonging to the said Church.

The case does not centre on the question of how badly the Church has acted over recent years. Our opponents try to make mileage out of a comparison between who has acted more badly, us or them. No doubt they will indulge in such an exercise in any court action. The case, however, is not about such comparisons: the identity of the true Free Church of Scotland does not, and never can, rest upon such fluid issues. The identity of the Free Church of Scotland rests upon Constitutional Principles. The case centres on one fundamental Principle out of which the Free Church of Scotland was born in 1843, and for which she stood in 1900. Thus, it is not a question of unconstitutional acts or decisions arrived at by successive Courts of the Church over a number of years. It is about the Right of Continued Protest, a right which we hope to prove is fundamental to the identity of the Free Church of Scotland, yet a right which we were deprived of by those who opposed us on 20th January 2000. {Associated with the 'Right of Continued Protest' are the principles involving the Headship of Christ, the role of the Constitution of the Church, and the conscientious duty obliged by the ordination vows taken by all office-bearers of the Free Church of Scotland}.

Our case is set out as follows:-

1. To establish that the 'Right of Continued Protest' is the historic position of the Free Church of Scotland;
2. To establish that it is fundamental to Her Testimony;
3. To establish that the body formerly known as the Free Church of Scotland (and referred to as the 'Residual Body' in this paper) departed from this principle and that on 20th January 2000 its Commission of Assembly separated from those holding to it; that at the General Assembly on 24th May 2000 it ratified this position; and that consequently the body now temporarily known (for administrative purposes only) as the Free Church of Scotland (Continuing) is the true successor of the Free Church of Scotland, and that the title 'Free Church of Scotland' resides with it as does all the property, goods, and funds relevant thereto.

1. To Establish that the Right of Continued Protest is the historic position of the Free Church of Scotland

(a) 1833-1843

The Free Church of Scotland was born out of continued protest. In 1843, a disruption took place in the Church of Scotland over a matter of principle. The principle involved was the relationship between Church and State. Believing in the spiritual independence of the Church, the Disruption Fathers of the Free Church of Scotland continued to protest against the State's intervention in the spiritual affairs of the Church. Nothing would deflect them from this. It was a demonstration by the Church of her loyalty to the Head of the Church, the Lord Jesus Christ, and a demonstration of the authority of conscience. So much so, that the years between 1833 and 1843 became known as 'The Ten Years Conflict'. They produced and distributed pamphlets, and in the year 1842-1843 they organised public meetings throughout Scotland to explain their case to the people.

During this period *they were unwilling to accede to unconstitutional impositions which would violate both their conscience and their vows as Ministers of the Gospel.* They would not leave the Church of Scotland, yet neither would they forsake what they had vowed to defend and what had been secured to them by law. Only when they were forced to leave did the disruption take place. Even then, while they left what they saw as a vitiated establishment, they did not see themselves as leaving the Church of Scotland. It was their contention that they were the true successors of the Church of Scotland, but now free from State interference. Thus, they took the name 'The Church of Scotland *Free*'. {In temporarily adopting the name The Free Church Of Scotland *(Continuing),* we have adopted not only the same principles as the original Free Church, but also the same method by which to distinguish ourselves}.

Prior to the Disruption, Thomas Chalmers - the undoubted leader of the Free Church in 1843 - had cause to reply to a pamphlet issued by the then Dean of Faculty in which the Dean made an open attack on Chalmers' fellow Churchmen. He replied in the following terms:

> "The Dean of Faculty proposes for us an alternative, either to give in to him, or to go out of the Church.....Our reply to this civil hint is, that upon this subject we stand alike opposed to those on our own side who have threatened a secession, and unmoved by the kind suggestion of the Dean of Faculty. There may be a conjuncture arise, when the sin of not coming out from among them might outweigh the sin of schism; but till that happens, **let the virtuous remonstrance,**

[1] The term 'Residual Body' has been adopted to describe the remnant majority who separated from us.

> **and the reclaiming testimony of our brethren, be heard within the walls and precincts of our Establishment, rather than from beyond them, so long as conscience can allow - let them not quit their places at the call of their taunting adversaries,** nor leave the beloved Church of our fathers a useless *residuum*, and a mere *caput mortuum* in their hands". [2]

Over the last number of years, many within the Free Church of Scotland have echoed the words of the Dean of Faculty i.e. give in to us or go out of the Church. For example, Rev John L. MacKay, Assembly Clerk, stated on the floor of the Commission of Assembly on 6th October 1999: "The question of freedom of speech is yesterday's question. They have had their freedom. They have spoken. They have spoken repeatedly. The Church has given a decision and they must now decide, and it is the only honourable thing that they themselves should have decided between whether they can accept the decisions of the highest court in good conscience or whether they feel duty bound to leave." [3] Our answer to this has been the same as that of the Free Church leaders in 1843. Conscience cannot allow us to give up what is right, neither will we leave the Church we love. This is exactly what the Free Church of 1843 believed, as shown by the thoughts of Dr Chalmers on the matter:

> "A forcible ejectment from our places would put an end to all the difficulties of conscience; and the sin of schism would then be no longer ours. But, meanwhile, we refuse to be bowed down stairs, or walked off from the Church of our fathers by the Dean of Faculty.....he will at least forgive us if we shut our ears against his propositions as long as he is going to shut his eyes against our pamphlets." [4]

The 'Claim, Declaration and Protest' of 1842 (see Appendix 1) is one of the fundamental historic documents of the Free Church of Scotland. Part of the questions put to all office-bearers in the Free Church at ordination includes: "Do you approve of the general principles embodied in the Claim, Declaration and Protest, adopted by the General Assembly of the Church of Scotland in 1842.....as declaring the views which are sanctioned by the Word of God, and the standards of this Church....." [5] That document is itself a standing testimony to the right of continued protest. In unfolding the position of the infant Free Church it states:

> And they DECLARE that they cannot, in accordance with the Word of God, the authorized and ratified standards of this Church, and the dictates of their consciences, intrude Ministers on reclaiming congregations, or carry on the government of Christ's Church, subject to the coercion attempted by the Court of Session.....they must, as by God's grace they will, refuse to do: for highly as they esteem these, they cannot put them in competition with the inalienable liberties of a Church of Christ, which, **alike by their duty and allegiance to their Head and King, and by their ordination vows, they are bound to maintain, "Notwithstanding of whatsoever trouble or persecution may arise."** And they PROTEST.....**that it shall be free to the members of this Church, or their successors, at any time hereafter when there shall be a prospect of obtaining justice, to claim the restitution of all such civil rights and privileges,** and temporal benefits and endowments as for the present they may be compelled to yield..... (The Claim Declaration & Protest, Gen. Assembly Act XIX.)

Regardless of the issues of the time, two things are particularly relevant:

(i) Today, the Residual Body claims that because the written Constitution has not been changed it is automatically the Free Church of Scotland. Yet this is contradicted by the case in 1843. The Claim Declaration and Protest of 1843 assumes that there is no change to either the Constitutions of the Church or State. Indeed, this is the very cornerstone of her claim: the rights and privileges secured to her within the Constitution of the land as well the Church could not be changed. However, the opening paragraph shows that despite the many safeguards she had within the Constitution, she now found herself, "assailed by the very Courts to which the Church was authorized to look for assistance and protection." The foundation of her Claim was not primarily *in* legislation or Acts of Parliament, but was 'essential doctrine' and 'fundamental principle' as set forth in the Church's own Confession, "in accordance with the Word and Law of the Most High God," which doctrine and principle have been secured to her *by* legislation. What is therefore at the heart of her claim is not simply the question of a change to the written Constitution, **but the imposition upon her conscience of principles contrary to the Word of God, the Confession of the Church, and the Constitution of both Church and State.**

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[2] Memoirs of Life and Writing of Thomas Chalmers DD.LL.D - The Rev. William Hanna - p. 137-138

[3] A tape recording of Mr. MacKay's statement is available.

[4] Memoirs of Life & Writing of Thomas Chalmers by William Hanna. p.137-138

[5] Practice of the Free Church of Scotland & Her several Courts (1964 edition). p101

In recent years, and in similar manner to those of 1843, Ministers of the Free Church have had imposed upon them principles contrary to the Word of God and the Constitution of the Church. Further, the very Courts to which they were authorised to look for assistance and protection were themselves responsible for this imposition.

(ii) It is evident from the Claim, Declaration and Protest of 1842 that the Free Church of Scotland was not only born out of Protest, but that she would continue that protest over the following year until the Assembly of 1843, and that in tabling her Protest at the Assembly of 1843 she expected her descendants to *continue* that protest until a satisfactory answer was forthcoming. They saw this as not only a right given to her descendants but a duty incumbent upon them. A Protest by its very nature implies this.

Just as the men of 1843 believed that unbiblical or unconstitutional impositions by the Civil Court upon the consciences of men was unacceptable, so today similar impositions by Church Courts are equally unacceptable. The Westminster Confession of Faith, the Subordinate Standard of the Church to which every office-bearer must subscribe, is germane to our argument at this point:-

> God alone is Lord of the conscience, and hath left it free from the doctrines and commandments of men which are in any thing contrary to his Word, or beside it, in matters of faith or worship. So that to believe such doctrines, or to obey such commandments out of conscience, is to betray true liberty of conscience: and the requiring of an implicit faith, and an absolute and blind obedience, is to destroy liberty of conscience, and reason also. (W.C.F. ch.XX. ii)

At the General Assembly of the Church of Scotland on 18th May 1843 held at St. Andrews Church, George Street, Edinburgh Professor David Welsh DD, Moderator of the preceding General Assembly, was due to constitute the Assembly for that year. Instead, he explained to the assembled brethren that the normal Assembly business could not proceed, "without a violation of the terms of the Union between Church and State in this land, as now authoritatively declared." The violation here referred to concerned interdicts served on 7 Ministers who, by an Act of Assembly forming their congregations (Chapels-of-ease) into parish Churches *quoad sacra,* were fully entitled to take their place at the Assembly, but which the Court Interdict now deprived them of. Dr.Welsh read the 'Church's Protest' (see Appendix 2) and left the building with over 400 ministers and a large number of elders. This Protest also forms part of the Free Church of Scotland's historic documents. It ends as follows:

> And, finally, while firmly asserting the right and duty of the civil magistrate to maintain and support an establishment of religion in accordance with God's word, *and reserving to ourselves and our successors to strive by all lawful means, as opportunity shall in God's good providence be offered, to secure the performance of this duty agreeable to Scripture* .....but, at the same time, with an assured conviction, that we are not responsible for any consequences that may follow from this our enforced separation from an Establishment which we loved and prized - through interference with conscience, the dishonour done to Christ's crown and the rejection of His sole supreme authority as King in His Church. (Protest 18th. May 1843) [6]

This was not the first time Ministers in the Church of Scotland had exercised their right of continued protest. When the Assembly of the Church of Scotland met in 1732, an Act was passed which had to do primarily with the procedure to be adopted when the right of appointment to a vacant parish lapsed to the Presbytery. Rev. Ebeneser Erskine "fulminated from his own pulpit against the assembly's Act, and again as moderator of the synod of Perth and Stirling." [7] Having been censured for certain expressions found to be "offensive and tending to disturb the peace and good order of the Church", Erskine (and three friends) tabled written protests claiming the right to maintain his views *and to testify against any defections in the Church.* The Assembly then instructed the four brethren to withdraw their protest and express sorrow for having made it; suspension from ministerial functions would follow if they refused. In August 1733, these men were duly suspended, and in November they were removed from their charges.

> Before the Commission, Mr. Erskine said that 'he was indeed sorry that what he had done should be interpreted by any as a contempt of the authority of the judicatories of the Church, no such thing being intended by his Protest, but only a solemn adherence to the truths of God' Mr. Erskine showed his respect for the authority of the Supreme Court so far that he received the rebuke and admonition when they were tendered to him, **but immediately he laid a protest on the table in which he declared that notwithstanding such a sentence having been pronounced, he was at liberty to preach the same truths of God that he had already preached.**.....So averse were these men to leave the Church and so great was their dread of being accounted Schismatics that notwithstanding the treatment which Mr. Erskine had received and the

[6] Practice of the Free Church of Scotland & Her several Courts (1964 edition). p120

[7] A Church History of Scotland by Burleigh. p281

> many corruptions which prevailed, they were willing to have remained in her communion and to have acted under their Protest, provided they had been permitted to do so.
>
> (History of the Secession by McKerrow. p67)

Principal John Cunningham, a recognised historian of the 19th century described by Rev John MacPherson in his *Chalmers' Lectures* as 'fair minded and calmly deliberative', wrote regarding the behaviour of the 1733 Assembly in the following terms:

> Yet, there was another blunder on the part of the Scottish Church and the last was worse than the first. Erskine and his friends bowed themselves to the censure of the Assembly and only desired to comfort their consciences by lodging a protest. The Assembly should have overlooked the protest and let the matter end. (History of Scottish Church. John Cunningham.Vol. II p.437)

The General Assembly of 1734 sought to rectify the situation by rescinding an earlier Act against the recording of protests *and acknowledged ministerial freedom to testify against defections by the Church.* This, however, failed to bring Erskine and his friends back into the Church and they were deposed from the ministry in 1740.

On 20th. January 2000, we similarly expressed our concern that we should be portrayed as showing contempt for the Supreme Court of our Church. This was never our intention. Many of our number were long standing Ministers who had given faithful service to the Free Church. We always took our place as Commissioners of the Assembly showing the courtesies due to the Court. Several of the Ministers restated on the evening of 20th January 2000 that they were willing to give an unreserved apology for anything said or done that was either untrue, unwarranted, or that showed contempt for the Court. We demonstrated our respect for the authority of the Assembly by continuing to co-operate within it, even when Rev Maurice Roberts was suspended from the ministry without being given any opportunity to defend himself. We appeared at the Bar of the Assembly and were willing to accept rebuke or censure even if we considered it unfairly arrived at. We only left the building when conscience could no longer allow us to remain i.e. when it became clear that the majority in the Assembly were no longer acting as the Free Church but were in contempt of the Constitution in removing us from our ministerial duties and thus our pulpits, and in refusing to give members their lawful rights in the administration of church discipline.

The Commission of Assembly on 20th January 2000 acted with the same high-handed manner as the Assembly of 1733. And rather than seek to rectify the situation as our brethren did in 1734, the Assembly of May 2000 endorsed the actions of its Commission.

(b) 1863-1888

At the General Assembly of the Free Church of Scotland in 1863, an overture came before the House which opened up the subject of innovations in public worship.[8] Then, in 1866, the General Assembly took up consideration of overtures anent Psalms, Paraphrases and Hymns. There followed over 20 years of debate on the subject. [9]

The reason this debate went on so long was because a matter of principle was involved. Dr. Begg wanted a committee set up to consider "whether any principle is involved in singing inspired or uninspired compositions in the public worship of God?" While the Assembly did not accept his motion, it did resolve: "to appoint a committee to consider maturely the whole matter....."

At the 1869 and subsequent Assemblies overtures were received from a number of Presbyteries, dissents and protests were lodged by various persons, and there was even a memorial tabled by Professor Macgregor against the decision of the Assembly to introduce uninspired materials of praise and musical instruments into the public worship of the Free Church. At the 1869 Assembly, James Begg and others entered their dissent on two grounds:

(i) That the resolution was inconsistent with the principles of the Free Church, and
(ii) That it would cause dissension and division in the Church.

Again, laying aside the subject matter involved, it should be noted that at no time was it suggested by the Assembly that these matters were now closed, or that disciplinary action would be taken against those continuing to protest. On the contrary, Dr. Adam, in opposing a motion by Dr. T A G Balfour in which Mr. Balfour asked the Assembly to recall its decision to introduce instrumental music and enjoin "all her congregations to adhere to the scriptural and immemorial practice of this Church....." made the following remarks:

> The Assembly, while receiving with all respect the Petitions and Overtures regarding instrumental music in public worship, now on the table, and while deeply regretting that the

[8] 'Innovations' here means the use of musical accompaniment in public worship.

[9] A record of Assembly overtures, debates, motions and findings is attached. (see Appendix 3)

> decision of last Assembly on that subject has not met with the approval of many highly esteemed ministers, office bearers and people throughout the Church, yet see no reason for reopening the question decided by last Assembly.....*he hoped that the door of the Assembly would always be open for the members of the Church to come in with any complaint, especially when that complaint was founded on conscientious convictions....* [10]

The same hope was expressed by none other than Principal Rainy (the architect of the anti-Free Church Union of 1900). In 1885, the year after Dr Adam made the above statement, another overture came before the Assembly this time from the Synod of Ross and the Presbytery of Tain. It sought exactly the same as Mr. Balfour's the previous year. *The overture was received and debated.* During the debate Principal Rainy, in moving a motion, stated:

> "There could be no doubt that their friends were entirely within their rights in bringing up this question, and he did not think that anyone was disposed to complain of the use they made of their right."

These matters were never declared closed. Thus, at the 1888 Assembly, the Synod of Glenelg overtured the Assembly with almost the same wording on the same subjects viz. exclusive Psalmody and the use of instrumental music. No disciplinary action was taken against the Synod for continuing to raise the issues and they were not instructed that the matter was now closed.

During this controversial period, Dr Begg wrote a book along with various articles on Purity of Worship in which he unfolded the arguments against the Assembly's decision. Thus he continued to work against the Assembly's decision unhindered. At the 1883 Assembly, Dr Begg not only protested prior to the debate, but registered his dissent stating that he and those with him *reserved the right to use all competent means to have the judgment now adopted in regard to the use of instrumental music reversed.* While Begg died later that year, his supporters continued to use all means to further their end. Indeed, one recurring reason given for dissenting and protesting was that this decision was causing, and would continue to cause, dissension and division in the Church. A number of things may be noted about this period.

(a) It is obvious that the issues involved caused considerable offence to many within the Church;

(b) It was a matter of conscience for those opposed to the Assembly decision;

(c) They continued with every legal means possible to overturn the Assembly decision;

(d) These legal means included repeated attempts within Church Courts for a favourable decision, meeting with brethren to discuss the issues, writing articles and books, as well as preaching against the new Acts.

All that the forefathers of the present Free Church of Scotland did in 1863-1888 we endeavoured to do at the end of the 20th. century - all four points mentioned above apply to us. However, there is one difference. The majority in the Commission of Assembly of the Free Church of Scotland on 20th January 2000, exercising a tyranny unknown in the Free Church, sought to remove us from our pulpits. The General Assembly in May 2000, by endorsing the actions of the Commission, ultimately denied us the right to continue to protest against a simple finding of Assembly.

(c) 1860-1900

The union that took place in 1900 between the United Presbyterian Church with the Free Church of Scotland formed a new denomination called 'The United Free Church'. The minority who refused to enter this Union continued on and, after a House of Lords judgment (General Assembly of The Free Church of Scotland vs. Overtoun and others), were confirmed as the true representatives of the Free Church of Scotland of 1843. Yet why did it take so long for union to take place? After all, the union movement started as early as 1860.

In 1863, a majority of the Free Church General Assembly sanctioned discussion with a view to Union with the United Presbyterian Church, a denomination which in 1847 had brought together various of the 'voluntary' seceding bodies from the Church of Scotland. In 1867, Principal Rainy proposed that so far as the amount of divergence between the two Churches was concerned it constituted "no bar to the Union contemplated." Dr. Begg entered a Protest against this. He and others protested against the resolution of the Assembly on the grounds that it "implied an abandonment and subversion of an admittedly constitutional principle of the Free Church of Scotland" and was "*ultra vires* of this Assembly." They went on to protest that "we and all office-bearers and members of the Church shall not be committed by the said resolution to any action that might be taken thereupon, and shall be at liberty to oppose all such action by

[10] Dr Adam's address to the 1884 General Assembly.

every competent means." In the words of Alexander Stewart and Kennedy Cameron, "the controversy was now waged with great vigour throughout the country." [11]

Begg and his associates put forth all their strength to combat the Union. They roused the Church by pamphlets, and many speeches were made throughout the country. The same year, a magazine called *The Watchword* was started in which the issues were freely discussed. The Assembly never prohibited this publication. In 1870, they founded the Free Church Defence Association (F.C.D.A.) where like-minded brethren came together with the object of defending the Free Church from the designs of the majority and upholding the Constitution and principles of the Free Church. No attempt was made by the Assembly to outlaw this organisation, nor was membership of it ever held to be incompatible or inconsistent with membership of the Free Church of Scotland. Its activities were never suppressed.

The continued Protest of these men was the reason why, in 1873, moves toward Union were stopped. The F.C.D.A. became inactive at this point in time.

The Watchword carried articles from Begg that spoke in a most frank fashion. Indeed, the language used by Begg displayed more invective against the Assembly than any publications issued by the Free Church Defence Association of late. The following are but some examples:

1. "The true theory of spiritual independence is a right to serve Christ according to His own Word; but by no means a right to do as we please. *Church Courts can commit sin as well as individuals* or as the State, and they have no final control over temporal things. Let the Church act within her own province; but, if in so acting, she interferes unfairly with the arrangements between man and man, or the rights of property, *she must be resisted and repelled.* It is clear that the Free Church has of late been attempting to interfere with Caesar's province, as certainly as Caesar ever interfered with hers; *and there must be no scruple in keeping the Church in her own place.*" (The Watchword 2/9/1872)

2. "If the present course is persevered in, the result will be that, so far as concerns property and civil rights, we shall be entitled to have it found and declared that they (the majority) have ceased to be the Free Church of Scotland, or to be entitled to administer its property and to enjoy its privileges. We maintain besides that *this illegal conduct of theirs* is aggravated by the attempt to use, and take advantage of the so-called spiritual independence of the Church, pled for on high and holy grounds, for the purpose of *perpetrating an act of fraud and of complicated moral and civil wrong*." (The Watchword 2/9/1872).

3. "Experience proves that non-established Churches may accumulate, and do accumulate, vast masses of property. This property is undoubtedly given on the assumption that the fundamental principles of the body shall remain unchanged. Many of the men who gave the money have gone to their rest, leaving their property to be guarded by the civil law. The destination of all other property after men are dead is jealously watched and guarded by that law: and are we to suppose that a mere haphazard majority in a Church may do what can be done nowhere else - may not only make the most sweeping changes...; but are we to suppose that they may at the same time turn over the whole property of the Church from the peculiar purposes for which the testators left it, to a purpose which they would cordially have abhorred? This surely would be to place the Church above the State, and *to introduce an ecclesiastical tyranny which might ultimately lead to the most serious consequences"* (The Watchword 1/4/1873).

4. "In our last number we demonstrated that the proceedings of the late Assembly, however *deplorable as a manifestation of unfaithfulness* were a mere *brutum fulmen...."* (The Watchword 1/8/1867).

For all that Begg wrote he was never libelled by the Assembly. {It is also of interest to note that the present Residual Body attempts to use, and take advantage of the so-called spiritual independence of the Church, pled for on high and holy grounds, to do as it pleases, and to justify its illegal and high-handed conduct towards brethren (ref. points 1 and 2 above)}.

The House of Lords' case of 1903-4 which our predecessors won, goes as far as to say, "For a considerable time all efforts in the direction of Union failed, by reason of the objections of those who adhered with loyalty to the distinctive principles of the two Churches respectively. In the Free Church these efforts were met with determined opposition by a large body of ministers and elders.....who maintained that such Union would involve defection from the distinctive testimony and principles of the Free Church, *and who were prepared, and known to be prepared, to carry their resistance to the utmost length"* (Condescendence for Pursuers, The Free Church of Scotland Appeals Case 1903-4, cond. 17)

Union negotiations were suspended in 1873 and were not reopened for another 20 years. However, a Declaratory Act was introduced into the Free Church in 1892, and in the year 1894 overtures in favour of Union were for the first time laid on the table of the Free Church Assembly. The Free Church Defence Association was revived again in 1898 on the

[11] The Free Church of Scotland, The Crisis of 1900. by Alexander Stewart/J Kennedy Cameron. p25

same constitutional basis as in the 1870's. While the organisation continued to campaign strongly against the plans for Union and the designs of the majority, again no attempt was made to suppress it nor to discipline its members.

A book [12] bearing the name of Rev. Professor J Kennedy Cameron (one of the twenty seven Ministers who stood with the minority in the Free Church in 1900) records the following facts about the period; facts that can be applied to the Free Church situation today:

(a) In speaking of Dr. Rainy, the leader of the pro-Union party, it says: "His principles did not seem to have the sacred inflexibility of Truth; they were adaptable things that were capable of being 'fashioned to the varying hour'. What determined his line of action in the last resort was not whether a thing was right in itself, but whether it was the thing that seemed best suited to the exigencies of a particular situation." (page 55)

From this it is obvious that the minority Free Church in 1900 stood for firm conviction of principle - not expediency. Those acting as the majority party in the Free Church at the end of the 20th century in continually neglecting principle made decisions that reflected simple expediency, imposed these decisions upon protesting office-bearers, and ultimately expelled these office-bearers for continuing to protest (an act itself of expediency).

(b) The book also notes regarding Dr. Rainy's consideration of the minority: "The same disregard of claims on his sympathetic consideration marked his relations with the dissenting minority.....Their unyielding devotion to principle, their refusal to compromise on any terms what they believed to be the interests of Divine truth, was a thing he never seemed able to appreciate or willing to recognise. Their sincerity even he often appeared to regard as a nebulous quantity. So long as they did not thwart his own aims, he suffered them with great forbearance; but he had the haughtiness of the autocrat, and when his pride was touched he could unmask his feelings in words of bitter scorn." (page 57)

From this it is obvious that our Free Church forefathers in 1900 were rebuked and scorned for their sincerity in action. They were only suffered so long as they did not hinder the designs of the majority. The majority party in the Free Church at the end of the 20th century similarly rejected such sincerity of conscience, and itself became the instrument of persecution whenever its aims were threatened.

(c) In regard to the case itself, the book states: "It was a case of a majority resolving to alter their relation to a Confession which they had never presumed to charge with being unscriptural.....Could they claim under these conditions to carry with them the identity of the original body? *Could they trample upon the convictions, and set aside the rights, of men, be they many or few, whose only offence was their determination to remain faithful to their ordination vows*?" (page 75)

From this it is obvious that an overriding consideration in the House of Lords' Case in 1903-4, which determined the identity of the Free Church of Scotland, was that a majority was trampling under foot the convictions and rights of a minority. *The majority did not constitute the Free Church of Scotland.* Similarly, the majority in the Free Church of Scotland of late assumed for itself the power to override the rights of a minority - rights secured within the Constitution of the Church - and trampled upon the convictions of men whose only offence was their determination to remain faithful to their ordination vows.

(d) Regarding the actions of the Free Church men of 1900, it states: "Literature bearing on the subject was prepared and distributed throughout the Church; deputies were appointed to visit such congregations as expressed a desire to have the views of the anti-Unionists set before them; and numerous meetings were held in various parts of the country." (page 99)

Some meetings in 1900, organised by the minority, were invaded by the supporters of Union and on occasions very serious disturbances took place. For example, in Stornoway a police presence was required. Yet there was never action taken within the Courts of the Church to expel those who held the meetings. This is in stark contrast to those acting as the majority in the Church today who not only sought to silence the voice of the minority, but suspended all the Ministers and elders involved.

When a Declaratory Act was passed in the Free Church in 1892, it was a 'grave deflection from the principles of the Free Church as originally constituted' (Free Church vs. Overtoun & Others 1903-4: Condescendence for Pursuers, cond.20). Two ministers seceded from the Church in 1893 to form the Free Presbyterian Church of Scotland. The forefathers of the present Free Church, however, did not secede at this time. They did not do so for two reasons:

(i) They considered this Act to be unlawful, and while they remained and protested against it the minority constituted the true Free Church of Scotland, and,
(ii) (ii) The Act was not imposed upon them.

[12] The Free Church of Scotland, The Crisis of 1900. Alexander Stewart/J Kennedy Cameron

The latter point can be shown from the House of Lords' case of 1903-4:

> Act of 1894, No.5 of Class II., also passed under protest, cap. 9, titled an Act anent the Declaratory Act 1892 on the Confession of Faith.....provided that the statements of doctrine contained in said Declaratory Act 1892 were not imposed on the Church's office-bearers as part of the standards of the Church..... (Free Church vs. Overtoun & Others: Condescendence for Pursuers, cond.20)

Thus, from 1892 to 1900, their continued protest against what they saw as unscriptural and unconstitutional action was the very cornerstone of their existence as the Free Church of Scotland. Further, it was not the alteration to the written constitution *per se* that was paramount; if it had been they would likewise have separated in 1893 with their Free Presbyterian brethren. Such a change to the constitution they simply viewed as *ultra vires.* What was of paramount importance to them was that they would not accept an *imposition upon their consciences* of anything contrary to the Word of God, their ordination vows, and which usurped the Constitutional position of the Free Church. With the envisaged Union in 1900, the Declaratory Act of the United Presbyterian Church meant such an imposition, as;

> But in May 1879 the Synod of the United Presbyterian Church had adopted a Declaratory Act.....to the effect of making the modifications of the Declaratory Act not merely permissive but compulsory..... (Free Church vs. Overtoun & Others: Condescendence for Pursuers, cond.21)

This imposition upon their consciences they would not accept. In this, they emulated the men of 1843. They had a high view of church unity. They deplored schismatics. Yet their ordination vows dictated that they defend what they had vowed to, even if that meant parting with the majority. In other words, while they could continue to protest in all good conscience they did so, and only separated when it became impossible for them to continue. The House of Lords in 1904 acknowledged this position and awarded them the title 'The Free Church of Scotland'.

Again this is exactly the position that occurred of late in the Free Church of Scotland. Acts and Findings of Assembly contrary to the constitutional position of the Church were protested against as *ultra vires*. We continued to protest as our forebears did until this right was removed from us and an endeavour was made to sever us from our pulpits. We would therefore maintain that we have not left the Free Church of Scotland. On the contrary, we believe that in emulating the actions, and standing for the same principles, of the Free Church in 1843 and 1900, we are their true descendants.

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<u>To establish that the Right of Protest is fundamental to the Testimony of the Free Church of Scotland</u>

In this second section, we wish to show that the Right of Continued Protest is not only part of the Church's history, but that the right to exercise such a protest is fundamental to her testimony. We will look at the following four areas:

A Definition of the Free Church of Scotland.
Constitution v Assembly.
Ordination Vows
The Supreme Duty of the Church

A Definition of the Free Church of Scotland

The Free Church of Scotland is no different to any other Church in that she has a unique existence defined by certain criteria. Thus, in seeking to establish what is or what is not part of the testimony of a Church we must first define what we mean by that Church. The House of Lords' case furnishes us with such a definition for the Free Church:

> "The said Free Church of Scotland is a voluntary association or body of Christians associated together under a *definite contract* involving the maintenance of *definite principles*."
> (Free Church vr. Overtoun & Others: Condescendence for Pursuers. cond. 10)

It was in the light of this basic definition that the Free Church in 1903-4, in laying claim to the property and assets of the Free Church of Scotland, stated: "no part of the said lands, properties, or funds so vested in or held by them might lawfully be diverted to the use of any other association or body of Christians, or at least of any other association or body of Christians *not professing, adhering to, and maintaining the whole fundamental principles embodied in the constitution of the said Free Church of Scotland....*without the unanimous assent of the members of a lawfully convened General Assembly of the said Church" (Free Church case: I - SUMMONS). Indeed, the reason why the Free Church stood against the Act of Union in 1900 also reflects this definition. The following reasons were given by them for refusing Union (cond.42):-

First, the new Church did not merely differ in name, "but does not recognise, and is under no obligation to recognise, the distinctive principles and standards of doctrine herein before mentioned as essential and fundamental in the Free Church constitution or contract";

Second, the said Union substituted as the basis of association, "a contract which is undefined, and which has deliberately been made susceptible of alteration from time to time at the hands of the General Assembly of the said United Free Church, *without any power to a minority to effectively object thereto";*

Third, it provided for admitting to equal rights in the government of the Church, and to the property held for the distinctive purposes of the Free Church, men who would never be called upon to accept the distinctive principles of that Church;

Fourth, it recognised Declaratory Acts which hitherto had not been binding upon those disapproving of them, but which now were binding;

Fifth, certain Acts and documents of the United Presbyterian Church were not law in the Free Church, but were "antagonistic to its principles".

According, therefore, to the case accepted and won in the House of Lords in 1904, the true Free Church of Scotland involves *a definite contract to maintain definite principles.* The Free Church must do three things: *profess, adhere to, and maintain* the fundamental principles as embodied within her own Constitution. As Lord Davey states:

> "That Church is a voluntary and unincorporated association of Christians united on the basis of agreement in certain religious tenets and principles of worship, *discipline,* and Church government"
> (Written Judgment of Lord Davey) [13]

It should be noted that in his Lordship's judgment, discipline constitutes one of the fundamental tenets or principles upon which the Free Church of Scotland is founded. The question now arises as to what is embraced within the Constitution of the Free Church of Scotland?

The supreme standard of the Free Church of Scotland is the Bible. All other standards are subordinate to this, and are themselves regulated by it.
On 31st May, 1851 the General Assembly by Act of Assembly sanctioned a volume containing the subordinate standards and other authoritative documents of the Church. The documents involved were those which the Church of

[13] The Free Church Of Scotland Appeals. p578

Scotland herself held as her subordinate standards, viz., the Westminster Confession of Faith, the Larger and Shorter Catechisms, and the Directory for Public Worship and form of Church Government agreed upon by the Assembly of Divines at Westminster in 1643.

The Questions and Formula used when licensing a probationer, and that used at the ordination of deacons, elders and ministers, were amended by an Act of Assembly in 1846 to take account of the Disruption of 1843. The men of 1900 referred to this in their pleadings at the civil court: this Act was, "in entire accordance with the origin and construction of the Free Church, and accordingly recognised the said Confession of Faith as the test of their profession to be imposed by subscription upon her ministers and elders." (Free Church vr. Overtoun & Others: cond. 9) From this, it could be argued that our ordination vows constitute the 'definite contract of definite principles' mentioned earlier.

They also go on to state that the contract of association which binds Christians within the Free Church of Scotland "is constituted by the foresaid Claim of Right, Declaration, and Protest of 1842, Protest of 1843, and Act of Separation and Deed of Demission of 1843, and the Acts of Assembly of the Church of Scotland, in so far as not modified thereby". (General Trustees Case 1900 - cond.10) The contract of association or constitution of the Free Church under which it was associated, "contains no provision for any alteration being made in the essential principles of the said constitution and standard of belief, by any mere majority, however large, of the members for the time being of the said Free Church." (cond. 11)

Thus the men of 1900 laid great stress on the Claim, Declaration and Protest of 1842 as the deed which united the Church. Within this Claim in 1842 the Standards of the Church are shown to have been:-

(a) The Westminster Confession of Faith
(b) The First and Second Books of Discipline
(c) The whole Acts of the Church of Scotland before 1843.

A Committee was set up and reported to the General Assembly in 1864. This committee had the task of identifying the documents which were of authority in the Church. It identified two distinct areas:-

1. Subordinate Standards binding on the conscience:-

(a) The Formula subscribed by probationers
(b) The Westminster Confession
(c) The Claim of Rights and Protest 1843

2. Documents adopted by the Church and still more or less illustrative generally of her position and principles:-

(a) The First Book of Discipline
(b) The Second Book of Discipline
(c) Larger and Shorter Catechisms
(d) Documents on Discipline, viz. 'The Form of Process' and the Acts of Assembly 1853 and 1854 there anent.

The Form of Process - This deals with the question of discipline within the Church and has a direct bearing on the case today. The Assembly worked on this from 1696 - 1705. Having been circulated around Presbyteries and Committees, it was unanimously adopted by Act of Assembly in 1707, "to be observed and practised by the respective judicatories of this Church as an act and ordinance of Assembly, and as fixed binding rules and directions in the whole matters therein contained....."(see Appendix 4). This Act was one of the Acts of Assembly included in those adopted in 1843 by the Free Church of Scotland. The Free Church Defence Association in 1873 included it in the Memorial to Counsel as part of "the deeds in which the Constitution of the Free Church is to be sought." [14] A Counsel's Opinion included it when confirming that: "The Free Church of Scotland has a Constitution which could be recognised by the Civil Courts in determining disputed questions of right to property belonging to that Church" [15] In the Free Presbyterian Deed of Separation of 1893, the Acts of Assembly of the Church of Scotland prior to 1843 were included as constitutional documents. Furthermore, these same Acts, including *The Form Of Process,* were among the documents listed in the House of Lords' Appeal Case in 1904, said to be, 'constituting documents' of the Free Church, forming the basis of the contract of association or, 'constitution of the Free Church of Scotland under which it was first constituted." [16]
Thus, for nearly 300 years the Form of Process has remained substantially unchanged - all subsequent acts simply explain, amplify or update matters. It has been the undisputed manual of Church discipline within the Church during

[14] Free Church Principles, James Begg p.142

[15] *Ibid.* p.246

[16] Free Church Appeals Case 1904. Condescendence for Pursuers. cond.10-11.

this period, and has been universally recognised as the form of discipline under which one puts oneself in being ordained to office in the Free Church. Even during the recent troubles it was never suggested that the Form of Process was obsolete or that our relationship to it should be changed.

The Practice of The Free Church of Scotland In Her Several Courts (The Blue Book) - this book was first published in 1871 by authority of the General Assembly. It has been revised nine times.[17] It attempts to codify the procedures adopted by the Free Church of Scotland, and to facilitate an acquaintance with the laws and constitutional practice of the Ecclesiastical Courts of the Church. While it is not itself a constitutional document, and is to be used simply as a guide book, it does reflect the generally accepted practice of the Church for the past 130 years. So far as Church discipline is concerned, it sets out the authorised processes which the Church has accepted as the biblical norm, practices which are therefore in conformity with the constitutional position of the Church.

Conclusion: From the above information, the following can be quite legitimately argued regarding the true Free Church of Scotland :

1. The various Courts of the Free Church of Scotland, and the office-bearers therein, are bound by a definite contract involving the maintenance of definite principles.

2. This definite contract involves the demanding by these Courts on the one hand, and the taking by office-bearers on the other, of specific ordination vows.

3. Our vows bind us to the definite principles contained within the supreme standard of the Church (the Bible) and the other subordinate standards as defined above i.e. we are to *profess, adhere to, and maintain* these definite principles.

4. These vows also bind us to each other as 'a body of Christians associated together'.

5. No person is compelled to take these vows i.e. it is a 'voluntary association'.

6. The means of enforcing this definite contract - and thus safeguarding the definite principles involved - is by the use of properly exercised Church discipline - which discipline is not indefinite but known and accepted.

The contract of association or constitution of the Free Church of Scotland as defined above must mean that office-bearers are obliged to protest, and to continue to protest, when Christian principles are at stake. To remain silent would be to violate the definite contract into which we enter as office-bearers of the Church, and would ultimately be a denial of the Church's very existence. In such a situation, to continue to protest becomes a duty. This is as equally valid today as it was in 1843 and 1900.

The form of Church discipline as outlined within 'The Practice of the Free Church of Scotland in Her Several Courts' (The Blue Book), which is itself based upon biblical principles, is designed to safeguard the Church's integrity in this regard. Its objective is at least threefold:

(i) to prevent as far as is possible any departure from Christian principles and standards;

(ii) in love to recover those who transgress, and;

(iii) to safeguard the rights of all, including those who have vowed to defend such principles.

While the biblically recognised form of discipline as set out in *The Practice and as defined within The Form of Process* is adhered to there is no room for continued protest. On the other hand, when such discipline is departed from and - as in the case in question today - an arbitrary form of discipline is introduced based more on expediency than principle, the possibility of men being required by conscience to continue in protest becomes very real.

Constitution v Assembly

The above leads on to the question of the General Assembly: what role does it play and what is the nature of the authority it possesses? The assumption upon which the majority party in the Free Church of Scotland proceeded to remove 22 ministers from their pulpits on 20th. January 2000 was that the Assembly is the highest earthly authority in the Church. Repeatedly it was asserted that one could bring an appeal to the Assembly, but once the Assembly had made its decision that was the end of the matter. One could dissent, even submit a written Protest (although some appeared to doubt even this right), but one then had to 'leave it to the Lord'. Conscience must be satisfied with a

[17] The 1964 edition (Seventh edition) of *The Practice* is used for the most part throughout this work. The eighth (1995) edition is referred to in the later stages of the document.

dissent or written Protest. If conscience was not satisfied then the only recourse was to leave the Church. This was stated on a number of occasions within the Assembly, within overtures accepted and endorsed by the Assembly, within congregations, within the Monthly Record (the official magazine), and within Presbyteries. Yet is this correct?

There is no doubt that the Bible and the subordinate standards of the Free Church give a very high place to the authority of the ordained courts of the Church, including the General Assembly. The various vows reflect this:

> At Licensing:-
>
> "Do you promise that in your practice you will conform yourself to the said worship, and submit yourself to the said discipline and government of this Church, and not endeavour, directly or indirectly, the prejudice or subversion of the same" (Probationer before Licensing. Qu.6) [18]
>
> At Ordination:-
>
> "Do you promise to submit yourself willingly and humbly, in the spirit of meekness, unto the admonitions of the brethren of this Presbytery, and to be subject to them, and all other Presbyteries and superior judicatories of this Church....." (Probationer after being called by Congregation; Qu.6) [19]

Respect for the authority of church courts has never been an issue with those of us who were removed from our pulpits on 20th. January 2000. Not one of us would have these vows either relaxed or softened in any way. We are bound by the Word of God and therefore the Constitution of our Church to be law abiding members of Church and State. This we accept fully. We submitted to decisions that we considered *ultra vires* and were willing even to apologise for any disrespect that may inadvertently have been given to the Courts. Yet we do not accept that church courts possess such absolute authority as is now expressed within the Residual Body, and we do not accept that church courts can impose such decisions upon the conscience.

Again, the case of 1904 helps us understand the relative authority possessed by church courts. The Pursuers (the forefathers of the present Free Church), in defining the Free Church of Scotland, declared:

> The individual pursuers became members, ministers, or office-bearers of the said Free Church of Scotland under and in reliance upon its constitution as herein before defined. (Free Church vs. Overtoun & Others: Condescendence cond.12)

It should be noted that it is 'under' and 'in reliance upon' the constitution of the Church that we are associated together as the Free Church of Scotland, not 'under' or 'in reliance upon' church courts. The reason for this is obvious - the highest earthly authority is not church courts but the Constitution of the Church. All members, ministers and office-bearers are under the authority and discipline *of* the Constitution, which discipline is exercised *by* church courts. We rely upon the Constitution to settle all matters of faith and doctrine, and to adjudicate in matters of controversy. This 'being under' the constitution covers all members of the Church in whatsoever role they may play e.g. individuals acting in a corporate manner within church courts are equally bound to be under, and to rely upon, the Constitution of the Church. They are so upon their own account. Yet they are so for another reason. Church courts are themselves under the authority and jurisdiction of the Constitution.

The General Assembly has no absolute authority. Its authority, along with that of its members, is derived from the Constitution. Its actions are therefore limited to actions within a Biblical and constitutional framework. It has no authority to go beyond this framework, and has therefore no authority to impose upon the conscience of its members decisions that are not in accordance with the Constitution's dictates. It has no authority to stop members from exercising their duty to continue to protest against decisions that are unconstitutional, nor to exclude from its communion anyone without first invoking the discipline as defined by the Constitution.

The Westminster Confession of Faith again throws light on this:-

> God alone is Lord of the conscience, and hath left it free from the doctrines and commandments of men which are in anything contrary to His Word, or beside it, in matters of faith or worship. So that to believe such doctrines, or to obey such commandments out of conscience, is to betray true
>
> liberty of conscience, and the requiring of an implicit faith, and an absolute and blind obedience, is to destroy liberty of conscience, and reason also." [20]

[18] The Practice of the Free Church of Scotland (1964 edit.) - p125

[19] *Ibid.* p125

We agree with much of the contents of an article written in 1988 by Prof. Donald MacLeod of the Free Church College in which he deals with the rights, liberties and freedoms of Church members, and the restraint upon obedience to church courts. Professor MacLeod aptly describes the religious principle which is the subject of our case, that even the General Assembly cannot forbid what God commands or command what God forbids, and the Christian duty in such a circumstance to continue to protest :

> "We are absolutely free from any human directive which contradicts Scripture. This is not confined to "matters of faith and worship" (which is why there is a semi-colon, not a comma, after word). It applies in anything. An anti-Scriptural instruction is never binding, whether it comes from the Fuehrer or from Winston Churchill, from Hospital Matron, Consultant Surgeon, Army General, Pope or General Assembly.
>
> This was the anvil that shattered Stuart absolutism. The King thought that his authority gave legitimacy to whatever he commanded. The Puritan conscience said, "No! You can't forbid what God commands or command what God forbids." In that No! the struggle for freedom was born: a struggle which would never have gained momentum had the principle itself not been invested with religious significance. The Cromwellian army was fighting not for a mere social contract, but for a god-given privilege: indeed, for a blood-bought one. Christ had died to make them free. How could they return to the yoke of bondage?" [21]

Strangely, Professor MacLeod was at the centre of what took place on 20th January 2000 and, by so doing, gave at least the appearance of contradicting his views as expressed in the article just quoted.

Conclusions: (i) **General Assembly Under Authority** - The majority party constituting the pretended Free Church of Scotland today may still theoretically hold its constitutional documents intact. We do not deny this. This, however, is insufficient for it to be considered true to its trust: it must go further. Its courts must be 'under' these constitutional documents. History again supports us in this view.

The men of 1900 rejected the Declaratory Act which was introduced in 1892. Why did they protest for eight years and consider the Act *ultra vires*? Why did they reject it again in 1900, and why did they win their case in the House of Lords in 1904? Because they recognised that to accept this Act was to give the General Assembly power *over* the constitution and not *under* the constitution. The last clause of the Declaratory Act (Act of Assembly 1892, no.8 of Class II) placed in the hands of the General Assembly a power and authority which our forefathers were not willing to accede to. This Act meant that the Assembly was: "claiming for the first time the authority to determine what points in the Confession of Faith entered and what points did not enter into the substance of the Reformed Faith."[22] Thus it constituted *itself* the supreme authority on questions of belief, and by so doing robbed the Constitution of its rightful place as the highest authority. In other words, the General Assembly was *above* rather than *under* its authority. The men of 1900 were declared the true Free Church of Scotland by the House of Lords, and thereby entitled to the name and goods applicable thereto.

Mr. Johnston K.C., speaking in the House of Lords on behalf of the Free Church in 1904, examined the constitutional documents of the Free Church going back as far as the Acts of Parliament and of Assembly from the Reformation onwards, and clearly showed that the power of legislation possessed by the Church all along was a power that operated within clearly defined constitutional limits.

As Professor Donald MacLeod quite rightly says, these things are not restricted to matters of faith and worship. *They embrace all matters, including discipline.* On 20th January 2000, the majority within the General Assembly sought to impose upon office-bearers decisions that were unbiblical, and a form of discipline that left the various ministers involved no option but to declare the Commission of Assembly unlawful and to reconstitute elsewhere. All they sought was for the Church to return to Biblically based church discipline - the discipline the Constitution demands, the discipline to which we all submit at ordination. However, by taking to themselves procedures alien to the Constitution, by making decisions contrary to natural justice, and by then refusing to allow us to continue to protest against these procedures and decisions, the relative position of the Courts of the Church in relation to the Constitution of the Church was fundamentally changed.

(ii) **The Bar of Appeal** - if it is accepted that the courts of the Church are under the authority of the Constitution, this automatically implies that the General Assembly is not the highest bar of appeal. If no satisfaction is gained within the highest Court of the Church, one may still appeal to the Constitution of the Church. If all has been enacted according

[20] Westminster Confession of Faith. Ch. XX.ii

[21] Monthly Record, April 1988, "Calvinism & Freedom": Prof. Donald MacLeod

[22] Free Church of Scotland Appeals. Condescendence cond.20

to the Constitution then the Constitution will ratify the verdict of the Assembly and no further earthly appeal is available - one must bow to the decision of the highest court of the Church, dissent if need be, and leave it to the Lord. If, however, the Constitution of the Church gives a judgment condemning the actions and verdict of the Assembly, then one has the right to appeal to the Constitution and to continue to protest. We would be as justified in removing from a man the right to appeal from the lower courts of the Church to the higher Courts, as to remove the right of a man in the General Assembly to appeal to the Constitution. Without this, it can be seen how in such a circumstance, a form of organised tyranny by a simple majority could prevail with no ultimate right of appeal by an aggrieved minority. This is what has prevailed within the Free Church of late. Yet this is exactly the position that the House of Lords condemned in 1904 in awarding our forefathers the title 'Free Church of Scotland'.

(iii) **Charge of Contumacy -** the charge of contumacy (disobedience to Church Courts) is a very serious crime indeed. It is spoken of in the Form of Process as 'a gross scandal'. Yet this is the charge that was levelled against those ministers who were dealt with on 20th January. Indeed, this is the one and only charge that has been applied within the courts of the Church of late. However, both within The Practice of the Free Church of Scotland in Her Several Courts, and within the Form of Process, there are only two interpretations given for the crime of contumacy.

Firstly, within *The Practice Of The Free Church of Scotland* the use of the word contumacy is reserved for those who refuse to appear before a Court of the Church when duly cited:

> If a party do not appear after a third citation, or after a citation *apud acta,* which has been regularly recorded....and if no relevant excuse be adduced or verified, such party is liable to censure for contumacy.[23]

The most prominent use of the word contumacy within the *Form of Process* is given in Chapter II, and is also for non-appearance when cited by a Court of the Church:

> All citations *apud acta* are peremptory, and if instructed, infer contumacy, if not obeyed.
> If the person do not appear on the third citation, or upon a citation *apud acta,* and no relevant excuse be adduced and verified, though in that case he be censurable for contumacy.....[24]

Secondly, while the *Form of Process* does not specify any other crime of contumacy than that of a refusal to appear before a Church Court, it does indicate that simple disobedience to the verdict of a Court of the Church involves the crime of contumacy e.g. if a guilty person under the censure of lesser excommunication frequently relapses into the sin for which he has been censured, this; "may be constructed such *a degree of contumacy*.....as to found a process of the censure of the higher excommunication....." [25]

Thus contumacy, according to the Constitution of the Church, is restricted to:

(i) A refusal to appear when duly cited by a Court of the Church, and

(ii) A refusal to refrain from scandalous behaviour *after having been convicted* by a Court of the Church.

The simple definition of contumacy is 'deliberate defiance of the authority of a Church court'.[26] However, as is seen above, it is not just *any* disobedience, and it certainly cannot imply blind obedience. It is disobedience to legitimate authority properly exercised. Contumacy is nowhere described within the Form of Process as a refusal to obey Church Courts *per se.* Why is this the case?

Contumacy, as defiance of the authority of a Church Court, must imply an incontrovertible authority on the part of the Court involved. In the case of citation, a Church Court has such authority, as:

> These assemblies or Church judicatures before mentioned **have power to convene and call before them any person within their own bounds**, whom the ecclesiastical business which is before them doth concern, either as party, witness, or otherwise, and to examine them according to the nature of the affair, and to hear and determine in such cases as shall orderly come before them, and accordingly dispense Church censures.[27]

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[23] Practice of The Free Church of Scotland (1964 edition). Chapter VI. Part I. para.12. p.75

[24] The Form of Process. Chapter II. para 5 & 6

[25] *Ibid.* Chapter III. para 6

[26] The Form of Process (eighth edition). Chapter V. part ii. para 7

[27] *Ibid.* Chapter I. para 5

A Church Court has also the authority and duty to deal with those *rightly convicted* of scandalous behaviour - to argue otherwise would be to invite anarchy in the Church. However, the Form of Process knows nothing of obedience to Church Courts *per se.* Thus, even though contumacy is described as a gross scandal, it is not found within the list of specific misdemeanours recorded in *The Form of Process.* This list speaks of swearing, cursing, profaning the Lord's Day, drunkenness (Chapter III); fornication and adultery (Chapter IV). Yet a specific sin of contumacy is not included. The opinion of the Westminster Confession of Faith is pertinent as to why this is the case. It not only describes God alone as the Lord of the conscience, but bears the following witness regarding Church Courts:

> All Synods or Councils since the Apostles' times, whether general or particular, may err, and many have erred; therefore they are not to be made the rule of faith or practice, but to be used as an help in both. (Westminster Confession of Faith. ch.31. para IV)

This is surely the reason why the Constitution of the Free Church restricts the crime of contumacy to these two areas. Only in these two areas can Church Courts claim an *absolute* right to obedience. The arbitrary use of contumacy in any other area implies an absolute authority that the Constitution of the Church does not recognise. Thus, in all other areas the Church must *prove its authority* by a proper examination of the facts. In disciplinary cases, this involves bringing an accused person to trial for his specific crime (drunkenness, slander, heresy etc.) and to prove his guilt. If he refuses to appear to answer for his crime he may be found guilty of contumacy. Or, having been found guilty of the crime, he refuses to refrain from continuing in the offence he may be found guilty of contumacy and may ultimately be excommunicated. In the latter case the Church has proven its authority by due process of discipline. In other words, after due trial of the facts it can act with authority. To argue otherwise could simply lead to every ecclesiastical offence being reduced to the crime of contumacy and to Church Courts becoming instruments of tyranny.

This was the reason why the ministers on 20th January 2000 agreed to appear at the Bar of the Commission - *they recognised the rightful authority the Commission had to cite them.* Had they refused to appear, that would have been contumacious. Had they been tried and found guilty of a crime that "hath been declared censurable by the Word of God, or some act or universal custom of this National Church agreeable thereto," [28] and then refused to desist from the crime this would have been contumacious. However, the Commission of 2000 failed to prove that it had the authority to impose the mind of the majority on the minority. Behind what took place on 20th January 2000 was the accusation that brethren were guilty of slanderous behaviour. Indeed, it was the offence of 'slander' that the 1995 Assembly declared should be levelled against any persisting in raising the matters against Prof. Donald Macleod. Yet the charge of slander was never employed. The brethren were charged with contumacy. However, the Constitution recognises no such arbitrary use of the crime of contumacy, because the Assembly has no absolute authority to simply impose the will of a majority on a minority without first proving the correctness or otherwise of its case - something the majority in the Assembly refused to do.

Again we see how, on 20th January 2000, by the arbitrary use of the charge of contumacy, the relative position in which the Courts of the Church stand in relation to the Constitution of the Church was fundamentally changed, in that an attempt was made by the majority to manipulate charges against brethren to give to Church Courts a power which they do not have under the Constitution.

Ordination Vows

The Westminster Confession of Faith regards the taking of any vow so serious that it devotes one whole chapter to the subject. It states: "Whosoever taketh an oath, ought duly to consider the weightiness of so solemn an act, and therein to avouch nothing but what he is fully persuaded is the truth. Neither may any man bind himself by oath to any thing but what is good and just, and what he believeth so to be, *and what he is able and resolved to perform*." (W.C.F. ch. XXII - para III) The principle is clear: "Better is it that thou shouldest not vow, than that thou shouldest vow and not pay" (Ecclesiastes 5:5) Thus, the Free Church of Scotland, by her own Constitution, demands that all vows taken must be performed with all faithfulness.

Before taking up office within the Free Church of Scotland specific vows are required. Furthermore, prior to being translated from one congregation to another, ministers are required to reassert their vows. A list of the vows in question is included (see Appendix 5).

A number of points may be noted regarding this:

(a) While the vows are voluntarily taken, they are imposed on the part of the Church;
(b) A Minister may require to repeat his vows several times in the course of his life;
(c) The vows - taken before God and in front of a congregation - bind the conscience of the pledger to certain fundamental principles believed by the Church;

[28] The Form of Process (eighth edition). Chapter I. para. 4

(d) The vows are arranged by way of priority. The general arrangement is as follows:

- ➔ Vows to the Scriptures as the Word of God and the only rule of faith and manners;
- ➔ Vows to the Confession of Faith as the confession of our faith, with the promise to 'firmly and constantly adhere thereto' and 'to assert, maintain, and defend the same';
- ➔ Vows disowning all doctrines contrary to the Confession of Faith;
- ➔ Vows regarding Presbyterian Church Government with a promise to defend the same;
- ➔ Vows regarding purity of worship (exclusive Psalm singing without accompanying music); [29]
- ➔ Vows regarding the Spiritual independence of the Church;
- ➔ Vows regarding subjection to the several judicatories of the Church;
- ➔ Vows regarding the specific office to which one is being inducted, and personal vows regarding the duties there anent;

(e) No vow taken can contradict a previous vow given;
(f) These vows must, if they are to mean anything, dictate the course of action a person must take in certain circumstances e.g. it may demand a continued protest.

The vows are not given in a random fashion. The first vow stands on its own: The Word of God is the supreme standard. All subsequent vows flow from this. Thus, obedience to the several judicatories of the Church (including the General Assembly) - as one of the last vows - is qualified by the previous vow taken to the Word of God i.e. one cannot be subject to any Court of the Church, nor vow to be so, if such subjection involves the denial of Biblical principles. If this were the case, the Church would be demanding contradictory vows from her office-bearers. This point is particularly significant when one considers the following two vows imposed upon Probationers:

> Are you persuaded that the Presbyterian government, and discipline of this Church are founded upon the Word of God, and agreeable thereto; and do you promise to submit to the said government and discipline, and to concur with the same, and not to endeavour, directly or indirectly, the prejudice or subversion thereof, but to the utmost of your power, in your station, to maintain, support, and defend the said discipline and Presbyterian government by Kirk Sessions, Presbyteries, Provincial Synods and General Assemblies? (Formula & Questions. III - Probationers at Ordination. Qu. 4)
>
> Do you promise to submit yourself willingly and humbly, in the spirit of meekness, unto the admonitions of the brethren of this Presbytery, and to be subject to them, and all other Presbyteries and superior judicatories of this Church.....and that, according to your power, you shall maintain the unity and peace of this Church against error and schism, notwithstanding of whatever trouble or persecution may arise, and that you shall follow no divisive courses from the doctrine, worship, discipline, and government of this Church? (Formula & Qu. III - Probationers at Ordination. Qu. 6)

It should be noted that Church Government and Church discipline are mentioned separately, the latter being a function of the former.

A number of things follow from these two vows:

(i) They assume that Church discipline is one of the functions of Church government;
(ii) They assume that there is a known form of government within the Free Church which exercises a known form of discipline to which we can vow;
(iii) They assume that such government *and* discipline are 'founded upon the Word of God, and agreeable thereto';
(iv) They bind the pledger not to endeavour, directly or indirectly, the prejudice or subversion thereof;
(v) They bind the pledger to maintain. support, and defend the said government and discipline i.e. to defend discipline *'founded upon the Word of God, and agreeable thereto'*.

As we have already noted, Lord Davey assumed Church discipline to be one of the religious tenets or principles which identifies the true Free Church of Scotland.

Conclusion: (i) **Responsibility of Church Courts** - the vows imposed upon ministers can be represented as a "*definite contract* involving the maintenance of *definite principles*." (Free Church vr. Overtoun & Others: Condescendence for Pursuers. cond. 10) As with any contract, there are two parties involved. On the one hand, Ministers must be faithful to their Ordination vows while, on the other hand, the Church has a responsibility to be faithful to the trust committed to Her. Church Courts, therefore, have the responsibility to be faithful to the same principles they impose upon office-bearers. Were this not so, it would be a case of the Church saying, 'Do what I say, not do as I do'. Indeed, they have the responsibility to encourage and defend those who seek to faithfully fulfil their ordination vows. It is therefore the

[29] Since 1932, at Ordination and Induction prior to putting the appointed questions to the Ordinand, a statement is read regarding the practice of the Free Church to avoid the use in public worship of uninspired materials of praise as also of instrumental music.

Church's duty to ensure, as far as is within her power, that what she imposes by way of vows, *the pledger is able* as well as resolved to perform. (W.C.F. ch. XXII - para III) Further, as Lord Davey noted in 1904;

> "The right of the Assembly to impose any innovations from established doctrine on a dissentient minority, and the limit of such right (if any) must be found in the constitutional powers of that body, *and must be proved by evidence.*" [30] (Lord Davey's Opinion)

We believe that the draconian measures exercised by the General Assembly over the last few years in removing the right of free association, the right of free speech, and in removing ministers from their pulpits for seeking to defend discipline 'founded on the Word of God, and agreeable thereto' cannot be proven to be within the constitutional powers of the Free Church.

(ii) **Responsibility of Office-bearers -** The Ordination vows bind the conscience of every minister of the Free Church of Scotland to maintain, support, *and defend* Church discipline. The form of discipline to be defended is particularly specified, as that: "founded upon the Word of God, and agreeable thereto." Thus, it is a specific right and duty attached to the ministry of the Free Church of Scotland that her Ministers defend the biblical and constitutional form of discipline. While they are able to exercise this right, they fulfil their Ordination vows and, as such, they are not prevented from being Free Church Ministers. Remove this right, and they are not only prevented from fulfilling their ordination vows, they are curtailed from being what they vowed to be - Free Church Ministers

We believe that, like the forefathers of the Free Church between 1892 and 1900, this defence may ultimately take the form of 'continued protest'. However, when a majority in the General Assembly disallows the right to continue to protest against a failure to exercise biblical discipline, they are actually obstructing ministers in the fulfilling of their ordination vows. They remove the last place of refuge for a conscience seeking to be faithful, and thereby prevent men from being what they have vowed to be. Ministers in that situation are forced to recognise that the majority have defected from the Free Church of Scotland as defined by its own standards, and so are forced to reconstitute simply for themselves to remain as *The Free Church of Scotland.* We believe this is what happened on 20th January 2000.

<u>The Supreme Duty of the Church</u>

Free Church ministers have duties placed on them by the Word of God and by their ordination vows. While civil courts have the responsibility to administer the civil law, so church courts have the responsibility to administer church law. As the civil magistrate has a duty to be an example within the community, so ministers have a duty to be examples to the world. Yet there is one supreme duty exclusive to the Church and to the ministry: that of preaching to others. This duty of preaching includes bringing before the State the continuing obligation of the Ten Commandments. The Westminster Confession of Faith puts it this way:

> "God gave to Adam a law, as a covenant of works, by which he bound him, and all his posterity, to personal, entire, exact, and perpetual obedience; promising life upon the fulfilling, and threatening death upon the breach of it....." (W.C.F. XIX. para I)
>
> "This law, after his fall, continued to be a perfect rule of righteousness; and, as such, was delivered by God upon Mount Sinai in ten commandments....." (W.C.F. XIX. para. II)
>
> "The moral law doth for ever bind all, as well justified persons as others, to the obedience thereof...." (W.C.F. XIX. para. V)

It follows from this that certain conduct could be condemned within the Church which would not necessarily be outlawed within the civil sphere. For example, adultery is condemned by the seventh commandment and is a matter for disciplinary action within the Church. Adultery, however, is not directly illegal within the state. For all this, there is still the duty placed on the Church to continue to preach against it. The Establishment Principle dictates that we have to "proclaim the law of God to the State so that the State governs in accordance with Biblical principles." [31]

If this be the case, breaches of the Ten Commandments within the bounds of the Church (e.g. adultery, perjury) dealt with lightly or in a perfidious manner, would bring the Church under the charge of hypocrisy and would bring the gospel into disrepute. The mouths of Ministers would be stopped, lest they preach to others what they refuse to practise themselves, and condemn in others what they do not condemn among themselves. This is no doubt why *The Form of Process,* [32] in dealing with 'Processes against Ministers', speaks in the following terms:

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[30] Free Church Case 1904. Lord Davey's Opinion.

[31] Crown Him Lord of All by Rev. Clement Graham. p51

[32] The Practice of the Free Church of Scotland. Form of Process. ch. VII. 2

> "The credit and success of the gospel (in the way of an ordinary mean) much depending on the entire credit and reputation of ministers, their sound doctrine, and holy conversation, no stain thereof ought lightly to be received, nor when it comes before a judicature ought it to be negligently inquired into, or when found evident, ought it to be slightly censured."

In a *'Catechism on the Principles and Constitution of the Free Church of Scotland'* published by authority of the Publication Committee of the General Assembly in December 1845, and subsequently endorsed by the General Assembly itself in 1847 as "containing a valuable summary of this Church's history and exhibition of her distinctive principles, from the beginning of the Reformation to the present time", the question of church courts breaching Christ's Biblical rule and Headship is dealt with as follows:

> *Question 148*: Has the principle of Christ's Headship, in respect of authority, an important bearing on the purity and progress of the Gospel, and the edification and increase of the Church?
>
> *Answer*: It has. To intercept the communion of spiritual office-bearers with Christ himself, and his mind and will as contained in the Bible, whether as regards doctrine, discipline, or ecclesiastical administration, must have an injurious effect on the feelings and character of the office-bearers themselves, and must act perniciously on the interests of the Gospel and the true prosperity of the Church. (Matthew 6:24; Galatians 1:10) [33]

This argument becomes all the more potent when one considers the number of occasions in recent years where immoral conduct has been uncovered within religious organisations e.g. church office-bearers being accused of adultery and the sexual harassment of women and children, and those in charge of Children's Homes being found guilty of sexual abuse. The guilt that accrues to the organisation involved, as opposed to the individual, quite rightly lies in the lack of appropriate and timeous action to deal with the offence.

Thus, the matters contended for by those ministers disciplined on 20th January 2000 are not insignificant nor are they immaterial. They are not minor matters of administration or of faith. They enter into the very heart of the Church's *raison d'être.* They regard the Church's supreme duty of preaching the Gospel and Her integrity before the world. While ministers were able to continue to protest against incorrect and insufficient decisions of Assembly, they were able to appease their consciences before God - they continued to do what they could to establish the guilt of the guilty, as well to clear the good name of the innocent. When a majority in the General Assembly stopped them doing even this, it effectively closed their mouths on all moral issues. How can we tell anyone else to put their house in order if we fail to clean our own doorstep, and how can we address the conscience of others if we are forced to ignore our own conscience which condemns us?

Addendum

In light of the foregoing, we strenuously maintain that the majority decision of the Commission of Assembly to remove Ministers from their ministerial duties on 20th January 2000, which decision was subsequently ratified by the General Assembly on 24th May 2000, was an unconstitutional interference with the rights and liberties of Ministers of the Free Church of Scotland, and was a violation of the true principles of the bond between the Church and her Clergy i.e. it was a violation of the principles of Presbyterianism which postulates an engagement between ministers and elders to regulate their relations on the grounds of the constitution rather than on the basis of majority rule.

Further, we maintain that it was a fundamental departure from the principle undergirding the Claim of Right of 1842 and the Protest of 1843, and a denial of the stand made by the Free Church between 1892 and 1900. In these circumstances, we found ourselves unable to submit with a good conscience to the existing restraint imposed by the decision and, accordingly, on 20th. January 2000 declined to recognise the majority ruling of the Commission of Assembly as being in contravention of the Constitution. The minority therefore reconstituted as the continuing Free Church of Scotland. When the General Assembly of the Residual Body ratified all the decisions taken earlier by the Commission of Assembly it was, in effect, adopting unconstitutional principles which violated her right to the title The Free Church of Scotland.

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To establish that the body formerly known as the Free Church of Scotland departed from this principle and that on 20th. January 2000 its Commission of Assembly separated from those holding to it; that at the General Assembly on 24th May 2000 a majority convening and voting there ratified this position; and that consequently the body now temporarily known (for administrative purposes only) as the Free Church of Scotland

[33] Catechism On The Principles And Constitution of the Free Church of Scotland.

(Continuing) is the true Free Church of Scotland, and that the title 'Free Church of Scotland' resides with it as does all the property, goods, and funds relevant thereto.

We now seek to show that the majority meeting at the Commission of Assembly as met on 20th January 2000 so violated the trust that was placed into its hands that it could no longer be seen as acting on behalf of the true Free Church of Scotland, and that the General Assembly as met on 24th May 2000 - in ratifying such decisions on behalf of the Residual Body - broke the terms of the trust placed into its hand as the Supreme Court of the Church. In so doing, we believe that it is our responsibility to prove three things: firstly, that the issues protested against were so serious as to warrant a continued protest; secondly, that the Constitution of the Church supplied an appropriate answer to the problems, thus affording us the right to continue to protest; and, thirdly, that by the actions of the majority of the Commission of Assembly and of the General Assembly an attempt was made to deny us the right to continue to protest. We believe that the following case history proves all three points conclusively.

Our case is set out as follows:

I A Background Summary of the Case;
II. The General Assembly's Findings; [34]
III. The Church's dealings with individuals;
IV. Closing Questions.

I. A Background Summary of the Case

This brief background summary introduces the crux of our case and the reasons why a minority of office bearers and members of the Free Church felt compelled to insist that disciplinary procedures be taken against either Donald Macleod, or some of its ministers and members who were accused of conspiracy and lying in a secular court. Their persistence in this led finally to their being accused of contumacy by a majority in the Free Church Assembly.

In 1988, allegations of sexual assault were made against Professor Donald Macleod. Again, in 1989, allegations of adultery involving Professor Donald Macleod were brought before the Training of the Ministry Committee of the Free Church (T.o.M.) which acts not as a court, but as something akin to the Procurator Fiscal. It investigates whether or not there is a case to answer In 1992 another young woman alleged that she had been sexually assaulted by Macleod at the Free Church College. Subsequently, because no charges had been brought before a church court, and because the Professor had not been suspended, two English ministers complained (since English students attend the Free Church College from time to time). In 1994 three other women brought further complaints before the T.o.M. The two original complainants went separately to the police, frustrated that their case was not being dealt with appropriately by the Church and, in the case of one, because she felt threatened by statements of Macleod appearing in the press. The Fiscal then contacted the other three women and subsequently charges were brought against Donald Macleod.

He was tried in a summary court in June 1996. He was acquitted by the Sheriff, who also damningly indicted some 12 men (ministers, elders and members of the Free Church, and others) as conspirators who had perverted the course of justice; and judged the women to have lied as co-conspirators. The 'conspirators' were not present in court and so were unable to defend themselves from the counter charges brought against them by Macleod and his counsel. After public calls for the 'conspirators' and women to be charged on the basis of the Sheriff's allegations, Crown Counsel investigated them and found that 'neither further investigations nor further proceedings would be justified'. However, the media gave little publicity to this, and continued to widely publicise the Sheriff's remarks, and those of Macleod and his supporters. Whenever Free Church matters are reported, the Sheriff's legend is invariably repeated. As recent as 22nd December, 2000 a report in the *Ross-shire Journal* (page 8 'Last week on the Farm') stated that the Free Church was rent apart "by a small minority of vindictive characters, unable to accept that Professor Donnie Macleod was found not guilty of the various charges *which they had hatched against him*."

Free Church people have a great respect for law and authority and due procedures, both secular and ecclesiastical. In the wake of the Sheriff's remarks many of those accused, and their friends, felt overawed and even afraid. They realised that the press and many powerful friends of Professor Macleod were against them. For a time they were unable to think of any way of clearing their names. Free Church ministers who had access to T.o.M. committee papers felt duty-bound to keep these confidential even for some years after the trial. Yet it is believed that these papers would have done much to demolish the conspiracy theory.
In a small denomination like the Free Church of Scotland, Professor Macleod had an intimate knowledge of many interrelated families. He could rely on an unwritten code of conduct, by which ministers would close ranks in order to protect the good name of the whole denomination. At the time of the secular trial most Free Church members were entirely dependent on the media for information about Macleod. Indeed many of the clergy had little knowledge of what had happened in the foregoing years in the T.o.M. committee. Amongst the laity too there was a strong loyalty to the clergy and a wish to avoid washing the church's dirty linen in public. There was a strong belief that the Free

[34] A file containing all other relevant Assembly and Commission papers has been compiled and may be referred to.

Church was doctrinally and morally purer than other denominations - this justified its very existence as a separate denomination. It was felt that if the Professor were guilty that *raison d'être w*ould be jeopardised. People sincerely wished to believe the best. For these reasons it was especially difficult for further complaints against the Professor to be made. Yet they were made because of the strong adherence of some to the traditional right of continued protest which is outlined in this paper, and to the belief that discipline is an indispensable feature of any Protestant Reformed denomination. These two features with its subordinate standards and Practice make the Free Church *the* Free Church, rather than any supposed superiority in doctrine and morals. Yet they are not unrelated.

In 1995, the General Assembly came to a *finding* that was to be used over the succeeding five years to stifle all endeavours to address the problem. An important aspect of our case is to show that this finding was non-judicial and therefore open to review. We list eight reasons to substantiate this belief. We also list eight procedural irregularities and flaws with the finding, any one of which on its own would cast doubt on the ultimate decision reached.

Act XXXVI, 1976 addresses the possible review of decisions by a Presbytery. *The Practice* expands on this and makes the following distinction between judicial and non-judicial decisions:

> Presbytery decisions are of two kinds: judicial and non-judicial. Judicial decisions are those come to in regard to formal cases before Presbytery. Judicial decisions cannot be revised or rescinded by Presbytery but are subject to review by Superior Courts. In non-judicial proceedings decisions may be revised or rescinded only after careful consideration introduced by notice of motion and in the light of evidence affecting the matter or in the light of consequences which were unforeseen at the time of the decision and which are deemed prejudicial to good order, equity or the interests of the Court.

According to the *Form of Process,* no stain on a minister's reputation "ought lightly to be received, nor when it comes before a judicature ought it to be negligently inquired into, or when found evident, ought it to be slightly censured." [35] *The Practice* of the Free Church states: "no serious allegation against a minister's conduct that breaches Biblical norms and impinges the good name of the Church, is to be overlooked" (*The Practice,* Chapter V. Part IV. para 2.2. p104). No majority voting can remove this obligation. *The Practice* puts it this way:

> "Although the General Assembly is invested with the power of regulating the whole action of the Church in its Synods, Presbyteries and Kirk Sessions, still it is not regarded as having any lordly or absolutely binding authority. It is expected to act ministerially under Christ, and to carry out such rules as appear to harmonise with His own instructions in His Word."
>
> *(The Practice, Chapter IV. Part II. para 4)*

Rather than review the 1995 decision and deal with the problem as the Constitution of the Church demanded, majority voting in the Assembly and its Commissions was employed to impose this decision. New allegations of perjury after 1995 were ignored and majority voting was again used to silence the minority. It became obvious that Professor Donald Macleod was above the law of the Church, while others were to be persecuted for continuing to demand that the requirements of the Constitution be enacted. Ultimately, majority voting demanded that the minority promulgate an untruth. This untruth was to the effect that all allegations against Donald Macleod had been thoroughly investigated. We seek to show that this assertion is not true. It was the unwillingness on the part of the minority to acquiesce in this assertion, and to bow before unconstitutional behaviour by the majority that resulted in the minority signing a Declinature on the 20th January 2000 and reconstituting in the Magdalene Chapel.

II. The General Assembly's Recent Findings

Finding of Assembly - 1995 (see Appendix 6)

We believe that at the heart of the indictment against the 22 Ministers disciplined on 20 January 2000 was their continuing to exercise their constitutional right to seek a review of a non-judicial decision of the 1995 General Assembly. Even the Special Peace Commission set up by the General Assembly in 1998 recognised that this was the major stumbling block to reconciliation in the Church. The Ministers involved sought a review on two grounds: procedural flaws and irregularities involved in an original decision relating to allegations against Donald Macleod; and, new evidence which arose after that decision.

Following a number of allegations of sexual assault on females levelled against Professor Donald Macleod of the Free Church College, the 1995 General Assembly came to a finding, based on a report by the Training of the Ministry Committee (hereafter referred to as the T.o.M.) which had acted as a precognitions committee in the matter (somewhat akin to the work of the Procurator Fiscal), that "on the completion of.....and intensive enquiry the Committee found no evidence capable of proving in the Courts of the Church censurable conduct on the part of Rev. Professor Donald Macleod." It not only determined that, "the enquiry is completely terminated and no action is taken against Rev. Professor Donald Macleod - it being understood that this decision now includes reference to the allegations contained

[35] The Practice of the Free Church of Scotland. Form of Process. ch. VII. 2

in papers brought to the Committee on 4.10.94.," but also warned that, "anyone seeking to pursue it further does so at the risk of themselves being censured as slanderers."

Confusion has arisen over the status of this finding - was it a judicial finding or was it not? No doubt in some cases such confusion was genuine. However, in other cases it was deliberate, the view taken being dependent upon the argument to be won. For example, the Rev. Alex MacDonald in a speech to the June Commission of Assembly 2000 said that the 1995 decision was judicial:

> "The Assembly in 1995 came to a judicial finding properly arrived at; there was no attempt to have that finding overturned at the time because it was unconstitutional or incompetent, why should we allow doubt to be cast upon it now?"

In the same speech, however, Mr. MacDonald also referred to it as non-judicial:

> "There was an extract minute from the 1990 Synod of the P.C.E.A., our sister church in Australia, stating that the matter had never been formally before their Church Courts and had been settled privately by one of their ministers. How could we take up a matter judicially which our sister Church had dealt with privately?"

We believe that the decision arrived at in 1995 was a non-judicial finding and that the evidence for this is overwhelming. We give the following reasons:

(i) **Act IX, 1861** - It would have been incompetent of the Assembly to engage in a judicial process. Professors are under the jurisdiction of their Presbytery, so that although Act IX, 1861 lays upon the T.o.M. the special function of originating and prosecuting any process required against Professors, it also states that the presentation of a libel is to the relevant church courts. Judicial proceedings start at the Presbytery so that the rights competent to all parties are preserved according to the laws of the Church e.g. the right of appeal to a higher Court. In other words, the Assembly is not the court of primary reference and it is therefore not competent for it to initiate a formal process (*The Practice.* (1995 edition) p112. Chapter V, Part V. para 4. along + Part VI. para 1).

(ii) **Relevancy** - the first step in a formal process is that of determining the *Relevancy*. "When a Presbytery has framed or resolved to entertain a Libel against a minister it must *as a first step* consider the relevancy of the libel." (*The Practice* Chapter V. Part IV. 2(14)) The Assembly in 1995 was not determining the relevancy or otherwise of a libel. This was outside its remit. This *first step* in the process would have been the responsibility of Edinburgh Presbytery if and when a libel was served. Only then could a judicial process be said to have been entered into.

(iii) **There was no *case* before the Assembly** - only a Report from the T.o.M. Committee came before the Assembly. What the Assembly had to decide was the administrative and procedural question of whether the decision of the T.o.M. Committee, acting as a precognitions committee, should be allowed to stand. Thus no judicial procedures were adopted e.g. "Once a Church court has decided that the information given to it requires formal action on its part it must.....notify everyone concerned and require them to attend a meeting of the court...." (*The Practice,* p91. Chapter V, Part II, para 3). No witnesses were cited to appear before the 1995 Assembly because this was not *formal* action by the court. No accused person was before the Court. No verdict of innocence or guilt was pronounced. And crucially, *no evidence was presented or discussed.* What was discussed were the relative merits of the reports submitted.

(iv) **There was no libel served on Professor Macleod** - "It has been established by long practice that no judicial process of a serious kind can be carried out against a minister or probationer except by what is called a libel." (*The Practice*, Chapter V, Part IV, para 2.8. p.106). Also, "This is to ensure that no *formal proceedings* are initiated rashly and all that properly can be done to avoid such action is done.....*The formal charge is designated a Libel*" (*The Practice* Chapter V. Part IV. 2(6). p.105). No libel has ever been served on Professor Macleod.

(v) **There were two Reports plus a Minority Petition** - two separate reports came before the Assembly - one from a minority of the T.O.M. (five members), and one from the majority (six members). There was also a Petition from the minority in which they sought the relevant documents for themselves - with access to the Church's Law Agent - in order "for them to prosecute a libel." Both the Minority Report and the Petition were therefore proposing the commencement of a judicial process. The Majority Report was first put against the Minority Report, then against the Petition of the minority. To suggest that voting in such an administrative way can conclusively terminate any serious judicial process is inconceivable. Such a suggestion only serves to bring the whole judicial process into disrepute, and would be manifestly unfair to any accused person.

(vi) **The Assembly Clerk** - Professor John L MacKay, Assembly Clerk, has on at least two occasions put in writing his opinion that the decision in 1995 was non-judicial:

> "May I suggest that what follows is my personal understanding of the matter, and is in no way binding on any church court, which has the duty to consider and resolve on the matter of itself.....A finding as regards church policy may be reversed by a finding of a subsequent

Assembly. The precise status of the matter you inquire about is not totally clear. It is not a judicial finding in the sense usually employed in Church courts. It is, however, a finding in a disciplinary investigation"

(Letter from the Assembly Clerk to John MacPherson. 12/9/95, see Appendix 7)

"Consideration of the first clause of the Preamble and the first crave of the Petition shows them to rest on a fundamental misconception. What was before the 1995 General Assembly was not a case, and the Assembly did not take a judicial decision. The decision was focussed on the procedural matter of whether a repeated decision of the Training of the Ministry Committee, acting as a precognitions committee, should be allowed to stand.....In 1995 the General Assembly did not reach a judicial decision, and therefore in principle that decision is subject to review.....Your letter raises the further question of whether it is competent for Mr. Murray who was a member of the 1995 General Assembly and who dissented from its decision to seek to reopen the matter by way of petition. As the decision referred to was a non-judicial decision, it is in principle subject to review....."

(Letter from the Assembly Clerk to Free North Session Clerk. 4/2/97, see Appendix 8)

(vii) **Finance, Law & Advisory (F.L.A.) Committee** - within a Statement issued on 28th June 1999, the F.L.A. Committee clearly indicates what transpired at the Assembly in 1995 viz. no evidence was presented before the Assembly, no hearing was held, no accused person summoned i.e. *no case was heard.* It confirms that all the Assembly did was to endorse a decision of the T.o.M. It states:

"Church Courts operate like ordinary Courts. Any allegation of impropriety is examined and a judgment made as to whether there is a case to answer, rather as is done by a Procurator Fiscal in respect of civil proceedings. In the case of a Professor in the Free Church College the procurator fiscal function is performed by the Training of the Ministry Committee.....The Committee concluded.....there was no basis for bringing a case against Professor Macleod to a Church Court" (see Appendix 9).

(viii) **Special Peace Commission** - At the 1998 General Assembly, a Special Peace Commission was set up consisting of all Presbytery Clerks, Synod Clerks and the Assembly Clerks. Its Convener was the Moderator for that year, Rev. D. K. Macleod. Mr. Macleod wrote the following on behalf of the Peace Commission:

"The Commission would also wish to point out that the 1995 decision of the General Assembly, to which you refer, was not a judicial decision - which was why the full papers in the matter were not before Commissioners - but was in fact an administrative decision that the Training of the Ministry Committee had carried out the duties assigned to them and had reached a decision which brought the matter to a conclusion"

(Letter from Rev D.K.Macleod to A Morrison. 27/11/98, Appendix 10)

Conclusion: The Assembly decision itself gave the impression that a judicial decision had been reached - it threatened anyone who pursued the matter with censure for slander. Thus, Rev Iain Campbell (the then Editor of the Free Church Monthly Record) in an interview with Colin MacKay on the 'Benchmark' programme, stated:

"If we do not like the decisions of our Supreme Court, I think that either we honour what we promised to do and submit to them, or else we do the honourable thing if our conscience cannot accept the decision and we terminate our contract of office.....I think that you have got to remember that there was a judicial aspect to this. That within the Church, although it is a fraternity and a brotherhood, that it still has to act as a court, and if a court comes to a conclusion, I think we've got to abide by that conclusion"

(Radio Scotland, 26th September 1999)

Mr. Campbell is, we believe, incorrect in what he says. To suggest that Ministers must 'terminate their contract of office' because they disagree with a simple *finding* of an Assembly is preposterous. Even were the 1995 decision to be viewed as a judicial decision, it would still be open to review were new evidence to appear of which the responsible Court was not aware (*The Practice,* (1995 edition) Chapter V. part I. para 8. p.90). However, as is shown above, this was not even a judicial decision but a mere *finding* of Assembly. As such, the presence of procedural flaws and irregularities, coupled with new evidence warrants, in our judgment, a continued protest against it (Act of Assembly XXXVI, 1976).

The procedural flaws and irregularities can be summarised as follows:

(a) Prior to the 1995 Assembly, a number of Commissioners received a letter from an Advocate. This letter was not simply asserting the rights of Professor Macleod but was of a threatening nature, suggesting that if the Free Church were ever to proceed to libel Professor Macleod, he would have grounds to sue the Church. The

existence of this letter was brought before the Assembly and noted.[36] However, the continued threat of Professor Macleod suing and financially ruining the Church was a factor in the Assembly debate, and hung over the Assembly like a cloud. Similarly, a Memorial in support of Professor Macleod, signed by a number of individuals, was received by the Assembly. It is obvious from all this that the members of Assembly were under some duress to come to one particular decision in favour of the majority T.o.M. report.

(b) The General Assembly came to its decision without knowing the precise nature or detail of the charges, and without examining any of the evidence. Commissioners were unaware, for example, that in the case of three of the women there was evidence from secondary witnesses to substantiate their claims. They were similarly unaware of the details of an alleged affair in Australia and the documentary evidence relevant thereto, and were ignorant of the gross deficiencies surrounding the investigation into this affair.

(c) The General Assembly came to its decision unaware that of the six allegations made against Professor Macleod, only three had been brought before the Church's Law Agent. The report presented to the Assembly made no direct reference to this fact, and was written in such a way as to give the impression otherwise. This crucial fact meant that the Assembly proceeded on the basis of what was false premises and inadequate legal advice.[37]

(d) The General Assembly came to its decision unaware that the T.o.M. had come to its decision without examining all the relevant evidence. On 3 March 1993 the T.o.M. formed a Precognitions Sub-committee consisting of members of an ad-hoc committee set up "to examine depositions and correspondence relating to the fama." To this committee was added four special advisers appointed by the 1993 General Assembly. In the light of the papers then available, the precognitions committee agreed there was a case to answer and it took great care in preparing a draft libel against Professor Macleod containing four charges with supporting evidence and documentation. The sub-committee prepared reasons for serving a libel and brought this to the T.o.M. Committee on 13th December 1993. There was immediate outrage and antagonism on the part of some within the T.o.M. and the report of the sub-committee was rejected out of hand. It transpired that work had been carried out behind the scenes to undo the work of the precognitions committee. Rev Alex MacDonald, a close friend of Professor Macleod, presented a paper giving his own analysis of the situation. The T.o.M. accepted this assessment without reviewing any of the evidence. We quote from a letter of one of the members of the sub-committee present at the T.o.M. that day (see Appendix 11): "I acknowledge that it was competent for the Committee to reject the advice of their precognitions sub-committee but they could only logically do this if they themselves took the evidence under review. This they steadfastly refused to do." (Letter from Mr. John MacKenzie to Mr. James Fraser 28/6/99). It would be some months before the Committee would have the evidence before it.

(e) The General Assembly came to its decision on the basis of Legal advice rendered inconsequential. The General Assembly of 1994 authorised and instructed the T.o.M to recall the decision of 13th December 1993 and to submit it together with the report of the precognition sub-committee to the Assembly Clerk, and to the Church's Law Agent in order to ascertain his opinion whether the report warranted judicial investigation. The Church's Law Agent concluded that there was insufficient evidence to proceed with the case on the basis of the papers presented to him, but he did identify certain weaknesses and deficiencies and the action necessary to correct these. Thus, the advice given was contingent. The weaknesses in evidence identified by the Law Agent were addressed. Yet despite having strengthened the evidence according to the legal advice given, the report was not then re-submitted to the Law Agent for his further scrutiny. When the committee met in October 1994 to consider the report of the Law Agent, a further three fresh allegations were brought to its attention. As stated above, these fresh allegations were not submitted to the Law Agent for advice. Thus, while the limited advice available from the Law Agent was perfectly sound, it was effectively rendered meaningless by the subsequent actions of the Committee.

(f) The General Assembly came to its decision despite the fact that the accused person was not interviewed with regard to some of the allegations. At the committee meeting in October 1994, an 'interviews sub-committee' was set up to confer with all parties. This sub-committee interviewed the three women and sought to interview Professor Macleod. Professor Macleod, however, replied through his solicitor that he was unwilling to accede to

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[36] It is noteworthy that at the 1999 Assembly, Rev. David Robertson stated in reference to Rev Maurice Roberts that the Assembly should censure Mr. Roberts for having acted in contempt of the Assembly by seeking to influence the decisions of the Assembly in threatening legal action. The same Assembly forwarded to the Law Agent a letter by one minister which simply stated that he would hold individuals responsible for the loss of temporalities in the event of any suspension. Yet the 1995 Assembly received this threatening letter on behalf of Macleod without comment.

[37] The impression that all the allegations had been before the Law Agent is reflected in the Assembly's finding: "The General Assembly note that these matters have been the subject of prolonged investigation by the Training of the Ministry Committee, and that in terms of the decision of the 1994 General Assembly legal opinion had been obtained as to whether or not judicial investigation of these allegations is warranted. In the light of this the General Assembly resolve that on the basis of the evidence available no further judicial proceedings are appropriate." The term 'these matters' and 'these allegations' were not specified thus leaving the impression that all allegations had been scrutinised by the Law Agent. An Assembly Committee (The F.L.A.) was later to issue a statement in which it stated: "This decision [of 1995] was in full accord with the advice of the Church's Law Agents" (Letter issued 28 June 1999 - see Appendix 23).

this request. Thus, Professor Macleod was never interviewed with regard to three of the allegations made against him. Nonetheless, at the end of its restricted investigation the sub-committee was again substantially of the view that there was a case to answer and that there were grounds for recommending a process of libel be initiated against the Professor. Once again the main committee rejected the recommendation of its own sub-committee. This resulted in two reports being submitted to the 1995 General Assembly - a majority report and a minority report.

(g) The Assembly had to decide whether the *Moorov Principle* applied in this instance or not i.e. were the offences so linked in time and circumstances as to be mutually corroborative. The advice to the Assembly on this point was defective in that the Church's Law Agent was not acquainted with three of the allegations. Had he been made aware of the further allegations, his advice may well have been different. Of course, the Assembly was not told that only some of the allegations had been before the Law Agent. The Law Agent's advice regarding the three allegations was presented in such a way as to imply that it took account of all six allegations. Thus, the Legal Agent's professional judgement was given the appearance of being at variance with not only the Procurator Fiscal who adjudged the case worthy of prosecution, but also Sheriff Horsburgh who, when he was specifically asked in the 1996 trial to adjudge on the Moorov question, and with all the charges before him, ruled that the allegations could be considered together under the Moorov Principle.

(h) The warning attached to the decision concerning those who pursued these matters further gave the decision an incontestable aspect that, as a simple *finding* of Assembly, it could not possess. It meant that the matter was now pronounced closed contrary to stated practice without any Church Court examining the evidence, without the T.o.M. properly examining the evidence, without full and proper advice being sought from the Church's Law Agent, and with no further means of reviewing the decision, and this despite the fact that the subscribers to the minority report were willing themselves to bring a libel against Professor Macleod at their own hand.

In the light of the above evidence, it was considered by many in the Church that the allegations against Professor Macleod had not been handled in a proper constitutional manner.[38] Over the next two years new evidence and fresh allegations were to emerge that confirmed these fears.

Findings of Commission of Assembly 1996 (see Appendix 12)

During 1996, Professor Donald Macleod was tried and acquitted in the criminal courts of sexual assault against four women. His defence was to the effect that he had been the victim of a conspiracy. During his summing up, Sheriff Horsburgh Q.C. condemned several ministers, elders and members within the Free Church as liars and accused Free Church office-bearers of seeking to pervert the course of justice. In his opinion, they had conspired together and convinced the women concerned falsely to accuse Professor Macleod. Their motives were ecclesiastical - Professor Macleod had liberal views and had to be stopped.[39] Unfortunately, those accused of conspiracy or malice were never called as witnesses in court and had therefore no opportunity to defend themselves.

Sheriff Horsburgh's remarks were widely reported in the National Press: *The Times* (June 26, 1996) carried the heading, 'Church conspiracy led to sex charges against theologian"; on the same day *The Herald* began its account by stating, "In a damning judgment, the sheriff concluded the women had all lied in the witness box to further the ends of Professor Macleod's enemies in the Free Church of Scotland"; *The Daily Record* led with, "Sex Liars Tried to Crucify Me"; and *The West Highland Free Press* (June 28th) called Sheriff Horsburgh's finding, "among the most damning indictments of witnesses, ever delivered from a Scottish bench. No array of reprobates, clumsily perjuring themselves to protect gangsters from the prison cell, could have been more scornfully dismissed for their mendacity."

The Sheriff's damning indictment led to calls in the House of Commons for the women and the conspirators to be prosecuted. Crown Counsel duly investigated and found that 'neither further investigations nor further proceedings would be justified'. But this decision was widely ignored and the Sheriff's remarks were continually alluded to by Macleod and others in the media. Where did this leave the Church? Either Professor Macleod was guilty or, according to the Sheriff's continually-quoted remarks, the Church had office-bearers and women who were guilty of serious crimes. Discipline clearly needed to be applied to one or other of the parties and this would require the Church itself to look into the whole case. Act XXVIII, 1978 of the General Assembly draws attention to this:

> "It should be recognised that Church discipline is not precisely of the same order as civil, and the Church cannot therefore divest itself of the responsibility of ascertaining facts and their relevance. No proceedings or judgment of a civil (or criminal) court can be regarded as a substitute for due

[38] Out of a total of just over eighty members of Assembly, twenty seven registered their dissent from the Assembly finding. In addition, the five petitioners also registered their dissent.

[39] It should be noted that in 1989, in the one case where he alleged a motive, Professor Macleod claimed that the origin of the allegations made against him by the men in Australia was jealousy, not opposition to his liberal views.

ecclesiastical process, though such judgments may help in determining whether a process is required. Church courts must form their own judgments independently of proceedings in other courts"

The Commission of Assembly on 2nd October 1996 at least recognised that there was a problem to be addressed. Among its *findings,* the following is recorded:

5. The Commission of Assembly are aware that throughout the Church there have been widespread rumours that ministers and others have been involved in a conspiracy to pervert the course of justice. The Commission repudiate the idea that there has been such a conspiracy. They admonish members and adherents of the Free Church of Scotland to refrain from any comment or action that would tend to call in question the innocence of any alleged conspirators.

The difficulty with this statement is obvious. If the Church repudiates the idea of a conspiracy, where does this leave Professor Donald Macleod's defence in the secular court? If it does not, where does it leave those who are accused of conspiracy? The Church cannot to this day evade the force of this question. After some weeks of campaign and agitation, Professor Macleod's supporters demanded this *finding* be rescinded. A second meeting of the Commission was convened on 31st October 1996. The Commission took up consideration of a Report of one of its own committees, the Finance Law and Advisory Committee (hereafter referred to as the F.L.A.). Part of that Report reads as follows:

4. It is *ultra vires* and incompetent for the Commission to repudiate the idea that there has been a conspiracy to pervert the course of justice without considering the question of evidence. (This is quite apart from the question of whether one believes there was a conspiracy or not).

5. It is *ultra vires* and incompetent for the Commission to forbid questioning the innocence of "alleged conspirators". This is giving certain uncertain unspecified individuals immunity from discipline on any matter whatsoever. (see Appendix 13)

Thus, according to the F.L.A. report, there is no possibility of repudiating the idea of a conspiracy without a proper trial of all the evidence, and there will always be room for questioning the innocence of "alleged conspirators" until such time as the questions are answered. It therefore logically follows that the way to proceed was to put the evidence to trial. This is exactly what, later, the Free Church Defence Association (hereafter referred to as the F.C.D.A.) was to demand and to continue to protest for. Those within the F.C.D.A. were to recognise this as the Church's duty to her ministers and her people.

The Commission of Assembly on 31st October received the F.L.A. Report. However, it proceeded to a *Finding* which included the following statement:

The Commission of Assembly recognise that as a Church we have failed in our attempts to deal in a God glorifying way with the problems facing the Church. We were found unprepared. Therefore the Commission of Assembly call office-bearers and members to seek earnestly a true spirit of humility and repentance before the Lord. (*Finding* Commission of Assembly - 31st October 1996)

The Commission of Assembly recognised that the problems facing the Church had not been dealt with in a God glorifying way. Yet some four years later the majority were to assert that all allegations against Professor Macleod had been thoroughly investigated, and they were willing to discipline 32 ministers for seeking to address these very problems in a way that would be God glorifying, and in a way consistent with the F.L.A.'s report.

The Constitution of the Church similarly demanded a trial of the evidence, as:

Church discipline and censures, for judging and removing of offences, are of great use *and necessity* in the Church, that the name of God, *by reason of ungodly and wicked persons living in the Church,* be not blasphemed, nor his wrath provoked against his people: that the godly be not leavened with but preserved from the contagion, and stricken with fear, and that sinners who are to be censured may be ashamed to the destruction of the flesh and saving of the spirit in the day of the Lord Jesus.

(*The Form of Process*. Chapter 1, para 3)

Yet the need for proper disciplinary procedures to be invoked became all the more mandatory when, in October 1996, the Rev Iain Murray - not a member of the Free Church of Scotland but one of those accused of being a conspirator - published a booklet entitled *Professor Donald Macleod and His 'Opponents'*.[40] This booklet was circulated within the Free Church and found its way into the hands of many members. A copy of the booklet was sent to the Training of the Ministry Committee, the body responsible for such matters in the case of a Professor. Amongst other things, the booklet made the following allegations:

[40] This booklet can be made available as required.

(a) There was a campaign *for* Macleod operating within the Free Church. This campaign involved members of the T.o.M., and included the withholding of documentary evidence from the Committee. (This behaviour was subsequently officially criticised).

(b) There was *prima facie evidence* that in the years between 1982 -1984 Donald Macleod had an improper relationship with a woman in Australia (The woman herself confessed to an adulterous relationship).

(c) Professor Macleod admitted on different occasions - and in front of witnesses - to a sinful, wrong physical relationship, a relationship for which he admitted he needed to repent. His admission to Rev. John McCallum was even more explicit. He also carried out a prolonged correspondence with the woman which had to be kept hidden from his wife. Yet he had claimed in the civil court that the relationship was non-physical, and denied *any* sinful relationship with the woman.

(d) None of the primary witnesses was interviewed by the T.o.M.:

(g) The woman who made the confession was never interviewed.

- While there was written testimony available from Professor Douglas MacMillan, Rev Iain Murray, Rev John Davies, Rev Allan Harman and Rev John McCallum none of these men was interviewed by the T.o.M.

- While there was incremental testimony from Rev Maurice Roberts and the Rev John D Nicholls none of these men was interviewed by the T.o.M.

- The sister of the woman involved claimed to have found a sordid love letter from Macleod to her sister. (She was also along with Rev John Davis a witness to statements which Professor Macleod subsequently denied ever having made). Yet she was never interviewed by the T.o.M.

- Doubt was cast on the veracity of the evidence given in court by an elder of the Free Church (Dr.Eric MacKay) in support of Donald Macleod .

The allegations contained within Iain Murray's booklet were very serious. The *Practice* states: "In all cases which may lead to a libel, a careful preliminary examination of proposed witnesses is requisite by the party prosecuting in order that a charge incapable of proof may not be proceeded with" (The *Practice* Chapter V. Part IV. 2.12). *The Form of Process* states that such allegations are not to be negligently inquired into (*Form of Process.* Chapter VII. 2). Thus, these allegations not only challenged the good name of Macleod and others who gave evidence in court, it impugned the very integrity of Church Courts. Yet there was one further accusation that was so serious it left many in the Church with no option but to continue to protest against the continued inaction of the Church. T**he accusation was that Professor Donald Macleod committed deliberate perjury in the civil court.** We quote from the Booklet:

> Thus, as already stated, the defence obtained the files *(from the Church)* by a court order (January 1996) whereas the prosecution remained without them and only had sight of such documents as the defence chose to use at the trial. This meant, for instance, that although there was a very significant difference between Macleod's evidence on 'woman 3' as given in court, the prosecution had no means of knowing the discrepancy. (Prof. Macleod and His Opponents. Rev Iain H. Murray. p20)

This accusation has grown in credibility over the last number of years. Not only the Crown Counsel's decision not to prosecute the women for lying in court, but members of the T.o.M., having been told of Macleod's evidence in the civil court, do not deny that this account contradicts that which had previously been given before the T.o.M. The subsequent action of the Church only served to confirm this impression. The Church was in an ideal position to refute this serious allegation since it not only had in its possession what Macleod admitted to church courts, but the Finance Law and Advisory Committee had members present in the civil court observing the proceedings. Despite this, no official has endeavoured to disprove what Mr. Murray claims in his pamphlet. The cover page of Mr. Murray's booklet states: "The writer has personally seen the documents quoted which could, if necessary, be seen by responsible parties." No one has taken up this invitation. If Mr. Murray's case is right then ministers and members have been publicly condemned on the basis of a lie. Alternatively, Professor Macleod has been the victim of a diabolical conspiracy unworthy of any Church, in which case the Church is duty bound to discipline ministers who conspired to get members of their congregations to commit crimes; and to discipline those members. In either case, we believe that it was the duty of the Church to properly investigate the evidence and establish the innocence of the innocent.

The opening words of the chapter on Discipline within the *Practice of the Free Church* deals with this matter, and gives a caution about the effective working of the Church, and of the Christian duty relative thereto, as:

> "Any institution or society which is to function effectively must be well ordered: it must have recognised means of correcting aberrations which threaten its integrity. This is true pre-eminently of the Church of

> Jesus Christ whose witness in the world depends so intimately on the godly behaviour of its members. If the membership of the Church constitute "an epistle of Christ, known and read of all men", care must be taken that what is exhibited is a life-style consistent with and authenticated by the word and example of Jesus Christ. *Christians have a duty* of mutual encouragement and watchfulness to ensure that the obedience of faith is maintained and that any whose conduct may bring reproach upon the name of Christ may be warned, corrected and recalled to conduct becoming the faith. The process of warning, correction and restoration are what are usually described under the heading of discipline."
>
> (*The Practice,*Chapter V. Part I. para 1. p88)

The Practice also places a responsibility upon the relative authorities of the Church to deal with serious allegations, a responsibility to which those of the F.C.D.A. appealed as they continued to protest, as:

> "However distasteful and distressing it may be for a Presbytery to initiate a process against one of its ministers, the overriding consideration must be the honour of Christ and the purity of His Church. No serious allegation against a minister's conduct that breaches Biblical norms and impinges the good name of the Church, is to be overlooked." (*The Practice,* Chapter V. Part IV. para 2.2. p104)

According to *The Practice,* there are three distinct grounds for bringing a libel. The third of these grounds is:

> "The prevalence of a widespread rumour *(fama clamosa)* which lays Presbytery *under an obligation* to take action for its own vindication." (*The Practice.* Chapter V, Part IV, 2.9.3. p106).

The *Form of Process* states:

> "..but still, on all occasions the office-bearers in the house of God are to show all prudent zeal against sin." (*The Form of Process*. Chapter II. 2)

The *fama clamosa* that now surrounded the court case in 1996 demanded, in our opinion, action on the part of the T.o.M., and placed an obligation on the various Presbyteries of the Church to prosecute libels in order to establish the innocence of the innocent, and to vindicate the good name of the Church.

Findings of General Assembly 1997 (see Appendix 14)

Minority Report: When the T.o.M. met on 5th March 1997 it had before it correspondence referring to Rev. Ian Murray's booklet and to the new evidence of wrongdoing. Yet again it decided to take no action. Despite the fact that the booklet dealt with public statements and allegations made subsequent to 1995 it simply forwarded the correspondence to the Clerk of Assembly claiming these allegations were covered by the 1995 decision. A minority comprising Professor Hugh M. Cartwright, Rev. Angus Smith and Dr. Murdoch Murchison brought a report to the 1997 General Assembly. They had good reason to seek the Church's help as they had each been publicly vilified in the press by Macleod after the trial. Rev Angus Smith had also been branded a conspirator in court. They asked the Assembly to appoint a Special Committee consisting of one representative of each Presbytery to exercise the functions normally exercised by the T.o.M. in relation to, among other things, the pamphlet by Rev. Iain Murray. The motion also stipulated that any who had had previous involvement in the case should not be appointed to the Committee. They felt this would be fair to all.

This was an attempt on the part of these men to have the issues at last dealt with in what would be a proper Biblical manner, and in a way whereby the whole Church could unite together. Professor Cartwright was indisposed through illness. However, Dr. Murchison read from notes on his behalf.[41] Professor Cartwright stated his motives as follows:

> "I affirm my view that the Committee have used the findings of May 1995 and 31st October 1996 to prevent any consideration of complaints and enquiries arising since these dates, although all these communications relate to alleged statements subsequent to May 1995. I suggest that this approach of the Committee undermines the proper and necessary Biblical procedures provided for in the Constitution of our Church. I maintain that while this attitude persists no well-grounded peace will be secured in the Church.....I think I can say before my God to any one here who takes on himself to judge the hidden motives of the heart that I am not here with a concern for my own reputation rather than the reputation of Christ.....If my conscience would allow me it would be much easier for my health of soul and mind and body to pass this matter by on the other side as some want to do. But I am here as a duly appointed member of a responsible, official body to which complaints were made and which is obliged to take cognisance of these complaints. My conscience, my sense of duty to the Free Church of Scotland, my concern for the future of the Church, make it imperative that when I consider that a Committee to which I belong have failed in their responsibility to Christ and to His Church and to those who have written and to

[41] See Appendix 15

> those who are written about I should take the steps open to me to bring these matters to the attention of the fathers and brethren whose Committee they are and to whom they are responsible. What I have been asking for all along in these sad matters is that everyone should be subject to the same discipline"
>
> (Free Church General Assembly 1997. p.10-11)

The General Assembly rejected Professor Cartwright's plea and the minority Report. It approved of the action of the T.o.M. in ignoring letters of complaint against Professor Donald Macleod even though these complaints were substantiated with *prima facie* evidence. We believe this decision flies in the face of the Constitutional position of the Church which, in the ninth Commandment, declares: "Thou shalt not bear false witness against thy neighbour" (Exodus 20:16). This Commandment places an obligation on all Christians to preserve the good name of our neighbour as well as our own, as can be demonstrated by the following two answers within *The Larger Catechism*: [42]

> Qu 144. What are the duties required in the ninth commandment?
>
> *Answer.* The duties required in the ninth commandment are, the preserving and promoting of truth between man and man, and the good name of our neighbour, as well as our own; appearing and standing for the truth.....a charitable esteem of our neighbour; loving, desiring, and rejoicing in their good name.....defending their innocency....
>
> Qu. 145 What are the sins forbidden in the ninth commandment?
>
> *Answer.* The sins forbidden in the ninth commandment are, all prejudicing the truth, and good name of our neighbour, as well our own, especially in public judicature.....calling evil good and good evil.....concealing the truth, undue silence in a just cause, and holding our peace when iniquity calleth for either a reproof from ourselves, or complaint to others.....

The decision of the General Assembly effectively placed Professor Donald Macleod above the law of the Church. Yet the Assembly went further. It proceeded to discipline Professor Cartwright and the two men who had brought the Minority Report, as:

> 3. The General Assembly declare that the Minority Report is in contempt of the finding of the 1995 General Assembly in relation to Professor Donald Macleod and is also in contempt of the finding of Commission of Assembly (31 October 1996) on the Report of the Finance, Law and Advisory Committee which urged reconciliation and repentance.
>
> 4. The General Assembly censure the signatories of the Minority Report for acting in contempt of the General Assembly by raising through the Committee matters declared closed by the Assembly and for showing contempt for the Commission of Assembly's plea for reconciliation and repentance. Therefore the General Assembly remove from the membership of Group II Committees the signatories of the Minority Report and instruct the Nominations Committee to amend their report accordingly.

The allegation of improper conduct on the part of these three men was pronounced without any due process of law: they were never cited, two of them were not even present, no evidence was examined, and no opportunity given for a defence. It was simply a declaration. Dissents were lodged to this effect. The Assembly, having taken the decision, now sought to redefine the word 'censure'. The word censure in this instance was to mean "strong displeasure at the action of" and not in the technical sense of a disciplinary censure. Yet in the *Practice* the word censure requires nothing less than a disciplinary process. This was the only definition existing when the Assembly came to its finding. Thus, to vote for censure and then subsequently to redefine what one has voted for was, in our opinion, highly irregular. Be that as it may, the three men were found guilty of a crime (contempt of court) without due process of law and were then punished by being removed from Committees. [43]

Petition: A Petition was then presented on behalf of Professor Cartwright and 27 other signatories. The petition sought to address directly the Church's position on Church discipline. The petition was as follows:

> "Wherefore it is humbly petitioned by the undersigned ministers and elders of the Free Church of Scotland that the General Assembly take these premises into consideration and reaffirm the basic principles of Church fellowship and discipline (1) that persons against whom accusations are made by fellow church members are entitled to expect that accusations will be made in proper form before the appropriate church body or will be regarded as unsubstantiated and repudiated or withdrawn and (2) that

[42] The Larger Catechism is one of the Constitutional documents of the Free Church.

[43] A Petition was presented to the 1998 General Assembly requesting the removal of this censure. The motion carried. However, while paragraph 4 was removed, paragraph 3 remained so that the verdict of guilt remained.

> when accusations are made in proper form before the appropriate church body that body is bound to give them serious consideration." (Petition signed by 28 ministers and elders)

This petition was only asking for rights which the Constitution affords every member of the Church. However, the Assembly passed from this petition and, instead, it approved the following:

> 2. The General Assembly recognise that due processes of discipline properly applied according to regulations, safeguard the purity of the Church and the rights of its members and so contribute to the well-being and godly integrity of the Church. The General Assembly therefore expect the judgments of Church Courts to be respected by all office-bearers and members.

There is within this statement the assumption that either church courts are infallible and must be obeyed, or that it is not a part of proper Church discipline for church members to expect that accusations will be given serious consideration and that such accusations should be made in proper form. In either case, it was obvious to many that a breakdown in constitutional Church discipline was unfolding. Before the next General Assembly, Professor Cartwright had resigned and had joined the Free Presbyterian Church of Scotland. Rev Angus Smith was to follow in his footsteps in 1999. Before leaving, Rev. Angus Smith demanded that his Presbytery libel him in order that he could clear his name. The Presbytery refused this request.

Others, emulating our forefathers, remained within the Church under cover of protest and revived the Free Church Defence Association. A quarterly magazine *Free Church Foundations* was published. The F.C.D.A. Constitution (see Appendix 16) was drawn up with great deliberation, and mirrors the constitutional position of the Free Church of Scotland. It gives full recognition to the authority of the duly authorised courts of the Church.

Findings of General Assembly 1998 (see Appendix 17)

Special Commission: Several motions were placed before the 1998 General Assembly. The eventual finding of the brethren was to the effect that a Special Commission be appointed to confer with all parties "whom they deem it wise to consult and to do so with all diligence and speed." It was empowered to receive representations from others in the Church, although there was a reminder of the 'embargo imposed by the Deliverance of the 1995 Assembly' (see p 19). The Commission was to be composed of Assembly Clerks and Presbytery Clerks with the Moderator of the General Assembly as the convening Chairman. The Assembly charged all to pray together, to discuss freely and actively seek peace, and to refrain from further public utterances and meetings in connection with those issues under consideration.

The F.C.D.A. resolved to abide by the last stated condition and to refrain from action that would be in violation of the Assembly's wish. It ceased all public meetings. Its magazine, while continuing to be published, confined itself to what was considered inoffensive articles of a general nature. In the meantime, numerous submissions were made to the Special Commission. It was later revealed (by way of Petition to the General Assembly) that at least one such submission referred to further allegations of sexual abuse by Professor Macleod made by two women in the Free Church not involved in the court case of l996. The Special Commission was made aware that these allegations had previously been made known to office-bearers and in at least one instance to a Church Court, but had never been dealt with according to due process. The Special Commission recommended that their cases be referred to the Training of the Ministry Committee. To date, the T.o.M. has not investigated either of these allegations.

Mr. John MacPherson: Also before the 1998 Assembly was a Petition from Mr. John MacPherson, father of one of the women who had appeared in the civil court (see narrative of events supplied by Mr. MacPherson at Appendix 18). The allegation that Professor Donald Macleod committed perjury in the civil court was directly related to his daughter's case i.e. it is alleged that Macleod gave one version of events to church courts, and then gave a different version in the civil court. Mr. MacPherson requested that the Free Church carry out a full investigation into the allegations made against Professor Macleod. His petition pointed out the injustice to people, particularly his daughter, in not being allowed the opportunity of being heard to clear their names. Despite this plea, the petition was deemed incompetent on the grounds that "the crave was not specific, and that it seems to deal with matters which should be properly originated in a lower court." It was therefore not passed into the Assembly.

Libels:

The continual challenge made to the F.C.D.A. during this period was to disband. If any individual had further complaint against Professor Donald Macleod they should proceed by means of private libel. For example, a Petition from the Edinburgh and Perth Presbytery attacking the F.C.D.A. stated as part of its premise:

> Whereas any person who thinks he has suffered injury or wrong, or that injury or wrong is being done to the Cause of Christ, or that there exists a case for Church discipline, has access to the Courts of the Church; (Acts of Assembly 1998. p39 - Petition Edinburgh & Perth Presbytery)

Rev David Robertson, Moderator of the Edinburgh and Perth Presbytery, wrote in *Scotland on Sunday* (14/3/99):

> "Any individual can personally challenge a church member if they wish, they don't have to wait for the church as an institution to act, although they can be disciplined for spreading scandal if they lose. So far no one has been brave enough to take the risk."

Thus, on 16th March 1999, four ministers tabled before the Edinburgh and Perth Presbytery private libels against Professor Donald Macleod. They have each given reasons for their action (see Appendix 19):

Rev. Maurice Roberts, Greyfriars, Inverness states: "My motive in so doing was to comply with what I believed and still believe to be my duty to uphold the Ordination Vows that I took in the Free Church of Scotland in 1974..... For my pains I found nothing but obstruction at each stage of my attempt to have the evidence of my Libel looked at by the relevant church courts."

Rev. William Macleod, Portree states: "Although I have been accused of it I have not acted out of hostility to Professor Donald Macleod. In fact I was one who more than most appreciated his great gifts. I had him preaching in my congregation on several occasions. I was shocked when I first heard of his alleged immorality. I was then greatly saddened to discover several breaches by him of the Ninth Commandment."

Rev. John Harding, Shettleston, Glasgow, having enumerated the various vows taken as a minister, states: "My continuing to hold office (and enjoy the temporalities), and hold ecclesiastical fellowship in the Free Church, depends on my *continued adherence to these engagements.* In my own case, letters to the Training of the Ministry Committee, containing matters for investigation, were ignored by that Committee."

Rev. David Murray, Lochcarron, states: "I have made a serious accusation against Professor Macleod and I am prepared to be thrown out of the Church if I am wrong.....I am told repeatedly that I represent a tiny minority in the Church and that Professor Macleod enjoys majority support. Yet I am prepared to plead my case in these same courts which are heavily weighted against me. This libel is not about traditionalists and liberals.....It is about right and wrong."

The libels in due form which referred to lying under oath in the Sheriff Court, slandering fellow ministers, elders and Christians, breaking ordination vows, and immoral behaviour were substantiated with *prima facie* evidence and detailed relevant witnesses. They were formally presented before the Bills and Overtures Committee of Edinburgh Presbytery on 30th March 1999. However, and in the view of many predictably, the Committee recommended to the Presbytery that the libels be not accepted on technical grounds, and consequently the Presbytery refused even to take them onto its agenda. The three accusers present (Rev John Harding was absent) duly took instruments and craved extracts to appeal to the Southern Synod. The Synod refused the appeal and the libels were passed to the 1999 Assembly. In the Synod, Rev William Macleod records regarding Rev David Robertson: "He stated that the two technical points raised by Edinburgh Presbytery were only the most obvious. From that it was plain to me that Edinburgh Presbytery would go on raising technical objections to ensure that my libel will never be heard." [44]

Findings of General Assembly 1999 (see Appendix 20)

Libels: On 12th. May 1999 the General Assembly considered the appeals from the three libellers. The texts of the speeches given before the Assembly by Rev William Macleod and Rev David Murray are attached (see Appendix 21 and 22). Their deliverances addressed the technical arguments for refusal by the Presbytery, showing clearly that there were no grounds according to *the Form of Process* for the Presbytery to reject them. On the contrary, the Presbytery had a duty to guide and help them in their libels:

> "At all stages parties should be guided by the court as to correct procedure and their rights." (*The Practice*. Chapter V. part II, 21. p.94) [45]

It is our opinion that there was an obligation placed on the Presbytery which not only justified, but which required, it to proceed, as:

[44] Free Church Foundations. Issue 9, July 1999. p.5

[45] The Practice of the Free Church of Scotland. (eighth edition)

> "A written and signed statement lodged by some person charging a minister with immoral conduct or heresy, providing some *prima facie* evidence and undertaking to frame a libel;"
> (*The Practice.* Chapter V. part IV, 2.9.(1). p.106)

Failing this, the Presbytery itself was obliged to take action on its own account, as:

> The prevalence of a widespread rumour (*fama clamosa*) which lays Presbytery under obligation to take action for its own vindication. (*The Practice.* Chapter V. part IV. 2.9.(3). p.106)

> No serious allegation against a minister's conduct that breaches biblical norms and impinges the good name of the Church, is to be overlooked. (*The Practice.* Chapter V. part IV. 2.2. p.104)

> "The overriding consideration in church discipline must be the honour of Christ and the purity of His Church" (*The Practice* Chapter V. part IV. 2.2 p 104).

We believe that the technical grounds given were feigned, and ignored the overriding consideration as specified in *The Practice*. The Presbytery had a clear judicial role *to assist* in the technical aspects of presenting the Libel (without getting involved in the preparation of the cause itself), and not *to hinder* the libellers. The accusations having been brought, it was the Presbytery's duty to carry out the disciplinary procedures.

The main ground for the Presbytery refusing to accept the Libels was that the men had not produced documentary evidence to the effect that they had previously informed Professor Macleod, the T.o.M. and the Presbytery. There is, however, no stipulation within the *Form of Process* requiring such documentary evidence. On several occasions the T.o.M. had been written to without action being taken, Professor Macleod was written to without response, and the Edinburgh Presbytery itself knew of these accusations and had stated that church courts were open to anyone who felt that there was a case to answer. In *A Digest of Church Law*, a work widely regarded as the textbook on Scottish Church Law, Rev. William Mair writes:

> Christians should neither spread any censurable fault against a minister, nor accuse him thereof before the Presbytery, without first acquainting him, if they can have access thereto, and then, if need be, taking the advice of the most prudent of the ministers and elders of the Presbytery. Note. - This good counsel is not regarded as a necessary part of judicial procedure. (Mair p 227-228)

Within *The Practice* dealing with 'General Procedures Applicable in all Church Courts', we are told;

> "Once a Church court has decided that the information given to it requires formal action on its part it must, prior to discussing the substance of the case, notify everyone concerned....."
> (*The Practice.* (1995 edition) Chapter V. Part II. para. 3. p.91)

It was, therefore, the duty of the Presbytery to inform Professor Macleod of the Libel.

John MacPherson (Killin) had written to Prof. John L MacKay in 1995 inquiring as to the correct procedure for initiating a private Libel against Professor Donald Macleod. I quote from the Assembly Clerk's reply (Appendix 7):

> "Regarding a private prosecution of a libel. I have to point out to you that this is a serious course of action, laying an individual open to censure as a slanderer should the action fall. It is not sufficient that you personally believe an allegation to be true. You must be in a position to prove that an allegation is true. To avoid censure, you must show that even though the court has not accepted an allegation as proven to be true, you had reasonable grounds to expect that you could prove it to be such. That is more difficult in this instance if you are proceeding on the basis of evidence that has already been scrutinised and deemed not to be capable of warranting further proceedings.
>
> If you decide to proceed, then matters are set out on page 106 of the 1995 Edition of the *Practice*. I would consider that the first step is that of § 2.9 (1) [page 106]: "A written and signed statement lodged by some person charging a minister with immoral conduct or heresy, providing some *prima facie* evidence and undertaking to frame a Libel". In this instance you should make it clear that you are addressing this to the Presbytery of which the Professor is a member because the finding of the 1995 General Assembly has debarred the Training of the Ministry Committee from further acting in the matter on the basis of evidence previously before it. The Presbytery would have to decide if it was competent to receive your statement.
>
> If the Presbytery proceed, I would expect it to consider whether it should itself undertake to frame a Libel. In my opinion I think it would decide that it also is debarred from doing so, and the Presbytery would then proceed in term of § 2.10 (2). It would require that you frame a Libel and present it to the Church's Law

> Agent for scrutiny (Act XV,1860). A date would also be set at which the Libel should be presented to the Presbytery (§ 2.20)." (Letter of John L Mackay to John MacPherson dated 12/9/1995)

The four men who had presented the Libels to the Edinburgh Presbytery in effect conformed with the Assembly Clerk's advice. The Libels consisted of written statements making serious allegations. They were signed, and were accompanied by supporting *prima facie* evidence. They were placed before Edinburgh Presbytery and the men were willing to themselves be censured as slanderers should their action fall. The fact that the statements were in the form of a Libel was largely inconsequential. It was well known that Edinburgh Presbytery would never charge any other party to prepare a Libel against Professor Macleod. Neither would it itself initiate Libel proceedings, despite the widespread *fama clamosa* surrounding the Professor which, according to *The Practice,* placed it under obligation to do so. During the 1998 General Assembly, the Assembly Clerk and other senior leaders of the Church had stated that if anyone had any further complaint against Professor Macleod, then the only route open was by private libel. *The Practice* makes it clear that a private libel is an acceptable way to proceed: "When a Libel against a minister is prepared and prosecuted by any other party than the Presbytery, it must be presented to the Presbytery and can only be served by its authority. In this case its relevancy cannot be judicially considered until it has been served." (*The Practice.* Ch.V.pt.IV.2.20) Indeed, the accusations were regarding matters that had arisen subsequent to 1995 so that there was no reason why the Presbytery itself should be debarred from framing a Libel. Thus there were no just grounds for the Presbytery not to proceed. Edinburgh Presbytery, however, simply refused to consider the allegations - all four allegations were summarily dismissed.

The General Assembly, without knowledge of the substance of any of the libels, came to the following finding:

> "The General Assembly dismiss the appeals from Rev. M. J. Roberts, Rev. D. P. Murray and Rev. W. Macleod and sustain the finding of the Southern Synod. The General Assembly ordain that this matter be now terminated." (Acts of Assembly 1999. p55)

The dissent and protest recorded includes 15 grounds whereby this decision was considered unconstitutional. Many felt obliged by conscience to continue to protest at the General Assembly's continued endorsement of church courts refusing even to look at *prima facie* evidence of wrongdoing, and thus to harbour within her bounds a Professor of Theology accused of serious immoral crimes and perjury, and ministers accused of slander and conspiracy. The Assembly's decision that this was now 'terminated' could not be accepted by brethren seeking to be obedient to their ordination vows. The 1998 Assembly had officially stated that a private libel against Professor Donald Macleod was permissible. Four men had now tried this course of action and found that it was not. Now the Assembly was terminating serious disciplinary matters without even looking at the evidence, or even knowing the substance of the allegations brought before it. This was the second time this had happened, 1995 having been the first.

Mr. John MacPherson: The Assembly also took up an appeal by John MacPherson. Mr. MacPherson, *in accordance with the decision of the 1998 Assembly (see above)*, wrote to the Kirk Session of St. Columba's Free Church, Edinburgh where his daughter was a member. He asked the Kirk Session to take such steps as were necessary to clear his daughter's good name. She had been accused by the Sheriff of lying in the 1996 court case. The Kirk Session duly sought the papers relating to his daughter's allegations but its request had been turned down by the F.L.A. Committee. The Kirk Session simply affirmed that she was a member in good standing. However, the *Practice* makes it clear:

> ".....undoubted difficulty does not absolve the Church Court from endeavouring to arrive at the truth" (*The Practice.* Chapter V part II. para. 4. p91).

It was considered intolerable that a Committee should now be hindering an investigation by a legitimate Court of the Church. When the Kirk Session refused to consider the matter further, Mr. MacPherson appealed to the Presbytery.

The Bills and Overtures Committee of Edinburgh Presbytery found a new technicality on which to recommend refusal of Mr. MacPherson's appeal: "There is no demonstrable evidence that Mr. MacPherson is acting on behalf of his daughter in lodging the appeal" The appeal was not received into the Presbytery. When his appeal came before Synod, it simply affirmed the Presbytery's decision, despite the fact that Mr. MacPherson now had a written letter from his daughter authorising her father to act on her behalf. (After her ordeal before church and civil courts she felt unable to represent herself). Mr. MacPherson appealed to the 1999 General Assembly. The Assembly appointed three persons to confer with him as to whether he should proceed with his appeal. The Assembly eventually dismissed his appeal. The conclusion that Church Courts were deliberately obstructing the cause of truth and justice was very easily arrived at by many in the Church.

{On 24th November 1999, Mr. MacPherson presented the T.O.M. with a libel against Professor Donald Macleod alleging perjury in the civil court. The T.O.M. declined to receive the complaint. It stated there were two options open to Mr. MacPherson viz. (i) "by way of petitioning the General Assembly to receive your complaint", or (ii) "to originate a private libel before the Presbytery of Edinburgh and Perth, this being contingent upon your being a member of the Free Church." However, this latter course had already proven fruitless for members of the Church. Mr. MacPherson, not now a member of either church, brought three petitions to the 2000 General Assembly of the Residual

Body claiming obstruction on the part of Courts of the Church. The Assembly rejected all his appeals. It acknowledged an awareness of his concern and distress and appointed two men to meet with him and his wife if they should so wish. At the same time it accused him of having a 'litigious' spirit.} [46]

Principal of College: The 1999 Assembly appointed Professor Donald Macleod as Principal of the Free Church College. The Free Church of Scotland subsequently described this as "an overwhelming vote of confidence in Professor Macleod on the part of the Church" (reply of Free Church to PCEA Q.4, May 2000). A member of the Assembly sought to register his dissent from the decision but was denied this right. Thus, the Assembly denied one of its members the basic right afforded in the Constitution whereby a man keeps his conscience clear from the responsibility of what he does not approve of.

Findings of June Commission 1999 (see Appendix 22)

The Special Commission appointed by the 1998 General Assembly presented its Report to the Commission. Its task was to identify areas of disagreement, and to seek ways of peace and reconciliation within the Church. The Special Commission identified several areas of grievance and was able to formulate proposals to deal with these matters. However, it identified the matters relating to Rev. Professor Donald Macleod as representing; "the most significant and intractable source of dissension within the Church." The Special Commission set out two main points of view that had been expressed within the Commission. One of these points is as follows:

Section 4: (a) The Special Commission should recognise the existence of widespread divisions throughout the Church and ask the General Assembly to direct that investigations take place regarding the following matters in relation to Rev. Professor Donald Macleod:

(1) leaving to one side the matters dealt with.....

(2) The Special Commission would be failing in its duty to the Church if it did not take cognisance of the fact that there are still statements being made and publicly repeated regarding Professor Donald Macleod's conduct in Australia, accompanied by allegations that the Church's investigation into these matters has been deficient in that there exist primary witnesses whose evidence has never been sought or heard by a Church court. In the light of this the Special Commission would ask the General Assembly to recall the decision of the 1995 General Assembly as being procedurally unsafe and contributing to the present unrest in the Church in that there exist grave doubts as to the thoroughness of the underlying precognition previously undertaken by the Training of the Ministry Committee, and that the Training Committee be directed to re-examine matters in regard to Professor Macleod's behaviour in Australia. (*Special Commission Report.* Para. 4.a.[2]. Reports to General Assembly 1999. p.202)

The Special Commission, while stating two points of view, made no specific recommendation regarding either. However, the Commission of Assembly decided simply to remove this section of the report altogether. It passed an amalgam of the amended version of the Special Commission's Report, with an Overture from Edinburgh Presbytery. Its main findings can be summarised as follows:

(i) Section 4 of the Special Commission's Report was deleted. This meant that all critical references to Professor Macleod were removed from the report, while criticism of the F.C.D.A. was inserted.

(ii) Among other things, the finding affirmed the commitment of the Free Church to the Bible as her only rule, affirmed the Church's commitment to Biblical discipline, affirmed that discipline should not be carried out in a way contrary to natural justice, affirmed that all processes of discipline ought to be carried out with a desire for truth and justice, and affirmed the right of free speech.

(iii) At the same time, the finding stated that no one had sought to pursue the matter of 1995 through church courts at the risk of themselves being censured as slanderers, except, of course, some who had tried to raise the matter in reference to the 1996 trial, but they were found incompetent by Edinburgh Presbytery. Thus they declared "that any opportunity for private action in regard to this matter in the courts of the Church *now ceases*." The matter was not now to be pursued *'henceforth in any form'*. The Commission also instructed all church courts receiving information to the effect that an individual under its jurisdiction had not complied with this instruction was to be libelled for *contumacy*. The Commission of Assembly then granted itself the power to hear all appeals and references regarding any such libels.

(v) The Commission of Assembly instructed the Clerk of Assembly to destroy all papers relating to the allegations

[46] It may also be noted that a booklet entitled 'When Justice Failed in Church and State' was published during 2001. Among other things, it gave more specific information concerning the court case of 1996, including the allegation of perjury on the part of Professor Donald Macleod. The booklet was forwarded to the Assembly Clerk of the Residual Body, but no action has been taken on it.

made against Donald Macleod forthwith. The reason given for this was that ample time had been given for new evidence to emerge, but none had been forthcoming.

(v) The F.C.D.A. was to cease canvassing outwith the Church matters properly dealt with by church courts. If this was not complied with the Commission required church courts to bring a charge of *contumacy,* with the Commission itself being given the power to hear appeals etc.

(vi) Ministers were instructed to give notice of the finding to their congregations.

To many in the Church, this decision was not only against the constitutional position of the Church, but was contrary to natural justice. It was full of contradictions and distortions of the truth. The fact is that many individuals had endeavoured by various means to pursue the Macleod case in church courts over the previous four years, only to be thwarted on every occasion by technicalities. Indeed, the original minority in 1995 were willing to pursue a case against Macleod but were denied the papers. It is also untrue to say that no new evidence had been forthcoming since 1995. Gross deficiencies in the investigation into the affair in Australia and alleged perjury in the civil court is to name but two. It should also be noted that now Church Courts were *instructed* to act upon *information* received, whereas Edinburgh Presbytery itself had refused to act upon libels (with evidence and witnesses) at the hands of those willing to take the risk of themselves being censured as slanderers and despite the existence of a *fama clamosa.*

The competency of this finding can be called into question in that the *Form of Process* makes no provision for an absolute denial of private action in a disciplinary case from 'henceforth in any form', without the case having been judicially heard. New evidence always allows the case to be opened. And no Church Court, let alone a Commission of Assembly, can instruct office-bearers to ignore gross sin. This is to command what ordination vows forbid.

It is also of note that the General Assembly, the Supreme Court of the Church, stated in 1995: "anyone seeking to pursue it [the matter of Professor Macleod] further does so at the risk of themselves *being censured as slanderers*." This Commission of Assembly simply overruled the decision of the 1995 General Assembly and substituted the charge of contumacy. Of course, with the former charge one is afforded the opportunity of a defence, whereas with the latter there is no such opportunity. It was apparent to many that the majority were now willing to use their majority power in Church courts to manipulate advantage, even if that meant undermining the authority of the Assembly itself.

With regard to the destruction of the papers relating to Professor Macleod, this only served to fuel the suspicion that all was not right. If these papers proved the innocence of Professor Macleod why seek to destroy them? Why had Professor Macleod not demanded their retention for his own protection? How could the Church defend herself against improper conduct in the event of a civil action in the courts of the land? And what about those who were seeking these papers to clear their names and had been refused? There was no pressing necessity to destroy these papers, why then destroy them? The lasting impression for many was that *'evidence'* was being destroyed.

A Protest was lodged against the findings of the Commission by several of the brethren, stating over thirty reasons for dissent. The Protest concluded: "For these and other reasons, we protest, that we and all other office-bearers and members of the Church shall not be committed by the said resolution to any action that may be taken thereupon, *and shall be at liberty to oppose all such action by every competent means*" How this Protest concurred with the designated dictum that Church Courts were now to prosecute for contumacy those defying the Commission of Assembly is open to debate. At least one member of the Assembly, Rev David Robertson, was on his feet ready to have this protest disallowed. This, however, only served to show how unschooled some were in the historic Free Church position and how far the majority in the Free Church had departed from the position of our forefathers, since these were the very words used by Dr. James Begg of the Free Church party in protesting in 1867.

While the reasons for dissent were being read to the Commission, the Rev David Robertson interrupted the proceedings claiming that the giving of so many reasons was "a mockery.....wasting time.....and ridiculous." The reasons for dissent, he argued, could be forwarded to a committee to give answers. To this the Commission agreed. However, the committee, of which Mr. Robertson was himself the Convener, never answered the reasons for dissent. It described the tabling of these reasons as unnecessary and time wasting. Thus, the solemnly appointed means by which brethren could clear their conscience was devalued, and reasons for dissent were simply ignored.

Finance Law & Advisory Committee: The F.L.A. issued a Statement on 28th June 1999 (see Appendix 23), as per the instruction of the Commission of Assembly. The Statement defined the work of the T.O.M. in a disciplinary process as equivalent to that performed by a Procurator Fiscal. It is not to determine innocence or guilt, but whether or not there is a case to answer. In the case of Professor Donald Macleod, it asserted that the T.o.M. had, "instituted a detailed and exhaustive investigation which included seeking evidence from Australia, and examining all available documentary evidence.....Each and every allegation has been thoroughly investigated by the Training of the Ministry.....This decision [of 1995] was in full accord with the advice of the Church's Law Agents.....The Church consistently followed the process set out in its procedure and practice..."

It can be seen from what has already been stated that this assertion is erroneous. The committee may have *instituted* an investigation and *sought* evidence in Australia, but there was no detailed examination of witnesses. Indeed, it was admitted that our sister Church in Australia did not co-operate in the investigation. If this is the case, it is an implicit admission that the investigation was not detailed and exhaustive, but was superficial and stifled. Every allegation could not be said to have been thoroughly investigated if our sister Church in Australia hindered the investigation.[47] Furthermore, all available documentary evidence was not examined. And allegations have been made which have never been investigated, particularly ministers and elders accused of conspiracy and church members accused of perjury.

The F.L.A.'s assertion that the 1995 decision was 'in full accord with the advice of the Church's Law Agent' is false. Some of the allegations were never before the Church's Law Agent. At the June 1999 Commission of Assembly the Rev. Alex MacDonald, in presenting the Overture from the Presbytery of Edinburgh & Perth, clearly implied that the Church had sought legal advice on all the cases brought before the Training of the Ministry Committee. This misinformation was repeated in the Finance, Law and Advisory Committee's statement. The August issue of the "Free Church Foundations" magazine which was sent to, among others, all ministers in charges in the Free Church, sought to correct this error. Nevertheless, in December 1999, at a public meeting in North Uist organised by the Western Synod of the Free Church of Scotland in order that the people in the Presbytery of Skye & Uist might be adequately informed of the decisions of the Assembly and Commissions, the Rev. Kenneth Stewart (Stornoway) as an official spokesman for the Synod, repeated the error. He also repeated the same misinformation in a statement to his congregation which was subsequently published in the "Stornoway Gazette" of 20/1/00. Later that year, the Rev. David Robertson (Dundee) made the same erroneous statement in a posting on the internet entitled "What's going on in the Free Church of Scotland?"

The F.L.A.'s Statement was also at variance with the opinion of at least one member who was present during the T.O.M. investigation. John MacKenzie, Assynt was one of the special advisers on the T.O.M. He wrote to James Fraser, Convener of the F.L.A., on 28th June 1999. Mr. MacKenzie identified his own concern with respect to the T.O.M.'s rejection of its own sub-committee's report while at the same time refusing to examine the evidence. In his reply, Mr. Fraser conceded: "it is difficult to understand the basis on which they rejected the recommendation of the sub-committee." (see Appendix 24) He also wrote the following:

> "The Church over 10 years or so followed its processes - sometimes well and sometimes less well. It is regrettable that sometimes they were followed badly; I suppose the best that can be said is that the processes are convoluted and difficult and that the people trying to operate them are strictly amateurs and a set of people whose composition changed dramatically throughout the whole period. The worst interpretation is that the majority of the committee in 1993/4 were simply unwilling to libel Professor Macleod on any evidence.....My view, however, is that T.O.M. carried out an investigation; the quality of their work was, in my view, at times sub-standard.....the Church may have allowed T.O.M. to do its job badly." (Letter from James Fraser to John MacKenzie 2/8/1999).

With regard to what James Fraser writes here, it must be stated that no church process, however convoluted or difficult, can account for a committee changing the recommendation of a sub-committee without itself reviewing the evidence. Neither can any amount of amateurism or change of personnel, however dramatic, account for documentary evidence being withheld from the Committee. Further, it was not the role of the T.o.M. to determine innocence or guilt. It was to establish whether or not there was a case to answer. Those who had seen the evidence and had interviewed those concerned had concluded there was. Even the eventual voting on the Committee (6 votes to 5) would suggest that there was at least a *prima facia* case to answer. While the reasons given by Mr. Fraser may account for some bad actions, they cannot account for such unreasonable behaviour. There can, therefore, be only one answer. The worst scenario that James Fraser himself outlines can alone account for this i.e. "the majority of the committee were simply unwilling to libel Professor Donald Macleod." And his comments further ignore the fact that accusations of perjury have been levelled against Professor Macleod as well as new accusations of immoral conduct, and accusations of conspiracy against others, none of which have ever been examined. For Mr. Fraser and the F.L.A. to fall back on the statement, 'the Church followed its processes' is simply unacceptable.

Despite the intelligence within James Fraser's letter, the F.L.A. did not modify its Statement. It continued with the assertion that the T.O.M. came to its decision after 'examining all available documentary evidence'. In the succeeding months, ministers were persecuted, libelled and suspended for seeking review of an Assembly *finding* that even the Convener of the F.L.A. had to admit was based on sub-standard work. The Church perpetuated untruthfulness in maintaining that there was a thorough, exhaustive, detailed investigation into Donald Macleod. Having itself perpetuated untruth, it then demanded its office-bearers to acquiesce in its authority. This many were unwilling to do.

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[47] The Presbyterian Church of Eastern Australia as a sister church refused to exhibit the degree of cooperation expected by the Free Church in the examination of the principal witness in Australia. However, it should also be said that the Free Church did not fully exhaust all the options open to her to obtain her desired end. In February 2000, in an official response to the question as to when and by what committee or court [civil or ecclesiastical] the principal witness in Australia was questioned, the Residual Body stated: "The Australian woman was under the jurisdiction of a church which told us that her minister had dealt with the matter pastorally and they were taking no further action."

{The F.L.A. Committee had appointed observers to the 1996 trial in the civil court. Following upon the trial it commented: "It is also a matter of satisfaction that the decision of the 1995 General Assembly has been effectively vindicated in the state court." This was misleading because the material under review by the T.o.M Committee, whose finding was confirmed by the 1995 General Assembly, included allegations of sexual misconduct which were not under review in the criminal court in 1996, and the verdict of the criminal court was based upon an allegation of conspiracy which has never been investigated by the Free Church. Also, the 1995 Assembly rejected the Moorov Principle and refused to allow the evidence to go to trial, whereas the Sheriff decided differently. Thus. the fact that the Sheriff allowed the trial to proceed effectively condemned the 1995 General Assembly decision}.

Findings of October Commission 1999

The October Commission of Assembly considered an Overture from the Edinburgh & Perth Presbytery. The outcome was to the effect that the Commission began proceedings against Rev William Macleod and Rev David Murray, editors of the F.C.D.A. publication *Free Church Foundations.*

The Special June Commission of Assembly Issue of *Free Church Foundations* included the following comment; "The General Assembly should recall the decision of the 1995 Assembly as being procedurally unsafe." This statement was considered by the Commission as "gravely prejudicial to the interests of the Church" and "in contempt of the General Assembly and Commission of Assembly." However, Mr. Macleod and Mr. Murray published this statement under cover of the Protest lodged at the June 1999 Commission (see above). Thus, they were acting in accordance with the example given by the forefathers of the Free Church (e.g. James Begg) who, during the mid to late 19th century, continued to exercise their right to protest against decisions of Assembly which contravened the Constitution of the Church. The men in the 1800's simply assumed that this was their right and at no time were they threatened with libel. However, the October 1999 Commission of Assembly appointed a Committee to prosecute libels against Mr. Macleod and Mr. Murray, and that before the December meeting of Commission.

At the same time the Commission of Assembly entertained Overtures from the Lewis Presbytery intended to deal with the F.C.D.A. and the Stornoway Relief Church. Firstly, the Commission *declared* that the F.C.D.A. was "pursuing a divisive course" and decided in effect to outlaw it. All Presbyteries were instructed to inform office-bearers of the incompatibility of office in the Free Church, and office in the Free Church Defence Association. Those who refused to resign from office within the F.C.D.A. were to be disciplined. Secondly, a group in Stornoway who now worshipped apart from the Stornoway Free Church because of their minister's invitation to Professor Donald Macleod to conduct Communion services, were *declared* 'sinful schismatics'. The Commission now outlawed any office-bearer giving support to this group. Each Presbytery was to make 'diligent enquiry' about office-bearers within its bounds and get assurances that they would not in future give any support to this group or they would be disciplined for contumacy.

Neither of these instructions was implemented by the Presbytery of Skye & North Uist. So far as the group in Stornoway was concerned, the Presbytery noted that they had never claimed to be the Free Church of Scotland - they were a relief congregation for those who in conscience could not worship in Stornoway Free Church. It was also noted that this group had been found guilty of the very serious crime of sinful schism by mere declaration, without ever having been tried by due process. The Presbytery decided that, in the circumstances, it would not require its office-bearers to give any assurances regarding this group.

The Presbytery gave several reasons for its refusal to implement action against the F.C.D.A. (see Appendix 25). Among the reasons given were the right of freedom of association, the F.C.D.A.'s illustrious history within the Church, the harmony that exists between the constitution of the Free Church and the constitution of the F.C.D.A., and the rightful duty to speak out against sin. The sin the Presbytery was referring to was spelt out. It included the Assembly decision of 1995, and the refusal by the 1999 Assembly to accept the private libels. The Presbytery believed that the right to continue to object to such "cannot be denied anyone."

However, the most fundamental reasons are as follows:

(a) According to *The Form of Process:*

> "Nothing ought to be admitted by any Church judicature as the ground of a process for censure, but what has been declared censurable by the word of God, or some act or universal custom of this National Church agreeable thereto....." (*The Form of Process.* Chapter I. para. 4)

Mere membership of an association whose Constitution, aims and objectives correspond exactly to that of the Free Church of Scotland has never been declared censurable by the Word of God, nor by any universal custom within the Free Church (indeed, many office-bearers in the Church today belong to organisations that *do not* correspond with the constitution of the Free Church and do so with impunity). Thus, in order for the Commission of Assembly to proceed with disciplinary action, or for it to instruct Presbyteries to do so, there needed to be some other ground of indictment. The ground given, of course, was that the F.C.D.A. was 'pursuing a divisive course'. However, the Commission

simply made a majority *declaration* to this effect. It did not seek to prove this by due process or by testing the evidence. The F.C.D.A. was never put on trial. No office-bearer of the Association was ever charged with divisive behaviour, nor were any of its members libelled for unruly behaviour. Every libel issued was for contumacy. We therefore believe that the process by which the majority removed ministers from their pulpits was fundamentally flawed, in that the basis upon which the F.C.D.A. was condemned was on the mere *declaration* of a majority within a Commission of Assembly.

(b) When an individual is ordained to the ministry of the Free Church, there are certain tenets that must be renounced. These are included in what is called, 'The Questions and Formula' which the Ordinand must sign. This is known as 'The Ordinand's Pledge'. Entrance into the Ministry of the Free Church is dependent upon taking this Pledge. To make continuance within the Free Church ministry conditional upon repudiating an association (e.g. the F.C.D.A.), without first proving that that association is at variance with the constitutional position of the Church, can be seen to mean in effect that the majority then in the Free Church had added to the Questions and Formula. This being the case, and on this ground alone, it can no longer claim to be the Free Church of Scotland.

Such a Finding, which is clearly of a declaratory nature, would need to pass through Barrier Act legislation in order to be binding.

{The Barrier Act - In 1697 an Act of Assembly was passed that "before any General Assembly of this Church shall pass any Acts, which are binding rules and constitutions to the Church, the same Acts be first proposed as overtures to the Assembly, and being by them passed as such, be remitted to the consideration of the several Presbyteries of this Church, and their opinions and consent reported by their Commissioners to the next General Assembly following, who may then pass the same in Acts if the more General opinion of the Church thus had agreed thereunto."}

Petitions: A number of letters and Petitions were received by the October Commission. One was presented by Mr. John MacKenzie, Assynt.(see Appendix 26). These sought a way forward whereby reconciliation could be found. The proposals for the most part suggested that some outside body be approached with a view to arbitration. For example, a number of office-bearers from sister Churches in Ireland, the Netherlands, and/or the United States would be asked to examine the respective case of either side and give a judgment which both sides would be bound to accept. The idea of taking a problem to the wider Church is biblically based, therefore those representing the F.C.D.A. agreed in principle to the suggestion. The F.C.D.A. bound itself and its members to accept the findings of a panel of independent arbiters:

> "The Free Church Defence Association hereby undertake to cease functioning as an actively functioning body forthwith.....the F.C.D.A. hereby bind themselves to accept the findings of the panel of arbitration.....They undertake to disband when the Panel's findings are accepted by the General Assembly and when there is no further perceived threat to the Constitution of the Free Church whether in letter or practice." (see Appendix 27).

The Commission, however, did not receive the Overtures. We believe that their refusal to allow other Christian brethren to examine and determine the evidence betrayed the fact that the evidence could not stand the light of close scrutiny.[48] It also betrayed the fact that the majority were now willing to expel 32 Free Church ministers rather than have the evidence examined.

Findings of December Commission 1999 (see Appendix 28)

To secure their right of appeal, the Commission of Assembly postponed the trial of Rev William MacLeod and Rev David Murray which was now to be heard before the Western Synod. This trial, however, was overtaken by events on 20th January 2000 and so never took place.

Skye Presbytery - The Commission appointed eight ministers and eight elders from outwith that Presbytery to the Presbytery of Skye & North Uist. This meant that the existing members of the Skye and Uist Presbytery would be outvoted in their own Presbytery and thereby the will of the majority in the Commission would be imposed upon the Presbytery. The Presbytery of Skye & North Uist was now effectively in the hands of the majority of the Commission of Assembly. This was seen as a gross violation of the rights of the elected Presbyters of Skye & North Uist, and a breakdown of basic Presbyterianism.

Libels - Before the Commission was a response from the National Committee of the F.C.D.A. to the decision of the October Commission. This letter was courteous, but explained why those of the F.C.D.A. could not in all conscience fall in with the course of action demanded by the majority. The Commission now began a process of discipline against

[48] Two sister churches, the Orthodox Presbyterian Church (of the USA) and the Reformed Presbyterian Church of Ireland, made their own limited but independent investigations into the dispute which led to the division and reached their own conclusions. The Reformed Presbyterian Church of Ireland have suspended relations with the Residual Body. The OPC wrote a letter in which it requested the Assembly of the Residual Body either directly or through its TOM Committee to reconsider their not censuring publicly acknowledged sin. This letter was not even discussed by the Commissioners of the Residual's Assembly.

the ministers named in the letter, requiring them to appear before the Commission of Assembly on 19th January 2000. A Committee was appointed to prosecute the libel.

Commission Letter - A letter was compiled and sent to all the ministers to be prosecuted (see Appendix 29). There were two versions of the pastoral letter before the Commission. The more conciliatory letter was withdrawn. This letter implores those named to reconsider their position. It addresses a number of issues, but does so inadequately. The following points may be made regarding this communication:

Firstly, it did not address the fundamental problems that had arisen over the past number of years and that were at the centre of our grievance e.g. denying a review of the Finding of the 1995 Assembly; denying private libels; allowing sinful behaviour (immorality, conspiracy, perjury) to be ignored or treated lightly contrary to the Constitution of the Church; denying natural justice to those seeking to clear their names; and the Church itself continuing to propagate untruth regarding the 1995 finding.

Secondly, it states that "Members and office-bearers of the Church have every right to express their point of view within the courts of the Church and during the processes of discipline. This is not a right that is being infringed or modified." Yet this statement is at variance with the facts. The June Commission declared: "that any opportunity for private action in regard to this matter in the courts of the Church now ceases" (N.B. - 'this matter' is an undefined and elastic reference to *anything* relating to Professor Macleod, and is the term used by the majority from the 1995 ruling onwards). This matter could not now be pursued 'henceforth in any form'. Further, Rev William MacLeod and Rev David Murray published an issue of *Foundations* magazine including this statement: "The General Assembly should recall the decision of the 1995 Assembly as being procedurally unsafe." The mere publishing of this statement was held to be sufficient for a process towards libel to begin at the October Commission. The statement issued by the Commission denied men the right to continue to protest, even in the face of new evidence.

Thirdly, the Commission instructed all to desist from making allegations of conspiracy unless they did so by means of due process. Yet the Commission of Assembly on 31st October 1996 had received a Report from the F.L.A. Committee, which stated: "it is *ultra vires* and incompetent for the Commission to repudiate the idea that there has been a conspiracy to pervert the course of justice without considering the question of evidence.....it is *ultra vires* and incompetent for the Commission to forbid questioning the innocence of alleged conspirators". Thus, according to the Assembly's own advisory Committee, because the Church refused to examine the evidence it could neither exonerate the conspirators, nor repudiate the allegations made against them. However, neither could it forbid questioning their innocence. Everyone, it appears, was just to stop talking about it. This situation was hardly likely to please those accused of conspiracy, especially now that the Commission had stipulated that, "this matter in the courts of the Church now ceases....." The matter was not now to be pursued *henceforth in any form*. This left them in the position of being publicly branded conspirators, suspicion over their heads, with no prospect of ever clearing their name.

The letter goes on to expose the real rationale behind the Commission's decision - the unquestioning duty to submit to decisions of the majority or to honourably leave the church, as:

> "All office-bearers are required to respect the decisions of the courts of the Church, but if any individual feels that it is impossible for them to live with the decisions of the majority, the Church acknowledges that the honourable course in such matters is to leave the Church." [49]

This statement reflects the view expressed by Professor John L Mackay, the Assembly Clerk. He had stated on the floor of the Assembly that a protest safeguards the conscience of those who disagree with an Assembly's decision. One must then leave it to the Lord. If one could not be obedient to a decision of the majority one must leave the Church. Mr. Mackay did not, however, indicate what he saw as the distinction between a *dissent with reasons* and a *protest*. We believe that conscience is safeguarded by a *dissent with reasons* without the need of going further. This view is affirmed by *The Practice*, which states:

> "The General Assembly being the Supreme Court of the Church, there is no room for any other procedure against its decisions except that of dissent with reasons. There is no room for a Complaint or Appeal. By dissenting with reasons a man keeps his conscience clear from the responsibility of what he does not approve of, and his appeal goes up to the Head of the Church on high." [50]

As we have endeavoured to show earlier in this document, while the forefathers of the Free Church of Scotland wholly endorsed this statement in *The Practice*, they never interpreted it as affording a reason for a minority to forsake what they had vowed to defend and from protesting against unconstitutional decisions. The 19th century minority protested,

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[49] Letter from John L MacKay, Assembly Clerk on behalf of the December Commission of Assembly to those ministers to be suspended on 20 January 2000.

[50] Practice of the Free Church of Scotland, 1995 edition, Part II.10

and continued to protest, at unconstitutional decisions. Decisions of Assembly, constitutionally arrived at, must be submitted to even when disagreed with. As shown above, dissent with reasons clears the conscience of responsibility. However, violations of the Constitution must be protested against. In this, one is protesting as much against the proceedings as against the decision itself, and one is appealing to the Constitution. Dissent with reasons in the case of late could not have satisfied the conscience of many. Leaving it to the Lord may have safeguarded the conscience of some, but it would not have safeguarded the reputation of those who had been accused of adultery, perjury, or conspiracy. No church court can demand from its subjects the acceptance of such an evil designation. No church court has the authority to remove the constitutionally secured rights of her members. And no church court can demand that others refuse to help such in an endeavour to clear their names through constitutionally appointed means.

The statement within the Commission's letter implies that majority decisions of Church Courts are infallible. This is contrary to the doctrine of the Westminster Confession of Faith which clearly states that Church courts are fallible and often err. It would appear also to fly in the face of the historic position of the Free Church of Scotland in 1892-1900. It is certainly contrary to the view of the evangelical party in the 18th century from which the Free Church descends. During the 18th century, ministers were imposed on congregations by patrons. Certain presbyters of the Evangelical Party refused to attend such inductions as a matter of conscience, believing in the call of the people. The Moderates initially appointed 'Riding Committees' to help with this situation, but eventually *demanded* the attendance of all presbyters. The Evangelical Party drew up the following manifesto:

> Whatever privileges the Church of Scotland has by law, these can never make her a merely voluntary, or merely legal society, so as to be governed only by rules of her own making, or only by civil laws, or only by both together; but she must still be reckoned a part of the church of Christ, of which he alone is Lord and King; and which has a government appointed by him, distinct from the civil magistracy; and all the members of it are to be subject to his laws alone, absolutely and without reserve. And therefore the censures of the church are never to be inflicted but upon open transgressors of the laws of Christ, himself, its only lawgiver; *nor can we think that any man is to be constructed an open transgressor of the laws of Christ, merely for not obeying commands of any assembly of fallible men; when he declares it was a conscientious regard to the will of Christ, himself, that led him to this disobedience.* And therefore this decision of the Assembly seems to us a stretch of power derogatory to the rights of conscience, of which God alone is Lord, and to the sole authority of Christ in his church.
>
> We have always .....conceived that Presbyterian government as distinguished from all other forms of church government consisted in the parity of pastors and subordination of church judicatories; as it is described both in the form of our subscription and in the laws of our establishment; without implying that even the supreme judicature was vested with absolute authority or infallibility, or that an active obedience without reserve was to be given to its decisions; which we could never imagine to be a principle tenable by any Christian Protestant church. Accordingly, our subscription, *and engagement to obedience and submission to the judicatures of the church, is with the express limitation of its being in the Lord; that is, in such cases only as we judge not to be disagreeable to the will of the Lord:* of which every man has an unalienable right to judge for himself, as he will be answerable to the Lord: a right which he cannot give up to any man or society of men; BECAUSE IT IS NOT MERELY HIS PRIVILEGE BUT HIS INALIENABLE DUTY. (Evangelical Manifesto 1751)

The late Principal John Macleod of the Free Church College, a noted and distinguished exponent of Free Church principles, in speaking about the introduction of new legislation elucidates the relative distinction between a dissent and a protest as follows:

> Those who oppose it may enter either a dissent or a protest - the difference being that when they are able to co-operate with the section which put through the new statute, even though they oppose it, they will enter a dissent, to make it clear that it was against their mind that the matter was done; but if they cannot co-operate with the new legislation, it is a protest they raise, or, in other words, a protective witness to say that they cannot be obedient to the courts in the matter in hand."
>
> (Principal John Macleod. F.P. Magazine. vol.6. p.158)

It was not new legislation that the majority in the Free Church imposed upon brethren on 20th January 2000 but a simple *finding* of Assembly; yet a *finding* which was subsequently to be used in a manner which usurped all norms of church discipline. The ultimate outlawing of the F.C.D.A. was equivalent to new legislation in that it became an integral part of the terms of communion in the Free Church. When the letter from the Commission addresses the question of what options are open it confines itself to two - submit or leave. There was one other option, however, not considered by the Commission. That option was to apply the requirements of the Constitution of the Church in the case against Professor Donald Macleod and the so-called conspirators. This was all the F.C.D.A. wanted. Were the Commission to have done so, all parties would have had to submit to the final verdict.

20th January 2000 (see Appendix 30)

On 20th January 2000, the libels against 22 ministers were prosecuted. The charge was contumacy. The accused appeared at the Bar of the Commission of Assembly believing it their duty to obey the will of the Commission in this matter. They did so under cover of protest. They asked for the proceedings to be held in open court. This was refused. They asked for the proceedings to be recorded. This was refused. The relevancy of the charges was debated. The accused were allowed to speak but only on the matter of relevancy. **During the proceedings, the Assembly Clerk informed the brethren that it was now his opinion that the Commission did not have the authority to proceed with the trial.** This advice from the Assembly Clerk is very telling. His role is to guide and advise the Assembly on such matters. However, the Commission paid no attention to his warnings.

When relevancy was found proven a protest was lodged. The men charged were asked three questions relating to their membership of the F.C.D.A. and their willingness to renounce it. After these questions were answered according to conscience, no further trial was necessary. Thus, no opportunity was given for a defence. The libels were served and, according to the law of the Church, suspension from duties was immediate, final sentence to take place at the May 2000 Assembly.

It appears though, that the final sentence had already been determined even before proceedings had begun. In the October issue of the Monthly Record, Rev Iain Campbell had written: "It is time to cast out the bondwoman and her son. The Commission of Assembly will fail the Church unless it disciplines them all." The Rev Angus MacRae, the Commission's own Press Officer, reported in the January 2000 issue of the Monthly Record: "The Commission of Assembly began a process of discipline against these ministers, requiring them to appear before the Commission of Assembly on 19th January 2000. If at that meeting they confirm they are still in agreement with the FCDA letter and they refuse to move their position the Commission will have no option but to suspend them for their continuing contumacy." The ministers involved complained that this statement was prejudicial to their trial and such comments should not have been made on an issue *sub judice.*

The Assembly Clerk was asked to clarify the position. He confirmed that the ministers involved were now removed from their pulpits and all ministerial duties forthwith. Yet again, the use of the charge of contumacy was employed to deny men the right to defend themselves. Only when the position was clarified by the Assembly Clerk was the Declinature read, and we left the building to continue the Commission of the Free Church of Scotland within the Magdalene Chapel. To this date, the Residual Body has never engaged with the Declaration signed by the men who reconstituted (copy of Declaration at Appendix 31).

III. The Church's dealings with individuals.

We seek here to relate something of the Church's dealings with two particular individuals. Each has experience of unacceptable behaviour on the part of the courts of the Church, and each has provided a statement of events. In both instances, we believe there is incontrovertible evidence of a spirit of imposition and authoritarianism on the part of the majority, behaviour alien to the Practice of the Free Church and that denies the basic human rights of ministers of the Gospel. We look at the cases of:

(a) Rev Maurice Roberts, Greyfriars, Inverness (see Appendix 32)

(b) Rev Murdo Angus Macleod, Harris Free Church of Scotland (see Appendix 33)

<u>Rev Maurice J Roberts</u>

As stated above, Rev Maurice Roberts had brought a libel against Professor Donald Macleod to Edinburgh Presbytery. His libel, in contrast to the other libels, referred to statements made in newspaper articles regarding the form of worship practised within the Free Church. Professor Macleod had taken his vows on at least four separate occasions (at licensing, induction to Kilmallie, induction to Partick Highland, and to the Professorship in the Free Church College). These vows were to the effect that he would, "to the utmost of [his] power assert, maintain and defend the said.....worship of this Church." Yet on five separate occasions in newspaper articles in the *West Highland Free Press* bearing these dates (5/7/96; 6/9/96; 16/5/97; 6/2/98 and 29/5/98) Professor Macleod attacked the Free Church's principles of worship. As already stated, Edinburgh Presbytery refused to receive the libel. The June Commission, in closing the whole subject without specifying the matters concerned, had prevented a Free Church Minister from defending the Church's form of worship. Free Church ministers were henceforth prevented from fulfilling their own ordination vows which demand that they do the utmost within their power to defend purity of worship.

{It is worthy of note that the 1999 General Assembly removed the necessity for vows in the induction of a new Principal of the College. The natural suspicion was aroused that this change was introduced simply to facilitate the new Principal elected, Professor Donald Macleod, who could no longer *in good conscience* take the vows required regarding the worship as presently practised within the Free Church}.

At the General Assembly on 14th May 1999 the Rev Maurice Roberts, having been challenged by Rev David Robertson (Dundee) regarding alleged statements made in the media that morning that the F.C.D.A. had been

considering taking legal action against the Free Church of Scotland depending on the outcome of that day's proceedings, stated that he had witnessed proceedings in the General Assembly which were; "characterised by gross and irremediable wickedness and by hypocrisy." David Robertson immediately proposed a motion which implied that Mr. Roberts had called *the proceedings of the Assembly* wicked. This switch from the particular to the general may have been unintentional, but it went unnoticed and had a profound influence on what later transpired. After debate, Mr. Roberts was called forward and asked to withdraw the words attributed to him. Mr. Roberts sought to make a clarifying statement. However, he was refused permission to make any such clarification. The Assembly demanded he withdraw the offending statement and express profound regret. This Mr. Roberts was unwilling to do.

We believe that the proper course of action for the Assembly would have been to give Mr. Roberts three options: explain and prove what he had said; withdraw it unreservedly; or, failing either of these, to proceed to disciplinary action. By refusing to allow him to explain and prove what he had said the majority, in effect, were declaring that the Assembly was beyond reproach, and that majority decisions were beyond criticism or questioning. The assumption that decisions of Assembly cannot be criticised in any way is contradicted by many examples in the past. As we have already stated, Rev James Begg in the 19th century is but one example. If there was, as many believed there was, gross evil and hypocrisy in some of the proceedings of the Assembly then that should have been addressed. However, the Assembly now proceeded to set up a committee to draw up a libel against Mr. Roberts.

An Overture before the brethren sought to draw the Assembly's attention to the fact that this whole issue had started with unsubstantiated remarks attributed to the F.C.D.A., remarks which were categorically denied. Mr. Roberts, on being pressed further than he should have been, had been subjected to undue and unwarranted pressure to answer hostile questions. As such, the Assembly was asked to instruct the committee to take these points into account. It refused this request and passed from the overture.

June Commission 1999 - This Commission of Assembly was assigned the task of dealing with the libel against Mr. Roberts. The discrepancy between what Mr. Roberts actually said regarding particular proceedings of the Assembly, and the false assumption that he had accused the Assembly itself of being evil and wicked, was established during opening questioning by the Assembly Clerk. Mr. Roberts stated: "Moderator, it was never my intention to characterise the whole Assembly, and every person and every action, as partaking of hypocrisy and wickedness." (The reports of the actual words spoken by Mr. Roberts at the 1999 Assembly confirm the accuracy of this fact). Even the Assembly Clerk, in now recognising the discrepancy, had to admit, "It seems to me that you have already in part complied with what the General Assembly asked you to do." This made no difference - the Commission proceeded with the libel. The focus of the libel, however, had fundamentally changed. The charges were not now to do with what Mr. Roberts had or had not said. That appeared to be irrelevant. It was now his refusal to obey the Assembly's instruction to withdraw that was the crime to be faced. This shift was not only unconstitutional, but had the effect of denying Mr. Roberts the right to a fair and proper trial. Relevancy was dealt with first. This part of the proceedings is referred to in *The Practice*, as follows:

> At the very commencement of formal proceedings and before any witnesses are heard the person accused may object to what is called the relevancy of the charge as stated. The essence of such an objection is the claim that the conduct referred to in the charge is not, in fact, in breach of a principle of Scripture." (*The Practice.* Chapter V. Part II. para. 14. p.93)

For Mr. Roberts to refuse to withdraw a statement against his conscience, a statement he knew to be true and which he felt duty bound to make, was not in breach of any principle of Scripture. Indeed, to have withdrawn his statement would have violated both his conscience and Scripture which demands honesty in our dealings one with another. The following texts are given in support of this:

> 11. Ye shall not steal, neither deal falsely, neither lie one to another. (Leviticus 19:11)
>
> 27 And when they had brought them, they set them before the council: and the high priest asked ,
> 28 Saying, Did not we straitly command you that ye should not teach in this name? and, behold, ye have filled Jerusalem with your doctrine, and intend to bring this man's blood upon us.
> 29 Then Peter and the other apostles answered and said, We ought to obey God rather than men. (Acts 5:27-29)
>
> 25 But he said, I am not mad, most noble Festus; but speak forth the words of truth and soberness.
> 26 For the king knoweth of these things, before whom also I speak freely: for I am persuaded that none of these things are hidden from him; for this thing was not done in a corner. (Acts 26:25-26)

What was in breach of a principle of Scripture was for the Commission to refuse Mr. Roberts any opportunity of a defence. "Doth our law judge *any* man, before it hear him, and know what he doeth?" (John 7:51). Had the Assembly charged Mr. Roberts with slander he would have been able to defend what he had said. However, the Assembly, charging him with contumacy, shifted the emphasis from what he had said to the simple fact that he had said it. Thus the question was; 'Did Mr. Roberts refuse to comply with an instruction of the Assembly?' The answer was: 'Yes'. Despite the fact that the Assembly Minute upon which the proceedings were based was inaccurate (as tape recordings

are able to show), despite the fact that the primary subordinate standard of the Church (The Westminster Confession of Faith) warns that "All synods or councils since the apostles' times, whether general or particular, may err, and many have erred;" (W.C.F. Ch.31.iv), despite the fact that the Commission gave no indication of its willingness to consider the allegations in any form, despite the circumstances surrounding the alleged offence, and despite the fact that the indictment brought denied him the opportunity to present the twenty-seven documents he had gathered in evidence and the opportunity to cite the twenty-six individuals and two Presbyteries as witnesses to the truth of his statement, the Commission found Mr. Roberts guilty of contumacy. He was suspended *sine die.*

Rev Murdo A. N. Macleod

A difficulty arose for many ministers within the Free Church during the summer of 1999 when the F.L.A. issued its Statement - on the authority of the Commission of Assembly - dealing with some of the problems within the denomination, including those concerning Professor Donald Macleod. Many ministers were all too aware that there were assertions made within this Statement that were simply not correct. Some ministers therefore refused to issue the statement on the grounds that they would not be implicated in spreading untruth. However, Rev Murdo A N Macleod of Harris Free Church had a double problem. His Presbytery had issued a comparable Statement containing similar misinformation. The Presbytery determined that its Statement was to be distributed to all congregations within its bounds in addition to the F.L.A. Statement. There was also a Statement issued regarding the suspension of Rev Maurice Roberts which Mr. MacLeod felt was at the very least misleading.

Rev MacLeod decided, however, to obey the Presbytery ruling. He issued both Statements at a congregational meeting held on 3rd September 1999. Along with the Presbytery Statement, he issued a Statement of his own (Appendix 34) giving facts to clarify the situation as he saw it. His Statement was courteous and reasoned. For this, Mr. MacLeod was questioned in a hostile manner at the Lewis Presbytery and a Committee was appointed to look into the matter. When the Committee reported back, the Presbytery demanded Mr. MacLeod withdraw his own Statement - unreservedly withdraw all criticisms of the Presbytery Statement - and give a public apology from his pulpit. Mr. MacLeod explained to the Court that it was impossible for him to withdraw what he believed to be true in favour of what he believed to be error. "At the same time" he writes, "I made it clear that I would withdraw anything that was shown to be erroneous or false." The Presbytery was unable to identify any erroneous statements made by Mr. MacLeod, yet on 26th October 1999 it proceeded to libel him for subversion and contumacy. He was to meet the Presbytery on 18th January 2000 to consider the libel but this was overtaken by events in the Commission of Assembly. The action of the Presbytery is based on the same belief as that expounded by the Commission of Assembly, as:

> "That is not to say that decisions of Committees or Church Courts cannot be challenged. It has always been the case in Free Church government that a person objecting to any decision of a Church Court can seek review of that decision by a superior Court. But what then happens if an Assembly decision is objected to? The Presbytery wish all our people to know that in those circumstances Free Church government allows for only two options. Firstly, the objector may dissent and protest against the decision, thereby clearing his/her conscience in connection with the decision, yet continue to live and work in the Church as a full member of it. Secondly, if the objector cannot live with the decision, then he/she has no option but to leave the Church. That has always been the Free Church position. What an objector may not do is dissent and then continue to subvert the findings of the Assembly. We have no licence to sin against Scripture by acting and speaking divisively. Such conduct never accords with the worship of the Church." (Statement by Lewis Presbytery)

We believe this statement is itself divisive and subversive of the Constitution of the Free Church. We believe it breaches the Constitutional position which gives unity, form and cohesion to that body.

Firstly, it has *never* been the Free Church position that anyone *must* give obedience to the highest court of the Church. "God alone is Lord of the conscience, and hath left it free from the doctrines and commandments of men which are in anything contrary to his word, or beside it in matters of faith and worship.....and the requiring of an implicit faith, and blind obedience, is to destroy liberty of conscience, and reason also." (*Westminster Confession of Faith.* Chapter XX. Section II)

Secondly, so far as the assertion that an objector *must* separate from the Church is concerned, the question put to Probationers at Ordination states:

> "...and that, according to your power, you shall **maintain the unity** and peace of the Church against error and schism, notwithstanding of **whatsoever trouble or persecution may arise**....." (*The Practice* Appendix II. (3) p.153)

It was not our duty to leave the Church. On the contrary, it was our duty to stay in the Church *(maintain the unity)*, despite all the difficulties that may come our way (*notwithstanding whatsoever trouble or persecution may arise)*, and continue to protest.

Thirdly, the Lewis Presbytery makes no distinction between 'dissent' and 'protest'. The distinction made by Principal John Macleod is lost. If, in normal circumstance, one disagrees with the decision of the Supreme Court of the Church, a dissent with reasons keeps the conscience clear and the appeal goes up to the Head of the Church. If, however, one cannot co-operate with a *Finding*, it is a protest that is raised, or, in other words, "a protective witness to say that they cannot be obedient to the courts in the matter in hand."

Fourthly, and perhaps most obviously, Free Church history during the 19th century puts paid to the assertion "this has always been the Free Church position." The original F.C.D.A. was born out of such a Protest. This is the reason for the Free Church Protest in 1867, which stated: "...we and all other office-bearers and members of the Church shall not be committed by the said resolution to any action that may be taken thereupon, *and shall be at liberty to oppose all such action by every competent means."* (Protest of James Begg and others, 1867)

Fifthly, we agree that a case of discipline carried out in a proper judicial manner is binding. We believe, however, it has been amply demonstrated that not only have no judicial proceedings been instigated against Professor Donald Macleod, in that he has never been libelled, but there are some accusations that the Church has never considered. While this situation continued, we reserved our right to protest.

Addendum

We believe that Biblical Church discipline is a mark of the Church. We believe it to be one of the defining principles embraced within the Constitution of the Free Church of Scotland. We believe that on 20th January 2000 the majority party within the Free Church of Scotland so violated and effaced that mark, and expelled from her communion those who sought to defend that mark, that she has forfeited the right to be called the true Free Church of Scotland. We believe that the Residual Body now exercises an indefinite and arbitrary form of church discipline, contrary to the contract of association as specified by Lord Davey in 1900: "That Church is a voluntary and unincorporated association of Christians united on the basis of agreement in certain religious tenets and principles of worship, *discipline,* and Church government" [51] and contrary to the definition given by the forefathers of the Free Church in 1900: "The said Free Church of Scotland is a voluntary association or body of Christians associated together under a *definite contract* involving the maintenance of *definite principles*." [52]

We believe that by professing, adhering to, maintaining, and defending church discipline 'agreeable to the Word of God' we have the right to the title The Free Church of Scotland, and to the moneys, property, and goods relative thereto. In this respect, we believe the Model Trust Deed (see Appendix 35) supports our assertion in that we as a body have adhered *more closely* to the principles of the Free Church of Scotland than the majority (Free Church Model Trust Deed. Act XVIII, 1844: Act anent the Model Trust Deed).

Our appeal to the civil authority is in respect of temporalities only. We believe that the civil magistrate has the duty to consider the moneys, properties, and goods belonging to the said Free Church of Scotland and that we are therefore justified in bringing our case into the civil arena. We refer to the case of the Free Church of Scotland in 1900 (Free Church vr. Overtoun & Others) for precedent, as well the 'Catechism on the Principles And Constitution of the Free Church of Scotland' published in 1845, which states:

> Qu. 53. When you say that the Church is subject only to Christ's laws, and is to be governed only by the office-bearers he has set over it, do you speak of the TEMPORAL PROPERTY that may belong to the Church?
>
> Answer No; God has made all temporal possessions whatever subject to the civil magistrate. (Luke 12:13,14; Romans 13:6,7)

Some Closing Questions

Question 1: Did the F.C.D.A. go too far in the way it protested? Can the Residual Body object that it was not the fact that it protested, but the way in which the F.C.D.A. carried out its protest that was offensive?

(i) The F.C.D.A. emulated the forefathers of the Free Church of Scotland who, in the 19th century, held meetings, published a magazine, and spoke out in a more vociferous way than the F.C.D.A. ever did of late. There was, therefore, precedent for all our actions.

(ii) If those of the F.C.D.A. went too far in protesting why were they not libelled for being divisive, disruptive or for slander? Every libel served was for contumacy i.e. wilful disobedience to a Church court.

[51] Written Judgment of Lord Davey: The Free Church Of Scotland Appeals. p578

[52] Free Church vr. Overtoun & Others: Condescendence for Pursuers. cond. 10

(iii) Rev William Macleod and Rev David Murray were libelled simply for publishing the statement: "The General Assembly should recall the decision of the 1995 Assembly as being procedurally unsafe." This proves it is not the way the F.C.D.A. went about its business that was offensive, but what it had to say.

Question 2: Are we not bound to comply with the injunction: "Obey them that have the rule over you, and submit yourselves?" Do we not promise at induction to submit ourselves to the judicatories of the Church?

These commands and vows do indeed show the need for obedience to those who have the spiritual rule over us. Yet what is at question is not the obedience due to those who rule over us, but the relative relationship between the obedience to those ruling, and the right of private judgment and liberty of conscience. The latter must come first. The Westminster Confession of Faith states it as follows:

> " God alone is lord of the conscience, and hath left it free from the doctrines and commandments of men which are in any thing contrary to his word, or beside it, in matters of faith or worship. So that to believe such doctrines, or to obey such commandments out of conscience, is to betray true liberty of conscience: and the requiring of an implicit faith, and an absolute and blind obedience, is to destroy liberty of conscience, and reason also." (*W.C.F.* Chapter XX.ii)

This implies that private judgement *comes prior to* the obedience demanded to rulers. Thus, in things contrary to the Word of God, the ruler cannot demand implicit obedience. The confession goes on to state:

> It belongeth to synods and councils ministerially to determine controversies of faith, and cases of conscience; to set down rules and directions for the better ordering of the public worship of God, and government of his church; to receive complaints in cases of maladministration, and authoritatively to determine the same: which decrees and determinations, *if consonant to the word of God,* are to be received with reverence and submission, *not only for their agreement with the word,* but also for the power whereby they are made, as being an ordinance of God, appointed thereunto in his word." (*W,C.F.*Chapter. XXXI. iii).

The above makes it very clear that only decisions consonant with the Word of God are to be obeyed.

Question 3: Could we not have just forgotten the troubles and got on with preaching the Gospel?

(i) No. A Professor of Theology accused of immoral conduct; the same Professor accused of perjury in the civil court and; office-bearers accused of conspiracy; church courts accused of covering up sinful actions and issuing official statements that were at best misleading; the Church destroying papers in the face of a father seeking to clear his daughter's name; office-bearers denying their own ordination vows; and office-bearers manipulating procedures within church courts for their own ends. The Constitutional position of the Church is "If I regard iniquity in my heart, the Lord will not hear me" (Psalm 66:18)

(ii) The greatest difficulty to emerge from what took place was the attitude of the Church in covering up sin. It appeared to be willing to persecute the righteous, while at the same time to harbour alleged wrongdoers. At the same time it was espousing a principle alien to the Free Church of Scotland, that of authoritarian rule and denying its members the right to continue to protest against violations of church discipline.

Question 4: There was no answer to the problem - should we not just have left it to the Lord?

There was an answer. The Constitution of the Church provided the answer. The requirements of the Bible and the Subordinate Standards demanded a proper and thorough investigation of the evidence.

Question 5: What about the finding in the civil court in 1996? Can the Free Church interfere when there has already been a verdict in the civil court?
There is a difference between civil law and that of the Church when it comes to discipline. The Church is concerned with the moral and spiritual well-being of its members. Act XXVIII, 1978 of the General Assembly draws attention to this.

> "It should be recognised that Church discipline is not precisely of the same order as civil, and the Church cannot therefore divest itself of the responsibility of ascertaining facts and their relevance. No proceedings or judgment of a civil (or criminal) court can be regarded as a substitute for due ecclesiastical process, though such judgments may help in determining whether a process is required. Church courts must form their own judgments independently of proceedings in other courts"

Further, the civil court case did not address the allegation of improper conduct in Australia.

Question 6: Were the issues involved not matters of discipline and, as such, different from Acts of Assembly or legislation? Does this not make a difference to the case?

(i) We do not believe the Assembly decision of 1995 was a judicial verdict. It was a *Finding* of Assembly involving discipline, but not a judicial finding.

(ii) The Constitution of the Church demands that we defend Church discipline "agreeable to the Word of God"

(iii) Regardless of what type of decision the Assembly comes to, it cannot impose any ruling upon office-bearers that is contrary to the Constitution of the Church. If a majority in the Assembly seek to enact unconstitutional decisions, office-bearers are duty bound to protest. Those who continue to protest become the true representatives of the Free Church, even if that is a minority of one. If the protesting minority are expelled, they carry with them the title 'Free Church of Scotland' (These last two points characterise the position of 1900, accepted in the House of Lords in 1904)