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The notable decision of the Free Church Case in the House of Lords,[1] the sensation, not to say consternation, which that decision created in Scotland, and the attempt to relieve the difficulties of the situation by an Act of Parliament—a mode of relief which of course would not be available to override a like decision in the United States—may well cause a feeling of satisfaction in the minds of American lawyers that our courts have already clearly departed from the English precedents in dealing with church controversies.

The Free Church case arose from the formal union in 1900 of the Free Church of Scotland, with the United Presbyterian Church, under the name of the United Free Church. To this union a very small minority of Free Church ministers and congregations—afterward popularly known as the Wee Frees—refused to consent. The United Free Church thereupon sought to oust them from the churches, parsonages and other church property which they were occupying, and which had been originally vested in trustees of the Free Church, and after the union transferred to trustees of the United Free Church. The Wee Frees retaliated by a demand for the entire property held by the Free Church prior to 1900, claiming that the majority of the Free Church had lost their right thereto by the act of Union, and that they, the Wee Frees, were entitled to it as the only legal representatives of the Free Church. This claim, after being denied by all the Scottish courts, was sustained by the House of Lords. By this decision about eight hundred churches, with their manses, schools, etc., three great universities, and over one million pounds of invested funds were declared to be the property of a small body of Highland congregations, with not

1. *Free Church of Scotland v. Overtoun* (1904), A. C. 515.

over thirty ministers. The Parliamentary action which followed this decision was justified in argument by the absolute impossibility of the Wee Frees administering this great trust property. To an American, the ground of decision is perhaps more surprising than its results; but, to make this clear, a brief statement of history is necessary.

Prior to 1843 the later Free Church was a part, and formed the majority, of the Established Church of Scotland, Presbyterian in polity, and adhering to the Westminster Confession as its theological standard. Its ministers and elders had often been restless under the inconveniences incident to its position as a state church, especially under the right of presentation of ministers to its churches still vested in certain lay patrons. In 1835 its General Assembly passed the Veto Act, by which any congregation might reject the minister presented by the patrons. The Veto Act was held by the civil courts to be in conflict with Acts of Parliament and void. This decision brought about what must certainly be deemed one of the most heroic and dramatic events in modern church history. The church first presented to the Queen and to Parliament its "Claim, Declaration and Protest," in which the claims of the church were set forth with stately and powerful eloquence. But neither Queen Victoria nor the British Parliament received the protest with any favor; and it was evident that within the establishment there was no hope of relief from subjection to secular control. Then, on May 14, 1843, in the General Assembly of the Church of Scotland, the Moderator, the honored and loved Dr. Chalmers, solemnly left his chair, and, followed by four hundred and seventy-five divines, a majority in numbers, and a far greater majority in distinction of character and influence in the church, went out upon a neighboring hill, there to re-assemble as the Free Church of Scotland. "The life departed from the Establishment, and these who remained gazed upon the empty space as if they had been looking into an empty grave." [2]

The seceders had counted the cost, and they at once executed individually a formal Deed of Demission, by which they surrendered all their right as ministers of the state church, and abandoned their churches, parsonages, and endowments. They might well have applied to themselves the words spoken of the Father of the Faithful, who "when he was called, obeyed to go out into a place which he was to receive, and he went out not knowing whither he went. By faith he became a sojourner in the land of promise,

2. Buchanan, "The Ten Years' Conflict," Vol. III., p. 442.

as in a land not his own, dwelling in tents."[3] But the leaders of the Free Church were practical men; they were conscious of having behind them the religious and patriotic strength of Scotland, and to that strength they at once appealed.

Dr. Chalmers prepared an address, which was adopted and widely published by the General Assembly of the Free Church, setting forth the grounds of their action, and asking the endorsement of the Scottish people by the contribution of funds for the upbuilding of a new church. This appeal was nobly met, and the Free Church began its new career. But in this address—and this was relied upon as of supreme importance in the House of Lords—they declared themselves a voluntary church by necessity only, and affirmed their belief in the principle of an established church, and in the duty of the state to support the true religion by the endowment and support of the church. They therefore declined to join with the so-called Secession Church and Relief Church, both of which were voluntary churches in principle as well as in fact, and denied the rightfulness of any union of church and state. These two churches soon after became one, the United Presbyterian Church.

A church disestablished for fifty years can hardly be expected to adhere very zealously to the principle of establishment, and the same result happened, though far more slowly, to the Free Church of Scotland, which happened to the English Puritan exiles, adherents, though persecuted, to the Church of England, when on the free soil of America they came in close contact with the Separatist Pilgrims, and found the bonds of sympathy with their free brethren far stronger than those of loyalty to the established church. The Puritans almost at once abandoned their Episcopal principles, and adopted the Congregationalism of the Pilgrims; and the Free Church in 1900 joined upon equal terms with the United Presbyterian Church, the United Free Church by the agreement of union recognizing the right of freedom of opinion as to the principle of establishment. It was this union, involving an abandonment of the "principle of establishment" as an essential to orthodoxy which was held by the House of Lords to be such a departure from the original principles of the Free Church as to forfeit the rights of the majority in the property of the church, and to entitle the dissentient minority to take the entire property. And it is singular that this result was reached in spite of the fact that the founders of the Free Church had prepared for use in making gifts of property to the church a "Model Trust Deed," under the

3. Hebrews, xi., 8, 9.

terms of which many of the larger gifts were made, and that this express declaration of trust particularly provided for the passing of the property to any church to be formed by a union of the Free Church with other churches. "I think the soundest view is to hold... that the union here contemplated must be taken to be one with other churches which might properly be made without detriment to the distinctive tenets of the Free Church," said Lord Davey;[4] and Lord Robertson went even farther: "It is not too lightly to be assumed that such unions are within the competency of any majority, however large, even if there existed no essential differenccs between the uniting bodies."[5]

It will be noticed that the departure from the principles of the founders was not upon a question of theology, in the usual understanding of that term, but on one of polity; and that the question could hardly be claimed to be one of primary importance. Indeed, the Lord Chancellor said: "I do not think we have any right to speculate as to what is or is not important in the views held. The question is, what were, in fact, the views held, and what the founders of the trust thought important,"[6] and one of his colleagues more explicitly stated: "I do not think that the court has any test or touchstone by which it can pronounce that any tenet forming part of the body of doctrine professed by the association is not vital, essential and fundamental, unless the parties have themselves declared it not to be so . . . I also think that not only an accepted interpretation of Scripture, but an accepted interpretation of an inference from a subordinate standard may just as well be an article of faith as any other opinion, and there is no tenable distinction for this purpose between one religious principle or opinion and another."[7]

It is the law of Great Britain, then, that no church can unite with another church from which it had differed in any point of faith or polity, without abandoning its entire property to a protesting minority, however insignificant. And it does not appear that the same result might not be occasioned by any such change in the doctrine and teaching of the church, though manifested in some other way then by uniting with another body. We cannot wonder that Lord Macnaghten, who with Lord Lindley dissented, was led to use unusual vehemence in his dissenting opinion: "Ev-

4. Opinion in the Free Church Case, 1904, A. C. 515, p. 654.

5. P. 668.

6. Lord Halsbury, p. 613.

7. Lord Davey, pp. 645, 651.

ery one, I think, must feel that the consequences of your Lordships' decision for good or evil will be far-reaching and of momentous importance—graver, I think, and more serious than the consequences of any decision in which it has been my lot to take part. Was the Free Church, by the very condition of her existence, forced to cling to her subordinate standards with so desperate a grip that she has lost hold and touch of the supreme standard of her faith? Was she from birth incapable of all growth and development? Was she (in a word) a dead branch and not a living church?" [8]

Even Lord Davey said: "I sympathize with the effort made by men of great intelligence to escape from the fetters forged by an earlier generation. But, sitting on appeal from a court of law, I am not at liberty to take any such matter into consideration." [9]

It is rather appalling to think of the results which would have followed from applying the British doctrine to the conditions in America, where to the religious sects of every country in the Old World we have added a sturdy crop of native growth, and where there is doubtless a greater complexity of religious organizations than anywhere else in the world.

In the last reported case of church schism in the courts [10] the opinion dealt with the Augsburg Confession, the Symbolical Books of Luther, and the national organization into rival synods of the German Lutheran church; the next case may require an investigation into the true Mormon orthodoxy, into the legitimate polity of the Old Two-Seed-in-the-Spirit Predestinarian Baptists. [11]

But the misfortune would have been far greater than to put a burden of difficult investigation upon the courts. It is hardly apparent how any of the great movements toward church unity that have been so notable a feature of recent church history could have been effected without the wholesale forfeiture of church endowments. For instance, in the union that is just being consummated between the Congregational, United Brethren and Methodist Protestant Churches, it can hardly be questioned that each of the churches is making concessions in its original polity as important as the relaxation of faithfulness to the "principle of establishment" of which the Free Church of Scotland has been found guilty.

How many of our American churches stand in doctrine and

8. Lord Macnaghten, pp. 630, 631.

9. P. 645.

10. *Duessel v. Proch*, 78 Conn. 343, 62 Atl. 152.

11. This is a denomination having 473 local churches, and 12,851 communicants. See Carroll, "Religious Forces in the United States," 48-52.

polity exactly in the footsteps of their founders? How often might not a dissentient minority have claimed to be the true adherents to the ancient faith? No more striking case of the shifting of theological standard could occur than the Unitarian schism in Massachusetts, when every Congregational church was rent between the Orthodox and the Liberal party, and when the First Church of Plymouth, the First Church of Boston and the First Church of Salem—the three foundation churches of the Pilgrims—each became Unitarian.[12] But we do not learn that the Massachusetts courts intervened to save church property for orthodox minorities.[13]

The very fact of the freedom of religion from state connection, and the absence of any governmental standard of orthodoxy, seems to have led our courts, almost unconsciously for a time, to depart from the course of English decisions. But it is fortunate that our highest court has defined the American doctrine with no less distinctness than has the House of Lords that of Great Britain. *Watson v. Jones*[14] is from every standpoint a great case. The counsel were Thomas W. Bullett, Jeremiah S. Black, Benjamin H. Bristow and John M. Harlan, and the opinion of the court was by Mr. Justice Miller. The counsel for the appellants relied wholly upon the early English and Scotch cases which are followed in the Free Church case, and the court, in affirming the judgment below, said: "We concede at the outset that the doctrine of the English courts is otherwise." They then proceed to discuss the difference between the relation of the churches to the government in England and that in America and add: "For the reasons which we have given, we do not think the doctrines of the English chancery courts on this subject should have with us the influence which we would cheerfully accord to it in others."

Having thus brushed away the British precedents, they go on to lay down lucidly the American rule by distinguishing three classes of cases:

"1. The first of these is when the property which is the subject of controversy has been, by the deed or will of the donor, or

12. A most picturesque monument of that schism still exists in the two neighboring churches in Plymouth, one proclaiming by a conspicuous tablet that it is the church of the Mayflower, having kept the organization and the records intact from the beginning, and the other that it is the church of the Mayflower, having kept the faith unperverted.

13. Such interference was expressly refused in the Dublin case, 38 N. H. 459; for other interesting controversies growing out of the Unitarian schisms, see *Hale v. Everett*, 53 N. H. 1; *Princeton v Adams* 10 Cush., 129.

14. 1 Wall, 679 (1871).

other instrument by which the property is held, by the express terms of the instrument devoted to the teaching, support or spread of some specific form of religious doctrine or belief.

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

"3. Third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals, with a general and ultimate power of control in some supreme judicatory over the whole membership of that general organization."

In the first case the express trust created by the deed must be enforced, however difficult the questions involved may be; in the second, the usual rules governing voluntary associations will prevail, that the majority governs; in the third, the controversy must be submitted to the church tribunals, and the courts will not act except to follow and enforce their decision. This opinion has indeed made a plain path for the American courts to follow, and has cleared up whatever confusion before existed. But even before *Watson v. Jones,* the American courts had almost uniformly affirmed the power of the majority in the self-governing churches. Some of them had gone so far as to permit a majority to pass over recognized denominational lines.

"It is no doubt in the power of this (Episcopal) parish, if they so determine, to convert their church and society into a Presbyterian, a Baptist or a Methodist church, without forfeiting the property held by the corporate body." [15]

In some cases, the power of the majority is limited at the point where there is a change of denomination, or a substantial change

15. *Youngs v. Ransom,* 31 Barb. 53, emphatically reaffirmed in *Burrel v. Associate Reformed Church,* 44 Barb. 282. Similar cases are *Baptist Church v. Fort,* 93 Tex. 215; *Gipson v. Morris,* 31 Tex. Civ. App. 645, 67 S. W. 433; *E. Norway Lake (Lu.) Church v. Halverson,* 42 Minn. 503; *Trustees v. Seaford,* 1 Dev. Eq. (N. C.) 453; *First Baptist Church v. Wetherell,* 3 Paige Ch. 296; *Calkins v. Cheney,* 92 Ill. 463; *Dubs v. Egli,* 167 Ill. 514, 47 N. E. 766; *Henry v. Dietrich,* 84 Pa. St. 286; *Landis' Appeal,* 102 Pa. St. 467; *Macbeth's Appeal,* 158 Pa. St. 541, 27 Atl. 1102; *Clark v. Evan. Soc. in Quincy,* 12 Gray 20; *Canadian Rel. Soc. v. Parmenter,* 180 Mass. 415, 423; *Keyser v. Stanisfer,* 6 Ohio, 363; *Wiswell v. First Cong. Church,* 14 Ohio St. 31; *Shannon v. Frost,* 3 B. Mon. (Ky.) 253, 261; *Harper v. Straws,* 14 B. Mon. (Ky.) 39; *Wilson v. Livingston,* 99 Mich. 594.

of faith, but, to justify the action of the court, the change must be substantial and must be clearly proved.

"Though there be a change in church polity, or alteration in the expressed form of faith, if the substantive theological doctrine and the general polity be retained, there is no such departure as would amount to a misuse or perversion of the trust." [16] In a few early cases the British doctrine seems to have been pretty closely followed. But since the decision of *Watson v. Jones* no court has denied that it had laid down the true line of American law.

Thus we may well say that there has become established a British rule, and an American rule, each clearly stated in a great decision of the highest court; and we may, as American lawyers or as American Christians, congratulate ourselves that the American rule tends to make of every American church, to borrow the picturesque figure of Lord Macnaghten, a living church and not a dead branch.

Epaphroditus Peck.

16. *Kuns v. Robertson*, 154 Ill. 394, 415, 40 N. E. 343, 349; *Heckman v. Moss*, 16 Ohio 583; *McGinness v. Watson*, 41 Pa. St. 10, 16-27; *Happy v. Morton*, 33 Ill. 398; *Fadness v. Braunborg*, 73 Wisc. 257; *Lawyer v. Cipperly*, 7 Paige Ch. 283.