FREE CHURCH OF SCOTLAND (Continuing)

Legal Advice & Property Committee

The Right of Continued Protest

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PART I

CONTINUED PROTEST IN ACTION

Background

1. The right of protest is well precedented in the Scottish Reformed tradition. Examples can be quoted of its use from the Reformation period and onwards. While the treatment accorded to such protests has varied considerably, it was only for a relatively brief period during the Moderate ascendancy in the 18th century that the right of protest in the supreme court was either systematically denied or made the subject of discipline. Thus the protest of Thomas Boston and others in 1722 against the condemnation of the "Marrow" was not allowed to be either read or recorded, and in 1733 the refusal of Ebenezer Erskine and his brethren to withdraw their protest was made the ground for their suspension from the ministry. The Secession churches appear to have allowed considerable latitude for the use of the right of protest, and there are numerous instances of protests being received, recorded and answered. In the Church of Scotland the right seems to have been infrequently exercised in the years following the Secession, and it was not until the Disruption period that it came into more frequent use. One of the most notable examples from this period is a Protest tabled by Dr George Cook, leader of the Moderate party, in the Assembly of 1841 against the deposition of the Strathbogie ministers. This Protest was a direct challenge to the authority of the Assembly, and sought to draw a distinction between it and the constitution. It stated: "We cannot, without violating what we owe to the Church and the State, cease to regard these men as still ministers, just as if the proceedings against them had never been instituted. In thus acting, we are persuaded that we do what we could not refuse to do, without going in opposition to the express injunctions of Scripture, and to the explicit directions of our Confession of Faith. Although, therefore, on these grounds, we do not in the present case submit to the judgement of the General Assembly, we, as office-bearers in the Established Church, under the grace of God, and protected by constituted and lawful

authority, will endeavour faithfully to discharge the duties which we as such are bound to perform." The Protest was characterised as "most unusual" and "highly disrespectful" by the Assembly, who unanimously agreed that it be not received, Dr Cook himself not opposing this. Despite the Assembly's disapprobation, there was no move towards disciplinary action against Dr Cook or any of the others who had signed the Protest.

2. On 18th May 1843 a Protest was read at the start of the General Assembly on behalf of those who then withdrew to form the Free Church of Scotland. After their departure the Protest was ordered to be kept *in retentis* and it was agreed that an answer be prepared, though in the event this was never produced. In 1851 the Free Church Assembly passed an "Act and Declaration" in which the Church traced its succession from the Church of the Reformation, and in which reference was made to the many trials which that Church had passed through. Among these (referring particularly to the situation in the eighteenth century) was "the tyrannical exercise of church power over brethren, with the unjust denial of the right of protest for the exoneration of individual consciences." The right of protest was thus regarded as a standing right by the founding fathers of the Free Church.

3. In no case is there historical support for the proposition that submission of a Protest against the highest Court of the Church necessarily severs the connection between the protester and the Church. That such a proposition has come to be the view of the Free Presbyterian Church of Scotland is evident from several cases of discipline in her Courts, notably that involving Rev Ewen MacQueen in 1938. The record of the Synod proceedings in that case is as follows: "The Rev E. MacQueen thereupon tabled the following protest: 'To the Synod of the Free Presbyterian Church of Scotland, met at Inverness this 29th day of June 1938, I protest against your finding because I consider it to be irregular, unconstitutional, and unscriptural.' The seriousness of this action, which meant that he was separating himself from the Church, was pointed out to Mr MacQueen, and an earnest brotherly appeal was made to him by the older ministers to withdraw his

protest. Mr MacQueen, however, refused to be advised on the matter and left the Synod." So far as is known, the Free Presbyterian Church is the only Presbyterian denomination which adopts this position. The Church has issued various statements over the years purporting to clarify its view of the issue, notably the "five points" issued in 1944 which were prominent in the determination of the Brentnall & Radcliff case in 1986. In substance however there is no reason to think that the stance adopted in the MacQueen case has been basically departed from, notwithstanding that this seems clearly at odds with the position taken by Rev Donald Macfarlane and other founding fathers of the Church in 1893 and the years immediately following.

Continued protest in the Free Church

4. These aspects of the right of protest may be demonstrated in the actions of Free Church constitutionalists in the latter part of the nineteenth century. This was a period which saw considerable controversy within the Free Church. The main areas of controversy were negotiations for union with the United Presbyterian Church, from 1863 to 1873; the Declaratory Act controversy of the late 1880s and early 1890s; and the renewed negotiations with the United Presbyterians which culminated in the Union of 1900. It is profitable to consider the actions of the constitutionalists in each of these controversies, and some others.

(a) The first Union controversy

5. In 1863 the Free Church appointed a Committee to confer with the United Presbyterian Church and others about potential union. The United Presbyterians were a "voluntary" body who did not espouse the Establishment Principle. On that ground many in the Free Church were suspicious of the negotiations. Annual reports by the Committee

were made to the Assembly, and the progress of the negotiations was watched with increasing concern by an influential minority. A critical point was reached in 1867 when the Assembly was asked to agree that differences between the two churches on the role of the civil magistrate in relation to the Church appeared to be "no bar to the union contemplated". This was approved by a large majority, whereupon Dr James Begg and others tabled a protest in the following terms:

> "We, the subscribers, for ourselves, and on behalf of all others who may adhere, do hereby protest against the resolution now adopted by this Assembly, and that on the following, among other grounds:- 1st, because the resolution, as adopted, implies an abandonment and subversion of an admittedly constitutional principle of the Free Church of Scotland. 2nd, because the resolution, as adopted, is *ultra vires* of this Assembly. 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".

The latter part of this Protest provides a clear link to the concept of continued protest as enunciated the previous year by Dr Charles Hodge (see paragraph 36 below), and indeed may well have been influenced by it. Dr Begg proceeded to hold public meetings, publish books and pamphlets, and edit a monthly magazine *The Watchword*, all in support of the grounds stated in his protest. He also associated with others in the establishment in 1870 of a Free Church Defence Association (FCDA), which co-ordinated opposition to the Union negotiations. These efforts were largely influential in the ultimate failure of the negotiations, which were not to be resumed for over twenty years. Neither Dr Begg nor any of his co-adjutors was threatened with disciplinary action over their conduct.

6. Dr Begg's Protest of 1867 appears to have been the first time that the right of protest was exercised since the Disruption. Dr Begg's friend and biographer, Dr Thomas Smith, notes that "This was till then a procedure, so far as I know, without precedent [i.e.

in the Free Church Assembly]. It was understood by many on the other side to have been adopted with a view to litigation on the subject of property, and because it was deemed to have more validity to that end than the ordinary dissent." The Protest had an interesting sequel. At that time it was customary to print the Acts of Assembly as a single class, entitled "Principal Acts" and not to accord the status of Acts to any other findings of the Assembly. When the Acts of the 1867 Assembly were printed, it was found that the finding on Union against which Dr Begg had protested had been printed as a Principal Act. This drew forth strong criticism from Dr Begg and others at the subsequent Commission. When the 1868 Assembly met, it felt obliged to take account of the criticisms and reached a finding in the following terms: "The insertion of the Act of last Assembly anent Union, among the Principal Printed Acts, does not and cannot give to it any special authority or permanence, and does not and can not raise it in the least degree out of the place that belongs to it as the finding of a single Assembly, carried by a majority, and strongly dissented from and protested against by a minority." In the light of this incident the 1868 Assembly also decided that, in future, the Acts should be divided into two classes: Class I comprising "Acts of Legislation and Standing Rules" and Class II comprising "Other Acts that are regarded as important for the general use of the Church". This distinction is still observed. It is worthy of note that the findings of the 1999 Assembly and Commissions which were the subject of Protests were recorded as mere findings and were not even accorded the status of Class II legislation in the printed Acts.

7. In addition to campaigning actively against the proposals for Union, Dr Begg and his supporters continued to lodge formal Protests in the Assembly. In 1870, before the debate on Union was started, they lodged a Protest declaring that if the proposal of the Union Committee were passed, they "would not hold themselves bound by any decision in its favour, and would consider themselves free to adopt any competent remedy." After the Union debate at the 1871 Assembly they lodged a further Protest. When the matter came before the 1872 Assembly they submitted a Protest before the debate started, and

another after the finding. All these Protests were received by the Assembly and, though not engrossed in the minutes, were ordered to be kept *in retentis*.

(b) The Education (Scotland) Bill

8. Dr Begg and his supporters were also involved in another controversial issue about this time. This concerned a Bill (which became the Education (Scotland) Act 1872) being promoted by the Lord Advocate for Scotland to establish a national education system for Scotland, into which would be absorbed the existing parish schools, including Free Church schools. When this matter was considered by the Commission of Assembly in March 1872 the Commission reached a finding in favour of the Bill, including a statement that it contained "due security for religious instruction." Dr Begg and others lodged a strong Protest declaring the finding to be "dishonouring to the Word of God; contrary to the duty of any Christian Church; in violation of the principles and history of this Church; and because the clause in said finding which declares "that the Lord Advocate's Bill provides due security for religious instruction" is contrary to fact. And we further protest that it shall be legitimate for us to use all competent means – by Deputation and otherwise – to have our views fairly represented before Parliament and the country." This was a particularly significant Protest as it envisaged specific action contrary to the finding of the Commission – i.e. the sending of deputations to Government – at a time when the Church itself was already instructing a deputation in support of the Bill. The Protest was nevertheless received by the Commission and inserted in full in its minutes.

(c) Disestablishment

9. Over a long number of years a majority in the Free Church Assembly passed resolutions in favour of the disestablishment of the Scottish Church. Dr Begg and his supporters strongly contested these moves. When the matter came before the Assembly of 1878 they lodged a Protest stating: "We, the undersigned, do hereby protest that in taking part in this discussion we are not to be held as admitting that a movement for disestablishment in the Free Church is in accordance with her Constitution".

(d) The Declaratory Act controversy

10. In the last decade of the 19th century the Church was agitated by what was to become known as the Declaratory Act controversy. This was precipitated by the decision of the Assembly of 1889 to institute an inquiry, in response to numerous overtures from Presbyteries, into the Church's relationship to the Confession of Faith. Before the Assembly started to debate these overtures the following Protest was submitted by some thirty ministers and elders:

> "In our own names and on behalf of all who may adhere to us, we, the undersigned, protest that in taking part in any discussion arising from the overtures now on the table we are not to be understood as admitting the lawfulness of altering the relation of this Church to any part of its received doctrines, as set forth in its authorised standards, or to the terms of subscription thereto."

At the Assembly of 1891, when the Committee set up by the Assembly reported, a Protest in similar terms was submitted by fifteen ministers and elders before the start of the debate. Again in 1892, when returns from Presbyteries were before the Assembly, the

debate was preceded by a similar Protest signed by thirty ministers and elders. Following the debate, which resulted in the Declaratory Act being passed into a standing law of the Church, a lengthy Dissent and Protest was submitted by thirty-seven ministers and elders. The Protest stated:

> "We, further, protest that, notwithstanding the passing of this Act, it is and shall be lawful for us and for all who adhere to us, to adopt all competent measures, according to the constitution of the Church, for fulfilling the obligations which rest upon us by our ordination vows, to assist, maintain and defend the doctrine of the Confession of Faith, and to follow no divisive courses therefrom, renouncing all doctrines, tenets, and opinions whatsoever contrary to or inconsistent therewith, and to take all proceedings competent to us."

Another four ministers and elders signed a Dissent and Protest which contained the following: "We protest that the said Act shall not be binding on us or those who may now and hereafter adhere to us, but that, notwithstanding the passing of the said Act, we and those who may now or hereafter adhere to us, shall not be thereby prejudiced in maintaining the doctrine and principles of the Free Church as set forth in her authorised standards and authoritative documents, as hitherto recognised, and in taking all steps that may be necessary to vindicate the said doctrines and principles, and our own and the Church's rights, civil and sacred, in connection therewith." Both these Dissents and Protests were fully engrossed in the Assembly's minutes.

11. In 1893, a number of overtures were before the Assembly pleading for the repeal or review of the Declaratory Act. The Assembly dismissed all these overtures. Dissents were submitted by forty-five ministers and elders. In addition, Rev Donald Macfarlane, Raasay, tabled a Protest in the following terms:

> "Whereas by the action of the General Assembly of 1892 in passing the Declaratory Act into a law of the Church, and by that Act being retained in her

> constitution, the Church, in our opinion, ceased to be the true representative of the Free Church of Scotland; and whereas by our ordination vows we are bound by the most solemn obligations to assert, maintain and defend the doctrines and constitution of the said Church, and to follow no divisive courses from the doctrine, worship, discipline, government and exclusive jurisdiction of the same, I, the undersigned minister of the Free Church, in my own name, and in the name of all who may adhere to me, declare that, whatever I may subsequently do, neither my conscience nor my ordination vows allow me to act under what has now been made law in this Church. I also protest against the despotic power exercised by a majority of the office-bearers of this Church in making changes in her creed and constitution, which are *ultra vires* of any majority in the face of any protesting minority, and I declare that I claim my sacred and civil rights according to the terms of contract agreed upon between me and the Free Church at my ordination, and in accordance with the creed and constitution of the Free Church in the year 1843."

On the motion of Principal Rainy, the majority leader, the Assembly refused to receive this Protest as, in his words, it was "an express repudiation of the authority and validity of the final act of the General Assembly in this matter." In reply, Mr Macfarlane said he wished to reserve the power of acting in any way he thought best. His words, and the terms of his Protest, suggest strongly that he did not regard the Protest as in itself separating him from the Church. Indeed, some weeks after the Assembly, he held a Communion at Raasay at which he had the assistance of a Free Church minister, Rev William Fraser of Sleat (who had not taken up Mr Macfarlane's position and was later to be one of the Free Church constitutionalists of 1900). Mr Macfarlane's separation from the Church did not become effective until his signing of a formal Deed of Separation on 14th August 1893. As previously noted, his actions contrast markedly with the position taken by the Free Presbyterian Church in the 1938 (MacQueen) case and afterwards. That the early FP Church held a more orthodox view of Protest is also exemplified in the case of Rev Allan Mackenzie who lodged a Protest against a finding of the FP Synod in

1897 and who was not regarded as thereby separating himself from the Church, but rather had his Protest received and a Committee appointed to answer it.

12. The Declaratory Act continued to trouble the Free Church after 1893. At the 1894 Assembly further overtures were submitted against it. In response to these the Assembly passed an Act stating that the Declaratory Act was not "imposed as part of the standards of the Church" but that those answering the Questions and subscribing the Formula were "entitled to do so in view of the said Declaratory Act." Before the debate started fourteen ministers and elders lodged a Protest stating: "We protest that in taking part in this discussion with reference to the Declaratory Act, we are not to be held as prejudicing the dissents and protests that have been taken in connection with the passing of the said Act, as the same are recorded in the books of the Assembly." The Protest was engrossed in the minutes.

(e) Heresy cases

13. This period in the Free Church was also notable for heresy cases brought against Professors for their allegedly liberal views. The most celebrated of these resulted in the dismissal of Professor William Robertson Smith from the Chair of Hebrew at the Church's Aberdeen College in 1881. When the case came before the Assembly of 1879 Professor Smith submitted a Protest that a finding of a previous Assembly in the case had been "invalid and a breach of the constitution" and "that my compliance in submission to the Assembly shall not be held to compromise or abridge my right to use all lawful means within the Courts of the Church to challenge and reduce the said finding." His Protest, with reasons, was fully engrossed in the minute. When the case came before the 1881 Assembly for final decision, a Protest was submitted signed by 127 ministers and elders declaring that they should not be held as consenting to an earlier finding of the Assembly that it was no longer safe that Professor Smith should teach in the Church's Colleges, and

denying the competence of the motion to remove Professor Smith from his Chair. Again this Protest was fully recorded. Some years later, allegations of heretical teaching were brought against two other Professors, Dr A B Bruce and Dr Marcus Dods. Both were exonerated by the Assembly of 1890, which merely addressed exhortations to them advising greater care in their public statements. From these findings a considerable number of ministers and elders dissented. The dissents were accompanied by a "declaration", in similar terms to a Protest, "that in view of the vital interests imperilled by this decision of the Assembly, we hold ourselves not only at liberty, but bound by our ordination vows, to use all legitimate means to have this judgment reversed." The dissents, including this declaration, were engrossed in the minute and a Committee of Assembly appointed to answer them.

(f) Instrumental music

14. A further controversy at this time concerned the use of instrumental music in public worship. Overtures seeking sanction for the use of instrumental music were considered by the Assembly of 1882. Before the discussion Dr Begg and 21 others lodged a Protest in these terms: "The undersigned members of the General Assembly protest that, in taking part in the ensuing discussion or division, they are not to be held as admitting – especially since all our ministers are solemnly bound to maintain "the purity of worship as presently practised in this Church" and "to follow no divisive courses" therefrom – that it is within the competency of this Church, without the subversion of her constitution, to sanction such a sweeping alteration in our worship as is implied in the introduction of instrumental music." Again, the Protest was received and engrossed. In 1883, before the final debate on the matter, the Protest was repeated in very similar terms. It read: "We, the undersigned members of the General Assembly, protest that, in taking part in the ensuing discussion or division, we are not to be held as admitting that it is competent to this Church to sanction in any form the use of instrumental music in the

public worship of the sanctuary, inasmuch as that would be a virtual abandonment of her present Constitution."

(g) The second Union controversy

15. In the mid-1890s negotiations with the United Presbyterian Church, which had been abandoned some twenty years earlier, were resumed. Initially these were concerned only with exploring closer relationships, but in 1897 the Assembly authorised moves towards union. The constitutionalist party, now considerably reduced in number, recorded their dissent. By the time of the 1898 Assembly it had become clear that the union negotiations were assuming a serious dimension. At the start of the debate the constitutionalists tabled a Protest disassociating themselves from the competence of what was being proposed. This was received, though not engrossed in the minutes, and was allowed to "lie on the table". At the end of the debate, the constitutionalists again dissented.

16. At the start of the Union debate at the 1899 Assembly the constitutionalists tabled a Protest in the following terms: "We, the undersigned ministers and elders, for ourselves and those agreeing with us, protest that though taking part in the discussion upon the proposals for Union contained in the Report of the Committee on Union with the United Presbyterian Church, we do not admit that these proposals are such as the Church may competently adopt, and we shall not be prejudiced thereby in our contendings for the Constitution of the Church; and particularly, as to the proposed plan of Union, including the "proposed Questions and Formula for a United Church" we protest that, if the same be sent down to Presbyteries under the Barrier Act, and be by them or next Assembly

approved of, nevertheless the same shall not in any part of it be made binding on or operative in the Church.". The form of this Protest, which on the face of it disowns, prospectively, a measure which had been subject to the Barrier Act procedure, is arguably of doubtful competence and it is somewhat surprising that it was allowed. However, it was fully engrossed in the minutes and, again, "laid on the table". The usual dissents were lodged at the end of the debate.

17. At the Assembly in May 1900 the final Plan for Union was laid before the Assembly, together with a draft of the Uniting Act to be sent down to Presbyteries. Once again the constitutionalists lodged a Protest at the start of the debate. This was as follows:

> "In our own names, and on behalf of all who may adhere to us, we, the undersigned, protest that in taking part in the discussion upon the Report of the Committee on Union with the United Presbyterian Church, and on the various motions arising out of the said Report, including the motion to transmit the Overture therein embodied, we are not to be held as admitting the lawfulness or competency of this Assembly entertaining, considering or discussing the said Report, or the Uniting Act therein set forth, or any other proposals for union with another Church in so far as the same may innovate upon or derogate from the standards or constitution of the Church or the distinctive views of truth on matters of faith and doctrine adopted by the Church at its separation from the Establishment in 1843 and since consistently maintained as the distinctive testimony of the Free Church of Scotland."

This, once again, was engrossed and "laid on the table" and, as before, the constitutionalists dissented at the end of the debate.

18. On 30th October 1900 a special General Assembly was held to pass the Uniting Act and to give formal effect to the Union. At the start of proceedings the

constitutionalists tabled a Protest in similar terms to that tabled at the start of the debate in May. Again, this was engrossed and "laid on the table". When the Uniting Act was passed the constitutionalists lodged a Dissent and Protest as follows:

> "On behalf of ourselves and all who may adhere to us, we, the undersigned, dissent and protest that whereas the Union on the basis proposed cannot be carried through consistently with the standards and constitution of the Free Church of Scotland; therefore that all parties taking part therein may lawfully be held as having withdrawn from the membership of the Free Church of Scotland, and may lawfully be treated accordingly: And further, that it shall be lawful for us and those adhering to us to decline to follow the parties so acting, and to maintain the existence of the Free Church of Scotland as at present constituted: And further that those of us and those adhering to us who may be members of this Assembly, notwithstanding any adjournment or dissolution thereof for the purpose of carrying through the proposed Union, may continue in session and exercise all the powers inherent in the General Assembly of the Free Church of Scotland, with liberty to us to adjourn from time to time as may be necessary until such time as said Assembly shall be lawfully dissolved."

This strongly-worded Protest was fully engrossed in the minutes and the Assembly unanimously agreed that it should "lie on the table." When the Assembly eventually adjourned to consummate the Union, the constitutionalists lodged a final Dissent and Protest stating "On behalf of ourselves, and all who may adhere to us, we, the undersigned, being members of this Assembly, dissent and protest that, notwithstanding the pretended adjournment or dissolution of the General Assembly for the purpose of carrying through the proposed Union, we have right to continue in session, and to exercise all the powers inherent in the General Assembly of the Free Church of Scotland, with liberty to adjourn from time to time as may be necessary until such time as the said Assembly shall be lawfully dissolved." This too was fully engrossed.

19. Like their predecessors in the first Union controversy, the constitutionalists in the 1890s supported their Protests with action. Early in 1898 they resuscitated the Free Church Defence Association, which had lapsed in 1873 following the earlier Union controversy. The revived Association embarked on an active programme of meetings, publication of pamphlets etc. aimed at showing the incompetence of the proposed Union and its inconsistency with the Standards of the Church. At no time were the Association's activities called into question by the Assembly, or its members threatened with any form of disciplinary action.

The emerging picture

20. The picture emerging from the above is that the right of protest was fairly liberally exercised in the pre-1900 Free Church. In the majority of cases it took the form of a Protest before the debate, disassociating the protesters from recognising the competence of what the Assembly was being asked to approve. Where the right of protest was exercised consequent upon the Assembly's finding, it generally included a "continuing" clause pledging the protester to use all competent means (or some similar formula) to oppose the consequences of the finding and to act in support of his objection. The right of protesters to repeat their Protests was not questioned, nor was any restraint placed upon them in campaigning publicly against the Assembly's decisions. Indeed, it was specifically acknowledged by Principal Rainy that the minority by maintaining their Protest were "entirely within their rights." Where a Protest had been lodged before the start of a debate it was usual for a Dissent with reasons, rather than a further Protest, to be lodged after the decision. There were however important exceptions to this, as in the Union debate in 1872, the Declaratory Act debate in 1892 and the Union debate in 1900 – all critical points in the affairs of the Church. What is noteworthy is that whether exercised before or after an Assembly finding, the right of protest, including its continuing element, was not disallowed to members of Assembly, nor made the basis of disciplinary action against them

PART II

CONTINUED PROTEST DENIED

The events of 1999/2000

21. The immediate cause of the Division of 2000 was the purported suspension for contumacy of ministers who had acted as office-bearers of the Free Church Defence Association (which had been revived in 1997 along the same lines as its nineteenth century precursor) and who, in that capacity, had refused an instruction from the Commission of Assembly to disband the Association. In June 1999 the General Assembly reached a finding with regard to an Overture from the Presbytery of Edinburgh & Perth (Overture B) which among other things instructed all office-bearers and members to abide by the finding of the 1995 General Assembly (regarding allegations against Professor Donald Macleod) "and furthermore not to pursue this matter now or henceforth in any form whatsoever". This 1995 finding, however, had been a non-judicial finding and as such it should have been quite proper to raise again the matter referred to, providing it was done in the appropriate manner spelled out in the *Form of Process.* Moreover, the 1995 finding could not possibly be considered to be binding on matters which had not yet arisen at the time of the finding, yet it had consistently been used in an attempt to stifle any attempt to investigate allegations against the individual involved, even though the substance of those allegations arose after 1995.

22. A Dissent and Protest against the June 1999 finding was lodged in virtually identical terms to that lodged by Dr Begg in 1867, including a commitment to oppose all action consequent on the finding "by every competent means". Although this Dissent and Protest was allowed and tabled its specific reasons were not answered; rather, the tabling

of them was described in a Report to the October 1999 Commission of Assembly as "unnecessary and time-wasting." It is of interest that one of the points raised in that Protest which to this day remains unanswered was: " It is incompetent to find the Free Church Defence Association guilty of misconduct without trial and therefore without trying the office-bearers for following divisive courses from the discipline and government of the Church. If it be established that canvassing these matters outwith the courts of the Church is against the constitution of the Church, and if the Free Church Defence Association is suspected of guilt therein, then the remedy is to try the office-bearers of the Free Church Defence Association in terms of the *Form of Process.*" In furtherance of this Protest the August issue of the FCDA magazine, *Free Church Foundations*, urged that the Assembly should recall the finding of the 1995 Assembly as being procedurally unsafe. When notice of this was taken at the October meeting of the Commission, the editors of the magazine were summoned to the Bar and, on refusing to withdraw or repudiate the statement, were thereafter served with libels for contumacy. These were later subsumed in general libels served on office-bearers of the FCDA after the December meeting of the Commission, which resulted in the purported suspensions of January 2000.

23. On 7th October 1999 an Overture from the Presbytery of Lewis (Overture B) asked the Commission of Assembly "to declare that the Free Church Defence Association [FCDA] is pursuing a divisive course from the government and discipline of the Free Church of Scotland [FCOS], that the office-bearers of the FCDA have adopted a position that is in violation of their position as office-bearers of the FCOS, and to call upon the FCDA to disband immediately. " The crave of this Overture was granted in its entirety. The effects of this finding were that:

(a) Office-bearers of the FCDA were declared to be pursuing a divisive course from the government and discipline of the FCOS. (The FCDA *per se* could not be said to be pursuing a divisive course from the government and discipline of the FCOS as long as it adhered to the aims and objectives of that organisation as stated in its

constitution, which were the same aims and objectives as those of the FCDA of the 1870s and conformed fully to the principles of the FCOS; the FCDA could only be alleged to be pursuing such a divisive course through the actions and statements of its members and office-bearers). Thus members and office-bearers of the FCDA were, in effect, declared to be pursuing a divisive course (i.e. a sinful course) from the government and discipline of the FCOS.

(b) The Commission of Assembly had acted contrary to the constitutional principle that Christ alone is Head of the Church. By effectively declaring members and office-bearers of the FCDA to be guilty of sinful behaviour without trial or due process they had abused their power of discipline and they had arrogated to themselves crown rights which belong alone to Christ as Head of authority to the Church (cf. *Catechism on the Principles and Constitution of the Free Church of Scotland* which was issued by authority of the General Assembly in 1847[1]).

(c) Regarding the call of the Commission of Assembly for the FCDA to disband immediately, the question arises as to what status did this call possess. Was it a mere request for the FCDA to disband immediately? – in which case it would not have the status to justify the bringing of a libel against any who might refuse to comply with it. Or, was it, as it was later interpreted to be, legislation of Class I status, imposing in a subtle way a new condition on ordination into office in the FCOS? – in which case, according to the *Practice of the Free Church of Scotland,* 1995 ed., Chapter IV, Part II, paragraphs 4 – 4.6 (pp 82-3) - it should have gone down to Presbyteries through the Barrier Act and been passed through all the due processes of legislation before any libel could be brought against any member of the FCOS on the basis of it.

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[1] Q.63. If you found Church judicatories passing Acts irrespective of the laws of Christ in the Bible, and introducing, at their own discretion, rites and institutions for which there is no Scripture warrant, what would you say? A. That these judicatories were arrogating to themselves Christ's prerogative as the Lawgiver of his Church. Q.144. Who are they that violate the crown-rights of Christ as the Head of authority to the Church? A. They are such as seek to subject the Church to human laws, in place of, or in addition to, his laws in the Scriptures; and such as allow either more or less authority and power to Church office-bearers than he has given them.

24. As was the case with the June 1999 finding referred to above, the October 1999 finding was also protested against. Both of these findings had been simple findings of the Commission and were therefore legitimate subjects for the exercise of the right of protest, including its "continuing" aspect. On the basis of the unproven assumption that office-bearers of the FCOS were pursuing a divisive course from the government and discipline of the FCOS and also on the basis of the Commission's call on the FCDA to disband immediately the Commission then instructed every Presbytery to inform all ministers, elders and deacons within their bounds that office in the FCDA was in breach of their ordination vows. Presbyteries were also required to instruct all ministers, elders and deacons within their bounds who were office-bearers in the FCDA that they resign office in that body forthwith, failing which they were liable to be declared contumacious. In the event the office-bearers of the FCDA intimated by letter dated 29th November 1999 that they did not consider disbandment appropriate "at the present time." They also denied that the FCDA had been pursuing a divisive course from the government and discipline of the Church.

25. On 9th December 1999 the Commission of Assembly declared the FCDA's response to represent a *prima facie* act of continued and wilful contumacy. Whatever was/were the motive(s) underlying the bringing of a libel on a charge of contumacy rather than, as had been alleged up till now, on a charge of divisiveness regarding the government and discipline of the Church, the bringing of the libel on a charge of contumacy had the effect of depriving the accused persons from mounting a defence regarding their alleged actions which would necessarily not have been denied them had the charge against them been one of divisiveness. In order to have the libel declared valid all that was required was that three questions be put to the accused: (Regarding the document forwarded by the FCDA to the Commission of Assembly meeting on 8th December 1999, was your name appended to that document with your knowledge and consent? Do you now wish to withdraw your name from that document? If you have not already done so, do you now resign as an office-bearer of the FCDA and sever all connection with that body?) and on the basis of an affirmative answer to the first and a

negative answer to the second and third of these the libel was then found to be valid. This finding also ignored the fact among other things that the bringing of charges of contumacy unrelated to any proven or confessed Biblical sin is contrary to established practice and is unwarranted in terms of the constitution of the Free Church of Scotland. In particular, it amounted to a denial of the Headship of Christ over the church, in that an accused person is entitled to a defence founded upon an argument that the demand with regard to which he is alleged to be contumacious is itself *ultra vires* and not founded on legitimate Biblical authority. The Commission of Assembly, on the other hand, was denying this to be a valid foundation for defence, thus arrogating to itself an absolute hierarchical authority and so denying that the Commission was answerable to Christ as Head of the Church.

26. On 20th January 2000 when the Commission considered the Report of the Libel Committee the then Principal Clerk of Assembly advised the Commission not to proceed with the libels at that point. The Commission rejected this advice. They went on to find the libels relevant and they also, although under no obligation to do so, proceeded to serve them. This meant that those upon whom the libels had been served were now administratively suspended from all the duties of the ministry. Those who had been administratively suspended had expected that the next stage in the process of dealing with the libel, the Proof stage, would follow immediately. However, the Commission decided at that point to sist the disciplinary process and to refer it to the General Assembly so that the Assembly could address the issue of possible indemnification of individual Commissioners. It may reasonably be remarked that if the Commission feared that they might have been acting unlawfully, they should surely have heeded the advice of the Principal Clerk and not have proceeded to find the libels relevant and to serve them.

27. Having already noted the tawdry "response" to the dissent and complaint which was registered against the June 1999 finding of the Commission of Assembly anent the Overture from the Presbytery of Edinburgh & Perth (Overture B), it is also worth noting

at this point that dissents and protests had been lodged concerning the constitutionality of findings of Commissions of Assembly on 7th October 1999 (Overture B from the Presbytery of Lewis) and on 9th December 1999, and although these dissents and protests had been tabled and committees appointed to provide answers to the points raised in them, yet at the point when the Commission on 20th January 2000 found the libel against the office-bearers of the FCDA valid no answer had been given concerning the points that had been raised in these dissents and complaints. And, indeed, those who were libelled then on a charge of contumacy submitted to proceedings being initiated against them by the Commission of Assembly which met on 19th and 20th January 2000 under cover of the following protest: "We, the undersigned, protest that in taking part in any proceedings arising in connection with the libels before this Commission we are not to be understood as admitting the lawfulness of the Commission having raised the said libels in the absence of specific authority to do so from the General Assembly, or without having been empowered by the General Assembly in a manner consonant with the precedents of the Church."

28. The administrative suspension imposed by the Commission would have entailed ministers being barred for four months from the pastoring of the congregations to which they had been called with a holy calling at the time of their ordination. The removal of men from their pulpits for such a long time would amount in fact to intrusion on congregations of ministers whom the congregations had not chosen and did not want. It would not be simply an exclusion of these men from their charges, but an attempt to prevent them from carrying out any of the work of the ministry for a protracted period for no good reason. There was no valid judicial ground for delaying the proof stage for so long because all the accused ministers had already confirmed that they had carried out the action in question.

29. It was at this point – having up till then, in an effort to maintain and retain the unity of the church, remained subject to the authority of the court under cover of dissent

and protest against its exercise of that authority in a magisterial rather than in a ministerial way, and thus breaching the Biblical and constitutional principle that Christ alone is Head of the Church – that the accused office-bearers, not wishing to be complicit in such sinful deviation and the consequent compromise of their ordination vows that submission to this finding would entail, submitted a document of Declinature in these terms: " We, the undersigned, protest against this Commission having reached a finding of relevancy in regard to libels which are based on matters not condemned by the Word of God or the standards of this Church; and we further protest that, by this action, the Commission have disqualified themselves from being a duly constituted Commission of the General Assembly of this Church; wherefore, we, in our name and in behalf of all who may adhere to us, hereby decline the jurisdiction of this Commission, declaring that we shall not be bound by any judgements pronounced in regard to us, and that we resolve to meet as a Commission of the General Assembly in a manner consonant with the constitution of the Church and with the Act of Assembly appointing this Commission. And the more effectually to carry out the said resolution, we call upon all members of this Commission who wish to remain loyal to the constitution of the Free Church of Scotland to assemble in the Magdalen Chapel in the Cowgate of Edinburgh at 9.45pm to continue in a constitutional manner the present Sederunt of the Commission."

A departure from precedent

30. In the Assemblies and Commissions leading up to the events of January 2000, there were fundamental differences in the views of either side on the character of protest. The view of the majority was clearly articulated by the then Principal Clerk of Assembly at the Commission in October 1999. It was in these terms (referring to the protesting minority): "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 decision of the

highest Court in good conscience or whether they feel duty bound to leave." This is not the Free Presbyterian position, but approximates closely to it. It is saying, in effect, that once one has protested against a decision of the supreme court that is the end of the matter, and if one cannot conscientiously live with that decision the only option is to leave. That is clearly not the principle which has characterised Free Church practice in the past nor is the right of protest, which both parties accept is a long-established right, one which is subject to the limitations with which the majority attempted to fetter it.

PART III

SOME GUIDING PRINCIPLES

Introduction

31. The following principles are derived from such sources as are available on the right of protest in the supreme court of the Church and on the outworking of that right (see Part I of this paper) in the Free Church in particular.

Difference from Dissent

32. A protest is inclusive of a dissent. A dissent is essentially for the relief of conscience; it frees the dissenter from association with a decision which he feels to be unjust or ill-advised. A protest however goes further. It maintains that the court at which it is directed is acting *ultra vires* (beyond its powers) and in a way which is subversive of the law and constitution of the Church. A protest must therefore be taken seriously by the court concerned. At the same time the right of protest should be jealously guarded and not used where a more appropriate course would be that of dissent. To have recourse to protest where other than a constitutional issue is at stake is to misuse this important right and to diminish it.

Basis for Protest

33. The right of protest emanates from the ordination vow to "assert, maintain and defend" the doctrine, worship, discipline and government of the Church as these are set out in the Church's constitutional standards. It is an important means for implementing the ordination vow in situations where decisions by church courts appear to the protester to be in conflict with the law and constitution of the Church. It thus acts as a means both to enable the protester to fulfil his ordination vow and to require the Church court to justify its actions in terms of the constitution.

Grounds for Protest

34. An essential principle of the Church's constitution is that church courts must act according to the rule of God's Word and subject to the authority of Christ as the only Head of the Church. The Confession of Faith, the Church's principal subordinate standard, states that "it belongeth to synods and councils, ministerially to determine controversies of faith, and cases of conscience……which decrees and determinations, if consonant with 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". Perceived departure from this principle becomes a legitimate ground for protest in terms of the duty of the ordination vow. By fulfilling that duty, the protester is defending the prerogative of Christ as the supreme lawgiver within his Church. Whenever a Church court exercises its authority in a magisterial rather than in a ministerial way and thus, in effect, calls in question the great principle that Christ alone is the Head of the Church it is not only a fundamental right of members of that court to protest against such action, it is also their bounden Christian duty to do so.

The Continuing Character of Protest

35. The "right of continued protest" is not, as has sometimes been claimed, a novel idea devised to justify the stand made in 2000. On the contrary, it is expressive of the continuing character of the right of protest as that right has been exercised in the history of the Church. Continuity is of the essence of Protest. Protest, by definition, cannot be a once and for all action. Its exercise must be co-extensive with the obligation to assert, maintain and defend the doctrine, worship, government and discipline of the Church. That is of course an ongoing obligation.

36. In a review of his denomination's General Assembly of 1866, published in the *Princeton Review* of that year (and reprinted in *The Church and its Polity*, 1879) Dr Charles Hodge welcomed the Assembly's declaration that the right of protest was "the birthright of Presbyterians" and "a sacred right, with which the Assembly disclaimed all intention of interfering". Hodge continued: "The right of protest, as it has always been exercised, includes the right of dissenting from the deliverances of Church courts, on the ground of their being unwise, unjust, unconstitutional, or unscriptural. It includes the right to make all proper efforts of proving the correctness of the grounds of objection, and to bring their brethren to agree with them." This last sentence is highly significant for the right of continued protest and for the manner in which it has been exercised in the Free Church. It demonstrates that protest is not a once-for-all matter but that, properly exercised, it is merely the first step in a process which can include the submission of repeated Protests to Church Courts and can also involve action either within or outside these Courts to vindicate the action of protest and to seek to win over others to the same point of view.

Protest and Unity

37. It has been claimed that continued protest is subversive of the unity of the Church. Unity however is not to be maintained at the expense of truth. The context of the ordination vow is to "maintain the unity and peace of this Church against error and schism, notwithstanding of whatsoever trouble or persecution may arise". The right of protest, exercised in such circumstances, is not incompatible with true unity. Where this right is honoured, and freedom given to exercise it, a protesting minority may conscientiously remain in communion and avoid dividing the Church. An example of this is the position taken by the Free Church constitutionalists in the period 1892-1900 after the passing of the Declaratory Act by the majority.

Protest and Obedience to Church Courts

38. It has also been claimed that continued protest is subversive of obedience to Church courts. This is not the case. Ministers and elders do not vow implicit obedience to Church courts. The authority of these courts is bounded by the law and constitution of the Church. Commissioners to the General Assembly are required in terms of their Commission to "consult, vote and determine in all matters that come before them, to the glory of God and the good of his Church, according to the Word of God, the Confession of Faith, and agreeable to the constitution of this Church, as they will be answerable". Here and elsewhere, the obedience promised is obedience within the constitution.

The Duration of Protest

39. It is consistent with the ongoing character of the ordination vow that a protest remains valid until the grounds for it are addressed and the church court either (a) rectifies the matter protested against or (b) demonstrates that the protest is itself unconstitutional. In either case the protester would be expected to fall from his protest. Where the protest had been shown to be unconstitutional, the protester would himself be at the risk of censure. In a disciplinary case a judicial decision reached in proper form would also of course have the effect of terminating any protest.

Denial of Continued Protest

40. It may happen that when confronted with a protest a church court seeks to impose implicit obedience and to deny the protester his right of further protest. Such action usurps an authority which belongs to Christ alone and can create a situation where the protester finds it impossible to continue in fellowship since to do so would require him to sin against his conscience by failing to fulfil his ordination vow. Any resulting separation would not be the fault of the protester but rather of the majority who had acted magisterially rather than ministerially under Christ.

PART IV

CONCLUSIONS

41. The undernoted conclusions may be drawn from the above.

a. The right of protest has been a long-recognised right within the Reformed Church in Scotland and has been exercised particularly when important issues affecting the character and constitution of the Church have been at stake.

` b. The right of protest has a continuing aspect which carries with it not only the right to continue protesting within the Courts of the Church but also to campaign outside these Courts to gain acceptance of the position expressed in the Protest.

c. The continuing character of the right of protest was freely recognised by General Assemblies of the Free Church in the nineteenth century when protesters were free both to submit renewed Protests and to campaign outside Church Courts without fear of being disciplined.

d. Conversely, General Assemblies and Commissions of the Free Church in the period leading up to the Division of 2000 denied the right of continued protest in either of its forms and purported to discipline and eventually to suspend those who sought legitimately to exercise it.

e. Experience of the right of continued protest in the Free Church of the 19th century provides benchmarks and guiding principles for its use to fulfil the ordination vow, to safeguard the constitution and to preserve the unity and peace of the Church.