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THE CARDROSS CASE.

(From the *Reformed Presbyterian Magazine*, Oct. 1859.)



APPREHENSIONS seem to be entertained that the civil court may pronounce, on this important case, a decision at variance with the principles of toleration, and subversive of the spiritual independence of all the Scottish Churches. We can scarcely at this stage permit ourselves to sympathise very deeply with this alarm. It is quite true that the legal profession may very naturally view with favour any movement that would increase the cases of litigation in the civil courts. Moreover, in a certain portion of the profession, there has been in all generations a ridiculous and unaccountable panic on the subject of church-power, as if they went to bed every evening haunted with dreams of the cutty-stool and the jugs. Still it cannot be questioned that our lawyers generally are a body of enlightened and honourable men, and that the judges, whose decision is awaited in the Cardross case, are men quite above the paltry influences to which we have alluded, and able lawyers, perfectly competent to evolve and apply the very simple principle upon which the present case falls to be determined.

We have no hesitation in pronouncing that principle a very simple one indeed. Partly under the influence of avowed dislike to evangelical religion, of which the Free Church is an honoured and eminent representative, partly under the influence of sectarian bias and jealousy against it on other accounts, a mist has been raised around the case, through which some may have been unable to thread their way to a plain and positive conclusion in regard to it. The Free Church is quite able to fight its own battle. The calm and lucid statement of Dr Buchanan at the late Commission, in our judgment, remains, in spite of keen efforts to shake it, untouched in all its leading and essential positions. Our only reason for adverting to the case is the opportunity it affords of eliciting and illustrating certain important principles in the relations between the civil and ecclesiastical courts, which are in truth essential to the religious liberties of the nation.

With the merits of the case, as a case of discipline within the Free Church, neither we nor the public have aught to do. We have to do with it simply as a question of jurisdiction before the Court of Session—not as a case of discipline before the General Assembly. The Free Church is at the bar of the Court of Session, with the simple plea, that in such a case as the present, whatever be the merits, viewed ecclesiastically as a case of discipline, the civil courts have no right to interfere, not from any defect of power within their own legitimate province, but because it is beyond their jurisdiction. They might as well be asked to decide a question of French or German law. Nor is it to the disparagement of the Court of Session that such a question is beyond its province. It is its privilege and glory to decline entertaining it for a moment. There is nothing real in our boasted toleration, if, in questions religious and ecclesiastical, we are not henceforth to call no one master and head in the Church of Christ, but Christ, whose Church it is.

Let us glance for a moment at the history of the case. A minister is libelled on three counts before his Presbytery—two of them involve charges of inebriety, and a third of criminal advances to a married female. The Presbytery found one charge of drunkenness not proven, the second charge to the same effect proven, and the third in part proven. The case was carried by appeal to the Synod. The Synod discharged the first count, and found by a majority the two last counts not proven. Appeal, on the ground that the whole of the two last counts was proven, was taken to the General Assembly. The Supreme Court sustains the appeal, and reverses the judgment of the

Synod. Mr M'Millan, the party libelled, is suspended. He applies to the civil court for an interdict prohibiting the execution of the sentence. The Assembly, not in hot haste, as has been sometimes asserted, but deliberately, summoned him to appear before them *four days* afterwards, and to answer for his conduct. On appearing, to the question, whether the application for suspension and interdict had been taken at his instance and by his authority, he answers in the affirmative. In accordance with a former precedent, the General Assembly deposed him summarily from the office of the ministry.

If we had any call to enter on the merits of the case as before the courts of the Church, three questions might be raised,—the sufficiency of the evidence, the regularity of the procedure, and the alleged precipitancy of the final sentence. On all these points grievous accusations have been preferred against the courts of the Free Church. We are bound to state, after a careful examination of the case, up to the stage when it reached the Assembly, that we cannot accede to the justice of these accusations. We could have wished a different course taken in one or two points. For example, we would have allowed Mr M'Millan, not as a matter of right, or as an indispensable form of procedure, but as a mere indulgence, to explain and defend his conduct as he best could, after he had answered the question put to him at the bar of the Assembly. Nevertheless, nothing in the pleas of M'Millan as to alleged irregularity, is worth a moment's consideration, as affecting the substantial merits of the case. Let us glance at them.

We have no call to pronounce on *the sufficiency of the evidence*, for Mr M'Millan himself does not urge this point among his pleas in law, contained in his original application to the Lord Ordinary. The main plea refers to an alleged *irregularity of procedure*, on the ground that judgment was pronounced by the Assembly, in matter from which the Presbytery had fallen, and on which there could be no appeal from the Synod to the Assembly. It is no part of our duty to prove Mr M'Millan guilty or innocent. To his own Master he must stand or fall. Our main position, in regard to his case, is perfectly compatible with the supposition of his entire innocence; and if he is innocent, we have little doubt that, in due time, his righteousness will appear as the noon-day. But assuredly on this special point, the competency of the Assembly to discuss the part of the libel from which the Presbytery had fallen, he is the last man entitled to urge a complaint, as, so far as we can gather, he is himself the party that brought up this part of the case before the higher courts by his own reasons of appeal against the finding of the Presbytery. The Assembly could not possibly decide on his appeal without considering the strength and validity of the evidence on the whole of the third count. It does not signify, however, in the least degree, whether the procedure of the Church courts on this point was right, or the reverse. The party within whose jurisdiction it falls to decide this extremely nice point, for such it must be admitted to be at the best, is the Church court, whose decision he had bound himself by a special vow and written agreement to accept as final and ultimate; at all events, the Court of Session, supreme in questions of civil law, cannot take cognisance in such a question of ecclesiastical casuistry. They would never think of reversing the decision of a civil court in New York on the ground of irregularity, because a British subject conceived himself aggrieved by it in regard to property he held in that city. There is a gulf even more impassable, as we shall see immediately, by which all civil courts can have nothing to do with ecclesiastical sentences.

The only other point in the merits of the case, ecclesiastically considered, to which we referred, is the *alleged precipitancy of the sentence*. It is held that, conceding the essential justice of the sentence under which Mr M'Millan was deposed, he should have been allowed to prosecute his suit in the civil courts, and have been deposed for his offence in applying to them only after formal trial. We have met with some persons to whose candour and judgment we would defer, that question the propriety of the course taken. We have seen

however, that there was really no precipitancy,—that an interval of four days elapsed between the knowledge of the offence and the passing of the sentence—that the sentence was regulated by a former precedent, and that it was based on the public avowal, in open court, of the offence committed. To insist on the formalities of a trial in these circumstances, were as absurd as for a judge to insist on a trial after the panel had pleaded “guilty” or to commit an offender for contempt of court, not immediately on the spot, in virtue of his own authority, as alone competent to determine when such an offence had been committed, but only after a tedious process of proof and trial. As to the notion, that the matter should have rested till the civil courts had brought it to an issue, we cannot see how such a course would have been compatible with the dignity of the Church courts. We can easily see how such delay might have operated to the prejudice of the Church in the Court of Session. But notions of dignity vary. Enough for us that all these three points belong entirely to the Church courts, they are completely beyond the jurisdiction of the civil courts; otherwise, the Church has no exclusive and independent jurisdiction, and by consequence, as we hasten to prove, the law of toleration is in abeyance, and the rights of conscience are most clearly traversed and suppressed.

1. We argue that a civil court is incompetent to review the sentence of an ecclesiastical court from *the nature of the Church*. As a voluntary fellowship, based on the common love of its members, it must surely have the right of determining who shall be its members and ministers, and the converse right of excluding from the membership such as it deems unworthy of the privilege, and from the ministry such as it deems unworthy of the office. If it has no such right, or what amounts really to the same thing, if it must take directions in the exercise of it from an extraneous authority, its essential character as a Church is destroyed. To retain in membership or in office any man, not because Christian love requires it, but because civil law commands it, would contravene the first principle on which a Church is based; it would be no Church, it would be hypocrisy established by law.

It is not an action of damages which Mr M’Millan has brought against the Church. He asks the Court of Session, according to the barbarous tautologies of the law, “to reduce, retract, rescind, cass, annul,” &c., the judgment of the Assembly,—“to repon and restore him” as a minister of the gospel, *in integrum*. He might with equal justice ask the French Emperor to make him king of Great Britain. It is conceded that the Court of Session might,—we do not say that in this case it ought, or that in any such case it has the least right to do so—but it might by an excess of its powers, as defined, not merely by the principles of the constitution, but by the light of every man’s conscience, inflict civil penalties on the Free Church, for refusing to comply with its mandates and repon Mr M’Millan. This would be simply persecution. In obedience to their solemn conviction of duty—the duty which they owe to Christ, they suspend a man because in their judgment he is guilty in two counts of the libel, and depose him, because, as to the interdict, they conscientiously believe his crime, avowed in open court, to be nothing less than virtual perjury and contumacious insubordination. Suppose it be ruled otherwise in the Court of Session, how can the Assembly obey conscience, and at the same time the Court of Session,—Christ, the head of their Church, and the State which thus usurps the Church’s jurisdiction? Upright men cannot be expected, and should not be asked, to undo in compliance with a civil mandate, what they have done as an ecclesiastical duty. They cannot have one conscience for the courts of law, and another for the courts of the Church. This difficulty may be a reason why Mr M’Millan should never have connected himself with any Church, or why no Church should be tolerated in the land. But to profess to tolerate a Church *as a Church*, and yet to punish it for executing its recognised functions as a Church, is persecution with a double sting,—encouraging the victim to offend, and then punishing him for the offence.

It is true that a party may suffer in his civil status and interests by an ecclesiastical sentence. But constitutional lawyers of the highest eminence emphatically warn us against the doctrine of consequences. It may be a consequence of my efforts to defend myself against a burglar, that he suffers from my resistance. But his suffering can be no ground of blame to me, when I act strictly within the limits of self-defence. Civil results may ensue from a deposition for heresy. Are the civil courts to be judges, therefore, over the whole region of polemical theology? A session may decline to admit an applicant within the pale of the Church. Should a stigma fasten upon him by consequence in the locality where the fact transpires, is the session to be blamed if it acted strictly within its own province? Would it be competent to insist in law that it should state the reasons for its decision? If these did not satisfy a civil court, are the members of session liable to civil penalties? If this be true—and all follows by absolute necessity, if the plea in the Cardross case be valid—not a church court, not the humblest session, can hold its next meeting in safety. The battle of toleration has yet to be fought on the soil of Scotland.

2. But apart from the nature of the Church generally, we may appeal to the *jurisdiction of the Church*, not merely as connived at, but expressly recognised in Scotch law. It may be said that the law tolerates a Church as to worship, but not as to jurisdiction. We do not mean to reconcile all that may be contradictory in the decisions of the civil courts. We have a shrewd belief that the civil courts could not accomplish the task themselves. Moreover, we frankly admit their competency to review the decisions of church courts as to *matters of fact*, when civil property is contested, or when an act can be proved to have been perpetrated, not for the ends of discipline, but in the spirit of malice. The Cardross case falls under neither category. It involves neither a question of property, nor a charge of malice. It would have been absurd to charge 300 men with malice, most of whom never perhaps had seen the delinquent. A session might conspire to destroy the character of a man under motives of envenomed malevolence. But in inquiring into the facts of the case, the civil court is not reviewing an ecclesiastical sentence at all. If the malice be proved, they would be punished as men, not as members of the Church at all. If no malice could be proved, the decision, in the judgment of the civil court, might be erroneous; but as an ecclesiastical sentence, and nothing more, they would pronounce it beyond their jurisdiction. What, however, we are chiefly arguing at present is, that they cannot ignore the fact of ecclesiastical jurisdiction. They *have recognised it*, not as established, but as tolerated by law, and so as to lay the basis of a claim of privilege. In the case of Osborne in our own Church, when an attempt was made to interrupt the procedure of the Church court by an interdict, the following interlocutor was pronounced by Lord Moncreiff:—

FIRST DIVISION, July 26. 1831. “Case of Rev. JOHN OSBORNE, of the Reformed Presbyterian Church.

“Edinburgh, July 5. 1831.—The Lord Ordinary having considered this bill, with the answers and productions, and having heard parties by their counsel, in respect that the complainer admits that he was a member of the religious society referred to,—that he received his ordination as a minister from the Reformed Presbytery, and that he bound himself to submit to their jurisdiction as an ecclesiastical body; and in respect that it does not appear to the Lord Ordinary, according to the statement of the complainer himself, that he had been loosed or released from that connection and jurisdiction in regard to his ecclesiastical status: Finds it incompetent for this Court to interfere to stop the proceedings of the respondents on the matters alleged, which are purely of an ecclesiastical nature: Therefore refuses the bill as incompetent, and finds expenses due, and remits the account, when lodged, to the auditor to be taxed.

(Signed)

JAMES W. MONCREIFF.

"*Note.*—The complainer having voluntarily bound himself, as a member of this association of Christians, tolerated and protected by law, to submit to the discipline of the Presbytery, according to the ordinary principles of Presbyterian government, the law will recognise the obligations thereby come under as matter of contract. This gentleman admits that he was charged with certain matters of a proper ecclesiastical nature; and while the Presbytery were *in cursu* of prosecuting the charges, he says that he intimated that he wished to renounce the connection, and cease to be a member of the society. But the Lord Ordinary apprehends that an ordained minister, of any such sect or association, cannot merely, by saying so, release himself from the jurisdiction—once solemnly contracted;—and that the legal effect of the contract is, that the Presbytery must have authority to prosecute to an end the measures of Church censure or discipline which they have begun, unless the party has been loosed from his connection with them by their own act. (Initd.) "J. W. M."

Another case is thus reported in the *Caledonian Chronicle* of March 12. 1793:—

"The Court of Session, on the 6th instant, gave a decision of no small importance to several classes of Dissenters in Scotland, as it shews them to be authorised by the laws of the land, and that the sentences of their ecclesiastical courts cannot be reviewed by any civil court in the nation. It was a decision in an action to recover from the defenders a compensation in damages to the pursuer, to the amount of £3000, for defamation and for deposition from the office of the ministry, raised at the instance of Mr John Auchincloss, formerly pastor of the Associate congregation of Liff, against the members of the Associate Presbytery of Perth, and others, who had access to hear the confessions that the pursuer made of his repeated guilt of fornication with Euphemia Smith, formerly his servant. The action was before Lord Justice-Clerk, the Lord Ordinary, on the 24th January 1792, who at that time passed the following interlocutor:—

"Having heard the debate, conjoins the two summonses at the pursuer's instance, and in respect the Lord Ordinary does not consider it competent for this Court to review the proceedings of Associate congregations, commonly called Burghers, when sentences are pronounced by them in their ecclesiastical character—therefore sustains the defences; assoilzies the defenders; finds them entitled to expenses; modifies them to £3, 3s. sterling, besides the full expense of extract, as the same shall be certified by the Clerk's Collector; and decerns accordingly.' A representation against this interlocutor was given in to the Lord Ordinary by the pursuer; but was refused. The cause was afterwards brought by petition before the Inner House, and on the 6th instant the Court of Session gave the following decision:—'The Lords having advised the petition with the answers, they sustain the defences, and assoilzies the defenders: Find the pursuer liable in the three guineas of expenses and the expense of extract awarded by the Lord Ordinary, but in no further expense; and decerns accordingly.'

"The Lords, in giving their judgments, took up the case in two points of view. First, as it respected the members of Presbytery in their ecclesiastical character, and gave it as their judgment that they had no authority to review their sentences in this capacity. Secondly, they took up the petition as charging some members of the Presbytery—the Rev. Messrs Black, Johnston, Aikman, James Morris, and Euphemia Smith (not members of Presbytery)—with scandalising the pursuer's character 'out of doors.' The Lords in this point of view admitted that if the defenders had falsely slandered the pursuer by saying that he had been repeatedly guilty of fornication, they would have been liable in damages, the same as other British subjects; but declared that the letters written by the pursuer to the Rev. Messrs Johnston, Black, and Aikman, containing confessions of his guilt, and which letters were produced in the process, gave undoubted evidence of the fact. And accordingly the Court assoilzied all the defenders, without requiring any proof of the fact, by the testimony of witnesses who heard the confessions of his guilt, which proof was offered to be given by the defenders in their answers, if their Lordships should see it necessary to require it."

Similar reference might be made to other cases. Dr Buchanan in his statement before the Commission adduces them. All we mean to found upon them is simply, that the jurisdiction of ecclesiastical courts is beyond all question recognised in them. The only question that can be raised is, what is implied in such jurisdiction of the Church? It is admitted to embrace two prerogatives—that of making, and secondly, that of interpreting its own laws and rules. It follows that the Free Church, in the Cardross case, may have interpreted its own laws erroneously; but still if it had the right to interpret them, Mr M'Millan has absolutely no case whatever against it. You might as well, to use the phrase of Dr Chalmers, “reason with a precipice,” as reason with a man who holds that a Church has a right to interpret its own laws, only so far and in such a way as the Court of Session interprets them for it. To argue that the Church may *make* laws and *interpret* its laws, but may be called to account by the Court of Session, should it *break* them, is simply to constitute the civil courts the interpreters of ecclesiastical law, and to deny, what the civil courts have, as we have seen, expressly affirmed,—the exclusive jurisdiction of the Church in matters ecclesiastical. It were an insult to all logic to dignify such reasoning even with the name of sophistry. It is in truth dishonest evasion.

3. There is a third, but lower ground, on which, as it seems to us, Mr M'Millan must be nonsuited—*his ordination vow*. That vow binds every minister in all our Presbyterian Churches to recognise the jurisdiction of his Church, whether the civil courts recognise it or not. By express contract—the contract which he made with the Church, and without which he never could have been a minister in it—he himself admitted, in the language of Lord Moncreiff, “that the Presbytery must have authority to prosecute to an end the measures of Church censure or discipline, which they have begun, unless the party has been loosed from his connection with them by their own act.” If he did not mean *that*, when he vowed to submit to the jurisdiction of his Church, what could he mean? Does any sane man believe that a Presbytery, in accepting a vow of obedience to their jurisdiction, would be willing to accept it, when it was offered only on the condition that the Court of Session was to be the ultimate and supreme interpreter of the nature, ends, and rules of ecclesiastical jurisdiction? A vow, like an oath, must surely be understood *ex animo imponentis*. No Church on earth would care to ask such a vow. It would be to blow hot and cold—to play fast and loose—to claim and at the same time repudiate, jurisdiction.

It is vain to argue that no man should be bound by any vow to affirm the infallibility of ecclesiastical judges. The vow in question binds us only to recognise their authority as supreme and exclusive, and their sentences as final in all ecclesiastical matters. It no more requires of a minister when he is ordained belief in their infallibility, than the civil constitution binds us to recognise our civil judges as infallible. The latter binds us to submit to their decision in civil questions, not because they cannot err, but because their authority is supreme, because supreme authority in such cases must be lodged somewhere, and because for one evil that may occur, a thousand evils will be prevented by such an arrangement. Society could not exist without it—without supreme civil jurisdiction. As little can the Church, without supreme ecclesiastical jurisdiction; with this advantage in favour of the latter, and reconciling us all the more to its authority, that any man aggrieved has perfect liberty to retire and escape at once from the sphere of its jurisdiction, if he is no longer inclined to submit to it.

4. But, finally, the Free Church urges a special ground. It demands of its ministers, not merely a general vow of obedience to its jurisdiction, but *subscription to a formal agreement*, embodying such a vow. “I shall,” so run the words, “in my practice, conform myself to the said worship, and submit to the said discipline and government, and *exclusive jurisdiction*, and not endeavour, directly or indirectly, the prejudice or subversion of the same.”

Surely the grounds must be overwhelmingly strong on which any court on earth could take the part of a man deposed, simply for violating, by his own confession, an obligation so express and clear. Not that we make much account of the special signature. Some may be disposed to think the Free Church wrong in insisting on anything beyond the vow common in all Presbyterian Churches. Adjectives sometimes weaken, instead of enhancing the import of the nouns with which they are coupled. However this may be, the written agreement places, beyond cavil, what the church courts meant, and what Mr M'Millan professed to mean when he signed it.

We are not very careful to answer certain reasonings, to the effect that, if Mr M'Millan be wronged he is entitled to redress—that church courts may do all manner of mischievous and naughty things, and that they should not have the uncontrolled power of passing decisions that may seriously affect the character and standing of an individual in the community. Suffice it to say in reply, that the civil courts cannot, by any possibility, give him the redress he seeks; and that civil courts are no more infallible than ecclesiastical courts, and may do things quite as naughty as the Church, while they are far less under the influence of a public opinion, sanctified as in the case of the Church, by the principles and influences of the Christian religion. Nor is it a strange thing, and without precedent, that a body of men should be allowed to pronounce opinions affecting character undeterred by the risk of civil prosecution. Every jury has the same privilege of immunity from civil penalties, though the life of a fellow-creature may hang upon their verdict. The whole bench of the judges may differ from them, but it dare not coerce them. It is of unspeakably greater moment that the independence of an ecclesiastical tribunal be guarded jealously—of greater moment in the vast proportion, that the interests of eternity outweigh the supreme jewel of all our earthly interests, even life itself.

It is here that the great danger lies. Our religious liberties, the rights of conscience, the law of toleration, are all directly imperilled, if the exclusive jurisdiction of the Church, within its own province, is not to be recognised. But worse than all this will be the issue, if the hands of ecclesiastical authority, on pleas so very miserable, even at the best, and conceding their full strength, as are urged in the Cardross case, are to be paralysed by the risk of civil interdicts. We know not a single case in which church courts in any Presbyterian Church have in the end decided recklessly, to the prejudice of an individual. The danger is all the other way—the tendency and temptation are to laxity rather than to rigour. But we would submit to many erroneous ecclesiastical sentences rather than see discipline paralysed, and order subverted in the Church. The Church, in such circumstances, would be worse than “a moral nullity,”—it would be the greatest nuisance upon earth,—“a net spread upon Mizpeh, and a snare upon Tabor.” Tell our juries that they are liable to a civil prosecution for their verdict, and justice would soon wither from the land. Tell our Churches that, in every case of discipline, they are liable to a civil prosecution, and may have their sentences cognosed by judges who, for aught that the constitution provides, may be aliens and sceptics, and the Church might soon become a scene of corruption, impurity, and disorder. As the case actually stands, not a case of intricate law, but depending on a broad principle, of which all can judge, and ratified alike by the constitution and common sense, despite the alarms of our Free Church brethren, we cannot seriously entertain any doubt about the issue. With Dr Buchanan, “we don't believe, and won't believe, till we see it,” that the Court of Session will deny what itself has affirmed—the jurisdiction of the Christian Churches.

There are some points of view under which a better thing could not happen than an adverse decision on the question of their rights and jurisdiction. The fire of a common danger might weld us at once into unity and confederation.





