42

Faith, Trust, and Charity

*Joshua Getzler**

1. Remembering Alan

Alan's first book[1] transformed our understanding of an area that had been thoroughly studied for generations. Through close study of the classical forms of action for servitudes and natural rights, Alan demonstrated how the vaunted individualism of Roman property law was counterbalanced by subtle communitarian controls that curbed the egotism of the *dominus*, and made owners act as neighbours. I kept this gem-like work by my elbow all through my time as a research student, as a constant inspiration. This, Alan's first great contribution to the law, will always be read as an exemplary work of legal history and analysis.

Many years later, Alan was appointed Visitor at St Hugh's College, Oxford, shortly after his appointment as a Lord of Appeal in Ordinary. He generously gave of his time to the college. Once he came up to talk to the students about 'accidents in legal history'. He had the detective's instinct that causations in history could be uncovered by posing the intelligent counterfactual. He noted how it was the barest of chances that secured the transmission of the Roman Digest to medieval Europe through the survival of the single Pavia manuscript. How different Western law would have been without that text surviving! Then, turning to recent history, he told how Lord Wilberforce was called away to a Privy Council committee deciding obscure colonial constitutional issues, and a different panel without him heard the important Lords' appeal from Scotland of *Junior Books Ltd v Veitchi Co Ltd*,[2] in which Alan represented the appellants as junior counsel. Alan was convinced that, had Lord Wilberforce been present, his side would have won and that the general theory of liability for economic loss stated in *Anns v Merton London Borough Council*[3] would early have been restricted and refined into a scope of duty model, and so survived the tests of time.[4] Alan was making the simple, incisive point that

* Professor of Law and Legal History in the University of Oxford and Fellow of St Hugh's College; Conjoint Professor of Law, University of New South Wales.

[1] Alan Rodger, *Owners and Neighbours in Roman Law* (1972).

[2] [1983] 1 AC 520.

[3] [1978] AC 728.

[4] It was the fate of *Anns* to be overruled by a post-Wilberforce court in *Murphy v Brentwood District Council* [1991] 1 AC 398. Lord Wilberforce was later asked in Oxford what he made of *Murphy.* His reply: 'Après moi, le déluge'.

decisions of law that can appear to have a certain logic and rightness may seem more difficult and unstable to those who participate in making them, and that many decisions could easily have gone the other way down a very different track of reasoning. Alan regularly returned to Oxford, particularly delighting to share with us his learning and discoveries in Roman law. These visits were always highlights of the year. We did not know that his time with us would end too soon.

2. The Disruption of 1843 and Problems of Law and Religion

In this essay in memory of Lord Rodger I will write not about his classical scholarship but rather about the crowning work of his fine series of studies in modern legal history.[5] In his 2008 study of the Disruption of 1843,[6] Lord Rodger expertly charted the theological, legal, and constitutional conflicts that led to one-third of the ministry of the Church of Scotland seceding to form the Free Church. He then examined the ensuing battles over the identity and governance of the dissenting church and the due succession of ecclesiastical property, quarrels that would surface over and over again in the courts down to present times.[7]

One may suggest that Lord Rodger's two most important works of legal history share a common theme, though at first impression it would seem that the subject of Scottish church law and government over the past two centuries is very far distant from the property law of third-century Rome. Yet both studies, the classical and the modern, can be seen to address an enduring problem of private law—how rights, particularly property rights, that lie within the patrimony, *dominium*, and control of individuals, must be governed so that individuals can form durable groups and communities. Both studies show how litigants may turn to the law for help when they differ on how their individual, joint, and common rights should be used. It is all in the title of that first book—*Owners and Neighbours*—a pungent phrase that emerged from Alan's earliest discussions as a graduate student with Tony Honoré.[8]

The main legal problem identified in Lord Rodger's study of the Disruption concerns how far secular courts may claim jurisdiction to decide upon questions of

[5] See further Alan Rodger, 'Lord Macmillan's Speech in *Donoghue v Stevenson*' (1992) 108 *LQR* 236; *idem*, 'The Codification of Commercial Law in Victorian Britain' (1992) 108 *LQR* 570; *idem*, 'Scottish Advocates in the Nineteenth Century: The German Connection' (1994) 110 *LQR* 563; *idem*, 'The Form and Language of Legislation' (1999) 18 *Rechtshistorisches Journal* 601; *idem*, 'The Form and Language of Judicial Opinions' (2002) 118 *LQR* 226.

[6] Alan Rodger, *The Courts, the Church and the Constitution: Aspects of the Disruption of 1843* (The Jean Clark Memorial Lectures of 2007) (2008).

[7] See, eg, *Moderator of the General Assembly of the Free Church of Scotland v Interim Moderator of the Congregation of Strath Free Church of Scotland (Continuing) (No 3)* [2011] CSIH 52; *Smith (As Moderator of the General Assembly of the Free Church of Scotland) v Morrison* [2009] CSOH 113; *Free Church of Scotland v General Assembly of the Free Church of Scotland* [2005] CSOH 46.

[8] Alan Rodger's main doctoral supervisor was David Daube but Tony Honoré came in to assist after Daube left Oxford for California. Honoré and Rodger soon after collaborated in important studies of classical law: AM (Tony) Honoré and Alan Rodger, 'How the Digest Commissioners Worked' (1970) 87 *ZSS (RA)* 246–314; *idem*, 'The Distribution of Digest Texts into Titles' (1972) 89 *ZSS (RA)* 351–62; *idem*, 'Citations in the Edictal Commentaries' (1974) 42 *Tijdschrift voor rechtsgeschiedenis* 57–70.

a group's religious doctrine and practice where these bear upon issues of civil rights and duties. The problem has haunted the courts since before the Reformation and in every generation has taken on new jurisprudential hues. In some cases the problem concerns interpretation of explicit constitutional guarantees; other cases engage a deeper instinct of the courts to respect freedom of religious association quite apart from positive law. It is a different problem to the issue of freedom of the individual conscience to act in accordance with belief or disbelief, though modern courts will often view group rights through the prism of individual claims.

Difficult issues concerning the relationship between law and religion do not belong to some age of faith in the distant past but have frequently been posed in the past few decades, with no signs of abatement.[9] A notorious recent example came before Lord Rodger in the *Jewish Free School* case in 2009.[10] There he dissented on the question of whether a religious identity test for admission to a state school offended against discrimination law. He argued that the issue of race and religious identity raised in the litigation were better seen as a question of whether the law should choose between or favour rival ecclesiastical authorities in their claims to supervise religious conversions. He cautioned against secular or post-Anglican judges imposing their own views of right religious practice on minority faith groups. Lord Rodger's understanding of the history of religious conflict in Scotland helped him to bring a deeper understanding of the matters at stake in that fraught litigation. It truly was the speech of a noble and learned judge.

Aidan O'Neill has written on the conflict of religion with the commands of secular law in his illuminating essay in this collection.[11] My contribution seeks to isolate and analyse a related problem, where the court is vested with jurisdiction over issues of religion by the regular operation of secular law as a source of private rights created at will by private actors. This is quite distinct from cases where religious practice collides with secular law created directly by coercive public command so as to bind all subjects.[12] For example, where a group forms an association based on civil institutions of contract, co-ownership, and trust in order to pursue a common religious life, does this mean that regular enforcement of those private law agreements and shared property rights gives the courts a lever to decide matters of religion enshrined in the original constitution of the group? If A and B vest property into common or entrusted ownership and agree that this will be used to support a certain form of religious practice, creed, and ritual, then can A sue B to force him by law not to vary the practice, creed, or ritual, as a matter of

[9] A large body of law ancient and modern is analysed expertly in Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (2010); see Alan Rodger's appreciative review of Rivers in (2011) 11 *International Journal for the Study of the Christian Church* 100.

[10] *R (On the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS* [2009] UKSC 15, [2010] 2 AC 728. A study of the case placing it in a wider legal-historical context may be found in Didi Herman, *An Unfortunate Coincidence: Jews, Jewishness, and English Law* (2011); trenchant criticism of the *Jewish Free Schools* case is offered in Lisa Fishbayn Joffe's review of Herman in (2012) 75 *MLR* 936.

[11] See p 637.

[12] This reiterates Herbert Hart's distinction of coercive and facilitative rules in *The Concept of Law* (3rd edn, 2012) ch. 3.

contract, property, or trust law? Can A and B's successors perpetually rely on the original agreements to enforce religious forms many generations later? Do religious compacts enshrined in pacts and trusts run across privities and successions to bind endless third parties? And can a religious form of life be 'double-entrenched' by making the original means of governance of the religious community a fundamental condition of the association and so immune to normal majoritarian vote?

The church conflicts in nineteenth-century Scotland may be given a valuable new perspective through a private law lens of trusts, property, and contract, alongside the issues of constitutional and ecclesiastical law analysed by Lord Rodger in his study of the Disruption. Issues of faith were woven into the legal regulation of property and charitable trusts in English as well as Scots law, and earlier litigation over religious trust doctrine was an important backdrop to the Disruption itself and to the long years of litigation that followed. Lord Rodger invited fresh scrutiny of the Disruption.[13] I will take up that invitation by describing the Scottish church conflicts in proprietary terms and setting the story against a wider backdrop of church law in England. Neither the Scottish nor the English story can be studied in isolation.

3. Scottish Churchmen in Court

The Disruption concerned a power struggle within the Church of Scotland over appointment of clerics.[14] The Evangelical wing protested against the practice whereby property owners with rights of patronage incident to their land could nominate ministers to parish livings within the Church. The Evangelicals claimed that local communities should have a share in appointment through a veto power over nominees. Moreover, they claimed that communities should have a wholly independent power to appoint ministers to chapels outside the parochial system, and further that parish and chapel ministers should have equal representation in church government. Once the Evangelicals attained a majority in the Church's assembly in 1834, they had those claims enshrined in ecclesiastical legislation.

The opposing Moderate wing claimed that the 1834 Veto Act fell afoul of the 1711 Patronage Act, a superior statute restoring and entrenching the landowners' rights to appoint. The Evangelicals riposted that the 'spiritual independence' of the Church of Scotland had been guaranteed in the still higher constitutional legislation of the Act of Union of 1707; and this independence they interpreted radically to mean that the civil courts lacked jurisdiction to enforce legal claims against the Church, no matter what was ordained by the general civil laws (including the 1711 statute). Not only was the spiritual government of the church protected from lay interference by such constitutional guarantee, it was argued, but the church's decision as to the limits of the spiritual sphere was itself a purely theological matter and was not justiciable in the civil courts. If the medieval church had claimed

[13] Rodger (n 6) 120.
[14] The section following is largely based on Rodger (n 6), Lectures 1 and 2.

benefit of clergy or immunity from lay prosecution for individual priests, then the Scottish Evangelicals claimed a kind of 'benefit of church' or immunity from judicial control for the entire Scottish religious hierarchy.

The Evangelicals ultimately asserted their constitutional claim to church immunity in the *Auchterarder Case*, but they lost in the Court of Session and then lost the appeal to the House of Lords in May 1839. Indeed, their Lordships unanimously rejected the Evangelical position even more vehemently than had the majority of the Court of Session. The claim that church legislation could not be constrained by any contradictory civil rights or laws, or that church acts could not even be adjudged by civil courts, was described thus by Lord Cottenham: 'This is but a mode of describing pure despotism.' Their Lordships further held that presbyteries could only reject a presentee minister for obvious unsuitability; in any other case the patron's nomination was legally protected.

The Evangelicals' resounding defeat could not be swallowed. Ultimately, in what became labelled as the Disruption, one-third of the serving ministry left the Church of Scotland, dramatically walking out of a General Assembly in protest on 18 May 1843 and going on to create the Free Church of Scotland. The new church was to be insulated from state and landowner interference in all its decision-making, and would acknowledge no governing authority but Christ as interpreted by the organs of the church. At the same time, the greater goal of the Free Church, deriving from its roots in the 1647 Westminster Confession, was to displace the Church of Scotland as the true established church enjoying state support—not to split away perpetually as a dissenting church. Through strenuous communal effort fresh endowments were raised for the Free Church, new churches built, and a parallel system of Presbyterian religious community constructed entirely outside the established Church of Scotland.

Other streams of dissenting Presbyterianism existed in Scotland, dating back centuries to the time of John Knox and the Reformation, but the split of 1843 exacerbated religious divisions and led to further conflict. The most striking legal episode after the Disruption was the 1904 case of *The Free Church of Scotland v Overtoun*, also fought all the way to the House of Lords.[15] In that case, a majority of the Free Church decided to unite with an older secessionist church based on 'Voluntaryism' or independence from the state, in order to form a larger Free Church. The idea was that the Free Church would no longer aspire to claim establishment status and would mildly liberalize its theology in order to appeal to modern pluralist congregations. Lord Rodger recounts how this regrouping went disastrously astray, with a diehard minority claiming that the utopian goal of establishment for the Free Church under the Westminster Confession was a 'fundamental' tenet that could not be abandoned.[16] The Free Church majority

[15] Also known as *Bannatyne v Overtoun* [1904] AC 515 (HL). Alan Rodger discusses the case in Rodger (n 6) Lecture 3. For a study of the complex theological arguments presented in court, see Frank Cramner, 'Christian Doctrine and Judicial Review: The Free Church Case Revisited' (2002) 6(31) *Ecclesiastical LJ* 318.

[16] Rodger (n 6) 97–109.

seeking union with a Voluntaryist or disestablishmentarian church had thereby in effect left the Free Church behind and had forfeited any claim to the Free Church's sizeable assets or to occupy or use its churches or manses. The Court of Session rejected the minority claim, holding that the Assembly of the Free Church had a democratic power to adapt its governing principles. On the appeal to the House of Lords, counsel for both sides relied on a welter of detailed church history and theology, with the reported arguments taking up 100 pages of the official report. Lord Rodger suggests that the majority's case for union of the two churches was lost through the misplaced enthusiasm of the majority's counsel, Mr Richard Burdon Haldane. Certainly, the Appeal Cases report do show how this Gottingen-educated lawyer, then the most highly paid counsel in London and later to be War Secretary and Lord Chancellor, deployed a formidably erudite set of arguments ranging from the Gospels through the church fathers and scholastics to the renaissance and modern divines. A bewildered Judicial Committee ended up finding by a five to two majority that the Free Church was indeed defined by its founding principles including the establishmentarianism enshrined in the Westminster Confession, and that departure from those principles logically entailed secession from the church. The minority of the Church that acceded to those fundamental principles therefore rightly embodied the Free Church—and controlled all its wealth, far more than it could possibly use. Frederic William Maitland wryly observed that here, 'the dead hand [of the law fell] with a resounding slap upon the living body of the Church'.[17]

To escape from the imbroglio left by the judgment, Parliament swiftly intervened with legislation to partition the wealth of the original Free Church between the split factions. What had begun as a judicial intervention in the life of the church developed into a root-and-branch legislative restructuring. The bitter irony was that attempts by the Scottish churchmen to assert autonomy through resort to law led to stronger controls of Scottish religious life than ever before through binding judgments of the London-based House of Lords and interventionist Westminster legislation. But the defeat did not come through a political act of intervention by the Lords based on the judges' own ideas of right theology and ecclesiology, but rather through their interpretation of how trust law should operate in the context of religious association. To better understand that point we will need to stand back from Scottish affairs and look back into English legal and religious history.

4. Religion, Property, and Power in England

The yearning for an independent Protestant church, insulated from the patronage of kings and lords and governed by the presbyters or elders of the community, is one of the great themes of Scottish history since the time of John Knox. There is a parallel history in England from the sixteenth century, where Puritans or Independents or Congregationalists chafed against royal and aristocratic control of the

[17] Frederic Maitland, 'Moral Personality and Legal Personality' in Herbert Fisher (ed), *The Collected Papers of Frederic William Maitland*, vol 3 (1911) 304–20, 319.

reformed Church of England. A legal flashpoint of this conflict concerned the ancient rights of manorial lords to appoint the priest or minister of the parish. These rights were known as advowsons, and were an important and valuable species of property that may have predated the Conquest. Advowsons worked on the theory that the lord's ancestor who had built the church and provided a living had thereby constituted a right or power to present the priest for appointment by the bishop, and that this right or power descended as an incorporeal hereditament. Outside the category of advowsons, it was also common for the tithe income from a benefice to be later 'impropriated' into lay hands, giving the impropriator an economic power to appoint a vicar. The Crown had impropriated the tithes owed to monasteries and other religious houses in the Reformation, and granted many of these rights to the laity, but also reserved many livings to itself as a source of royal ecclesiastical patronage.[18]

Landowners' control of appointments and benefices became a potent source of religious and political conflict in Elizabethan and Stuart England. Puritans objected to lords foisting ministers of low learning on congregations, often seen as acts of nepotism and corruption. In the reign of Charles I, the problem worsened as Archbishop Laud used Crown impropriations to influence appointments throughout the hierarchy. Laud promoted ministers of high-church Arminian theology at odds with Calvinist belief, whose religious stance was often allied to extreme authoritarian and Royalist politics.[19] The control of the clergy and of clerical wealth by the Crown, lords, and gentry helped to push the Puritan movement into political opposition and, together with fiscal and constitutional conflict, precipitated the meltdown of the established church and the monarchy itself in 1640s England.

Economistic interpretations of the ecclesiastical conflict over patronage and impropriation in the seventeenth century have been evoked, notably by the Marxist historian Christopher Hill.[20] He argued that the direct legal powers of owners to indoctrinate and discipline parishioners through their control of local church structures was a good case of economic power dictating cultural superstructure. Moreover the insurgent Puritans, typically based in the growing towns of the south-east, and opposed to the feudal-religious hegemony of the Crown, nobility, and established church, showed how a rising class would claim power through ideological and political revolution. In Hill's vision, the contest of religious ideas and practices in the English Revolution veiled a deeper conflict within the Protestant mind over the value of material wealth and power as a sign of predestined grace. In

[18] William Blackstone, *Commentaries on the Laws of England*, vol 2 (1765–69) book 2, ch. 3, esp 21–24; Susan Wood, *The Proprietary Church in the Medieval West* (2006) 926–33. Patronage and impropriation of benefices is a live issue in the Church of England to this day, see Legal Advisory Commission of the General Synod, *Revocation of Presentation by Patron and Refusal of Presentee by Bishop* (2007).

[19] Hugh Trevor-Roper, *Archbishop Laud, 1573–1645* (1940); Charles Carlton, *Archbishop William Laud* (1987).

[20] Starting with Christopher Hill, *Economic Problems of the Church: From Archbishop Whitgift to the Long Parliament* (1956); 'Social and Economic Consequences of the Henrician Reformation' in *Puritanism and Revolution: Studies in Interpretation of the English Revolution of the 17th Century* (1958) 30–45.

the post-1660 period of defeat and reaction, John Bunyan could write with intense ambivalence about the sense of salvation opposing the sense of self-interest: 'I see dirt in mine own tears, and filthiness in the bottom of my prayers'.[21] But notwithstanding this ambivalence, Puritan theology did help to drive the people to rebel against the established order of gentry power and episcopal hierarchy.[22]

On the other side of the divide, material interests could also be seen to drive the conservative Anglican cause. For the traditional land-owning class, the Puritan push to abolish tithes and patronage in the 1640s and 1650s and the radical Independent claim to freedom of religious expression and conscience seemed to call all settled property and order into question. The lords and land-owning gentry, who ended the radical republican and ecclesiastical experiments of the Interregnum and brought back the Stuart monarchy and established church, cited the tithe question and control of the parishes as a major reason to roll back the revolution.[23]

Following the Restoration in 1660, the Anglican monopoly was reinstalled. Power was returned to lay lords to control the spiritual and economic governance of the parishes, and this embraced not only preaching and pastoral functions but also the extensive welfare and educational functions of the church. The Crown no longer directly suppressed dissenters who maintained communal worship outside the established church (eg Congregationalists, Baptists, Presbyterians, Quakers, and Unitarians) but, like Catholics and Jews, the dissenting or non-conforming churches were reduced to minority sectarian faiths, tolerated in their private worship but prevented from any participation in public office[24] and denied any state recognition or support for their communal practices. This intolerance of dissenters was a translation of an earlier anti-papalism. The Chantries Acts of the sixteenth century had aimed at preventing endowment of 'superstitious uses' for the saying of masses for the dead, a specifically anti-Catholic policy that could be adapted to repress the non-Anglican and non-Christian faiths.[25]

The 1688 Revolution brought in the Toleration Acts in England and Scotland, removing disabilities imposed on non-conformists who subscribed to core Protestant Trinitarian beliefs, and allowing them to form licensed meeting houses for public worship. The courts interpreted the new toleration after 1689 as removing any bar to the use of trusts and associations for such organized worship. In an important speech in 1767, Lord Mansfield affirmed the legality of such trusts and went further to hold that dissenting Protestant belief was a defence to any fine or charge being imposed for failure to participate in any Anglican form of oath or ritual.[26] The rise of Methodism in the late eighteenth century fuelled the rise of

[21] John Bunyan, *The Holy War* ([1682] 2002) ch. 6, 61.

[22] Michael Walzer, *The Revolution of the Saints: A Study in the Origins of Radical Politics* (1965, 1982).

[23] Margaret James, 'The Political Importance of the Tithes Controversy in the English Revolution, 1640–60' (1941) 26(101) *History* 1; Eric Evans, *The Contentious Tithe* (1979).

[24] eg under the 'Test Acts' from 1673.

[25] Joshua Getzler, '*Morice v Bishop of Durham* (1805)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (2012) 157–201, 161–4.

[26] *The speech of the Right Honourable Lord Mansfield in the House of Lords, in the Cause between the City of London and the Dissenters* [*Chamberlain of London v Evans* (1767)] (1774). Lord Mansfield's

endowed chapels serving communities and the courts became well used to recognizing and enforcing trusts for religious communities both within and outside Anglicanism.[27] After 1688, Unitarians, Jews, and Catholics were granted a measure of de facto toleration for public worship, with de jure toleration granted over the next century, though the full removal of religious tests for participation in public life was postponed to the Victorian period.

The use of trusts to guarantee religious pluralism in Britain after the Toleration Acts was noted by Maitland in his great essay 'Trust and Corporation':

> [J]udges who were themselves stout adherents of the State Church have had to uphold as 'charitable,' trusts which involved the maintenance of Catholicism, Presbyterianism, Judaism . . . This brings us to a point at which the Trust performed a signal service. All that we English people mean by 'religious liberty' has been intimately connected with the making of trusts. When the time for a little toleration had come, there was the Trust ready to provide all that was needed by the barely tolerated sects. All that they had to ask from the State was that the open preaching of their doctrines should not be unlawful . . . And now we have in England Jewish synagogues and Catholic cathedrals and the churches and chapels of countless sects. They are owned by natural persons. They are owned by trustees.

Maitland then posed the question: how are the ecclesiastical associations under trusts to be governed?

> We must look at the 'trust deed.' . . . A certain amount of *Zweck* [purpose] there must be, for otherwise the trust would not be 'charitable.' But this demand is satisfied by the fact that the building is to be used for public worship. If, however, we raise the question who shall preach here, what shall he preach, who shall appoint, who shall dismiss him, then we are face to face with almost every conceivable type of organization from centralized and absolute monarchy to decentralized democracy and the autonomy of the independent congregation. To say nothing of the Catholics, it is well known that our Protestant Nonconformists have differed from each other much rather about Church government than about theological dogma: but all of them have found satisfaction for their various ideals of ecclesiastical polity under the shadow of our trusts. . . .[28]

For all Maitland's celebration of religious pluralism via trust endowments, it is not correct to suppose that Parliament and the courts were always keen to encourage endowment of religious life. Mortmain legislation had been revived in 1736, partly to deny the flow of wealth into a newly evangelical Anglican church but also to prevent endowment of non-Anglican communal worship, and this legislation was quarrelled over and enforced in courts across the eighteenth and early nineteenth

speech was affirmed in the House of Lords decision of *Harrison v Evans* (1767) 3 Bro Parl Cas 465, 1 ER 1437 (HL). See further Charles Mullett, 'The Legal Position of the English Protestant Dissenters, 1689–1767' (1937) 23 *Virginia LR* 389, *idem,* 'The Legal Position of the English Protestant Dissenters, 1767–1812' (1939) 25 *Virginia LR* 671.

[27] *Attorney-General v Wansay* (1808) 15 Ves Jun 231, 33 ER 742; *Davis v Jenkins* (1814) 3 Ves & Beam 151, 35 ER 436; *Attorney-General v Pearson* (1817) 3 Merivale 353, 36 ER 135 (all decisions of Lord Eldon C).

[28] Frederic Maitland, 'Trust and Corporation' in *Collected Papers* (n 17) 321–404 at 358, 363–6.

centuries.[29] Moreover eighteenth-century courts could also use the *cy-près* doctrine aggressively to curtail non-Anglican practice. In the infamous 1754 case of *Da Costa v De Paz*,[30] Lord Hardwicke C refused to permit a bequest by testamentary trust to a 'Jesuba', that is, a yeshiva or house of Jewish study. But rather than voiding the trust and returning the funds to the estate, he found that the donation being charitable in intent could be applied by sign manual to different charitable objects; the funds were then applied to a foundling home that would bring up children in the Christian faith. Later judges found this approach illiberal and intolerant and pushed back against such aggressive use of *cy-près* to subvert the religious intentions of donors. In the 1786 case of *Isaac v Gompertz*,[31] Lord Thurlow C upheld charitable legacies to support Jewish study and religion, save one legacy of funds for maintenance of a synagogue, this being reserved for the Crown to decide upon an appointment *cy-près*. Cases could be multiplied of trust law being used to protect bequests for Catholic and dissenting worship.

Despite these signs of toleration and pluralism, the Anglican animus against dissenting and non-Christian religion continued as an undercurrent in the law of trusts, especially during times of political stress. Communicants of religions deemed alien might be denied the benefit of valid charitable trusts. A trust endowment of a non-established religion could be voided as 'superstitious', or more politely, as lacking public benefit.[32] A leading reactionary in these debates over religious pluralism was the redoubtable Lord Eldon C. In the 1819 case of *In re Masters of Bedford Charity*,[33] Lord Eldon refused to allow charitable funds for the education, apprenticeship, and marriage of persons engaged in religious practice to be made available to Jewish children who fitted the qualifying criteria. He stated:[34]

> I apprehend that it is the duty of every judge presiding in an English Court of Justice, when he is told that there is no difference between worshipping the Supreme Being in chapel, church, or synagogue, to recollect that Christianity is part of the law of England . . . that in giving construction to the charter and the acts of parliament, he is not to proceed on that principle farther than just construction requires; but to the extent of just construction of that charter and those acts, he is not at liberty to forget that Christianity is the law of the land.

Lord Eldon notoriously agitated against the toleration of Catholic worship as legislated in 1791; but he was not so hostile to the dissenting Protestant sects.[35]

[29] Charitable Uses Act 1736; Gareth Jones, *History of the Law of Charity 1532–1827* (1969) 109–33.

[30] (1754) Dick 249, 21 ER 268, Amb 228, 27 ER 150, 2 Swanst 532, 36 ER 715.

[31] *Isaac v Gompertz* (1786) cited in *Moggridge v Thackwell* (1802) 7 Ves Jun 36, 61, 32 ER 15, 23.

[32] *Thornton v Howe* (1862) 31 Beav 14, 54 ER 1042 (voiding a gift to propagate the teachings of Joanna Southcote); *Gilmour v Coats* [1949] AC 426; *Leahy v Attorney-General* (NSW) (1959) AC 457 (PC) (voiding gifts to support intramural Catholic religious practice); *Re South Place Ethical Society* [1980] 1 WLR 1565 (non-deistic belief system cannot attract charitable support as religion). See further Pauline Ridge, 'Legal Neutrality; Public Benefit and Religious Charitable Purposes: Making Sense of *Thornton v Howe*' (2010) 31 *Journal of Legal History* 17; *idem*, 'The Legal Regulation of Religious Giving' (2006) 157 *Law and Justice* 17. The restrictive approach of the law was reviewed and mitigated only as late as 1917 in *Bowman v Secular Society* [1917] AC 406 (HL). Lord Findlay's dissent in *Bowman* showed that the older intolerant approach had not wholly died out at that date.

[33] (1819) 2 Swanst 470, 36 ER 696.

[34] 2 Swanst 470, 527–8, 36 ER 696, 712.

[35] See cases cited in n 27.

In the 1820 case of *Foley v Wontner*,[36] he held that where a dissenting church was constituted under a trust, and the trustees had quarrelled over recruitment of a minister and appointments to the governing trust body of the sect, then the court could make the appointments itself in order to maintain the original trust purposes, as set out in the constituting deed, overriding the objections of present trustees and congregants. By threatening use of this power, he forced the parties to arbitration. In hearing the arguments, Lord Eldon stated that:

> . . . he had several times been called upon to execute trusts, with respect to these dissenting meeting-houses, held under trust deeds; but what the Court could do in such cases was very little. Considering their number, it was much to the credit of dissenters that their affairs were not more frequently made the subjects of suits; when they had been, he had never known any good result from it. . . . I am almost afraid that [by taking jurisdiction over the trust] I am doing what may subvert the peace of many religious societies, in showing the infirmities of the law on this subject.[37]

5. Religious Trusts as Theological Compacts

In fact Lord Eldon had made a decision concerning church trusts some seven years earlier that proved to have enormous potential to subvert the peace of religion. The problem he had to deal with in the key 1813 case of *Craigdallie v Aikman*,[38] an appeal from Scotland, has recurred over and again across the common law world in the two centuries that followed.[39] The problem typically arises where a religious community forms as an association with property held on trust, and later splits with a part wishing to vary the governance or the creed of the group, and another part dissenting from those changes. Which part of the sundered church can claim the succession? Is the split a resignation of the dissentients, a secession, or a division? And who gets the church property on the sundering of the association, the original

[36] *Foley v Wontner* (1820) 2 Jac & W 245, 37 ER 621.

[37] (1820) 2 Jac & W 245, 248, 37 ER 621, 622.

[38] *Craigdallie v Aikman* (1813) 1 Dow 1, 3 ER 601 (LC), aff'd (1820) 2 Bligh 529, 4 ER 435.

[39] To give just a sample of litigations over the principle stated in *Craigdallie v Aikman*, see *Varsani v Jesani* [1999] Ch 219 (CA) (Hindu congregation); *United Free Church of Scotland v McIver* (1902) 4 F 1117; *Bannatyne v Overtoun* [1904] AC 515; *General Assembly of the Free Church of Scotland v Johnston* (1904) 4 F 517 (Free Church of Scotland); *Attorney-General v Bunce* (1868) LR 6 Eq 563 (mixed Presbyterian–Baptist congregation); *Forbes v Eden* (1866–69) LR 1 Sc 568 (HL) (Scottish Episcopalian congregation); *Attorney-General v Gould* (1860) 28 Beav 485, 54 ER 452 (Particular Baptist congregation); *Attorney-General v Murdoch* (1849) 7 Hare 445, 68 ER 183 (mixed congregation of Church of Scotland, Presbyterians, Baptists, and Independents); *Drummond v Matthews* (1849) II HLC (Clark's) 837, 9 ER 1312 (Unitarians); *Shore v Wilson* (1842) 9 Cl & Fin 355, 8 ER 450 (Trinitarians and Unitarians); *Milligan v Mitchell* (1837) 3 Myl & Cr 72, 40 ER 852 (Church of Scotland). The *Craigdallie v Aikman* principle has also been litigated heavily in the United States and the Commonwealth: see Louis Sirico Jr, 'Church Property Disputes: Churches as Secular and Alien Institutions' (1986) 55 *Fordham LR* 335; Sarah Barringer Gordon, 'Religion and Law, 1790–1920' in Michael Grossberg and Christopher Tomlins (eds), *Cambridge History of American Law* (2008) 417–48; Bruce McPherson, 'The Church as Consensual Compact, Trust and Corporation' (2000) 74 *Australian LJ* 159.

contributors, the dominant or majority faction, the various factions pro rata, or the rump of the original church left behind?

In many associations the founding agreement, be it a contract, covenant, or trust deed, will expressly state what is to happen upon changes of membership or dissolution or division. The matter is complicated where the property is held on trust not for all of the members of the church from time to time, but rather for an inner group whose agreed purpose is to benefit a larger religious community, almost as a sub-trust for purpose. But in either case church constitutions do not usually stipulate for their own disintegration or apostasy. More likely they will form with statements of creed and governance laid out in their foundation documents admitting of no change or reformation. Lord Eldon's 1813 decision in *Craigdallie v Aikman* set out what should happen in the absence of express stipulation. He held that where the church creed did not change but the form of governance did, the majority group in control of the church government could claim the property, and the rejecting minority were to be characterized as having resigned or seceded. But where one group within a church does purport to change the original creed, the rival group adhering to the original creed can claim to be the true church and may characterize the group favouring change as secessionists who take no church property with them as they depart. Lord Eldon insisted that this doctrine conferred no power on the court to decide any theological question as such:

> It was true the court could not take notice of religious opinions, with a view to decide whether they were right or wrong, but it might notice them as facts pointing out the ownership of property.[40]

Little did Eldon suspect what disruption his decision in *Craigdallie*—and especially the statement just quoted—would bring in the next two centuries, especially in Scotland from where the case issued. What he did not foresee was that the twinned issues of church governance and ecclesiastical control of property can themselves be cast as creedal issues.

Craigdallie v Aikman concerned a Scottish congregation that left the established church in 1737. The congregants endowed their chapel and paid for the minister with numerous small subscriptions. There was a further split in 1745 upon rejection by the 'Anti-Burghers' of oaths of loyalty to secular magistrates, no doubt connected with the reassertion of English power in Scotland following the failed Jacobite rebellion in that year. The remnant 'Burgher' faction of the sect who accepted the oath in 1745 then split again in 1795 when the majority in control of the sect voted to allow the church officials to prosecute for heresy. The minority claimed that this breached the original creed of the church, such that the majority had forfeited their place in the church and were to be excluded from the church property. The majority case was argued by the formidable team of Samuel Romilly and William Grant. They argued that the Toleration Act permitted congregations operating under the form of religious charitable trusts to mould and change their

[40] (1813) 1 Dow 1, 16, 3 ER 601, 606.

systems of governance, ritual, and creed, and that the law had no place policing the governance and evolving theology of such organizations. The trust gave the sect a form of church government, and individual beneficiaries lacked standing to enforce their own understanding of the purposes of the religious community against that government. All the law could do was enforce the powers of the trustees to pursue the religious purposes of the group as they decided from time to time.

The minority argued that the trust property could only be regarded as belonging to a temporal association sitting alongside the church, and that the trust association was bound by the intentions of the trust founders rather than subject to the governance of the church as it presently stood. To argue otherwise would permit the church government to depart radically from the original purposes of the sect, even if they wished to convert a Protestant meeting house into a Catholic chapel. For a court to give the trustees power to adapt the forms of church organization and worship and claim constitutive power under the trust was, in effect, to allow the trust document to create an established, state-enforced form of religious governance, corrupting the trust settlors' benefaction of property at the behest of trustees.

Lord Eldon C determined that the proposed power to repress heresy breached the original creed. He then decided that the majority, by departing from the creed, had in effect seceded and had no remaining claim to the church property. This he saw as mandated by basic trust principles concerning loyalty to founders' intentions:

> With respect to the doctrine of the English law on this subject, if property was given in trust for A, B, C, etc. forming a congregation for religious worship; if the instrument provided for the case of a schism, then the court would act upon it; but if there was no such provision in the instrument, and the congregation happened to divide, he did not find that the law of England would execute the trust for a religious society, at the expense of a forfeiture of their property by the *cestui que* trusts, for adhering to the opinions and principles in which the congregation had originally united. He found no case which authorised him to say that the court would enforce such a trust, not for those who adhered to the original principles of the society, but merely with a reference to the majority; and much less, if those who changed their opinions, instead of being a majority, did not form one in ten of those who had originally contributed; which was the principle here. He had met with no case that would enable him to say, that the adherents to the original opinions should, under such circumstances, for that adherence forfeit their rights.[41]

Counsel for the victorious minority had warned, as we saw, that to uphold the power of the majority to remould the religious trust would involve de facto establishment of the church government as backed by secular law. But Lord Eldon's decision instead made the religious intentions of the founders legally mandatory. By applying the law to decide the continuing governance of the trust, de facto establishment of one side or the other was inevitable.

An example presented itself very shortly. In the 1817 case of *Attorney-General v Pearson*, Lord Eldon, on the suit of a Trinitarian congregant who claimed there was

[41] (1813) 1 Dow 1, 16, 3 ER 601, 606.

no power to shift from the original religious purposes of the trust, intervened to prevent a 150-year-old self-governing dissenting congregation worshipping under a Unitarian theology and rite, and denying the sect use of the chapel property. This was the dangerous legacy of *Craigdallie*, providing a powerful legal weapon for use in ecclesiastical and congregational enmities. And it was so used.[42]

6. Ritualist Controversy in the Secular Courts

The move of the secular courts into ecclesiastical jurisdiction was hastened by legislation of 1832[43] which vested a wide appellate power over ecclesiastical causes in the Privy Council, a secular tribunal where the judges, typically lawyers of the House of Lords, had neither special training in canon law or theology nor experience of church politics.[44] These powers had been little tested when the *Auchterarder* litigation came to the judges of the House of Lords in 1839. It is not surprising that the legitimacy was questioned of vesting a lay tribunal with any type of power touching questions of theology. Lord Eldon's characterization[45] of such determinations as judicial notice of religious facts rather than interpretations of theology did not convince. The Disruption of 1843 may be seen as a rejection of the position, ultimately derived from Eldon, that secular courts could intervene in religious organizations without purporting to take any religious position.

Soon the English followed suit and began to split the Anglican Church following an ill-judged and ill-expressed intervention by a secular court. In 1850 the Privy Council ordered the Bishop of Exeter to admit to a benefice one George Gorham, a radical Calvinist minister who had rejected the permanent grace of baptism. The Privy Council excited dismay by ruling that Gorham's opinions were not 'contrary or repugnant to the declared doctrine of the Church of England as by law established'.[46] A powerful reaction against the secular resolution of matters of theology and rite set in, and leading Anglican clerics founded the Oxford Movement, joined the Catholic Church, or did both. Prosecutions for religious deviance continued to rumble on, and soon the aggression flowed the other way, with Evangelicals hunting down ritualism and crypto-Catholicism amongst High Churchmen and in effect using the law to diminish or expel their church enemies. In the end, Disraeli passed the 1874 Public Worship Regulation Act creating a new court to decide forms of worship, and vesting a power to stay prosecutions in a panel of bishops. The goal was to restrain the zeal to prosecute ritualists that was sundering the Church.[47] A turning point came when Sidney Faithorn Green was

[42] See cases cited at n 39. [43] Privy Council Appeals Act 1832.

[44] R Brian Outhwaite, *The Rise and Fall of the English Ecclesiastical Courts, 1500–1860* (2006) chs 13–15.

[45] Text at n 40.

[46] *Gorham v Bishop of Exeter* (1850) 7 Not Cas 413, 434.

[47] See *Ridsdale v Clifton* (1876) 1 PD 383, where the Privy Council used its new statutory powers to block an Evangelical attack on High Church ritual; see further James Bentley, *Ritualism and Politics in Victorian Britain: The Attempt to Legislate for Belief* (1978); Nigel Yates, *Anglican Ritualism in Victorian*

imprisoned in 1881 for a year and a half for refusing to submit to the jurisdiction of the ritual court; opinion in the Church turned against the prosecutors. In a last throw the Evangelicals prosecuted the ritualist Bishop King of Lincoln in 1888 but they were defeated in every appeal through to the Privy Council.[48]

Perhaps this sad history of conflict over the forms of religion provides an essential backdrop for understanding the decision of the House of Lords a generation later in the *Overtoun* case of 1904. After the long years of conflict in both English and Scottish churches, Lord Eldon's doctrine of *Craigdallie* might be seen as attractive as a force for conservatism, since enforcement of original theological forms would put a brake on the power of all reformers, whether Evangelicals or Ritualists. But it was not entirely clear in *Overtoun* which side was disrupting settled practice, the majority who sought union with a sister dissenting church, or the minority who wanted to maintain separation and dreamed of becoming the established church of Scotland one day. It is hardly an insight that one of the most powerful forces for religious radicalism is adherence to perceived fundamentals in a changing world. It is perhaps a surprise that sober English judges sought to protect religious fundamentals via the law of trusts.

7. Taming the Fires

It remains only to observe that we have not escaped trust-driven legal-ecclesiastical conflict in the present day. The *Craigdallie* doctrine has travelled to Australia,[49] where it has been used to enforce the use of the Book of Common Prayer,[50] to refuse the ordination of women,[51] and to decide whether a faction of an Eastern Orthodox church abused both church doctrine and trust powers in dismissing a priest.[52] Examples may be multiplied from the United States and Canada.[53] Sadly, such cases have consumed the energies and wealth of entire congregations in expensive litigations.

It is with some relief that we can end more positively with a 2011 Scottish case restraining the reach of the *Craigdallie* and *Overtoun* doctrines. In *Free Church of Scotland v Strath Free Church*,[54] the Court of Session held that a protest against the manner of discipline of an errant minister within the church did not engage fundamental theological principles but rather matters of internal disciplinary

Britain, 1830–1910 (1999); Charlotte Smith, 'Ridsdale v Clifton: Representations of the Judicial Committee of the Privy Council in Ecclesiastical Appeals' (2008) 19(3) *King's LJ* 551.

[48] Yates (n 47) 213–76.

[49] Keith Mason, *Believers in Court: Sydney Anglicans Going to Law* (Cable Lecture, Sydney, 2005); McPherson (n 39).

[50] *Wylde v Attorney-General (NSW); Ex rel Ashelford* (*Red Book* case) (1948) 78 CLR 224.

[51] *Scandrett v Dowling* (1992) 27 NSWLR 483 (NSW CA).

[52] *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66.

[53] Sirico (n 39).

[54] *Moderator of the General Assembly of the Free Church of Scotland v Interim Moderator of the Congregation of Strath Free Church of Scotland (Continuing) (No 3)* [2011] CSIH 52.

machinery and organizational politics. In a congregationalist church the property was held for religious purposes for the use of all the congregants, with its use to be governed by the existing hierarchy of trustees and clerics. Dissenters could not claim that because of the religious nature of the trust, their every disagreement with the hierarchy engaged rights of conscience and fundamental principle allowing dissolution of the trust and disintegration of the church property. Lord Rodger's scholarship on the Disruption figured prominently in this irenic judgement.

Lord Rodger's study of church law and politics in Scotland ultimately makes a case for peaceable community in religious life. His narrative shows a certain scepticism and coolness towards the hotheads and enthusiasts—those who ignited the long-running conflict that broke the Church of Scotland, and those who later prevented union of the free churches. His filigree historical work teaches an important lesson: to strive to be congregants and neighbours, to learn to live together even if we do not always agree. Lord Rodger in the *Jewish Free School* case[55] opened another door to help us to escape from embroilment in conflicts of religious identity and doctrine within fissiparous communities. In that case, he made the simple point that the quarrel over Jewish theology pressed on the court was really a dispute over authority within different streams of Judaism, and that it was a category mistake for the law to use anti-discrimination principles to throw its weight on one side of the divide. It is a great might-have-been to think how he might have brought further insights into the law and evolved fresh solutions where religious communities strain and split asunder.

[55] See n 10.