THE
PRESBYTERIAN QUARTERLY
AND
PRINCETON REVIEW.

NEW SERIES, No. 16.—OCTOBER, 1875.

Art. 1.—PRESBYTERIAN ELEMENTS OF OUR NATIONALITY.

By E. H. GILLETT, D.D., Professor in the University of the City of New York.

THE vital and permanent elements which are assimilated in our nationality were derived from various sources. While, as a general rule, they had originally much in common, they were by no means homogeneous. There were marked diversities and peculiarities in New England Puritans, Dutch, Swedish, and Welsh colonists, Huguenot exiles, Scotch-Irish emigrants, and the Episcopalians of Virginia and the Carolinas. In what now constitute the Middle States, there was a preponderance of Presbyterians, and yet along with these were to be found many Quakers and Episcopalians. President Stiles, a few years before the Revolution, made an estimate of the relative strength of the Congregational Churches of New England and of the Presbyterian Churches outside of it, and, according to his calculation, the latter were but about one-fourth of the aggregate of both, or, in other words, the Congregationalists outnumbered the Presbyterians by three to one. If we concede to non-Presbyterians, who heartily co-operated in the region south of New England, a strength equal to that of the Presbyterians, we shall conclude that the latter were numerically one-fifth of the active Revolutionary force of the time.

her solemn pledges—some of them, it is true, made under the pressure of adversity—the Christian Powers have only to announce that their protection is withdrawn, and the days of Moslem supremacy in Turkey will be ended.

That God would in his own way secure the spread and speedy triumph of the Gospel in that great Empire, must be the prayer of every Christian heart.

Art. III.—THE RIGHT OF A PROSECUTOR TO APPEAL.

By Francis L. Patton, D.D., Professor in the Theological Seminary of the Northwest, Chicago, Illinois.

This article is designed to maintain the following proposition: That when a Presbyterian minister is under process for heresy at the instance of an individual accuser, the prosecutor has a right to appeal from a sentence of acquittal.

Four leading objections have been urged against this proposition, to wit: (1.) The common-law maxim, that no one shall twice be put in jeopardy of life or limb for the same offense. (2.) The allegation that the prosecutor in such a case is not an aggrieved party. (3.) The alleged absence of precedents in support of the proposition, and the alleged existence of a precedent which contradicts it. (4.) The objection based on a construction of Chap. vii, Sec. 3, of the *Book of Discipline*.

Objection First.—Among the pleas in bar at the common law is that known as *autre fois acquit*. The principle on which it rests is the well-known maxim, that no one shall twice be put in jeopardy of life or limb for the same offense. It is easy to understand, that while a former acquittal is a good plea against a new indictment for the same offense, it would not necessarily prevent the granting of a new trial for cause shown, and on motion of the prosecutor. And while it is freely conceded that the courts in England* do not grant new trials in criminal

* In this country the doctrine in question has been embodied in the Federal and in the State constitutions. That it was deemed necessary to make the doctrine part of the organic law of the land, goes to show that it was not considered as an absolutely indisputable legal principle.

cases, we are safe in saying that the common-law doctrine of "second jeopardy" is not so fundamental* as some have supposed, and that it behoves us not to be precipitate in concluding that there is a necessity for its application in courts of spiritual jurisdiction. It will not do to carry the provisions of municipal law into the sphere of ecclesiastical jurisprudence; and the blunders into which we shall fall will be all the greater if we undertake to interpret the law of the church by the common law of England—which is not its prototype—instead of by the law of Scotland, or, rather, the civil law, which is. Indictments at the common law are usually by a grand jury; the church allows an individual accuser to prefer charges. Criminal trials are by a jury of twelve men; a church trial is by a permanent court, whose members are not open to challenge. Criminal verdicts must be unanimous; church trials are decided by a majority vote. The law of the land provides that no one shall be required to incriminate himself; the law of the Church of Scotland recognized the right of inquest.† Who ever heard of a secular court being called to account for its decisions by a

* Law writers express themselves in a qualified way on this subject. Thus, Chitty says: "A new trial cannot, in general, be granted in favor of the prosecutor after the defendant has been acquitted, whether on an indictment for a misdemeanor or a felony. . . . . But it seems to be the better opinion, that when the verdict was obtained by the fraud of the defendant, or in consequence of irregularity in his proceedings, as by keeping back prosecutor's witnesses, or neglecting to give due notice of trial, a new trial may be granted."—1 *Chitty Crim. Law*, § 657.

J. F. J. Stephen speaks of the sentiment (meaning the doctrine of "second jeopardy") as probably rational, considering the suspense and distress of mind created by a criminal prosecution, though the rule founded on it is, he says, "a rough expedient."—*General View of the Criminal Law in England*, p. 228.

Edward Livingstone, in the criminal code which he prepared (it was not adopted) for Louisiana, provided, that when an acquittal had been obtained by defendants bribing a witness, a new trial may be given on motion of the public prosecutor.—*Livingstone's Works*, vol. 2, p. 287.

In England the judge may discharge a jury, after a reasonable time, if they declare that there is no chance of an agreement. This is not far from a "second jeopardy." A new trial, after acquittal was given in *R.* v. *Francis*. The case was a *quo warranto* information to show by what authority he claimed the office of alderman of Cambridge.—2 *Durnf. & East.*, 484.

† "If the libel is found relevant, the minister is dealt with with a view to confession. . . . Should Presbytery be unsuccessful in bringing the accused party to an acknowledgment of his guilt, they then resolve to proceed to probation."—*Styles of Writs, etc., in the Church Courts of Scotland*, p. 118–16.

court of appellate jurisdiction? But, according to our *Book of Discipline*, the lower court is a party to an appeal, and is liable, not only to have its sentence reversed, but to come in for censure as well.* With these differences between the two systems of jurisprudence before us, the bare citation of the common-law doctrine of "second jeopardy" can hardly be regarded as a strong argument against a prosecutor's right of appeal. At the furthest, it could only serve to show that our ecclesiastical system should be made to conform to the law of the land. As interpretative of the existing system it is worthless. In reply to the objection under consideration, it can be shown, (1) that there is no good reason for the application of the maxim in the case supposed; (2) that there are good reasons against the application of it; and (3) that the *Book of Discipline* does not contemplate such an application.

1. There is no good reason why the doctrine of "second jeopardy" should apply to ecclesiastical proceedings. In all developed systems of law there is a distinction between a private and a public wrong; a tort and a misdemeanor; a *delictum* and a *crimen*."* Out of this distinction arise two methods of legal procedure: actions and indictments; civil suits and criminal prosecutions. There is this fundamental difference between the two: that in the one case, the court may award damages; in the other, it may sentence to privation of life or liberty. It is this distinction which accounts for the doctrine of "second jeopardy" being confined to criminal cases. Liberty is a natural right. Every man is allowed, speaking generally, to go where he pleases and do what he likes. And since it is in the power of a court to deprive a man of his natural rights, it is very important that this power should not be used as an

* Dr. Thornwell noticed this anomaly in his article on *The Revised Book of Discipline* (*Thornwell's Writings*, vol. iv. p. 315). But the attention of the Church of Scotland was called to this long before Thornwell's day; for, in the year 1741, the Synod of Lothian and Tweeddale overtured the Assembly in the following terms: "That there appears to this Synod many obvious inconveniences attending the present practice of this church, whereby the members of inferior judicatories are considered as parties before the superior courts, when any cause in which they have given judgment comes to be revised upon an appeal, and surely this is likewise contrary to the practice of all other courts."—*Laws of the Church of Scotland*, vol. ii, p. 459

* See *Maine's Ancient Law*, p. 358.

engine of oppression. The provisions of the law which look *in favorem vitæ* are, therefore, important guarantees of liberty. A man ought not to be arrested without warrant, and when accused of crime should have a speedy trial. Better let a hundred rogues escape than allow one innocent man to lose his life or pine in prison. But what necessity is there for these humane provisions in the case of a minister accused of heresy? He stands in no jeopardy of life or limb; or, indeed, of any natural right. The church can only deprive him of privileges which it had previously conferred. If it had a right to be satisfied that he possessed the qualifications necessary to the bestowal of the privileges, it has a right to be satisfied that he has not lost them; and of the way in which it shall be satisfied the church of course has a right to be the judge. The law of the land contemplates the liberty of the individual. The law of the Church contemplates the purity of the organization. Hence the differences which characterize the two systems of jurisprudence. The one system is more litigious; the other more inquisitional.† The one system presumes the accused innocent till he is proved to be guilty; the other calls upon him to confess, and questions him respecting the alleged offense. Under the one system harm might be done to the individual without the doctrine of "second jeopardy," for the innocent might forfeit life or liberty. Under the other, harm might come to the church were the application of this doctrine to bar the prosecutor's right of appeal, for a false teacher might be kept in a position of trust and influence.

In this connection care should be taken to notice the difference between the provisions which are made for a criminal and for an ecclesiastical trial. The verdict of the jury is designed to be final, and in England is final—second trials, even for benefit of the accused, being seldom allowed. And the reason is plain. It is a fundamental principle, that the judge takes cognizance of the law, the jury of the facts. This being the case, while a second trial for misdirection of the judge would be philosophical enough; second trial because the verdict is contrary to the evidence is unreasonable. For, if there be an

† On the difference between the inquisitional and the litigious or accusatory trial, see *Lieber on Civil Liberty*, p. 218; and *Stephen on English Criminal Law*, p. 22.

authority above the jury capable of determining whether the verdict is according to the evidence, it is only in a qualified sense that it could be said that the trial is by jury; and a new trial would be equivalent to a trial by a jury instructed already as to the verdict they should find. Besides, if a second trial be granted, why not a third, and a fourth, until public sentiment called for a termination of the case on the principle: *Interest est rei-publicæ ut sit finis litium.* Trial by jury, however, is no part of our ecclesiastical system. We have a subordination of courts, and the genius of our system is, that all the proceedings of a lower court are brought under the control of the courts above. It is only when a case has reached the court of final adjudication (unless the constitutional remedies of appeal or complaint have not been taken advantage of) that a case becomes a *res judicata*, and that the maxim, *nemo bis in idem*, has any application.

2. There are good reasons why the doctrine of "second jeopardy" should not be a bar to a prosecutor's right of appeal. An ecclesiastical court is a court of conscience. A minister on trial should not desire to escape conviction through the error or unfairness of his Presbytery. He should be ashamed to avail himself of a felon's plea. It is no hardship, therefore, to ask a higher court to sit in judgment on his case. It is true, the effect of an appeal will be to put him to the trouble of a second defense, and will subject him to the disquietude of delay. But, if innocent, he will have the opportunity of a fuller vindication of himself before the bar of a higher court, and he can better afford to bear the trials of suspense than the church can afford to part with the right to maintain her purity. It is not irrational, therefore, to presume that the unwillingness of an accused person to submit his case to the hearing of a higher judicatory arises from the fear of an adverse decision. It is right, moreover, that when an inquiry assumes the form of a litigation, the parties should stand on a level. Serjeant Stephen, in a work already quoted, objects to the proposition to grant a new trial on motion of the prisoner, instead of granting him a pardon, on the ground, that "if the prisoner be allowed to move for a new trial, *the same right ought, in consistency, to be given to the prosecutor.*" (The italics are ours.) To give a minister the opportunity of being

heard on appeal in the court of last resort, and to conclude the prosecutor from going beyond the Presbytery, would be in violation of the spirit of our system—inasmuch, as it would betray far greater solicitude for the liberty of the individual, than for the purity of the church. Again, it ought to be admitted, without argument, that a church should have the power to remove from office those who violate the vows of office, and to silence false teachers when she knows them to be such. Let us attend now to the doctrine of "complaints," as laid down in our *Book of Discipline*. A minister, let us suppose, is accused of heresy and acquitted. A member of the minority complains. This brings the whole case before the higher court, and may have the effect of "drawing down censure on those who concurred in the decision complained of." It is admitted then, that our book contains provisions whereby a Synod may judicially determine that A. B. is an atheist, and that the Presbytery deserves censure for acquitting him; and yet he is protected, we are told, by the doctrine of "second jeopardy!" It is hard to over-estimate the mischief which would result from importing the common-law maxim into ecclesiastical jurisprudence. It would put it out of the power of the church to protect herself against error. It would make the Presbytery the sole judge of a minister's qualifications. It would destroy the principle of unity, and resolve the church into a confederation of Presbyteries.

3. *The Book of Discipline* does not contemplate the application of the maxim. For, in the chapter on "complaints," we read, respecting a judgment complained of, that a complaint may have the effect "of reversing that judgment, and placing matters in the same situation in which they were before the judgment was pronounced." Let us suppose a case in which a complaint has been attended with this result. The Presbytery, having acquitted a minister on trial for heresy, finds by action of Synod that its sentence is reversed, and that the case is still on its hands. The charges are the same, the parties the same, the evidence the same. But it must make another decision, for the former one is declared to be wrong. Here is a complete refutation of the objection under notice, for not only is the accused in this supposed case sub-

jected to a "second jeopardy," but the court is instructed in respect to the decision it shall reach.

But, it will be said that the General Assembly has given its sanction to the principle which constitutes the ground of the objection we are considering. Now, what are the facts? The Barnes case had reached the court of last resort and had been finally disposed of, It would have been wrong for him to have been subjected to a new process on the same charge, and the Assembly refused to censure his *Commentary on the Romans*, on the ground that this would be equivalent to a new process. This was all it meant when it said that the "attempt to condemn Mr. Barnes by a condemnation of his book, after he had been acquitted on a hearing, on charges wholly founded on the book, is a violation of the fundamental maxim of the law, that no man shall be twice put in jeopardy for the same offense." The Assembly did not mean to say that an appeal would not lie from a sentence of acquittal in a lower judicatory, for Mr. Barnes was condemned in the Synod on an appeal of his prosecutor, and the Assembly recognized his right to appeal, by trying the case on its merits instead of reversing the Synod's action, on the ground that it had no jurisdiction. There is a very wide distinction between a case, which is finally disposed of by a court of final jurisdiction, and a *lis pendens*, transferred by appeal or complaint from the lower to the higher judicatory.*

Objection Second.—It is alleged that the prosecutor, in the case supposed, is not an aggrieved party. Two questions claim attention here; (1.) The relevancy of the objection; (2.) The truth of it.

1. Its relevancy. It is admitted, that if the prosecutor were aggrieved, he might appeal. It can hardly be doubted that

---

* "No case of discipline upon which a final decision has once been pronounced in regular form, by a competent church court, can be renewed again by any process, unless it can be shown that new grounds of action have arisen which were not before that court. An extreme instance might appear in which a proof of great irregularity in proceedings might be allowed so as to reopen the matter. But such an instance would be too extreme and peculiar to interfere with the general rule, that the question of discipline once disposed of by a court of final jurisdiction, or by any court, without regular appeal, complaint, or review in due time, is conclusively and irreversibly determined."—*Practice of the Free Church of Scotland*, p. 103.

cases might occur in which he would be aggrieved. The doctrine of "second jeopardy" must, therefore, be qualified, even by those who maintain it, so as to read thus: No man shall twice be put in jeopardy for the same offense, unless his prosecutor has been aggrieved by the sentence of acquittal—a very important modification of the common-law doctrine. The assumption which underlies the application of the maxim of jeopardy to the case supposed, is that it is of the nature of a criminal proceeding. But in criminal cases the maxim holds good against all private considerations. We must conclude, then, that if this plea holds good for one case of ecclesiastical trial, it is good for every case, and that in no instance can a prosecutor appeal; or else, we must conclude, that in church law there is a distinction between civil and criminal suits. The latter view we should seem to be shut up to, since it is allowed that an aggrieved prosecutor may appeal. And now, to make a successful transfer of common-law rules to ecclesiastical practice, it will be necessary to show that a prosecutor in an ecclesiastico-civil suit is, or may be, an aggrieved party, while the prosecutor in an ecclesiastico-criminal suit is not, and cannot be, aggrieved. To this arrangement, however, there are fatal objections: (*a.*) The distinction between a civil and a criminal suit is not known in our system. What our book calls "a private offense" is a secret offense. A private wrong, in the language of the law, is a wrong done to an individual. "A public offense," speaking ecclesiastically, is an offense the notoriety of which calls for judical notice. A public wrong, juridically speaking, is a wrong done to the State. Our book does once speak of offenses which are "personal," as well as "private," not, however, for the purpose of founding on the distinction a different kind of process, but for the sake of laying down the law in regard to the steps which in such cases should be taken prior to process, in accordance with the instructions contained in Matthew xviii. The attempt to introduce into our system a distinction of which it takes no cognizance, is simply an unauthorized and irresponsible method of revising the *Book of Discipline.* (*b.*) Though the distinction were made, it would not settle the question of appeal. For while it is true that the common law limits appeals to civil cases, the law of the church allows an appeal to an aggrieved

party; and it would be necessary to show that, in a criminal suit, a prosecutor could not be an aggrieved party. The refusal of appeals in criminal suits, or the allowance of them in civil, is not founded on the interest, or want of interest, of the parties prosecuting, but on the result of a decision adverse to the party indicted or sued. In criminal cases the law may deprive of liberty; hence its humane provisions. But it is not pretended that a prosecuting party in a criminal case may not be aggrieved by a sentence of acquittal. (*c.*) But the adoption of the distinction referred to would lead to absurdity. Let it be granted, for the sake of argument, that, in the trial of public offenses, the prosecutor, not being aggrieved by a sentence of acquittal, has no right to appeal, and that in the trial of private offenses (the words "public" and "private" being here employed in their legal, not their ecclesiastical, sense) he may. A. B. accuses C. D. of habitual drunkenness; C. D. is acquitted, and the doctrine of "second jeopardy" bars appeal. A. B. accuses E. F. of defrauding him; E. F. is acquitted, and A. B., having an interest in the suit, appeals. It would seem, then, according to those who advocate the distinction between civil and criminal ecclesiastical offenses, that a minister may be followed from Presbytery to Synod, and from Synod to General Assembly, on a charge of *theft;* but if charged with *drunkenness*, he is safe when his Presbytery acquits him. What is the propriety of making this distinction? If, in the case of theft, A.B. brought suit in an action of trover, or replevin, there might be some ground for it. But if the object of ecclesiastical discipline is the good of the offender and the purity of the church, it is difficult to see any reason for allowing an appeal to a higher court in a case of theft, while forbidding it in a case of drunkenness.

2. Its truth. We deny the allegation. The prosecutor is aggrieved by virtue of his relation to the church at large, and by virtue of his peculiar relation to the case. Will any one claim, that while in a suit for ten dollars the plaintiff is aggrieved if the decision is adverse, in a criminal prosecution the people who constitute the prosecuting party are not aggrieved when a notorious criminal goes scot free? But suppose that, in the latter case, instead of the people, an individual accuser is the prosecuting party, will it be said that the individual

prosecutor is not aggrieved? If it is true that when one member suffers the whole body suffers, it ought, *a fortiori*, to be true that when the whole body suffers every member shares the injury. Why did the civil law discriminate between civil suits, to which none could be parties but those who could show an interest, and criminal suits, to which any one could be a party? Because, in a case which concerned the public peace every one had an interest, by virtue of his relation to the State. I might not prosecute a man for breach of contract unless I could show that he had defrauded *me;* but I might prosecute him for arson, whether it were my house or my neighbor's he had set fire to. Let us now suppose a case of heresy. The accuser is a member of the Presbyterian Church. He is jealous of her honor. He is as studious of her peace and purity as he is of the peace and purity of his home. A Presbyterian minister is accused of atheism; tried and acquitted in face of clearest evidence. Has any one so low a conception of the relations of a minister to the Presbyterian Church, as to say that, in a case like this, the accuser would not be aggrieved? But the prosecutor stands in peculiar relations to the case. The old Scotch procedure allowed three ways of beginning process: by common fame, delation, and by an individual accuser. In common fame, the court was both prosecutor and judge. In delation, an individual laid information before the judicatory, on which they proceeded to process. The delator differed from an individual accuser, in that he was not a party, might be called as a witness, and assumed no risk. The individual accuser undertook to make out a charge, became a party to the process, and was liable to censure if he "succumbed in the probation." Our *Book of Discipline* has given no place to the delator, and has made the individual accuser subject to risk only in the case of process against a minister. Let us suppose, now, a case, in which a minister on trial is acquitted, and the prosecutor censured. Is the latter not aggrieved? His censure is as directly related to the sentence of acquittal as the censure of the accused would have been to a sentence of condemnation. It is not denied that the accused might have appealed from a sentence of condemnation, because aggrieved by it. What should hinder the accuser in this case from appealing from the sentence of acquittal, because aggrieved by

it? Suppose, however, that the censure is not inflicted, on the ground that the prosecutor has manifested neither "rashness" nor "malignancy." The *Book of Discipline* does not allow the court this discretion. The censure is due on the ground that the charges are not proved, the "rashness or malignancy" only serving to measure its severity. If Presbytery sees fit, however, to decline to censure, it does so at its own risk. It cannot take advantage of its own wrong for the purpose of hindering the prosecutor from taking his appeal. But, although no censure be inflicted, it must be remembered that there is a difference between an offense and the punishment of an offense. The Presbytery is instructed to punish an accuser who fails to make good his charges. It is not the Presbytery, however, but the law, which determines that he is worthy of censure. In the eye of the law he is, *ipso facto*, a slanderer, the moment the Presbytery declares that the charges are not sustained.*

We have been at pains to show that the prosecutor, in the case supposed, has been injured by the sentence of acquittal. But the fact is, that it would be difficult to show that our book means, by an "aggrieved party," anything more than a party who is dissatisfied with the decision of the court—"who feels himself lesed," as the Scotch books have it. Otherwise, a court would be compelled, before hearing an appeal, to try an issue respecting the fact or measure of the appellant's grievance.

Objection Third.—We have here to notice the alleged absence of precedents favorable to our proposition, and the existence of one (in the Fishback case) which is claimed to contradict it.

1. Absence of precedents. This is, at best, an argument *e silentio*, and is even of less value than such arguments usually are. We may assume that prosecutions will not usually be undertaken without good cause; and then, that for good cause a court will condemn. In the nature of the case, appeals will, for the most part, be taken by the accused. Moreover, before a case reaches the General Assembly, it usually goes to the Synod. This increases the likelihood that the appellant at the

* "Our *Book of Discipline*, chap. v., sec. vii., pronounces a man a slanderer, who fails on trial to make good his charges."—*New Digest*, p. 524.

bar of the Assembly will be the accused. Thus, in the Barnes case, the accused was acquitted by Presbytery, and the prosecutor appealed; was condemned by Synod, and Mr. Barnes appealed. It is true that our Digest does not furnish a single case in which an accuser prosecutes an appeal before the General Assembly. But it should be remembered that, in the Barnes case, the Assembly so far recognized Dr. Junkin's right to appeal to Synod, as to try the case on its merits, instead of deciding that Synod had no jurisdiction. It must be allowed, however, that, strictly speaking, the right of appeal was *coram non judice*, and that we can not say what the Assembly might have done under the influence of a learned argument in opposition to the thesis which we now maintain.

2. Fishback case. The facts are these: The church in Carlinville, Illinois, decided, at a congregational meeting, to adopt the rotary system in the election of elders. Against this action Mr. Fishback complained to Presbytery. Presbytery decided adversely. Fishback appealed and complained to Synod. Synod dismissed the appeal and complaint. Fishbach complained to the Assembly. Assembly instructed Synod to issue the case. Synod then decided adversely to the appeal and complaint. Fishback appealed to Assembly, and Assembly dismissed the appeal, because, among other reasons, Fishback was not an aggrieved party. The question now is, whether this case is parallel with the one under consideration. It will be noticed: (*a.*) that this was not a case of process against a minister where risk was assumed; (*b.*) that this was not a case of process at all, no charges having been preferred; (*c.*) that the original complaint was not against the action of an inferior judicatory, but against the action of a congregational meeting, As our book defines a complaint to be "a representation made . . . respecting the decision of an inferior judicatory," Mr. Fishback was in error at the start. Suppose, however, that his original complaint had been against the session, then the decision of the Assembly would simply have been an interpretation of the doctrine of "complaints," and would in no wise have affected the hypothetical case we are considering. Now, there are only three views, so far as we can see, which can possibly be taken on the subject of a "complaint": (1.) It may be considered as in the nature of a charge; as initiating a process

to which the complainant and the judicatory complained of are parties. If this were the correct view, the party against whom an adverse decision was rendered would be entitled to appeal. But such a view is not sanctioned, either by the law or practice of the church. In dismissing this appeal, the Assembly simply decided, and wisely, as we think, that this view of a complaint was wrong. (2.) A complaint may be considered as a method of continuing a process, and as implying a previous charge, trial, and decision. If this were correct, complaints, like appeals, should be limited to judicial cases. According to this view, Mr. Fishback would have had no right to complain against a legislative decision, even though that decision had been made by a "judicatory," and the Assembly would have been justified in dismissing the appeal, which was founded on a decision adverse to his complaint. But, though something might be said in favor of this view were we considering the question what the doctrine of complaints ought to be, it cannot be doubted that this is not the view which is sanctioned by the law and usages of the Presbyterian churches in this country and in Scotland. (3.) The idea of a complaint, as it is found in the law and practice of the church, is, that it is a representation made to a higher judicatory of a decision, legislative, or judicial, which has been given by a lower court. It can be shown that, in the nature of the case, an appeal ought not to lie from a decision adverse to a complainant. And the confusion into which men sometimes fall is due to the fact, that in a complaint, as well as in an appeal, it is the "cause," not the court, the "decision," not the persons who rendered it, which is transferred to the higher court. There is no reason why the carrying of a decision from one court to another should so affect the parties interested that they may appear in a capacity in a higher court which they were not allowed to hold in a lower. Presbytery makes a legislative decision, for instance: this cannot be brought to the notice of Synod by appeal, but it may by complaint. Dissatisfied with the action of Synod, the complainant may lay the decision originally complained against before the General Assembly; but why should he be allowed to appear there as an appellant, whereas, before the Synod he could appear only as a complainant? The fallacy lies in the assumption, that a "complaint" is an arraignment of the

court, when, in fact, it is simply the transfer of a decision. The dismissal of Mr. Fishback's appeal, therefore, in no wise affects the case we are considering.

Objection Fourth.—It is urged that the chapter on appeals is constructed with exclusive reference to the presence of an accused party. This is a mistake. It is not strange that the book should contemplate the possible injury which an accused person might sustain by an unjust decision in a lower court. The fact, however, that language is used in this chapter applicable only to the accused, is no ground for concluding that an accuser may not appeal. It is said that the following passage militates against the truth of our proposition : "All persons who have submitted to regular trial .... may appeal." If this passage excludes the accuser in any prosecution, it must exclude him in every prosecution. But, it is admitted that the prosecutor in a so-called private suit may appeal. It proves too much, therefore, for those who quote it. But, strictly speaking, it is not the accused who is tried, but the issue, and to the issue there are two parties. Again, an appeal is from "a definitive sentence," and it is asked whether a sentence has been pronounced on the prosecutor. It will not be amiss to ask what the word "sentence" means in ecclesiastical language. And as our *Book of Discipline* is made out of Scotch materials, Pardovan's collections will be better authority on this subject than the *Acts of the Apostles* or *Webster's Dictionary. Ejus est interpretari cujus est condere.* Reference to these "collections" will show, that judicial sentences are those which terminate processes, and that they may either be absolvitures or condemnatory.*

Having replied to the objections urged against our proposition, we beg now to present briefly the positive side of the case. We affirm that the prosecutor of a minister may appeal from a sentence of acquittal. And these are our reasons :

1. The equity of the case requires that he should be permitted to appeal. It is allowed that, on the acquittal of a minister, his

* "Judicial sentenees are either interloeutors—that is, a sentenee intermediate between the deeredenee and the termination of proeesses—or they are definitive—that is, they terminate proeesses. And these are either absolvitures—whereby the defendant is freed and assoilzied from the conelusion of the libel or process; or, they are condemnatory—whereby they are found just and true against the defendant." *Pardovan*, book iv., title v.

accuser, or any member of the minority, may complain. It is claimed that the action of the higher court could, in that event, terminate only on the Presbytery, and that it could not reach the accused. If this is a correct opinion, then there is the more reason why a prosecutor should be allowed to appeal from a sentence of acquittal; otherwise, there would be no way whereby a case of heresy could ever go before the higher court. A man might actually be an active and unmolested member of an Assembly which, on the hearing of a complaint, had solemnly declared him to be unworthy of holding the ministerial office. But we believe that a complaint brings a case on its merits before the higher court just as fully as an appeal. This is implied in the statement, that the effect of a complaint may be to reverse the decision of the court below, and this is the doctrine of the Scotch Churches.* If this is the true doctrine of complaints it destroys the whole argument against the right of appeal, that argument resting on the alleged exemption of a minister from further molestation after acquittal by Presbytery. If a complaint would effect the result aimed at by appeal, it is unnecessary to contend seriously against the right of appeal. The procedure in a complaint is similar to that in an appeal. No injury is done the accused by employing the one method of transferring the cause rather than the other. If, therefore, the effect of saying "I complain," would be the same as that of saying "I appeal;" to dismiss a case because the prosecutor used one word rather than the other, would be an illustration of sticking in the bark, which would disgrace even a justice's court.

2. The truth of the proposition is corroborated by the practice of the Scotch churches.†

---

* "It was in my remembrance a matter of doubt whether, if there was no appeal by a party, a complaint from a minority of a court could have the effect of reversing the judgment of the majority. But the doubt has been completely removed by a number of decisions in different years, conformable in my opinion to the nature and reason of the case, and it is now understood to be part of the law of the church, that upon a complaint from a minority of an inferior court, the court of review may dispose of the sentence complained of in the same manner as if it had been brought before them by the appeal of a party."—*Extracts from Hills' Institutes in Compendium of Laws of Church of Scotland*, vol. I., p. 467.

† "A party may also bring a cause under the review of the superior court."—*Styles of Writs, etc.*, p. 25. "When a party conceives that the judgment of

3. The doctrine of our proposition is the recognized doctrine of our church. It has been a matter of doubt whether appeals and complaints are ever proper except in judicial cases,* but never until recently, and now only in a solitary instance, has the right of a prosecutor to appeal ever been disputed. The Assembly had a good opportunity to call it in question in the Barnes case, but it did not. It had a good opportunity in the Griffith case, but it did not. It only excepted to the minutes of the Synod of New York for allowiug the prosecutor to go on with his appeal, notwithstanding the death of the accused.† Appeals have been dismissed, or entertained as complaints, because not made by one of the "original parties," but the right of an original party in a case of actual process to appeal has never been contradicted or questioned by a single deliverance of the General Assembly.

4. The doctrine of our proposition is taught implicitly in the chapter on Complaints, where we read (Cap. vii, sec. iv, sub-sec. ii): "The cases in which a complaint is proper and advisable are such as the following, viz.: The judgment of an inferior judicatory may be favorable to the only party placed at the bar; or the judgment in question may do no wrong to any individual; or the party who is aggrieved may decline the trouble of conducting an appeal." The last-supposed case is plain. The one before it may refer to legislative acts of judicatories, or to judicial cases where no party feels aggrieved by the decision. For instance: a minister calls for judicial investigation

---

inferior court is unjust or erroneous, he is entitled to such redress by appealing to the court above it."—*Hill's Institutes.* "All persons who judge themselves lesed by the procedure or sentence of a kirk session may appeal to the Presbytery."—*Forms of Process in the Judicatories of the Church of Scotland*, chap. v. "A party in a case which has been under consideration in the kirk session, may appeal against their judgment to the Presbytery."—*The Practice of the Free Church of Scotland*, p. 20. "An appeal lies from all sentences of Presbyteries, first to the Provincial Synod, and from them to the General Assembly."—*Erskine's Institute of the Law of Scotland*, p. 130. "In a case (Inglis), a committee appointed to consider a libel, etc., but liberty given to either party to appeal from the committee to the Commission of Assembly, who are empowered finally to determine therein without any further appeal."—*Report of Commission of Assembly, 1719, May 20, Sess. 6, in Compendium of Laws Church of Scotland*, vol. 2. p. 441.

* See *Princeton Review for 1835.*

† *New Digest*, 548.

on the ground of rumors which affect his ministerial standing. Presbytery begins process on common fame, but, before reaching a decision, refers the case to Synod. Synod gives the accused an honorable acquittal. No appeal is to be expected. The accused is satisfied. The Presbytery commenced process only at his solicitation, and rejoices in the result. The first-supposed case is also plain. A person is charged with an offense on common fame and acquitted. Here, again, no appeal is to be expected. The Presbytery, being the prosecuting party, will not appeal from its own decision. The implication is plain, that had there been another party at the bar of Presbytery besides the accused, an appeal might have been expected.

5. The right for which we contend is distinctly recognized in our *Book of Discipline*. It tells us, first, who may not appeal: those who are not original parties; secondly, who may appeal: those who have submitted to regular trial and are aggrieved. The prosecutor in the case supposed has a right to appeal, for he is a party; has submitted to regular trial and is aggrieved.

(*a*.) He is a party. To some minds there is an anomaly in the idea of an individual appearing as a prosecuting party in what appears to them to be a criminal suit; and in their anxiety to establish an analogy between municipal and ecclesiastical law, they are apt to suppose that the individual accuser is a self-constituted district-attorney, or a prosecuting witness. They forget that the church law follows the civil, not the municipal law, here. And the civil law made this distinction, among others, between a civil and a criminal suit, that while, in the former, it was necessary to "show an interest" in order to be a party; in the latter, any one might be a party. The ecclesiastical law of England, likewise, follows the civil law in this respect.* Our *Book of Discipline* is not peculiar, therefore, in giving to the individual accuser the status of "a party."

(*b*.) He has submitted to a "regular trial." The hypothesis under consideration implies that charges have been preferred,

* "The general law upon this branch of the subject is thus simply and clearly enunciated by Lord Stowell: 'The criminal suit is open to every one, and the civil suit to every one showing an interest.'"—*Burn's Ecclesiastical Law*, vol. 3, p. 184.

that the accused has pleaded, that issue has been joined, that a trial has been had, and that a sentence or judgment has been given. Had the charges been dismissed without trial, because irrelevant, no appeal could have been taken. Had Presbytery seen fit to "refer" the case after process commenced, no appeal could have been taken against the decision. It is necessary that there should be a trial and a sentence to entitle a party to appeal. But the provisions of the book have been satisfied in the case supposed.

(*c.*) He is an aggrieved party. This proposition has been sufficiently discussed in answer to the second objection. It is not necessary, therefore, to say more on the subject.

Art. IV.—THE LAW OF APPEAL IN THE PRESBYTERIAN CHURCH.

By the Rev. GEORGE C. NOYES, D.D., Evanston, Illinois.

THE question, whether the law of the Presbyterian Church invests every one with the right of appeal who appears in her courts as a litigant, and as a party to the original action, is a question which has not often been distinctly raised, and which has still less often been satisfactorily discussed. It is held by some, that any defeated party in the lower court may appeal to the higher. By others it is claimed that, in all *public* offenses, none but the defendant in the original action may appeal. The two views agree in conceding that individual parties—by which is meant parties to an action, where the offense charged is a private one, involving a wrong done by one individual to another, or by a church to an individual—may each or either appeal. They differ as regards the right of a plaintiff to appeal when the offense charged is a public one, not involving wrong done to an individual—such as immorality of life, or unsoundness in doctrine. In all such cases the prosecutor, though defeated, cannot appeal. This is the proposition which it will be the aim of this article to maintain and establish.