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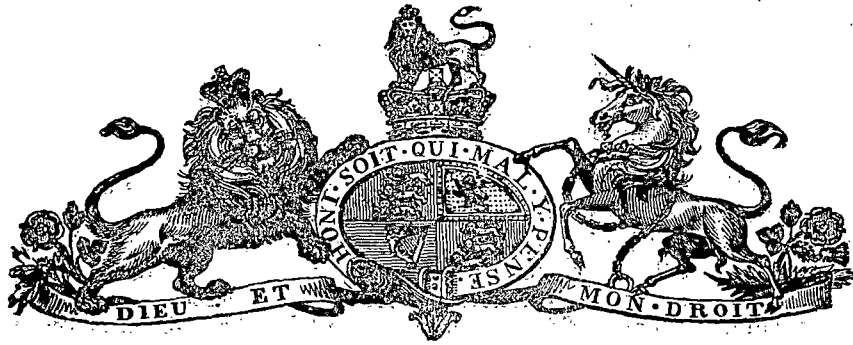
TASMANIA.

LEGISLATIVE COUNCIL.

REV. JOHN STORIE:

CORRESPONDENCE AS TO SUIT STORIE *versus* GARDINER.

Laid upon the Table by Mr. Chapman, and ordered by the Council to be printed,
August 25, 1875.



The Manse, Hobart Town, January the 22nd, 1875.

SIR,

I HAVE to request that you will submit the accompanying Statement and Memorial to the Governor in Council.

I have the honor to be,

Sir,

Your obedient Servant,

JOHN STORIE.

The Hon. the Colonial Secretary.

MEMORIAL to the Governor in Council.

I HAVE only waited Your Excellency's arrival to submit a statement in respect to the present bearing of the Marriage Statutes on the Ministers of the Church of Scotland in the Colony; and in respect to the conduct of the Chief Justice towards myself while giving evidence in the case of Hopwood at the late Criminal Sessions held in Hobart Town on the third of December last.

The facts are these:—Hopwood was indicted for perjury in having made certain false affidavits before me in order to obtain a Marriage Licence. In taking these affidavits it is my statutory duty to act on the authorisation of the Moderator for the time being of the Presbytery of the Church of Scotland in this Island. The Moderator of that Presbytery is, or ought to be, elected annually; and, since the twenty-first of October last, it has been necessary for me to act, in taking such affidavits, under the authorisation issued by the Rev. Rob. S. Duff, Minister at Evandale, professing to be such Moderator, and professing to issue the usual authorisation under the 2nd Vict. No. 7, and 6th Vict. No. 18.

In the course of my examination the prisoner's Counsel was, after some discussion, permitted to put to me the question,—“I ask Mr. Storie, as a matter of fact, is Mr. Duff a Minister of the Church of Scotland in this Island?” It was no part of my duty to decide as to the bearing of this fact on Hopwood's legal guilt, but it was my duty, on the question being allowed, to speak out the truth; and my reply was,—“As a matter of fact, Mr. Duff is not a Minister of the Church of Scotland in this Colony.” The fact is notorious, and I could say no else. On my making this reply, the Chief Justice thought fit to address me in these words:—“Then you ought to be ashamed of yourself for acting on that authority.” He then put the further question,—“Did you know as a fact that he was not a Minister at the time you got your authority?” As this question seemed to me ambiguous, or put in some misconception, my reply was,—“I did know as a fact that he was ordained into a Church that asserts for itself in this Colony a separate and independent position and character, and by the use of its ordination questions.” I could give no other reply; and this I read from the Book of Forms containing these ordination questions. The Chief Justice then put to me the further question,—“And knowing that, you acted on this authority?” My reply was,—“I did.” On this the Chief Justice again retorted,—“Then, I repeat, Sir, you ought to be ashamed of yourself.” The language of the Judge was certainly strong. As to the fact that Mr. Duff has been so ordained, and as no Minister in this Colonial Church had been before, it is notorious and avowed: it is recorded in minutes; can be attested by a hundred witnesses; and was reported in full in the *Examiner*. If his language went beyond the legal bearing of that fact on the case before him, then its insolence was beyond excuse; but if it is to be taken as expressing the Judge's opinion of the fair legal bearing of that fact on the case of perjury then before him, it affects the legality of Hopwood's incarceration on the one hand, and, taken in connexion with his subsequent words in addressing the Jury, to the effect that a Minister taking affidavits under such an authorisation

would "render himself liable to a charge of misdemeanour, if not of felony," it may define the very serious position of those who, by their own deliberate act, have assumed an ecclesiastical position so emphatically condemned. But to me the language of the Judge was insolent and unjust. He knew the fact, as I felt constrained to tell him; that it was one I could not conceal; "that I had endeavoured to obtain the opinion of the Supreme Court on this very point; but had done so without avail;" and that I stood there giving evidence not as a party offending, but as a party aggrieved; and by the Judge himself aggrieved.

The case between the Chief Justice and myself, or between him and the law which it is his duty to interpret and administer, stands thus:—Immediately on Mr. Duff's ordination, which I held to be dangerous and illegal,—anticipating that, by the Presbytery's usage, he would be almost at once elected Moderator, and that this very question as to the lawfulness of taking affidavits under his authorisation would necessarily arise,—I determined for my own direction and security, and that of parties who might require to make affidavits before me, to take the opinion of the Supreme Court as to the strict legality of his ecclesiastical position: and I employed the two Law Officers of the Crown to file a Bill in Equity in which the Court is prayed to declare that "the defendant Robert Duff was not duly inducted to the said Church at Evandale, and is not entitled to act as a Member of the said Governing Authority (or Presbytery) of the said Church of Scotland in Tasmania." I had charged in that Bill, and was of course prepared to prove that "the Presbytery of the Church of Scotland in this Island" had, by the vote and act of a majority of its Members, formally renounced that character, and "asserted for itself a separate and independent position and character;" that, after this action on their part, the Rev. Robert Duff had accepted ordination at their hands "with the use of the ordination questions," not of the Church of Scotland, "but of the Presbyterian Church of Victoria;" that he had become bound by standards of doctrine not owned as such in the Church of Scotland, and by a formula forbidden by the law of that Church;" and that in his ordination there was "exactd and obtained from the defendant Robert Duff a public declaration that he maintained the separation of the Church of Scotland in Tasmania from the Church of Scotland as established by law, and its possession of supreme and independent jurisdiction." I had submitted to the Chief Justice of the Supreme Court, by that Bill of Complaint, the exact facts which I gave in evidence in Hopwood's case. I had actually gone to the Supreme Court with the distinct purpose of bringing to an issue the very question that met the Chief Justice in the Criminal Court,—the question as to whether the Rev. Mr. Duff was legally empowered within the Statutes to issue such an authorisation, and whether it was within my legal duty to act on it in the taking of affidavits; and in respect to this application I had actually received a judgment of the Court in these terms:—"The Court considered it unnecessary and undesirable to express any opinion" as to Mr. Duff's legal position and power; and further, in dealing with a demurrer in the suit, the Court had acted with so much decision as to tender its opinion to the Attorney and Solicitor Generals that the "Plaintiffs (myself and others) should not be advised to ask leave to amend their Bill."

This then is the position: I am kept under the necessity of acting on an authority in taking these affidavits whose legality I doubt, and whose legality the Chief Justice has declared that the Supreme Court refuses, with a full knowledge of the facts and on my petition, to determine; and recommends that no further steps should be taken by me to force on a decision. Only three weeks later the same Judge, sitting in the Criminal Court, has thought fit to intimate, and with offensive reference to myself, that, if the facts alleged in my Bill of Complaint be true, no licence can now be issued for marriage according to the rites and ceremonies of the Church of Scotland without the Minister, who takes the affidavit in order to its issue, being exposed to an indictment for "misdemeanor or felony."

I have determined to bring these facts thus formally to the knowledge of Your Excellency, in order that it may be now placed on public record that, if there be illegality in the taking of these affidavits, the act on my part at least has been, is, and will be involuntary; and that the responsibility is not mine, but lies on those whose duty it is to decide what the law is, and who have declined that duty; and on those who have the power to provide a remedy; and I have respectfully to submit that, in the circumstances, I am entitled to be protected from a repetition of judicial insolence.

JOHN STORIE, *Minister of St. Andrew's.*

*The Manse, Hobart Town,
January the 22nd, 1875.*

REFERRED to Ministers.

FRED. A. WELD.
Feb. 1, 1875.

FORWARDED for the perusal of His Honor the Chief Justice.

THOS. D. CHAPMAN.
1st Feb., 1875.

MEMO.

I BEG to acknowledge the courtesy of the Hon. the Colonial Secretary in forwarding this Memorial for my perusal.

Although the Governor in Council has no jurisdiction in the matter in relation to myself, yet I think it desirable to correct misrepresentations contained in the Memorial. I guard myself against being supposed to imply, by the use of the word, that the misrepresentations are intentional.

It is a mistake to assert that the Supreme Court, in its Equity jurisdiction, has refused to decide a question said to be raised by the Memorialist's bill of complaint. The correct statement is that no such question has been properly raised for decision by the Court. It is not the fact that the Chief Justice, sitting in the Criminal Court, has thought fit to intimate any such opinion as that attributed to him in this Memorial. What I did upon the occasion referred to—the trial of the case of *Reg. v. Hopwood*—was to declare my opinion of the character of the Memorialist's conduct as it was disclosed by his own evidence given as a witness in that case. From that evidence it appeared that he had knowingly and deliberately acted under an appointment, the authority of which he repudiated at the very time he so acted under it. He had held himself out as possessing authority to take affidavits for marriage licences, and thereupon to issue licences for the celebration of marriage, when he believed he had no such authority. If his belief was well-founded, he was falsely pretending to have an authority which he did not possess, and was practising an imposture. He was deluding unwary women into concubinage by inducing them to trust his assertion, contrary to his own belief, that he had authority to celebrate lawful matrimony by licence. It was clearly his duty to abstain from marrying by licence while he believed himself unauthorised. He might have safely solemnised marriage by banns. I can see no excuse for his pretending to have authority which he believed he did not possess. The misery which he was bringing upon families—in making women concubines and children bastards—is too obvious to need to be further particularised. Anything more pestilent and pernicious than the course which the Memorialist was, according to his own convictions, pursuing, can hardly be suggested. Upon the character of his conduct being made clearly manifest by his own evidence, I, as presiding Judge, thought it my duty openly to condemn it. I did so by telling him, as he stood in the witness-box, that he ought to be ashamed of himself. I cannot think that any one, excepting the Memorialist, will be likely to consider these words too strong, if I was right in censuring such conduct at all; and, as to that, it seems to me that a Judge would be unworthy of his office who should shrink from censuring, in fitting terms, falsehood and fraud by whomsoever committed in connection with the case before him.

The tenor of the Memorial would seem to indicate that the Memorialist has been, and continues to be, insensible of the moral pravity involved in his conduct. I note this for the purpose of observing that I am not to be understood as denying to him the excuse, if he wishes to avail himself of it, that he was not conscious to himself of the true character of his conduct. I do not wish to be understood to mean more in the above remarks than that his conduct involved falsehood and fraud, whether he was conscious of its character or not; and that my rebuke at the trial was fully deserved in either view. For the excuse would imply a bluntness of moral perception, an insensibility of moral feeling, and a perversion of moral sense of which a man ought to be ashamed.

FRANCIS SMITH,
Chief Justice's Chambers, 3rd Feb., 1875.

Colonial Secretary's Office, 31st March, 1875.

SIR,

I HAVE the honor to acknowledge the receipt of your letter of the 22nd January, transmitting a Memorial to the Governor in Council, in which you complain of the conduct of His Honor Sir Francis Smith, the Chief Justice of the Colony, when you were being examined as a witness in a case recently tried before that Judge in the Criminal Court at Hobart Town.

In reply, I have the honor of informing you that your Memorial was referred to His Honor the Chief Justice for his perusal.

I have now the honor to state that your Memorial has been considered by the Governor in Council, together with the observations made thereon by His Honor the Chief Justice, and His Excellency the Governor in Council declines to interfere.

I have, &c.,

(Signed) THOS. D. CHAPMAN.

*The Rev. JOHN STORIE,
The Manse, Hobart Town.*