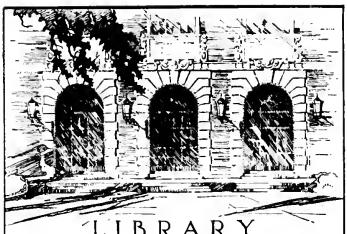

IS THE

INDEPENDENCE OF CHURCH COURTS

REALLY IMPOSSIBLE?

BY

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CANON OF CHRIST CHURCH.

A Reissue

WITH

AN INTRODUCTORY LETTER TO

THE DEAN OF CHRIST CHURCH.

James Parker and Co.

OXFORD, AND 6 SOUTHAMPTON-STREET,
STRAND, LONDON.

1899.

A Letter to the Dean of Christ Church.

MY DEAR DEAN,

It is said that the Convocation of Canterbury, of which you are a member, will next week be invited to consider important proposals in connection with the work of the Ecclesiastical Courts Commission, appointed in 1881. I hope you will allow me at such a moment to ask your attention to the contents of a pamphlet on the subject, which I was bold enough to write, as Vicar of Great Budworth, in the early weeks of 1886.

You will not, I hope, think that I am interfering with things that are beyond my reach. I am not dreaming, of course, of criticizing any practical measures, of which I cannot fully know whether they are, or are not, to be proposed; and can much less know the exact, or even the general, contents and character. But for that very reason this would seem to be a moment at which it is exceptionally convenient to call attention to some underlying principles; and, I must add, to some fallacies as to underlying principles, which have (it is to be feared) an almost exclusive possession of the minds of men in this country, who rely (as for practical purposes I admit that men are often almost compelled to rely) rather upon current impressions than upon careful thought of their own.

One such current fallacy meets me alas! in pages no less representative than those of this last week's *Guardian*, as a "principle which in" its "general outline must be frankly recognized if any good is to come of the proposed legislation." It is the belief, held largely in this country, without the least examination, because it is honestly believed to be a self-evident axiom, that the national establishment of a Church necessarily means the subordination

of its judicial procedure, in the last resort, to the review of the secular power. If this belief, instead of being assumed as self-evident, were seriously examined, the formidableness of its power would quickly dissolve. Happily the evidence is close at hand by which it can be proved, to absolute demonstration, that neither establishment in the abstract, nor establishment under the British Crown and Constitution in particular, is for a moment incompatible with a real freedom of either Church councils or Church courts. There is one other Church besides our own, which has been all this time, and is at this moment, nationally established, on British soil and under the British Crown. In it no appeal lies from the Church courts to the secular power. *Because the Church is established under Royal Supremacy*, therefore the supreme court of the Church represents the Sovereign in the act of speaking the last word for Church purposes, in precisely the same way in which, for civil purposes, the judgment of the secular court of appeal is the Sovereign speaking her last word. There is no more appeal from the highest ecclesiastical court to the Sovereign, than there is from the highest secular court to the Sovereign: nor does the absence of appeal infringe the sovereignty of the Sovereign in the one case any more than in the other. There is no more appeal from the highest ecclesiastical to the highest civil court, than there is from the highest civil court to the highest ecclesiastical. I am speaking, of course, of the Established Church of Scotland. If any one would take the moderate pains required to read the article by Lord Balfour of Burleigh, in the recent volume of 'Essays on Church Reform,' he would find it a simple impossibility ever again to assert that the ultimate dependence of Church courts upon secular revising was in any sense a necessary element in, or consequence of, establishment. On the contrary, I fearlessly assert that it is a direct infringement of what national establishment does, of right, either historically or logically mean. It was not even in England the real meaning of the theory, either of King Henry VIII. or Queen

Elizabeth on the one hand, or of the Churchmen who accepted the principle of Royal Supremacy on the other. I speak positively as the directest method of challenging inquiry on this matter. And meanwhile I protest against the use of language, by those who take either—or any—point of view in the approaching discussions, as if there were any reason whatever in the nature of things, why English Churchmen should lay down a principle so inherently untrue as this.

I am not one of those who regard the maintenance of establishment as being, in principle at least, of capital importance. The reasons for shrinking from the responsibility of disestablishing are indeed serious: but they are practical and historical (to my mind) rather than of abstract theory. The point is one as to which I hold that a Churchman, at least *as Churchman*, should be neutral. But in any case disestablishment is always open to the nation. Because (if it be so) the nation disapproves of the legislative or judicial development of the Church; because the nation considers that the Church has become, or is becoming, other than that which it had at first meant, or is willing now, by establishment to recognize and endorse; or indeed for any other cause, good, bad, or indifferent, it is open to the nation to disestablish, at any moment, a Church with which it no longer wishes its national life and procedure to be identified. If the nation wishes no longer to accept the organization of the Church as an aspect of itself; if it declines to accept Church legislature, Church judicature, Church corporate life with all the corollaries that are necessary to the corporate life of the Church, the first step in logic and equity would be to disestablish.

I have tried once before, and am certainly not trying now, to discuss, on its merits, the problem of disestablishing. But so long as Establishment remains, let it be clearly understood that Establishment is a condition not of servitude but of privilege. However far I may be from advocating disestablishment, I am quite sure that the Church's worst enemies are those who would conserve

establishment as a means of controlling and enthralling the Church. The existing condition in Scotland is the true and direct outcome, in logic and equity, of the idea of establishment, and of the principle (I do not say of the practice) of the Tudor Sovereigns in England. It is by a tacit growth, the result largely of inattention and accident, that establishment has come to be, in England, the expression of a principle which precisely contradicts its proper meaning; and yet is now genuinely believed, by I know not what majority of intelligent people, to be as irreversible as a law of nature, or as self-evident as an axiom of Euclid.

I should indeed be very far from admitting that the loss of freedom to legislate for herself, and conduct her own justice, within the things which properly belong to her sphere, would rightly or reasonably follow even from the disestablishment of the Church. The Church in America, a purely voluntary association in a democratic state, is for these purposes no less substantially free than the Established Church in Scotland; though of course not armed, like the Scottish Establishment, with the majesty of national recognition and secular power. If the instinct of modern thought is wholly wrong in supposing that a Church should be the less free because it is established; it is at least right in assuming that a non-established Church ought to be free. Strange to say, even this, though true elsewhere, is far from being true, according to existing tradition and practice, in England. But I must not enter into detail on these points. This letter at least is meant rather to draw attention to them than to argue them. There is something more about them in the pamphlet which I venture to send: not based, of course, on any expert knowledge of my own, but on that which the Blue Book of the Commission of 1881 made public to the world.

I will only add here that, when I speak of 'ecclesiastical' legislature or judicature, I am far from meaning, of necessity, the legislation or the judgment of what are commonly called 'ecclesiastics.' The place of Church

laymen, as Church laymen, in Church courts or councils, though immensely important, is yet, in principle, a question of detail. An ecclesiastical council, committee, or court, is one (however constituted in detail) which is, for the purpose in hand, the genuine outcome and *bonâ fide* representative, of the Church.

Meanwhile there is one other form of the fallacy I have spoken of, to which attention is not drawn directly in the pamphlet; which I will ask leave, for that reason, to make plain here.

It is very frequently supposed that even if Royal Supremacy does not absolutely require an appeal from the highest ecclesiastical to a secular court; yet at least some reference to such a court or committee may be justified as if it were part of a (supposed) inherent visitatorial power in the Crown, or as if it were parallel to the historical principle of the *appel comme d'abus* in the Gallican Church. The inherent visitatorial authority of the Crown in respect of ecclesiastical judicature will be more convincing when it is an established principle and practice in respect of secular judicature. Whether anything of the kind might be tolerable in principle, or in policy, if the historic Church in England were disestablished, is open to argument. But it has certainly no legitimate place while the courts ecclesiastical are themselves the Queen's courts for ecclesiastical matters.

And the reference to the Gallican Church and the *appel comme d'abus* is altogether fallacious. The *appel comme d'abus* was the national self-protection against an extra-national system of judicature. As long as Church courts rested ultimately on a basis not national but foreign; as long as their system of Canon law was in the main a foreign system, and the ultimate sanction and authority which lay behind the administration of it was the authority and sanction of the Roman court, that is to say, of an irresponsible foreign power, claiming to be more august than the national sovereignty; so long it was an imperative necessity that the national sovereignty should have some mode of checking and

limiting Church courts. No doubt in practice, when the Crown was strong, the *appel comme d'abus* gave the Crown an almost unlimited opportunity of interference,—unreasonable as well as reasonable. But so long as the basis of the Church's authority was foreign, some visitatorial power on the part of the Crown, some power of review and veto in the name of the nation, was indispensable for national freedom. Now no such machinery of protective veto is, or can be, necessary to guard the freedom of the nation or Crown against a judicature, which is already the judicature of the Crown itself. There is nothing at all of an Erastian nature in acknowledging, what is as true in principle as it is in practice, that all power of exercising a public jurisdiction within the nation comes ideally from the ideal source of all national jurisdiction,—that is, from the Crown. There is no other source of jurisdiction in this realm, within the region of material things, except only—I do not say (where a Church is nationally established) the secular power, but the Sovereign, who is the sole executive head, whether of secular power or of ecclesiastical. The Sovereign has no need of a power of visitatorial scrutiny, to check or to veto Herself.

Royal Supremacy represents one theory, the theory of a jurisdiction exclusively national. The *appel comme d'abus* represents another, and an incompatible, theory, the theory of an extra-national jurisdiction in Church courts. It must be one theory, or the other. The *appel comme d'abus* cannot illustrate, or proceed from, Royal Supremacy. To try to combine these two incompatible principles, or to make the one the method of the other, is mere confusion.

Such machinery, then, as this is quite illogical in a Church established under Royal Supremacy. It would be illogical also in a disestablished Church.

Nevertheless, though I have been driven to write under stress of conviction that some of these most fundamental principles are generally neither recognized nor believed in at all; I am sincerely anxious on the other hand to dis-

claim the presumptuous desire of interfering with the efforts of my betters to handle practical difficulties in a practical way. And therefore, if any one should urge that, in view of its unique national history in the past, the Church of England, if disestablished, would still hold so mighty a position within the nation, that some machinery analogous more or less to the *appel comme d'abus*, though corresponding neither to precedent nor principle, might yet be as a political expedient wise, if not permanently yet during a period of transition and experiment; I should not be very careful to resist the contention. I will go one step further, and venture to add that even if, on somewhat kindred grounds, such an expedient should be proposed in an established Church, as for the moment prudent diplomatically, though in principle unconstitutional and irregular; even that might lie outside my present argument. I scrupulously abstain from saying one word in the region of present practical politics. I am only endeavouring to protest against false theories of constitutional principle. But at least if anything should be proposed on politic grounds, which is irregular and illogical in principle, I may urge that it is of the highest practical importance, that it should be advocated rather as being, what it is, a politic irregularity, than as if it were what it is not, an illustration or outcome of principles constitutionally true.

I cannot but hope that my disclaimer of any desire to enter (save by clearing fundamental principles) within the region of immediate practical politics, may moderate somewhat of the grave displeasure which perhaps I must on some sides expect, as the penalty of venturing to speak at all. But at least in parting I may say, in general terms, that I write as one who is sincerely convinced that the difficulties of the Church in what is called her present crisis—(it is strange how few parishes through the length and breadth of the land are conscious, newspapers apart, of any crisis at all)—will be settled in the best, the wisest, and the most permanent manner, by the unfettered action of the Church herself. They will be settled effectively

just in proportion as it becomes freely possible, in the present and the future, for the Church herself, in councils and courts of her own, without imported excitement or pressure from the outside, to work out by degrees, with all the gravity of the responsible action of a body that is effectively self-governing, the methods and the needs, the judgment and the discipline, of her own life.

Forgive me, if you can, for my sudden intrusion upon you. I do not of course venture to presume upon your agreement in the things which I have said. But indeed, I only wish that I could hope to be as indulgently interpreted by others, as I am sure that I shall be by you.

Yours affectionately,

R. C. MOBERLY.

CH. CH.
Jan. 30, 1899.

ERRATA.

Page 20, line 3, *for* pp. 16, 17, *read* 12, 13.
,, 41, ,, 2, *for* body politic *read* body temporal.

Is the Independence of Church Courts really impossible?

"THAT religion should be absolutely free from State control is impossible." This principle, in one form of phrase or another, is so familiar just now upon the lips and in the minds of men, that it is worth while to distinguish some of the possible meanings which may underlie it. The words themselves are borrowed from a recent Charge of Archdeacon Palmer's; and their context in that Charge may suggest at once a distinction which will be convenient at the outset. After asserting the principle Archdeacon Palmer goes on, "The well-known example of the Indian Thugs will illustrate my position. A State cannot tolerate murder, because there is a set of men within its borders who believe it to be the fittest expression of devotion to the deity of their choice. Another instance nearer home may be adduced. Polygamy is a cherished practice with the Mormons. Yet surely it is not wrong for a civilized nation to forbid the re-introduction of such a practice." If these be accepted as illustrations interpretative of the meaning of the principle, the principle itself will readily be conceded. But what in that case does the principle mean? It means that whereas it is essential to the constitution of a State to prevent certain kinds of action which would injure the State, it would become necessary for the State to interfere with any religion which should inculcate or encourage such actions. Not even religion would be a sufficient defence for actions which are *per se* offences against the laws of a civilized community. The very statement implies a certain instinct that the rules and constitutions of religion

should *prima facie* be held to be outside of the cognizance of the State. Only it is asserted that this natural presumption might conceivably be rebutted; that it is not a truth so absolute as to be incapable of exception; that in certain extreme cases, capable of being hypothesized, the natural immunity of religion might and would be overruled, the State might and would so far overthrow the proper order and distinctions of things as to interfere and coerce within the sphere of religion. The emphasis is upon the word 'absolutely:' "that religion should be absolutely," i.e. under all conceivable circumstances, and in all its conceivable aspects, so only that it could claim the name of religion, "free from State control is impossible."

Now in such a sense as this the principle is an undoubted truth. And because there is a sense in which it is true, therefore the words themselves cannot be denied. And because they cannot be denied, therefore the statement remains, and is apt to be appealed to as a fundamental axiom in discussion about the relation of the Church to the State. But then the words are ambiguous. And there can be little doubt that the ordinary conception of their meaning, as they are generally used in such arguments, is something extremely different from that which has just been stated.

"That religion should be absolutely free from State control is impossible." We know that under existing laws and customs in England no religious body is free from State control. This is the case, in point of fact, in a very much wider sense than that just given. It is not only that under the administration of our law no religious body is allowed to interfere with the fundamental moralities of social and national life, but that in all disputed cases whatever, within the circle of any religious body, the civil courts are in fact the ultimate courts of appeal.

Many typical cases of disputes in Dissenting congregations have within recent years illustrated this fact. If only the dispute be persisted in, its decision will come at last from the civil judge, however many subtle questions

of ecclesiastical polity, or of theological doctrine, may be involved in the decision. That this is so in fact has been abundantly insisted on in recent controversy.

I quote two or three sentences from an article, which is full of information on the subject, published in the "Church Quarterly Review" of April, 1885: "Our contention is that Nonconformists are hopelessly subject to the jurisdiction of the State courts for the interpretation of the doctrines in their trust-deeds, and absolutely subject to the discretion of Parliament for their alteration." "Even then [i.e. if they should resign all their property in order to purchase freedom] the Dissenting communities would not be free from State control in matters of religion, for, after all, in such a case there would still remain some necessity in their purely voluntary and non-property-holding communities to exercise discipline, and in relation to their exercise of this right they would still be liable to have their ecclesiastical proceedings reviewed, and their sentences, if need be, reversed by any judge of the civil court to whom an aggrieved party might make an appeal according as we have shewn." Again, "It would be sufficient for the purpose of his argument to admit that State control, such as we have described, does not extend beyond the question of interest in property. But though such an admission would be sufficient for the purposes of the argument, it would not be an adequate admission and representation of all the facts of the case, for the truth is that State control extends to questions of discipline of a purely voluntary society, meeting in a weekly-rented upper room, holding no property, and having, as a society, no interest in property whatever." And finally, with reference to the 'Huddersfield case:' "Never was the subjection, absolute and helpless, of any religious body in its religious concerns more manifestly and unquestionably complete; and the more the case is inquired into and discussed, the more readily and candidly this will be admitted by all persons whose minds are open to the irresistible force of the facts stated, which overwhelmingly shew that in such a case there is no getting away from

State control in matters of religion, even by those who imagine that they are altogether free from it."

Now when facts like these are loudly insisted on; when they are urged upon us as arguments of immense force to shew not only that the independence of the Church of England *would* not, but that it *could* not be attained, either by any smaller change, nor even by the formal separation of 'Church' and 'State,'—as they have been urged on many a Diocesan Conference platform, and in many a private discussion; and when in this connexion words are used like those which in a limited sense we admitted just now, "That religion should be absolutely free from State control is impossible," is it not plain that the words themselves have begun to carry a totally different force and meaning from that which we admitted? They have now become the erection into an abstract principle, and the enunciation in the form of a necessary axiom, of that rule of procedure which is asserted in the extracts just given,—and no doubt asserted truly,—to be the existing practice of the English courts. They now lay down that it is inevitable, in the nature of things, that any questions, religious or otherwise, in any religious community, established or non-established, must (if the dispute be sufficiently persevered in) come up, for their really ultimate decision, before the court of the civil power. Is it at all too much to say that it is in this sense, and with this purpose, that maxims like that which has been quoted are continually being laid down? laid down as at once of indisputable authority, and as the basis alike of many arguments, and of many homilies?

We have now reached the precise question which it is the purpose of this paper to raise. The question is this: Is it in the least necessary in the nature of things, or is it in the least desirable, that questions of Church discipline (such as almost all the "disputes" in religious communities practically are) should receive their last word of settlement from civil courts? I decline to be answered by any evidence as to what does happen in our law-courts now, whether in reference to the Established Church or to

Dissenters. I am ready to concede absolutely that this is the existing and traditional maxim and practice of English courts. That fact is, of course, a weighty one. But whatever may be the exact significance of that fact, I deny that it is any proof that the thing is necessary in the nature of things, or that it could not possibly be otherwise. I deny that it is any adequate justification for that popular sense which would, I believe, at present be almost universally understood to attach to such a maxim as "That religion should be absolutely free from State control *is impossible.*"

Does the received practice of the English courts represent in this matter what is absolutely necessary or right?

That it is by no means necessary in the nature of things is indeed a proposition easily demonstrable. But I submit that any such demonstration, however obvious it may be, is at this moment of very real importance. The circumstances of the present time make it exceedingly desirable that the minds of Churchmen should look forward as clearly as possible to the issues, and to the different alternatives, which may open themselves in the future. But so long as it is at all generally supposed that the ultimate determination of its religious questions by civil courts is a necessity which no religious community can escape, so long the whole conception as to the conditions of the future problem, and as to the lines upon which we ought even now to be advancing to meet the future, is, in one most important respect, fatally prejudiced and overclouded. And yet at this moment I venture to submit that it *is*, very generally indeed, so supposed; that is to say, that it is really a general belief not only that the courts do act in this way, but that there is no alternative possible but that they should act in this way: I submit that this supposition does, in effect, go a very long way towards preventing Churchmen in general from even considering how far the present condition of things in this respect is, or is not, desirable (for no doubt it is futile to argue upon the desirableness of what could not be otherwise); I submit that the prevailing supposition has really

no other ground than the admitted fact of the present English maxim and practice: and I submit, finally, that if once the phantom of its supposed necessity were really and completely dissipated, there are grounds for thinking that the wisdom of the English people, as it ceased to think the existing practice a necessity, might very probably cease also to think it in any degree desirable or wise.

If the present condition is arbitrary, and not necessary, what other alternatives are open beside it?

I am concerned only to make clear my alternative, without staying to ask whether it is, or is not, the only form of alternative possible. And I may add that, at the present stage, I am only bound to shew that an alternative is fairly conceivable. Whether it would or would not be also reasonably practicable in this country or in this generation, is a question which I do not as yet profess to have reached.

But surely a condition of society is at least imaginable, in which ecclesiastical societies would be allowed to frame their own rules of discipline, and to carry them out, deciding for themselves all questions that might rise within their own body as to doctrine, ritual, or procedure,—discontents or complaints of aggrieved individual members or ministers notwithstanding. Of course there would be a limit to the scope of ecclesiastical discipline. The religious tribunals might pronounce whether an accused man was, or was not, heretical,—was, or was not, capable of retaining his post as an official of his society; and if they pronounced him heterodox, or insubordinate, or otherwise unfit, they might proceed to dismiss him: but of course in no case would they be able to interfere with his citizenship, or any of its rights,—they could not order him, for punishment, to be fined, or flogged, or imprisoned. Neither could they, of course, except at their own peril, impose upon any of their members the duty of making overt war against the fundamental laws of society. Subject, however, to the principle that they could not interfere with citizenship, or make war against society, their decisions

upon all questions involving the rules of their own community or the enjoyment of its privileges might be final, and might be accepted as such by the civil tribunals; so that the civil tribunals, without re-trying the question of rules or privileges, would (if need were) compel recalcitrant members to submit, on matters belonging to the discipline of their community, to the decisions formally given by the formal tribunals of the community.

It would of course be necessary that religious communities should constitute tribunals and procedure, which might be able to be recognized as the accepted tribunals and procedure of the community. Till this were done it would be impossible to say whether the case of Mr. A. or Mr. B. appealing for the retention of their position in such or such a religious body had ever been properly decided upon its merits by the body they claimed to belong to. But the moment it can be said Mr. A. claims or appeals so and so—the proper tribunal or synod of his religious society has tried the case according to its own rules, and has pronounced against him; from that moment it is possible for the civil tribunals to say, "We have nothing whatever to do with Mr. A.'s claims: he belongs to a society which has, and ought to have, its own rules, and its own power of interpreting its own rules: if they decide that under their rules he is not one of them, then he is not one of them; if they attempt, indeed, to assault or maltreat him we of course are ready to afford all legal protection: but for us, after their decision, to attempt to re-try the question on its merits, whether he is or is not loyal to their doctrine, whether he is or is not to be accepted by them as an orthodox representative and officer, would be much worse than superfluous. It would not only be useless, but in reference to the proper distinction between the political and religious administrations, it would be disastrously unwise, and full of nothing but peril to the peace and order of the commonwealth."

But there is one point which, according to the existing manner of thought on these subjects, would almost certainly be urged here. It would be said, these things might

perhaps be conceivable, if no questions of position or property were involved. But every such decision necessarily affects, not only the doctrinal position of a community, but the pecuniary position of an individual; and all questions affecting position or property must in the nature of things come before State courts, and therefore the position you speak of is not really imaginable. Now if the Ecclesiastical tribunals were affecting to inflict fines by way of penalties, whether of £5 or £5,000, this objection might be valid: but they do not. The most which they do, or would do, is to declare that a certain ecclesiastical position is forfeited; and the pecuniary loss complained of is only a necessary incident (direct or indirect) of the ecclesiastical position. It is true that Mr. A.'s private estate cannot be touched upon to the extent of a single penny. But Mr. A. has no private right whatever to the salary, or other advantages, which are the incidents of his ecclesiastical position. If he has forfeited the position, he has forfeited also its emoluments; and no right whatever which really belongs to him, whether of citizenship or of property, is affected at all. It is necessary that the line of distinction should be drawn in the strongest way between property to which there is any private right, and property to which the only right, actual or possible, is a mere result of the tenure of a particular responsible post. It is a distinction which, broad as it is, appears to be continually lost sight of. I utterly deny that there is any necessary reason, any reason involved in the proper constitution of a state, why decisions which affect property that is of the nature of a salary must be capable of being referred to civil courts. If the Wesleyans appoint an officer with £1,000 a year, chosen on account of his loyal exposition of Wesleyanism, to perform certain functions of importance to the Wesleyan community; and if he is subsequently dismissed on account of the formal judgment of the Wesleyan tribunals that his teaching is no longer true to their principles, I utterly deny that the fact that the position which he forfeited was a valuable one constitutes the slightest reason why the Wesleyan tribunals

should not have been the bodies best able to judge of the weight of the grounds on account of which alone it was proposed to dismiss him, or why the State should be supposed to neglect any one of its own essential functions, or any just claim of citizenship on the part of the person concerned, if it declines to review the merits of the decision, but lets it stand as a matter of course, as a point decided by those to whom it belonged to decide it, as much if salary is involved as if it is not.

I do not, indeed, deny that there might possibly be issues, collateral to the main one, which might have to come before the civil courts, and might carry damages; as e.g. if a man were avowedly dismissed on the ground of immorality or drunkenness, who could prove to the satisfaction of the civil court that the imputation in question was false in fact and slanderously and maliciously made and received against him, it is possible that he might claim from the court—not, indeed, forcible restitution to the ecclesiastical position (which the court would have nothing to do with),—but adequate, and possibly very heavy damages, for the stigma falsely affixed upon his character. But without staying to think further of other extreme or exceptional hypotheses which might make an indirect appeal to civil courts still undeniable, I do claim that as a general principle, and in all ordinary cases of discipline such as have come in fact before the English courts in recent years, whether from the Established Church or from Dissenting bodies, it is entirely conceivable as a working condition of things, that the civil power should leave to the ecclesiastical the entire determination of its own questions, and the entire exercise of its own discipline; and should accept the formal decisions of the accredited tribunals of the several bodies as the proper decisions of those bodies, to which all citizens who chose to be members of the bodies must as a matter of course submit—their own natural rights of citizenship being always untouched—so long as they desired to maintain their membership. The State would thus be absolved from the somewhat absurd possibility of solemnly pro-

nouncing the 'Baptist' orthodoxy, of one whom the whole Baptist body had repudiated as unorthodox; or the inadmissibleness in the Church of teaching or practices which the Church herself had formally pronounced to be Catholic.

I decline to despair of the acceptance of these principles. I decline to despair of the prospect of hearing them by and by enunciated as incontrovertible maxims, at once of common law and of common sense. Can we not imagine the sort of severely grave simplicity with which some impartial Law Court in the future might lay down the lines of its accepted theory as to the due relation of secular and ecclesiastical jurisdiction? lay them down in maxims sweeping and decisive as these? . . . "The decisions of ecclesiastical courts are final, as they are the best judges of what constitutes an offence against the Word of God, and the discipline of the Church." "Civil courts have duties and responsibilities devolved upon them, and a well-defined jurisdiction to maintain. The Church has more solemn duties, more weighty responsibilities, and an authority granted by the infinite Author of all things. We shall not enter in and 'light up her temple from unhallowed fire.'" "We have no right, and therefore will not exercise the power, to dictate ecclesiastical law. We do not aspire to become *de facto* heads of the Church, and, by construction or otherwise, abrogate its laws and canons." "The Church should guard its own fold; enact and construct its own laws; enforce its own discipline; and thus will be maintained the boundary between the temporal and spiritual power." The Church members "joined the Church with a knowledge of its defined powers, and as the civil power cannot interfere in matters of conscience, faith, or discipline, they must submit to rebuke or excommunication, however unjust, by their adopted spiritual rulers." "Freedom of religious profession and worship cannot be maintained, if the civil courts tread upon the domain of the Church, construe its canons and rules, dictate its discipline, and regulate its trials. The larger portion of the Christian world has

always recognized the truth of the declaration, 'a Church without discipline must become, if not already, a Church without religion.' It was as much a delusion to confer religious liberty without the right to make and enforce rules and canons, as to create government with no power to punish offenders." "In this controversy is involved a greater question, and of deeper moment to all Christian men, indeed to all men who believe that Christianity pure and simple is the fairest system of morals, the firmest prop to our government, the chiefest reliance in this life and the life to come. Shall we maintain the boundary between Church and State, and let each revolve in its respective sphere, the one undisturbed by the other? All history warns not to rouse the passion or wake up the fanaticism which may grapple with the State in a deathly struggle for supremacy."

There is, it must be owned, a trumpet-like ring, and a very sweeping inclusiveness about some of these last extracts; but does any one suppose them to represent a state of things literally inconceivable? Can such a relation between civil and ecclesiastical courts be found only in the misty places of the imagination? Is there anything in the nature of things, anything in the essential constitution of states, to make such an ideal relation *impossible* in the prose of common life?

But even if it be admitted to be in a real sense conceivable, we shall still be told, I imagine, that it is not a relation which the practical instincts of modern nations will ever really be content to accept. We shall be told, with I know not what precise delicacy of phrase,—perhaps that 'no state can tolerate the existence of an *imperium in imperio*,' perhaps that 'every subject retains always an indefeasible right of appeal to the sovereign power,' or under the spell of some other equally celebrated and equally fascinating dictum—that States, even though, if they would, they *might* do this, yet will never consent to give so much independence to Churches. No inherent necessity but the jealousy of States will prevent it. They desire to keep Churches more entirely under their own

authority. They will not part with any power, with any element or any means of control. They would be afraid to do it. Out of fear, out of jealousy, out of desire to control and restrain, out of anxiety as to the disorders and discontents which might grow out of overmuch independence—they *might* indeed do it, but they never *will*.

Now I might well argue in reply to such an assertion of jealousy, that the conclusion supposed to follow from it was, even upon the hypothesis, mistaken and impolitic in the highest degree. The State will best maintain its own dignity and authority, and the order and contentment of all its citizens, not by retaining in its own hands the maximum of direct authority, but rather by devolving as much as possible, retaining so little only as is indispensable. Every step in the practical independence of Churches is a step, not to say a stride, in the direction of national contentment and security. The nation as such, and from its own point of view, ought earnestly to desire such a consummation. The task of deciding all the doctrines of all the Churches, the burden of universal papacy, is a burden heavier, and more dangerous, than it can bear.

But to develope arguments such as these is hardly part of my present purpose. I prefer to ask whether, already, the instincts of practical nations have not given the very answer which some of us are inclined to think that they can never give. Does not the testimony of facts already shew that the practical immunity of ecclesiastical tribunals from all State revision whatsoever, is not conceivable only but an accepted and most living reality in the States of the modern world? and if this be so, is it even necessary to plead, that the contrary practice in England has *not* been conducive to greater smoothness among us of relations between Church and State, greater contentment amongst citizens, or, by consequence, greater national dignity or stability?

I point to two instances only, but they appear to be the two which should naturally be of greatest weight as examples pertinent to the case of our own Church in England. Besides the Church of England itself (whose

condition in this respect is the point now in question) there is one other conspicuous instance of a Church 'Established' under the British Crown and Constitution; that is the 'Established Church of Scotland.' On the other hand, if we wish to see the bearings of the matter apart from Establishment, by far the most considerable instance of a non-established Anglican Church is the 'Protestant Episcopal Church' of America. But whether we look to the great alternative instance of an Anglican Church non-established, or to the great alternative instance of a non-Anglican Church Established under the British Empire, in either case, strange to say, we see in full operation that very condition of things which many of our friends at home still seriously regard as hopelessly impracticable at least, if not inconceivable.

As setting forth the accepted doctrine on this subject of the United States of America, there is an elaborate American judgment printed in full in the appendices to the Report of the Ecclesiastical Courts Commission. The judgment is that of the Supreme Court of Illinois, and was given in January, 1871. But its significance is even wider than its direct authority; for it is introduced into the English Blue Book not only on the ground that "the very full way in which the relations between the Anglican Church and the State in America are gone into seems to make it desirable that it should be given at length," but also apparently because "that part of the doctrine laid down which is agreed to by the whole court appears to be generally recognized in the United States."

What, then, is the nature of the doctrine there laid down? Possibly it may be a surprise to some who did not at the moment recognize them, to hear that all those somewhat ringing quotations which were made two or three pages ago, are taken *verbatim et literatim* from the text of this formal, and representative, judgment. It may be added that they all (with the possible exception of the second extract) are taken from that part of the judgment which was "agreed to by the whole court."

The general principles, then, upon which American

State courts would approach—or decline to approach—such questions are singularly clear. But it will be worth while to describe the case itself a little more exactly. A clergyman was accused of omitting certain acts or words which the rule of the Church required him to make use of in public service, but to which he himself entertained objections on doctrinal grounds. The case was tried before the tribunal provided in the diocese for such a purpose; and the clergyman was condemned and deprived of his position. He thereupon made appeal to the civil courts. The grounds of his appeal which are material were of the following nature: (1) that the diocesan tribunal, purporting to be constituted according to the Canons of the Church, was in fact not constituted strictly in accordance with those Canons; (2) that the diocesan tribunal did through prejudice decide unfairly upon the merits of the case before it; (3) that inasmuch as the clergyman's salary and position were involved, and as indeed the very right to preach was in itself property, therefore the deprival of these was an infringement of the clergyman's civil rights; and that for this cause, if for no other, it was necessary that the diocesan sentence should be reviewed by the courts. The court decided against the clergyman on all three points. It not only decided against him, but decided against his right to a hearing upon the merits of his arguments. It did so in respect of the second and third of these three pleas unanimously; in respect of the first not unanimously but by a majority. The decision of the majority in respect of the first plea was of this nature. After alleging the facts that the diocesan officials had intended and attempted to organize a proper court for his trial, and that the clergyman complained of a misconstruction or neglect of the canons on their part, and a consequent want of authority in their tribunal to try him, they say, "The same point was made to that [i.e. the Diocesan] court, and its power denied. It was urged with the same earnestness, and enforced with the same arguments, there as here. That court overruled the objection, and decided that it had jurisdiction. Five

intelligent clergymen of the Church presumed to be deeply versed in Biblical and canonical lore, were more competent than this court to decide the peculiar questions raised. Why should we review that, and not every other decision which involved the interpretation of the Canons? It is conceded that when jurisdiction attaches, the judgment of the Church court is conclusive as to purely ecclesiastical offences. It should be equally conclusive upon doubtful and technical questions, involving a criticism of the canons, even though they might comprise jurisdictional facts. It requires no more intellect, information, or honesty, to decide what is an ecclesiastical offence, than to determine the authority of the court according to the canons. The distinction is without a difference."

To this particular doctrine, however, in the judgment, viz. that the diocesan court was the exclusive judge of its own jurisdiction, two out of seven judges demurred [a].

[a] The statement of the two dissentients is as follows: "We concur in the decision of the case at bar announced in the foregoing opinion, and we also concur in the opinion itself, except as to one principle therein. We understand the opinion as implying that in the administration of ecclesiastical discipline, and where there is no other right of property involved than the loss of the clerical office or salary, as an incident to such discipline, a spiritual court is the exclusive judge of its own jurisdiction, under the laws and canons of the religious associations to which it belongs, and its decision of that question is binding upon secular courts. This is a principle of so grave a character, that, believing it to be erroneous, we are constrained to express our dissent upon the record.

"We concede, that when a spiritual court has once been organized in conformity with the rules of the denomination of which it forms a part, and when it has jurisdiction of the parties and of the subject-matter, its subsequent action in the administration of spiritual discipline will not be revised by the secular courts. The simple reason is that the association is purely voluntary, and when a person joins it he consents that for all spiritual offences he will be tried by a tribunal organized in conformity with the laws of the society. But he has not consented that he will be tried by one not so organized, and when a clergyman is in danger of being degraded from his office, and losing his salary and means of livelihood by the action of a spiritual court, unlawfully constituted, we are very clearly of opinion he may come to the secular courts for protection. It would be the duty of such courts to examine the question of jurisdiction, without regard to the decision of the spiritual court itself, and if they find such tribunal has been organized in defiance of the laws of the association, and is exercising a merely usurped and arbitrary power, they should furnish such protection as the laws of the land will give. We consider this position clearly sustainable, upon principle and authority."

There is, then, a clear difference of opinion upon the one question, whether or no a civil court is at liberty, before compelling acceptance by Church members of the decision of a Church tribunal, to entertain or examine for itself the question whether that Church tribunal was regularly constituted according to the rules of the Church under which it professes to act; though even here a majority of five judges to two affirmed the immunity of the Church tribunal from all such examination. But upon every other point raised the decision of the court was unanimous. As to the plea that the clergyman's citizen-rights were infringed by the penal withdrawal of emoluments, or of that authorized status as minister and preacher, which was itself (he urged) of the nature of 'property,' or as to his claim to a 'vested right' in his status or office, they say, "No parish can form a part of the diocese of Illinois unless with the consent of the Bishop, and the formation of a constitution, as provided in Canon 8, by which it 'accedes to, recognizes, and adopts the constitution, canons, doctrine, discipline, and worship of the Protestant Episcopal Church.' The minister having been previously ordained, and pledged conformity to the rules and doctrines of the Church, is installed as Rector, according to Canon 10, by the production of a proper certificate from the Bishop. The vestry is required, by Canon 12, to obtain the amount stipulated for his support by 'the gathering of offerings in divine service, or by the procurement and collection of subscriptions or of pew-rents.' It would be a mockery of language to say that the agreement for a salary thus made constituted a vested right, a right which could not be suspended. The salary depended upon the continued performance of the duties of rector. The contract must be construed and enforced by reference to the canons which form a part of it. If the minister was suspended or deposed for any ecclesiastical offence the payment would cease. . . ."

"It is also claimed that there is value in the right to pursue any lawful avocation. Of this we entertain no doubt. We have no doubt either of the absolute right

of every citizen under our constitution to teach and preach the Gospel to whomsoever will listen. But in an organized Church, with written or printed rules, and established doctrines and modes of worship, the right is qualified. The continuance, power, and emoluments of the position depend upon the will of the Church. The right is contingent and restricted, and as a thing of value is very much lessened. The sentence of the Church judicatory, in a proper case, deprives of the position, and salary and emoluments are gone."

It is, no doubt, obvious to remark that the facts here recounted are in some respects different enough from those with which we are familiar; but across all such differences the leading principle of the judgment on this point will be none the less significant, viz. that emoluments or privileges incidental to the tenure of an ecclesiastical position can neither possess nor confer any title more durable than the position itself to which they belong, nor are they, in any necessary or natural sense, the 'property' of the incumbent of the office. If we in England have in any degree artificially made them so, that is a peculiarity of our own, the value of which may usefully be called in question. But perhaps it needs neither Royal Commissions, nor Blue-books, nor Liberationist energies, nor studies of America or any other country, to make thoughtful Churchmen desire that the system of 'freehold' tenure of English incumbencies might be greatly modified. There is always a slightly strange ring about the word 'Freehold' as applied to a Pastor's position. And yet it is just this word, and fact, of 'Freehold' which seems sometimes to be treated as though it were our one foundation-principle. There is a sort of mysterious spell and fascination about it. We are warned not to come near to touch or to question it. It is clung to, it is idolized, with an almost superstitious reverence. But it is the stronghold of the scandals which discredit and weaken us through the length and breadth of the land.

As to any appeal upon the merits of the case itself, the answer of the court, with its sweeping repudiation of the

functions thus attempted to be thrust upon it, has been already sufficiently given in the vigorous language of the quotations upon pp. ~~16, 17~~ 12, 13. Without repeating these again, we may add to them an extract or two more. First there are the words (which could not conveniently be quoted then) of semi-apology for entertaining or noticing some parts of the argument at all. The Court preface the substantial judgment by saying, "Without asserting the power of this Court in cases of this character, yet on account of the earnest and elaborate argument of counsel, we will notice the objection that the spiritual court had no authority to adjudicate upon the alleged offence." Then, a little further on, they quote, and accept, the following language of another typical judgment in a somewhat similar case: "The only cognizance which the Court will take of the case is to inquire whether there is a want of jurisdiction in the defendant to do the act which is sought to be restrained. I cannot consent to review the exercise of any discretion on his part, or inquire whether his judgment or that of the subordinate ecclesiastical tribunal can be justified by the truth of the case. I cannot draw to myself the duty of serving their action, or of canvassing its manner or foundation, any further than to inquire whether, according to the law of the association to which both of the parties belong, they had authority to act at all. In other words, I can inquire only whether the defendant has the power to act and not whether he is acting rightly. . . . . The refusal of the defendant to issue a commission to take testimony, his refusal to grant a new trial, the alleged misconduct of one of the court, are all matters which relate to the mode of procedure, and not to the right to proceed; and I repeat that it is the latter only that I can take cognizance of."

There is still one more quotation to be offered from the text of the judgment. "The minister in a legal point of view is a voluntary member of the association to which he belongs. The position is not forced upon him, he seeks it. He accepts it with all its burdens and consequences, with all the rules, laws, and canons subsisting or to be

made by competent authority, and can, at pleasure and with impunity, abandon it. If they were merciful, and regardful of conscientious examples, he knew it; if they were arbitrary, illiberal, and attempted to chain the thoughts and consciences, he knew it. They cannot, in any event, endanger his life or liberty, impair any of his personal rights, deprive him of property acquired under the laws, or interfere with the free exercise and enjoyment of religious profession and worship, for these are protected by the constitution and laws. While a member of the association, however, and having a full share in all benefits resulting therefrom, he should adhere to its discipline, conform to its doctrines and mode of worship, and obey its laws and canons. If reason and conscience will not permit, the connexion should be severed."

And now we have done with this most striking and suggestive judgment, and with the conception which it so vigorously sets forth as to the proper relations of civil and ecclesiastical discipline. It can hardly be necessary to disclaim the supposition that it is applicable in all points, as it stands, to the existing condition of things in England. But at least for the purpose for which it was adduced it is most pertinent, and most effective. It demonstrates incontestably that it is not ideally only but most rationally and practically possible, in the most prosaic and modern constitution of things, for the decisions of ecclesiastical tribunals upon questions of ecclesiastical things and persons to be accepted, without review, as conclusive, by the highest State courts, if any one should be so ill-advised as to attempt to move the State courts to review or restrain them. It shews that the American courts not only see their way to affirming this independence, but that they are ready to affirm it in vehement—I had almost said impassioned—language, as the one great safeguarding principle against indefinite confusion and peril. "Shall we maintain the boundary between Church and State, and let each revolve in its respective sphere, the one undisturbed by the other? All history warns not to rouse the passion or wake up the

fanaticism which may grapple with the State in a deathly struggle for supremacy."

Such is the condition of things with a non-established Church in the midst of a democracy; a condition essentially different, quite as much from that of any non-Established as from that of the Established Communion amongst ourselves. No doubt it cannot but occur to those who read the account of it, and notice the difference of the circumstances implied, to ask themselves how far the relation described is to be connected, in the way of consequence, either with the democratic principle of the Constitution, or with the fact that the Church is there in the simple position of a voluntary body. And there is sometimes a disposition to lay it down that Independence and non-Establishment stand in a necessary connexion with each other; and that a Church which accepts the privileges of Establishment must necessarily purchase them by a greater or less surrender of liberty.

To this opinion we will refer again presently. Meanwhile that this independence of the American Church is not inseparable from either of the two conditions, non-Establishment or Democracy, is shewn sufficiently plainly by the fact that the Scottish Kirk, an Established Communion under the British Crown and Constitution, is itself no less independent. We are indeed told, in reference to the Established Church of Scotland, that it would be rash to deny that cases might conceivably arise of such extreme departure from the recognized condition of Church settlement, as might possibly be held by the courts to justify interference: but a proviso of such character as this serves really rather to emphasize than to limit the actual independence for all normal purposes whatever.

The general statement upon the point in the Blue-book appendices runs thus: "No appeal lies to a Civil Court in matters of discipline or on the ground of excess of punishment. But if under the form of discipline the Church courts were to inflict Church censures (involving civil consequences) on a minister for e.g. obeying the law of the land, a question would arise similar to some of

those questions which arose in 1838-43 in connexion with the Strathbogie ministers, and might be brought before the Civil Court on the ground of excess of jurisdiction. It is believed that in no case would the Civil Court entertain an appeal from a judgment of an Ecclesiastical Court on a question of doctrine, or enter on an examination of the soundness of such a judgment before enforcing its civil consequences.

"Any questions which have arisen on matters of ritual, such, for example, as the introduction of instrumental music in the services of the Church, or the postures to be observed in public worship, have hitherto been decided exclusively by the Church courts. But it can scarcely be affirmed that cases might not arise of such flagrant departure from the 'form and purity of worship' established by the Act 1707, appended to the Treaty of Union, as might be held to constitute a violation of the provisions of that Act, and consequently to justify, on the failure to obtain redress from the General Assembly, an appeal to the civil court."

The position is further illustrated by the quotation of a judgment of Lord Lee in 1880. A minister who had been condemned by the Presbytery, and, after appeal, by the General Assembly, attempted to carry the case to the civil court, on the ground of alleged irregularities in the proceedings. The action, we are told, was at once dismissed as incompetent. The following is an extract from the judgment:—

"All the questions raised by the complainer are questions of Church law and procedure in a case clearly within the province of the Church courts. In such cases it has always been held that the Court of Session cannot interfere upon an allegation that the forms of ecclesiastical procedure have not been observed. As Lord Fullerton said in the case of Campbell, 'If the Presbytery have power to proceed independently of the remit, there is an end of the case. But even if it were assumed that they had not, what is the result? Only that they, an Ecclesiastical Court, did, in a case clearly within their pro-

vince, something which, according to the form of ecclesiastical procedure, they were not entitled to do. But on such a ground the Court of Session is clearly not entitled to interfere.' The opinions of the other judges in that case, and in the later cases, appear to the Lord Ordinary quite conclusive against the competency of interfering upon such allegations as are here presented. Thus the Lord President Boyle, in Lockhart's case, 'We have just as little right to interfere with the proceedings of the Church courts in matters of ecclesiastical discipline, as we have to interfere with the proceedings of the Court of Justiciary in a criminal question.' Lord Ivory, as well as Lord Fullerton, explained the distinction between such cases and the Auchterarder and Strathbogie cases[b]. Again, in the case of Paterson, where a Presbytery was said to have oppressively and illegally proceeded with a prosecution, disregarding medical certificates of the insanity of the accused, Lord President M^cNeill laid it down that the Church courts alone could regulate their own order of procedure in regard to the matter. 'If there was anything wrong or irregular in what the Presbytery did, I think the proper appeal was not to the court but to the superior Church tribunal. It is said that in the meantime evidence might have been led in support of the charge. But that would have raised a question of order of Procedure in the Ecclesiastical Court with which we do not interfere.' The opinion of Lord Moncrieff (L.J.C.) in the case of Wight is still more distinct and emphatic. 'If therefore,' he said, 'this were a case in which we were called upon to review the proceedings of an inferior court, I should have thought a strong case had been made out for our interference. But whatever

[b] At the same time, a little further on, Lord Lee remarks: "It is impossible to read the opinion of Lord Ivory and the judges who concurred with him in the final stage of the [Strathbogie] case, without seeing that there was ground for difference of opinion as to the competency of interfering even in the exceptional circumstances there presented." Certainly it may be doubted whether this case, as the one prominent exception quoted, does not do more to prove, than to shake, alike the fact and the credit of the usual rule.

inconsiderate dicta to that effect may have been thrown out, that is not the law of Scotland. The jurisdiction of the Church courts, as recognized judicatories of this realm, rests on a similar statutory foundation to that under which we administer justice within these walls. It is easy to suggest extravagant instances of excess of power, but quite as easy to do so in regard to the one jurisdiction as to the other. Within their spiritual province the Church courts are as supreme as we are within the Civil, and as this is a matter relating to the discipline of the Church, and solely within the cognizance of the Church courts, I think we have no power whatever to interfere.'"

To these quotations from the appendices of the Commission's report may be added the following extract from Mr. MacColl's evidence before the Commission: "In delivering judgment in the case of Sturrock *v.* Greig (in 1849) Lord Justice Clerk Hope used these words: 'The first section (of the Confession of Faith) announces a great truth of the Church, liable to misapprehension, doubtless, but a doctrine which is the foundation of the whole authority and government of the Church over its members, that is, that in the matter of discipline, whether as to doctrine or evil practice, or non-observance of Church ordinances, the Church is exercising a government through its Church officers, appointed by the Lord Jesus, distinct from the civil magistrates. Whatever questions have been raised as to the wider effect of this declaration, to which I need not now advert, this is undeniable, that in regard to discipline, the authority of the Church, as a distinct and separate government, is derived from that source. To that declaration, as the foundation of the exercise of Church censure over the members of the Church, I think courts of law must give full effect as much as to any other statutory enactment. It is not our business to consider the truth of that declaration; if it were, I should be prepared to defend it. Neither are we to consider whether it will arm men with alarming power, capable of producing great mischief. The statute has given the remedy in the

courts which it trusted—in the appeals competent to the superior Church courts.' He goes on to say that the Church courts 'have been trusted as a separate government. The declaration of the authority under which they act assumes that it must be separately administered, free from control, from subjection, or subordination to civil tribunals. They are distinct and supreme, and the authority under which they sit excludes any inquiry into their motives by civil courts.'"

"Then in the case of Lockhart *v.* the Presbytery of Deer, the four judges of the First Division of the Court of Session laid down the law in similar terms. The Lord President said, 'We have just as little right to interfere with the proceedings of the Church Courts in matters of ecclesiastical discipline as we have to interfere with the proceedings of the Court of Justiciary in a criminal question.'"

Now in the face of all this unimpeachable evidence, it is surely not too much to assert, that much of the current thought and language in England about the *impossibility* of the ultimate independence of spiritual courts has been shewn by the work of the Commissioners, not with any greater or less amount of probability, but to absolute demonstration, to be simply a fallacy. It is surely not too much to claim that the current language on the subject—that confident laying down of sweeping principles in an abstract form—should be discontinued; and that those who still assert the 'impossibility' should understand and admit the very different and qualified sense in which alone their assertion is admissible at all. What the assertion may mean still, and what it can only mean, is (1) that such independence is not compatible with the received tradition and practice of *English* law; and (2) that any change in this tradition and practice, such as to admit of it, is (in the opinion of the particular assertors) utterly improbable. The first of these two propositions is undeniable. The opinion which follows may or may not be true. But it is, in any case, arguable; and I have to submit that it greatly concerns the present generation, alike on the

side of the Church and on the side of the State, to examine it far more narrowly, and with far more openness of mind, than has been even possible for those to whom the 'impossibility' of independence has appeared a foregone conclusion.

I said just now that it is often asserted that (whatever may be the case with voluntary societies) establishment necessarily involves a surrender, more or less, of ecclesiastical liberty. The assertion has a fair and plausible sound, and is apt to be therefore accepted without scrutiny; and yet it is a singularly hollow one. For first, it has been already pointed out that establishment and ecclesiastical independence do actually coincide in the case of the Scottish Kirk. And more than this; the Scottish Kirk is more completely independent of State control than any merely voluntary association could be. I quote a paragraph from Mr. Spencer Holland's "Summary" of the Report of the Commission :—

"Such being the admittedly independent position of the Church courts in Scotland, its Establishment as a fact secures it more liberty of action than if it were an independent corporation.

"'As to forms of procedure, the Established Church of Scotland,' says Mr. Æneas Mackay in his text-book of Scotch Law, 'has wider powers (than a Dissenting Church), it having a statutory form of legislation as well as a statutory Judiciary, and it can make laws or rules of procedure having statutory authority;' while as to Dissenting Churches, although they equally may delegate governmental duties to representative bodies [here the quotation from Mr. Mackay is resumed], 'a question may, however, be raised as regards their constitution which could not be raised as regards the Courts of the Established Church, namely, how far provisions excluding the jurisdiction of the Civil Courts are legal?'

"Again, where the existence or constitution of the Established Church comes in any way before a civil court it is accepted as a Body having forms and procedure recognized by and known to the law, whereas a Dissenting

Church would have to prove its terms of association and contract.

"'The former (says Mr. Mackay) possesses a jurisdiction proper directly derived from the Crown, while the latter has only a prorogated jurisdiction derived from the consent of its members.'

"This, as he says, is the sole distinction between the position of the Established Church or any other religious corporation in the eyes of the law; a distinction, as has been pointed out, to the advantage of the Established Church."

Now without going further into this, or caring to settle how far what is here said agrees, or not, with the dicta of the American judgment, it may be useful, from the point of view of this last extract, to canvass for a moment the meaning of the supposition that an Established Church is, or should be, less "free" than a non-Established one. I submit that such a view, however plausible at first sight, or however generally held, will not bear examination for a moment. It absolutely depends upon a conception of the nature of Establishment, which is alien to every possible reading of historical facts; a conception on which, had it been true, the Church never would have been established. Moreover it so completely inverts the leading idea of 'Establishment,' as to make it a condition of exceptional disability instead of being one of exceptional privilege. And yet surely if Establishment means anything, it means at least this; that the religious association which is 'established' is more accepted by the State, more trusted, and endowed with more powers and facilities than those which are not established. Men allow themselves to speak as though the essence of Establishment were that the State gave to the Church money, or something analogous to money;—sometimes as though by its supposed gift of money the State purchased, and paid handsomely for, the right of trampling at will over the Church; or even as though, by authenticating, it had actually created a Church, where no Church before was! No doubt the State may give money, or it may not; but in

any case this is but an accessory. What is of the essence of Establishment is that the State accepts, facilitates, authorizes with the stamp of secular as well as spiritual authority, that which the Church is, whether established or no. The Church is what it is. The Church is, before it is established; for otherwise certainly no establishment ever will bring it into being. The State, so far as it establishes, accepts the Church for what it is, and authenticates it to the nation. The State has no knowledge of unestablished communions: but the Church which the State establishes is known to the State, and acknowledged, and authorized by it. Its standards, its principles, its constitution, its procedure, the nation adopts and incorporates as a part of the national system. Is it not an extraordinary inversion of any meaning that could ever rightly attach to the conception of Establishment, to represent that the Established Church means the one among Churches that the State distrusts, gags, fetters with disabilities? that all others are free, but that she alone is in servitude? that all others have, or may have, rules, principles, authorities whom the State may, if it will, treat and listen to with respect, but that she whose whole system the nation has in such sense both known and trusted that it has received and adopted it as being, in its view, the truest and best presentment of Divine Truth, that she by virtue of this very act of acceptance and homage should become the one society, professing to be divinely constituted as a Church, which is to be held, for ever and necessarily, incapable of finding out or of determining any of her own principles or practices for herself? Certainly this is something as remote as possible from anything that 'Establishment' ever was historically conceived or intended to mean. And if this is what statesmen understand by it now, or if it is for this that they or any of them desire to maintain Establishment, then the sooner it is plainly avowed that the so-called position of privilege means nothing really but the most degrading of servitudes, the better it will be for us all.

It is probable indeed that there are very few, other than professed enemies, who would acknowledge such a principle. But there are a great many who indirectly imply it, and use it, and build upon it. There are a great many who lay down—and think that they are laying down an unimpeachable, almost axiomatic, principle—that the Church by the fact of Establishment has naturally and necessarily lost its freedom of life and being as a Church; as though, indeed, the grip of the State were so fatal, that it could not embrace a Church without strangling it; as though, in a word, the very title "Established Church," instead of representing a great historical reality, were a contradiction in terms!

Undoubtedly the truth ought to lie the other way. The position of an Established Church ought to be better, not worse, than that of an unestablished. Whatever amount of recognition or respect is capable of being paid, in America or elsewhere, to a Church which is unestablished, *à fortiori*, much more of the same respectful recognition ought to be paid, as a consequence of course, if the Church were recognized and accepted as the Established Church of the nation. It cannot be admitted for a moment that the freedom can reasonably be an incident of the non-establishment. The argument from the one to the other, from the non-established to the established, can only be an *à fortiori* argument. In the case of Scotland it has been indicated already that this is so, at least to a perceptible degree, in fact. It should be an essential element in the fact of Establishment. Establishment without this is a caricature of Establishment.

It may be worth while to notice incidentally one point about the Scottish procedure which is sometimes urged as if it constituted an answer to any arguments based on the autonomy of the Established Church of Scotland. We are reminded that the General Assembly (which is the final court) "is composed of representatives elected annually by every Presbytery in the Church, and numbers about 440 members, in the proportion of about 260 ministers to 180 elders; the four universities and the royal

burghs also send representatives to the Assembly;" and we are asked whether if we emulate their independence we are prepared to imitate the constitution of their Assembly by a large infusion of laymen in our governing bodies? As an argument nothing could be more irrelevant than this question. We might quite as well be asked whether because we admire their position in some points, we are therefore ready to adopt their Presbyterianism. The point is that their final Church Court (however according to their system it may be constituted) is really final,—unrevised by either State or Crown. If the question is meant to imply that the court is any more a civil, or any less an ecclesiastical court, because lay or semi-lay persons are (by the constitution of their Church) seated as members, it is simply a confusion of thought on the part of the questioners. And yet on no other ground is the question strictly relevant. If, however, it is merely meant that we should do well to consider in what way, if we could obtain a similar independence, our Church courts should be constituted, and how far both in them and in Councils it is right to hear the voice of laymen, the answer is simple. Of course we should do well to consider. Everything ought to be considered. And the particular question of the admission of laymen to such positions, and its limits, appears to be a burden laid specially upon the Churchmen of our own generation. But neither their admission nor exclusion, which is purely an internal Church question, affects in the smallest degree the question of the compatibility of Establishment and Freedom, or the relation which a Church established ought to bear to the nation.

We are drawing towards the close of our present argument; but there are still two matters on which it will be worth while (if it be not too presumptuous) to make some remark, viz. first as to the nature and grounds of the present method in the English Courts; and secondly, as to the meaning and outcome of the English "Royal Supremacy."

It may not unnaturally be felt that even if everything

were conceded which has been either said, or inferred, about the Scottish and American Churches, yet the most that is hereby proved — the most indeed that has even claimed to be proved — is that things can possibly be otherwise than they are in England. Moreover it may be urged that without any insular boasting of the superiority of our own ways we are at least entitled to consider that a system which has grown with our growth in England must have a good practical account to give of itself. It may be urged that the mere fact that the English rule and practice are what they are towards every religious society constitutes an argument of the gravest weight on behalf of them; and that there is at least undue self-confidence, if not some flippancy, in freely conceding the fact as to English law-courts, and yet ignoring the argumentative weight of the fact. Why should English law-courts and lawyers consistently have taken for granted one view of the proper relation between the courts of the realm and the rules of all religious societies, unless it be that that view is in itself inherently reasonable? Now if it were impossible to return any direct answer to this question, the argument which is implied in it would be more formidable. But the argument fails, directly an alternative answer can be given.

Just a word or two to clear the ground first, before suggesting an answer. The conduct of English courts towards the Established Church on the one hand, and towards the "Free Churches" on the other, must be kept as distinct ideas. The thought which is here meant to be suggested is not so much that the English conception of Establishment standing by itself is its own justification, but rather that the treatment by English courts of the "Free Churches" is an argument on behalf of the treatment of the Established Church; or at least that the correspondence between the conduct of the State towards the one and the other,—the fact that State courts eventually overrule both alike impartially is an argument to prove that she does nothing wrong or unnecessary towards the Established Church. It is implied that if there were

anything oppressive or unjust in the treatment of the State Church, we should see it brought into relief by the contrasted independence of Dissenting Churches; for that it is extravagant to suppose that there can be anything but the strictness of equity in the conduct of the State towards *them*. Is not the subjection of the "Free Churches" an evidence that the subjection of the Established Church is no tyranny? And how except on good grounds of principle and history is it possible to account for the undoubted subjection of the 'Free' Churches? Here lies then the real point of the question; and to this question in this form it is perhaps not so difficult to suggest an answer.

For has not the custom of dealing, as law-courts deal now, with the rules of religious societies grown up as a half-unconscious but not indirect result of that theory of the Royal Supremacy, which has traditionally been a sort of underlying principle of all dealing in England with the Established Church? No doubt it is a growth, and a modern growth, the necessity of dealing with voluntary Churches at all. When the necessity began to arise, was it not dealt with by men whose minds were saturated with the old Establishment theory of the Royal Supremacy? The practical outcome of that theory has been the reservation, as a matter of tenacious, almost (so to say) of sacred principle, of a revising power to the Crown behind all ecclesiastical judicature. If the minds of lawyers have come to be traditionally imbued with this as a sort of sacred principle of the constitution, it is natural that when first religious questions in nonconforming bodies began to be brought up to be dealt with by them, they should, as a mere result of the training and atmosphere of which their lives and their courts were full, take for granted that the civil power was to go to the bottom for itself of every question, interpreting all documents, and pronouncing upon all creeds (as under the shadow of the theory of the Royal Supremacy) without accepting anything as authoritative from the members of the religious societies themselves. In the Established Church itself

something analogous to this was done—though, it is true, upon a different theory and under circumstances which, if scrutinized, would be found to be different. In the Established Church the Sovereign claimed the power as (so to say) from within the Church, by virtue of his Church authority, as supreme Church governor. But I submit that it was the shadow of this theory and practice in dealing with religious questions, which, before men's minds were awake to the nature of the question, caused the law-courts instinctively to deal with nonconformists' disputes in a method of analogous kind; and on a principle which, when analyzed, is referrible to the Established Church conception of the Royal Supremacy. They acted conservatively, as was natural; and by instinct, at a time when the real nature of the choice before them, or its magnitude could hardly have been recognized by any one. Of course it is not meant that they consciously applied the theory of the Royal Supremacy to the case of unestablished communions: but that they used ideas which only the case of the Establishment really supplied to them,—not being conscious to what they owed them, or from whence they came. Practically, then, their minds were prejudiced—by the force of their traditional atmosphere; and were far less open, than e.g. the American law-courts, to perceive in its true bearings and decide upon its real merits the question how best to deal with disputes as to conscience or discipline internal to the life of religious societies. May I compare this unconscious debt of the lawyers to the received principles and atmosphere of the Established Church, to the unconscious debt which—as has often been, and will have to be oftener, pointed out—modern Agnosticism lies under to the principles and instincts of Christian morality? It acts by them, thinks by them,—and knows not whence or why it is moral: rather it falsely attributes its morality to causes incapable of producing it. So the lawyers instinctively and unconsciously borrowed from the methods traditionally in use in respect of the Established Church (which methods themselves were due to the theory of the

Royal Supremacy) the principles on which they acted, and still act,—supposing now, erroneously, that the principles have their foundation in some abstract reason,—towards the disputes of religious Societies. Were not the American law-courts, after all, more prescient and more practically wise?

But if there be any shadow of truth in this suggestion, then it is plain of course that the fact that the practice of English law-courts is towards nonconformists what it is, will not bear the weight of any argument at all. Being itself a mere shadow of the English tradition towards Establishment, that practice can contribute nothing whatever to determine that which, after all, is the main subject under discussion, viz. the question of the necessity or wisdom of the English tradition.

But possibly what has been said upon this matter may lead us to perceive more easily that which appears to be the greatest paradox of all. The implied thought in the above argument was that the independent Churches must be presumed to be treated, as far as it was a possibility, on principles of independence. Therefore, if they were overruled, such overruling could be no infringement of the utmost independence possible. Our suggestion in reply, which we believe to be perfectly reasonable and true, is that the independent Churches have really been treated on the pattern of the treatment of the State Church. But if Churches really meant to be treated as independent came to be treated after the pattern of the State Church, is it possible that this may be interpreted, after all, and almost *per impossibile*, into meaning that the pattern of the treatment of the State Church is itself, in its real proper truth, a pattern not of subjection, but of independence?

Paradoxical as it may sound to some ears, and opposite as its modern results have been—to the State Church first, and afterwards, by consequence from her, to the Free Churches also—this is precisely what appears to be the truth. I submit that the treatment of the Free Churches in English law-courts is the more, in a sense,

paradoxical, because while it has grown imperceptibly as a shadow of the treatment of the State Church, the historical attitude meanwhile towards the State Church (of which it is a shadow) has itself precisely contradicted the real principles on which it was based. The practice which has grown up, indeed, is that all Church decisions, on what points of doctrine soever, are liable to authoritative revision and overruling at the hands of the lawyers. But the theoretical and constitutional position of the Church is independent. The transition from the one state to the other, great as it seems to be, is yet made not unnaturally nor otherwise than easily, under cover of the really ambiguous term "Royal Supremacy."

If I may, without extreme presumption, venture to comment upon the phrase at all, it will at least be a modest contention to begin by insisting that the phrase 'Royal Supremacy' is one which has undergone a very practical and very considerable modification. That which it really was first meant to signify, or at least that underlying principle which first gave it crucial importance, was (I suppose we may safely venture to say) the competency of the national Church to determine all its ecclesiastical questions for itself, without being bound by the ties of extra-national allegiance towards Rome. But passing by all discussion of this sense, in which it is directly equivalent to an assertion of Anglican independence in respect of those without; and looking only to the mutual relation which was signified by it between the Church and the Crown at home; yet can it be doubted that it meant something wholly different from what it either does or can mean now? No doubt there were practical usurpations and transgressions of its meaning, but, usurpations apart, did it not mean that the Sovereign, being naturally the fountain of all coercive jurisdiction within the realm, and being moreover himself within the Church, was acknowledged by the Church to be, both within the Church and without it, both according to the ancient traditions of the realm, and with the full consent of the Church herself—the proper source of all other than strictly spiritual power?

It was not he indeed who conferred upon spiritual officers their spiritual office. But it was he who commissioned them to be a State power in England. Quite apart from him, Bishops of the Church would indeed have been Bishops, and would have been possessed of all rights and powers which belong to the inherent authority of their office: but apart from him they would have had no licence to act in any way as Bishops within the laws of this realm, and would have exercised their spiritual influence at their material peril. To him as Sovereign they acknowledged that they owed all their public authorization, all right to act in and through the ecclesiastical processes of the State, all jurisdiction in the region of material things. There was a sense no doubt in which the Crown, even if heathen, must still have had sovereign power over all its subjects. But the acceptance by the Church of the Royal Supremacy was a recognition that to a Christian sovereign, himself in things spiritual a dutiful son of the Church, the Church in all its persons and all its processes owed a directness and alacrity of obedience by which the merely necessary submission and loyalty of subjects were transfigured into something of a religious character. The Church was willing to receive from him all the civil and national sanction of its functions; and in acknowledgment of, and in reliance upon, his dutiful Churchmanship, to exercise its high office as spiritual council and legislature only by and with his consent. Apart from his consent indeed, its acts, however spiritually regular, could in no case have had any legal validity; and persons, or actions, or tribunals of the Church which were non-legal, could hardly then have been other than illegal also. The loyalty, then, of Churchmen *as Churchmen* became his due, not merely as symbolizing the national independence of Rome, but because the Church exercised national rights and powers, and because he was, whilst himself loyally and wholly of the Church and in the Church, the personification of *all* lawful executive power in the realm.

There was in all this not so much a submission to an alien power standing coldly without and above, as a cheer-

ful acknowledgment that, in things not expressly pertaining to God, the Churchman sovereign was indeed sovereign over Churchmen. But then this sovereignty of his was to be exercised in a Churchmanlike fashion; and what fashion this meant was not ambiguous at all. In exercising it he was to be, not the supreme secular person overriding the Church, but rather the Churchman to whom God had entrusted all executive force, and whose privilege therefore it was to give public effectiveness to the Church. He was supreme as Churchman, acting Churchmanly; just as in the State he was supreme as Englishman, acting within the English constitution and laws. He was no more meant to be supreme as against or above Church principles, or the proper ministers of them, than on the civil side he was meant to be supreme as against or above the laws of the land, or the judges who administered them. In either case the judges, ecclesiastical or temporal, were, when acting in their capacity as judges, independent of him; even whilst in either case they were personally, and for their public position as judges, and for their authority to act in that position, dependent upon him. In either case his supremacy was the sort of personified, yet half-mysterious force lying behind, to give effect to—we may say (if he acted dutifully) to give effective independence to—that system (secular or spiritual) behind which it lay. It still signified really the independence, not the subjection, whether of the civil or the ecclesiastical law and judicature.

I do not contend that there were no exaggerations or perversions of this conception on the part of the sovereign, or that there were no high-handed acts of usurpation which had to be, and were, more or less expressly submitted to on the part of the Church (as well as on the part of the secular Parliament and courts); but that, exaggeration and usurpation apart, the true conception of the Royal Supremacy, that conception which made the submission of Churchmen to it an honest and a reasonable thing, that conception which was really present to the conscience of Churchmen from the beginning, and did not

die away, but outlived all the more dangerous threatenings of usurpation, was of such a nature as this. Now herein there is no such thing really as the 'temporalty' overriding the 'spiritualty.' The sovereign, who was ideally supreme, was by no means identical, as a conception, with the temporalty. Rather he was the incarnation of a divinely Sovereign Power, lying behind and over all ecclesiastical and all temporal machineries alike. They are side by side, they are co-ordinate, in their distinct domains, the ecclesiastical and the temporal; they neither override the other: they do not meet, save only in that unique sovereign personality, who is conceived of as the ideally majestic fountain of all the legal jurisdiction of them both.

In what it came afterwards to be, the 'Royal Supremacy' is almost the exact antithesis to the principle which underlies the American judgment so largely quoted just now: but in its original conception it would not have contradicted it at all. Nay, it is the American method, and not the English one (however lineal the descent of the latter may be) which really illustrates and gives exact practical expression to the proper meaning of the old English principle. So directly is this the case that that very American judgment can appeal to the old English principle as the direct and original expression of its own controlling idea, in a way in which no modern Privy Council judgment could have done without a manifest distortion of meaning. "The controlling principle" (I quote once more from the text of the American judgment) "is declared in the 24th statute of Henry VIII.: 'causes spiritual must be judged by judges of the spirituality, and causes temporal by temporal judges.'"

This statement of principle is not merely compatible with, but is part of the necessary exposition of, the real purpose and meaning of the Royal Supremacy.

But the posture of times has changed. The Royal position itself is modified. It is impossible that Royal Supremacy can have for practical purposes an unchanged meaning. Usurpations still quite apart, the growth of

events itself has been reading new senses into the phrase. The 'sovereign' is now in fact identified with the total civil administration. The phrase contains less and less of the personality of the personal ruler,—be he Churchman or Mohammedan,—and more and more simply represents the civil or secular power. It is obvious at a glance that the 'supremacy of the secular power' will mean something different in kind from what the 'Royal Supremacy,' on any admissible hypothesis, could ever have been properly intended or understood to mean. It now becomes the direct contradiction of that which was once, in its own way, in England, and is now elsewhere, and for justice and for safety should everywhere and always be the maxim at least of modern states about Churches, viz. that established or unestablished, they should themselves be the guardians of their own rules, and should execute their own discipline within themselves. The State can certainly now-a-days disestablish a Church which it no longer trusts. But to attempt to overrule a Church in its own subject-matter is, at least in modern States, fundamentally impolitic. And this is precisely what we have been brought to in England—not so much with open eyes and deliberate intention, as by the gradual shifting of the import of political terms, by the modification—nay the reversal of the meaning of the once all-important phrase 'Royal Supremacy.' As pressed upon us now-a-days it is really pressed with no other outcome of meaning except that the civil power shall override the spiritual; except (in other words) that the Church shall *not* be independent; except (that is) in direct and fatal contradiction of its own proper meaning and value.

Is this inevitable? The Royal Supremacy was once, it is suggested, an ideal sovereignty, lying behind both ecclesiastical and secular machineries, both the 'spiritualty' and the 'temporalty,' which were themselves, in the constitution, parallel. In both these spheres the phrase and the idea remain. Call it fiction, or call it constitutional principle: it is retained equally in both, but with the most widely diverse signification. In the tem-

poral sphere it now means practically that the 'body politic' is guaranteed in perfect independence. In the ecclesiastical sphere it now means that the 'body spiritual' is held in subjection to the 'body temporal.' Is this contrast of meaning inevitable? Is it impossible that in the spiritual as well as the temporal sphere it should mean (that which would be now, I submit, its proper meaning according to the modifications of the modern conception of sovereignty,) a guaranteed independence? If this is really impossible, if it is really true that Royal Supremacy now-a-days can have no meaning except such as necessarily contradicts what it ought to mean; is it wise, is it conservative, to continue to be enamoured of the phrase?

If indeed it should be urged that the ideal conception of sovereignty has but been gradually transferred in fact from the personal sovereign to the 'body politic;' and that all else that has followed has only followed as a necessary corollary of that transfer; it must be answered that the considerations, half practical, half mystical, which really justified to the conscience of Churchmen once the recognition of an exceptional Church position in a loyal mediæval Churchman sovereign, could not possibly be so transferred as to be made applicable to the heterogeneous parliament of modern days. Such a many-headed despot cannot possibly be supreme as Churchman, or as the Church's half-consecrated champion. Supreme it can be, no doubt; but supreme only as Cæsar, the great impersonation of secular authority, the power of this world, external to and in contrast with the Church.

Until the last two or three years indeed we might have been told that the Privy Council was no more external to the Church than the Sovereign had been conceived to be; but that the voice it spoke with was indeed a Church voice. They are no adverse court (it would once have been said) overriding the Church; but they are themselves the supreme court of the Church; they are the Church's own last word. So long as this language was capable of being used, it greatly aggravated the Church's wrong.

Churchmen could far better have borne the undisguised yoke of coercionist or even of persecutor; but to be relentlessly overruled by a will and force essentially alien, and yet told in all sweetness that this alien and unintelligent force was itself but the voice of the Church claiming spiritual loyalty, was the bitterest injury and insult of all. The Ecclesiastical Courts Commissioners have probably saved us from all such language in the future. They have done all that seemed to them practicable to narrow the sphere of the Privy Council Court; and to strip it of all appearance of being a final overriding court of appeal. Every single thing that they have done in this direction has been of real value, and deserves lasting gratitude. And yet in their tenderness to the venerable but shifting conception of the Royal Supremacy they have, after all, essentially left the court, and with it the elements of the former complications. Men can see now that the Privy Council Court is no Church court. Men can see now that the Privy Council Court ought to have no power of final overruling, no voice in really ecclesiastical decisions. Yet in the last resort it retains the power; nor is it easy to doubt that practically all the ecclesiastical tribunals, as lower courts subject to its ultimate revision and overruling, would (if ever the recommendations of the Commission were tested in practical working) come by-and-by to administer and interpret Church principles and rules, and be, in effect, compelled to administer and interpret them, not independently of, but in accordance with, the administering and interpreting of the court of the Privy Council. But if it be so, the essence of the confusion has not yet been removed. Neither will it be, until the Church of England, whether it be disestablished, or still more,—much more,—if it continue to deserve and command the national trust as Established, shall have been in all its ecclesiastical processes and discipline, and in all their rightful consequences wholly and absolutely emancipated from all secular overruling.

It is possible that the change in English tradition and procedure which I venture to plead for may still seem, on

many sides, exaggerated. Possibly some would say that so great a modification of existing conditions necessarily involves—perhaps even that it amounts to—Disestablishment. Others with no less show of reason might answer No: but it rather is the prudent reform which most truly conserves the Establishment by averting at once the danger and the need of Revolution. Upon any such dispute as this I have no concern now to intrude. Only upon whichever hypothesis, and under whichever title, I submit that the modification is in itself a reasonable one; and is necessary for the preservation of health.

APPENDIX.

Even Henry VIII. himself, whose exaggerated pretensions are undeniable, could write and urge [I quote from Bishop Stubbs' historical appendix to the Commission's report] "that the title should not be strained so as to imply a denial of the sole and supreme lordship of Christ, or to claim a headship of the mystical body of Christ, or as more than meaning headship of the clergy of England; he insists that the headship is not limited to temporal matters, but that 'all spiritual things by reason whereof may arise bodily trouble and inquietation, be necessarily included in princes' power:' that the spiritual things, the ministration of which is by Christ committed to the clergy, are not so far extended as the modern use of the word spiritual assumes, but that as to persons, property, acts, and deeds, the clergy are under the king as head; that this headship does not imply superiority in things in which emperors and princes obey bishops and priests as doers of the message of Christ and His ambassadors for that purpose; the addition *in temporalibus* would be superfluous, 'as men, being here themselves earthly and temporal, cannot be head and governor to things eternal.' If spiritualities 'refers to spiritual men, that is, priests, clerks, their good acts and deeds worldly, in all this both we and all other princes be at this day chief and heads.' He alleges, as illustrations of the existing headship, the Convocations assembled under royal authority, the fealty of the bishops, licence and assent to the election of abbots, cognizance of certain offences of the clergy; 'so as in all those articles concerning the persons of priests, their laws, their acts, and order of living, forasmuch as they be all temporal and concerning this present life only, in those we, as we be called, be indeed in this real *caput*, and because there is no man above us here, be indeed *supremum caput*.'"

Queen Elizabeth's explanation after the abandonment of the *supremum caput*, is, perhaps, more entirely re-assuring. "And further, her Majesty forbiddeth all manner her subjects to give

ear or credit to such perverse and malicious persons which most sinisterly and maliciously labour to notifie to her loving subjects how by the words of the said oath it may be collected that kings or queens of this realm, possessors of the crown, may challenge authority and power of ministry of divine service in the Church, wherein her said subjects be much abused by such evil-disposed persons; for certainly her Majesty neither doth nor ever will challenge any authority than that was challenged and lately used by the said noble kings of famous memory, King Henry VIII. and King Edward VI., *which is and was of ancient time due to the imperial crown of this realm; that is under God to have the sovereignty and rule over all manner of persons born within these her realms*, dominions, and countries, of what estate, either ecclesiastical or temporal soever they be, *so as no other foreign power shall or ought to have any superiority over them.* And if any person, that hath conceived any other sense of the form of the said oath, shall accept the same oath with this interpretation, sense, or meaning, her Majesty is well pleased to accept every such in that behalf as her good and obedient subjects, and shall acquit them of all manner of penalties contained in the said Act against such as shall peremptorily or obstinately refuse to take the same oath." With this runs the language of the 37th Article, "When we attribute to the Queen's Majesty the chief government, by which titles we understand the minds of some slanderous folks to be offended, we give not to our princes the ministering either of God's word or of the Sacraments, the which thing the injunctions also lately set forth by Elizabeth our Queen do most plainly testify, but that only prerogative, which we see to have been given always to all godly princes in Holy Scriptures by God Himself, that is, that they should rule all estates and degrees committed to their charge by God, whether they be ecclesiastical or temporal, and restrain with the civil sword the stubborn and evil-doers."

The following passage from Dr. Liddon's evidence may be added:—

"I should like to be allowed to refer to the language of Abp. Grindal, soon after he was appointed to the see of Canterbury, when a difference had arisen between him and Queen Elizabeth about the Puritan prophesyings. It shews how little the legislation of Henry's reign had destroyed in the representatives of the Church of England the sense of what was due to the spiri-

tuality in matters of Christian doctrine and discipline. I quote from his 'Remains in the Parker Society's Edition,' p. 387. 'I beg you, Madam, that you would refer all these ecclesiastical matters which touch religion, or the doctrine and discipline of the Church, unto the bishops and divines of your realm; according to the example of all godly Christian emperors and princes of all ages. For indeed they are things to be judged (as an ancient father writeth) *in ecclesia, seu synodo, non in palatio.* When your Majesty hath questions of the laws of your realm, you do not decide the same in your court, but send them to your judges to be determined. Likewise for doubts in matters of doctrine or discipline of the Church the ordinary way is to refer the decision of the same to the bishops, and other head ministers of the Church.' Then he goes on to address to Elizabeth the language which was used by St. Ambrose to Theodosius and to Valentinian; and he quotes with approval the statement of the same father, that Constantius fell into Arianism 'because he took upon him *de fide intra palatium judicare.*' Grindal represents what may be termed the extreme point of the Puritan impulse which succeeded the Reformation; Grindal is more of a Puritan than either Parker or Whitgift. This language shews how mistaken it is to suppose that the sensitive feeling about the transfer of purely ecclesiastical duties to the Crown or to laymen began with the High Church Caroline reaction.

"7389. Have you any evidence that Elizabeth conducted her ecclesiastical business in that way, that she withdrew the business from the House of Commons because not fitted for the laity?—Yes, she did.

"7390. Was that her interpretation of it?—That was her interpretation of it. The 37th Article refers to her injunctions. And there is a passage in James the First's 'Apology for the Oath of Allegiance' which shews how he himself understood this oath of supremacy. James had sufficiently high notions of the prerogative, yet he writes as follows: 'I never did nor will presume to create any articles of faith, or to be judge thereof; but to submit my exemplary obedience unto them [the bishops of the Church] in as great humility as the meanest of the land,' p. 269. To the same effect Bishop Andrewes, who was selected by James to defend his supremacy against Bellarmine: *Tortura Torti*, p. 380. Docendi munus *vel dubia legis explicandi* Rex non assumit."

Mr. MacColl concludes his evidence with a further quotation: "If I might express my opinion in the language of Lord Coke, I should like to be allowed to do so. What he lays down is this: 'As in temporal causes the King by the mouth of his judges in his Courts of Justice doth judge and determine the same by the temporal laws of England, so in causes ecclesiastical and spiritual . . . . the same are to be determined and decided by the ecclesiastical judges according to the King's ecclesiastical laws of this realm.' And in the fourth of his Institutes, he says: "And certain it is that this kingdom has been best governed, and peace and quiet preserved, when both parties—that is when the Justices of the temporal courts and the ecclesiastical judges—have kept themselves within their proper jurisdiction, without encroaching or usurping one upon another. And where such encroachments or usurpations have been made they have been the seeds of great trouble and inconvenience.'"

Mr. Gladstone, in his letter to the Bishop of London in 1850, wrote: "It is an utter mistake to suppose that the recognition of the royal supremacy in matters ecclesiastical established in the Church a despotic power. The monarchy of England had been from early times a free monarchy. The idea of law was altogether paramount in this happy constitution to that of any personal will." . . . "Thus every body knew that there were laws superior to the Sovereign, and liberties which he could not infringe: that he was king in order to be guardian of those laws and liberties, and to direct both the legislative and all other governing powers in the spirit which they breathed, and within the lines which they marked out for him:" . . . . "in making Church law he was to ratify the acts of the Church herself, represented in Convocation, and if there were need of the highest civil sanctions, then to have the aid of Parliament also; and in administering Church law he was to discharge this function through the medium of bishops and divines, canonists and civilians, as her own most fully authorized, best-instructed sons, following in each case the analogy of his ordinary procedure as head of the State."

"It is a well-established principle that the sovereign cannot administer justice in his own person, unless authorized to do so, as any officer of state might be, by statute. 'Edward I. frequently sat in the Court of King's Bench; and in later times James I. is said to have sat there in person, but was informed

by his judges that he could not deliver an opinion[a].' And it is now an undisputed principle that 'though the king should be present in a court of justice, he is not empowered to determine any cause or motion but by the mouth of his judges, to whom he has committed his whole judicial authority[b].' The doctrine of this passage is, I believe, that of the great legal authorities. Thus while the immense latitude of nominal prerogative was overshadowed on the one side by the superiority of the combined legislature, it was on the other barred from arbitrary excess by the necessity of operating through responsible instruments. The ideal or legal monarch was invested with these high attributes, while the living one was on almost all sides limited by law, in order that the actual authority under which the work of government is carried on throughout the country in its details might be one and undivided, revered and resistless."

It may perhaps, then, be also remarked that however fair and constitutional it may sound at the first blush, there is no more logical ground for laying down that there must be an essential right of appeal to the person of the Sovereign in ecclesiastical than in ordinary civil or criminal cases. It is no principle of the constitution that the Sovereign in person, or through his personal counsellors, may always be called upon to re-hear and revise what the Lord Justices of Appeal have pronounced upon. Neither is it necessary for the safe-guarding of any constitutional or essential rights of the subject, that the Ecclesiastical Courts of Appeal should not be final.

[a] Blackstone, iii. p. 41, note.

[b] Allen on the Prerogative, p. 93.

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