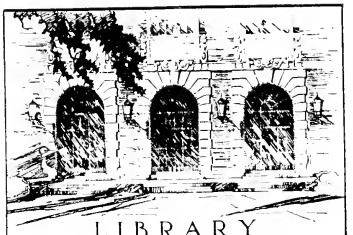

A LETTER

TO

THE ARCHBISHOP OF YORK,

ON THE

REPORT

OF THE

COMMISSION ON ECCLESIASTICAL COURTS.

BY HIS CHANCELLOR AND VICAR-GENERAL,

SIR EDMUND BECKETT, BART., LL.D., Q.C.

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ON THE

REPORT OF THE ECCLESIASTICAL COURTS COMMISSION.

My dear Lord Archbishop,

You asked for the opinion of your Vicar-General about the Report of the Royal Commission which was appointed in May 1881, "to Inquire into the Constitution and Working of the Ecclesiastical Courts as created or modified under the Reformation Statutes and other subsequent Acts." I could not give you an answer of any use in less than a pamphlet, as I certainly cannot say that I approve of the Report, and it is no use saying that I disapprove, without explaining how and why.

I might perhaps have said that I have expressed my own notions of what ought to be done, in the Bill which the Commission asked me for, and have printed in vol. ii, 402, and also in an article on "The Ritualists and the Law," in *The Quarterly Review* of January 1881. But I should now make one material alteration in consequence of the separate reports of your Grace, the Lord Chief Justice, Lord Penzance, and five other Commissioners, and some of the evidence, about the episcopal veto on ecclesiastical suits, and a few minor ones. I might also say that I agree generally with the criticism of the Report in *The Quarterly Review* of last October; and now (January 1884) still more, with the article on "Ecclesiastical Jurisdiction" in the current *Edinburgh Review*. But I have sundry things to say besides. The first is that I can find no authority whatever, in the Commission, or the Address for it, or in the late Archbishop's speech in moving it, or the Lord Chancellor's in giving the assent of the Government, or anywhere else,

for inventing any new judicature, or making any recommendations at all. I have already quoted all the significant words in the Commission and Address. Yet every "religious newspaper," and every speaker on it at Congresses and Conferences (so far as I have seen), have assumed that this was what the Commission was appointed for and instructed to do—and to do conclusively, *subject only to the approval of Convocation;* and straightway to have their scheme turned into an Act of Parliament and forced upon the nation.

Nor can there be any pretence for saying that there was a general understanding that the Commission was intended to propose a new Judicature Bill. For Archbishop Tait distinctly said that he made the motion in that form at the request of the bishops, among whom the matter had been discussed. So it is quite clear that this body of ecclesiastics, lawyers, and amateurs, had no more right or authority to do what they have done than a Grand Jury summoned to "find Bills" of Indictment have to present a Bill for Reform of the Courts of Law or of Parliament. It is rather significant of some consciousness of this preliminary objection, that the Report, after fifty-one pages of historical and other statements, conspicuously changes its literary style (certainly not for the better), and is struck with "*apprehension* that it is our duty to proceed to Recommendations:" which looks very like real apprehension that they would be accused of exceeding their duty and gratifying their wishes. And the more so, because we shall see afterwards how scrupulous they were not to exceed their instructions by taking the momentous step of recommending that their Report should be laid before the Convocation of Canterbury in return for its Resolutions, to which they say, most truly, that they "have paid very careful attention." I shall advert to that again when I speak of the Resolutions themselves as the least that will be "satisfactory" to that body.

Nor will it avail them or anybody else to say that, whether authorized or not, the opinion of such a collection of persons who had heard all that evidence must be worth attending to. That entirely depends upon their fitness as a whole—

not the fitness of a few of them—for what they have volunteered to do. I have not the least hesitation in saying that such a Commission as that, was and is unfit in every possible way for anything but a mere inquiring one, if for that; and it is absolutely ludicrous, except that the matter is too serious to laugh at, for such a body to undertake the reform of all the ecclesiastical judicature of England, and (according to their own theory of what Courts do) to alter gradually the whole ecclesiastical law of England. The Ritualists and all their adherents, and some others who do not deserve that name any more than that of lawyers, are continually telling us that any Court which has to interpret the law of the Church makes the law of the Church; and so it does not lie in their mouths to deny that whoever is allowed to influence the Church Courts will be able gradually to alter the legal doctrines and ceremonies of the Church, and make them what they please; and moreover, their scheme at once alters the relations of the clergy to the State; the very thing that the Puseyites and Ritualists have been avowing, for just half a century now, that they intend. Archbishop Tait gave some specimens of their sayings in his speech on the Public Worship Regulation Bill in 1874, and they made no secret of it in their evidence before you. In short, their object has long been, and is, to undo the Reformation both theologically and politically; which concerns everybody in England, whatever may be his creed.

If anybody says the Commission would have wasted its time and sat for nothing, if it had not proposed a new judicature, he shall be answered by no less a person than the very Bishop (of Peterborough) who, Archbishop Tait said, had moved for the Commission among the bishops, and answered the only objector to it in the House of Lords. He took a more sanguine view of what they might succeed in doing than anybody else, and the Lord Chancellor, for the Government, distinctly said he did not share it, or expect much good from the Commission. But the Bishop said, "If the result be nothing else but the publishing of a Blue Book, with a statement of the various theories held on

these questions, and an examination of those theories (which they have not given us), with the evidence in support of them . . . I will venture to say that the Commission will have conferred great benefit, and there is the hope that it will tend to a larger knowledge," &c. That is exactly what Archbishop Tait had said was the real object of having the inquiry. I might quote half his speech, but this will be enough: "I am convinced that there is an immense amount of misinformation and prejudice about the Supreme Court. . . . Lord Selborne said on the Public Worship Regulation Bill, that the State had always arranged the mode in which the Ecclesiastical Courts were to act. On this point there is great misunderstanding in the country, especially among the clergy. . . . I beg to say we have no intention whatever of going back beyond the Reformation." And yet they spent hours and days in so going back, even to the judicature of Constantine, and give us pages without end about that of other countries and churches; and finally restore as much of the ante-Reformation system as they dare—all but the Pope; for whom the Ritualists substitute themselves. They do not even see the difference between ante-Reformation times, when the clergy made the doctrine and ritual what they chose from time to time, and post-Reformation times, when it has been made and stereotyped for the Church of England, leaving Dissenters to adopt what they choose.

Archbishop Tait was a singularly wise and powerful man, who rose with his advance in position as small men sink; and I am much struck with the ability of his long examinations of all kinds of witnesses. But he did not foresee one thing, which you may remember that some smaller people did, viz., that a Commission might do all that he contemplated: might collect and publish opinions, the most absurd, extreme, and contradictory, which he and you and others might expose by cross-examination; and yet the Commission might do a vast deal of harm in other ways, especially if it contained a strong "representation" of the very party whose extravagances and "misinformation" he wanted to

correct. And it might even state them strongly, and leave them uncorrected. He certainly did not forget that he might die before he finished his work, but I doubt if he calculated what the consequences of that might be to the Report, especially in such a body as that; and he could not guess what that would be when he moved for it. I venture to think that you yourself discovered before long that your own first thoughts, and not your second, were the best; for you told the Lords that your first had been against it.

What was the cause avowed by everybody for having the Commission? Simply the rebellion of the Ritualists (as Archbishop Tait called them throughout) against the written law where it is too clear for any honest man to doubt, and against the decisions of the Courts where it was not. They have said in every possible way that they neither mean to obey it, nor any conceivable Court now: that there has been no real Supreme Ecclesiastical Court since the Reformation, and still less since 1832, and no genuine Provincial Court since 1874; and a great deal more of the same kind: of which not a word appears in the Report; but it intimates on the contrary that its scheme "would command obedience," which had hitherto "been refused" (p. vi): for which there is not a scrap of evidence from any single Ritualist. Would any statesman or nation that has not lost the art of governing appoint or listen to a Commission on which those very people are largely represented, as the inventors and proposers of a new judicature to deal with them, or their verdict that the present judicature is incompetent or unsatisfactory, as the southern Convocation says, and they agree? Substitute any less respectable kind of rebels—say poachers, smugglers, or any other determined breakers of positive law that you like; and then would any man out of Bedlam put a large, or any, number of them on a Commission to invent some better means for "restraining" them?

Not only were the party of rebellion largely represented in the Commission, but they actually had a large majority more or less favourable to them, as was evident to everybody

from the beginning. *The Edinburgh Review* says the majority at first proposed was even larger, but the Prime Minister yielded a little to the remonstrances of the late Archbishop, taking care however to retain a very decisive preponderance for what is notoriously his own side: which may be a warning to some other agitators for a Prayer Book reforming Commission. The principal bone of contention among you was sure to be, and was, the episcopal veto; about which there was such evidence that the Lord Chief Justice says it is "fast becoming intolerable in practice, besides being indefensible in theory" (see p. 49, here). The Bishop of Winchester was the man who induced the House of Lords in 1874 to reject the amendment of the Commons, giving an appeal against a veto to the Archbishop, as the great Commission of Bishops and Judges of 1832 had before. And it has been incidentally proved that such an appeal would have been no real protection to the laity of the Province of Canterbury. One other bishop's name had been conspicuously connected with the veto in legal proceedings, as well as with the English Church Union, the body which exists merely to defend clerical rebellion: at least *the Edinburgh Review* says so of him. And of him Lord Bramwell said, even while deciding in favour of his legal right to veto an ecclesiastical suit ("Law Reports," 4 Q. B. Div. 555):—

"By what means Mr. Carter has persuaded himself that he can receive the wages of the State [*i.e.*, secured to him by the State] to do a certain duty, and not to do it, but that which is opposed to it, I cannot conceive. And, with all submission, I feel a nearly equal difficulty in understanding how it can seem right to the Bishop (of Oxford) not to bring him to justice. It does seem to me that the discretion has been most erroneously exercised. It is as though a public prosecutor should refuse to prosecute a man persisting in a public nuisance against the rights and to the injury of the neighbourhood, because the offender was old and respected and because some of the neighbours worked for him and because some prosecutions for nuisance had recently failed."

Yet these two bishops, and one other who has always been reckoned as a High Churchman, were the only three besides the two Primates who were selected for impartial judges whether the quite modern invention of the episcopal veto should be retained. In this case the High Church party prefer the modern "use" to the ancient. I shall have more to say about that farther on. At present I am only on the constitution of the Commission, and its claims to have its recommendations listened to.

It is not the least exaggeration to say that every question put by sundry other members, from one end of the 800 columns of evidence to the other, might have been put by counsel for the Church Union, with all sorts of interjections, sometimes rude enough when the answers did not please them. I make no objection to their so displaying themselves as partisans bringing out their own views, and exhibiting their own unfitness to invent new courts to try them, or to give an impartial account of the complaints against the present courts, which were never heard of till the decisions against their party; and proving the utter worthlessness of the Report, except as a manifesto of the Sacerdotalists, and a warning to the laity of England to look after them.

It would be equally absurd to pay any attention to the recommendations on such a difficult subject as judicature, which requires the best legal and ecclesiastical knowledge and experience, from a set of mere amateurs, as many of these Commissioners are, and all the more so if they are partisans. Deduct these two classes, joint and several, and then see how many remain of this body of successors to the great statesmen of Elizabeth, or the learned and powerful Commission of 1832, which substituted the Privy Council and its Judicial Committee for the old precarious Delegates, of whom the Ritualists have become enamoured because they are irrecoverably gone.

But no doubt many a reader is already thinking, is this Vicar-General forgetting that his own Archbishop signed this very Report? No, I am not. But the chief organ of

the High Church party (though not of the highest) has kindly saved me all trouble upon that score. I had the luck to see a leading article in *The Guardian* of 17 October, 1883, advising the clergy to accept the recommendations of the Commission, however short of their desires and hopes, for this reason: "They have presented a virtually unanimous [*i.e.*, not unanimous] Report. Several of them, we may be sure, must have made a *very large surrender* of individual preferences in order to do this; and if their Report is in substance accepted by the clergy [the laity are of course ignored], their surrender will remain operative. If, on the other hand, it is not"—in short, the triumph will be lost. Much the same kind of language has been used at most of the Conferences; where the Report has been welcomed as at least a step in the right direction, and an instalment of the rights of the clergy, and so forth; and Mr. Beresford Hope, who is always playing the game of the Ritualists, and declaring that he does not even understand the name, boasts that they have "slain [the Jabberwok] the Judicial Committee," and have only to ride on and conquer, and "put on the coping-stone."

I have my own opinion whether this evident minority on the veto did wisely or unwisely in not joining Lord Penzance, who made no surrender, but a separate report. Nor am I going to volunteer conjectures here as to why you did so, beyond remarking on the unfortunate (the other side will say Providential) removal of the powerful hand of Archbishop Tait in his commanding position, at the critical moment between taking all the evidence and making the Report. I am quite sure there would have been none such if he had lived a year longer. I am content to take the assertion of the friends of the majority, that your signature is not to be thought of as a real agreement, but only as the best compromise which a minority could get. They had much better have got none. Accordingly, whenever I say the Commission I mean only the majority, whether exactly divided from the minority by the line of the veto or by others from time to time. The subsequent publication of

a paper of conclusions of the Lord Chief Justice proves that the dissent of the minority was really greater than appears from their separate reports.

Before going into any details, I say that to any man of common sense who means the supremacy of the Crown and State over the clergy to be maintained, apart from all questions of doctrine, and however little he may care for the Reformation theologically, this Report is condemned already by the exultation of the party who want the supremacy of the Church, as they call it, meaning the supremacy of the clergy, and want to repeal the "Submission of the Clergy" in 1532; and the more so because they only take it as an inadequate instalment, and in that sense complain of it. People who will not, or cannot, examine it in detail, may be sure that the Ritualists know their own business and interests very well. And for those who care to know any more, I proceed to show that those rejoicings are quite right.

The first thing that occurs to me to point out is the singular omission of any word of notice of the unanimous Report of the twenty-nine Commissioners on Ritual in 1867, containing this sentence:—"We are of opinion that it is expedient to restrain in the public services of the Church all variations in respect of vesture [and *à fortiori*, ceremonies] from that which has long been the established usage," &c. Lord Penzance is equally struck with the omission, and I gladly refer to his further remarks upon it. It is the more extraordinary because that very sentence had been brought into unusual notice while this Commission was at work by the history of it in that suicidal and parricidal third volume of the "Life of Bishop Wilberforce," who boasted, as he was fond of doing, of the success of his own management in getting "restrain" unanimously accepted instead of "prohibit" or "abolish." Nevertheless, Pusey wrote to him that even *restrain* "seemed to him a complete extirpation of the vestments, root and branch; an absolute and complete defeat" ("Life of Bishop Wilberforce," iii, 215). It is also

worth notice that the 1867 Report was signed by six archbishops and bishops, four of the most distinguished and learned deans, four canons, two ecclesiastical judges (Sir R. Phillimore being one), and Lords Hatherley and Coleridge, besides some notoriously High Churchmen among the amateurs. The second Report of the same Commission dealt expressly with ceremonies, and recommended that the usage of three centuries should be conclusive. All that was fully laid before this Commission by Mr. Valpy, solicitor, and every word of it ignored; and so is his catalogue of the fate of all the suits prosecuted or vetoed.

Mr. Hope hopes that this new Report will not be "pigeon-holed." It certainly has done its best to pigeon-hole its predecessor and hide it away for ever, while it notices and prints almost every other old document which has any kind of bearing on this question, with some curious omissions, as we shall see. One omission of another kind, which every impartial reader of the evidence must have noticed, is that of the smallest expression of opinion by the Commission about the Ritualists' objections to all the present judicature, which they set forth with such elaborate minuteness that it is easy to count sixteen of them. One would think that people who apprehended it to be their duty to proceed to volunteer recommendations would have felt it rather more their duty to say whether they considered those objections well or ill founded which were to be their motives for action. The only qualification that they introduce is the bare intimation (in the first page) that "as to *many* of the objections . . . there were decided expressions *on the part of some*, that no changes, or merely slight changes, were required or would be justifiable;" which everybody knew beforehand. Of course every indifferent reader concludes that they consider the objections to the present judicature substantial and well founded, and the "decided expressions of some the other way"—not worth attending to: and they treat them so.

I can easily understand the difficulty the majority were in. It was impossible to express the opinion they wanted

to express without throwing off your weighty minority into an independent orbit altogether, which would have ruined the course of the majority: so they state the objections to the present system as strongly as they can, and then put in that feeble parenthesis for the minority, that some of the witnesses had a decided opinion the other way. But we shall see greater things than these; and here is one brilliant specimen of ecclesiastical history. The Ritualists have been dinning in our ears, ever since one of them fished it out of Hansard, that Lord Brougham said in a debate about a Bill of Bishop Blomfield's in 1850 for referring all doctrinal questions to the bishops, which was rejected by a large majority, including Brougham himself, that the "Judicial Committee of the Privy Council had been framed without the expectation of questions like the [Gorham one] being brought before it. It was created for the consideration of a totally different class of cases, and he had no doubt that if it had been constituted with a view to such cases, some other arrangement would have been made." Canon Stubbs quotes all that in one of his "Historical Appendices," with the introduction that what it implies "was recognized as a fact" proved thereby (p. 48), and repeats it even more strongly at p. 51, and actually goes the length of saying that the appeal to the Crown in the Privy Council in Church cases (and by the same reasoning *any* appeal to the Crown) "is neither part of the Reformation Settlement nor a necessary historical consequence of it:" which is all founded on the assumption that the Commissioners of 1831-2 did not know what they were doing, and what the Delegates had done before, who were specially made the Court of Ecclesiastical Appeal by 25 Hen. VIII, c. 19, and had always been so since.

The Commission adopts this story, without naming Brougham, in the Report (xliv). "It cannot fail to be noticed (they say) that neither in their examination of witnesses, nor in their Report, do the Commissioners (of 1831-2) appear to have given any special consideration to appeals on matters of doctrine as distinguished from other ecclesiastical causes."

I suppose no lawyer of much experience has ever believed a word of that thoroughly Broughamic story, or thought it worth the trouble of hunting down. But these Commissioners have unconsciously given us the means of doing so without more trouble than reading those two reports, which they apparently have not, but print in their Appendices (pp. 192 to 207), and fortunately with the signatures of the Commissioners, of whom Brougham was not one, but signed the receipt of them as Chancellor. So, first of all, he could not possibly know eighteen years afterwards what was in their minds—any more than Sir Fitzroy Kelly could know that he and Sir R. Phillimore and one other were the only impartial members of the Judicial Committee in the Ridsdale case; and therefore that there was not one honest judge in the preceding Purchas judgment to the same effect. Secondly, who do you think they were that are thus asserted to have forgotten all about Church discipline and offences of a spiritual kind as subjects of appeal? Only six prelates, including the five strongest and most learned of that time, except Philpotts, who was then almost the youngest: three, then or afterwards, great ecclesiastical judges, and one of the Admiralty Court: all the Common Law Chiefs: the Judge Advocate; and one other, whose position I forget. A very likely team indeed to have run away and forgotten Church discipline suits, and to know less about the Delegates than this Commission chiefly of amateurs, partisans and clergymen who were mostly little boys then.

But these are probabilities. Let us see the facts, and whether this present Commission and their historian had the smallest loophole of excuse for saying what they have. Turn to p. 195 of the Appendices, and you will see in the Report of 1832: "The ecclesiastical jurisdiction comprehends causes . . . . lastly, some *purely spiritual*. . . . The third class includes Church discipline and the correction of offences of a spiritual kind. . . . Among these are offences committed by the clergy themselves, such as neglect of duty, immoral conduct, advancing doctrines not conformable to the Articles, &c. . . . . These offences are punished by monition . . . . suspension, and deprivation." And

further, they express their satisfaction that the number of clerical prosecutions had been very few within the last five years. So much for the notion of that Commission forgetting what sort of causes the Privy Council would have to try.

Even that is not all. You had all either been present when, or had read that, Lord Coleridge told a witness and the Commission that Brougham's story was "absolutely a mistake, and impossible" (pp. 301 and 534). And Archbishop Tait said so too. Yet, without another word of any kind in support of it, there it stands in different forms, three times over, in the Report and the Appendices, for every Ritualist to repeat "on the unimpeachable authority of a Royal Commission" (as we shall see presently), as a "recognized fact," and one which the Commission says "cannot fail to be noted from the (1832) Report itself." Did they note it themselves? Did they ever look at the signatures of all those great bishops and ecclesiastical and other lawyers? Did they ever read at all the very document they parade as proving this impossible piece of nonsense, or did they take it all second-hand from somebody, and whom? And is a report or a history made up in that way worth—I won't say the 3*s* 4*d* marked on it, but three farthings—except for the copies of the documents which refute it?

This strange mistake however, and some others, have an incidental value; for they show how little real concurrence in the Report is implied by the mere signatures of the aforesaid minority. For here is this very statement, which Lord Coleridge had specially contradicted, as no doubt some more of you remembered, left standing in the Report signed by him and you all. I can easily understand the minority subsiding into a state of disgust and indifference, and not being disposed to waste more months in trying to correct every mistake in a partisan Report with which it was as impossible as *The Guardian* says for them to have any cordial agreement or feel it to be their own.

Before leaving the Delegates I remark that the Professor of History struggles through two columns at p. 47 to make out

that the Act of Hen. VIII, c. 19, did not mean what it said, with a distinctness which modern Act-makers have lost, and that the Court of Appeal established by it was never intended to try heresy. If the Act were ambiguous instead of clear, and the practice had been in the direction that he wants, he would have been justified by legal principles in saying what he does. But as the Act is quite clear and the Delegates did try heresy appeals for just 300 years, the "contention as a historical fact" that the Act was never intended to give the Crown jurisdiction over heresy, is another historical accuracy of the Report (p. v). The rarity of such appeals while "heresy" was not rare is amply accounted for by their going to the High Commission Court which was established under Elizabeth and lasted till William III: and Professor Stubbs confesses that no less than 193 doctrine and discipline cases went to the Delegates besides: all without real jurisdiction, if his law-making is right. And the records are confessedly imperfect. He has however blown to pieces that audacious guess of Pusey's, which was of course adopted as a historical fact by his followers, that the delegates on heresy were always bishops for a long time. They simply never were: there was always a preponderance of lawyers.

Now for a little more of their history. Here is their account of the resumed Reformation under Elizabeth (p. xxxiv). "The title of Supreme Head of the Church was, by her Protestant advisers, represented as unscriptural, and was, as she knew, a form heartily disliked by all those adherents of the unreformed religion whose support was indispensable to her. She had not, like Edward, any strong bias towards the religious teaching of the Continental Reformers, and her advisers were, for the most part, men of compromise. The result of this combination was, in the revision of the Prayer Book, some small but *important alterations in the way of compromise.* In the re-settlement of Church government her action was more free and her recurrence to her father's principles more decided." This passage is itself such a compromise that it may mean anything. Why could they

not tell us the course of the Elizabethan Reformation in a straightforward way, with facts instead of inferences from them? Nobody who does not know already could even gather from their account whether the Act of Uniformity, 1 Eliz. c. 2, restored the more Popish first or the more Protestant second Prayer Book of Edward, and what the "small but important alterations" made upon it were. It was the second. And the alterations were some in the Lectionary (as it is now the fashion to call it), and in the "*form* (*i.e.*, arrangement) of the Litany," both of no consequence; and these "two only" (as the Act says) in the Communion: the first Edwardian Prayer Book had the first part only of the two delivery sentences, dividing at "life;" and the second book had the second part only: Elizabeth's combined them. That is all that was done to justify the term "compromise" in the revision of the Prayer Book. Every man ordained after 1 Eliz. c. 1 swore allegiance to "the [Queen] as the only supreme governor, as well in all spiritual or ecclesiastical things or *causes*, as in temporal," instead of the former vague title of "supreme head of the Church on earth." It is worth notice that Henry VIII and Parliament never accepted the *quantum per legem Christi licet* by which the clergy wanted to qualify their Submission, and it is not there, or in any Act. So much for that "compromise." I am not going to forget the clause about "ornaments" in her Act of Uniformity, which was illegally and inaccurately turned into a rubric of the Elizabethan Prayer Book: but that will come farther on.

There is another passage about the legislation of that reign in the Appendix (p. 143) which wants a little qualifying. Canon Stubbs gives a very sufficient reason and explanation of the Protestant Prayer Book being restored by 1 Eliz. c. 2, without consulting the Convocations; viz: that "they were hostile to the change" from Mary's Popery; "but," he adds, "from the moment that Elizabeth had secured the support of the recruited body of bishops, and was able to collect a Convocation willing to accept the Prayer Book [not that they ever formally did, for it was by

that time law]; she did her utmost to prevent the Parliament from meddling with ecclesiastical laws. Her ecclesiastical supremacy was to be exercised according to the ideas which she inherited from her father; in legislation by the Canons of Convocation, and in judicature by the Court of High Commission," which she was authorized to establish; and all the powers of the Ecclesiastical Courts—and no more —were given to it, as Lord Penzance and Lord Coleridge had to instruct the President of the Church Union when he was plunging a good deal beyond his depth.

Who would suppose from that version that there never was the smallest power, under either Elizabeth or Edward or Henry, in the Convocations, even with the concurrence of the Crown, to *legislate* an inch beyond the limits of the Prayer Book and the existing Acts of Uniformity, or for the laity at all, or to vary any doctrine or ceremony of the Church in the smallest degree? Nor were any canons ever sanctioned by any of those sovereigns, though some were made by Convocation under Elizabeth, which were afterwards revised into those of 1603. The Commissioners' summary of the Elizabethan legislation only just notices (at p. xxxv) and not by its proper title, and the Appendix only in the smallest type (p. 145) the great Act of 13 Eliz. c. 12, "for Ministers to be of sound Religion," which defines no doctrines except by reference to the Prayer Book and Articles, and under which all the deprivations for contravening or "depraving" it have taken place; for it is still "*in viridi observantiâ.*" Neither is it among the Acts printed in the Appendix. Nor is the Act of Uniformity of 1661, establishing the present Prayer Book. Convocation had nothing to do with that Act of Elizabeth any more than with her others: *nor with any Act having reference to judicature,* either in that reign or any other Protestant one, including Henry VIII's. The present Lord Chancellor distinctly said so in his speech before-mentioned, besides what Archbishop Tait quoted from him.

I am not much surprised however, at seeing in the newspapers that the President of the Church Union (whose

father-in-law was one of the Commissioners and went even beyond them in a separate report) is going about the country using this kind of language: "We now have it on the *unimpeachable* authority of a Royal Commission, that the Courts which have *attempted* to decide these solemn matters arrived at their authority by a mistake. In old times the secular side of Church business (wills, tithe-suits, divorces, &c.) was decided by the Ecclesiastical Courts, and what really happened a few [*i.e.*, 350] years ago was, that instead of allowing these matters to be taken out of the kingdom [to Rome], it was *agreed* that they should be decided in Chancery." My business is not with the Church Unionists, but with the unimpeachable Commission. And though they have in one place called the right of appeal to the Crown against every ecclesiastical decision "indefeasible," they have left it to pass for a "historical fact" (as we have seen), entirely uncontradicted by themselves, that "it was never intended at the Reformation to give an appeal to the Crown in questions of heresy."

Apparently they do not see, too, that it is fatal to the whole theory of "agreement" between the clergy and the State as to Courts, or what they were to try, or appeals about the performance of "divine service," that the Submission of the clergy, on 16th May, 1532—not the "Act for the submission of the clergy" in the following year (25 Hen. VIII)—said not a word about Courts or Delegates or Chancery, or causes or appeals of any kind, but only "promised *in verbo sacerdotii*, submitting ourselves humbly to your highness, that we will never henceforth presume to make or promulgate any canons in our Convocation without your highness's consent." And then it goes on to authorize the king to appoint the sixteen lay and sixteen clerical Commissioners to overhaul the old Canons (as we say now); who however never were appointed to do that work. Such is the confused arrangement of the twelve historical Appendices, that it took me some time to find the Submission at all, imbedded among other things at p. 71, and far away from the Act that followed it. Nor do I see

any reference to it or quotation of it in any of the places where it is alluded to, nor the least intimation that the Commissioners appreciated that vital distinction between mere canon-making and legislating on judicature.

Again, their historiographer says at p. 34 that "the Act (of 1533) incorporates the *language* of the submission of the clergy made in (May) 1532, and also makes provision for appeals in ecclesiastical causes supplementary to the Statute of Appeals, 24 Henry VIII, c. 12 (1535). It is a moot point whether this Act received the assent of Convocation;" of which he admits that "there is no direct evidence." No, nor indirect either, unless he thinks it "indirect evidence" to say that "there is *no* evidence that clauses 4, 5, and 6 (all those *beyond* the submission) were *not* laid before the clergy;" "and that there *is* evidence (*i.e.*, that somebody said) they were prevailed upon to accept some repulsive legislation." That is a queer way of making history. However, if I wanted the strongest possible case against the clerical claims to meddle with judicature, I should accept Dr. Stubbs's conjectural history at once. For if "the Convocations consented to that statute as a whole," they thereby conceded to the Crown for ever unlimited jurisdiction over all ecclesiastical suits by unlimited Delegates to try them. The Act of 1833 only limited the Delegates to the Judges and ex-judges and Bishops of the Privy Council, with two others. So he and his friends may take their choice between the actual and the imaginary history.

It is equally strange that these new historians of the Reformation should imagine that it signifies one farthing whether appeals about heresy or the performance of divine service lawfully or unlawfully went to Rome or not; when the Act of 24 Hen. VIII, c. 12—before the Submission of the Clergy Act—had prohibited appeals to Rome about a multitude of things, including "sacraments and divine service, and all other things within this realm," under the penalties of, first, a year's imprisonment, and then præmunire (see p. 215 App.). It is true that they had never

gone there lawfully, but that was no reason why they should not be peremptorily stopped under strong penalties. And suppose they had never gone at all, what then? The Act for the submission of the Clergy established the Delegates as a new Court of Appeal from the Archbishops, which the previous Act had prohibited altogether, except where the King was concerned. I may remind you that the attempt to set up the Upper House of Convocation as the final judge of heresy was made after the Gorham judgment, on the ground that the king was patron, by applying to all the Law Courts in succession for a prohibition against instituting him, and was repelled by all of them, as contrary to the second Act.* What is the value of a Report which leaves all this in confusion and ambiguity, and rather suggests the opposite conclusion, when there is no doubt about it, and the question has been actually decided by three Courts?

As the Ritualists make much of Elizabeth's giving up the title of Supreme Head of the Church, forgetting the more definite one which was given her, we may as well observe what she and her statesmen, "men of compromise," as this Commission calls them, said in the very clause of 1 Eliz. c. 1, which authorized the High Commission Court (App. 225): "And that it may please your Highness that it may be established and enacted that such jurisdictions, privileges, superiorities, and pre-eminences spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority, hath heretofore been, or may lawfully be, examined or used for the visitation of the ecclesiastical state or persons, and for reformation, order, and correction of the same, and of all manner of errors, *heresies*, schisms, abuses, offences, contempts, and enormities, shall for ever, by authority of this present Parliament, be united and annexed to the imperial crown of this realm." And then comes the power to appoint or create that Court. The idea of any English king or Parliament having made any bargain or "settlement" *with* the clergy (I do not say "against" them) is a pure fiction

* Brodrick and Fremantle's "Ecclesiastical Judgments," p. 115. It is a pity that they or somebody else do not continue that book, now that there are ample materials for another volume.

contradicted by every bit of history. The nation has no more made bargains with them than with the Pope, or the Methodists or the Freemasons. They all go their own way within the limits of the law of England.

Every ecclesiastical Act that was ever passed shows this besides. Whether they made bargains before the Reformation or not I neither know nor care, nor had this Commission any business to inquire, and Archbishop Tait said they would not. It seems the fashion now for Commissions and Committees for revising anything, up to the Bible, to take the bit between their teeth and disregard all instructions and promises and go where they please. I do know however, as most people do, I suppose, that the nation always asserted its right to legislate against the Pope, and did so when it chose before the Reformation as well as after. That fundamental error of a right of the clergy as a legislative body to bargain with the Crown and the State runs through every High Church argument. Even their "Submission," recited in the Act of that name, was an abject submission and no bargain. The very word makes an end of it; and so does the failure of their attempt to qualify it by the "*quantum per legem Christi licet,*" which they would have interpreted as they chose. On that also the Commission and their historian are silent. The "Reformation Settlement," which they are so fond of talking about, was a settlement made by the State for its own supremacy over the Clergy.

The High Commission Act however did recognize the power of "*Parliament with the assent of the clergy* in their Convocation" to define heresy, but of neither of them without the assent of the other (1 Eliz. 1, s. 20, p. 228); and that is their present real constitutional position and relation, which neither party has any moral right to alter. Doctrine and jurisdiction are very different things. So you see that Canon Stubbs's version of the Elizabethan Reformation has to be slightly altered into this: Convocation never legislated at all, or was allowed to interfere with Parliamentary legislation throughout her reign; and Parlia-

ment without Convocation passed the Conformity Act, and had previously established an entirely new ecclesiastical court, in which ecclesiastics might sit if they were appointed, and which became so tyrannical and odious that it was twice abolished with the two abolished Stuart kings. In short, Convocation was not allowed to do a single thing in her reign, except to prepare some canons which she did not ratify.

It is however also true, and I am as ready to insist on that as any Ritualist, that Parliament *alone* never did alter the doctrines or ceremonies of the Church, or the Prayer Book, or the Articles, except at the beginning of Elizabeth's reign, when it was absolutely necessary, in order to prevent the Reformation being destroyed again by the Marian clergy. All the Commissions which were authorized under Henry and Edward to revise the old canons, and to "make new ecclesiastical laws," 3, 4 Ed. vi., c. 11 (not printed in the Report), were to have as many bishops and divines as laymen; and their only actual work, the Reformatio Legum, was never ratified, and came to nothing. But not even that was entrusted to any Convocation. I can see no more right (except might) for Parliament to alter the Prayer Book without the general concurrence of the clergy as well as the laity of the Church than to alter the doctrines of the Methodists against the wishes of their Conference, or to open Popish chapels to Protestant preachers. All that would be pure tyranny and robbery, which of course any supreme power *can* commit, whether its "number is six hundred three score and six" or one. If we are to profess to stand upon the Reformation settlement, as both sides do, I feel bound to say that that is it, though I should no more have been deterred from doing the necessary thing in the first year of Elizabeth, or at two later periods, by abstract theories about either kings or churches, than the great men of those times were.

Parliament has from time to time legislated for various dissenting bodies with their own proved consent, and in order to give legal effect to their wishes. It does so from time to time for the Church, and it would be only another kind of tyranny to refuse to do it when there is no doubt

about the real opinion of the whole Church to the satisfaction of men of sense, which may be sometimes proved in one way and sometimes in another, but is certainly not proved by any act of the Convocations of clergy alone, who are not a hundredth part of the adult members of the Church of England. The Convocations never were the Church, nor ever recognized as representing it, but only part of it. The Houses of Parliament represented the other part until they ceased to be necessarily Churchmen, that is, during all the time that any "Reformation settlement," or restoration of it in the next century, was being made. I am glad to find that this substantially agrees with the conclusion of another Oxford Professor of History, Mr. Montagu Burrows, in his "Parliament and the Church of England." Mr. Tomlinson's lately published "Review of the Report" proves still more than I have, that when Professor Stubbs has a theological object in view his historical object-glass is not only far from achromatic, but so defective that vision through it is altogether distorted, and its "images" altogether imaginary. He seems to feel at liberty to "read" anything "into" Acts of Parliament, and anything out of them, according to his own theories or any contemporary gossip as to what was intended to be done by somebody. The *Edinburgh Reviewer* evidently thinks the same of him.

Lest I should be thought to have spoken too strongly, I will give a specimen of the process by which the Commissioners and their historian make statutes say and do what they want. At p. xxxi, practically following the historical Appendix, they foist into their account of the appeal clauses of the Act of Submission, 25 Hen. VIII, c. 19, the words "in which the [*i.e.*, any] right of appeal lay," implying that none did lie before as to heresy; and then they add, "this jurisdiction may not improbably have, if exercised at all, been confined to matrimonial and testamentary causes." The elegance of the style is striking; but the accuracy is more striking and more important. It is hardly credible that there is not a single word of such "confinement" in that Act, which expressly says that "all manner of

appeals shall thenceforth be made after such manner and form as is limited for appeals in causes of matrimony, tithes, &c., by the Statute" of Appeals of the previous year; "and for lack of justice in the Courts of the Archbishops, to the King's Court of Chancery; and on every such appeal a Commission shall be directed to" Delegates, the previous Act having been prohibited all appeals beyond the Court of Arches. And what makes it worse, all this had been explained fully by Lord Campbell in the Gorham prohibition case, citing Lord Coke, and other old decisions to the same effect, including one about the deprivation of a dean, which went four times to Delegates under three sovereigns, and was finally confirmed.

One of the clerical jurists of the Ritualists, Mr. Joyce, has been at their favourite game again of denouncing the ignorance of the highest judges, and their judgments, because Lord Campbell then made one or two insignificant mistakes about dates (see *Guardian* of Jan. 23). But, like this Commission, he has overshot the mark, by adding that those mistakes were exposed and laughed at in the other two Courts; which nevertheless gave the same judgment. All these things, and indeed all the proceedings of the Commission, are valuable in showing us the fitness of "the Spirituality" for supreme judges, which is their object throughout.

And can anything be more ludicrous than the Ritualistic quibbling and hair-splitting about the exact nature of a truly spiritual Court, on which the late Archbishop and the Lord Chief Justice thoroughly posed several of the witnesses, including the legal historian himself, who suddenly discovered, *pro hâc vice*, that such things were "rather out of his line," when every one of the four Acts of Uniformity and every clerical jurisdiction Act since have given or retained concurrent jurisdiction to the Assizes to try clergymen for disobeying the Prayer Book, and to deprive, and imprison them—the third time, for life—the Bishop sitting with the Judges, if he likes? This Commission was doubtless wise in its generation in setting three such amateurs, and not

one even of their own High Church lawyers, to compose its legal history, and to "go behind the Reformation" as they have, in spite of the Archbishop's promise for them. Perhaps you may remember my saying that you or the Crown would get better information on the professed subject of the Commission from any two competent lawyers in a month for a few guineas than from a large Commission—even if a fair one—in two years.

Probably the aimers at clerical supremacy will ask, "Who then represents the laity of the Church now? Parliament does no longer, and so who is left but Convocation," whether Convocation should be itself enlarged to admit a few well-behaved laymen or not—those *mixtœ personœ*, as Archbishop Tait called a conspicuous one of those who are always acting as a kind of gratuitous acolytes to the Convocationists? And on the other hand, we are told by those tyrannical people who call themselves Liberationists, that the Church has to pay the penalty of submission to all the Jews, Papists, Infidels, and Heretics in Parliament for being an "established" or a "State Church." If all that were true, it would not make the Convocations into the Church of England a bit more, though it would be—and to some extent is—unfortunate, but inevitable. But no more so to us than to every sect. None can flatter itself, nor all of them together, that even this House of Commons represents them any more than, or as much as the Church. The fact is that we all, Church, Papists, Dissenters of all degrees, have to trust to Parliament not tyrannically oppressing any of us, but legislating for us in our turns fairly as we want, in matters only affecting ourselves. Hitherto it has generally done so, though of late not always, but has robbed the Church as it never has any Dissenters. But that issue is not between us and the enemies of the Reformation, but between us and Dissenters in the opposite direction. And it will puzzle the High Churchmen to invent any better "working theory" than this. They may invent visionary ones, which are all cunningly contrived to work out their own supremacy, just like the concessions they have got from

this Commission. But Parliament has not abdicated yet, nor is going to undo all the Reformation statutes at the bidding of the majority of this packed Commission.

Probably a very small proportion of the readers of the Report have paid as much attention to the following passage (already referred to) as its solemnity, and its significance in another way, deserve (p. lv):—"We have thought it right to pay *very careful attention* to the resolutions of the Lower House of the Convocation of Canterbury, communicated to us, &c." (see next page). And they recommend the reciprocal attention of their Report being "ordered by your Majesty to be laid before the Convocation;" or rather they would, if they dared to take such a solemn step without instructions: "it does not come within the scope of our instructions to make a formal recommendation on the subject;" and so they only venture to be "not insensible of the advantage which might ensue" from such a revelation. What charming scrupulosity, to be sure, and what timid shrinking from the responsibility of advising *without instructions*, that a couple of Blue Books should be sent across the street to the people who are the most certain in all England to have already devoured them, and to have begun talking of them as a public document as soon as possible. No instructions to make a formal recommendation of a formal sending to people of what they had got long before! Where then did they find any instruction to make formal recommendations of a million times more consequence, amounting to an ecclesiastical revolution? These swallowers of that enormous camel seem to be choked with very small gnats. In the same way they dare not include the necessary three lines (see my Bill, in vol. ii, p. 406) for dealing with offending bishops, because that also was not specifically in their instructions; and yet they did ask many questions about it, and learnt that bishops have been convicted and deprived, and the proceedings upheld.

But I now ask your Grace and other people to follow their example, and to pay "very careful attention" to those

Convocation resolutions of February 1882, for they deserve it. Here they are (see ii, 400) :—

I. "No settlement of ecclesiastical judicature will be satisfactory [to Convocation] which does not proceed upon the principle that the ancient canonical courts be preserved, subject to such amendments as may be deemed necessary, and shall *receive synodical approval*" [*i.e.*, that the ancient courts shall now be reformed by Convocation].

IV. That the bishop may *stay all proceedings*, or hear the cause [which hardly any bishop has done since the Reformation] either in *camerâ* or in his court.

VI. That in cases of appeal to the crown for the maintenance of justice [are there some appeals for the maintenance of injustice, and what are they?] in questions involving doctrine and ritual, the *judgment of the spirituality* shall be required on the precise points of doctrine or ritual which are involved; and

VIII. That "the spirituality" be taken to mean the [bishops], assisted, if they think fit, by learned divines. [Fancy the bishops wanting the assistance of divines.]

X. That where a clerk has been *acquitted*, no appeal shall be allowed.

XI. That Her Majesty be requested to grant her royal license to convocations to enact such canons as may be necessary.

I know that the Commission does not adopt all this, but we shall see how near it goes, and we must for other reasons see what it means. It means, first, a new set of canons, which will forthwith repeal the old ones of 1603 which recognize "the Advertisements (*Admonitiones*) published *anno septimo* Eliz.," and order surplices, and not albs and other Popish vestments, which had vanished forty years before; for everybody knows that is the first thing that all the Ritualists want, exactly contradicting the two aforesaid reports of the Ritual Commission of 1867, much more unanimous than this.

On that particular proposal this Commission is silent. But on those relating to the judicature which is to unsettle all those judgments, they are far from silent. What is the

meaning of their telling Her Majesty that though they do not presume to recommend, they are not insensible to the advantages of (in plain English) consulting the Convocations about reforming ecclesiastical judicature, for the first time in English history, from the Statute against appeals to Rome down to Bishop Wilberforce's last bit of boasted scheming in 1873, to degrade his three great rivals from judges, as a prelude to reviving his and Blomfield's and Philpotts's cherished scheme of practically making all the bishops a court of appeal from the Privy Council. He threatened the House of Lords then with "the alienation of the whole Church of England if they rejected it," which they forthwith did by a large majority. (See his "Life," iii, 417, and "Hansard" of June 1850.)

The next of the Convocation demands which this Commission practically concedes and recommends, is that the judgment of the spirituality, embodied in the bishops, assisted by other theological assessors, "shall be required in questions involving doctrine or ritual;" and that not only in appeals (as Convocation said), but in inferior Courts too. So there you have the whole scheme (for the details are immaterial just yet), which practically means a new Court of High Commission, consisting of some five "permanent lay judges," assessed by all the bishops of the province or of all England, if any one lay judge chooses to invoke them: an odd condition certainly, if the judgment of the spirituality is worth anything.

It is true that the bishops are only to be *assessors* to the final court, on which the ecclesiastical law of England is to depend (as all these people say); and Mr. Beresford Hope said in his evidence that "an assessor's only privilege is to have his advice disregarded;" and he has now come to wonder how he was ever "fascinated by Bishop Wilberforce's purely lay court." He actually did not see what Wilberforce was scheming after under that guise: nor probably did many other Members of Parliament then, or the trick would not have succeeded, even with Mr. Gladstone's help, and more discreet silence. But Mr. Hope's friends can see farther

than he does. A mere assessor is not a very formidable creature; and when a Judge or Court is ignorant of specialities, as engineer arbitrators of the laws of evidence, and legal ones of engineering, and an Admiralty judge of some nautical technicalities, and *possibly* a whole court of legal Churchmen of the phrases of the Church, which no more belong to the clergy than to them, an assessor or two may be useful to inform the Court of what it may not know. And real *information* is not likely to be disregarded. *Advice* on what the Court can judge of as well as the adviser may be, and ought to be if the Court thinks it wrong.

Therefore a multitude of assessors are of no use, and are out of place, and were never heard of before the five episcopal Assessors in rotation were absurdly foisted into the Judicial Committee in 1876. The Commission evidently calculated that a large number of assessors would hardly be disregarded if they should be tolerably unanimous. It is quite clear that the Convocation thought so, and therefore the majority of the Commission made the assessors far exceed the judges in their new Judicial Committee, or nominally lay Court of High Commission; for it is only the old enemy under a new name, with a whole province or kingdom of episcopal advisers. Mr. Hope boasts that the Report "has slain the Judicial Committee" for them—that is, by this new assessment; for otherwise it is to be simply a body of lay judges "learned in the law," appointed by the Crown again. Moreover, they may be anybody whom the Prime Minister is pleased to pronounce "learned in law," as the present one did a man who had never practised it, and yet was put into the Judicial Committee four days before it sat on the most important doctrinal case ever tried there, Sheppard *v.* Bennett (L. R. 4 P. C. 371), and for aught we know, made the majority, which was all but announced to be as small as possible. After his death it was published, and was well known before, that he was intimately connected with the *Guardian;* so was one of the clerical members of this Commission, according to the *Edinburgh Review.* A Prime Minister however can only

make two such members of the present Committee. Of the Commissioners' Judicial Committee he could make any number—surrounded by a Province of advisers. With a sufficient amount of packing of Commissions and Courts and the Bench of Bishops, the Ritualists need not despair of undoing the Reformation, if other people go to sleep.

It seems funny, that of all the ecclesiastical Judges in the world, the one they leave naked of assessors is that very Dean of Arches about whose uncanonical appointment the High Churchmen are always raving, and Ritualists pretend that that is why they don't obey him—as if they ever obeyed his most orthodox and canonical predecessor a bit more. On the other hand, a bishop is not to be trusted to sit alone in his own Court, or even with his Chancellor—degraded into an assessor, as the Archbishops have been in the Privy Council, but he must get a theological adviser too, and by the advice of his Dean and Chapter, if he has the bad luck to possess one, for otherwise he is allowed to choose his own; but a theological adviser he must have, as the Pope has a confessor.

But though the Dean of Arches is left without assessors, he is to be provided with a new functionary—an executioner: not the crier of the Court, who used to "nonsuit" plaintiffs in the Courts of Nisi Prius till the Judicature Act came and swept him away; not the Registrar reading the formal judgment after the Judge has signed it; but nothing less than an Archbishop: whether in full canonicals, or in Convocation robes, or in his modern walking dress, the Report forgets to prescribe. The poor Archbishop may think the Dean as wrong as Archbishops Sumner and Musgrave did the then Dean who decided against Gorham; the reversal of which decision by the Privy Council, or at any rate the reasons for it, and the doctrine invented for Mr. Gorham—it now turns out, by Archbishop Sumner (see Ed. Rev. 247 and Ev. 6592)—appears to be thought by all parties, including Gorham himself, to have been wrong, as it was at the time by one of the ablest of judges, Knight-Bruce, L.J. The High Churchmen are crying out

long before they are hurt, in assuming that that decision would not be "open to reconsideration and dispute" in the Court of Appeal, though of course not in an inferior one, in any future suit on some assertion about Baptismal Regeneration. Still the Archbishop must do the bidding of his Dean, and execute the man whom he considers innocent, under this new scheme of Ecclesiastical Judicature. And there are some minute directions for getting exactly the right bishop to execute if the proper one is "unable." This Commission has learnt nothing of the danger of prescribing details from those two wretched pieces of legislation, the Clergy Discipline and the Public Worship Regulation Acts. For now, just when the lawyers have found their way, by the advantage of many suits, through all these labyrinths, and got it pretty well marked out, they are to be started afresh into another maze of blunders and litigation from over-legislation, and a still greater number of appeals—probably two more in each case, as one bishop is to sit first and all the bishops last, if required.

Besides that, if this new Court, receiving its instructions from "the spirituality" who have heard the case argued before them—probably after the Court has heard it once—is convinced that it ought to vary a decree of the Dean of Arches letting off somebody who they think ought to have been suspended or deprived, the Court of Appeal cannot do it, but must send the cause down again with orders to the Dean to order his archiepiscopal executioner to come in and do that awful business. They have evidently "got rather mixed," as the slang goes, between deprivation, degradation from orders, and institution to livings. The last is a kind of corporeal operation, but can be done even by the lay deputy of a bishop; and we read continually in the newspapers of the Vicar General of Canterbury doing it; and donatives have no institution. Degradation used to be called "pulling a man's gown over his ears." When collegers at Eton were sent off to King's, they underwent the terrific operation of "ripping" in my time. I dare say that has been reformed away now because

it was so old, though it was only the gown that suffered, not the boy. I see no objection to degradation, if there is any such thing still, being done by the same hands that confer orders. But deprivation is absolutely nothing but saying and signing the sentence of the judge, which makes a living vacant; and suspension is still less. Yet this new grand jury of ecclesiastical masters of ceremonies think "our present unhappy divisions" are going to be "healed" by sending the Primate of all England into Court to repeat a few words after Lord Penzance, which words he may think utterly wrong, and say so.

It is hardly credible, except on the hypothesis that they mean to make every ecclesiastical prosecution as costly and as ridiculous as possible, that after all the experience we have had of defied suspensions, and now deprivations, as I predicted in my evidence, they propose to begin that game again, and that there are to be two successive suspensions defied, before even deprivation is to begin, by what they facetiously call "summary process," after waiting three months more. They pretend to abolish imprisonment for defying deprivation, suspension, or inhibition, and yet say that the rebel is to be treated as a disturber of public worship, under the Act of 1860, who may be imprisoned by two justices for two months and then come out and begin disturbing again, and being again imprisoned.

But a more dreadful catastrophe may happen under this new judicature Act than the imprisonment of clergymen who persist in "standing where they ought not," in pulpits from which they have been suspended or deprived. I wonder what the bishops who profess to be shocked at those inevitable imprisonments think they would do with clergymen who persisted in preaching infidelity to the admiring congregation which they would doubtless get, and could not be stopped without that *ultima ratio* of the law. The very two bishops who helped to invent this execution scheme have said also that the Archbishops ought to refuse at all hazards to obey an order of the Court to deprive or suspend if they dissent from it: which is to

assume a final veto besides the initial one. The present Primate of all England has not yet declared whether he agrees with them. But if he does, and if it is true that he is employing a celebrated Church Union lawyer to build a Bill on the lines of the Report, and can get it turned into an Act, we may see a vicarious martyrdom on the grandest scale. The Queen's Bench would not hesitate five minutes about "attaching" an Archbishop who returned "*non possumus*" to their mandamus to obey his own Court or the new Appeal Court. And the rebelling parson would escape, because the scheme provides no substitute for an archiepiscopal executioner, who only refuses to act; and it would be merely making fun of the Archbishop if it did.

The abolition of appeals against acquittals, proposed by Convocation and Sir R. Phillimore and Lord Devon, involves a more important confusion of ideas, for the other is mere formal rubbish. If a man is acquitted wrongly of stealing a goose, it does not alter the law of theft a bit, whether the rule of no appeal in such cases is, on the whole, wise or unwise. There it has been in all ages. But if there had been no appeal against acquittals for nonconformity in either doctrines or ceremonies, every reversed decision of Sir R. Phillimore that certain things are the law and doctrine of the Church of England would have been law to this day, and irreversible by any known process. And so would every decision that a clergyman may do anything and preach anything that a semi-popish or unbelieving Dean will tolerate. Nay, every decision of a High Church bishop of O. or E. in favour of his own party, and of a Low Church bishop of L. or N. in favour of his party, whether by trial or veto, would settle the law of England in one way in E., O., &c., and the other way in L., N., &c. For nobody will be able to open this preliminary turnstile against a bishop's will if the veto is retained after your strong reports against it.

They forget too (indeed what do they remember of these things?), that no clergyman is ever more than monished for only mistaken nonconformity apart from contumacy: not even for heresy, if he retracts it. Nor is deprivation for

punishment, but to protect the laity of the Church of England, who outnumber the Ritualistic clergy a thousand times, from having their pulpits usurped by real Dissenters from the law and doctrines of the Church. The Bishop of Oxford put it to me that by deprivation "the man is burnt" (5676), and "cannot repent" (5669). I never object to a joke, or to a reasonable metaphor, unless I see it is to be made the basis of an argument, and then I do. So I reminded his lordship that there is a rather practical difference between being burnt and being sent about your business, to go and preach your favourite heresy, or perform your ceremonies, and wear your chasubles and albs and tunicles in any other place that will have you, but not in our churches, where these things are not the prescribed wedding garment, but proscribed, as the supreme tribunal has decided so often that no clergyman can possibly be more ignorant of it than poachers of the game laws. He is no more burnt than an obstinate claimant of Cuddesdon Palace, who would be ejected by law, and then kept in prison if he defied it.

After the bishops have practically abandoned again the power which was foolishly given them by the Clergy Discipline Act, of sitting as judges in the Diocesan Courts, and now always send these cases to the Provincial Court at once, why need these philosophers of Laputa step in and declare that they know better, and tell the bishops that they ought to increase the expense of suits by sitting themselves, and with all their new assessorial paraphernalia, just for the pleasure of being always appealed against if they condemn anybody, and being abused as partisans if they acquit?

Much that I have said applies to the question of the veto; and, after the remarks of Lord Bramwell, quoted at p. 8, and the separate reports of yourself, the Lord Chief Justice, Lord Penzance, and the others, I have only one thing to add about it, and that is from the Commissioners themselves, though one would rather have expected it in one of the minority reports. They say solemnly several times over that "their scheme must be regarded as a whole;" and

then (p. liii) "The scheme is framed on the assumption that every subject of the Crown who feels aggrieved by a decision of any ecclesiastical Court has an *indefeasible right to approach the throne* itself with a representation that justice has not been done him, and with a claim for the full investigation of his case. No ecclesiastical Court can so conclude his suit as to bar this right." An admirable sentiment, and very grandly expressed, if with a little redundance of words, and if open to a little cross-examination which I would rather have to apply than to undergo. But grand maxims generally are; and therefore accepting it as an axiom, may I ask how the Englishman's indefeasible right to approach the throne for justice and a full investigation of his case, from a bishop or an archbishop sitting in his court, becomes defeasible, and no right at all, when the bishop sits in his own room reading a complaint and the snswer to it without a word of proof for either. I am quite unable to guess at the answer, and I look in vain in the Report for any, beyond the statement that abolishing the veto would lead to "complications" (liii). I should say that its existence has led to a good many already, if it were necessary to answer such a statement; which only indicates that the writer did not know what to say, and his colleagues could not help him. I am convinced by the evidence that the balance has been turned by the action of some bishops decidedly against the veto; and that the risk of frivolous and vexatious suits can be obviated by giving the Court power to dismiss them with full costs as soon as it perceives them to be so. The law must provide for the worst specimens of bishops, as of other people, not the best.

And for that reason too they are, as a class, not generally fit to be judges. All other judges are specially appointed for their supposed fitness to act as judges. Bishops are not, and need not be. There are always a few who would probably be very good ones, but many who certainly would not. Lord Penzance gives other reasons, perfectly good and unanswerable, which I now reprint here (*see* p. 54). That does not the least interfere with the recommendations of

your Grace and him, and the Lord Chancellor on a former occasion, that all complaints should go first to the Bishop, and that he should have powers of monition, subject to *bonâ fide* appeal; for which also my Bill provides, declaring disobedience an ecclesiastical offence, as Lord Penzance says it is already.

I promised at the beginning to say a few words on another subject on which the views of the Commission are evidently hazy. I am afraid I tried in vain to make clear to so learned a man as the Bishop of Winchester the difference between judicial *dicta* not necessary to support the judgment, which lawyers call *obiter dicta*, and the reasons which are logically necessary for it. Nor could I do any better than at last say No, to his proposition that it is "rather formidable for the Church that the Privy Council should sometimes decide by the voice of one man," that (for instance) Mr. Bennet was not deprivable for publishing the amendment which Pusey invented for him as the nearest approach that was safe to venture on to the assertion of the Real Presence "in the hands" of the communicants, according to the famous Keble revision of *not* into *as*. I said "It is no use calling a thing formidable which is inevitable. If a Court is divided it is divided." Judges cannot yet be starved into agreement on legal propositions, or be shut up like the Cardinals till they elect a Pope by a good large majority. Even Lord Cairns's Privy Council order, which the late Chief Baron and most other lawyers thought illegal, attempting to interpret an oath by Royal authority, *not* "to regulate practice in the Privy Council," but to direct the judges what they may talk about outside, and which could not be enforced if disputed, does not order judges who dissent to say that they agree.

Then as to the question of "interpretation making law." If a written law is doubtful, what are judges for but to ascertain it? Indeed what is all judging for, except to deal with people who either dispute or break the law? The real question is, whether we are to have honest judges who

will decide on the best logical and legal reasons, or some others, who have decided everything in their own minds beforehand, and are impregnable to arguments. Lawyers are not honester than other people; but their very business of advocacy, which is entirely different from partisanship or personal feeling, and constantly having to act against it and against their own friends and interests, and their knowledge that the eyes of all the profession are upon them, make them far more impartial judges than any other class of people. No doubt they may have strong prepossessions on subjects which they have fully considered; and then they will naturally follow them, unless they are convinced by some new arguments. But they often change their minds in the course of a discussion, upon some unexpected thing turning up—or without it; and very often say they are sorry that the law is what it is, but they are not there to amend the law but to declare it. One of the strongest (late) judges of the Court of Appeal told me, and probably others of his friends, that two of them actually changed their minds while writing their judgments in the great *Penzance* v. *Cockburn* case, and so the majority was changed, and the decision given for the Dean of Arches, which the House of Lords affirmed unanimously.

Yet this Commission wants to overwhelm supreme and great judges of this kind with a heap of clerical assessors, who are of course meant to be their masters, and *not* "to have the privilege of being disregarded." And they say (liii) as an excuse for it, "considering how widely different [how widely ?] a matter the legal interpretation of documents must often be from the definition of doctrine, *we* [those amateur laymen as to law] hold it to be essential that only the actual decree, as dealing with the particular case, should be binding authority in the judgments *hitherto* [there we have the entire cat let out of the bag] or hereafter to be delivered, and that the reasoning in support of those judgments, and the *obiter dicta* [which last now go for nothing, as every lawyer knows] should always be allowed to be reconsidered and disputed." And they had said just before,

"It is not the function of lay judges appointed by the Crown to determine what *is* the doctrine of the Church, but to decide whether the impugned opinions or practices are in conflict with the authoritative formularies of the Church in such a sense as to require correction?"

Do they not know that this last statement is exactly what the Judicial Committee itself has said over and over again, and other great ecclesiastical judges before it? So it need not be either reformed away, or "slain," or overridden by assessors, in order to teach it that it has not to determine what the doctrine of the Church is, but only what it is not.

Again, have they forgotten that the right of the Court itself, but of no inferior one, to reconsider both its decisions and the reasons for them was asserted by the Judicial Committee itself, and acted on in the very case which has raised the greatest fury among the Ritualists, because on most points, though not quite all, it repeated the previous decisions against them. Certainly it does not "reconsider and dispute them" to the extent of treating the previous ones as no decisions or reasons worth attending to, but only as not to be reversed without very clear proof that they were wrong. When this Commission professes to want "only the actual decree as dealing with the particular case to be of binding authority," they really mean that they want it *not* to be of binding authority, and so to have no Act of Uniformity at all; which is just what all the most candid Ritualists avowed. But it is needless to hunt down the folly of this scheme of enacting that judges are to pay no respect to the reasons and judgments of their predecessors, and so to keep the ecclesiastical law of England in a state of perpetual flux: surplices to be the only lawful wear to-day, albs and chasubles next week; Baptismal Regeneration, with Archbishops Sumner and Musgrave, and Bishop Baring (suppose) for assessors, to mean regeneration at any time except baptism, and to mean what it says, with Bishops Blomfield and Philpotts and Bethell; and the "Real Presence in the hands" to be the doctrine of the Church, or not, as the majority of the Bishops of the Province and of the day may

think. There is nothing like concrete examples to make people understand abstract propositions.

I should like to know why "the definition of doctrine" from written documents "must be widely different from the interpretation of documents," if doctrine had to be defined, as ritual inevitably has, but doctrine not. What the Ecclesiastical Court has to do, and what the Civil Courts have to do for Dissenters when they dispute what doctrines may legally be preached in their chapels, is simply to compare two written documents, the one complained of as heretical (by that branch of Christians) and the other their settled standard of faith—Prayer Books, Westminster Confessions, and all sorts of things, even down to the known faith of the founder of Lady Hewley's charity. How is that any harder, or wanting more assessors to overbear the real judges, than the absolute interpretation of one legal document which has often to be made in civil cases?

It must not be forgotten that the High Church party avow distinctly that their new Judicial Committee encompassed with clerical assessors is only their second best scheme, and a step to what they really want. Canon Liddon volunteered to say to the Commission that their proposal of lay judges in preference to the old mixed court with one or two episcopal judges on it was "*primâ facie* inconsistent" with their avowed desire to have a purely clerical one (7325). He tried to explain away the inconsistency, with such success as may be guessed. Bishop Wilberforce had done it better as "S. Oxon," when he first began moving Mr. Gladstone to get it done, to whom he wrote, and his son publishes it for him, "The *first* and great object is to get the bishops off the Privy Council. Their presence there gives to the Court the look of an Ecclesiastical Court, and so commits us. If we can get nothing more, I would far rather be rid of them there" ("Life," iii, 103). And he quoted Bishop Philpotts as saying, "I decidedly prefer abandoning the Court to the lawyers, if we can thereby secure a reference of doctrinal questions to the Church"—meaning the Bishops. This new plan of the

Commission is that very thing; and everybody who attends to these matters knows very well that it is all a means to an end, and that end is the reversing of every decision of the Judicial Committee on these subjects, except those on the Bennett and Heath and Voysey heresy cases (see Dean Cowie's evidence, 4483).

The Ridsdale one is the most important to them, and as it involves a purely legal judicature question I will add a little to explain it. I have been particularly asked to do so, on account of the Law Reports being inaccessible to most people, and the Ritualist writers taking care never to notice the most important parts of the judgment on the most undisputed facts. Canon Stubbs put it to me, rightly enough, that it stands logically on the basis of the Advertisements of 7 Elizabeth (May 1566), which he evidently did not think were sufficiently proved to have been issued by her order or authority under her Act of Uniformity. One of them is:—"Every minister saying public prayers or ministering the sacraments shall wear a *comely surplice with sleeves.*" But neither he nor one clergyman in a thousand seems to have the least idea of the principles on which the legality of usages which may have had a legal origin is determined in every Court of this kingdom, and always has been by the greatest judges. It has been held by all such judges, as people may see in the Ridsdale judgment if they choose,* and in Lord Campbell's above-mentioned judgment in the Gorham case, that long and undisputed usage proves its own legal origin, if such an origin was possible; and here there was actual provision made for it.

So that evidence of the usage alone would be enough, if there were not a word of anything else surviving, except that Act. Of the universal usage from the time of the Advertisements till quite lately, there is no dispute. Moreover the fact that they were completely authorized has been attested by nothing less, and by many things more, than three Convocations, in some canons of 1571, only five years after the Advertisements; of 1603, and of 1640; which last

* 2 Probate and Divorce, 304. And reprinted by H. King & Co., as "the Folkestone Ritual Case," 1877.

call them, not only "published in the 7th year of Elizabeth" as the others do, but "the Advertisements *of* Queen Elizabeth of blessed memory." It does not signify for this purpose that the canons of 1571 and 1640 were or became invalid for different reasons (see Cardwell's "Synodalia"). They are equally the utterances of Convocation, to whose judgment we are now told that every such question ought to be referred. And what can be more absurd than members or supporters of Convocation now setting up for knowing better what was done than three Convocations within a century of the time when it was done, and all the bishops and great men whom I will name presently, and even the vacillating and High Church Cosin, and the bishops after the Savoy Conference, who either anticipated or met the Puritan objection that the Ornament Rubric might "*bring back* the vestments" which had then been gone for just a century. If they did not mean to obviate it they were rogues and nothing else. It was true that the (illegal) rubric of the Jacobean Prayer Book, which had not the word "*retained*," till these bishops so inserted it, would have legally restored the vestments. It is singular that they never were restored even while that rubric stood through the two first Stuart reigns. In fact both parties were really fighting about the surplice only.

Lord Eldon once said that he would presume a private Act of Parliament, if necessary, to support a long-established usage, not contrary to the general law; and he several times did presume authorized variations of old College Statutes without a scrap of direct evidence but usage. People who think they know better forget that, if the judges were as foolish as themselves, the longer any usage has lasted the more certain it would be to be condemned the first time it comes into Court; for the less chance there would be of any direct evidence of its legal origin surviving. And they spend their time in fishing up superfluous proofs that Elizabeth did not do this or that particular thing up to 28 March 1566; as if all that could prove that she did not do the requisite thing afterwards, before her Metro-

politan and those three Convocations solemnly accepted the Advertisements, and every bishop and clergyman in England began obeying them for three centuries.

The other legal principle which they either cannot or will not understand, or rather two combined, are (1) that obscure laws like the Ornament Rubric of 1662 are to be interpreted by clear ones like canons 25 and 58, ordering surplices only, and not clear ones by subsequent obscure enactments; and (2) that, if the two can stand together, the earlier is not repealed by the later.* The absurdity and impudence of calling the rubric "plain," when its meaning is the very thing the two parties differ about, and nobody dreamed of their "plain meaning" till a few years ago, does not seem to strike the ritualistic pamphlet-writers; or that of assuming that "retained" means "restored." I dare say the majority of your late colleagues are prepared to say that the interpretation of ecclesiastical laws and customs "differs so widely" from civil ones that they are entitled to "plead their clergy," and be exempt from legal principles; and every Ritualist is confident that a genuine ecclesiastical court of ecclesiastics would soon make mincemeat of them. Probably they would, or of any others that might stand in the way of their previous theological conclusions. But the people in England are not yet such fools as to deliver over the laws of England to a few thousand clergy, if they only understand what they are doing. My present object is to help them to understand it. The Ritualists had better understand too, that the moment they get the Church disestablished, into the civil courts they go, and may whistle for clerical assessors and privilege of clergy there, but none will come; besides that they would soon be trampled to death by laymen with the power of the keys—of the money-box and of the ballot-box. One of their own bishops said "nine out of ten laymen are against them."

Not that the judgments against restoring the vestments rest only on those principles, which are principles of common sense as well as common law. They proceed also

* See Maxwell on the Interpretation of Statutes, cap. vii.

on the Visitation Articles and acts and writings of more than forty bishops, besides other officials, continuously from the date of the Advertisements till the Puritan rebellion; all of which Articles and acts and statements would have been lies or illegalities, and certain to be resisted as such, if "order had *not* been taken by the Queen with the advice of her Commissioners or the Metropolitan," as these acts and documents all inserted or implied. Archbishop Parker, who was complaining up to the date I mentioned that he could not get the Queen's approval of the Advertisements, and saying that he would not stir without it, was soon afterwards, viz., in May 1566, telling the other bishops to enforce them, and they were doing it. And they were mentioned by name or indisputably referred to as law, by the other Archbishop, Grindal, in 1576, by the next Metropolitan, Whitgift, in 1584, by Parkhurst of Norwich in 1569, by Cox of Ely about 1572, by Hooker in 1594, by Thornborough of Bristol in 1603, besides the three Convocations; and also by Richard Cosin, Chancellor of Worcester and Dean of Arches in the latter part of Elizabeth's reign.* Among the bishops who enforced them were the most High Church ones of those days, Laud and Wren, and, somewhat later, Cosin (John). I need hardly say that these few pages are a very brief summary of the principal arguments, but I think sufficient for this purpose.†

It must be remembered that surplices, copes, hoods, albs, chasubles, tunicles, were all to be used under the first Edwardian Prayer Book, and the second hardly lasted a year before the old vestments were all revived by Mary; so that they would be literally "*retainable* until further order" under Elizabeth, though it would have been nonsense in 1662 if it meant things that had been out of use for a century, which surplices alone had not.

People will naturally ask, as I did till I learnt from

* In his "Answer to two Treatises of a certain factious libel put forth under the title of an Abstract of certain Acts of Parliament, &c., 1584." It was anonymous, but stands in the catalogue of Lincoln's Inn Library as his.

† See the *Purchas* judgment in (L. R.) Privy Council, iii, 349.

meeting and reading the pamphlets and articles of the literary champions of the vestments, How do they profess to answer all this? By the best of all methods in such cases, viz., ignoring it altogether in their writings; and in their talk, when they must answer, saying that the Judicial Committee made more of something else, viz., the earlier letters of Archbishop Parker up to that 28 March 1566: which is as untrue as any assertion could be, and immaterial if true; and then by such others that I had to end the discussion thus: "You are the most unfortunate controversialists in the world: you are beset by a host of conspirators of the highest rank and character, including three of your own parliaments, for a whole century after the critical epoch, and by the undisputed use of two more centuries, and now by two judgments of the Supreme Court. You all but say these have been all liars, fools and rogues; and so they have, if the Advertisements were never duly issued." If they were, the surplice (and cope, *black* tippet or stole,* and hood) were the only vestments of the first Edwardian Prayer Book and the Canons that remained either actually or legally in use at the Restoration and long before it, and therefore the only ones capable of being "retained:" which the Ritualists never meet at all.

This wretched Report has really made legislation more hopeless than ever—like the Revised Version. But the only thing that is needed to make the Public Worship Act work, under which proceedings are simpler than under the old ones, is the removal of the condemned episcopal veto on "the indefeasible right of every man to approach the Crown" and its Courts "for a full investigation of his cause," and of the insane allowance of three years for a convicted defendant to say whether he means to obey. All that may be done by an Act of a single clause like this:—

* *Stola ab utroque humero pendula, et ad talos demissa,* Bishop Grindal said, which incidentally proves the orthodoxy of long surplices instead of the fashionable Popish white spencers *usque ad genua,* or less. Coloured or decorated stoles are directly contrary to the Canon, and have been pronounced illegal.

"Be it enacted that the consent of a bishop shall not be requisite for the institution of any ecclesiastical suit; but the Court may dismiss the same with all or any of the costs incurred by the defendant if it thinks the suit frivolous, or unnecessary, or vexatious, even though the complainant may be technically right. And the word *years*, where it first occurs in the 13th section of the Public Worship Regution Act 1874, shall be read as *weeks;*" which the Lord Chancellor said was long enough. Also, that stupid piece of timidity in the Purchas judgment, which caused all the subsequent rebellion, ought to be cured by enacting that disobedience to any sentence shall be at once punished by deprivation without a new suit.

I do not mean that it would not be desirable to do more; in fact, all that is in my Bill, except the veto. But the Samsons of this Commission have pulled the legislative house down while flattering themselves they were "restoring" it for Convocation. And the experience of all modern ecclesiastical legislating and commissioning is by no means encouraging. They mention the Dilapidations Act 1871, which has been absolutely condemned by a Committee of the House of Commons, and ought to be called *An Act for the benefit of diocesan surveyors*, some of whom contrived it. It was an utterly unnecessary and mischievous piece of meddling. I suspect that the Act of Elizabeth about dilapidations was overlooked. The Incumbents' Resignation Act is doing enormous injustice now, in consequence of giving the resigners fixed sums instead of a fixed proportion of the net income received, besides other defects. The Commission professes to want some more legislation to make the practice in different dioceses about faculties "uniform." They have evidently no idea whether they mean it to be "the Use of Sarum" or "the Use of York," or some new invention, probably worse than any that exists; or that uniformity in badness would make all the better ones worse; or what good uniformity alone would do. Nor do I see a bit of evidence against any practice, except that the cost of faculties still remains in some dioceses much

higher than in ours; but it is often increased by not applying directly to the Registrars.

Another of these variegated Commissions is threatening us with a lot of new Cathedral Statutes, of which all that they have issued yet leave the most notorious difficulties unsolved, and rather perpetuated, and some are full of the most trifling ceremonial details. And no wonder, when the very Visitors of every cathedral are excluded from the Commission, except the one who now represents them all, and actually not the Primate of one province; and now that Archbishop Tait is gone, of neither. I am glad not to see his name to any of the published Statutes. Perhaps your absence is sufficiently made up for by the presence of—which of the lay amateurs shall I say? I had better say, Sir W. C. James, because his aid was thought essential to the success of both Commissions. Perhaps future historians, who may know that there was a great Judge called Sir W. M. James in these days, will speculate whether the name of the Reformer of the Cathedrals and the Church of England was misprinted in these two Commissions.

But I must not imitate the Commission on Ecclesiastical Courts by wandering outside of my commission and your question; so I remain

Your faithful Chancellor and Vicar-General,

EDMUND BECKETT.

33, Queen Anne Street, W.
November 1883: *Revised, February* 1884.

[I am requested to reprint here the following separate Reports alluded to in the preceding pages.]

APPENDIX.

The Report of the Royal Commission was signed with the following Reservations, among others :—

In signing the Report I am compelled to record my dissent from it in two important particulars.

1. In allowing anyone to lodge a complaint, the Report makes the hearing of the complaint depend absolutely upon the permission of the Bishop. Except with this permission the Courts will be closed entirely to a layman, who will have no right of appeal from this absolute decision, however great the wrong which he may conceive himself to have sustained.

2. Great evils have resulted from litigation in the past. To prevent the evils for the future, something should be done to afford a means of direction and arbitration without resort to the Courts. One such means is supplied by the Prayer Book, in the reference to the authority of the Bishop when doubts or divers interpretations prevail. But unless the decisions of the Bishop are held to be binding, until they are appealed against, they are of no avail. Let the Bishop have power to make an order in all matters affecting the conduct of public worship, which shall be binding until reversed by the Court of Appeal. Let there be an appeal to the Archbishop's Court either from such an order, or from a trial in the Diocesan Court. Once make the Bishop's authority a reality, and not an utterance of which no Court will take notice, and he would be able to compose many of the disputes which now arise about such subjects without prolonged litigation. W. Ebor.

We concur in these reservations.

J. J. Stewart Perowne. F. H. Jeune.

Lord Chichester, Dr. Deane and Canon Espin also concurred in the first.

I desire to express my concurrence in the second of these reservations, having written separately as to the first.

Coleridge, C.J.

I am unable to concur in the recommendation made by my brother Commissioners that the Bishop's assent should be made a condition precedent to the taking of proceedings to enforce the law, whether moral or ritual, against a clergyman.

I believe that practically this is a power claimed and exercised by Bishops for the first time since the Church Discipline Act. I do not question the great power of a Bishop in the Middle Ages; or that in practice he could probably have prevented any proceedings against a clergyman in the Church Courts which

he chose to prevent. But since the Reformation, though the fiction of permission was kept up by the forms of the Court, yet it was a fiction only, and the practice was as declared by the highest authority, Lord Stowell, for the assent to be given as a matter of course if the Bishop were made safe as to costs. I am very clearly of opinion that this ought to be so, and that the active interference of the Bishops to prevent the law of the land being enforced against those who have deliberately broken it is as indefensible in theory as, I must confess, it seems to me to be fast becoming intolerable in practice.

The right as now claimed and exercised covers everything, moral delinquency of the gravest kind, doctrinal error the most extreme, ritual excess, whereby in spite and defiance of the law a repugnant congregation may be compelled to assist at a ceremonial which they think symbolizes an abject and mischievous superstition. It is obviously no answer in reasoning to say that the right claimed would never be so abused. But besides, this is a right clearly capable of being abused, more likely to be abused in proportion to the strength and earnestness of character of those who claim it; finally, one which, desiring to speak with true respect, I must think in fact has been abused.

The English people have, in my opinion, a right to see that the condition upon which they have granted or secured great privileges to the maintainers of a particular set of religious opinions are carefully observed, a right which ought not to be limited by the will of a few distinguished men amongst those to whom these very privileges have been granted or secured on these very conditions.

It is true that as the Bishops may abuse their right of interference, so the people at large may abuse their right of prosecution. But I think that competent judges with absolute power over costs would very soon restrain, and indeed altogether put an end to merely frivolous litigation.

There are some other points on which the Report does not represent my individual opinion, but they are none of them, except the one as to which I have ventured to express myself above, serious enough to justify me in withholding my signature from a Report, the recommendations of which, on the whole, I regard as very valuable, and as likely, if adopted, to bring about a very beneficial change.

COLERIDGE, C.J.

REPORT OF LORD PENZANCE.

Having been prevented by ill-health from attending a great number of the meetings of Your Majesty's Commissioners, and taking part in their discussions in connection with the volu-

minous evidence which they have received, I do not feel competent to give a general assent to their Report, although there are some parts of it with which I entirely agree.

I shall best, I think, discharge the duty imposed upon me under Your Majesty's Commission by embodying some conclusions at which I have arrived in the form of a separate Report.

There are some matters of law and constitutional history to which I think a closer attention should be drawn than appears to have been thought necessary.

Two main propositions have been put forward by those who find fault with the constitution of the existing Courts :—

1. That the Ecclesiastical Courts of this country, as a matter of constitutional history, are Courts which derive their authority and jurisdiction from the Church, independent of the Sovereign or the State, and as a corollary from this, that the Legislature is exceeding the proper limits of its authority if it interferes with, or attempts to regulate them, without the consent of the Church, thereby meaning the clergy in Convocation assembled.

2. That the judges who administer the ecclesiastical law ought, according to the ancient and true constitution of these Courts, to be either ecclesiastics or persons upon whom a quasi-spiritual character has been impressed by the Bishops or Archbishops whom they represent.

These objections have not been dealt with directly by affirmation or denial in the Report, but as some of the statements and recommendations to be found in the Report appear to me to give a tacit adhesion to them, at least, in some degree, I will state very shortly why it is that in my opinion they cannot be maintained.

Until the Conquest, whatever ecclesiastical jurisdiction was exercised in this country through the medium of a constituted Court, as distinct from the personal power and control of the Bishops, was exercised in what were the temporal Courts of the country, the Bishop sitting there by the side of the temporal judges. This is stated to be the case by, I believe, all historians of repute, including both Lingard and Collier. The existing Ecclesiastical Courts first existed, and were erected and created, by and under a charter of William the Conqueror. Whether this charter emanated from the Sovereign in Council, or whether it partook of the nature of what was afterwards known as a charter in Parliament, it is needless for my present purpose to inquire. The charter professes, on the face of it, to be made "communi consilio" of the Archbishops, Bishops, and Abbots, "et omnium principum regni mei." The date of this charter is, I believe, unknown, but its terms are still extant. "Mando et Regiâ auctoritate præcipio ut nullus episcopus vel archidiaconus de legibus episcopalibus amplius in hundretto placita teneant nec causam quæ ad regimen animarum pertinet ad judicium secularium hominum adducant sed quicunque secundum

episcopales leges de quâcunque causâ vel culpâ interpellatus fuerit ad locum quem ad hoc episcopus elegerit et nominaverit veniat, ibique de causâ suâ respondeat, et non secundum hundrettum sed secundum canones et episcopales leges rectum Deo et episcopo suo faciat."

Having thus provided for the holding of separate courts for the administration of the "episcopales leges" at places to be nominated by the Bishops, the Conqueror went on to give effect and coercive jurisdiction to these Courts over his subjects to the following language:—

"Si vero aliquis per superbiam elatus ad justitiam episcopalem venire non voluerit vocetur semel et secundo et tertio; quod si nec sic ad emendationem venerit excommunicetur et si opus fuerit ad hoc vindicandum *fortitudo et justitia regis vel vicecomitis adhibeatur.*"

It was under this authority, and from this time, that the Bishops first "nominated," as they were ordered to do, the fixed places where they would hold their Courts, and the Archbishop of Canterbury fixed upon the Church of St. Mary-le-Bow, where the Court of Arches first sat.

"Before this reformation of justice (says Collier, vol. ii, p. 44), as the charter calls it, the Bishop used to sit with the sheriff in the County Court, and with the hundredary in the Hundred Court, if he pleased, where ecclesiastical and civil causes were tried by their joint authorities, but from this constitution of King William's the separation of both jurisdiction bears date."

It was the King, therefore, who created, as he says in his charter, "regiâ auctoritate," a separate set of tribunals for the treatment of questions of ecclesiastical law, and the practical exercise of purely spiritual jurisdiction. It was the Sovereign, and not the Church, who authorized the holding of these separate Courts for the administration of ecclesiastical law, which have come down, with many alterations no doubt, but without losing their identity, to modern times, and are the Ecclesiastical Courts of the present day.

To go no further than this, therefore, it appears to me that what the Sovereign of his own supreme authority, with the advice of his Council or Parliament, set up and created, the Sovereign, with the advice of Parliament, may well alter and amend. But as a matter of fact and of history, the Sovereign, by the advice of Parliament, has never hesitated to do so when thought desirable, and every alteration which has been made in the jurisdiction, the practice, or the constitution of these original Ecclesiastical Courts as they first existed under the Conqueror's charter, have been made by the authority of the Sovereign in Parliament, and by that authority alone. The Bill of Citations, as it was called, which is the Statute 23 Hen. VIII, c. 9, did very largely interfere with, and restrict, the action and jurisdiction of the Ecclesiastical Court of the Province, when it

provided that the Archbishop's Court should no longer entertain original suits for breach of ecclesiastical law within the province except at the request of the Bishop of the diocese. Before this statute was passed the King's subjects used to be cited from all parts of the province to appear at the Archbishop's Court in London; and the grievous expense and vexation thereby caused gave rise to the statute, but a graver or more distinct interference with the Archbishop's original jurisdiction could hardly be conceived.

It is needless to call attention in detail to the numerous statutes passed since then, modifying, changing, restricting, and amending the jurisdiction of the Ecclesiastical Courts, some carrying away from ecclesiastical cognizance entire classes of causes, such as the testamentary and matrimonial causes, others restricting ecclesiastical censures in their application to the laity, such as that which transferred the offence of brawling in church from the category of ecclesiastical to that of civil offences, and that which put an end to proceedings for defamation; and others again dealing with the practice and procedure of these Courts, such as the Church Discipline Act, the Act under which evidence is now taken *vivâ voce* in open court, the Acts for the imprisonment of contumacious persons and, lastly, the Public Worship Regulation Act.

It is not of course intended by these statements to be suggested that the Conqueror set up or created for the first time the exercise of spiritual censure in this country. For there is no doubt that before the Conquest the Bishops did exercise authority and control here, as elsewhere in Christendom, over both clergy and laity; but that authority was, as is stated in the Report, p. 17, "a judicial authority inherent in the person of the Bishop rather than in the Court, and might be exercised in synod, in visitation, *in camerâ*, or *in itinere*." The extent, however, to which this spiritual control was exercised by the Bishops before the Conquest, and the manner of its exercise, are not (so far as I am aware) susceptible at the present day of any very exact or cogent proof. But the erection of constituted Courts with a coercive jurisdiction, to be enforced if need be by the civil power, over the King's subjects, was a different matter. It could only be done, as the Charter said it was done, "Regia auctoritate," with the advice of his Parliament, by and under which authority, says Lord Coke, alone all Courts of Justice have had their existence in this country, 4 Inst. 200.

The older law books are not silent upon this subject. I will only refer to the following passages from the digest of Chief Baron Comyn, tit. Prærogative D 9. "All ecclesiastical jurisdiction began originally by the grant of William I, or rather by Parliament, before ecclesiastical causes were determined in the Hundred," 2 Rol. p. 216, l. 20. And again, "The jurisdiction of the Bishops, &c., began by the King's grant," 2 Rus. 1343. And again, "The ecclesiastical laws, though derived from others,

yet being approved and allowed here by general consent, are the King's Ecclesiastical Laws," 5 Co. 9 a, Dav. 70 b.

I come therefore to the conclusion that there is no warrant to be found in the legal or constitutional history of this country for the proposition that there have existed at any time since the Conquest, or indeed before it, Spiritual Courts deriving their original authority from the Church independent of the Sovereign or the State, and that the authority for the jurisdiction of the existing Ecclesiastical Courts did, on the contrary, emanate directly from the Crown. I do not offer any opinion whether it would or would not be an improvement if the Spiritual Courts had a more independent existence. I desire only to place on record their actual constitution and origin.

I now pass to the suggestion that the judges of the Ecclesiastical Court ought to be ecclesiastics.

I will presently consider this suggestion in the character of a proposed change from the existing state of things. But if it is intended, as I rather think it is, by those who urge it, to assert that the administration of the ecclesiastical law in the Spiritual Courts by laymen is in any degree a modern innovation, I must record my dissent from such an assertion. The practice of delegating the authority of the Archbishops and Bishops to laymen learned in the law, under the name of officials or chancellors, is many centuries old, and has been continued almost without intermission down to the present day. I have nothing to add to the statement on this matter to be found in the Report at page 19. It is beyond doubt, however, that the notion that ecclesiastics ought to preside in the Spiritual Courts is not a new one. In Bishop Gibson's "Codex," at p. 984, will be found a reference to the institution of Archbishop Chichely, temp. Hen. V, by which it was provided that no lyman should exercise ecclesiastical jurisdiction. The same thing was enjoined by some portion of the canon law, but whether it was received and acted upon in this country before the Reformation to any, and if so, to what extent, it is not easy to say. The matter, however, was finally set at rest by the statute of 37 Hen. VIII, c. 17, which declared this restriction to be one of the abuses of Papal power, and expressly provided and declared that laymen might lawfully exercise all manner of ecclesiastical jurisdictions, and "all censures and coercions appertaining to the same." This statute has never been repealed, and has been followed by an almost unbroken practice (I speak of the Archbishops' officials) of appointing lawyers to these judicial offices.

But the question remains whether it is desirable that this practice should continue; and a prominent suggestion made in the Report is that it should not, so far at least as the Diocesan Court is concerned, where the Bishop himself, it is recommended, ought to preside. I cannot agree in this recommendation. I will presently state in what way it seems to me that the personal

authority of the Bishop in the control of his clergy, which dates from the earliest periods of ecclesiastical history, would be best revived and exerted at the present day. To effect this object by providing that he should preside in the Diocesan Court is, I think, objectionable for the following reason. The administration of law, whether civil or ecclesiastical, by a Court, implies the application to individual cases of strict and constant rules, adhered to continuously, not only in the Court itself, but uniformly by all Courts of similar jurisdiction throughout the realm. It is thus and thus only that a consistent body of legal decision and settled interpretation of the written rules, regulations, and other written documents in which the law is embodied is gradually built up, accumulated, and maintained, and it is thus and thus only that men come to know what is forbidden and what allowed to them by the law, and are able to guide their conduct accordingly. Speaking generally, where discretion begins the proper administration of the law as such comes to an end.

For the administration of strict law in this sense I do not think that an ecclesiastic is, by his training and acquirements, well qualified. It is, I think, to be apprehended that a Bishop would not be careful to follow decided cases, with which, perhaps, he would be little familiar; that he would be apt to import into his enunciation of the law considerations of policy and the elasticity of discretion, while in controversial matters of doctrine there would be room for the apprehension that he might bring to judicial decision opinions already formed, and perhaps strongly held, on one side or the other of the controversy. The probable result would be a startling divergence of decision in the different dioceses, which, by rendering the law uncertain, would bring it into discredit and impair its efficacy.

But while holding these views as to the Bishop presiding in the Diocesan Court, I am strongly of opinion that, historically and constitutionally, the primary authority for the correction of excesses in the clergy resides personally in the Bishop, and that the exercise of that authority, which was vigorously asserted in times past by the Bishops in their visitations, ought to be restored to them.

It is well known that as visitor of his diocese, the Bishop used to enforce obedience upon his clergy by suspension and even deprivation, though the right to proceed to deprivation without a regular suit, and the exhibition of written articles, has been questioned. As visitors, the Bishops acted without set forms or the cumbrous formalities of regular suits. The old legal definition of a visitor's mode of proceeding was as follows:—"Summarie, simpliciter et de plano, sine strepitu aut figurâ judicii."

It is this personal power and jurisdiction of the Bishop's (with any safeguards that might be thought necessary) which I would revive. Let all complaints of the conduct of the clergy in respect of ritual or doctrine be made to them; let them have

power to take evidence on oath, and institute what inquiries they think right and in the way they think right; then let them issue any admonition they think fit to the offender, and if he does not obey, let them pass a sentence of suspension. An appeal from any such sentence might lie to the Provincial Court, and, on the other hand, if the Bishop refuse to act, or fails to act with effect, the complainant should be allowed to promote the office of judge against the offender in the Provincial Court, the leave of the judge having been first obtained, whose duty it should be to refuse it if he found the complaint to be frivolous, trivial, vexatious, or urged without sincerity. From the Provincial Court an appeal should lie in all cases to the ultimate Court of Appeal.

If it be allowed that the laity have any rights in the due and proper administration of the services and ceremonials of the Church, it seems to me to follow that, if the Bishop is unable or unwilling to maintain those rights, any parishioner who is aggrieved by a breach of the law in this respect, ought to be permitted to assert them in the Spiritual Courts, provided always that his complaints, or supposed grievances, are not trivial, or frivolous, or vexatious, and are honestly put forward.

In support of these views I venture to refer to the following passage from the First Report of the Commissioners, dated the 19th of August, 1867, under the Commission issued by Your Majesty in the month of June of that year, in reference to the conduct of public worship: "We are of opinion that it is expedient to restrain, in the public services of the United Church of England and Ireland, all variations, in respect of vesture, from that which has long been the established usage of the said United Church, and we think this may be best secured by providing *aggrieved parishioners* with an easy and effectual process for complaint and redress." This Report was signed by the whole twenty Commissioners, of whom several were Archbishops and Bishops and the rest distinguished lawyers and laymen most conversant with the subject, and presents a strong body of opinion in favour of the proposition, that (in the last resort, at least) means should be secured to the laity of enforcing the law in respect of vestments, and by parity of reasoning in respect of other departures from the Ceremonial Rubrics.

In making the above suggestions for the intervention of the Bishops before a resort to the Courts of law, I regard the position of the Bishops in these matters rather as that of superior officers entitled to control and direct the clergy by their commands than as merely judges correcting them by censures of law. It is a strong confirmation of this view of their position that mere disobedience to the Ordinary, without more, is a distinct ecclesiastical offence, warranting ecclesiastical censure in the Ecclesiastical Courts, while "incorrigible disobedince to the Ordinary" is declared, over and over again in the law books, to be properly punished by deprivation. It is also to be borne in mind that

every ordained priest has at his ordination taken a solemn oath to obey his Bishop. Great good would, I think, ensue from thus conferring on the Bishops a large personal jurisdiction and discretion in composing disputes, restraining excesses, and settling the differences between a clergyman and his parishioners without an appeal to the law, which should only be invoked where the Bishop has failed. In a word, I would only appeal to the law and the Courts of law in the last resort. If an appeal to a Court of law could be avoided, it would be no longer necessary to send solicitors' clerks to attend Divine service in order to obtain definite and legal evidence of the way in which the service is conducted.

Court of Appeal.—I will only remark upon the recommendation in this part of the Report, that in future "The actual decree should be alone of binding authority, the reasoning of the written or oral judgments should always be allowed to be reconsidered and disputed."

If this only means that what are known among lawyers as *obiter dicta* are not to be held binding on future cases, I have nothing to say to it; these judicial utterances never, so far as I am aware, have been treated as anything but the expressed opinion of the individual judge upon points or matters not directly in question, and which did not arise for judgment in the particular case. But the language of the recommendation goes much further. It appears to me to propose that in future, in place of asking upon what principle was this or that case decided, the only question should be—did the Court decide (in reference to the ascertained facts) for the promoter, or for the defendant, for that is all which the actual decree will show. Such a system, if adopted, would result in this, that no case would become a precedent for the decision of cases arising after it, except those in which every circumstance was identical. No legal principle would be asserted or established, no general interpretation of the terms and directions involved in the Rubrics of the Prayer Book, or of the language in which the doctrine or the ceremonial of the Church has been expressed by lawful authority, could be arrived at or ascertained. Every fresh point, though in reality falling under a general category with which the Court had previously dealt, would become necessarily the subject of a fresh suit to settle it, and until it was brought to adjudication, no man would be able to tell what the law might be held to be. In a word, such a system, if acted upon for half a century, would destroy the ascertained law altogether; and had it been maintained in the temporal Courts from early times, it is not too much to say that what is known as the common law of the land could have had no existence.

All which matters I beg humbly to report and submit to Your Majesty. PENZANCE.

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