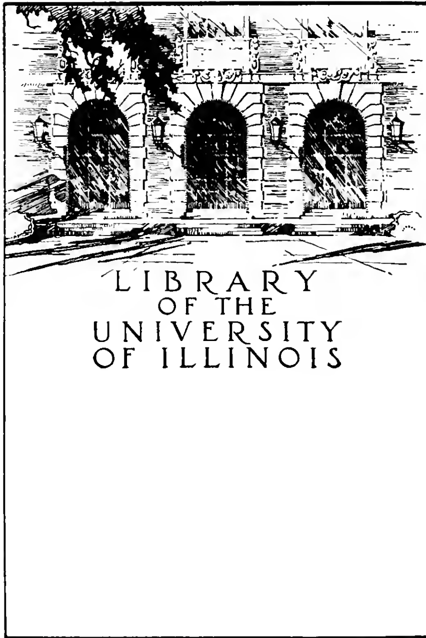
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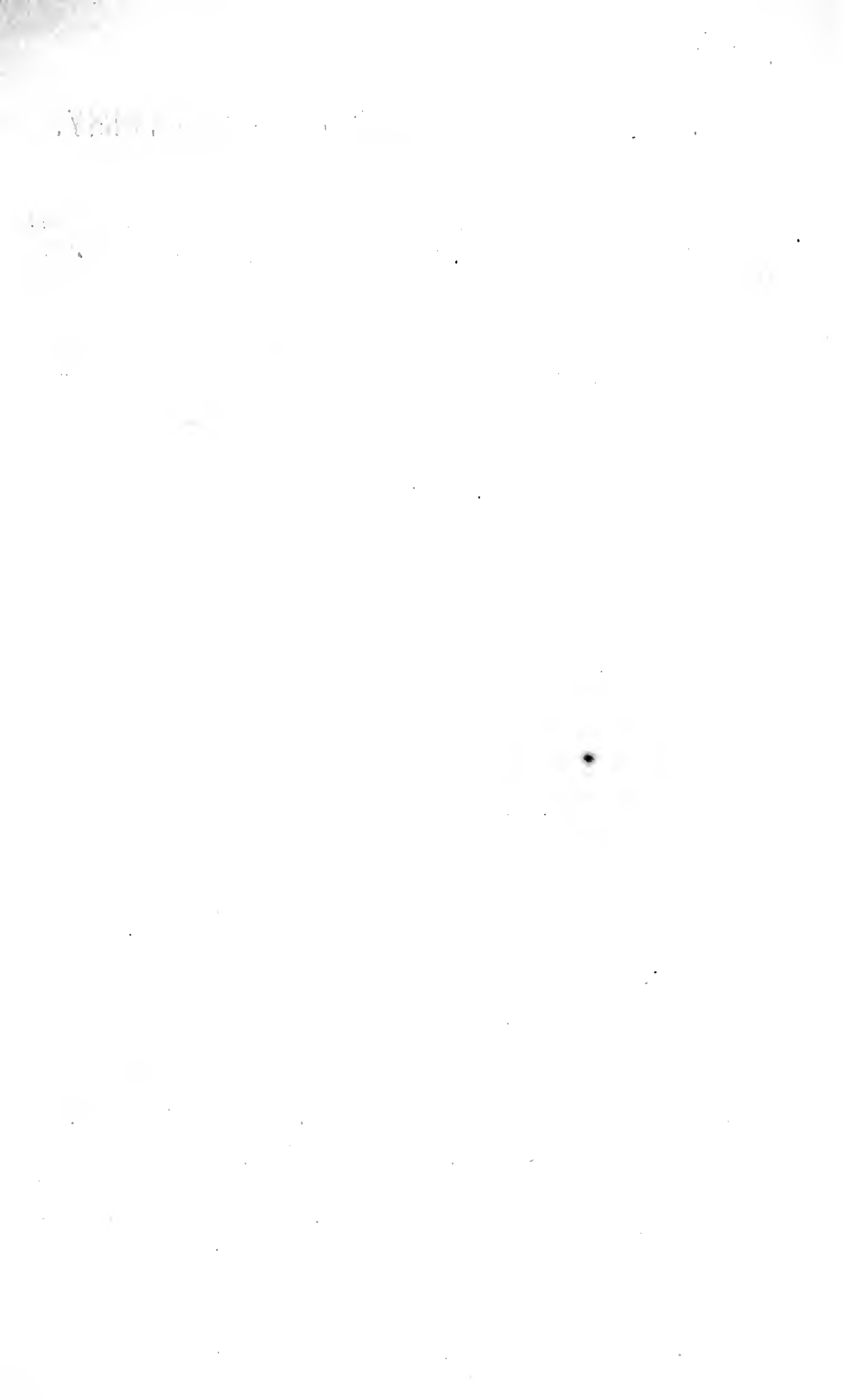

THE RIGHTS
OF THE
CHURCH OF ENGLAND
UNDER THE
REFORMATION SETTLEMENT

A LETTER
TO THE
LORD BISHOP OF WINCHESTER

BY
VISCOUNT HALIFAX

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THE

RIGHTS OF THE CHURCH OF ENGLAND

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79 Eaton Square : March 25, 1899.

My Dear Lord,

His Grace the Archbishop of Canterbury has recently stated that it is his intention, and that of the Episcopate, to submit to Parliament a Bill for freeing the Ecclesiastical Courts from the difficulties which at present interfere with the proper exercise of their authority. He has asked for a general expression of opinion as to how such a measure can be best carried out, and to facilitate such an expression of opinion the draft of a Bill dealing with Ecclesiastical Procedure has been brought before Convocation for discussion.

It is understood that the Bill is also to be submitted to the Lay Houses of both Provinces, and under such circumstances it will not, I hope, be thought presumptuous if I venture to address some observations to your Lordship upon a matter which so nearly affects the peace of the Church, and in regard to which, for so many reasons, both in the past and in the present, I am assured of your interest and sympathy, even if I should fail to obtain for them that entire assent which I hope to secure.

With this object I will endeavour, in the first place, to deal with some of the facts, a knowledge of which is essential for the elucidation of the subject, but which are

often ignored or forgotten, and in the next, to state certain principles, which, as it seems to me, ought to govern the attitude of those who have the welfare of the Church at heart in regard to any measure which may be brought before Parliament. I cannot do better for this purpose than quote from a letter which I addressed to the members and associates of the English Church Union in 1881. It is as applicable to-day as it was then. No one will remember better than yourself that Archbishop Tait, in a speech addressed at that time to a large body of clergy belonging to the Diocese of Canterbury, had publicly stated, in reference to existing difficulties between Church and State—(1) that those difficulties were likely to be more effectually met by an adherence to 'such arrangements as the great Statutes of the English Reformation sanctioned, rather than in any other;' and (2) 'that how far these Statutes have been adhered to in practice . . . was a fair subject for discussion.'

An endeavour was made in consequence to show (1) why the claim to adjudicate in spiritual causes, put forward by the Judicial Committee of the Privy Council and the Courts subject to its jurisdiction, was a direct violation of the arrangements made for the decision of spiritual matters by those great Statutes to which the Archbishop referred; (2) why it was impossible to acquiesce in the existing judicial machinery which had been substituted for those arrangements; and (3) to indicate a way in which 'those complex relations' to which the Archbishop had alluded, resulting 'on the one hand from the independence of the Church and the Christian conscience, and, on the other, from the controlling power which every well-ordered State must exercise over all bodies, ecclesiastical or other, which exist within its dominions,' might be reconciled and adjusted.

The first step in this inquiry was to show what the arrangements, sanctioned by the great Statutes of the English Reformation, were for the decision of spiritual matters.

The first Statute, as it is the most important, which deals with this subject, is the Statute of Appeals. That Statute (24 Henry VIII. cap. 12) recites in its preamble that if 'any cause of the law divine happened to come in question, or of spiritual learning, then it was declared, interpreted, and shewed by that part of the body politick called the Spiritualty, now usually called the English Church, which always hath been reputed and also found of that sort, that both for knowledge, integrity, and sufficiency of number, it hath been always thought, and is also at this hour, sufficient and meet of itself, without the intermeddling of any exterior person or persons, to declare and determine all such doubts, and to administer all such offices and duties as to their rooms spiritual doth appertain.'

Nor does the Statute embodying the submission of the clergy in the following year (25 Henry VIII. cap. 19) assert any different principle. By that Act, which established the Court of Delegates, the right of appeal to the King is made to depend on lack of justice in the Archbishop's Court. While in regard to the manner in which it was intended such an appeal was to be worked, the recommendation of the Commission appointed under the powers and in accordance with the contents of the same Act, with a view to the revision of the ecclesiastical laws, laid it down that in the case of any appeal lodged with the Crown from an Archbishop's Court, the cause, if a 'grave' one, should be concluded by a Provincial Synod; if not a 'grave' one, by three or four Bishops to be appointed for that purpose. Recourse might be had to the King for lack

of justice, as was the case under the similar right of the *appel comme d'abus* in France; yet, even so, and in regard to unimportant as well as to important matters, the Judges were to be ecclesiastics, and the forms of procedure governed by the methods of the Courts Christian. It is true that the recommendations of the Commission above referred to were never definitely embodied in any subsequent Act, but they are none the less conclusive as to the general tenour of the arrangements contemplated under the Act; and when we consider further what the matters were which the Statute of Appeals had directly in view—that they were matters 'testamentary, causes of matrimony and divorce, rights of tithes, oblations, and obventions,' and that appeals to Rome in regard to them were forbidden on the express ground that 'those who appeal commonly do so for the sake of delaying justice,' and because, owing to 'the great distance of the way,' 'the true knowledge of the cause,' and the 'witnesses . . . cannot be so well examined as within the realm,' and that, therefore, they are to be 'definitely adjudged within the King's jurisdiction, and not elsewhere, in such Courts Spiritual as the natures of the cases shall require;' it will be seen that the real object of the Statute of Appeals—though it recognises an appeal to the Crown in regard to the more secular side of ecclesiastical business—was not to hand over the decision of spiritual matters to the Crown, but to prevent appeals in regard to them being carried out of the kingdom.

Proof that this is so is to be found in the fact that—though there are plenty of cases affecting the civil side of Church matters adjudicated upon by the Court of Delegates, such, for instance, as questions of tithe or patronage; or again, such questions as testamentary and matrimonial causes, which up to very recent times were technically spiritual cases and outside the cognizance of the ordinary

Courts—there is, I believe, no single instance among the thousand and eighty cases brought before it, of the Court of Delegates having finally determined a strictly spiritual case, as we now understand the word, that is, a case of doctrine or ritual.

A long catena of authorities, legal and historical, may be cited on the same side. I will content myself by quoting, first, Lord Coke, a writer of weight from his position, and one by no means disposed to exaggerate the rights of the Church, who lays it down that, by the law of England, spiritual cases, strictly so called, are to be decided by the clergy in their Convocations, that is, in their Synods, *juxta canones et leges sanctæ ecclesiæ* ; next, the answer of eight out of the twelve Common Law Judges in Queen Anne's time, together with the Attorney and Solicitor General, who added the weight of their authority to enforce the principle that spiritual questions should be decided by spiritual authority, when they gave the following opinion on a case submitted to them by the Crown:

'We humbly lay before your Majesty that all our law books that speak of this subject, mention(ing) a jurisdiction in matters of heresy, and condemnation of heretics, as proper to be exercised in Convocation . . . and none of them that we find making any doubt thereof.'

Such was the opinion of the law; such, too, was the practice of English Sovereigns.

Elizabeth, by Royal Injunction, asserted that she 'neither doth nor ever will challenge any authority than that . . . which is and was of ancient time due to the Imperial Crown of this realm, that is, under God, to have rule over all manner of persons born within her realms . . . ecclesiastical or temporal . . . so as no other sovereign power shall or ought to have any superiority over them.'

In a message to the House of Commons, May 22, 1572, the Queen says: 'Her pleasure is that from henceforth no bills concerning religion shall be preferred or received into this House unless the same shall be first considered and liked by the clergy.' (Contrast this with the history of the Public Worship Regulation Act, by virtue of which Lord Penzance adjudicated in ecclesiastical matters.)

Charles I., in the Royal Declaration prefixed to the Thirty-nine Articles, restrains spiritual questions to spiritual arbitration. The words are as follows: 'If any difference arise . . . concerning the injunctions, canons, and other constitutions thereto (*i.e.* the Church) belonging, the clergy in their Convocation is to order and settle them.'

Lord Bacon—to cite three more authorities for the sake of their individual weight—speaking of questions touching the Law Divine, writes, that they should be 'left to the holy wisdom and spiritual discretion of the master builders and inferior builders in Christ's Church.'

Hooker, in the 'Ecclesiastical Polity' (iii. 359, 360), says: 'Of this most certain we are, that our laws do neither suffer a Spiritual Court to entertain those causes which by the law are civil, nor yet, if the matter be indeed spiritual, a mere Civil Court to give judgment of it.'

Jeremy Taylor declares, 'that the intrusion of lay Judges into spiritual arbitrations is an old heretical trick.'

While Lord Coke, who has been previously quoted, thus concludes the matter by stating that, 'certain it is that this kingdom hath been best governed, and peace and quiet preserved, when both parties, that is, when the Justices of the Temporal Courts and the Ecclesiastical Judges have kept themselves within their proper jurisdictions, without encroaching or usurping upon one another. And when

such encroachments or usurpations have been made, they have been the seeds of great trouble and inconvenience.'

It is hardly necessary to point out that there is all the difference in the world between the position here claimed for the Church—the assertion, that is, of the competence of the spiritualty of England to declare and interpret the law of the Church in all spiritual matters without foreign interference or the intermeddling of persons exterior to the spiritualty—and the claim now put forward by Courts like those of the Judicial Committee and of Lord Penzance to interpret that law themselves;—to usurp, that is, what the Statute of Henry VIII. declares to be the proper function of the clergy. And when we further remember that the chief author of the Act which finally transferred the authority of the Court of Delegates to the Privy Council—the late Lord Brougham—speaking in his place in Parliament, has told us, 'that he could not help feeling that the Judicial Committee had been framed without the expectation of (ecclesiastical) questions . . . being brought before it. It was created,' he said, 'for the consideration of a totally different class of cases'; when we remember the words of the then Bishop of London, who at the same time stated 'that the contingency of doctrinal matter coming before the new tribunal had occurred to no one,' it seems impossible to escape the conclusion, that in endeavouring to force upon the Church of England the authority of the Judicial Committee and the Courts subject to its jurisdiction, an attempt is being made to compel her to acknowledge a machinery for the decision of spiritual matters which can claim no sanction from the great Statutes of the Reformation Settlement.

Here then is the answer to the first point in this inquiry. The character of the existing Courts for the decision of spiritual matters is not only inconsistent with, but it

directly contradicts the arrangements contemplated by the Reformation Statutes.

Before, however, passing on to the next, let me endeavour to reply to three possible objections.

It may be said (1) that the Crown is the source of all jurisdiction, ecclesiastical as well as civil, 'and is in all causes and over all persons supreme'; (2) that all the objections raised against the Judicial Committee apply just as much to the old Court of Delegates; and (3) that whether the existing Courts be good or bad, constitutional or the reverse, they only interpret the law, they do not make it.

To the first objection I reply that all jurisdiction, in the sense in which that word is very commonly used, is not derived from the Crown, but only coercive jurisdiction. Spiritual jurisdiction, in the sense of spiritual authority, which alone is able to bind the conscience, is derived from a very different source. It is the ignoring of this double source of jurisdiction that lies at the root of so many of our present troubles.

In considering the limits of the jurisdiction of the Crown in ecclesiastical matters, two things—as Mr. Gladstone, in his Letter to the late Bishop Blomfield on the Royal Supremacy, has pointed out—must be kept in mind. The first is, that long before the Reformation the respective claims of Church and State had been adjusted upon this basis—that the civil power lent the support of law and the strong hand to the Church, while the Church promulgated her decrees under the sanction of the State. As a consequence, Church law and State law were presented to the people as a unity, and escaped the risk of losing by division or conflict. The second is connected with the strict meaning of the word jurisdiction, in reference to which an important distinction is to be observed. I refer

to the fact that jurisdiction is of two kinds—the one, which perhaps alone may be said to be strictly jurisdiction at all coercive in its operation, and, as such, the prerogative of the supreme power in the State; the other—which, in this sense, is improperly so called—being purely spiritual, bestowed upon the Church and her Bishops by Christ. Canonists bear witness to this distinction, and it was one which was not lost sight of in Henry VIII.'s reign, where it was said that the clergy of England have of the King all manner of jurisdiction and goods, save only such mere (in the sense of pure) spiritualities as were granted unto them by the Gospels and Holy Scripture. Church authority, then, which had been in the Church from the beginning, to govern, decide, adjudicate, was a true self-governing authority; but it was not properly, in strictness of speech, jurisdiction.

Now it will be found, with respect to the claims made by the Crown on the clergy in the sixteenth century, that they refer, first, to jurisdiction in its strict sense as coercive authority—that is, to any claim of any independent temporal authority, on the part of the clergy as against the Crown, and not to jurisdiction in the sense of spiritual authority at all.

The words of the Act 24 Henry VIII. cap. 12, already quoted, show this. The Preamble of that Act, declaring the principle of after enactments, first recites the independence of the Realm of England, and next declares that the King's jurisdiction (founded, you observe, on the independence of the Realm, and therefore a temporal authority) is, therefore, over all causes and persons. So 25 Henry VIII. c. 21, 'That your Grace's Realm, recognising no superiority under God, but only your Grace, hath been, and is, free from subjection to any man's laws, or to the observance of laws of any foreign prince or prelate.' Observe, again,

how what is implied is freedom from any foreign coercive power. And in the same sense is the Act 1 Elizabeth, which, alluding to the Acts of Henry, is entitled 'An Act to restore to the Crown the ancient jurisdiction over the estate, ecclesiastical and spiritual,' recites the objects of the Act to be 'to restore and unite to the imperial Crown of this Realm the ancient jurisdiction, authorities,' &c.

It would be too long to quote further Acts, but the sense of them may be summed up by saying that, while they assert the independence of the Realm of England and the supremacy of the Crown in all cases (an incident inseparable from the strict sense of jurisdiction), they no less strongly assert the authority, fitness, and usage of the spiritualty to administer the law spiritual, just as the temporalty were to administer the law temporal. Lord Coke—and his witness is the more valuable owing to his Erastian tendency—distinctly says that 'the laws ecclesiastical are to be administered in Ecclesiastical Courts, and by Ecclesiastical Judges, as the laws temporal are administered by Judges of the other part of the said body politic,' and 'that the Convocation of the clergy is a Court of which the jurisdiction is to deal with heresies, &c., and other mere spiritual and ecclesiastical causes.'

Upon a review, then, of the history of the Church from the time of the abolition of the Roman jurisdiction, it will not be difficult to ascertain—I quote from Mr. Gladstone—to what the Church of England, so far as the Crown is concerned, is committed, and to what she is not committed at all.

'She is most formally committed to placing the enactment of Canons under the restraint of prior permission and posterior confirmation by the Crown, but by a Crown of which the wearer is able to act for himself, and not through the medium or under the control of Ministers

virtually chosen by a majority in a Parliament of mixed belief—by a Crown of which the wearer had been wont to consult the Synods of the Church, and gave not only the strongest possible indication of his intention, but likewise the most solemn and formal promise of which the case admitted, to do so thereafter, by embodying in the preamble of a great Statute the formal declaration that the spiritualty of England, with its own constitutional organisation, was entirely competent to deal with all matters of ecclesiastical legislation, and was accustomed so to do just as the temporalty dealt with questions of temporal right.'

Need it be pointed out that, if this is the state of things to which the Church consented, it is not the state of things in which she finds herself? In the first place, the position of the Crown is altered; the Church, instead of dealing with the Crown personally, has to look to the majority of the House of Commons, as being, in fact, the Crown's capital adviser in respect to the exercise of the Royal Supremacy; and, in the next, the appellate jurisdiction of the Crown has been progressively altered, till it has been thrown entirely into lay hands.

We here touch the second objection which may be raised against the contention that the Judicial Committee has, under the arrangement sanctioned by the Reformation Statutes, no right to adjudicate in spiritual matters. I refer to the assertion that the Judicial Committee is, after all, substantially the same as the old Court of Delegates. That Court, it will be urged, was no doubt, up to the beginning of the last century, composed chiefly of Bishops and ecclesiastical lawyers, but the members of it were nominated by the Crown, and latterly it had more and more of the lay element introduced into it. Two remarks may be made with respect to such allegations.

The first is, that precedents derived from a time when Convocation was forcibly suppressed can have no weight as to what are the normal relations of the Church to the State; and, next, that the appellate jurisdiction of the Court of Delegates in strictly spiritual matters can scarcely be said ever to have lived; not more, I think, than three cases of a strictly spiritual character having been brought before it between 1609 and 1832.

But even so, a comparison of the Court of Delegates with that of the Judicial Committee of Privy Council will show what little similarity exists between the two Courts.

The Court of Delegates could consist only of Churchmen. As a matter of fact, it consisted chiefly of clergy and canonists. It was established not only on the distinct understanding that the king should adjudicate on Spirituals through the spiritualty, but that all the old canons and constitutions of the Church were to remain in force. What was accounted heresy by those old canons was to be accounted heresy still. Catholic consent was to be the standard of orthodoxy and practice. In a word, the Court or Courts to which the clergy submitted, in regard even to such matters as matrimonial and testamentary causes, were Courts to be administered by persons acquainted with, and themselves amenable to, the Church's law; they were to be tied to a certain standard which could not be altered without the consent of the clergy—for the only authority for making and altering the canons was admitted to rest in the clergy—and they were to be put in motion by a Sovereign, himself a member of the Church—as much bound by her rules as any other member of the Church—and acting solely on his own responsibility as a member of the Church. Contrast this with the Judicial Committee. That Court need not, with the single exception of the Lord Chancellor, consist of persons of any religion at all, much

less of Churchmen. The standards by which the old Courts were to be governed have been altered by Parliament against the will of the Church. I need only remind you again, as an illustration, of the marriage laws, which violate all the canons as to the marriage of divorced persons, but are nevertheless held to bind the Ecclesiastical Courts. The decisions of the Judicial Committee, instead of being bound by Catholic consent, and of being based upon the old principle of construction, that if the matter was doubtful it was to be decided by the practice of the Church and the ancient canons, openly disregard primitive tradition, set Church authority entirely on one side. I think that no one can pretend that this is what the Church of England submitted to; and I sum up the matter in the words of Mr. Keble,[1] which are all the more weighty from the fact of their conceding more than is necessary, 'that it by no means follows because the Church bound itself to the Court of Delegates, as it was then constituted, that she bound herself to the Court of Delegates if it should come to be materially altered, much less to any Court which might profess hereafter to succeed to the same functions, though differing most widely from the Reformation Court, both in its composition and in the authority by which it is constituted.' It does not follow, because the Church assented to a certain power in the Crown, advised by Churchmen and spiritual persons, that she has therefore acknowledged a supremacy virtually put into commission, and exercised by those whom a majority of the House of Commons shall see fit to entrust with it. 'Neither by oath or engagement,' says Mr. Keble, 'are we committed to such an arrangement. It is no part of the system to which the clergy are pledged.' And, far from its being their duty to submit to it, it is their

[1] See Pastoral Tracts in volume of *Occasional Papers and Reviews*, by John Keble, M.A., published by Messrs. Parker.

duty, so long as the Church Courts consider themselves bound by the decisions of the Judicial Committee, to treat them, so Mr. Keble puts it, 'as the Dissenters treated certain Acts of Parliament which fined them for not going to church—*i.e.* to disregard them, and to take the consequences.'

There remains the third objection, namely, that the existing Courts merely interpret the Church's law, but do not make it. The proposition sounds plausible, but it is impossible to assent to it, for though, in the words of the late Rev. J. W. Joyce—in his book on the Civil Power in its relation to the Church[1]—'the Court is not charged with authority to construct new doctrine, it is clear that the practical effect of its decisions may be to do so. . . . Everyone must know, in the words of the late Bishop of London, "how much of the law of the land has been made by the decisions of the Judges. Every decision of a point of doctrine by the Judicial Committee would form, as in other Courts, a precedent." Such precedents settle or modify the law, and at last become law themselves; and thus a Supreme Court of Justice may in some sense not only administer, but make laws.'

I may quote Mr. Keble to the same purpose: 'The Privy Council,' he says, 'does attempt to decide the doctrine of the Church of England; for,' and he gives an illustration which has since been verified, 'if it is found necessary to excommunicate a layman, no civil right at all being concerned, but only the right of admission to Holy Communion, this would be the Court to decide the matter finally.' The case of Jenkins *v.* Cook proves that Mr. Keble was right; but in truth, those who assert that the

[1] *The Civil Power in its Relation to the Church considered with special reference to the Court of Final Ecclesiastical Appeal in England.* By the Rev. James Wayland Joyce, M.A. (Rivingtons).

Privy Council does not decide doctrine do not believe what they say themselves. It will be remembered what passed when the late Bishop Blomfield proposed in the House of Lords that the same jurisdiction exercised by the Privy Council should be transferred to the Episcopate. It was at once replied that such a proposal was out of the question, for such a transfer would 'put the doctrine of the Church under the control of the Bishops.' In lay hands the power exercised by the Privy Council amounted to nothing; in those of the Bishops it would be everything. It does not require any great amount of intelligence to see that such statements cannot stand together. In truth, the question does not admit of discussion. Austin, in his 'Jurisprudence'—a book of authority on such points—lays down that 'judicial decisions are one of the sources of law'; and again, that judicial decisions erect what were opinions into law—*i.e.* create law, for 'courts of justice are a source of law, in so far as the law consists of judicial decisions binding upon subsequent Judges.'

Mr. Keble sums up the whole matter when he says, 'That a judicial sentence contrary to a prevailing interpretation, though its force be short of legislation, cannot be denied to be a practical change in the law;' an assertion which is endorsed by Mr. Gladstone, in his celebrated Letter to the Bishop of London, in the following words, 'That the licence of construction claimed by the Privy Council, although disclaiming in words the decision of doctrine, in effect leaves the whole range of Church doctrine and practice at the mercy of the Court.' The reading of the word 'not' into the Ornaments Rubric by the Judicial Committee puts the case in a nutshell.

The whole matter, then, stands thus: The Reformation Statutes provided that spiritual causes should be decided, as heretofore, by spiritual persons subject to the acknow-

ledgment that the *coercive* power of the Church Courts came from the Crown. Under existing circumstances, the most spiritual matters are decided, and the Church's Law interpreted, by secular persons, and, with the exception of two individuals, the Chancellor, and the Judge under the P.W.R.A., by persons not necessarily Christian.

I contrast all this with a proclamation of Queen Elizabeth, after she had been on the throne ten years; and I do so because it will not be denied that the authority of the State was never exercised with greater vigour than in her reign, and yet it is Elizabeth who emphatically asserts:—'She had neither claimed nor exerted,' so the proclamation ran, 'any other authority in the Church than had attached from immemorial time to the English Crown. The Crown challenged no superiority to define, decide, or determine any article or point of the Christian faith or religion, or to change any rite or ceremony before received in the Catholic Church. The Royal Supremacy in matters spiritual meant no more than this: that she, being by lawful succession Queen of England, all persons born in the Realm were subject to her, and to no other earthly ruler. . . . So far, and no further, the Crown of England claimed authority over the Church.' I fail to discover here any claim to decide spiritual cases before a civil tribunal, and ask, in the face of such testimony, which might be indefinitely multiplied, whether it can be seriously maintained that in resisting the Privy Council, and all Courts bound by its decisions, those who do so are resisting tribunals known to the Church of England, or can justly be accused either of rejecting the Reformation settlement or of disrespect to any authority which 'this Church and Realm hath received.'

And now let me turn to the future, and ask whether a frank return to the principles of the great Reformation Statutes is impossible. Archbishop Tait publicly stated

that our difficulties would be more easily met by a recurrence to them than in any other way; and surely, when it is once understood that those principles are now being ignored, when it is perceived that the Church of England is the only religious body in the Queen's dominions to which, in the words of Mr. Keble, the following privileges are expressly denied:—To interpret her own formularies and rules; to declare her own Doctrines; to confirm, vary, and repeat her own Canons; to grant or withhold her own Sacraments according to her own proper rule as a religious body—there is no Churchman who will hesitate for one instant to demand that our rights be restored to us.

It will be said that such rights are inconsistent with Establishment. We have only to carry our eyes across the Border, into Scotland, to see the falsity of the assertion. In Scotland the General Assembly of the Established Presbyterian body is absolutely independent of the civil Courts. That Assembly is an exclusively clerical body; for the elders, who, together with the ministers, compose it, are all, in theory, ordained persons, and have all been set apart with the laying-on of hands. The Assembly is absolutely supreme in all ecclesiastical matters in Scotland; and, to prove that I am not making an empty assertion, I will refer to a case that was brought before the Court of Session in Edinburgh on June 29, 1870. The case was this: A minister of the Established Church in Scotland was suspended by the Presbytery of Dunkeld for six months, during which time he was compelled to pay 55*l.* to his assistant for discharging the duties of the cure. The General Assembly, however, were not satisfied with the decision of the Presbytery, and, in May 1870, ordered the Presbytery to proceed to a fresh trial on the same charge. Upon this the minister prayed the Civil Courts to suspend the judgment of the Assembly, on the ground that

the Assembly had exceeded its jurisdiction. The Court of Session, however, held that the proceedings complained of, being within the exclusive jurisdiction of the Church Courts, it had no power to review them. The following were the decisions of the judges:—

'It appeared to the Lord Ordinary that the whole matter was a question of ecclesiastical law and procedure, of which it was the exclusive province of the General Assembly to judge, and with which the Court of Session had no right to interfere. If the Court were to do so it would simply be reviewing the proceedings of the supreme Ecclesiastical Court.

'*The Lord Justice Clerk:* Within their spiritual province the Church Courts are as supreme as we are within the civil, and as this is a matter relating to the discipline of the Church, and solely within the cognizance of the Church Courts, I think we have no power to interfere.

'*Lord Cowan:* I am of the same opinion. The Assembly is the supreme tribunal in ecclesiastical offences, whether attaching to the morality of ministers or to alleged heretical opinions. I repudiate the idea of a civil Court being entitled to overrule the deliverances of the Assembly in matters of that kind. It may be that incidentally and necessarily the civil interests of the clergyman may be affected. Every such judgment pronounced by the Assembly has necessarily that effect, but because the civil interests of the man found guilty of an offence may be affected, is that any reason for the Civil Courts interfering? By no means. The procedure having regard to offences cognizable by the Church Courts, and to be followed, on conviction, by ecclesiastical pains and penalties, the Church Courts had supreme and exclusive jurisdiction.

'*Lord Benholme:* Within their own department the

law of the land gives the Assembly an exclusive and final jurisdiction. The General Assembly is the supreme Ecclesiastical Court in Scotland.'

Now what is consistent with Establishment in Scotland cannot be inconsistent with Establishment in England. And, I ask, why is that amount of freedom to manage her own affairs to be denied to the Church of England which is freely granted to the Establishment in Scotland? It can only be because we do not ask for it. It is a moderate demand, it is a reasonable demand, it affects no one but ourselves, there are no reasonable arguments against it; and if, irrespective of party, we were to unite in demanding that the Church of England shall not be denied the rights which are freely conceded to other religious bodies in union with the State, it is hard to see how the demand could be refused.

I turn to the Report of the Royal Commission appointed to inquire into the constitution and working of the Ecclesiastical Courts published in 1883. It will be seen, if that Report is carefully examined, that the Report taken with the Appendices justifies the contention that the Appeal to the Crown in Chancery from the Ecclesiastical Courts, given by the statutes of Henry VIII. and Elizabeth, had no reference whatever to matters touching the Doctrine, Worship, and Spiritual discipline of the Church.

The Bishop of Oxford in the Historical Appendices contributed by him to the Report, the value of which can hardly be exaggerated, shows very clearly the secular nature of the suits adjudicated upon in the Ecclesiastical Courts. The main part of their business was civil, not religious. All questions of marriage and legitimacy, all questions of personal property and tithes, came within their cognizance. The jurisdiction claimed by them over the laity *pro salute animæ* was also of the widest description,

and was exercised through a machinery of a most extensive character. They took cognizance of offences against morals, good faith, and good behaviour. It is with cases of this kind that the records of the Consistorial Courts are filled.

The subject-matters of Appeals from them to Rome are all either disputed elections to Episcopal Sees, or matrimonial and testamentary causes, disputes relating to the authority of the Bishops and Abbots over Cathedral and Conventual Churches, disputes as to the construction of statutes or customs in Cathedrals, &c. On the other hand, there are no recorded cases of any appeal from them in cases of heresy. Such cases, if they came before the Courts at all, were either disposed of at once or referred to the personal jurisdiction of the Bishop or the Metropolitan. Usually, it would seem, they were decided summarily by the Bishop *in camera*, or by his Vicar-General; and when they could not be disposed of in this way, they were either brought before the Archbishop or deferred till the next sitting of Convocation, where they were finally decided, without any appeal from the decision of the Archbishop in Synod.

In the Historical Appendix No. II., contained in the Report, a long list is given of cases so tried, the great majority of which were determined either by the Archbishop, or by the Archbishop with other Bishops, or by the Archbishop in Convocation; and at the close of Historical Appendix No. I. the Bishop of Oxford sums up the matter by pointing out—

1. 'That there is no evidence to show that before the Reformation any appeal was allowed in suits for correction on points of doctrine or ritual.

2. 'That there is no instance of appeal to the Pope on a charge of heresy from the Provincial Courts.

3. 'That in the Statute of 25 Henry VIII. c. 19, no express mention is made of appeals on questions of doctrine and ritual, so as to give a new right of appeal on such points where it had not before existed; and that, as there was no custom of appealing on such points to the Pope, it is improbable that by this Act it was intended to allow an appeal on them to the King in Chancery—*i.e.* to the Court of Delegates. Further, that, as in the same Session of Parliament an Act was passed for the repression of heresy by other means, in which no provision for appeal of any kind is made, it is improbable that it was ever intended to apply the process before the High Court of Delegates to such questions.

4. 'That, notwithstanding the existence and activity of the Court of High Commission, the jurisdiction of the Diocesan and Provincial Courts for correction, &c., still subsisted, and was for all matters on which appeal was allowable subject to appeal to the Court of Delegates. Notwithstanding which, no evidence can be produced of any cause turning on matter of doctrine being carried by appeal from the Ecclesiastical Courts to the Delegates.

5. 'That on the abolition of the Court of High Commission, the Court of Delegates remained the only Supreme Court of final ecclesiastical judicature in England, and that, under these circumstances, it is found to have entertained appeals in which questions of doctrine are involved, perhaps without due consideration of the novelty of the practice, or of the importance of the principle involved. That notwithstanding this innovation, only seven causes which can be shown to have even remotely involved any question of doctrine were tried on appeal before the Delegates. In the first case sentence was given against the appellant; in five other cases the proceedings were discontinued before a final decision was given; and in the one remaining case the

Delegates varied the decree of the Provincial Court in a minor point, and confirmed the decree of the Diocesan Court from which the original defendant had appealed, he being the appellant also in recourse to the Delegates. From which it may be inferred, that in no case in which the law of the Church of England as touching doctrine was concerned are the Delegates known to have reversed the decision of the Provincial Courts, and that further, no sufficient ground has been established for regarding the Court of Delegates as a constitutional Court of Appeal on questions of doctrine.

6. 'That when the functions of the Court of Delegates were transferred to the Judicial Committee of Privy Council, there was no express intention to create a new Court of Appeal on doctrine or ritual, nor any provision made for the trying of such points by judges who had either spiritual authority or theological competence; but that owing to the infrequency of suits in which such points were involved, the transfer was made without any regard to such contingency.

7. 'That the appellate jurisdiction of the Judicial Committee of Privy Council having been brought about by no conscious act of the Legislature, and by no conscious acquiescence of the Church, but rather by a series of overlookings, and takings for granted, by the assumption of successive generations of lawyers, and the laches or want of foresight on the part of the clergy, the maintenance of the existing jurisdiction of the Judicial Committee of Privy Council, as a final tribunal of appeal in matters of doctrine and ritual, is not to be regarded as an essential part, or necessary historical consequence, of the Reformation settlement.'

I will merely add to this complete vindication of the objections which from time to time have been urged against

the jurisdiction claimed by the Judicial Committee in doctrinal and ritual matters, so far as that jurisdiction depends upon any right of appeal given to the Crown in Chancery, that, as was pointed out by Mr. Justice Phillimore, in his very lucid paper on the Report of the Commission read to the Church Congress at Reading—

'The Bishop had two officers, the Official Principal and the Vicar-General. The Official Principal heard causes and sat in court—he represents the secular side of the Bishop's jurisdiction. The Vicar-General had no court, but to him, when the Bishop did not interfere in person, not to the Official Principal, fell the correction of clerks. It does not appear that the legislation of Henry VIII. gave any appeal from the Vicar-General, as it certainly did not from the Provincial Synod. Further, as the Bishop of Oxford shows, the idea of there being a regular system of appeal in trials for spiritual crime was apparently as unknown at the time of Henry's legislation as it was, and still is, in trials for temporal crime. Certainly there was no appeal for an unsuccessful prosecutor.'

I turn now to the claims alleged to belong to the Crown by virtue of the general provisions of such statutes as 26 Henry VIII. c. 1, and 1 Eliz. c. 1, under which the Court of High Commission was created, and which conferred upon the Sovereign such jurisdiction as 'hath heretofore been, or may lawfully be, exercised or used for the visitation of the Ecclesiastical State and persons, and for reformation, order, and correction of the same, and of all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities.' It has been contended that here at least is ample justification for the jurisdiction of such a Court of Final Appeal as the Judicial Committee in Spiritual matters. The Report of the Commission, however, taken as a whole, shows that whatever claims may have been made by

Henry VIII. and the other Tudor Sovereigns to authorise and enforce the proper exercise of ecclesiastical authority, they do not claim to be the source of all authority, but merely to license the employment of that portion of it which is over and besides what is given by the Word of Christ to the Bishops. 'It may be questioned,' to quote again from Appendix No. I. of the Report, whether Henry 'ever goes any further, and extends his area of authorisation and enforcement within that given by the Word of Christ to the Bishops, coming, that is, between Christ and His Ministers, and assuming that their authority passes through him.'

In point of fact, however, a discussion of the exact nature of the claims in regard to ecclesiastical jurisdiction made by Henry VIII. has no very great practical importance. First, because the Act of Elizabeth, which restored to the Crown in modified form the visitatorial and corrective authority recognised by 26 Henry VIII. c. 1, as belonging to the supremacy, did not revive the indefinite claims attached to the title of Supreme Head. Secondly, because, even in regard to such visitatorial and corrective power, the High Commission Court through which it was exercised having been definitely abolished, no argument can be founded upon the practice of that Court for the exercise of a similar jurisdiction on the part of the Crown at the present day. Thirdly, because the jurisdiction claimed by Henry, or recognised by the Acts in question as belonging to the Sovereign, was personal to the King in his character of a Christian prince, a member of the Catholic Church, amenable to her laws, and liable, with the humblest of his subjects, to her censures if he abused his right, but, and so long as he acted up to his obligations, the protector of the Church, the ruler consecrated by God to see that all his subjects in their respective positions, whether as members

of the Church or of the State, discharged their appointed duties.

What place, it may be asked (as is well brought out in the evidence of the late Dean of St. Paul's), can a jurisdiction founded upon such claims as these have in a Parliamentary system of government like our own? To claim for the Crown of England, under existing circumstances, the prerogatives of a Theodosius, a Charlemagne, or a Louis IX., is as great an anachronism as to insist upon the maintenance of the wager of battle.

When, in the place of 'the godly prince,' God's vicegerent upon earth, personally ruling all estates of men, we are governed by an impersonal Parliament composed of men of all creeds or none, is it not idle to endeavour to maintain in regard to ecclesiastical matters certain portions of the mediæval system which have no application to present times, and have long since been discarded in all temporal and civil affairs?

It is a matter of great indifference what Courts may decide all matters other than those in respect to which the Church derives her authority direct from Christ. What authority settles all secular questions—*e.g.* those affecting the Church's property, is a matter of secondary importance.

What must be insisted upon is, that Spiritual things—*i.e.* all matters affecting the doctrine of the Church, the administration of the Sacraments, and the worship of the Church—shall be decided by the Church herself. No Christian can be content to see the authority given by Christ to the Episcopate left in the hands of a committee of lawyers. The Church cannot surrender her rights in such matters. If at any time her officers have professed to surrender them, it was an act on their part *ultra vires.*

'No human convention,' as Rosmini, in his celebrated book 'The Five Wounds of the Church,' edited by Canon

Liddon, well says, 'can take away the Divine and immutable rights of the Church, nor fetter the legislative power given her by Jesus Christ.'

I will conclude with some observations in regard to the actual Recommendations of the Commissioners for the reconstruction of the existing Courts, which are equally applicable to the Draft Bill now submitted by the Archbishops for consideration. Those Recommendations, as far as the reconstitution of the Bishops' and Archbishops' Courts is concerned, are a substantial attempt to revive the spiritual character of the Courts in question. It is impossible, however, to use the same language in regard to the proposed reconstruction of the Court of Final Appeal. The Report shows that cases affecting the Doctrine and Worship of the Church were not contemplated by the legislation which gave an appellate jurisdiction from the Ecclesiastical Courts to the Crown, that the existing Court of Final Appeal grew out of a mistaken conception of the purport of the Reformation Statutes, out of a gloss put upon them more than a century after, and that the Delegates got their jurisdiction in matters touching the Doctrine and Worship of the Church by a mistake, just as the Privy Council did later; yet the proposed Court of Final Appeal continues the mistake, and recommends an appeal in all cases from the jurisdiction of the Metropolitan to a body of lay judges appointed by the Crown. The Court so constituted is to be as wholly secular as the Courts of the Diocese and Province are intended to be wholly Spiritual; and yet it is to have power to overrule, not only in temporal, but in spiritual conclusions, all these Spiritual Courts. It is true that under the Draft Bill a reference is to be made to the Archbishop and Bishops of the Province, in order to ascertain what the mind of the Church may be upon any disputed point of doctrine or ceremonial, but the Court is

not to be bound by the opinion of the Episcopate when it has been ascertained. It is therefore quite possible, under the Draft Bill, that the same Metropolitan who has already pronounced a clerk to be guilty of no offence, may be compelled to excommunicate, deprive, or suspend one whom he has declared to be innocent. It is no answer to say that this is an extreme case which would never occur, since no Archbishop worthy of his position as Spiritual Head under Christ of the Church of England could be found so to violate his conscience, and give a decision contrary to what he knew to be just; the question at the present moment is not how we may hope such a scheme would perhaps actually work if it became law, but whether it recognises the inherent rights of the Church. This I am compelled to say the Draft Bill fails to do.

It is a satisfaction to know, from the speech of the Archbishop of Canterbury at the opening of Convocation on February 1, that the Draft Bill as it stands is not to be taken as representing the mind of the Episcopate on this subject.

It would indeed be a serious disaster if the Episcopate should appear to be responsible for any Bill that should seem to imply that the decisions on spiritual matters of the Provincial Courts of Canterbury and York could be reversed on appeal by any Committee of Privy Council. Peace cannot be secured by a sacrifice of principle, and dealing with so serious a matter as the spiritual discipline of the Kingdom of Christ, with an opportunity which, if now misused, may never occur again, of freeing the exercise of that discipline from the difficulties with which it is encompassed, it is a duty from which we cannot shrink to state plainly that we can see no hope for the peace and safety of the Church in any reconstruction of the present Court of Final Appeal which leaves the final decision of matters

affecting the doctrine and ceremonial of the Church in the hands of any Court other than one consisting of Bishops representing the authority of the Episcopate of the two provinces.

Recognising the existing Common Law right of the Crown to prevent through the temporal Courts, by mandamus, prohibition, &c., excess of jurisdiction or neglect of duty by the Ecclesiastical Courts, any scheme such as that contemplated by the Draft Bill should aim at a re-constitution of the Diocesan Court very much on the lines suggested by the Draft Bill. An appeal from the Diocesan to the Provincial Court should be provided, but I would venture to suggest that the Provincial Court, instead of being constituted as under the Draft Bill, should be strengthened by being made really representative of the Province. This would be secured if the Court consisted of the Archbishop, and Bishops chosen by the Provincial Episcopate, assisted by such assessors, legal, theological, or other, as might be deemed desirable.

An appeal from the Provincial Court should be not, as proposed by the Draft Bill, to a Committee of Privy Council with power to reverse the decisions of the Provincial Courts, but to some Court representing the authority of the Archbishops and Bishops of both Provinces.

By 29 Henry VIII. cap. 12, it was enacted that the final appeal should, in certain cases, be to the Upper House of the Convocation of Canterbury. The General Assembly is supreme in ecclesiastical matters in Scotland. What the General Assembly is to the Scotch Establishment, that the two Convocations are to the Church of England. Let Convocation, then, be restored to its rightful position. Let the Upper Houses of both Convocations, after conferring with and taking the advice of the presbyters assembled in the Lower Houses, and after hearing any representations

the Lay Houses of both Provinces may desire to make on any subject that may arise, be made the final judges in all matters affecting doctrine, ceremonial, and discipline. Let the Provincial Courts of Canterbury and York be cleared of any difficulties that now beset them (entailing the repeal of the Public Worship Regulation Act). Let the appeal from those Courts be to the Bishops generally, with whom it should rest, after conferring with and taking the advice of the presbyters composing the Lower Houses of both Convocations, to state the Doctrine, Ceremonial, and Discipline of the Church. Or, if it facilitated matters, that no change should be made in the form of the present arrangements, the same result would be practically secured by substituting new rules for those now constituting the present assessors of the Final Court of Appeal, and constituting instead the whole Episcopate the assessors of the Court. In any appeal from the Provincial Courts, let the matter be at once referred by the Final Court of Appeal to the assessors—*i.e.* the Episcopate—who should sit separately, under the presidency of the Archbishop of Canterbury. Let the report of the Episcopate, after conference with their presbyters, be made to the Privy Council within a given time. In most cases, there can be little doubt, the Privy Council would accept the decision of the spiritualty, and the matter, so far as the particular case in question was concerned, would be settled; but if not, let the decision of the Episcopate be final so far as Spirituals are concerned, which, following the analogy of the Scotch Establishment, should include the use of the fabric of the Church,[1] leaving the Privy Council to decide

[1] In Scotland—in the case of the Established Church—the Parish Kirk is not included in temporalities. The decisions of the Civil Courts determine the distribution of funds, but are inoperative *quoad sacra*, which term includes the use of the building.

as it sees fit in regard to temporalities. For the working of such an arrangement the Bishops would be bound to consult a Joint Committee of the Lower Houses of the Convocations of both Provinces, who should have power to call to their assistance any persons well acquainted with Canon Law they pleased. Such Committee should make a public report to the Episcopate, in order that the mind of the Episcopate might be properly informed before making their answer to the Judicial Committee.

The one essential thing is that the Episcopate should be ultimately responsible for the government of the Church, and not the Privy Council. As spiritual rulers governing the Church, according to her own rules and canons, every obedience is due to the Bishops; as State officials enforcing the decisions of the Judicial Committee, they can claim none. To render, therefore, any reform of the existing Courts satisfactory, it is absolutely necessary that the matters now under dispute, if they are to be reconsidered, should be reconsidered entirely apart from recent decisions. This is indispensable.

No one can desire Disestablishment less than I do. I appreciate its evils as keenly as anyone—but it is possible to pay too heavy a price for existing advantages. It is possible—it was a truth evident even to the Roman poet—'*propter vitam vivendi perdere causas*;' and that point will have been reached if the Church is to be compelled to submit to the Judicial Committee as the supreme authority in all matters relating to doctrine, ceremonial, and discipline.

There are still two alternatives open to the rulers of the Church. They may attempt to enforce the existing state of things by permitting those clergy who cannot acknowledge the authority in spiritual matters of the Judicial Committee

and the Courts subject to its jurisdiction, and who are unable to conform to recent judgments, to be deprived. If so, I am firmly persuaded that the life which is stirring in the Church of England will vindicate itself in other ways, and that, in the long run, it will not be the clergy directly attacked who will suffer the most. History will then have to relate that a great Church, at the very moment when, more than ever before, it was rising up to a sense of its responsibilities, was wrecked, not indeed, as has been said, for the sake of a Vestment, or for the sake of Incense, or even for that of Reservation, but because its rulers had been incapable of perceiving the time of its visitation. It will be the old story of Reform refused till it is too late, and Revolution, which might otherwise have been averted, rendered inevitable.

I am, my dear Lord, with every expression of my respect, and with my grateful thanks for the many kindnesses I have now for so many years received at your hands,

Yours most sincerely,

HALIFAX.

THE RT. REV. THE LORD BISHOP OF WINCHESTER.

P.S.—I append to this letter a copy of the Bill introduced by the Bishop of London (Bishop Blomfield) in 1850, for the reform of the Court of Final Appeal, together with the speeches made by the Bishop of London and the Archbishop of Canterbury (Archbishop Sumner), as well as extracts from the speech of Lord Stanley (afterwards Lord Derby), on the introduction of the measure.

It will be seen that the Bill in question, which had the support of nearly the whole Episcopate, emphatically asserts the inherent right of the spiritualty to hear and decide spiritual causes.

A Bill

INTITULED

An Act to amend the Law with reference to the Administration of Justice in Her Majesty's Privy Council on Appeal from the Ecclesiastical Courts.

WHEREAS it is expedient to amend the Law with reference to the Administration of Justice in Her Majesty's Privy Council, so far as relates to Questions of Religious Doctrine, arising in Appeals from the Ecclesiastical Courts of England: Be it therefore enacted by the Queen's most excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That in all cases of Appeals which may be hereafter made to Her Majesty in Council from any Ecclesiastical Court of England, if and so often as it shall be necessary to determine any question of the doctrine or tenets of the Church of this Realm, arising either in a criminal or civil suit, it shall be lawful for the Judicial Committee of Her Majesty's Privy Council, and they are hereby required, to refer such question of doctrine to the Archbishops and Bishops of the Provinces of Canterbury and York, in the manner hereinafter provided; and the opinion of the said Archbishops and Bishops upon such question, when duly certified to the said Judicial Committee in the manner hereinafter provided, shall be binding and conclusive for the purposes of the Appeal in which such reference shall be made, and shall be adopted and acted upon by the said Judicial Committee, so far as may be necessary for the decision of the matter under Appeal, and shall be specially reported by the said Judicial Committee to Her Majesty in Council, together with their advice to Her Majesty upon such Appeal.

II. And be it enacted, That every such reference shall be made in the form of a case, to be stated in writing by the said Judicial Committee, for the opinion of the said Archbishops and Bishops, and to be transmitted to the Archbishop of Canterbury in such manner as the said Judicial Committee shall direct.

III. And be it enacted, That upon receiving any such case the Archbishop of Canterbury shall, with all convenient speed, convene a meeting of the Archbishops and Bishops of the Provinces of Canterbury and York, to be held at such time and place as he shall appoint, by a summons in writing, under his hand and seal, to be sent by the general post to every such Archbishop and Bishop; and such meeting shall be held accordingly, at the time and place so appointed, with power to adjourn the same from time to time as may be found expedient.

IV. And be it enacted, That every such meeting of Archbishops and Bishops shall be a Court for the purpose of considering the question so referred to them, and certifying their opinion thereon; and at every such Court the Archbishop or Bishop who is first in rank of those present shall preside.

V. And be it enacted, That notice of the time and place of holding every such Court shall be given by the Archbishop of Canterbury to the parties or proctors of the parties in the cause or matter under Appeal; and such parties shall be entitled, if they think fit, to be heard by themselves, or by such persons (not exceeding two on each side) as they may depute for that purpose, before such Court; and the said Court shall, after such hearing, or without such hearing if the parties shall not desire to be heard, consider and decide upon the question so referred to them, and in case of any difference such question shall be decided according to the opinion of the majority of the Archbishops and Bishops present.

VI. And be it enacted, That the opinion of the said Archbishops and Bishops upon every case so referred to them, shall be certified to the said Judicial Committee in writing under the hands of the Archbishops and Bishops present at such meeting, or of such of the said Archbishops and Bishops as shall concur in such opinion; and every such certificate shall state the names of all the Archbishops and Bishops present at such meeting.

VII. And be it enacted, That in case of any vacancy of the

See of Canterbury, the Archbishop of York, or (in case of concurring vacancies of both the Sees of Canterbury and York) the senior in rank of the Bishops of England for the time being, shall be substituted for and shall stand in the place of the Archbishop of Canterbury for all the purposes of this Act.

VIII. Provided always, and be it enacted, That in case any Archbishop or Bishop shall be a party to the suit in which any such question as aforesaid shall arise, or shall be patron of any benefice or office the title to which shall be in question in such suit, or which in any event of such suit may be liable to become or be declared vacant, then and in every such case such Archbishop or Bishop shall not be at liberty to attend any such Court as aforesaid, or to take any part in the deliberations or business thereof.

HOUSE OF LORDS.—*Tuesday, February* 5, 1850.

PROCEEDINGS AGAINST CLERGY BILL.

The Bishop of London moved the first reading of a Bill to regulate proceedings against clergymen accused of holding heresy and false doctrine. This Bill contained a clause to which he wished to call the attention of all their Lordships, and particularly of the learned Lord on the woolsack, before it underwent a second reading. It related to the erection of a new court of appeal in all suits against clergymen for heresy and false doctrine. The ultimate appeal in such cases was formerly to the High Court of Delegates, but it was found to act inconveniently, as the delay and expense of the proceedings were very great; it was therefore thought fit to substitute for the Court of Delegates the Judicial Committee of the Privy Council. That tribunal, however, was not a proper one in questions of Church discipline, and was evidently not within the contemplation of those who had constituted it. But it had been found that the Judicial Committee of the Privy Council, of which he desired to speak with the utmost respect, as now constituted, was not a suitable tribunal for the decision of such questions. With regard to appeals under the Clergy Discipline Act, no objection could be taken to the Judicial Committee of the Privy Council; but with respect to the discussion of questions affect-

ing matters of religion, it was quite clear that the Judicial Committee of the Privy Council was not the most fitting tribunal. It was not a clergy tribunal; and at this moment a great number both of the clergy and the laity of the Church felt their consciences burdened by the fact of questions of heresy and false doctrine being ultimately referred to such a tribunal.

The ARCHBISHOP OF CANTERBURY expressed his concurrence in the observations which had fallen from his right rev. friend the Bishop of London, and hoped that his proposition for a new tribunal would meet with the support of their Lordships, and trusted that the Bill for its erection would be carried into law during the present Session. The present state of the law on the doctrine and discipline of the Church was acknowledged to be excessively defective; and he must say that it was chiefly owing to the defective constitution of the Court of Appeal that the Church now stood in a position of some difficulty. It could never be satisfactory that questions relating to the doctrines and discipline of the Church should be submitted to a tribunal of laymen. They ought to be submitted to a tribunal of ecclesiastics, and such would be the constitution of the tribunal proposed by the present Bill.

Monday, June 3, 1850.

APPEALS TO THE PRIVY COUNCIL FROM THE ECCLESIASTICAL COURTS (MATTERS OF DOCTRINE) BILL.

Order of the Day for the Second Reading read.

The BISHOP OF LONDON: I rise to move your Lordships to give a second reading to a Bill for amending the law with reference to the administration of justice in Her Majesty's Privy Council in appeal from the Ecclesiastical Courts; and I do so under an almost overpowering sense of the difficulty of the task which I have undertaken, and of my own inability to perform it in a manner at all adequate to its importance—its importance, my Lords, with reference to the consequences which are likely to follow from your Lordships' reception or rejection of the measure. My Lords, I am not apt to indulge overstrained or extravagant feelings of hope or fear, nor am I accustomed to employ exaggerated language in expressing them; but I do assure your Lordships, in the words of truth and soberness, that

I believe it to be impossible to overrate the momentous consequence of the issues which hang upon that alternative. I will not now describe them more particularly. It is enough to say that they involve not only the peace, but the integrity of the Church of this Empire. I allude to them now, only for the purpose of showing to your Lordships why it is that I approach this question with fear and trembling, under a painful apprehension lest the sacred and important interest which it involves should suffer detriment from the injudicious arguments or feeble reasoning of its advocate. But, my Lords, I feel at the same time that just measure of confidence which ought to be inspired by a settled conviction that the cause which I have undertaken to plead is substantially the cause of justice and truth, and that whatever may be the measure of success which will now attend it, it is a cause which must ultimately prevail. We contend, my Lords, for a great fundamental principle. We may possibly suffer a disappointment, but we shall not be disheartened; we may be perplexed, but not in despair.

My Lords, I am so deeply impressed with the importance of the duty which I have to perform, and so fearful of omitting any argument which might be urged in favour of the measure which I desire to recommend, that I may perhaps be led to trespass upon your Lordships' patience at somewhat greater length than it is my wont to do. If such should be the case, I must crave your Lordships' indulgence. For my own sake I will study all practicable brevity, for it is not without difficulty that I now stand to address your Lordships. But if I should be forced to occupy a larger portion of your time than it may be convenient or agreeable to your Lordships to devote to me, I must entreat your indulgence in consideration both of the great importance of the subject, and of the peculiar circumstances under which I address you. For, my Lords, it is a difficulty of a peculiar kind which embarrasses me. I must state it fairly and frankly, and I hope so to state it as not to be wanting in the respect due to your Lordships, nor so as to give any just cause of offence. But the truth is, my Lords, that the subject which I have to bring before you is one with which your Lordships are not so familiar as I could wish you were.

I have to invite your Lordships' most serious and earnest consideration of a question which, I fear, is far less interesting

to you than the ordinary topics which engage your attention in this House. I have to awaken, if possible, a new set of thoughts and feelings, and to enlist them in favour of a measure which has none of the attractions of party interests or political affections. I have to persuade you—would I could hope to succeed in the attempt!—to lay aside for a time your everyday habits of thought as relating merely to the concerns of civil government, and to think and act in your character of members of that great spiritual polity to which you are bound by ties of duty as sacred and as stringent as those by which we, who are its ministers, are bound, although the duties which you owe to it be not all of them the same in kind. But, my Lords, let me not be misunderstood. Do not imagine that I desire you to put out of sight for an instant, while legislating for the Church, its relations to the State, nor the mutual claims and duties of the two. On the contrary, it is because I hold it to be essential to the well-being of the State that the Church should be enabled to discharge its own proper functions without let or hindrance, and that the one should forbear from invading the legitimate province of the other, that I now earnestly entreat your Lordships to direct your attention more closely and thoughtfully than you are commonly required to do, to the peculiar nature of those functions—the functions which belong to the Church, as the keeper and teacher of God's truth.

Before I proceed to submit to your Lordships some reasons in favour of the Bill, I wish to remove some objections which may possibly be made. It may be said—I do not suppose that it will—but it may, perhaps, be said that this Bill has had its origin in the feeling excited by a recent judgment of the Judicial Committee of the Privy Council, in a case too well known to make a more particular description necessary. And undoubtedly, my Lords, it must be admitted that the very great importance of that judgment, and the conflict of opinions and feelings to which it has given rise, have forced us to a nearer and more critical examination of the question relating to a court of appeal in cases of false doctrine, and have imposed upon us the duty of endeavouring to devise some modification of the existing tribunal, which might remove what are very generally considered to be grave objections to its present form. But the necessity of some change in this department of our ecclesiastical

jurisprudence was felt long before the recent appeal, at a time when the probability of such an appeal was not in contemplation. It is only surprising that it was not clearly perceived at the time when the Judicial Committee was substituted for the old Court of Delegates. But no such necessity was then alluded to; the reason of which, I suppose, was this: that appeals to that court in suits involving questions of doctrine had been so exceedingly rare—not more than three or four from the first institution of that court—that the contingency of such an appeal came into no one's mind; and as to all other kinds of appeal in ecclesiastical suits, the Judicial Committee appears to be an unobjectionable tribunal, with one exception only, namely, that its members are not necessarily, as they ought to be, members of the Church of England.

In the Bill which I had the honour of presenting to your Lordships in 1847 an important change was proposed in the court of ultimate appeal in cases of false doctrine, or rather the substitution of an entirely new court for the Judicial Committee of the Privy Council, and that proposition was assented to by the Select Committee to whom your Lordships referred the Bill. That committee included all the Peers who had filled high legal offices, except, I believe, the noble and learned Lord who then filled with so much honour to himself and so much advantage to the country the office of Chief Justice of the Queen's Bench. Amongst them certainly was the noble and learned Lord who now discharges with so much ability the duties of that high office. The clause relating to a new court of appeal was carefully considered, and finally assented to by the whole of the Select Committee. The only objection hinted at was a doubt whether it would be such a court as could work for want of the necessary machinery. It having been found impossible to carry the Bill through Parliament that session, it was not pressed to a second reading; but the same Bill, as amended by the Select Committee, was reintroduced in the sessions of 1848, 1849, and in both years, owing to various causes of delay, was suffered to remain in suspense. A Bill with the same object was read a first time early in the present session, containing a clause which provided for the erection of a somewhat different Court of Appeal. That clause had been framed in compliance with the suggestion of some

eminent persons, whose opinions were entitled to my respect. But finding that many persons did not consider it to be so satisfactory as could be wished, I thought it my duty to refer the subject to my right rev. brethren, whom the most rev. Primate, at my request, called together for the purpose of considering it.

The result of our deliberation was that it would be better to look at the question of a Court of Appeal by itself, and to make it the subject of a distinct and substantive Bill, seeing that the principle it involves is regarded by the clergy in general as of so great importance as to throw into the shade all other measures for the regulation of Church discipline. The question was carefully and calmly considered by us at several meetings, attended by twenty-five out of the twenty-seven Bishops of England and Wales, and the result was an almost unanimous agreement as to the propriety of introducing into your Lordships' House the Bill now before you. I do not say that we were quite unanimous, or that all of those who agreed to the introduction of this Bill were entirely of one mind as to its provisions; but any difference of opinion which prevailed related rather to the details of the Bill than to its general principle, and the very few who withheld their approval of its introduction did so, not so much from any objection to the measure itself as from a doubt as to the expediency of bringing it forward without having first ascertained that it would have the support of Her Majesty's Government. Some of my right rev. brethren thought that the Bill would require, or admit of, some modification; and if it should be suffered to go into Committee I shall be ready to pay the most respectful attention to any suggestions for that purpose, provided that they do not materially interfere with the essential principle of the Bill.

My Lords, I have said enough to prove that the proposal for modifying the existing Court of Appeal is not the offspring of recent excitement, but had its origin in an opinion, long entertained, that some change was absolutely necessary in the constitution of that court as a court of ultimate appeal in cases of false doctrine.

Another objection which may possibly be made to this Bill I deem it necessary to meet by anticipation as being one of far

greater importance, but, as it appears to me, not less easily removed than the former, namely, that it interferes with the Royal Supremacy. And yet I can hardly think that such an objection will be seriously urged against the present Bill when no demur was made on that ground by those who were most competent to discern such a fault in the Bill of 1847, the provisions of which, as it seems to me, were far more open to the objection. If, indeed, my Lords, that objection could be substantiated, if it could be proved that this Bill went to interfere with the Royal Supremacy, properly understood, I should at once desist from urging your Lordships to give it a second reading.

My Lords, I am not one of those who think that the Royal Supremacy in matters ecclesiastical is an intolerable burden on the Church, in principle at least, whatever it may be in practice. It was not only acknowledged, but gladly resorted to, by the early Church. The history of the Councils abounds in examples. I regard it, not as an inevitable evil, but as a substantial good, a protection against foreign domination and spiritual tyranny, and no unimportant security even for civil liberty. It is a prerogative of the Sovereign, not resting on the ground of any recent or new-fangled claim, but a jewel in the ancient Crown of this Realm, plucked from it for a time by a foreign and intrusive Power, and transplanted to his own tiara, but reasserted to its rightful owner by the unanimous determination of the spiritualty and temporalty just before the Reformation. It is, in truth, that just and necessary prerogative which, as our Articles express it, 'we see to have been given always to all godly princes in Holy Scriptures by God Himself, that they should rule all estates and degrees committed to their charge by God, whether they be ecclesiastical or temporal, and restrain with the civil sword the stubborn and evil-doer.'

But this supremacy of jurisdiction, my Lords, is to be exercised by the Sovereign in things ecclesiastical, as it is in things temporal, by means of duly constituted Courts. Our Monarch is supreme Governor in all spiritual and ecclesiastical things, as in all temporal causes and things; in the latter by means of judicial tribunals, established either by common law (which presupposes the universal consent of the nation), or by statute law, which implies such consent given through its organ,

the Parliament; in the former, by means of Courts established either by ancient custom in the Church (which supposes an original Canonical authority), or by the Crown, with the assent of the Church's Parliament, its Convocation. The Sovereign, then, is supreme Governor, in causes spiritual, under precisely the same restrictions as in causes temporal.

Whatever court, therefore, legally constituted, is the Queen's Court is a means whereby the Royal Supremacy is exercised and cannot be said to infringe it. The Church, indeed, may have some reason to complain of an ecclesiastical tribunal which is established without its consent given in Convocation; but the Sovereign can have none on the score of the supremacy.

But one great recommendation of this present Bill, as compared with those to which I have alluded, is that it does not go to substitute a new Court for that which already exists, but only directs a particular course of proceedings in certain specified cases of a very peculiar nature, requiring a peculiar provision. I will now proceed, my Lords, with all practicable brevity, to trace the history of that Court, and to show how there has been a gradual and almost unnoticed departure from what I think may properly be called constitutional principles.

The first Statute respecting Appeals is that of 24 Hen. VIII. c. 12 (1532), which relates only to appeals in causes of wills, matrimony, divorce, tithes, oblations, and offerings. It is deserving of observation that this Statute, which refers in its preamble to the prerogative of the Crown, as supreme in its authority, to render justice in all causes, temporal or spiritual, expressly recognises the authority of that part of the body politic called the Spiritualty— as 'sufficient and meet of itself to determine all doubts, when any cause of the law divine happens to come in question, or of spiritual learning.' It makes appeals to the Archbishops' Courts final, in the causes to which it relates, except where the King is concerned, and then the appeal is directed to be made to the Upper House of Convocation, whose decision is to be conclusive.

In the following year (1533) the Statute 25 Hen. VIII. c. 19 was passed, which enacted, that 'for lack of justice in any of the Courts of the Archbishops of this realm,' an appeal should lie to the King in Chancery, and that, upon every such appeal,

the Crown should appoint delegates to hear and definitely determine the cause. Afterwards, however, in virtue of the prerogative, the Crown was considered to have the power of issuing a Commission of Review, for the purpose of revising the judgment of the delegates. This statute determined the course of appeals without any reference to the Royal Supremacy.

The Statute 26 Hen. VIII. c. 1 declared the King to be supreme head on earth of the Church of England, and gave him authority to 'visit, repress, and correct errors, heresies, and abuses which by any manner of spiritual authority might lawfully be reformed.' This statute was repealed in Queen Mary's time, and was never revived. But the Statute 1 Eliz. c. 1 gave a like power to the Queen; and it also gave her what the former statute had not given to the Crown—the means of exercising that power by the High Commission Court, afterwards made an instrument of great oppression and cruelty, and finally and deservedly abolished by the 16 Car. I. c. 11. But inasmuch as this court possessed not an appellate but an original jurisdiction, the ancient appellate jurisdiction of the Court of Delegates remained in force, having been in the first instance established by the Legislature, independently of the Royal Supremacy, and before that supremacy had been clothed by the statute law with any jurisdiction. In process of time the Court of Delegates fell into disrepute, from causes which the noble and learned Lord opposite (Lord Brougham) had pointed out, when at an earlier period of the Session I touched upon the question of a new court of appeal. The Statute of 2 & 3 William IV. c. 92 abolished that court, and directed appeals to be carried to the King in Council, and that no commission of review should in future be granted.

In the following year an Act was passed constituting a Committee of the Privy Council, consisting of certain specified Members of the Council, to whom the King might from time to time, by appointment, or his sign-manual, add any other two Privy Councillors, to hear all appeals which might be brought before his Majesty in Council, and to make a report or recommendation thereon to his Majesty in Council, for his decision thereon.

It is now, my Lords, my duty, a delicate and painful duty, but clearly necessary to the right performance of my task, to

point out what I consider to be the principal objections to the existing Court of Appeal. It is a painful and delicate duty, because I speak in the presence of some of those distinguished persons who are members of that court, for whom individually I feel the sincerest respect. No person is more thoroughly impressed than I am with a conviction, that as Judges, in all matters relating to the administration of the law, they perform their duty in the most admirable manner. My objection is rather to the principle on which that court is constituted than to the mode in which its members discharge their judicial functions. I am bound to say, that, as far as my own observation extends, and judging from the reports of others, there can hardly be a more satisfactory tribunal of ultimate appeal, in all cases but those which involve a question of purely spiritual discipline, than the Judicial Committee of the Privy Council as at present constituted. In all matters requiring judicial acuteness and calmness, impartiality and firmness, for the discovery of the truth of facts, and for the explanation and application of the law, nothing more is to be desired. It is only when questions of doctrine arise, and points of faith are to be determined, that I object to that tribunal as incompetent; it is competent to decide all questions of ecclesiastical law but not matters purely spiritual, involving questions of divine truth; for this office it is not properly qualified with reference either to the Church's original constitution, or to the personal qualifications of the Judges.

And here, before I proceed to examine that question, I will venture to state generally what, in my opinion, are the objects which the State and the Church may be supposed to have in view in constituting ecclesiastical tribunals. So long as these objects are steadily kept in view by both parties, there is no ground of alarm for either; and I beg to assure your Lordships that it is with a view to these objects alone that I now seek to remodel—no, not to remodel, but to give new efficiency to—the existing Court of Appeal. I apprehend it to be the duty of the State to preserve inviolate the original status of doctrine and discipline agreed upon by the Church and State; and, secondly, to keep all ecclesiastical Judges to the terms of that settlement, and within the limits of their lawful jurisdiction. On the other hand, the duty of the Church, I conceive, is to

preserve its doctrine pure, and its discipline inviolate; and, secondly, to have in the last resort a *bonâ fide* power of correcting errors in those respects committed by the civil tribunal, and so to avoid the danger of a collision with the State.

I know what would be the constitutional mode of carrying these purposes into effect; namely, to permit the Church to deal synodically with questions of heresy or false doctrine. But my whole course of argument proceeds on the assumption that such permission is not likely to be conceded to us at the present moment, and that the want of that freedom makes the present measure all the more necessary. Suffer me, my Lords, to remind you, in passing, that the Church of England is the only Church in Christendom which is deprived of the privilege of synodical deliberation. I do not now intend, my Lords, to touch upon that as a ground of complaint—the subject is too large and too important to be discussed incidentally; but I allude to it as a strong reason for acceding to the wish entertained by a very large body of Churchmen, both lay and clerical, that questions of false doctrine, when they arise, and must of necessity be decided, may be referred for decision to the Bishops of the Church of England.

I now proceed to state some of the reasons why I think that the Judicial Committee is not altogether a competent tribunal for the determination of such questions. In the first place, the Judges are exclusively laymen, some of whom are not qualified by their previous studies and habits of mind to deal with purely spiritual questions. Secondly, some of them, possibly a majority, may not only not be members of the Church of England, but may entertain opinions diametrically opposite to the Church's doctrines. But I am not disposed to dwell upon this objection, because I believe it will be generally conceded that in this respect a change is necessary, and that no Judges should sit to determine a question of Church Doctrine who are not members of the Church. Putting aside also, for the present, the question whether the Judicial Committee can be considered as properly a Church tribunal, I now proceed to speak of its incompetency. I am loth to use that word; but I find it difficult to employ any word which shall not be capable of an offensive meaning; and I must speak the truth

plainly, but with the most perfect respect for the individual members of that court. I object, then, to that tribunal on the ground that its members are not competent judges of such spiritual questions as are likely to be submitted to their decision. I am aware it may be said that every educated member of the Church must be considered to have a competent knowledge of its doctrines. I know that this ought to be the case; but I put it to your Lordships to say whether it be so indeed. There are, indeed, some leading features of the Church's doctrine so plain and palpable, that scarcely any one of its members who has received any religious instruction can be ignorant of them. But there are many grave and difficult questions in divinity, depending upon a right construction of the Articles, which scarcely ever engage the attention of the laity, especially of those whose profession necessarily turns their minds to other subjects. I can easily imagine a case of this sort brought before lay judges, altogether new to them, and scarcely to be understood without previous study and thought, where they might be puzzled to understand the exact meaning of terms which, to persons conversant with such matters, are the mere alphabet of theology. Is it likely that they will be able to decide satisfactorily such a question, involving, perhaps, in its consequences, the peace and unity of the Church, when all their previous studies have been in an entirely different direction, and when their minds have not been prepared, by the habitual consideration of such matters, to take an exact and comprehensive view of the case before them in all its bearings?

Your Lordships are well aware how much of the law of the land has been formed by the decision of the Judges. Every decision of a point of doctrine by the Judicial Committee would form, as in other courts of final appeal, a precedent. Such precedents settle or modify the law, and at last become law themselves. And thus a supreme court of justice may, in some sense, not only administer, but make laws. I am well aware that the Judicial Committee of the Privy Council has disclaimed both the intention and the power of determining any question of doctrine, properly so called. But is it so obviously impossible as to render unnecessary any attempt to prove it, that they can give any decision upon a question which turns

upon a point of doctrine, without affecting to some extent the doctrine itself, as one which is insisted upon, or not, by the Church? Take any one case of this kind. Suppose them called upon to decide a question, whether such or such a doctrine is, or is not, the doctrine of the Church of England, their judgment may be to this effect: It cannot be denied that the doctrine in question is the doctrine of the Church of England, but we do not think it indispensably necessary that a person should believe that doctrine, in order to the exercise of his ministry in the Church. Who does not see that a succession of such judgments would injure the character of the Church of England as a teacher and maintainer of the truth? Again: the Judges of our courts of law, when called upon to decide new cases, decide upon certain fixed principles, perfectly familiar to them, which they have only to apply to the facts of the particular case. These decisions are looked upon as faithful and true expositions of the law, because they proceed from those whose thorough acquaintance with the whole system of English jurisprudence, both in theory and practice, renders them perfectly competent to give them; and so it may be that those who are set to administer the law, do in some cases make it. So in cases involving questions of doctrine, the Judges, who are ultimately to decide them, may by degrees alter or modify the laws which relate to them. But then they are not versed in divinity, as the judges of the temporal courts are in the common and statute law, or in the rules of equity. There may be some exceptions to this; indeed, I have had the advantage of knowing more than one ornament of the judicial bench who was well read in theology. But this will not be a case of common occurrence. On the other hand, I think it will not be denied that in respect of the knowledge and experience required for coming to a right judgment on doctrinal questions, the collective body of the English bishops would form a competent and trustworthy tribunal.

And this brings me to a consideration of the principle which is embodied in the Bill now under your Lordships' consideration, that the decision of purely spiritual questions should be left to spiritual judges—not merely ecclesiastical, but spiritual judges. I venture to call this a constitutional principle—one which has been recognised in the constitution of this Christian country from

the earliest period of its history; and as an evidence of its soundness and expediency, I would remind your Lordships of a dictum of that great jurist, who is reckoned, by universal consent, the oracle of the common law—Lord Coke. His words are these:—

'Certain it is, that this kingdom hath been best governed, and peace and quiet preserved, when both parties—that is, when the justices of the temporal courts and the ecclesiastical judges—have kept themselves within their proper jurisdiction, without encroaching or usurping one upon another; and where such encroachments or usurpations have been made, they have been the seeds of great trouble and inconvenience.'

This, indeed, is said of the distinct jurisdiction of the temporal courts, and of the ecclesiastical, commonly so called; but the principle applies to the non-interference of lay judges in matters purely spiritual. Your Lordships may perhaps smile if, in illustration of this, I go back to the times of our Saxon ancestors; but I wish to trace up the distinction to the fountainhead of our laws; and, indeed, I shall have to go much further back before I have done. In those times, as is well known, the bishop of the diocese, and the alderman, or sheriff, of the county, sat together in the county court. The opinion of one prevailed in spiritual causes, of the other, in temporal. The laws of King Edgar say, '*Celeberrimo huic conventui Episcopus et Aldermannus intersunto, quorum alter jura divina, alter humana populum edoceto.*' And so it continued till the introduction of Norman laws and customs. The statute of *Articuli Cleri* was not merely an enacting statute, but, as Lord Coke says, declaratory of the common law and custom of the realm. The 13th chapter runs thus:—

'Also it is desired that spiritual persons, whom our Lord the King doth present unto benefices in the Church, if the bishop will not admit them (either for lack of learning or for other reasonable cause), may not be under the examination of lay persons, but that they may sue to an ecclesiastical judge, to whom it of right belongs, for the obtaining of such a remedy as may be just.'

The answer is—

'Of the fitness of a person presented to a benefice, the examination belongs to the ecclesiastical judge. So it hath been heretofore used, and shall be so in future.'

It is said by Lord Coke, that 'if the cause of refusal to institute be spiritual, the Court' (in the case of a writ of *Quare Impedit*) 'shall write to the Metropolitan to certify thereof.' In Specot's case, the Court of King's Bench admitted that 'it doth not appertain to the King's Court to determine schisms or heresies; and that where the original cause of the suit is matter whereof the King's Court hath cognisance, the King's Court is to consult with Divines, to know whether it be schism or not.' Blackstone says, 'If the cause of refusal to institute be of a spiritual nature, as heresy, particularly alleged, the fact, if denied, shall be tried by a jury; and if the fact be admitted, or found, the Court upon consultation and advice of learned Divines, shall decide its sufficiency.' Now, this is very nearly the arrangement which I desire to see established with respect to spiritual causes which come before the Judicial Committee. No persons can be better judges of the facts of a case than the learned and able members of that court; and it would be for them to inquire and determine as to the fact of A. B.'s having taught certain doctrines alleged to have been taught by him; and if he had, then to consult the Bishops whether those doctrines be heretical or not.

The *Reformatio Legum*, the recommendations of which, if King Edward VI. had lived a little longer, would probably have become law, provided, that where any cause of heresy should devolve to the Crown, it should be settled, if a grave cause, by a Provincial Council, or by three or four bishops appointed by the Crown.

I have already directed your Lordships' attention to the fact, that the first Statute of Appeals expressly declares 'that part of the body politic, called the Spiritualty, to be sufficient and meet of itself to determine all doubts when any cause of the law divine happens to come in question, or of spiritual learning.' And when power was given to the King to hear appeals by the Delegates, I conceive it never to have been contemplated that those Delegates should be other than ecclesiastics, or the Judges of ecclesiastical courts; and your Lordships will bear in mind, that down to the reign of Henry VIII. the Judges of these courts were mostly clergymen; and, if not clergymen, they were the substitutes and representatives of the bishops, or of other spiritual persons. It is by no means unimportant to

remark, that during the reigns of Henry VIII. and Elizabeth, there is no trace of any of the nobility, or common law judges, in any commission of delegates, nor afterwards in one commission out of forty, till the time of the Great Rebellion. In the celebrated case of Whiston, Queen Anne, in answer to a petition respecting the authority of Convocation to deal with charges of false doctrine, declared it to be the opinion of eight out of twelve Judges, and of the Attorney and Solicitor General, that 'a jurisdiction in matters of heresy, and condemnation of heretics, is proper to be exercised in Convocation.'

Having thus, my Lords, traced the principle of entrusting the decision of spiritual questions to spiritual persons, through the history of the English law, I must now call your Lordships' attention to the practice of the early Church. I have already said that it willingly recognised the principle of regal supremacy, and had recourse to it for protection and support in the discharge of its spiritual functions. The Emperors not only summoned General Councils, but sometimes presided over them, either in person or by their legates; not for the purpose, at least not for the avowed purpose, of overawing their decisions, but simply to take care that all their proceedings should be regulated according to the canons of the Church, and that there should be no extravagation beyond the line which those canons had marked out as that within which the Church was to exercise its proper jurisdiction. De Marca, in his well-known Treatise *De Concordia Sacerdotii et Imperii*, cites as an instance of this the proceedings of the Emperor Theodosius with respect to the Council of Ephesus. Speaking of the Roman Emperors, who claimed the right of hearing and determining appeals from ecclesiastical tribunals, he says—

'Eximia auctoritate potiti sunt Imperatores Romani in rebus et judiciis ecclesiasticis. Sed nullum, ut existimo, proferri potest exemplum judicii canonici, ab uno episcopo redditi, de quo statim recta via querela delata est ad Principem. Illi judices ecclesiasticos dabant; nunquam autem de re canonica cognitionem suscipiebant sed de ordine judiciorum.'

Van Espen, the most celebrated of modern Canonists, says—

'Indubitatum, examen ac decisionem fidei Ecclesiæ, ejusque ministris, non autem Principibus laicis a Deo concreditum.

Nec id unquam Principes Catholici sibi attribuerunt, sed ipsos Pontifices, et Episcopos, et Ecclesiæ Pastores, judices doctrinæ nunquam non cognoverunt.'

And again—

'Aliud enim longe est, Principem se interponere promulgationi novæ legis per suas provincias ejusque executioni: et aliud, velle judicare de ipsis articulis et dogmatibus, sive quid de fide credendum, vel non credendum, definire—nunquam enim a Principis officio alienum esse existimatum est, externum illud jus quod consistit in imperando, cogendo, promulgando, pacem custodiendo.'

This is the principle which regulated the exercise of the imperial or royal supremacy in the *Appellatio tanquam ab abusu*, of which so much was written by the French lawyers and divines, and which is still a subject of discussion—the *Appel comme d'abus*. The interference of the supreme civil power is limited, according to M. Lainé, as quoted by M. Dupin, in his *Manuel du Droit Ecclésiastique*, to—1. Excess of power in spiritual matters; 2. Violation of the laws and regulations of the kingdom and of the rights of citizens; and, 3. Outrage or violence in the exercise of ecclesiastical functions. But no right of interference has ever been claimed in the determination of purely spiritual questions. This question was agitated in the well-known contest for the liberties of the Gallican Church, in which the celebrated Bossuet bore so conspicuous a part. But long before his time the authority of bishops in deciding questions of faith independently of the Pope and, *à fortiori*, of the Prince, had been strenuously asserted by the Doctors of the Sorbonne, as belonging to the episcopal office by divine institution. One of their most celebrated writers, Petrus Alliacensis, afterwards Archbishop of Cambrai, and a Cardinal, in a treatise addressed, in the name of the Faculty of the Sorbonne, to Pope Clement VII., asserted that to exclude bishops from the examination and decision of matters of faith was *contra jus tum divinum quum humanum*. This principle is still acknowledged in the ecclesiastical law of France; for, though the *Appel comme d'abus* is still admitted, it is only in matters which affect the rights and liberties of the subjects, not in questions of faith.

I now proceed, my Lords, to adduce some arguments in

favour of the Bill, from the analogy of our courts of law. I am aware that the analogy is not perfect; that it does not extend to that provision in the present Bill which makes the opinion of the bishops compulsory upon the Court of Appeal; but still it justifies, I think, the essential principle of the Bill, which is, that the court shall take for its guide the judgment of competent persons. Your Lordships are aware that it is a maxim in our courts of law, that *cuique in sua arte credendum est*; in pursuance of which, when any matter comes before a court which it is not competent, for want of knowledge, to decide, it refers for advice and guidance to those who are. I will read to your Lordships a brief statement relating to the Court of Chancery, furnished me by a learned friend who practises in that court:—

'When a disputed question of common law arises in the course of a Chancery suit, and is necessary to be determined before the suit can be finally disposed of, it is the practice of the Court of Chancery either to direct the parties to try the question in an action to be brought by one of them against the other for that purpose in a common law court, or to order a special case to be stated, and sent to a common law court, for the purpose of obtaining the opinion of that court upon such question. In the former case the result of an action binds the parties, and is acted on as conclusive by the Court of Chancery; but the Lord Chancellor is not bound to act on the opinion certified by the judges in answer to a special case, but may, and often does, send a second case stating the same question, to a second court of law, and even a third case to a third court. It is true that, in theory, a judge in Chancery might refuse to act upon any of these opinions; but, practically, the certificate of one or more of the common law courts—according as the case may have been sent to one or more—is adopted and acted upon by the judge in Chancery, and is made the foundation of the decree, as far as relates to the legal question.'

With regard to foreign law, there was more difficulty, obviously, in ascertaining what it was:—

'Our courts do not take judicial notice of any foreign laws; and, when a question of foreign law arises, either in Chancery or before the common law courts, it is dealt with as a question of science, to be proved—like matters of fact—by the testimony of

witnesses practically conversant with the subject. The principle and mode of proof is exactly the same, whether the question be one of chemistry, or of mechanics, or of French law. None of our courts have jurisdiction to direct any mode of trial before a foreign court; but the evidence upon which they proceed is the sworn opinion, orally delivered, of a person learned and experienced in the foreign law.'

I will here read to your Lordships the opinions of learned Judges, whose names will carry infinitely greater weight than any statement of mine. The first is from that learned and excellent person, whom I have already mentioned in terms—I was going to say of commendation, but I feel that it would be presumptuous to use terms of commendation respecting him; most gladly do I pay the tribute of my deep and unfeigned respect to the late Lord Chief Justice of the Queen's Bench. In the Baron de Bode's case, Lord Denman said—

'There is a general rule, that the opinions of persons of science must be received as to the facts of their science. That rule applies to the evidence of legal men, and I think it is not confined to unwritten law, but extends also to the written laws, which such men are bound to know. Properly speaking, the nature of such evidence is not to set forth the contents of the written law, but its effects, and the state of law resulting from it. The mere contents, indeed, might often mislead persons not familiar with the particular system of law; the witness is called upon to state what law does result from the instrument.'

Mr. Justice Coleridge, in the same case, said—

'What, in truth, is it that we ask the witness? Not to tell us what the written law states, but, generally, what the law is. The question for us is, not what the language of the written law is, but what the law is altogether, as shown by exposition, interpretation, and adjudication.'

In the case of the Duchy of Bronte, Lord Langdale expressed his opinion thus:—

'With foreign laws an English judge cannot be familiar; there are many of which he must be totally ignorant. There is, in every case of foreign law, an absence of all the accumulated knowledge and ready associations which assist him in the consideration of that which is the English law, and of the manner in which it ought to be applied, in a given state of circumstances

to which it is applicable. He is not only without the usual and necessary assistance afforded by the accumulated knowledge and able suggestions contained in the arguments which are addressed to him, but he is constantly liable to be misled by the erroneous suggestions of analogies which arise in his own mind, and are pressed upon him on all sides. These difficulties are obvious enough, even in cases in which he may have before him the very words of that which has proved to have been the law applicable to the event in question. Even if we suppose it to be proved that the law has not been legislatively repealed or varied, and has not fallen into disuse, and that the words have been accurately translated, still the words require due construction, and the construction depends on the meaning of words to be considered with reference to other words not contained in the mere text of the law, and also with reference to the subject matter, which is not insulated from all others. The construction may have been—probably has been—the subject of judicial decision ; instead of one decision, there may have been a long succession of decisions, varying more or less from each other, and ultimately ending in that which alone ought to be applied in the particular case. The difficulty which arises under such circumstances is obviously very great, but it is vastly increased when the law itself, or the form or collocation of words in which the law is expressed, has never been authoritatively expounded, but is to be discovered from decisions or usages, or from the opinions of unauthorised writers, who may have written much that is acknowledged to be existing law, and also, in the same books, much which is contrary to existing law. The decisions were subject to be, and may have been, altered by subsequent decisions, and the precise application of them to the case in question may only be ascertainable by means of an accurate historical and legal deduction from all that has passed in the courts on the subject; and a judge who seeks information as to a foreign law has not in himself the means of distinguishing the correct from the incorrect proposition of a text writer. Whoever has considered the nature of the difficulties which frequently arise in our own courts in the investigation of English law, applicable to particular cases, and the mode of reasoning and investigation by which it is endeavoured to surmount those difficulties, will perceive what presumption it would often, nay,

generally be, in an English judge to attempt to apply the same process to the investigation of a foreign law, and the consideration of its proper application to particular cases. The rule of English law, that no knowledge of foreign law is to be imputed to an English judge sitting in a court of only English jurisdiction, is undoubtedly well founded; and as cases arise in which the rights of parties litigating in English courts cannot be determined without ascertaining to some extent what is the foreign law applicable in such cases, the foreign law and its application, like any other results of knowledge and experience in matters of which no knowledge is imputed to the judge, must be proved, as facts are proved, by appropriate evidence, *i.e.* by properly qualified witnesses, or by witnesses who can state, from their own knowledge and experience, gained by study and practice, not only what are the words in which the law is expressed, but also what is the proper interpretation of those words, and the legal meaning and effect of them as applied to the case in question.'

I may refer also to the practice of the High Court of Admiralty. When any question comes before it, which is to be decided according to the rules of nautical science, the Judge of that Court calls to his assistance some of the Elder Brethren of the Trinity House, and by their opinion he is invariably guided in his decision.

I have not yet quite done with the argument from analogy. From our own courts of law I would now direct your Lordships' attention to the practice of other Churches. In the Established Church of Scotland, the final decision of all questions relating to false doctrine rests with the Church Courts. True, they consist of lay elders as well as ministers; but they are strictly Church Courts according to the constitution of the Scottish Kirk, for the lay elders are office-bearers in the Kirk. The decision of spiritual questions is left entirely to those Courts which the Church considers to be competent to decide them. In the churches of Prussia such frequent changes have been made, and not only, I am sorry to say, in external regulations and questions of discipline, but as to the profession of vital and essential doctrines, that it is not easy to say what the present state of those churches really is. But, according to the projected constitution of 1850, a question of false doctrine, taught

by a minister of the Evangelical Church, is to be decided by the Church itself, represented by a General Assembly, a mixed assembly of clergy and laity. With regard to the Roman Catholic Church subsisting in Silesia and the Rhenish provinces of Prussia, there is no interference whatever in questions of false doctrine, on the part of the Government, but they are left to the authorities of the Church, even in the case of professors in the universities.

I have now, my Lords, in the last place, to notice, very briefly, some of the objections which have been made to this Bill, partly in the public papers, and partly in petitions against it. And I must say that, if no weightier arguments can be adduced against it than those which have been hitherto urged, I do not think that I have much to fear. One objection is, that the Bill proposes to constitute a new legislative body, having power to frame new doctrines. It is enough to say, in answer to this objection, that no power will be possessed by the new court, which is not possessed by the present. Supposing that it was in contemplation to invest any persons with the power, not simply of determining of any particular opinion, whether it be consistent with the Church's doctrine (which is all that the Court of Appeal will have to determine), but of framing new doctrines: surely the Bishops would be more competent to exercise that power than the court as at present constituted.

Another objection is, that the laity are to be excluded. Now, one peculiar merit of the Bill is, that it retains the laity in the exercise of their proper and legitimate functions. It will not displace the Members of the Judicial Committee from their office as judges of fact, judges of the law, and of the rules of justice; but they will have to take their measure of true or false doctrine from those who, I am bold to say, are more competent than themselves to judge of such questions. I am most anxious, my Lords, that the laity should know and exercise their privileges as members of the Church. By the fundamental principles of the Church of England, all its different members, laity as well as clergy, have certain rights and certain duties, upon the faithful discharge of which the safety and efficiency of the Church itself depend. There are common duties to be performed by all, but there are also particular duties

to be performed by particular members, and they are not to interfere with one another.

I am clearly of opinion that no judicial tribunal is likely to be properly conducted which is not presided over by a lawyer. There is a peculiar habit of mind formed in lawyers by study and long practice. When I was a younger man I used to fancy myself a tolerably good ecclesiastical lawyer; but when I grew older, I learned to recognise that peculiar habit of observation and thought, a sort of idiosyncrasy of legal minds, the result of long training and practice, which enables a lawyer to detect a flaw in argument, and to see at once the real strength or weakness of a case, and to apply to it the rules of law. I would have them employ that peculiar power of mind, in ecclesiastical causes, upon any legal question incident thereto; but I do not consider that it qualifies them to decide any point of religious doctrine.

A third objection is of a rather singular character—the possibility of heterodoxy amongst the bishops. Now this may be a very good reason for requiring some change in the mode of appointing bishops, but not for depriving them of their legitimate jurisdiction and inherent rights when they have been appointed to their office.

A fourth objection is, that the Bill will give to a majority of the bishops the determining the fitness of any man to hold office in the Church. If this objection has any weight, it applies much more strongly to the power, which a single bishop possesses, of preventing any person from entering into the sacred ministry of the Church, by refusing him ordination—a power which, I am persuaded, no man thinks of questioning. Besides, my Lords, as this power must reside somewhere, it is surely much better, if we look to the competency of the judges, that it should be entrusted to fourteen or fifteen bishops, than to six or seven lawyers.

A difference of opinion amongst the bishops on a point of doctrine would undoubtedly present a difficulty; but this is equally true with respect to convocation, or a council; and, whatever the difficulty may be, we must look it boldly in the face. The Bill may possibly be modified in Committee so as to obviate that difficulty; but at all events it is not to be put

in competition with the important principle involved in the Bill.

The last objection which I think it necessary to notice, is one which has been urged in a public print of great influence, namely, that it may be doubted how far such an assembly of bishops as the Bill purposes can be taken to represent the authority of the Church. My Lords, it certainly would not represent that authority. According to the constitution of the Church, no person, nor any body of persons, can be held to possess or represent its authority, except its legal representatives in convocation assembled. The meeting of bishops contemplated in this Bill would not be a Synod of the Church, nor would it have the authority of the Church.

My Lords, I will no longer trespass upon your indulgence. I have already done so at greater length than I wished; but on a subject with which your Lordships could not be expected to be familiar, I have thought it necessary to explain my views more in detail than would be necessary on ordinary occasions. I now leave the matter in your Lordships' hands. It remains for you to decide a question of supreme importance to the Church, with whom is to rest, at least for some considerable time to come, the final adjudication of any doubt which may arise, and must be solved, whether a doctrine, alleged to be at variance with the teaching of the Church of England, be really so or not. Putting aside for a moment the inquiry, who ought to be the judges of such a matter, according to the first principles of Church government, the practice of the early Church, and the theory of our own, I would humbly ask, Who are most likely to bring to its examination the qualifications necessary to ensure a right decision: a number of lay judges, whose studies and thoughts have taken a direction altogether away from the subject-matter to be decided—whose minds have been engrossed by pursuits and inquiries of an entirely different nature; or the collective episcopate of England, consisting of men who must be supposed to have been trained up from their early years in the study of theology, especially of those branches which relate to the distinctive doctrines of their own Church; men to whom the considerations of such questions must, from the nature of their ordinary duties, be almost of every-day occurrence; who are more likely than any other persons to

have looked at the doctrine submitted to them in every point of view, and to have qualified themselves to pronounce a just and well-grounded opinion as to its accordance with the Church's standards of truth?

But, my Lords, I would not be understood to rest my case entirely upon the probabilities of superior fitness in point of theological learning. I rest it also, and in the first place, on the inherent and indefeasible right of the Church to teach and maintain the truth by means of her spiritual pastors and rulers; a right inherent in her original constitution, and expressly granted to her by her Divine Head, on the terms of the apostolical commission. On this point I will say no more. It will probably be dwelt upon by some of those who will follow me in the debate; but I cannot conclude without protesting against an inference which may possibly be drawn from the fact of my having laid so much stress upon Acts of Parliament and ancient practice, and upon the question of comparative competency and fitness of judges, that I think lightly of what is in truth the fundamental and vital principle involved in this subject, namely, the inherent and inalienable right of the bishops of the Church of England to be the judges of questions of its doctrine duly submitted to them.

I now commend this measure to your Lordships' calm and serious consideration. I am myself almost overpowered by a contemplation of the results which are likely to follow from its rejection. I commit it to your Lordships' judgment, not without anxiety and apprehension, but at the same time not without hope. Looking to its extreme gravity and importance your Lordships will not be surprised if I conclude, with somewhat more than ordinary solemnity, by the expression of a devout and earnest wish, that He Who has committed to His Church the sacred deposit of His truth, may guide you to a right conclusion.

Lord Stanley would not presume to enter at any length into the discussion of the Bill, which he thought had been exhausted by the able and masterly speeches which had been delivered by the right reverend prelates upon the subject. . . . It was notorious that a great and practical evil existed. That great evil was this—that at this moment the Church of England

was placed in a position more disadvantageous than any other religious body on the face of the globe. She had in herself no authoritative means of declaring, through her recognised organs and teachers and heads, her doctrines when cases of heresy arose, or when doctrines were in dispute. Nothing was more certain than that, at the time of the Reformation, it was intended to confirm to the Church the fullest power of authoritatively declaring her own doctrines. There might be objections—he knew there were great and grave objections—to renew the Convocation of the clergy; and yet nothing could be clearer than that, according to the Declaration of the Crown in 1562, it was intended that, 'out of our princely care to the Church, and that churchmen may do the work that is proper unto them, the bishops and clergy from time to time, in Convocation, upon their humble desire, shall have license under the broad seal to deliberate and do all such things as, being mentioned by them and assented to by us, shall concern the settled doctrines and discipline of the Church of England as now established.' It was impossible that words could be more clear to show that it was intended that a spiritual body, under the authority of the Crown, should, from time to time, not introduce new innovations or fresh arguments, but should explain and expound the doctrine and teaching of the Church of England, and that such explanations should be intrusted, not to all, but to spiritual persons only. . . . He belonged to no party in the Church—he was not one of those who advocated extreme opinions—he was not one of those who desired to see points, which had been wisely left by our ancestors with a certain latitude, brought forward and dogmatically laid down, and perhaps unnecessarily excluding, on one side or the other, members who might conscientiously hold opinions which are not emphatically condemned by the Church; but he did say this, that it was right that the Church should have the power, through its authorised representatives, with the articles and teachings and writings of the Fathers of the Church in their hands, to declare that such is now, that such ever has been from the commencement, the doctrine and the teaching of the Church; or, on the other hand, to declare that such and such a question is one upon which many sincere clergymen have entertained different opinions—upon which the Church

allows a latitude, and has not declared itself in any formal and authorised manner. . . . As he would intrust to the judges the interpretation of the civil law, so he would intrust the bishops of the Church of England with the interpretation of the Articles of the Church of England, and would receive with implicit confidence the judgment and authority of the bishops. . . . As a general rule, their Lordships were in the habit of being guided by the opinions of the judges, to whom they constitutionally referred; and he was convinced that in ninety-nine cases out of a hundred the Judicial Committee would be directed by the opinion of the bishops upon questions of doctrine in precisely the same manner. He certainly should object to refer to the discretion of any party—to the discretion of the Judicial Committee of the Privy Council, or the Minister of the day, that selection of the archbishops or bishops—for the guidance and direction of the whole Church. Of this he was quite sure, that it would be a matter of satisfaction to the great body of churchmen in this country if they knew that upon any question raised they had an opportunity of obtaining—not the direction of the judges—not the direction of the legislature—but, for their own guidance as dutiful members and sons of the Church, the authoritative declaration of the united heads of the Church in matters affecting doctrine. . . . Here was a Bill brought forward on the authority of a right rev. prelate, for whom no man entertained a higher respect than he did. He believed the Bill had received the assent of a majority of the members on the Episcopal Bench, and he knew it was supported by a large body of clergymen of various shades of opinion, and by many of the laity; and, seeing no other remedy for the great and grievous evil which existed, he could not consent to vote against the second reading of the Bill, which he would rather accept in its present shape than have no measure at all, but which, when modified in Committee, would answer the reasonable expectations of all who desired a change of the present system.

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