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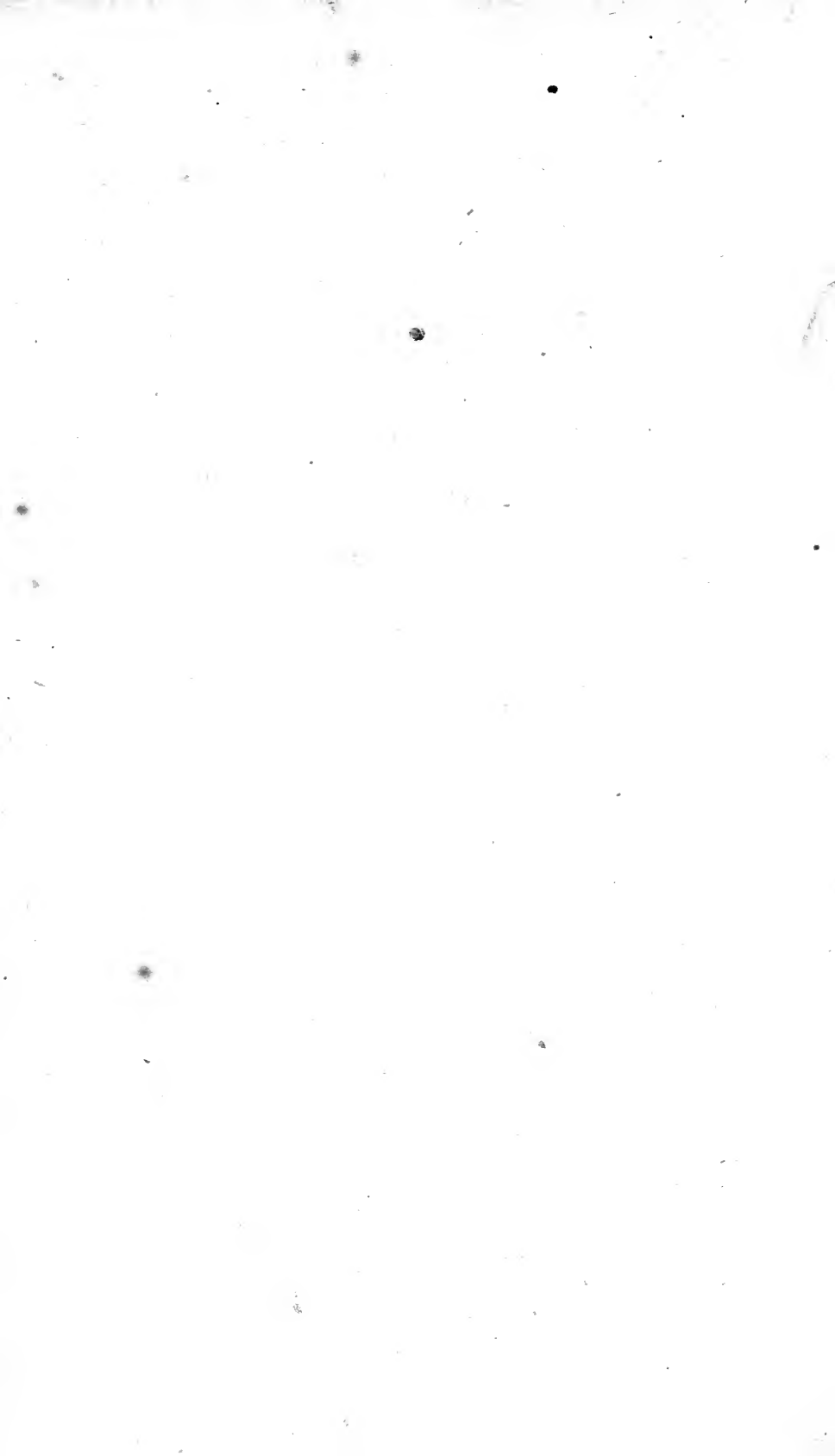
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TREATISE

ON THE

LAW OF THE CHURCH.

“IDEM REGIMEN—EADEM FIDES—IDEM SACRAMENTORUM NUMERUS  
—EADEMQUE EORUM ADMINISTRANDI FORMA—IDEM ETIAM RITUS  
—EAEDEM LEGES—EADEM FESTA ET JEJUNIA ; OMNIA DENIQUE  
ADEO HABENTUR, CONSTITUUNTUR, PRÆDICANTUR, UT JURE MERI-  
TO PRIMITIVA NUNCUPETUR ECCLESIA, ULTIMIS HISCE TEMPORIBUS  
REDIVIVA.”

*Epistola Dedicatoria Beveregii ad Codicem Canonum.*

A

TREATISE ON THE LAW

OF THE

PROTESTANT EPISCOPAL CHURCH

IN THE

UNITED STATES.

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BY MURRAY HOFFMAN, ESQ.

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NEW-YORK:  
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## NOTICE.

The following work may be considered as complete in itself, although a considerable body of canons and Church subjects are not discussed. These relate chiefly to the ordering of the ministers of the Church, and other analogous topics. The author hopes to be able to issue a further volume shortly, with an Index to the whole work.

NEW-YORK, SEPT. 1850.

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### ERRATA.

- Page 43, Line 1. For "*ne cultum*," read *nec ullum*.
- " 72, " 21. For "Gilbert," read "Gibert."
- " 116, " 4. Strike out the word "fifth."
- " " " 13. Do. Do. "Canon."
- " 131, " 9. Of Note, for *partialaribus* read *provincialibus*.
- " 139, " Strike out the 9th line—Insert after the word "a" on the 10th line, the words "Special Convention."
- " 168, " 4th from the bottom, strike out "and."
- " 227, " 17. For "porra," read porro.
- " 231, " 22. For "prohibitimem," read "prohibitionem."
- " 273, " 20. For "ever," read "even."
- " 283, " 4. For "promosendum," read "promovendum."
- " 284, " For "quærsela," read "quærela."
- " 441. " 27. For "urges," read "argues."
- " 451. " 14. After word "convention," insert word "as."
- Pages 417, 418, and 419 are misprinted for pages, 415, 416, 417.

The author suggests the expediency of making these alterations with a pen. 1

# INTRODUCTION.

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## OF THE LAW OF THE CHURCH.

THE laws and regulations concerning the discipline of the Protestant Episcopal Church of the United States may be thus arranged :

1st. The Constitution and Canons of the General Convention, forming a code for the uniform government of every Diocese and every Church.

2d. The Constitution and Canons of the several Dioceses, of force only within their several precincts, and generally subordinate to the power of the General Convention.

3d. The Rubrics of the Church, and in some particulars, the Articles.

4th. The civil laws of the states affecting the Churches and their members, in regard to corporate or personal rights, civil privileges, and the acquisition and preservation of property.

5th. And to these, in my judgment, is to be added a portion of the Ecclesiastical Law of England ; of that law strictly so called, and distinguished from what in that kingdom is known as the Foreign Canon Law.

The Constitutions and Canons, and those portions of the

laws of the states which are applicable, will be hereafter stated and discussed. I shall seek in this introduction to prove that the Ecclesiastical Law of England has an actual force and operation in the system of our Church—to point out the extent of that operation—its limits and qualifications.

But in order to understand, as well as to illustrate the meaning and the limitations of the proposition, it is necessary to enter somewhat at length into the history of the Colonial Church.

#### OF THE CHURCH OF ENGLAND IN THE COLONIES.

It is an admitted maxim that the great body of the common law of England, and of its statute law so far as adapted to the situation of the colonies, was brought to this land from the mother country, and formed the basis of colonial law.<sup>1</sup>

<sup>1</sup> Chancellor Kent thus states the doctrine:—“Although the great body of the common law consists of a collection of principles, to be found in the opinions of sages, or deduced from universal or immemorial usage, and receiving progressively the sanction of courts, it is nevertheless true that the common law, so far as applicable to our situation and government, has been recognized and adopted as an entire system by the constitutions of New-York, Massachusetts, New Jersey and Maryland. It has been assumed by the courts of justice, or declared by statute, with the like qualifications, as the law of the land in every state. It was imported by our colonial ancestors as far as it was applicable, and was sanctioned by royal charters and colonial statutes. It is also the established doctrine, that English statutes, passed before the emigration of our ancestors, applicable to our situation and in amendment of the law, constitute a part of the common law of this country.” (*Commentaries*, vol. 1st, p. 472.)

The rule is admirably expressed by Mr. West in an opinion given in 1720. “The common law of England is the common law of the plantations, and so all statutes in affirmance of the common law antecedent to the settlement of a colony, unless there is some private act to the contrary; though no statutes made since those settlements are there in force, unless the colonies are particularly named. Let an Englishman go where he will, he bears as much of law and liberty with him as the nature of things will bear.” (*CHALMERS' OPINIONS OF Eminent Lawyers*, vol. 1, p. 194. See also *Atty. Gen. Stuart* 2



Now this great principle, which pervaded every colony founded by Englishmen, prevailed, in a particular sphere, wherever a Church upon the basis of that of England, was established. They who belonged to such a Church were members of that of England at the time of their arrival, or voluntarily joined it here. The former brought with them—the latter adopted—the doctrine and discipline, the rules and order of the English Church.

Undeniable as this proposition seems to be, yet it is necessary, by a fuller statement, to guard it from mistake. The proposition is not, that the Church as an establishment, with the statutes of supremacy and uniformity, formed part of the law of the colonies, where the charters did not otherwise provide; but the proposition is, that all members of the Church of England in the colonies were subject to the ecclesiastical law of England, except where it was expressly altered or necessarily inapplicable.

Under the colonial government in New-York some suits were instituted involving the question as to the force of the statutes establishing the king's ecclesiastical supremacy,

Merivale, 143. And more particularly as to ecclesiastical law—in a case of *Gaskins vs. Gaskins*, (3 Iredell's Law Rep. 155, N. Car.) the Chief Justice said: "Testaments existed at the common law, and their validity depended upon principles declared by that law, or rather by the canon law as part of that law administered in peculiar jurisdiction, that is to say, the ecclesiastical courts. It was argued at the bar, that although this might be the law of England, yet since the jurisdiction is here changed to a common law court and jury, nothing short of publication by execution will sustain even a will of personalty; but we cannot accede to this argument, for although the jurisdiction be changed the rule of decision is not. The canon law is a part of the common law, so far as respects testamentary causes, and except such changes as may have been produced by statutes. We now determine here what is a good will of personal property, exactly upon the same principles that prevailed when the governor took the probate of wills, or before the ecclesiastical judge in England." See also *Bogardus vs. Trinity Church*, 4 Paige's Rep. 178.

the acts of Conformity, and consequently those of Toleration. The case of McKennie, in 1707, was one, and in 1723 the subject was warmly agitated. A statement of some of the topics and arguments which were then urged upon the subject is contained in the note.<sup>1</sup>

Some criticism might fairly be made as to the effect and meaning of part of the authorities stated; but conceding that they are unanswerable, yet it is clear, that the question of the force of the laws of the Church of England upon that Church in the colonies is wholly unaffected. What laws Churchmen brought with them, or submitted to for the regu-

<sup>1</sup> SMITH'S *History of New-York*, III. *et. seq.* Mr. Smith states, "The Episcopalians pretend that the ecclesiastical establishment in South Britain extends here, but the whole body of Dissenters are averse to the doctrine. The point has been discussed with great fervor, and the sum of the arguments against it is contained in a late paper. It was published in September, 1753, under the title of the Independent Reflector."

Among the authorities cited in this paper is an extract from a sermon stated to have been preached by Dr. Bisse, Bishop of Hereford, in 1757, before the Society for the Propagation of the Gospel, in which he owned that the government at home did not interpose in the case, or establish any form of religion. He quotes also a letter from the Lords Justices to Governor Dummer in 1725, in which they say there is no regular establishment of any national or provincial Church in the plantations. And the authority of Bishop Gibson is also cited, contained in a letter to Dr. Colman, of May, 1735. "My opinion has always been, that the religious state of New England is founded on an equal liberty to all Protestants, none of which can claim the name of a National Establishment, or any kind of superiority over the rest."

Dr. HAWKS (vol. 1, p. 109) states that Mr. Davies, about 1745, obtained an opinion from the Attorney General, Sir Dudley Ryder, that the English Toleration acts extended to Virginia. Smith observes (*Hist. N. Y.*, 191) that Counsellor West gave an opinion in 1724, upon being consulted by the Board of Trade, "that the acts of Uniformity did not extend to New-York, and consequently an act of Toleration is of no use in that province." It would seem, then, that an English Act of Toleration would supersede a Virginian Act of Uniformity, a point doubtful at least.

See also WILBERFORCE'S *Colonial Church*, 112, in which the opinion of the Lords Justices is also stated.

lation of their spiritual, and incidental secular relations, is a wholly different question from that of the prevalence of a law regulating the worship of every colonist.

The result to which these observations lead, viz., that the Church of England in the colonies was subject to all the laws of that of England which could apply to its situation, will be established by a glance at its settlement and course.

I proceed to state the legal position of that Church, and to notice various historical facts illustrating its connection with that of England, and bearing upon the proposition advocated.

It is first to be noticed that in those colonies in which any preference or superior privilege was bestowed upon the Church, it was by laws emanating from the provincial legislatures themselves.

Thus the colony of New-York, after the charter to the Duke of York was granted, was governed for several years (1664 to 1683) by a code known as the Laws of the Duke of York. The 4th section of the title, *Church*, runs thus—“That no minister shall be allowed to officiate, within the government, but such as shall produce testimonials to the governor, that he hath received ordination either from some Protestant bishop or minister, within some part of his majesty’s dominions, or the dominions of some foreign prince of the Reformed Religion; upon which testimony the governor shall induce the said minister into the parish that shall make presentation of him, as duly elected by the major part of the inhabitants, householders.”

It will be seen that under this law it was not necessary that a minister should be of the Church of England to obtain a license for a parish.<sup>1</sup>

<sup>1</sup> In 1840 a question arose under the Act of 31st of George 3d, Cap. 31, called the Constitutional Act of the Canadas, in which the language is almost identically the same with that of the law of the Duke of York. The judges of England were consulted by the House

By one of these laws all the inhabitants were to bear their due proportion of charges for the support as well of Church as of the state; and if a person did not voluntarily do so, he should be compelled by assessment and distress.

In 1672, certain orders were made at the General Court of Assizes held in New-York, and among them was an order that the laws of the government be duly observed as to parochial churches; and although divers persons may be of different judgments, yet all shall contribute to the minister established and allowed of.<sup>1</sup>

And in 1675, another Court of Assizes was held, and it was ordered that towards the maintenance of the ministry, besides the usual county rate, there shall be a double rate levied upon all those towns that have not already a sufficient maintenance for a minister.<sup>2</sup>

In 1693, the Assembly of New-York enacted a law for settling a ministry, and raising a maintenance in the counties of New-York, Richmond, Westchester and Queens. It provided that in each of these counties there should be called, inducted, and established a good sufficient Protestant minister, to officiate and have the cure of souls; that there should be annually assessed and levied a certain sum for the maintenance of such ministers.<sup>3</sup>

In the session of 1695, the House of Assembly resolved that the wardens and vestrymen had power to call a Dissenting Protestant minister under this act. By this statute ten vestrymen and two churchwardens were to be elected, who were, with the justices, to assess the maintenance of the minister. In 1705 a further act was passed, entitled "An Act

of Lords, and answered, that the words, "A Protestant Clergy," in the statute included other ministers than those of the Church of England. PHILLIMORE'S *Ed. of Burns*, vol. 1, p. 415. TTTT.

<sup>1</sup> Collections Hist. Soc. N. Y., vol. 1, p. 421.

<sup>2</sup> *Ibid.* 428.

<sup>3</sup> Laws of Colony of New-York, vol. 1, p. 18.

for the better establishment of the maintenance of a minister in the city of New-York," &c.

These several statutes were repealed by the acts of 17th and 20th of April, 1784, in which it was declared that though such acts were at variance with the constitution of the state, as tending to support and establish a particular denomination of Christians, yet it was necessary to repeal them to prevent uneasiness arising.

Notwithstanding the resolution of the Assembly, and perhaps the true construction of the statute, it is almost certain that the intention of the Legislature was to give a preference to the Episcopal ministers; and such was the construction in practice. This appears from various passages in Smith's History of New-York,<sup>1</sup> and fully from the recitals and other clauses in the acts of the 17th and 20th of April, 1784, above referred to.

So in South Carolina, the charter to the Earl of Clarendon and others gave them the right of patronage, and the advowson of all churches, chapels and oratories, and to cause them to be dedicated according to the ecclesiastical law of England. It conferred also the power to dispense with conformity to the liturgy and ceremonies of the Church, and subscription to the Articles.<sup>2</sup>

Although by the ninety-sixth of the fundamental articles drawn up by Mr. Locke, it was declared "that the Religion of the Church of England, being the only true and orthodox, and the national religion of all the king's dominions, was also that of Carolina"—yet the public maintenance was only to be by Act of Parliament; and, by the ninety-seventh article, indulgence to form congregations, churches, and professions, was accorded to all.

In the year 1696-7, the General Assembly passed an Act

<sup>1</sup> History New-York, p. 110. Ibid. 218.

<sup>2</sup> DALCHO'S *History of the Church in S. Carolina*, 1-3.

granting liberty of conscience to all Protestants "to enjoy full and undisturbed liberty to exercise their worship according to the professed rules of their religion."<sup>1</sup>

In 1698, an act was passed for providing a public maintenance of \$150 per annum for a minister in Charleston, payable out of the public treasury. This act recited the provision of the Charter of Charles II., that no religious ministry, except that established by law in this kingdom of England, should have any public maintenance. And, in November, 1706, an act was adopted supporting the establishment, which continued to be the law of the Church in that colony, with some additions and variations, to the time of the Revolution, and portions of which it is understood regulate the Church to this day.<sup>2</sup>

It is not necessary to notice any act connected with Virginia prior to the new charter granted in 1619. In that it was provided, that the clergy should have, in each borough, a glebe of one hundred acres, and should receive a standing revenue of two hundred pounds. In 1619, the Colonial Assembly passed an act embodying these provisions; and, in 1621-2, further provisions were made upon the subject. Dr. Hawks remarks,<sup>3</sup> that the Church could not claim for itself the privileges of an establishment prior to the legislation of 1619; that, from such period, we are to date the establishment of the Episcopal Church in Virginia.

In 1624, the Assembly, among other enactments respecting the Church, adopted the following, "That there should be an uniformity in the Church, as near as might be to the canons of the Church of England, and that all persons should yield a ready obedience to them, upon pain of censure."<sup>4</sup>

<sup>1</sup> DALCHO'S *History*, 31.

<sup>2</sup> *Ibid.* app. 1.

<sup>3</sup> *Contributions to Ecc. His.* vol. i., p. 35.

<sup>4</sup> *Ibid.* 44.

In 1642, an act was passed, declaring "that no minister should be admitted to officiate, in this country, but such as shall produce to the governor a testimonial that he has received his ordination from some Bishop in England, and shall then subscribe to be conformable to the orders and constitutions of the Church of England, and the laws there established."<sup>1</sup>

So, in 1662, the royal instructions were carried out by a legislative act. Provision was made for payment of a salary, and no one could serve as a vestryman without taking the oaths of allegiance and supremacy, and subscribing a declaration of conformity to the doctrine and discipline of the Church of England. There was also a penalty imposed upon those who should not attend divine worship.

In 1745 it was determined by the Attorney General, on a reference to him, that the English Act of Toleration extended to Virginia, and under this Presbyterianism arose and flourished in the state.<sup>2</sup>

With the qualifications resulting from this decision, the law remained the same until the sweeping repealing act of 1776.<sup>3</sup>

In Maryland, the first step towards the recognition of the Church as an Establishment, was by an Act of the Assembly of 1692. A certain tax was laid and ordered to be applied in support of a minister. In 1696 a new law was passed, annulling that of 1692, as well as several subsequent laws; and it was provided, "that the Church of England within this province, shall enjoy all the rights, privileges and freedoms, as it is now or shall be hereafter established in the kingdom of England; and that his Majesty's subjects of this province shall enjoy all their rights and liberties, according to the laws

<sup>1</sup> HAWKS' *Contr.*, vol. i. p. 53.

<sup>2</sup> *Ibid.* p. 109. See the note *ante* p. 16.

<sup>3</sup> *Ibid.* 143.

and statutes of the kingdom of England, in all matters and causes where the laws of this province are silent."<sup>1</sup>

This act, by a manœuvre of the adversaries of the Church, did not receive the royal assent; and in 1700 another was passed. This also was vehemently opposed. The able and devoted Dr. Bray went to England to obtain the sanction of the king, and a statute was drawn up in that kingdom. It was sent to Maryland, and in 1702 became a law.<sup>2</sup> By this law, every congregation and place of worship, according to the usage of the Church of England, was to be deemed a part of the Established Church. Every minister presented, inducted or appointed by the Governor, was to receive forty pounds of tobacco per poll. The sheriffs were to collect the tax. The English acts of toleration were extended to Quakers and Protestant Dissenters, under certain regulations.<sup>3</sup>

It is not necessary to detail the successive assaults upon the Church and the rights and property of the clergy, which, through a long series of years, were made in the Assembly of Maryland. Bitter animosity and perseverance advanced from innovation to outrage, until the Revolution brought with it, as a necessary and justifiable consequence, the overthrow of the Church as an Establishment; and the declaration of the rights and liberties of the State of Maryland, in November 1776, terminated all that had survived of its distinctive privileged character.<sup>4</sup>

<sup>1</sup> HAWKS' *Contr.*, vol. ii. p. 71.

<sup>2</sup> *Ibid.*, 89. 96. 113.

<sup>3</sup> The remarks of Dr. Hawks, (p. 115,) that this law sprang from the Board of Trade, and that its adoption by the Assembly of Maryland was a mere formal mockery, seem scarcely warranted. Whatever were its merits or demerits, it was a full expression of the real sentiments of the Assembly. The law of 1700 was quite as rigid in regard to Papists, and without any toleration of Dissenters; yet it passed the Assembly unanimously.

<sup>4</sup> The Legislature of Maryland, with a sense of justice most commendable in those days, secured to the Church all the glebes and property then owned by her, and directed that the repairs of the sacred



From this detail of the legislation in these colonies, it is plain that the whole system of a partial provision for the Episcopal Church is attributable to the Assemblies themselves. The government of England did not prescribe it:—Parliament was inactive and silent. There were, indeed, injunctions to this effect in several of the instructions of the king; but as to these we must notice, that a National Church could only be established by the authority of Parliament. No other power could bind the whole realm to uniformity of worship, or render an oath of subscription to articles, a condition of filling a civil or other office.<sup>1</sup>

Hence, when we find that in royal instructions and proclamations, the governors of colonies are directed not to prefer any one to an ecclesiastical benefice without a certificate from the Bishop of London of his conformity to the doctrine and discipline of the Church of England, we meet the very question which so long agitated the colonies as to the force of the royal ordinances, and must admit their insufficiency.<sup>2</sup>

It is not to be denied that the governors often availed themselves of these proclamations to justify their acts. Some

edifices then progressing should go on. It forbade all further assessments for the support of ministers.

<sup>1</sup> The authority of the king over the Church, prior to the series of statutes in the time of Henry the Eighth, though largely insisted upon by Lord Coke, (5 Institute,) has been, and particularly of late, much questioned and limited. Bishop Stillingfleet long ago denied, that the king could appoint a commission to proceed by way of an extraordinary jurisdiction against persons by ecclesiastical censures. (Ecc. Cases, part ii. p. 67.)

Mr. Churton, in his interesting history of the Saxon Church, affords valuable information upon this head. I think it may be gathered that the king was but one, though the head, of that great Assembly, in which priests, nobles and monarch framed the laws for both Church and State. See also Dawson's *Origo Legum*, Book vi., cap. 3d, 4th.

<sup>2</sup> Instructions to Lord Cornbury, Governor of New-York, 1703. Apud Hawkins' Hist. Notices, p. 423. Ordinance of the King, 1606. Apud Anderson's Hist. of the Colonial Church, p. 206. Instructions to Sir W. Berkely, Governor of Virginia. Apud Hawks' Contr., vol i. p. 65.

in the spirit of unjust intolerance, some in the conviction of their legality and the firm persuasion that to be within the Church of England was to be in the only path of safety, acted upon these instructions, and not upon the law. But the spirit of the age was not the spirit of toleration, nor can Churchmen be justly charged with an excess of severity. The act of Virginia, in 1642, which silenced the delegates from the ministers of Boston under pain of banishment, will not contrast unfavorably with the statute of Massachusetts which doomed the exiled Quaker to death if he returned.<sup>1</sup>

Another and important characteristic of the Church of the colonies was this. It did not owe its existence or support to the government of England. Neglected and unnoticed, if it received no strength from the hands of ministers, it escaped the baneful influence of dependence upon them. The government cared not to interfere with the nominations of clergymen to the places of labor and destitution which fell to the lot of the missionaries. It was only when the fervent eloquence of Bishop Berkely had won from a reluctant Parliament the munificent gift of £20,000 to found a college for America, that Sir Robert Walpole interposed, and plundered the fund to swell the nuptial pomp of a Princess.<sup>2</sup>

But it was to the Society for the Propagation of the Gospel in Foreign Parts, that this land was chiefly indebted for the spread of the sound doctrines and faith of the Church. That society was incorporated in 1701, and owed its existence as much to the exertions of Dr. Bray, commissary of Maryland, as to those of any other person. It was, in the language of the charter, established "for the receiving and managing such funds as might be contributed for the religious instruction of his Majesty's subjects beyond the seas; for the maintenance

<sup>1</sup> Hawks, vol. i. p. 53.

<sup>2</sup> HAWKINS' *Church in the Colonies*. CHANDLER'S *Life of Johnson*, 53.

of clergymen in the plantations, colonies and factories of Great Britain; and for the general propagation of the Gospel.”

It would be inappropriate here to trace the transactions of this beneficent body. The story of its abundant labors and countless blessings, is a proper theme for the eloquent pen of the historian of the Church. Throughout his own works—throughout the late publications in England upon colonial annals—are poured forth in a copious stream, the memorials of its holy efforts, and their holy fruits; and when from the thousand altars of the Episcopal Church, the utterance of praise and prayer arises in the stately-flowing language of the liturgy of Edward, let us remember that chiefly to that society we owe the inappreciable gift.

Nor does it devolve upon me to do more than to glance at the early, renewed, incessant efforts of American Churchmen to obtain a bishop for the colonies. From the year 1702, when the plan of the zealous Dr. Bray was urged, to the year 1767, when Johnson and Chandler made the last appeal, the missionaries of the Church stood upon the shore, and beckoned the descendants of the Apostles to come across. They beckoned ineffectually, and the cause of Episcopacy trembled for many years in the struggle with dissent.<sup>1</sup>

In connection with this topic, I shall briefly advert to the superintendence of the Bishop of London over the colonial Church, and its union with the Diocese of London. Some obscurity attends the origin of this authority; but at a later period, it was derived from the king's Commission.<sup>2</sup>

<sup>1</sup> HAWKS, vol. 2, p. 119. CHANDLER'S *Life of Johnson*, p. 115. Some earlier attempt may have escaped my notice.

<sup>2</sup> Dr. Hawks states (vol. 2, p. 112) that Bishop Gibson was the only bishop who had taken a commission from the king. Bishop Wilberforce observes (*American Church*, p. 137) that when Gibson came to the See of London he was told that by an order of Council in the reign of Charles II., the colonies were made a part of the See of London; that upon search he discovered none such to exist, and that he declined to act until he obtained a commission from the crown.

It would be an endless and unnecessary task to detail the recognitions by the Church and public bodies, of the authority of that Bishop. It is sufficient to adduce a few examples in the note, and to say that it was scarcely ever questioned.<sup>1</sup>

There are some other facts illustrative of the situation of the colonial Church in connection with that of England, which I deem it useful to notice.

In May 1704, the Assembly of South Carolina passed an act requiring conformity to the worship of the Church of England, in all members of the Commons House of Assembly.

The Reverend Edward Marston strongly censured the statute, and was proceeded against for reflecting upon the purity and character of the house. It ended by his being deprived, by resolution, of his salary of £150, granted under the act of 1698; leaving his office and ecclesiastical function to his

His first act appears to have been an address dated November, 1723. In the instructions of the venerable Society to the missionaries, they were directed to wait upon the Lord Bishop of London, their Diocesan; (1 HAWKINS' *Hist. Notices*, p. 424;) and in the instructions to the governor, of 1703, this authority over them is recognized. (Ibid. 423.)

There are two letters from Bishop Sherlock in Chandler's *Life of Johnson*, dated, one in 1750, and the other in 1752, adverting to the necessity of taking out a royal patent, and from the last of which I judge that he ultimately did so. (Page 171.)

<sup>1</sup> As early as 1687, a memorial was presented from Maryland to the Bishop of London, "to send some one invested with so much of the authority of the Diocesan as would capacitate to redress what was amiss, and supply what was wanting in the Church." In this the governor and Assembly concurred. (Hawks, vol. 2, p. 81.) In January, 1699, the governor and Council of South Carolina addressed a letter to the Bishop, speaking of the fatherlike care he had taken to fill all the churches in his majesty's plantations in America with pious, learned and orthodox ministers, and especially by securing so eminently good a man as the late minister, Mr. Marshall." (DALCHO'S *Hist.*) The bishop appointed commissaries for various colonies, the Rev. Mr. Johnson, for South Carolina, in 1707; Henderson and Wilkinson, for Maryland, in 1716; Dr. Bray, for North Carolina, in 1703; Dr. Blair, for Virginia, in 1689; and the Rev. Mr. Vesey, for New-York in 1713.

Ecclesiastical Governors and Ordinary, and not meddling therewith. The deprivation was to be until amendment and submission. The Governor and Council concurred in this censure.<sup>1</sup>

Another law of this colony, passed in November 1704, contained provisions of a very arbitrary and exclusive nature, and became a source of offence both to Churchmen and their adversaries. The Dissenters treated it as a violation of the charter and an infringement on their privileges: the Churchmen complained of it as constituting a lay tribunal for the judging of ecclesiastical cases. A commission for that purpose was established of twenty laymen. This was denounced as an invasion of the authority of the Bishop of London, by whom, or by whose officials, such courts could alone be held.

In 1706, a memorial was sent to the House of Lords, complaining of this act of the Assembly. It stated, amongst other things, that the ecclesiastical government of the province was under the Bishop of London, but that the governor and his adherents had at last done what the latter have often threatened to do—wholly abolished it.<sup>2</sup>

The Lords voted an address to the queen, in which they declare, that the said act, so far as the same relates to the establishing a commission for displacing the rectors or ministers of the Churches, was not warranted by the charter, was repugnant to the law of the realm, and destructive of the constitution of the Church of England.

They denounced equally the provision of the other act, as to the qualifications of members of Assembly. That act I have before noticed, as passed in May, 1704. In June, 1706, the queen declared the laws to be null and void. The Society determined to send no more missionaries to South Carolina, until the Legislature repealed the acts; and, accordingly, in November, 1706, the General Assembly abolished them.

<sup>1</sup> DALCHOS' *Hist.*, 56–58.

<sup>2</sup> *Ibid.* p. 65.

A striking case is to be found in the history of Maryland. In 1704, one of the parishes made an application to the governor, by way of petition, and drew up articles against their ministers. The governor consulted with some of the clergy. The course recommended was, that if a remonstrance with the ministers proved ineffectual, then the governor should call on him to answer the charges preferred, and that the testimony should be transmitted to the Bishop of London, for his determination of the case. The vestry renewed their solicitations to the governor to decide the case. He thought of summoning the party to make his defence before the council, but was advised by some of the clergy, that the matter was of purely ecclesiastical jurisdiction. He then sent three clergymen into the parish to examine into the matter, partly to quiet the minds of the complainants, and partly to ascertain facts which might be laid before the bishop.<sup>1</sup>

In this precedent, we have the theory of ecclesiastical authority and the rule of the canon law of England observed as far as it was practicable. By that law, the churchwardens have the right, and are the proper persons, to lay a complaint before the bishop of the diocese, by whom it is to be investigated and determined.<sup>2</sup> The application to, or through the governor, was a matter anomalous, but growing out of his legal position. The governor disclaimed the power of judging a matter merely ecclesiastical, and put the parties in the way of having the facts laid before the bishop.

*Again.*—In the course of the fierce and persevering attack made by Bordesley upon the Church, he introduced a bill into the Assembly to establish a Court for the Trial of Clergymen, and thus to bring them under a lay jurisdiction. The governor refused his assent; first, because the clergy were properly under the jurisdiction of the Bishop of London; and, next, be-

<sup>1</sup> HAWKS' *Contr.*, &c., vol. 1, p. 140.

<sup>2</sup> PHILLIMORE'S *Ed. of Burns*, vol. 1, p. 399.

cause there were really no such evils as to render the law necessary.<sup>1</sup> So we find that the Commissary of the Bishop officially informed one of the clergy of complaints made against him, and preliminary measures were taken for the investigation and correction of his conduct.<sup>2</sup>

Upon this subject, however, the attempt to procure an act from the Assembly of Maryland, recognizing the authority of the Bishop of London, deserves consideration. The details will be found in Dr. Hawks' volume, p. 159, &c. It appears that it was sought for by the governor; that it was not required, or deemed necessary, by the Bishop; that it was opposed by Mr. Henderson, the Commissary of the Eastern shore; and that the leading motives for the effort were the removal of difficulties which attended the exercise of the Commissary's power. By one provision, for example, the sheriff was appointed the officer to serve citations, &c.

Upon the whole, it is manifest, that this attempt was to strengthen and facilitate the exercise of the Bishop's jurisdiction, not to establish it.

During the colonial period, it was the custom of the clergy of Connecticut to meet in convention, and transact such business as lay in their power. After the consecration of Bishop Seabury, these assemblies were termed convocations. The connection with the English Church is clearly recognized, or implied, in all the early records.<sup>3</sup>

<sup>1</sup> HAWKS' *Cont.*, vol. 2, p. 179.

<sup>2</sup> *Ibid.* p. 159.

<sup>3</sup> Thus, at a meeting of convention at Wallingford, May 28, 1776, the following act took place:—"We, the clergy of the Church of England in Connecticut, in a voluntary convention, beg leave, with all humility, to recommend Mr. Abraham Beach to your Lordship, as a proper candidate for holy orders." This was addressed to the Bishop of London. It was also voted that a letter be wrote to the Bishop of London to acquaint him concerning the conduct of the churches in these difficult times; and also concerning the taking away children from their godfathers." I have examined various minutes of these

I have thus gathered together a collection of facts and historical muniments, to show the identity of the Church of the colonies with that of England—to show how thoroughly she was pervaded with the spirit of the law, as well as of the faith and doctrine of that Church. In following this inquiry, it can scarcely have escaped notice, how much that law was modified and influenced by our colonial situation, usages, and jurisprudence. The truth is, that a common law had sprung up in the colonies, the offspring of their necessities and position, in the same manner as the common law of England had arisen in the Saxon ages. The latter, with wonderful flexibility, had adapted itself to the mutations and the progress of successive centuries. That superadded American common law was developed in usages and statutes; and its influence was felt in the system of the Church, as well as in the civil relations of the people.

And thus, as we better understand her character and position, we shall better appreciate the facility of her transition from the Church of England in the colonies, to the Protestant Episcopal Church of the United States. No violent disruption of the sacred bond took place. The daughter glided from the mother's side, because, in the allotment of Providence, she had been led to maturity and independence; but

conventions through 1774, 1776, 1780, and other years. In 1776, in June, it was resolved, that the clergy supply the vacant congregations of the Church of England in this colony as often as will be consistent with their other duties. And the members present were distributed accordingly.

At the same meeting, letters recommendatory were given to Mr. J. Nichols as a candidate for orders, addressed to the Bishop of London.

In May, 1781, a conventional letter was directed to be written to a clergyman, expressive of their concern for his deviation from the doctrines of the Church, and appointing a committee to consider what was advisable to be done in his case.

The heading of the minutes of the convention, is, "At a Meeting of the Clergy of the Church of England in Connecticut."



the spiritual union, the union of faith, of worship, and of discipline, was undestroyed ; and God grant that it may prove indestructible.

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The separate action of the Churches in the states, after the revolution, and prior to or about the period of the organization of the General Convention, is the next subject of inquiry.

On the day after the declaration of Independence, the Convention of Virginia altered the Book of Common Prayer to accommodate it to the change of affairs.<sup>1</sup> This document is found in the State Library, in Albany. It contains various alterations of the service, almost exclusively relating to the prayers for rulers, and closes as follows :

“ Let every other sentence of the Litany be retained, without any other alteration, except the above sentences recited.”

By the act of the Assembly of Virginia, of 1784, the vestrymen were required to subscribe a Declaration of Conformity to the Doctrine, Discipline and Worship of the Protestant Episcopal Church.<sup>2</sup>

Among the regulations of 1785, it was provided, that the Liturgy of the Church of England should be used with such alterations only as had been rendered necessary by the American Revolution.<sup>3</sup>

In 1790, during the bitter assaults upon the rights of the Church to the glebes, it was resolved by the Convention, “ That the Protestant Episcopal Church is the exclusive owner of the glebes, churches, and other property held by the Church of England in Virginia, at the commencement of the revolution ;”<sup>4</sup> and, in 1799, an opinion was given by Bushrod Washington, Edmund Randolph and John Wickham, asserting the same doctrine as was contained in the resolution of the Convention.

<sup>1</sup> HAWKS' *Contr.* vol. 1, p. 238.

<sup>2</sup> *Ibid.* 163.

<sup>3</sup> *Ibid.* 182.

<sup>4</sup> *Ibid.* 209. An Essay was read by Dr. Madison upon this subject.

The action of Maryland is of the highest importance. In 1775, the authorities prescribed a form of prayer for the new, instead of the old government, and required an oath of the clergy to support it.

In 1783, the celebrated Declaration of fundamental rights was issued by the first convention. It was declared that "the Church of Maryland possessed the right to *preserve and complete herself as an entire Church, agreeably to her ancient usages and professions*: that she had the essential enjoyment of those spiritual powers which are essential to the being of every Church, independent of any foreign or other jurisdiction, so far as may be consistent with the civil rights of society."

It was also declared, "that the churches, chapels, glebes and other property formerly belonging to the Church of England, belonged to that Church and were secured to it for ever"; and it closed with the following admirable passage: "As it is the right, so it will be the duty of the said Church, (when duly organized, constituted and represented in a synod or convention of the different orders of her ministers and people,) to revise her liturgy, forms of prayer, and public worship, in order to adapt the same to the late revolution, and other local circumstances of America; which, it is humbly conceived, may be done without any other departure from the venerable order and beautiful forms of worship of the Church from which we sprung, than may be found expedient in the change of our situation from a daughter to a sister Church."

In the Vestry act passed by the State of Maryland in 1798, and adopted by the Church as part of its organization, there is a clause expressly recognizing the Church of England as having been the same as the Protestant Episcopal Church of Maryland.<sup>1</sup>

<sup>1</sup> HAWKS' *Contr.*, vol. ii., p. 330. Compilation of the Constitution, &c. Baltimore, 1849. p. 275, § 16.

By the Constitution of South Carolina, 31st May, 1786, it was declared that the doctrines of the Gospel be maintained as now professed in the Church of England, and uniformity of worship be continued as near as may be to the liturgy of the said Church. (DALCHO'S *Hist.*, &c., p. 474.)

The action and judgment of Pennsylvania is shown by the fundamental articles adopted in May 1784. One of them was, that the said Church shall maintain the doctrines of the Gospel as now held by the Church of England, and shall adhere to the liturgy of the said Church as far as shall be consistent with the American Revolution and the Constitution of the respective States.<sup>1</sup>

In September 1784, Massachusetts declared certain articles, the third of which was almost in the identical language of that of Pennsylvania above quoted.<sup>2</sup>

The State of New Jersey, in May 1786, passed a set of rules and regulations. By the 9th, a declaration was required from every clergyman before he could officiate in the state, "that he engaged to conform to the discipline of the Church, and also to the doctrines and worship agreeable to the Book of Common Prayer of the Church of England, except the political alterations in the mode of worship made therein by the Convention held in Philadelphia from the 27th September to the 7th October, 1785."

In New-York, in 1790, it was resolved as follows:—  
 "Whereas many respectable members of our Church are alarmed at the Articles of our Religion not being inserted in our new Book of Common Prayer, *Resolved*, that the Articles of the Church of England as they now stand, except such part thereof as affect the political government of this country, be held in full force and virtue until a further provision is made by the General Convention."<sup>3</sup>

<sup>1</sup> WHITE'S *Memoirs*, 73.

<sup>2</sup> *Journals* 1790, p. 39.

<sup>3</sup> *Ibid*, 69.

A proposition was submitted in 1791, instructing the Deputies to vote for retaining the Articles of Religion as they now stand in the old Book of Common Prayer, without any alteration except such as are of a political nature. The motion was deferred. In 1801, instructions were given to that effect.<sup>1</sup>

The Convention of New Jersey, in May 1786, after debate, agreed to a memorial to the General Convention, in which the following admirable passages are to be found: "Your memorialists do not question the right of every national or independent Church to make such alterations from time to time in the mode of its public worship as may be found convenient; but they doubt the right of any order or orders of men in an Episcopal Church without a Bishop, to make any alterations not warranted by immediate necessity, especially such as not only go to the mode of its worship, but also to its doctrines. Your memorialists having an anxious desire of cementing, perpetuating and extending the union so happily begun in the Church, with all deference, humbly request the General Convention that they will revise the proceedings of the late Convention and their committee, and remove every cause that may have excited any jealousy or fear that the Episcopal Church in the United States of America has any intention or desire essentially to depart, either in doctrine or discipline, from the Church of England; but on the contrary, to convince the world that it is their wish and intention to maintain the doctrines of the Gospel as now held by the Church of England, and to adhere to the liturgy of the said Church, as far as shall be consistent with the American Revolution and the Constitutions of the respective States."<sup>2</sup>

Among the documents of great value connected with the history of the Church in Connecticut, which I have examined,

<sup>1</sup> Journal, 1801.

<sup>2</sup> Proceedings of the Convention N. Jersey: Trenton, 1787.

is a letter from Doctor, afterwards Bishop Jarvis, dated May 1786, which expresses the views of the clergy of Connecticut. Among other things, he remarks:—"In the planting and growth of the Church in America, I have always understood that the Church of England was propagated and enlarged. Now, as our Church was in her original a part, and is, in her formation, the image of that—if we still adhere to the worship and doctrine, is it not proper (the question may be, whether it be not needful) to declare so authoritatively? I would, then, submit the following particulars:—1. That it be recommended to the Bishop to call a convocation, at which a resolution should be moved that we adopt the liturgy of the Church of England entire, except the prayers for the state, and the offices appointed for state days; or with some few abbreviations, such as will do no injury to the sense, order or connection of the whole. 2. That some particular prayers be added to those for special occasions, viz: for sick children, for persons under affliction for the death of friends, and for persons bound to sea, &c. 3. That such of the rubrics as we have found it necessary to deviate from, be altered where some alteration only is wanted; or others made, that are necessary to render our service and practice strictly rubrical and uniform. 4. That there be a revision of the canons, and such as are applicable, or may be made so, be selected; and in matters for which it is needful to provide entire new ones, suitable to the state and circumstances of our Church, that such be provided and confirmed by act of convocation."

In the year 1814, the following important act took place in the General Convention. The House of Bishops, and that of Clerical and Lay Deputies, united in the following declaration:

"It having been credibly stated to the House of Bishops, that on questions in reference to property devised before the revolution to congregations belonging to the Church of Eng-

land and to uses connected with that name, some doubts have been entertained in regard to the identity of the body to which the two names have been applied; the House think it expedient to make these declarations, and to request the concurrence of the House of Clerical and Lay Deputies therein, viz.: That the Protestant Episcopal Church in the United States of America, is the same body heretofore known in these states by the name of the Church of England; the change of name, although not of religious principle in doctrine, or in worship, or in discipline, being induced by a characteristic of the Church of England, supposing the independence of the Christian Churches under the different sovereignties, to which respectively their allegiance in civil concerns belongs. But it would be contrary to fact for any one to infer that the discipline exercised in this Church, or that any proceedings therein, are at all dependent on the will of the civil or ecclesiastical authority of any foreign country."

I add, in the note, the valuable and strong authority of Bishop White to the point now urged, as well as some other opinions. I would call attention to the perspicuous statement of the proposition by the late Thomas Addis Emmett.<sup>1</sup>

<sup>1</sup> "In all the deliberations of the convention, the object was the perpetuation of the Episcopal Church, on the ground of the general principles which she had inherited from the Church of England, and of not departing from them except so far as local circumstances required, or some very important cause rendered proper. To those acquainted with the Church of England, it must be evident that this object was accomplished on the ratification of the Articles."

Again, "The political prayers were superseded, (by the revolution,) and the using them was punishable by events brought about in the course of Divine providence. To pray for our civil rulers was a duty bound on us by a higher authority than that of the Church.<sup>1</sup> In all other respects, I hold the former Ecclesiastical system to be binding. The Conventions of our Church have always acted on the same principle, except that of October, 1789, whose adoption of a different principle has rendered our Liturgy much more imperfect (according to

<sup>1</sup> See the admirable Thanksgiving Sermon of Bishop Stillingfleet, 1694.

It appears to me difficult to overrate the force of the resolution of the Houses in 1814, and the similar proceedings in the states which have been mentioned. By the decided voice of the Church, separately expressed in Virginia and my opinion) than it would otherwise have been." (Appendix to WILSON'S *Life of Bishop White*, page 347.)

After speaking of Dr. Blackwall, he says, "He is of opinion, with the House of Clerical and Lay Deputies, in 1789, that our Church possesses no institutions until made for her specially. If the matter had been so understood at the close of the revolutionary war, and there had been among us such spirits as I can now designate, it would have torn us to pieces." (Ibid. 348.)

In the *Memoirs of the Church* (p. 175) the Bishop goes through the discussion upon the Book of Common Prayer in the year 1789, and states the different principles upon which the House of Clerical and Lay Deputies and the Bishops proceeded. In the practical result, the views of the Bishops were carried out. The English book was made the basis. It was to remain, except as altered.

See also his work on the *Comparative View of the Calvinistic and Arminian Controversy*, vol. 2, page 191. So in the *Memoirs of the Church* he re-states the position, and urges many reasons in its support, that what is now called "the Episcopal Church in the United States of America, is precisely in Succession the Body formerly known as the Church of England in America, the change of name having been a dictate of the change of circumstances in the civil constitution of the country."

The opinion of the House of Deputies in 1789 was in opposition to that of the Bishops, and Dr. Wilson (*Life of Bishop White*, p. 141) remarks that this differed from the course taken both by previous and subsequent conventions, and being confined to one House, and not at any time afterwards pursued, cannot be regarded as a determination against the principle adopted by the Bishops.

Dr. Hawks (*Constitution and Canons*, p. 265) observes, "The opinions which were entertained in the mother country, and the decisions which had been made on matters of ecclesiastical law, or usage, up to the severance of these colonies by the revolution, were, as far as applicable, held to be the guide of the Church of England here, and although the independence of the United States dissolved the connection, it evidently did not destroy the prevailing opinions among Churchmen as to matters and usages touching the Church. To the common and canon law of England we must therefore look, if we would fully understand the origin of much of the law of our own Church."

Maryland, and then uttered by the representative body of the whole Union, the identity of the Church of England with our own was proclaimed. In what then did this identity consist? How was it that the Protestant Episcopal Church in Virginia and Maryland continued to be the owners of that property, which was once vested in the Church of England in the colonies. Was it because the Liturgy was retained with several modifications—because the Articles were republished with some variations—because the faith was adhered to; or was it because the whole compact body of the English Church, in all its integrity—as far, and in every particular as far, as it was not necessarily, or by express enactment, changed, was continued and perpetuated?

That Church comprehended, as integral portions of its very existence, not merely Articles and Liturgy, but laws and canons for discipline and rule. On what possible ground can this identity be asserted, if the latter important fundamental element of identity, is discarded?

*Again*, Another argument may be used which strikes me as of great weight. It is stated by the highest authority,

I add a passage from the argument of Mr. Emmet, in the case of the Rev. Cave Jones, (Report of the Case, &c., p. 493. New-York, 1813,) “No man could be permitted to say, that nothing was permitted or restrained as to any particular matter in a newly erected state, since its own immediate legislature had passed no law or ordinance respecting it. The answer would be—the law which regulates it is prior to the existence of our state; it comes to us by inheritance from our fathers, and we brought it with us into this association. So it is with our ecclesiastical government. In organizing and becoming members of the Protestant Episcopal Church in America, no one considered himself as becoming a member of a new religion, or as adopting a different form or rules of ecclesiastical government, except so far as depended upon the connection in England between Church and State, and the regulations in that country produced by the king’s being the head of the Church. These were all necessarily rejected as being inapplicable to our situation; but in every other respect, the rules and laws of our Mother Church, where they can be applied, are the common law of our own religious association.”



that "in every Church, whatever cannot be clearly determined to belong to doctrine, must be referred to discipline; and that this Church was far from intending to depart from the Church of England in any essential point of doctrine, discipline, or worship, or farther than local circumstances require."<sup>1</sup>

Let us ascertain what is the sense of the term "discipline," when used in ecclesiastical writings.

It has, I apprehend, two meanings: *First*, The administration of punishment for offences. *Next*, The regulation and government of the Church. "The following passage from Bishop Gibson affords an illustration of the first meaning. "The very office of consecration, so often confirmed by parliament, warrants every Bishop, in the clearest and fullest terms, to claim authority by the Word of God, for the correcting and punishing of such as be unquiet, disobedient and criminous, *i. e.*, for the exercise of all manner of spiritual discipline."<sup>2</sup>

The other meaning is of more importance to the present argument. In the preface to the English Book of Common Prayer (2d and 5th Ed. VI., "Of Ceremonies, why some be abolished and others retained,") is the following clause: "Although the keeping or omitting of a ceremony, in itself considered, is but a small thing, yet the wilful and contemptuous transgression of a common order and *discipline* is no small offence before God."

Again. "And, besides, Christ's Gospel is not a ceremonial law; but it is a religion to serve God, not in the bondage of the figure or shadow, but in the freedom of the spirit, being content only with those ceremonies which do serve to a decent order and godly discipline."

The Book of Common Prayer received some alterations after the accession of James, and in the proclamation of that

<sup>1</sup> Preface to the Book of Common Prayer, 16th October, 1789.

<sup>2</sup> GIBSON'S *Codex*, vol. 1, p. 18.

monarch is the following sentence: "And now, upon our entry into this realm, being importuned with informations of many ministers, complaining of errors and imperfections in the Church here, as well in matter of Doctrine as of Discipline, &c."<sup>1</sup>

And in the statute (13th-14th Charles II., § 1,) the publication of all books bringing into contempt the *Doctrine* or *Discipline* of the Church of England is prohibited.

But I do not find any where a passage more admirably illustrative of this subject, than in the preface to the Canons of the Scottish Church, adopted in 1839. "The doctrines of the Church, as founded on the authority of Scripture, being free and immovable, ought to be uniformly received and adhered to, in all times and all places. The same is to be said of its government, in all those essential parts of its constitution which were prescribed by its adorable Head. But in the discipline which may be adopted for furthering the purposes of ecclesiastical government, regulating the solemnities of public worship as to time, place and form, and restraining and rectifying the evils occasioned by human depravity, this character of immutability is not to be looked for."<sup>2</sup>

Now, what did the discipline of the English Church comprehend? It embraced the establishment and prescription of the Book of Common Prayer, to be used throughout the realm; the adoption by ministers of, and subscription to the articles of faith; the regulation of rites and ceremonies by canons and rubrics; and just as much, just as fully and absolutely, did it comprise the whole body of ecclesiastical law by which the

<sup>1</sup> Statutes at Large, vol. 2, p. 438.

<sup>2</sup> *Apud Burns' Ecc. Law*, by PHILLIMORE, vol. 415. Hooker thus uses the term, "As we are to believe forever the articles of evangelical doctrine, so the precepts and discipline we are in like sort bound forever to observe."

The following occurs in an oration of Cicero, "Hæc igitur est tua Disciplina, sic tu instituis adolescentes?"—*Pro Calo*.

Church, in all other particulars, was controlled and directed. That this whole body of discipline was the rule of the colonial Church, with the unavoidable qualifications before adverted to, is a point which admits not of dispute.

When, then, we find our Church declaring, in one of its most solemn acts, that all which is not of doctrine is of discipline; that she meant not to depart from the Church of England in doctrine or discipline, further than local circumstances required; when we find that the body of English ecclesiastical law was an undoubted part of discipline in that Church and in the colonial Church; when we find no discrimination made between what of discipline is binding and what is annulled, the conclusion seems irresistible, that this law, with necessary modifications, retained the same authority after the revolution which it possessed before.

And what advantage can we reap by severing the tie with the Church of England, in this particular, when the wisest of our fathers cherished the connection in every other, as the pillar and foundation of truth? Far from their thoughts and feelings was that pride of isolation and arrogance of judgment, which would treat the Catholic Church as the newly-reared fabric of its members will; "as if it were a body in itself, indebted to no one, related to no one, without fathers, without brethren—as if it had fallen, like the Roman sacred shield, immediately from Heaven."

And what advantages do we not lose, when we disclaim this healthful and time-honored union? Looking at the question merely as a lawyer and searcher for truth, we abandon, (and for a dim untrodden path,) the road illumined by the shining lights of English intellect in the Church and on the bench. For our instruction and guidance we have the well-known names of Coke, Holt and Hardwicke, of Nichols, Stowell and Lee, in the tribunals of justice; of Ridley, Gibson, Stillingfleet, and a cloud of others, among the English

canonists. Under their auspices, we shall find "happier walls" than our own abilities can rear, or our own fancies can devise. Here we may attain to certainty, the mother of quietness and repose.

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What then is that English ecclesiastical law whose influence it is presumed is now felt in our Church? That question is best answered by quoting the doctrines and decisions of English jurists; and I deem the subject of such importance as to incur the charge of prolixity in stating them.

In the 25th year of Henry the VIII., in the act for the punishment of heresie, is a preamble setting forth the great grievance which the generality of the words in Popish decrees and acts produced, "and that the most learned and expert man of the realm, diligently lying in wait upon himself, cannot eschew and avoid the penalty and dangers of the same."

To prove the 'inconsistency of many of these laws with the laws of the land, Archbishop Cranmer had drawn together many citations from the body of the Canon Law. His compilation is<sup>1</sup> to be found in Burnet's History of the Reformation.<sup>2</sup>

And the Preface to the *Reformatio Legum* has the following striking passage:—" *Leges Legibus, Decreta Decretis, ac iis insuper Decretalia, aliis alia atque item alia accumulæ,*

<sup>1</sup> Codex. vol. 2, p. 997.

<sup>2</sup> Hist. Reformation, p. 257. Appendix. The articles enumerated are chiefly those which relate to or assert the Pope's absolute authority. One of them is very singular, "Every man must obey the canons and laws of the Pope, but the Pope and his conduct can be observed upon by no man: nay though his sins destroy his own soul and be the means to draw thousands into hell, yet can no man question his conduct."

Wickliffe must have had some such extravagance in his mind when he wrote as follows:—" *Ecclesiasticus imo, et Romanum Pontifex potest legitime a subditis et Laicis corripit et etiam accusari.*" (*Conclusiones J. WICKLIFFE apud Constitutiones Provinciales.* Oxford Ed., J. Lynwood and John De Athon. 1679. Addenda, p. 58. Anno 1378.)

*ne cullum pene statuit cumulandi finem, donec tandem suis Clementinis, Sextinis, Intra et Extravagantibus, constitutionibus provincialibus et Synodalibus, Paleis, Glosulis, Sententiis, Capituliis, Summariis, Rescriptis, Breviculis, Casibus longis et brevibus, ac infinitis Rhapsodiis adeo orbem conforcinavit, ut Atlas mons, quo sustineri cælum dicitur huic (si imponeretur,) oneri vix ferendo sufficeret.*"<sup>1</sup>

Dawson, in his elaborate work on the Origin of Laws, says, p. 35, "But afterwards, a new sort of common law began to take place, which thrust and crowded out the other, viz., that of the Decretals, Capitulars, Clementines and Extravagants, and I know not what beside. Its first appearance was about the year 836, as De La Marca saith, and Pope Nicholas countenancing it, it quickly prevailed over all the provinces of the west. In very deed, the true and real canon law is lost among the many voluminous heaps of what falsely bears its name; and the canons of General Councils are buried under the rubbish of decretals of Popes; which made an ingenious author, about the year 1046, in a comparison between the Churches of the East and West, to say, "In the Greek Church are many Canonists, and in the Latin Church are no Canonists, but many Decretalists." (Book I., cap. 15.)

By the act 25 Henry VIII., c. 19, a Declaration of the clergy was recited, that many of the constitutions, ordinances and canons, provincial or synodical, were contrary to the laws and statutes of the realm, repugnant to the king's prerogative, and onerous to the subject; and the king was authorized to appoint thirty-two persons, half clergymen and half laymen, out of the two Houses of Parliament, "to view, search and examine the canons, constitutions, ordinances, provincial and synodal, theretofore made, not contrariant or repugnant to the laws and customs of the realm and the prerogative royal."

<sup>1</sup> Prefatio Ed. 1640.

It was also provided that "such canons, constitutions and ordinances being already made not contrariant or repugnant as aforesaid, should be used and executed *as they were afore the making of the act*, till such time as they be otherwise ordered by such thirty-two persons."

So by the 21 chap. of Henry VIII. it is declared, that "the people of the realm had bound themselves by long use and custom to the observance of certain laws, not as the laws of any foreign prince or prelate, but as the customs and ancient laws of the realm, established as laws by the said sufferance, consent and custom."

By the statutes of 27 Henry VIII., c. 15, and 35 Henry VIII., c. 16, the authority of the commissioners was successively renewed, and again by the Act 3 and 4 Edward VI., cap. 11. A portion of this last act deserves attention. By the first section it was enacted, that the king should have power and authority to appoint the thirty-two persons to compile the laws, and by the fourth section nothing in the act was to be construed to give powers to those persons, *or to the king*, to compile, publish, or set forth any ecclesiastical laws repugnant or contrary to the common law or statutes of the realm.

The work was compiled, but did not become a law, in consequence of the death of Edward. Ineffectual attempts were afterwards made to revive and establish it.

We shall see how the principle announced in the statute prevails through all the leading authorities which I shall now cite:—

Pope Gregory, in writing to St. Augustine, says: "We are not to love customs, on account of the place from whence they come, but let us love all places, where good customs are observed. Choose, therefore, from every Church whatever is pious, religious, and well ordered; and, when you have made a bundle of good rules, leave them for your best legacy to the English."<sup>1</sup>

<sup>1</sup> CHURTON'S *Early English Church*, p. 43.

Chief Justice Hale—"I conceive that, when Christianity was first introduced into this land, it came not without some form of external ecclesiastical discipline or coercion, though at first it entered into the world without it; but that external discipline could not bind any man to submit to it, but either by force of the supreme civil power, where the governors received it, or by the voluntary submission of the particular persons that did receive it; if the former, then it was the civil power of the kingdom which gave that form of ecclesiastical discipline its life; if the latter, it was but a voluntary pact or submission which could not give it power longer than the party submitting pleased; and then the king allowed, connived at, and did not prohibit it; and thus, by degrees, introduced a custom whereby it became equal to other customs or usages.<sup>1</sup>

In Cowdry's case, (5 Coke's Rep. 33,) Lord Coke says: "So albeit the kings of England derived their ecclesiastical laws from others, yet so many as were proved, approved and allowed herein, and with a general consent, are aptly and rightly called the king's ecclesiastical laws of England." Justice Whitlock, in *Evans v. Owen*, (God. Rep. 432,) observes: "There is a common law ecclesiastical, as well as our common law, *jus commune ecclesiasticum*, as well as *jus commune laicum*."

The case of the *commendams* in Sir John Davies' Reports, 696, &c., is full of valuable learning, on this and other topics. The actual question was, whether an appointment to a Bishopric vacated *per se* all inferior benefices; and two cases, from the year books in the reigns of Henry IV. and Richard III., were cited to prove the position. A statement is then made as to the time and manner of introducing the body of the canon law into England; and it is inferred, especially from a passage of Roger Bacon, that it first came in under Stephen, about 1150. The gradual efforts of the Popes to ex-

<sup>1</sup> Cited by Lord Hardwicke, 2 Atkyns, 699.

tend its influence, as well over the laity as the clergy, are then fully detailed. The report proceeds: "A long time before the canon law was authorized and published, (which was after the Norman Conquest, as was before shown,) the ancient kings of England, viz., Edgar, Alfred, &c., have, with the advice of their clergy in the realm, made divers ordinances for the government of the English Church; and, after the Conquest, divers provincial synods have been held, and many constitutions made, in both the realms of England and Ireland; all which are part of our ecclesiastical law at this day." And so, in *Evans v. Ascaith* (Willm. Jones' Rep. 160,) it was declared that no foreign canons bind here except such as have been received, but, being received, they become part of our laws." And, in *Shute v. — Vaughan*, p. 132, upon a question of a cession of one benefice, by promotions to another, it is laid down, that the ancient canon law received into this kingdom, is the law of the kingdom in such cases.

I know of no authority in which the rule upon this subject is stated with more precision and accuracy, than in the opinion of Chief Justice Tindal, in the *Queen v. Mills* (10 Clarke & Finally, 678). "I proceed in the last place to endeavor to show, that the law by which the spiritual courts of this kingdom have from the earliest time been governed and regulated, is not the general canon law of Europe, imported as a body of law into this kingdom, and governing those courts *proprio vigore*; but instead thereof an ecclesiastical law, of which the general canon law is no doubt the basis, but which has been modified and altered from time to time by the ecclesiastical constitutions of our Archbishops and Bishops, and by the legislature of the realm, and which has been known from early times by the distinguishing title of the King's Ecclesiastical law. That the canon law of Europe does not, nor never did, as a body of laws, form part of the law of England, has been long settled and established."



So Lord Abinger (*Ibid.* 745.) "My noble and learned friend (Lord Brougham) seems to consider that the ecclesiastical law of England is to be derived from the ecclesiastical law of the continent. I beg to observe, that he has not at all satisfied my mind upon that part of the argument. The learned judges have, I think, satisfactorily derived it from the constitutions of the synods and councils in England, before the authority of the Pope was acknowledged in this country. I take that part only of the foreign law to be the ecclesiastical law of England, which has been adopted by Parliament or the courts of this country."

And Lord Cottenham, in his opinion, (p. 876,) thus expressed himself: "It is expedient, therefore, to ascertain as far as possible, what rules were prescribed to the ecclesiastical courts by the authorities within this realm; and if it shall appear that before the time at which the canon law is stated to have been introduced into this country, that is, before 1290, there were laws existing which regulated the proceedings and decisions respecting marriages, and which do not appear afterwards to have been altered, it must be of more importance to look to such laws, than to the rules of the general civil or canon law: and it appears that there were such laws, and that by them the intervention of a person in orders was necessary to constitute a valid marriage. The Institutes of Edmund direct that at a marriage 'there shall be a Mass Priest present, who shall bless the nuptials to all prosperity.' And by a constitution of the Council of Winchester, in the time of Archbishop Lafranc, (1076,) it was declared that a marriage without the benediction of a Priest, should not be a legitimate marriage. I see no reason to doubt the authenticity of these ancient ordinances; and if genuine, they establish the fact, that from the earliest times the laws of England differed upon this subject from the civil and canon law, and required the interposition of an ecclesiastical authority to make a valid marriage."

A more extended consideration of the laws of the English Church, at different stages of its history, will aid our inquiry. And there are four great periods, during each of which the laws received a strong and a distinct impress and character from political and civil regulations.

*First.* The first period comprises the time from the planting of Christianity to the coming of St. Augustine; the second, from that time to the Conquest; the next, from the Conquest to the Reformation; and the last, the period since that event.

It is not necessary to enter into any minute statement of the few memorials of history during the first period. It is sufficient to say, that it is proven there were bishops in England in the year 314. Three of them attended the Council of Arles of that year; others were at Sardica in 347; and at Rimini in 359.<sup>1</sup> It has been claimed that the Pope, during the Pelagian controversy, at the beginning of the 5th century, sent a delegate into England to keep it to the faith. The account of Bede is, that the British applied to the prelates of Gaul for aid; that they held a great synod, and elected Germanus and Lupsus to proceed to England.<sup>2</sup>

Without attempting to detail the scanty records of that period, I cite a statement of an eminent writer of England, upon this subject:

Dawson, in his *Origin of Laws*, after stating various historical matters respecting the Church, in the first six centuries, thus concludes (Book vi. cap. 4): "From all which put together and well considered, these four things are plain and easy to be observed. First, That the Britannic Church had its ancient laws and customs; and, by consequence, had an established way and form of Church government long before those days, (the coming of St. Austin.) Secondly, that it was

<sup>1</sup> STILLINGFLEET *Orig. Britt.* cap. 2, p. 76. KEMBLE'S *Saxons in England*, vol. 2. p. 355.

<sup>2</sup> *Ibid.* 366, note.

held unlawful for them to change or alter any of these laws or customs *sine consensu suorum*, as Bede (*expresses it*): *sine consensu suæ gentis*, as Alfred (*says*); and, by consequence, that all ecclesiastical matters were determined among themselves, and within the boundaries of their own nation, and not in any wise subject to any foreign jurisdiction.

Thirdly, That the way which was used by them, for the determining of such matters, was that of a national synod.

And, lastly, that the usual members of these synods were *optimates suorum, et alii viri docti*, by which we suppose to be meant their bishops and other learned men of the clergy; because Bede tells us, in the very next sentence, that when the business about calling another synod was agreed on, there met together, in a synod, seven bishops and many other very learned men." (Book vi. cap. 5.)

*Second.* St. Augustine arrived in England in the year 596. From that time down to the Conquest, there is a variety of original documents in existence, which have enabled the historians of the Church to trace its history and institutions with reasonable precision, and throw great light upon the canons and law then prevalent.

Thus, in the preface to the *Reformatio Legum*, it is stated: *Sic neque Angliæ nostra jam olim legum decreta sapienter a prudentissimis majoribus constituta. Declarant id Bracthonis nomethetica Inæ Regis, Edwardi senioris, Aethelstani, Eadmundi, Eadgari, Aluredi, Ethelredi, Canute, cæterorum que principum auspiciis institutæ sanctiones. Quæ leges quamdiu suam tueri auctoritatem potuerunt, viguit aliqua saltem in hoc regno morum disciplina.*

The labors of the Record Commission of 1821, have thrown great light upon the antiquities of English law. In the volume called the "Ancient Institutions of England," are published the laws of the Saxon kings, and other important documents. The compilers, in a note, p. 4, distinguish between

the *Laws*, whether upon temporal or spiritual subjects, and other *Institutions*. They term the latter *Monumenta Ecclesiastica*, and print them separately.

The laws relate in many particulars to the affairs of the Church. For example, that regulation which governed as much as any authority, the decision in the *Queen v. Mills*, in 1846, that the presence of a priest was necessary to a lawful marriage, is found among the laws of king Edmund in the year 940: "at the nuptials there shall be a Mass Priest by law, who shall, with God's blessing, bind the union to all prosperity."

Now all those of the Saxon Institutions which were termed *Laws*, were made at the great Council or Witenagemote of the realm, at which there was such a representation of the laity as the times admitted.<sup>1</sup>

But among the *Monumenta*, is a work called *Liber Penitentialis*, of Theodore, Archbishop of Canterbury. This consists of a full code of regulations respecting penance, made in the year 669, and by the authority, it would seem, of the Archbishop alone. So in the *Capitula*, cap. 38, it was provided, that any presbyter who should have obtained a parish by means of a price, is absolutely to be deposed, seeing that he is known to hold it contrary to the discipline of ecclesiastical rule. Also, it is to be forbidden both to clerks and laics,

<sup>1</sup> The prefix to the laws of king Inæ, runs thus: "Ego Inæ, &c., Rex exhortatione et doctrina Curedis Patris mei, et Heddes Episcopi mei, et Escenwaldes Episcopi mei, et omnium Aldermanorum meorum, et Seniorum sapientum regni mei, multaque congregatione servorum Dei, constitui rectum conjugium et justa judicia pro stabilitate," &c. (*Record Commission*, 498.)

The laws of Edgar begin: "This is the ordinance which king Edgar, with the Council of his Witan ordained." And those of Edmund: "Edmundux Rex congregavit magnum Synodum Dei ordinis, et seculi apud Lundonie civitatem, cui interfuit Ceda et Wulstanus Archepiscopi, et alii plures Episcopi, perquirentes de consilio animarum nostrarum et eorum qui subditi sunt illis."

that no one shall presume to give any church whatever to a presbyter, without the license and consent of the Bishop.<sup>1</sup>

In 673 was held the Synod or Gemote of Hertford, under Archbishop Theodore. By the seventh article, similar meetings were to be held twice a year. It is said by Dr. Burns, that this was one of the few National Councils held in England.

In 680, a Gemote was held at Hadfield, in the presence of the kings of Northumberland, Mercia, East Anglia, and Kent. Several ecclesiastical acts were made, and at the same time a Witenagamote was held, probably, it is said, to sanction the decision of the clergy.

I quote this from KEMBLE'S *Saxons in England*, vol. ii. 263, who refers to Bede, book 4 and 5.

In 742, a great council was held under Edelbend of Mercia, and Cudbeorht, Archbishop of Canterbury. Its acts are signed by clerks and laymen respectively, and it was clearly a Witenagemote.

In 787, 793, 794 gemotes were held at various places, which are termed *conventus synodalis*, *concilium*, and *concilium synodale*. In 798 a gemote, also called *synodus*, was held, in which the business recorded was merely secular. Before the signatures occur the words, "Hæc sunt nomina Episcoporum ac principum. qui hoc mecum in synodo consentientes subscripserunt." The signatures comprise the names of several laics, and Mr. Kemble considers this a proof that the term *synodus* was not confined to ecclesiastical meetings.

There is one document among the Monumenta which merits particular notice. King Alfric addresses Bishop Wul-

<sup>1</sup> See KEMBLE'S *Saxons in England*, vol. ii., p. 263. He cites Bede, to the point that Theodore was the first Archbishop whose authority was universally acknowledged in England. Lord Coke says that a Synod was termed, in Saxon times, a Church Gemote.

funus thus, (p. 441,) "Alfricus, an humble brother to the venerable Bishop Wulfunus: Peace in God. Obtemperavimus jussioni tuæ libenti animo, sed non ausi fuimus aliquid scribere de Episcopali gradu, quia vestrum est scire quomodo vos oportet optimis moribus exemplum omnibus fieri, et continuis admonitionibus subditos exhortari ad salutem quæ est in Christo Jesu. Dico tamen quod sæpius deberetis vestris clericis alloqui. Nos vero scriptitamus hanc epistolam quæ Anglice sequitur quasi ex tuo ore dictata sit et locutus esses ad clericos tibi subditos, hoc modo incipiens." Then follow various injunctions to the clergy.

From these citations there is ample reason to conclude, that a great principle of the Saxon Church was that which we find so strongly asserted in later times, viz., that while the councils of the clergy were sufficient to establish laws for the government of the clergy, yet where the laity were concerned, they must have been passed or ratified by the Witan, in which a representation of that order existed.

And accordingly, a very learned writer thus expresses himself, "Even so in the Saxon times, if there was any subject of laws for the outward peace and temporal government of the Church, such laws were properly ordained by the king and his great council of clergy and laity intermixed, as our acts of parliament are still made. But if there was any doctrine to be tried, or any exercise of pure discipline to be reformed, then the clergy of the great synod departed into a separate synod, and there acted as the proper judges; only when they had thus provided for the state of religion, they brought their canons from the synod to the great council, to be ratified by the king with the advice of his great men, and so made the constitutions of the Church to be the laws of the realm. And the Norman revolution made no change in this respect. Thus the case stood till the act of submission of 25th Henry VIII.<sup>1</sup>

<sup>1</sup> KENNETH *Ecclesiastical Synods*, p. 249.

I gather also that the instances I have quoted of the acts of archbishops singly, were merely monitions and counsels, of great weight and authority indeed, but not partaking of the character or force of laws, obligatory even upon the clergy.

*Third.* But the year 1066 brought the Conqueror to England. His banners had been blessed by the Pope, and gratitude and policy led him to assist in the subjugation of the liberties of the English Church. Then commenced an earnest contest, the history of which may be read in the statutes at large as profitably as in any records of history. Few labors would be more interesting, and few better adapted to serve and illustrate the cause of the true, the primitive, the unshaken Anglican Church, than to trace its struggles in the acts of parliament. But I must be content with a passage from the opinion of the court in a celebrated case where this subject was largely discussed. "Let us look further, and see whether the former laws made by King Edward the first and Edward the third against the usurpation of the Bishop of Rome, were not grounded upon the like cause and reason. The statute 38 Edward III., expressing the mischief that did arise by breves of citation, which drew the bodies of the people, and by bulls of provision and reservation of ecclesiastical benefices, which drew the wealth of the realm to the court of Rome, doth declare—that "by these means the ancient laws, customs and franchises of the realm were confounded—the crown of the king diminished and his person defamed—the treasure and riches of the land carried away—the subjects molested and impoverished—the benefices of holy Church wasted and destroyed—and divine service, hospitality, alms deeds and other works of charity neglected." (*Case of Præmunire*, Sir JOHN DAVIES, Rep. 86.)

The legislation of the Church after the Conquest to the Reformation, (exclusive of the acts of parliament,) is contained in the legatine and provincial constitutions. The for-

mer are to be found in the ordinances of Otho and Othobon, commented upon by John of Athon; the latter, in the numerous constitutions of the Archbishops, collected by Lynwood, with his glosses upon them.

It is true that, as a partial concession to England, the Popes constituted the Archbishops of Canterbury their Legates, so that they ultimately became known as *Legati nati*; but their provincial regulations were binding, not because they were Legates, but because they were Archbishops holding provincial synods. There is much reason to believe that the laws of the legates Otho and Othobon, were not regarded as obligatory without some recognition in the councils, or that they had become ratified by use and custom.

Bishop Stillington, in many instances, speaks in this manner: "By the old provincial constitutions, (*which are still in force so far as they are not repugnant to the laws of the land,*) those who have the smallest cures are called pastors," &c.

"Our authority herein is not derived from any modern constitutions or canons of the Church, (although due regard ought to be paid to them,) but from the ancient ecclesiastical common law in this realm, which still continues in force. There is a common law ecclesiastical, which although in many things it may be the same as the canon law which is read in the books, yet it hath not its force from any papal or legatine constitutions, but from the acceptance and practice of it in our Church. I could easily show, if the time would permit, that papal and legatine constitutions were not received here, although directed hither; that some provincial constitutions never obtained the force of ecclesiastical laws." (Duties and Rights of Parochial Clergy, p. 48.) At page 249, the Bishop enumerates a number of papal canons which had not been adopted into the law of England.

Bishop Gibson (Codex, preface, p. 28,) cites two cases, one



from the constitutions of Otho, and the other from Othobon, as not recognized in English law. One of them is of so much importance that I extract it in full in the note, with John of Athon's gloss, and the constitution of Stephen upon the same subject, with the gloss of Lynwood.<sup>1</sup>

The substance of the authorities stated in the note, is this: The regulation (a provincial regulation) of Archbishop Stephen, in 1222, declared that rural Deans should not have jurisdiction in matrimonial cases; but directed that it should be committed *viris discretis*. Lynwood insists that under this phrase a cause might be *specially delegated* by the Ordinary to a rural Dean, if a discreet person, as well as to any other person thus qualified. But the constitution of the legate

<sup>1</sup> The constitution of Othobon, (1268,) is this. — “*De delegatione causarum.*—Proinde sacris canonibus inhærentes quibus statutum est, ut non nisi personis in majori statu constitutis causæ a Sede Apostolica delegentur, eadem juris auctoritate commoti statuimus, ut ab Archiepiscopis, Episcopis, vel aliis ordinariis non nisi personis in dignitate vel officio constitutis, aut cathedralium vel aliarum ecclesiarum collegialium canonicis causæ aliquatenus committantur.”

Lynwood, in his Comment on the Constitution of Stephen, (1222,) *De judiciis*, lib. ii. tit. 1, as to the phrase *viris discretis*, says: “Sed nunquid Decanus ruralis ex commissione speciali possit cognoscere in causa matrimoniali si sit vir discretus et jureperitus? Puto quod sic; præsertim si talis commissio non concernat ejus officium principaliter, sed potius ejus circumspectionem et prudentiam. Sed contra hoc opponitur ea quæ leguntur in constitutione Othoboni, “*Judicii Robur*,” (the above cited constitution,) ubi statuitur quod causæ non committantur nisi personis in majori statu, &c. SOLUTIO: illa constitutio non fuit a subditis acceptata, ut dicit ibi Jo. de Athona; unde non videtur arctare; ad quod vide ibi Remissiones. Et hoc verum maxime cum de jure communi ordinarius quilibet in causarum cognitionibus committere valeat vices suas, his qui peritiam et exercitium in talibus habent.”

Now this constitution of Stephen, in 1222, runs thus:—“In causis, *et infra*, statuimus ut Decani rurales nullam causam matrimonialiam *de cætero* audire præsumant, sed earum examinatio non nisi discretis viris committatur.”

Othobon, in 1268, plainly forbade this. This constitution was held not to be binding in the realm, because not accepted, and therefore the former regulation was the law.

It becomes important to understand the meaning of the term *subditis*, in these constitutions. Generally, I apprehend, it signifies the inferior clergy; but on other occasions, it embraces all who are subject to the enacting power. Now, when we find that a constitution of a Legate is pronounced not binding because not received, the question is, by whom it could be received so as to give it authority? And this, it is presumed, must have been by the Archbishops and Bishops in the provincial councils.<sup>1</sup>

There was a constitution of Otho, (1237,) followed by one of Othobon, (in 1208,) prohibiting leases of Church lands for more than five years. But in a constitution of John of Stratford, in 1342, it is recited, that the religious and others of the province (Canterbury) assert, that those constitutions were not binding upon them; and it was then declared that all persons violating that, or the present constitution, should be subjected to punishment. (*Constitutiones Provinciales, &c.*, p. 44. Ed. of Lynwood and John of Athon, 1689.)

Again, as to the operation of provincial constitutions, it was laid down by Newton, in the case of the Prior of Leeds, 20 Henry VI. 12, (1441,) cited by Lord Hardwicke, that the Ordinary by his convocation had power to make constitutions provincial, by which *ceux de Sainte Eglise* shall be bound; yet they cannot do anything which shall bind the temporality.

In the Abbot of Waltham's case, 24 Ed. IV., the same

<sup>1</sup> Shakespeare, the warmest of patriots, had a correct notion of canon law. Surrey says to Woolsey:—

“You wrought to be a Legate, by which power  
You maimed the jurisdiction of all Bishops.”

(Henry VIII., Act 3. — 2.)

doctrine was insisted upon in argument; and it was urged that the convocation among the clergy was as powerful, as the parliament among persons temporal, because every abbot, prior and beneficed clerk, is privy and party to the convocation. The case went off on another ground.

Now Lynwood was employed in offices of distinction in the reign of Henry V., and died in 1446, the 25th year of Henry VI. The decision, therefore, in the 20th year of that king, could scarcely be expected to find a place in his work.

Chief Baron Gilbert says: "The project of Edward the First (about 1290,) was to have the clergy as a third estate; the Bishops and a sufficient body of clergy to sit together and make canons to bind the ecclesiastical body; and his great object was to get the sanction of this assembly to taxes and assessments upon the clergy. The latter insisted that they could not meet under a temporal authority to make laws for the Church. The Bishops and Archbishops were loth that the clergy should be allowed to share in the making of canons which formerly were made by their sole authority; for even if these canons had been made at Rome, yet, if they were not made in a general council, they did not think them binding here, unless they were received by some provincial constitution of the Bishops." (BURNS, vol. ii. p. 22, citing GILBERT'S *Exchr.*)

The subsequent passages show how the scheme was defeated, and it resulted in the convocations separately called in the provinces of Canterbury and York. They show, also, the resistance of the clergy to the assumption that the prince had any authority to convene synods; and illustrate the question whether the Act of Submission (25 Henry VIII., chap. 10,) was not a surrender of the liberties and rights of the clergy, not the recognition of a valid authority. This point has been strongly contested. Bishops Gibson and Stillingfleet are on

the one side, and Lord Coke and Justice Foster on the other. In my judgment, the great churchmen have overmastered the great lawyers.

The learned Spelman, in his treatise "De Sepultura," (p. 179,) says: "The canon law as adopted here—the national and provincial councils,—all these together, as they have been heretofore in use, and are not repugnant to the laws and religion of the kingdom, or repealed by the statutes of Henry VIII., or of later times against papal usurpation, are still in force, as I conceive."

Again—Let the decision in *Middleton v. Crofts* (2 Athyns,) be closely examined. The question arose upon an article in the ecclesiastical court, for being married out of canonical hours, without license or banns, and in a private house. A prohibition was applied for, upon which occasion Lord Hardwicke delivered his celebrated opinion.

*First.* It was decided that the canons of 1603 (which were very express to the point) did not govern the case, because they did not bind the laity, for want of a representation in making them.

*Secondly.* The second question is thus stated by Lord Hardwicke himself: "If lay persons cannot be prosecuted or punished by force of these canons, whether the court had jurisdiction of such a cause against them by the ancient canon law, received and allowed within the realm of England?"

And the *Third* question was whether, assuming that the spiritual court had such jurisdiction, it had been taken away by certain statutes inflicting a penalty?

The first point being decided, as above stated, the court determined the case and refused the prohibition on the second; and then held that the statutes referred to in the third did not take away jurisdiction.

The ground of the decision of the second point becomes, therefore, very important. Lord Hardwicke says, "It re-

mains to be inquired whether that part of the canon law which prohibits clandestine marriages hath been received and allowed in England."

"The canons of the Council of Lateran in the decretals *cum Inhibito*, which contain a general prohibition against clandestine marriages, and require publication of the banns by a minister in the Church, were adopted into the canons of the Church of England by the convocation held at London in the year 1328. LYNWOOD, Lib. 4, Tit. 3, *De Clandestina Dispensatione*, says: "It inflicts the punishment of suspension on the clergyman for three years, offending by celebrating clandestine marriage," and then adds, "Et hujusmodi contrahentes pœna debita percellendo." LYNWOOD in his Gloss., on the phrase *pœna debita*, explains it thus: "Erit arbitraria cum non exprimatur. Hodie vero sic contrahentes (ut aliqui volunt) sunt ipso facto excommunicati; so that he took it that the contracting parties marrying clandestinely were liable to the punishment of excommunication."

Lord Hardwicke then states that Dr. Andrews had cited many entries from the Registry of Canterbury, showing that the jurisdiction of proceeding by ecclesiastical censures for marrying clandestinely had been received and allowed in England; and he adds that a long course of such precedents would be of great weight in a case of this nature, though a few instances would not, because they might have passed *sub silentio*.

His lordship then cites the case of *Maltingby vs. Martin*, 1 Jones, 257, as in point; and refused the prohibition, except so far as related to proceeding for marrying at an uncanonical hour, which being solely forbidden by the canon of 1603, was not a violation of a law binding upon the layman.

In considering this subject, great attention must be paid to the distinction between the statute 25 Henry VIII. cap. 21, and that of the 25 Henry VIII. cap. 19. The former

plainly refers to the canons and laws prescribed by a foreign power, mainly the Pope; and these it expressly declares, rest not for any obligation they possess upon the power of a foreign prince or prelate, but because the people had taken them to be used among them, with the sufferance of the king, and established as laws by such sufferance, consent, and custom. But the other statute declares, "that the canons, constitutions and ordinances, synodal or provincial already made, not repugnant to the laws and customs of the realm, &c., shall still be used and executed as they were afore the making of the act;" manifestly referring and chiefly referring to that great body of English constitutions, &c., which had formed the law, and was to remain in force until the body of law to be framed by the thirty-two commissioners was adopted.

*Fourth.* The last period of the English canon law, was that from the date of the Reformation to the present time. But for the purpose of this work, it is necessary, and only necessary, to ascertain the state of the law at the period of the settlement of the Church in the colonies. It is of course not possible to mark that period with precision; but no greater difficulty attends the subject than in relation to English civil laws. In a late case in Georgia, (*Beal vs. Fox*, Ex. 4 Georgia, Rep. 404,) there is an admirable and full discussion of the point. The question was in relation to the prevalence of the statute 13 Elizabeth, Of Charitable Uses. It was held that the period of colonization was the proper period, and at that time the statute was of course in operation. The æra of colonization, it was urged by counsel, was properly when Georgia became a royal government."<sup>1</sup>

We cannot practically err if we place this period at the date of the royal charters to the colonies respectively, if fol-

<sup>1</sup> See also 2 Mass. Rep., 189 N.; *De Ruyter and St. Peter's Church*, 3 BARBOUR'S *Ch. Rep.* New-York.

lowed by a settlement, or the period of the first erection of a Church and public worship in a Colony.<sup>1</sup>

We have then all the noble statutes of Henry, Edward, and Elizabeth, the injunctions of the two latter in 1547 and 1559,—the Synod of Archbishop Parker, 1571, the *Articuli pro Cleri* of 1584—the *Capitula* of London 1597, and the canons of 1603, to make up, together with all previous institutions not superseded, the English canonical law as it then existed. (See Dawson, Book 6. chap. 8, page 157.)

But this body of the law, or a large part of it, became subject in England to important modifications, and to others in our own country. Thus the canons of 1603 in a great measure superseded the injunctions and institutions above mentioned; and as to those canons themselves, there are several considerations of moment. In consequence of the act of submission, convocations have been rarely called, and when called, have merely passed upon some formal matter. From this it has arisen that the canons have not been adapted to the numerous changes in the situation of the Church in many points affected by them. Some have grown obsolete—some incapable of being enforced—others superseded by statute law. Thus in the preface to Cardwell's *Synodalia*, (p. 24.) it is remarked "that these canons were passed at a period when the state of society was different from its present condition, and legislation was carried into matters of extreme detail. That there were some it would now be unwise to observe, and impossible to enforce. If we inquire how they are to be regarded, we answer, 1st. that owing to acts of the supreme legislature, the cases of real difficulty, such for

<sup>1</sup> On the 19th of December, 1606, the first ordained Minister of the Church of England, embarked as a missionary for the shores of America. In the Spring of the year 1607, the Services of that Church were first administered on this continent. An humble building was reared on the bank of James River, in Virginia. What a diffused and holy light has sprung from that lowly altar!

instance as relate to the treatment of Dissenters, are actually removed, and the few cases that remain may be met by other considerations; and 2d. that the enacting power having either abdicated or been dismissed from its office, it would seem irrational to wait for the same power to remodel its former measures, rather than to resort to the authority next in order, and to act according to its judgment or counsel." He enumerates a number of the canons actually or virtually superseded; and observes that "the authority from which they proceeded is virtually extinct, and that the high spiritual persons whose jurisdiction is next in order to that of a synod, though they are not competent to annul a canon formally, are competent to instruct and direct the conscience as to the continued observance of it."

So Bishop Stillingfleet (*Rights and Duties, &c.*, 261, 267,) enters into a long discussion as to the force of custom and disuse to vary and extinguish the obligation of canons. This work was published in 1698.<sup>1</sup>

*Next.* The canons are subject to further numerous exceptions and modifications in our own country.

In examining the canons of 1603 we shall find that the great bulk of them are not binding in our Church for various reasons. Thus, in consequence of the revolution, and the independence of our Church, numbers of these canons were superseded. Not that the principles of some of them did not remain, but not in the form therein declared. The first twelve are of this description. The 13th to the 76th inclusive are either inapplicable, (such as those relating to colleges,) or the subjects are provided for and regulated by canons of our own. There are a few exceptions which will be afterwards noticed. The 77th, 78th and 79th, are wholly inapplicable. The 127th to the 141st are local in their nature, and have no bearing here.

<sup>1</sup> See also ARCHBISHOP SHARP *on the Rubrics and Canons*, Discourse 5.



The result of the preceding investigations, it is submitted, is this :

*First.* That the body of the foreign canon law is presumptively without force or authority in England ; and that in every particular case where it is sought to render one of its regulations available, the burthen of proving that such regulation had been adopted in England, rests affirmatively upon the party adducing it.

That the legatine constitutions of Otho and Othobon stand upon the same footing.

*Second.* That the provincial constitutions have the presumption of legality and obligation attending them ; and whenever applicable to a given case, impose the task upon the adverse party of showing why they should not prevail.

*Third.* That in addition to these elements of law, the statutes of the realm, the decisions of the civil tribunals, the cases and precedents in the spiritual courts, made up the body of that system of regulations known as the Ecclesiastical Law of England.

The comments and writings of eminent men were also sources of information ; and all these, except the statutes, formed the testimonials and witnesses of the common law of the Church, in the same manner as similar records and reports are the evidences of the common law of the realm.

*Fourth.* That the canons of 1603, as well as the acts after the Reformation, also constituted a portion of that law binding upon the clergy, but only binding upon the laity where admitted by long custom, or express recognition of the civil tribunals.

This, then, formed the great body of the English ecclesiastical law, when the Church was planted in this country ; and this constituted the body of the law of the Church in the colonies. Many modifications arose from specific provisions of charters, or particular laws of the colonial assemblies, as

well as from those changes in the situation of the people and usages of the community, which rendered some provisions incompatible or inapplicable. Then came the Revolution. It brought with it many necessary alterations in the law and discipline, as it did in the liturgy of the Church. These have become sufficiently defined in our system. And then the constitution of the Church at large, and the organization of the several dioceses, have led to a body of regulations partly original, partly adapted; and these, with statutes of the civil authority, cover a very extended field of law.

But there will yet remain many cases not provided for. In these, I submit, we are to ascertain what was the law of the English Church. By that, such cases are presumptively to be decided; leaving it to be shown that such law is repugnant to some principle, settled custom, or institution of our own, secular or ecclesiastical.

*Again,*—another proposition results from these views, which it is supposed will meet with little objection: that upon every question of construction of a phrase or precept, its admitted acceptance in the English law is to prevail, until otherwise expressly interpreted.

I may state the result in these propositions:

1. The English canon law governs, unless it is inconsistent with, or superseded by a positive institution of our own.
2. Unless it is at variance with any civil law or doctrine of the State, either recognized by the Church, or not opposed to her principles.
3. Unless it is inconsistent with, or inapplicable to that position in which the Church in these States is placed.

And let it not be thought, that in this loyalty to the English law, we abjure the liberty of a National Church, or admit a subserviency to a foreign authority. We do not break in upon the principle embodied in the statute 25 Henry

VIII.,<sup>1</sup> and asserted in the noble language of the declaration of liberties of the Church in Maryland.<sup>2</sup>

In submitting to the guidance of English authority, we render no other allegiance than every honest judge in the land renders to the decisions of Westminster Hall in civil matters. These decisions are the witnesses and testimonials of the law, liable to be discredited, open to controversy; but standing, until this is done, sure and faithful witnesses. So the cases in the ecclesiastical courts are the credible expositors of English canon law; and it is that law to which we are to resort for guidance in all unsettled points. We shall find this submission more useful and more noble than the license and the anarchy of an unrestricted, undirected, and unenlightened judgment.

Yet it is not that the foreign canon law is to be disregarded. That of which Lord Stowell declares, that "whatever may be thought of its pretensions to a divine origin, it is deeply enough founded in human wisdom:"—that which continues to influence even the stern features of the Scottish

<sup>1</sup> "The realm of England hath been and is free from subjection to any man's laws, but only such as have been devised, made and obtained within this realm for the wealth of the same, or to such other as, by sufferance of the king, the people of this realm have taken by their own consent to be used among them, and have bound themselves by long use and custom to the observance of the same, not as to the observance of any foreign prince, potentate or prelate, but as to the accustomed and ancient laws of this realm, originally established as laws of the same by the said sufferance, consent and custom, and none otherwise." (25 Henry VIII. c. 21.)

<sup>2</sup> "We consider it as the undoubted right of the Protestant Episcopal Church, in common with other Christian churches, under the American Revolution, to complete and preserve herself as an entire Church, agreeable to her ancient usages and professions, and to have the full enjoyment and free exercise of those purely spiritual powers which are essential to the being of every church or congregation, and which, being derived only from Christ and his Apostles, are to be maintained independent of every foreign or other jurisdiction, so far as may be consistent with the civil rights of society."

Reformation, may not be contemned.<sup>1</sup> But let it be resorted to with caution, and watched with the jealousy of the great doctors of the English Church. "It sprang from the ruins of the Roman empire, and the power of the Roman pontiffs," and partakes largely of the spirit of absolutism which might be expected from its origin.

The application of these principles to particular cases will frequently appear in the following treatise. It will be useful, however, to point out some of an important character.

For example. What is the law of the Church as to the performance of the Burial Office? Is it obligatory upon a minister of a parish to read that service over a parishioner, a right to burial within the precinct, and a proper notice being presupposed?

We have no special regulation upon the subject. All I believe that is to be found is the rubric in the Burial Office, providing that it is not to be used for any unbaptized adults, any who die excommunicated, or who have laid violent hands upon themselves. This corresponds with the rubric in the English Prayer Book, except that in our own, the prohibition relates to adults only; in that it extends to infants.

Although the English rubric was not drawn up until 1661, yet it must not be considered as a new law, but merely explanatory of the ancient canon law, and of the previous usage in England.<sup>2</sup>

It can scarcely be argued that any inference from the rubric by itself is equivalent to a positive law of the Church on the subject. Certainly it allows, but it does not command the service. What then was the English law?

Lord Stowell uses this language: "About the year 750, spaces of ground adjoining the churches were carefully enclosed, and solemnly consecrated, and appropriated to the

<sup>1</sup> See FERGUSON'S *Consistorial Law of Scotland*. Introduction.

<sup>2</sup> Shephard, cited by Bishop Brownell, *Fam. Pr. Book*, p. 394.

burial of those who had been entitled to attend divine services in the churches, and who now became entitled to render back into those places their remains to the earth, the common mother of mankind, without payment for the ground which they were to occupy, or for the pious offices which solemnized the act of interment."<sup>1</sup>

This general law to a right of burial and the Church services was recognized in *Exparte Blackmore*, though a mandamus to compel burial in *a particular spot was refused*,<sup>2</sup> and in the *King vs. Taylor*, cited by Dr. Phillimore, from Sergeant Hill's MSS. it was held "that an information was grantable against a parson for opposing the burial of a parishioner in a Church-yard, but as to the refusing to read the Service over the deceased because he was never baptised, the King's Bench would not interpose, that being matter of Ecclesiastical Cognizance."<sup>3</sup>

This law was embodied in the 68th canon of 1603, providing "that any minister refusing to bury a body in such manner and form as is prescribed in the Book of Common Prayer, brought to the Church-yard after a convenient warning, shall be suspended for the space of three months." There are certain excepted cases.<sup>4</sup>

When, then, we find that at the adoption of the English rubric, such was the law of the Church, we have an interpretation of it making it obligatory to perform the Service over all except those enumerated; and our rubric must receive the same construction, and thus the refusal would be a violation of a rubric.

And this leads to another question connected with this

<sup>1</sup> 3 Phill. Rep. 349.

<sup>2</sup> BARN. & ALD. 122.

<sup>3</sup> *Burns* by PHILLIMORE, vol. i. title, Burial.

<sup>4</sup> "Our Church knows no such indecency as putting the body into the consecrated ground without the Service being at the same time performed." SIR JOHN NICOLL, 3 Phill. 295.

subject, directly growing out of the rubric, and in which the principle I am defending is of more pointed application.

The rubric directs that the Burial Office shall not be read over *unbaptized adults*. Who are such? The minister would be justified in refusing the Service over one unbaptized in the sense of the Church.

Here again, I am not aware of any exposition of the phrase in any decision of the Church Diocesan or General in our country. But the subject of Lay-baptism was discussed in the General Convention of 1811. Bishop White states,<sup>1</sup> that it was the object of two gentlemen to obtain a declaration of the invalidity of Lay-baptism, including of course a baptism by any of the Congregational ministers. He says also that there was an increasing tendency in some of the Clergy to administer Episcopal Baptism to such as desire it, on the alleged grounds of the invalidity of a former Baptism.

He adds that a distinguished member of the Convention, the Honorable Rufus King, had brought with him a pamphlet lately sent from England, containing a judgment in an Ecclesiastical Court of that country, in a case precisely in point. It was occasioned by a suit brought by a Dissenter against a parish clergyman for refusing to bury a child, who had been baptized by a Dissenting minister. It was decided by the Judge against the clergyman. The Bishop proceeds, "His reasons, grounded altogether on the rubrics, must carry conviction to every mind so far as concerns the question of the sense of the Church of England. It is true that this does not settle the question of the sense of Scripture. On the most serious consideration of the subject many years ago, conviction is entertained, that the Holy Scriptures and the Church are not at variance on this matter."

The case referred to was no doubt that of *Kemp. v. Wicks*, (3 Phill. Rep. 264,) decided in 1808.

[<sup>1</sup> *Memoirs of the Church*, page 280.

In 1841, the question was again brought before the tribunals of England. The case of *Mastick v. Estcott* was instituted to obtain the decision of the highest tribunal, and accordingly was appealed to the Privy Council, after passing through the Arches. (2 Curteis' Rep. 692; 4 Moor's Privy Council Rep. 104.)

The rite had been administered in the outward form used in the Church, viz: by sprinkling the child with water in the name of the Father, the Son, and Holy Ghost. It had been done by a dissenting minister.

An abstract of the opinion in this case may be of interest.

First, it was declared to be admitted by all, that the above form of administering the rite was essential. It had been prescribed at the institution of the sacrament.

Next, that in very early, if not the earliest ages of the Church, baptism by lay hands was practised, was allowed to be valid, and not to be repeated. That after the time of St. Austin, the ancient canons bear ample testimony to its universal adoption or recognition; and that this doctrine of the ancient Church was sanctioned in England to its fullest extent. The provincial constitutions, from the time of Langton, in the reign of Henry III., to that of Chichely, in that of Henry V., are referred to, with copious citations from Lynwood; and the conclusion is reached that this was the undoubted law of the English Church up to the time of the Reformation.

The learned Judge then proceeds to examine the liturgy of Edward the Sixth, and the Rubric, the Prayer Book of Queen Elizabeth, and shows that the previous rule was unchanged. He then notices the canons of the convocation of 1575, and particularly that one which expressly prohibited lay baptism; and he quotes Bishop Gibson to the effect that this canon was not inserted in the printed copy, and that he could not tell the reason of the omission; and after a full

examination as to the authority of the canon, the judge concludes that it never possessed effect or operation.

Then follows a minute statement of what was done at the Hampton Court Conference in 1603, and the result is stated to be, that although the persons engaged therein did all they could to discourage lay baptism, yet they could not prevail upon themselves absolutely to prohibit it, still less to declare it null and void. The judge cites Bishop Fleetwood's work upon the subject with much commendation, as showing the judgment of the Church of England in the matter.

It is true that the doctrine as stated in *Mastick v. Estcott*, met with much disapprobation. The general question is largely entered into by Archdeacon Manning, with a strong bias of opinion against the existence of the law as so declared.<sup>1</sup> A distinguished divine of our own branch of the Church, has also discussed the subject, and controverted the validity of lay baptism at large.<sup>2</sup> On the other side, the Rev. Mr. Maskell, in a late work, has entered upon the topic elaborately, and with great clearness supports the proposition, that the validity of lay baptism, administered as before stated, was and is the undoubted law of the English Church.<sup>3</sup>

Now, I do not presume to enter upon the question on scriptural, or even historical and expository grounds; but

<sup>1</sup> *The Unity of the Church*, pp, 271—278.

<sup>2</sup> *OGILBY on Lay Baptism*.

<sup>3</sup> *Holy Baptism*, a Dissertation, by the Rev. William Maskell, chaplain to the Bishop of Exeter. Chapter IX. is devoted to this question of lay baptism. It occupies 47 pages. He concludes thus:—"With respect to the judgment of the Church of England at present regarding lay administration, I trust that it has been sufficiently shown, that now, as of old, she recognizes and admits all baptisms to be valid, by whomsoever conferred, if done with the proper matter, and in the proper form: also, that there is no evidence by which we may justly suppose that the ancient permission which the Church gave to lay persons to baptize, in cases of necessity, has during the last 200 years been withdrawn."



these decisions appear to me to settle the law of our Church, and for these reasons.

They settle that the validity of Lay-baptism was the undoubted law of the English Church when the rubric in question was introduced into the English Prayer Book, and that the phrase "unbaptized" must receive a corresponding construction.

They decide that this was the law of the English Church at the period of its being established here, whatever time is assigned for that event. They therefore establish that such was the construction of the rubric in the Colonial Church.

Our Church continued the English rubric with the change before noticed as to infants. By doing so, it adopted the English rule of its construction, that is, the English law on the point discussed. It did this upon the same ground as the courts of justice proceed upon, where a statute of England has been in force in a colony, and is re-enacted by the state. The decisions, interpreting a phrase in such a statute, are received as law. If these decisions were made before our revolution, they are treated as authoritative; if subsequently, as evidence of the meaning."

But as the cases in question were determined since the revolution, they do not (upon the analogy presented) possess greater force than as witnesses of the law. But they do possess that force, and that must be overcome. It is perfectly competent for us, to prove that they are not true exponents of what was the law of the English Church, when that law came with the Church to this land. But if we fail in this, we fail in overthrowing their testimony, and the fact that such is the law becomes incontrovertible.

[ — ]

I proceed to another illustration connected with the law of marriage, viz., the prohibition of marriages within the degrees

as settled by the English Church. This leads to the vexed question of the union of a man with a deceased wife's sister. What is the law of our Church upon this subject?

I look upon this question as one of the most severe tests of the principle I am advocating. If no satisfactory and consistent explanation can be given respecting it, the truth of that principle may be doubted.

And, first, let us inquire what was the law of the English Church prior to the statutes of Henry VIII.

Bishop Gibson states it to have been that which was declared by the fourth Council of Lateran, (1215,) prohibiting marriages within the fourth degree.

He considers this to be made out by a recital of the statute 32d Henry VIII., cap. 38, (1541,) and the fact that the records show frequent dispensations by the Pope for the fourth degree, and none beyond.<sup>1</sup>

And it is probably this law which in the Institutions of John of Stratford (1342) is referred to as among the *canonica impedimenta*.

That this, however, was the law imposed upon the English Church during the usurpation of the Pope upon her rights and usages, is indisputable. It is also the opinion of very learned authors that the Church followed the computation of the civil law for several ages; and Gilbert denies the assertion of Pope Alexander in the Decree of 1065, that the canonical method had been the ancient custom of the Church.<sup>3</sup>

<sup>1</sup> Codex, vol. i. p. 479. n. d.

<sup>2</sup> Codex, vol. i. p. 494.

<sup>3</sup> The decree of the Council of Lateran was to remedy the gross inconveniences which arose from that of the Council of Rome, (1065.) under Pope Alexander, by which the prohibition was extended to the seventh degree. (POYNTER'S *Law of Marriage, &c.*, 101. u.)

In *Butler vs. Gaskell*, (Gilbert's Rep. 156,) first cousins, or cousins german, are declared to be in the fourth degree, and to be at liberty to intermarry, and it is said that this was the ancient sense of the Christian Church, and even of the Church of Rome in the time of Pope

Without pursuing the inquiry minutely through the action of Popes and Councils, it is conceded, I believe, (at least by anti-papal writers,) that the Church was first governed by the decrees of emperors on this subject, finally establishing the civil law computation."<sup>1</sup>

But all former laws and institutions of the Church of England were merged in the statutes of Henry VIII., to which attention must next be given.

The first act of this reign upon the subject, was the 25 Henry VIII. cap. 22. (1533.) This enumerated the Levitical degrees, added to them the marriage with a wife's sister, and enacted "that no person should henceforth marry within such degrees."

Without detailing the minute examination I have gone through, of the statutes, it appears to me that the statutory law of England rested on the the act 32 Henry VIII. cap. 38. That act was repealed in part by the 2 Edward VI. cap. 23; was repealed wholly in 1 Philip and Mary, and so revived in the 1st of Elizabeth, as to place it where it stood by the provision of Edward. The law therefore as resulting from the statute, was as follows: "All such marriages as shall be contracted

Gregory, for in writing to Austin, Archbishop of Canterbury, he says: "In quarta generatione contracta matrimonia minime solverenier."

<sup>1</sup> The matter is fully discussed in TAYLOR's *Elements of the Civil Law*, (Tit. 13, § 2.) Dr. Harris, in his *Notes on Justinian*, (Lib. 1, Tit. 10,) says: "Some authors supposed that Pope Alexander the 2d, perceiving dispensations to be very lucrative to the Church, and at the same time conscious that it had universally obtained, that persons might marry in the fourth degree, began a new computation, according to which the canonists have since reckoned all the degrees."

The prohibition by the Emperor Theodosius of the marriage of first cousins, which appear to have been the first interference with the rule of the civil law, appears to recognize that law as then in force.

Van Espen says: "Admodum autem verisimile est quod veteres computaverunt gradus non juxta dictam computationem canonicam, sed juxta computationem civilem. Ecclesia enim in similibus solita fuit regulas suas legibus Imperii conformare." *Juv. Ecc. Un.*, p. 1, Tit. 18, cap. 5.

between lawful persons (as we declare all persons to be lawful that be not prohibited by God's law to marry,) such marriages being contracted and solemnized in the face of the Church, &c., shall be deemed lawful notwithstanding any pre-contract.

“And no reservation or prohibition (God's law except) shall trouble or impeach any marriage without the Levitical degrees.”

In the year 1563, a table of the prohibited degrees was set forth which will be found in Gibson, page 499; and in Burns, vol. 2 page 442; and by the 99th canon of 1603 it was provided that no person should marry within the degrees prohibited by God's law, and expressed in a Table set forth by authority, in the year of our Lord 1563; and all marriages so made shall be adjudged incestuous and unlawful. The force of this canon is well stated in the case of *Butler vs. Gaskill*, (*Gilbert's Rep.* 150,) “It is objected that the canons bind only ecclesiastical persons, and do not bind the laity, because they have not the assent of the Commons and Temporal Lords; but to this I answer that such Tables do show the sense of the Church of England, and so are a proper exposition of the law of God, and by consequence ought to have great weight with the Judges when they expound the Levitical law.”

Under the statute law of England, interpreted and strengthened by the canons, the following points have been decided.

That the marriage of a man with the daughter of his wife's sister is prohibited. (*Man's case*, *Croke*, *Elizabeth* 228, 4. *Leonard* 16. *Wortley vs. Watkinson*, 2 *Levins* 254. *Ellerton vs. Gastrell*, *Comyns' Rep.* 318.)

So a marriage with the sister of the mother of the first wife, (*Butler vs. Gaskill*, *Gilbert's Rep.* 156,) and a marriage of an uncle with a niece was also virtually prohibited by the precept which forbids a nephew to marry his aunt. (*Lord Raymond* 464, 5. *Mod.* p. 170. *Gibson's Codex.* 499.)

In *Hill vs. Good*, 25. Car. 2 the point of marrying the deceased wife's sister came under consideration in the King's Bench. (See Vaughan's Rep. 302. 3 Keble 166.) Though it was alleged that the precept *prima facie* seemed to be only against having two sisters at the same time, and prohibition to the Spiritual Court was granted; yet in Trinity Term 26 Car. 2. after hearing civilians, they granted a consultation as a matter within the statute 32 Henry VIII., though the former statute 28 Henry VIII. had never been revived after the repeal by Queen Mary. This case is cited by Vaughan in *Harrison vs. Burwell*, (Vaughan's Rep. 206,) who adds, that the statute was virtually revived, in which position he most probably was in an error.

It will be seen that none of the cases cited above, are within the letter of the prohibitions in the 18th chapter of Leviticus. They have been held to be within the scope of the law, because of being within the same degrees upon the doctrine of parity of reasoning. This principle is admirably expressed in the *Reformatio Legum*.<sup>1</sup>

In the case of *Harrison v. Burwell*, (Vaughan's Rep. 206. 2 Ventris 9,) a marriage with the wife of a great uncle was held valid, because it was in the fourth degree.

In this case it was declared by the judges, "that but for the provisions of the statute it would be difficult to prove that they were civilly bound by the Levitical decrees in respect to the lawfulness of marriages, unless the prohibition was also clearly dictated by the natural law."

<sup>1</sup> *Duas regulas magnopere volumus attendi, quarum una est ut qui loci viris attribuuntur easdem sciamus fœminis assignari paribus semper proportionum et propinquitatum gradibus. Secunda regula est, ut vir et uxor unam et eadem inter se carnem habere existimentur, et ita quo quisque gradu consanguinitatis quemque contingit, eodem jus uxorem contingit affinitatis gradu; quod etiam in contrariam partem eadem ratione valet.* (De Gradibus, cap. 4, p. 45. Ed. 1640.)

Lord Stowell, in *Hutchins v. Denzilore*, (1 Consis., Rep. 179,) says:

Such was the law of England, until the Act 5 and 6 William IV., cap. 54, called Lord Lyndhurst's act. By that statute, all marriages within the prohibited degrees of affinity which had taken place before the 31st August, 1835, were to be held valid, except a suit for nullity was then pending; and all marriages thereafter, within the prohibited degrees whether of consanguinity or affinity, were pronounced absolutely null and void.

And since this act, the very late case of *Regina v. Chadwick*, has been determined. (Queen's Bench, January 1848.)<sup>1</sup>

In *Ray v. Sherwood*, (1 Curties' Ecc., Rep. 197,) the suit was brought by a father, to annul the marriage of a daughter

"I shall justify my interpretation by a quotation from the *Reformatio Legum*, a work of great authority in determining the practice of these times, whatever may be its correctness in matters of law."

Bishop Jewell, says: "Albeit I be not forbidden by plain words to marry my wife's sister, yet am I forbidden so to do by the words which by exposition are plain enough. For when God commands me I shall not marry my brother's wife, it follows that he forbids me to marry my wife's sister. For between one man and two sisters, and one woman and two brothers, is like analogy or proportion." (Apud Gibson's *Codex*, vol. i. p. 498.)

<sup>1</sup>*Queen v. Chadwick*, (17 Law Journal, Rep. N. S. p. 33.) The points determined were these:—The 5th and 6th William IV., cap. 54, renders void all marriages within the prohibited degrees, solemnized after its passage, which were before voidable only, by sentence during the life of the parties.

A marriage with a deceased wife's sister, contracted after the act, was absolutely void.

The prohibited degrees of consanguinity and affinity, in 5 and 6 William IV., cap. 54, refer to the decisions of the ecclesiastical courts at that time.

The degrees prohibited "by God's law," in 32 Henry VIII., cap. 38, are those enumerated in 25 Henry VIII., cap. 22, and 28 Henry VIII., cap. 7.

This last position is sustained by the court, by an elaborate course of reasoning. In substance it is, that the statute 32 Henry VIII., was undeniably in full force before Lord Lyndhurst's act; but that the previous statutes were so far operative, as to afford the rule of construction for the governing statute.

with the husband of her late sister. The court held, that while the act saved the marriage (being before the 31st August, 1835,) from being void on account of the offspring, it did not prevent the parties from being punished for an incestuous marriage.

My view, then, of the law of England, at the date of the colonization of this country, may be summed up in the following propositions :

1. The statutes 25 and 28 Henry VIII. were not strictly in force. There was therefore no statutory enumeration of forbidden degrees.

2. The statute 32 Henry VIII. cap. 38, or that part of it which bore on this subject, was the parliamentary enactment then existing. By this, marriages within the Levitical degrees were prohibited as contrary to God's law—those without were allowed. But,

3. It is to be noted that the distinction was carefully made between the Levitical prohibitions and the Levitical degrees. Many cases were decided as within the latter, which are not expressed in the former. And again it is to be noted that the phrase "God's Law," as used in the statute, is not identical with the Levitical prohibitions.

4. As the express prohibitions in Leviticus were few, and did not *in terms* embrace numerous cases, plainly as repugnant to even natural law as those enumerated, a rule of construction necessarily grew up, by which cases within the same degrees as those prohibited, were adjudged to be within the prohibitions.

5. Hence as the enumeration in the canon of 1563, has been in many instances sanctioned by judicial decisions, and as every case in it is within the three first degrees of the Civil Law Computation, that canon, adopted by the 99th of 1603, may be treated as the then English law, not by its own force or effect, but as a recognized exposition of the statute.

6. And thus it may in fact be stated that by that law, marriages within the three first degrees of the civil law computation were illegal, and beyond the third degree lawful; and that upon the question of affinity, those of the blood of the wife are in the same relation to the husband as those of his own blood; and so conversely. Of course in the lineal line the prohibition is *ad infinitum*.

It may then seem to be the result that this was the law of the colonial Church in our land, and continued to be its law after the revolution.

But here an important consideration arises. It can scarcely be doubted that the English statute law as to the prohibited degrees, was either not considered in the colonies as part of the statute law prevalent here, or was superseded by express statutes. This may be proven by the fact that statutes were passed upon the subject in most of the Colonies, and from some judicial decisions.<sup>1</sup> The instances of

<sup>1</sup> In Virginia there was a statute of prohibitions at least as early as 1730. In 1769, the issue of marriages within the prohibited degrees were declared illegitimate. In 1788 the degrees were extended, but the issue legitimized. And so the law stood in the Revised Code of 1817, (p. 399.) and I presume is now the law of the State. (See also 2 LEIGH'S *Rep.* 717.) These statutes comprised the Levitical degrees, and also the marriage of a man with the sister of a deceased wife.

In Connecticut by an act of 1715, the Levitical prohibitions were adopted, and the marriage with a wife's sister was included. But the present law does not include either a brother's wife, or a wife's sister.

In the Revised Code of Rhode Island, of 1844, (page 262,) in the statute of prohibitions, reference is made to an act of 1749, and another of 1754, which I have not had an opportunity of examining. The present law is similar to that of Connecticut.

By a statute of South Carolina, passed in 1706, it was declared that all marriages within the table of degrees directed to be set up in every Church were unlawful. The statute 32 Henry VIII. cap. 38 was then adopted as an express section of the colonial act. There can be little doubt that the table referred to was the English table.

There was an enactment in New Jersey in 1719, (cap. 94, § 7,) by which it was provided that "no marriages should be prohibited as within any degree of affinity or consanguinity, but such only as by the



Virginia, Maryland, South Carolina, and New Jersey, where in fact the English law was adopted, are very strong upon this point.

If this is so, then of course it was not the law after the

laws or statutes now in force or hereafter to be in force in his Majesty's kingdom of Great Britain, are, or shall be prohibited." An act was passed in 1795, (1 R. S. 1847, page 376.) which I understand is now in force. By this, the English table is adopted, except a father's brother's wife, mother's brother's wife, wife's father's sister, wife's mother's sister, wife's sister, brother's wife, brother's son's wife, sister's son's wife, wife's brother's daughter, and wife's sister's daughter.

In Maryland, a colonial act of 1702 was passed to prevent all illegal and unlawful marriages not allowable by the Church of England, but forbidden by the table of marriages," and it imposed a fine upon any persons marrying within the degrees.

In 1777, the General Assembly passed an act that if any person should marry with another related within the three degrees of lineal direct consanguinity, or within the first degrees of collateral consanguinity, each of them should forfeit £500, or be banished from the State forever; or should marry within the other degrees set forth in the table contained in such act he should forfeit £200. The table comprehended a wife's sister, and brother's wife; indeed was an exact transcript of the English table of 1563. But in 1785 the act was amended by omitting several of the degrees, viz: a father's brother's wife, mother's brother's wife, wife's father's sister, and wife's mother's sister, with others, and in 1790 it was again amended by omitting a wife's sister, and brother's wife.

There was no colonial law upon the subject in the province of New-York, and it is certainly to be deduced from the opinion of Chancellor Kent, in *Wightman vs. Wightman*, (4 John C. R. 343.) that the statute law of England did not prevail. "I incline to the opinion that, as we have no statute upon the subject, and no train of common law decisions, independent of any statutory authority, the Levitical degrees are not binding as a rule of municipal obedience. Marriages out of the lineal line, and in the collateral line, beyond the degrees of brother and sister, could not well be declared void, as against the first principles of society."

It is to be remembered that by the then constitution of New-York, the common law and such parts of the statute law of England as formed the law of the colony on the 17th day of April, 1775, was the law of the state. (See *LATOUR vs. TUESDALE*, 8 TAUNTON, 830. 2 KENT'S COM. page 74, § 5.)

revolution. Indeed, the latter is clear, even if the former were doubtful.

*Again.*—It is equally certain, that the English canon, by its own unsupported authority, did not bind the laity. The case of Middleton and Crofts is as strictly applicable to this question as to that which was determined by it; and it is impossible to say that the canon in this instance was but a recognition of prior established law.

*Once more.*—The legislation of the colonial civil authority superseded *as a matter of law*, and to some extent, all canonical regulations otherwise binding upon the clergy, as well as the statute law of England.

This proposition requires to be carefully stated and qualified.

It is to be remembered that marriage is to a great extent a mere civil contract, peculiarly the subject of civil legislation. The legitimacy of children, the right of succession, and stability of titles are involved in it.

It was one of the points of papal usurpation, that the law of marriage was established as distinct from and opposed to the laws of sovereign states.<sup>1</sup> In this aspect of the relation, and in modern times, the municipal law is the predominant rule of action. What is permitted by it is *prima facie* lawful—what is forbidden is illegal. Hence, if a new municipal

<sup>1</sup> For example, there were fifty-seven articles submitted to the consideration of the Bishops of Tuscany, by the Grand Duke Leopold, in the progress of his reforms. Among them, as to this law of marriage, it is stated:—"The important subject of marriage presented one peculiar feature, namely, that the opposition party would not agree to the nullity, in a civil point of view, of mere promises, whether written or verbal, as the Bishops of Pistoria, Colle, Chiuse and Loano would have wished them. They agreed, however, with these enlightened prelates, in admitting that there was a difference between the contract and the sacrament, and even allowed that the sovereign possessed all authority in regard to the former." (*Memoirs of Scipio de Ricci*, vol. i. p. 246.)

law has superseded an old one, the rule of action for every citizen, in every relation of the subject, is *primarily*, the new law.

To take a plain case for an example:—Numerous institutions and canons of the Church of England, before the statute of George II., called Lord Hardwicke's act, required the solemnization of marriage in the parish church, the presence of a priest, the publication of banns, &c., unless a special license dispensed with these formalities.

And this was the law of the Church of England, as settled in Middleton's case; and let it be assumed that it was part of the law of the land, brought into the colonies. But this rule was entirely superseded by express legislation, or long established custom.<sup>1</sup> It follows that every canon and rule of the Church upon the matter, was necessarily superseded by this change in the law of the land.

In like manner it is conceived that the law of the English Church, irrespective of parliamentary enactment, as to the degrees, was superseded by the law of the states; but superseded as matter of legal obligation, and no further. It left our Church without a definite rule, except that of the municipal law, until she enacts a regulation of her own. In the mean time, the clergy must be left to the guidance of their own judgment and conscience. They who believe, with a host of divines, that the prohibitions of Leviticus form part of the moral law still binding on Christians,<sup>2</sup> and that the cases

<sup>1</sup>One of the laws of the Duke of York (1664) was as follows:—“Whereas, by the law of England no marriage is lawful without a minister whose office it is to join the parties in matrimony, after the banns thrice published in the Church or a license first obtained, all which formalities cannot be duly practised in these parts.”—The act then proceeds to appoint the mode of publication, and the officers to perform the ceremony. (Collect. Hist. Soc., vol. i.)

In *Ward v. Day*, Prerog. Court, Nov. 1846, it was allowed that marriage in a colony is governed by the *lex loci*.

<sup>2</sup>See the 6th Article of the Church.

within the same degrees are within the prohibitions as much as if so expressed, have a law unto themselves. They who, while they do not regard the prohibitions as strictly obligatory, yet look upon the rule which they furnish, and the exposition of the English Church, as the safest guide for the conscience, have a rule of action equally clear, if less stringent. And they who discard both principles, will look either to the civil law for their direction, or to some other standard of their own creation or adoption.

The action of our Church upon this subject, appears to fortify the views above presented. In the year 1808, the Convention of Maryland adopted the English canon law as to the degrees, and instructed their deputies to the General Convention to report their canon, and to endeavor to obtain its adoption as the general law. This was referred to the House of Bishops, who reported that agreeable to the sentiment entertained by them in relation to the whole ecclesiastical system, they consider that table now obligatory on this Church, and as what will remain so, unless there should hereafter appear cause to alter it, without departing from the word of God, or endangering the peace and good order of the Church. They are however aware that reasons exist for making an express determination as to the light in which this subject should be considered. They recommended that the consideration be postponed, from the lateness of the session and other reasons.

In 1817, the subject was again referred to the House of Bishops, and that committee afterwards prepared the following declaration, which, however, was not acted upon:—"By the Bishops, the Clergy and the Laity of the Protestant Episcopal Church in the United States of America, in Convention. The table of kindred and affinity, wherein whosoever are related are forbidden to marry as established in the Church of England, is received and established in this Church; with the proviso in reference to the prohibition of a man's marrying his

brother's wife, or his wife's sister, and of a woman marrying her husband's brother, or her sister's husband: that although the Church disapproves of such marriages because of temptation to sin in the allowance of them, yet in the event of such marriage, it shall not be a cause of repelling from the holy communion. But it shall not be lawful for any clergyman of this Church to celebrate such a marriage." (WILSON'S *Memoirs of Bishop White*, p. 346.)

In the report which was to have accompanied this declaration, the committee said: "It must be held desirable, that the laws of the land should prohibit the marriages now treated of. But if this has not been done, it would seem that a Church in such a land, however it may see cause to entertain and to express disapprobation of them, should hesitate to reject from the communion on their account, unless there can be alleged some divine law requiring such an act; for then the sanction of the State ought not to extort the sanction of the Church." (Ibid. 344.)

The report proceeds: "The running of the line between the safe and the hurtful, is left to the determination of the State and the Church, in their respective spheres. The Church ought to accommodate her provisions to those of the State, so far as it can be done without injury or damage to the morals of her members. If the State should sanction what the Church considers as not essentially sinful, but as affording temptations to sin, she ought to discountenance it in such a degree as Christian prudence shall dictate." (Ibid.)

In the year 1838 the subject was resumed, and a committee was appointed by the House of Bishops, consisting of Bishops Griswold, Brownell, and Henry U. Onderdonk. In 1841, the two former reported that in their opinion it was inexpedient at the present time to make any decision on the subject. A minority report was presented by Bishop Onderdonk, in which he laid down that it was the duty of the

General Convention to legislate on the subject—that the evil of prohibited marriages has greatly increased since the English table ceased to be obligatory in our Church.

“He respectfully proposes that the entire English table of prohibitions be enacted by the General Convention, that table being in exact conformity with the law of God.

“He refrained from proposing any penalty on the parties intermarrying; but as to the clergy, he suggested that any one officiating should be suspended for a period not less than two, nor more than seven years; and that a minister contracting such a marriage should be displaced.”

No action took place in the Convention, and the subject has not been resumed.

The considerations now submitted, appear to justify the conclusion, that the English canon law upon the subject of the prohibition of marriages does not prevail in our church, and that this may be explained consistently with the general principle as to the force of that law, contended for in this work.

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! The positions which in this Introduction, I have endeavored to sustain are not urged, merely in the hope that they may aid in the interpretation and application of the laws of the Church. The attempt is allied to higher motives and deeper interests. A Churchman by inheritance, long and earnest examination has rooted the belief in my mind, that in the Protestant Episcopal Church, we have the nearest approach that the world can present, to the Church which the Saviour authorized his Apostles to establish. As I believe that all hope of the preservation of our unrivalled civil institutions rests upon the prevalence of Christianity, so do I believe that the more the people are anchored in the doctrines and principles of the Episcopal Church, the more surely will those institutions abide every assault they must encounter. The exposition of her laws

may assist in the promotion of that respect and love which her tenets command, just in proportion as they are studied. Her cautious spirit—her firm yet well-tempered discipline—her strong foundations in the Holy Scriptures—her stately columns, strengthened by all historic evidence and primitive action—the beautiful chastity of her garments of worship as she approaches the Father of Spirits—and that most exquisite union of Gospel truth and devotional fervor, the Book of Common Prayer,—all combine to supply every thing that a pure imagination, an earnest piety, or an enlightened intellect, can crave or deserve. Let but the spirit of forbearance and toleration move among ourselves—let us but uphold her doctrines with firmness and charity—let her holiness be exemplified in our lives,—and the mind of the country will give way to her claims, will imbibe her truth, and will spread her influence from the vale to the hill-top, until the whole land rejoices in her presence. “Yes,” in the language of one of the most magnificent of England’s orators,—“Yes, I would have her great, and powerful. I wish to see her foundations laid low and deep, that she may crush the giant powers of rebellious darkness. I would have her head raised up to that Heaven to which she would conduct us. I would have her open wide her hospitable gates, by a noble and liberal comprehension; but I would have no breaches in her walls. I would have her cherish all those who are within, and pity all those who are without. I would have her a common blessing to the world; an example, if she is not permitted to be an instructor, to all who have not the happiness to belong to her. I would have her give a lesson of peace to mankind, that a vexed and wandering generation may be taught to seek for repose in the maternal bosom of her Christian charity, and not in the harlot lap of indifference or infidelity.”<sup>1</sup>

<sup>1</sup> EDMUND BURKE.





## CHAPTER I.

### THE CONSTITUTION OF THE CHURCH AND THE GENERAL CONVENTION.

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Concilium sacrum venerandi culmina juris  
Candidit, et nobis congrua fræna dedit.  
(*Carmen dechasticum Conilii Nicæni.*)

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#### TITLE I.

##### THE CONSTITUTION—ITS HISTORY AND CONSTRUCTION.

When the peace of 1783 completed the severance of the colonies from the sovereignty of Great Britain, the separation of the Episcopal Church from the guardianship and nurture of that of England necessarily followed. It is true that the connection, and to some degree an admitted dependence, did not cease, until, by the consecration of three bishops, there was within our own limits the power of continuing the succession—an indispensable element of a perfect national Church. For all purposes of government and discipline, however, the separation was absolute. Linked together before by the profession of the same doctrines, the use of the same liturgy and rites, subscription by its clergy to the same articles, the prevalence of the same code of canon law, and subjection to one bishop, the Church of the colonies was in theory a compact and united body. Inadequate and inefficient as the superintendence of the Diocesan of London was, yet the great principle was recognized of the necessity of a bishop for a perfect Church, and exertions were constantly made to obtain the full benefits of the Episcopate for America.

But the all-engrossing and fierce struggles of the revolution, unfavorable to the growth of religion, or the spread of any body of Christians, were peculiarly fatal to a Church founded upon the principles of that of England. Accordingly, when peace arrived, it found the Episcopal Church prostrated and overwhelmed—the object of political jealousy and hatred—the object of bitter invective and persecution of sects, profiting by her downfall and exulting in her ruin. It found her drooping in sorrow and in fear amid the broken pillars of her temples, and the disjointed stones of her altars.

But the cause was not hopeless. Independent of the assurance of the perpetual presence of her founder, there was within these states a class of clergymen whose doctrines had been imbibed at the purest fountains of the English Reformation, whose faith had been strengthened, their intellects invigorated, and their prudence matured, by the scenes of difficulty and tribulation through which they had passed. They brought to the great work of the re-establishment of the Church a zeal, energy, and judgment worthy of the object, and adequate to the task.

The primary matters for their consideration and efforts were two. First, to procure the consecration of such a number of bishops as to secure within the United States the perpetual succession of the Episcopacy; and next, to establish a system of general union, and to constitute a body to secure and expand it.

The events and acts connected with the first subject do not fall within the scope of this work. That recital full of deep interest, belongs to the distinguished historian of the Church, whose useful labors have been (unavoidably, no doubt) too long intermitted.

The first influential step which was taken for the union of the Churches of the states of which we have any record, was at the meeting of various members of the churches of

Philadelphia, held in May, 1784. They adopted the following as fundamental principles for the Church at large.

1st. That the Episcopal Church in these states is, and ought to be, independent of all foreign authority, ecclesiastical or civil.

2d. That it ought to have, in common with all other religious societies, full and exclusive power to regulate the concerns of its own communion.

3d. That the doctrines of the Gospel be maintained as now professed by the Church of England; and uniformity of worship continued, as near as may be, to the Liturgy of the said Church.

4th. That the succession of the ministry be agreeable to the usage which requires the three orders of bishops, priests and deacons; that the rights and powers of the same respectively, be ascertained; and that they be exercised according to reasonable laws to be duly made.

5th. That to make canons or laws there be no other authority than that of a representative body of the clergy and laity conjointly.

6th. That no powers be delegated to a general ecclesiastical government, except such as cannot conveniently be exercised by the clergy and laity in their respective congregations. (BISHOP WHITE'S *Memoirs*, p. 72.)

In the same month of May, 1784, at a meeting of several clergymen, held in New Brunswick for another purpose, the subject of a general union was entered upon, and the result was an invitation for a more general meeting to be held in the city of New-York. Some discussion took place upon the principles of ecclesiastical union. In consequence of the pending application of Dr. Seabury, for consecration in England, further proceedings were postponed. Bishop White remarks that the more northern clergymen were under apprehensions of there being a disposition on the part of the

southern members to make material deviations from the ecclesiastical system of England, in the article of Church government. (*Memoirs of the Church*, p. 65.)

In September, 1784, a body of the clergy of Massachusetts and Rhode Island, held a meeting at Boston, and adopted a series of resolutions, most of them identically the same as those declared in Philadelphia. To the first, was added a clause that it should not exclude the churches, separately or collectively, from applying to some regular Episcopal foreign power for an American Episcopate; and to the fifth, it was added, that in the representative body, the laity ought not to exceed, or their votes be more than those of the clergy.<sup>1</sup>

<sup>1</sup>On the 8th of September, 1784, there was a Convention of the Clergy of Connecticut, at New Haven, and it was resolved, that Mr. Marshall should attend the Convention to be held at New-York on the first Tuesday after the Feast of St. Michael in October next, to represent this Convention on that occasion, and that a letter be written to that body to acquaint them with the reasons why the Clergy of Connecticut cannot enter into any discussion of measures relative to the settlement of the Church in the United States, previous to the completion of the Church in this State. by having a Bishop among us.

On the very same day, (8th September, 1784,) the Convention of the Clergy of Massachusetts and Rhode Island, before mentioned, was held at Boston, and a letter addressed to the Clergy of Connecticut, of which the following is an extract. After adverting to the minutes of the proceedings at Philadelphia in May 1784, it proceeds:—"It is our unanimous opinion that it is beginning at the wrong end to attempt to organize our Church before we have obtained a head. We cannot conceive it probable or even possible to carry the plan they have pointed out into execution, before an Episcopate is obtained to direct our motions, and by a delegated authority to claim our assent. It is needless to represent to you the absolute necessity of adopting and uniting in some speedy measures to procure a person who is regularly invested with the powers of ordination, without which scarce the shadow of an Episcopal Church will remain in these States. In case a meeting of a representative body shall be agreed upon, we have delegated a power to one of our number to represent us and our churches in such a meeting. We are extremely desirous for the preservation of our Communion, and the continuance of uniformity of doctrine and worship, but we see not how this can be maintained without a common

In October of the same year, (1784,) a number of clergymen appeared in New-York, from the states of Massachusetts, New Jersey, Connecticut, Pennsylvania, Delaware, Maryland, Virginia and New-York; but as the greater part of the deputies were not invested with powers to bind their constituents, all that was done was to recommend a series of resolutions to the churches in the several states, which should be considered as fundamental articles of union. They were as follows:

1st. That there shall be a General Convention of the Episcopal Church in the United States of America.

2nd. That the Episcopal Church, in each state, send deputies to the Convention, consisting of clergy and laity.

3rd. That associated congregations, in two or more states, send deputies jointly.

4th. That the said Church shall maintain the doctrines of the gospel as now held by the Church of England, and shall adhere to the liturgy of the said Church, as far as shall be consistent with the American Revolution and the Constitution of the respective states.

5th. That in every state, when there shall be a bishop duly consecrated and settled, he shall be considered a member of the convention, *ex officio*.

6th. That the clergy and laity, assembled in convention, shall deliberate in one body, but shall vote separately; and the concurrence of both shall be necessary to give validity to every measure.

The seventh article recommended the time and place of the meeting, (Philadelphia, September, 1785,) with an earnest request that clerical and lay deputies might be sent by the churches of the states.

Accordingly, in September, 1785, delegates assembled in head, and are therefore desirous of uniting with you in such measures as shall be found expedient and proper for the common good. Signed  
S. GRAVES.—MSS. Rev. Dr. Jarvis.

Philadelphia, from the States of New-York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia and South Carolina.

It may be useful to defer the consideration of the acts of this first convention in order to glance at the situation and action of the different churches in the states, prior to that important period.

A convention was held in Maryland as early as August, 1783. There was then made a declaration of the fundamental rights and liberties of the Protestant Episcopal Church of Maryland. The independence of that Church of any foreign or other jurisdiction, was declared, with its entire authority to establish its own internal government. In June, 1784, the laity were introduced into the convention, and they ratified the previous acts. Certain principles were declared fundamental, and conventions were to be held in every year.

In South Carolina, there was a meeting of vestries on the 8th of February, 1785, when the resolutions adopted at New-York were read. A convention was held in July, 1785; deputies were appointed, and it was resolved that they should be left to act according to their judgment. (*Dalcho*, 466.)

In New-York, a convention of clergy and laity was held in June, 1785. Three clerical, and three lay deputies were appointed to attend the General Convention, and they were authorized to proceed upon the points of business proposed for deliberation, so far as they should conform to the general principles established to regulate their conduct. At this meeting a body of rules and regulations were adopted for the government of the Church.

A convention was held in Virginia, in May, 1785. Deputies were appointed, and were furnished with such instructions as to leave the convention of that state at liberty to approve or disapprove of the proceedings of the General Convention, (*Hawks' Contributions, &c., Journals*, Vol. I. p.

185.) The 1st, 2d, 3d, and 5th of the fundamental articles, were approved. As to the 4th, the convention declined committing itself upon the subject, until it should have been revised in the approaching General Convention, and reported to the Virginia Convention. As to the sixth article, it was rejected, except that the mode was agreed to be used in the proposed convention then to take place.

At the same convention the standing committee was directed to consider the proper steps to be taken to obtain the consecration of a bishop, and a code of regulations was passed for the order of the Church. Districts were made, and a visitor appointed for each. (*Hawks' Contributions, &c.*, vol. i. p. 180, 181.)

A convention met in New Jersey, in the summer of 1785. Delegates were appointed with power to accede to the fundamental principles published by the convention of the Church held in New-York, in October, 1784, and to adopt such measures as the said General Convention may deem necessary for the benefit of the Church, not repugnant to the aforesaid fundamental principles. (*Journals, 1785.*)

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It was before stated that in Sept., 1785, the delegates from the seven states met at Philadelphia. On the 1st of Oct., 1785, the draft of an Ecclesiastical Constitution was submitted to the convention by the Rev. Dr. Smith, of Maryland, the chairman of a committee before appointed. It was read by paragraphs and ordered to be transcribed. Nothing further was done in that convention.

The second General Convention met on the 20th of June, 1786. The constitution was taken up and debated. Several alterations were made, and on the 23d of June, it was unanimously adopted. The title and preamble are as follows:

“A General Constitution of the Protestant Episcopal Church in the United States of America—

“Whereas, in the course of Divine Providence, the Protestant Episcopal Church in the United States of America has become independent of all foreign authority, civil or ecclesiastical” :—

The preamble then recited the meeting of deputies in New-York in October, 1784, and the recommendation to send deputies to Philadelphia in order to unite in a Constitution of Ecclesiastical Government, agreeably to certain fundamental principles expressed in such recommendation, and it proceeded—

“And whereas, in consequence of the said recommendation and proposal, clerical and lay deputies have been duly appointed from the said Church in the states of New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, and South Carolina: The said deputies being now assembled, and taking into consideration the importance of maintaining uniformity in doctrine, discipline, and worship in the said Church, do hereby determine and declare” —

Then followed the articles of the constitution. Most of these are substantially the same as those now in force, as will be seen hereafter, when they are stated at length.

The eleventh article was as follows :

“The Constitution of the Protestant Episcopal Church in the United States of America, when ratified by the Church in a majority of the states assembled in General Convention with sufficient power for the purpose of such ratification, shall be unalterable by the convention of any particular state, which hath been represented at the time of such ratification.”  
(*Bioren*, 25.)

On the 24th of June, 1786, the following recommendation was passed : “That the several state conventions do authorize and empower the deputies to the next General Convention, after we shall have obtained a bishop or bishops in our Church, to confirm or ratify a general constitution respecting



both the doctrine and discipline of the Protestant Episcopal Church." (Ibid. 26.)

On the 10th of October, 1786, an adjourned convention was held, at which the chief business was the consideration of the letters by the Archbishop and Bishops of England. The states of Virginia and Maryland were not represented in this adjourned convention. Copies of the proceedings were ordered to be sent to the standing committees.

The next meeting of the General Convention was in July, 1789. Bishops White, Seabury and Provoost had then been consecrated.<sup>1</sup> The former attended and presided. A committee was appointed to take into consideration the proposed constitution, and to recommend such additions and alterations as they should think proper.<sup>2</sup>

On the 1st of August, 1789, the committee reported the constitution. It consisted of nine articles, and it was resolved,—“that the 1st, 2d, 4th, 5th, 6th, 7th and 8th articles be adopted, and stand in this order, 1, 2, 3, 4, 5, 6 and 7, and that they be a rule of conduct for this convention; and that the remaining articles, viz: the 3d and 9th, be postponed for future consideration.”

On the 7th of August, the convention discussed the two articles which had been postponed, and which, after amendment, were agreed to. The constitution was then ordered to be engrossed for signing. On the 8th of August, it was read and signed by the members of the convention. Every delegate appears to have subscribed it, except two from Delaware, and one from Maryland. Both clergy and laity, however, of these states, were represented by those who did sign.

On the 5th of August, 1789, the following resolves were unanimously passed:—

“*Resolved*, That a complete order of Bishops, derived as

<sup>1</sup> Bishop Seabury in 1784, Bishops White and Provoost in 1787.

<sup>2</sup> BIOREN'S *Ed. Journals*, 47, 49.

well under the English as the Scottish line of Episcopacy, doth now subsist within the United States of America, in the persons of the Right Rev. William White, the Right Rev. Samuel Provoost, and the Right Rev. Samuel Seabury.

*“Resolved,* That the said three Bishops are fully competent to every proper act and duty of the Episcopal office and character in these United States, as well in respect to the consecration of other Bishops, and the ordering of priests and deacons, as for the government of the Church, according to such rules, canons and institutions as now are, or hereafter may be duly made and ordained by the Church.”

This convention was adjourned from August, 1789, to the 29th of September ensuing, in order to meet the views of the churches of Massachusetts, Connecticut, and New Hampshire. At that time its labors were resumed. It was resolved, the better to promote union with the eastern churches, that the general constitution was open to amendments and alterations. A committee was chosen to confer with the eastern churches. That committee reported the assent of the deputies from those churches to the constitution, except as to the third article; and their readiness to unite, provided that this article was so amended as to authorize the Bishops, when sitting in a separate house, to originate any measures, and to negative the acts of the other house. The committee recommended the adoption of these suggested changes. The convention agreed to them, modifying the veto so that a law might be passed if adhered to by four-fifths of the House of Deputies. On the 2d of October, Bishop Seabury, and the other deputies from Connecticut, Massachusetts, and New Hampshire, gave their written assent to the constitution as that day modified; and the labors and the cares of this convention ceased.

Thus was accomplished the great work of the union of our Churches. Through the ordeal of long investigation, of

thoughtful and wise councils, of admirable stedfastness in all matters essential, of laudable concession in all matters subordinate, the constitution was established. The fabric of the government of the Protestant Episcopal Church was founded upon the Apostolic rock, and built up of the living stones of the English Church. "Her fortifications, her walls, and her bastions are constructed of other materials than of stubble and of straw. They are built of the strong and stable matter of the Gospel of liberty. She has securities not shaken in any single battlement, in any single pinnacle."<sup>1</sup>

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The historical notices thus far presented, are important upon the inquiry, what are the principles by which the constitution and canons are to be expounded—the extent of the power of the General Convention, and the obligatory force of its canons.

#### TITLE II.

In examining the great question of the power of the General Convention, it seems useful to conduct the inquiry under distinct heads.

*First*,—As to the power of the Convention of 1789; and this, in the first instance, in relation to the constitution; and next, in relation to the canons passed by that convention.

*Second*,—As to the power of every subsequent General Convention, in regard to the constitution, and in regard to canons.

I. Upon the powers of the General Convention of 1789, the starting point of the inquiry may be taken at the resolution of June 24, 1786. No doubt what had passed before is historically important, and elucidatory of the views and action of the convention; but strictly, this resolution will be found the first material fact bearing upon this question.

<sup>1</sup> EDMUND BURKE.

It was thereby recommended, that "the several state conventions authorize their deputies to the next General Convention, after we shall have obtained a Bishop or Bishops in our Church, to confirm or ratify a general constitution respecting both the doctrine and discipline of the Protestant Episcopal Church." (*Bioren*, 20.) Bishop Seabury had been consecrated in November 1784, and Bishops White and Provoost were consecrated in February 1787.

Several of the state conventions acted under this resolution.

In September, 1786, the Convention of New-York resolved, "that the deputies have discretionary powers with respect to any matters which may come into debate in the General Convention."<sup>1</sup>

In 1788, the same convention passed a resolution that the union of the Protestant Episcopal Church in the United States of America, is of great importance, and much to be desired; and that the delegates to the next General Convention be instructed to promote that union by every prudent measure consistent with the constitution of the Church, and the continuance of the Episcopal succession in the English line.<sup>2</sup>

On the 19th May, 1787, the Convention of Virginia resolved that the 1st, 2d, 3d, 5th, 6th, 7th, 8th, 10th and 11th articles of the constitution prepared in 1786, be acceded to; that the 4th and 9th be also acceded to, but as articles of a temporary nature, and not as forming a part of the general constitution. These related to the Book of Common Prayer.

This convention also resolved, "that the recommendation of the General Convention, with regard to the powers to be given to the deputies to the next convention after a Bishop or Bishops were obtained, ought to be complied with."<sup>3</sup>

<sup>1</sup> Journals Conv. of New-York, 1786.

<sup>2</sup> Journals Conv. of New-York, 1788.

<sup>3</sup> Journals of Virginia Convention, annexed to *Hawks' Contributions*.

Dr. Hawks states that he has been unable to discover any proceedings of a Convention in 1788.

In Maryland, at a session in June 1789, instructions were given to the deputies for the approaching General Convention, in relation to the proposed book. The convention ratified and approved it. It does not appear that there was any formal instruction given as to the constitution.

The convention of South Carolina had in 1785 authorized their delegates to act according to their judgment. In April, 1786, deputies were appointed, and also in May, 1789, for the ensuing July convention. I do not find that any instructions were given at either of these meetings, nor whether the powers given in 1785 were deemed to remain in force.

In June, 1787, the convention of New Jersey resolved, that this convention will proceed to the appointment of delegates to the next General Convention, with powers agreeable to the recommendation of the General Convention held in Philadelphia in June, 1786; and such delegates were appointed.

I do not find any notice of the action of Pennsylvania upon this point, except that in October, 1786, clerical and lay delegates were elected to represent the diocese in the next General Convention.<sup>1</sup> In May, 1787, the deputies to the General Convention reported the acts of that body, and no resolution appears to have been taken.

The action of Massachusetts and New Hampshire, bearing upon the point, as far as I have ascertained it, is stated in the note. It was not decisive as to the authority of the deputies.

<sup>1</sup> Notes on Eccl. History, Church Review, vol. iii.

<sup>1</sup> The Convention of Massachusetts, in 1785, resolved that it was not necessary nor convenient to send deputies to the General Convention of that year. (Journal, 1785.) From the MSS. in the possession of the Rev. Dr. Jarvis, I am enabled to state some particulars as to the authority given to the Rev. Mr. Parker. The wardens, vestry, and congregation of Trinity Church, Newport, Rhode Island, on the 13th Sept., 1789, voted unanimously, "That this congregation will for the future abide by and maintain such rules and orders, respecting both the doctrine and discipline of our Church, as have been determined upon

In Connecticut, a convention was held on the 15th of September, 1789, to take into consideration the invitation of the convention in Philadelphia. It was decided to send clerical deputies to the meeting to be held on the 29th of that month. The Rev. Messrs. Hubbard and Jarvis were selected, and authorized to treat upon the terms of union, but with this restriction—"That the proceedings in the said treaty should not be deemed conclusive till they should be considered and approved by the body of the clergy, their constituents."

On the 30th July, 1789, the deputies to the General Convention from the several states were called upon to declare their powers relative to the object of the resolution of the 24th of June, 1786, which is recited in terms. They gave information that they came fully authorized to ratify a Book of Common Prayer, &c., for the use of the Church. So on the 30th July, upon the presentation of the credentials of the deputies from Delaware, they were requested to state their powers relative to the ratification of a Book of Common Prayer, &c., which were produced and deemed sufficient. (*Bioren*, p. 4.)

In speaking of this matter, Dr. Hawks observes, "that the first convention, after obtaining the Episcopate, was held in July, 1789. At this meeting the delegates declared them-

by the General Convention, held in the city of Philadelphia from the 28th of July to the 8th of August last, or which may be determined upon by the convention which is to be held by adjournment in the city of Philadelphia, the 29th of the present month. Voted, that the Rev. Samuel Parker, D. D., be requested to represent us in the said convention. Witnesses, John Handy, Robt. N. Auchmuty, churchwardens."

The Rev. Dr. Parker was also appointed a deputy to represent Christ Church, Boston, by a vote of the wardens and vestry, of the 7th Sept., 1789; and was empowered to represent Trinity Church, Boston, by a similar vote of the 6th of September, that church declining to send any lay delegate.

In June, 1789, at the meeting in Salem, he was deputed to represent the clergymen there assembled.

<sup>1</sup> MSS. in the hands of Rev. Dr. Jarvis.

selves authorized by their respective conventions to ratify a constitution."<sup>1</sup> Dr. Wilson takes the same view.<sup>2</sup>

It may be added that there is nowhere a suggestion, that the constitution should be submitted to the state conventions.

In many of the original states, however, a formal ratification took place. In South Carolina, at a convention of October 19, 1790, the general constitution and canons were unanimously adopted. (*Dalcho.*) In New-York, on the 4th November, 1789, a resolution, also unanimous, was passed, that the convention do approve and consider the Church in this state bound by the constitution lately adopted by the General Convention.

The language admits of the construction, that the Church was deemed bound without the ratification, and the resolution itself probably arose from the somewhat qualified resolution of November, 1788, before mentioned.

In Maryland, the Journal of the General Convention was presented in 1790. A committee was appointed by the convention upon the subject. That committee reported "that as far as the proceedings of the General Convention were warranted by the instructions given to the Maryland delegates, they are binding in Maryland. That the Prayer Book is obligatory and ought to be observed. That there was nothing in the constitution repugnant to the fundamental articles which had been adopted in Maryland." The constitution was approved of in the convention, with one exception. That related to the 8th article, as to which it was declared, that as by it a power would be vested in a future General Convention, to establish such alterations in our articles of religion as they might think proper, without requiring the consent of the conventions in the several states, they regarded it as exceptionable, unless a proviso should be added that no

<sup>1</sup> Constitution and Canons, pp. 11, 12.

<sup>2</sup> Life of Bishop White, p. 135.

such alterations should be obligatory unless the mode prescribed by the 9th article was pursued. There is no trace of any action either in the ensuing General Convention or in Maryland, resulting from this exception. On the contrary all the subsequent proceedings prove that the constitution was considered to be in full force. The act can only be looked upon as the expression of an opinion.

No vote of ratification took place in Virginia.<sup>1</sup>

In New Jersey the convention of 1790 unanimously resolved that the convention and Church of the state were bound by the proceedings.

It appears that in Connecticut, the constitution was approved by the convocation of the diocese, in October, 1790; but was not adopted by the several parishes so as to form a convention under it until 1792.<sup>2</sup>

It will be remembered that in September, 1789, Bishop Seabury and two clergymen, deputies of the Church in Connecticut, attended the Convention and ultimately signed the constitution. It is stated in the Journal, that the Rev. Dr.

<sup>1</sup> The convention in that state terminated on the 8th of May, 1789. I have carefully examined the Journal of 1790, and find no trace of a vote of adoption. On the 1st May of that year, the Journal of the General Convention was read and laid on the table.

<sup>2</sup> Prefatory note to the *Journals of Connecticut*. Among the MSS. in the possession of the Rev. Dr. JARVIS, are the minutes of numerous conventions and convocations prior to the date of the first convention in the published Journal. From this it appears that on the 1st of October, 1790, a convocation was held, and the question was put whether we confirm the doings of our proctors in the General Convention at Philadelphia, on the 2d of October, 1789, which passed in the affirmative by the vote of every member present except one. (15 to 1.)

On the 15th of February, 1792, it was resolved that unless the wardens and vestrymen of \_\_\_\_\_ church should transmit to the Bishop within fourteen days after Easter-Monday next, a notification that the congregation of such church have adopted the Constitution of the Protestant Episcopal Church as settled by the General Convention of 1789, they (the congregation) will be considered as having totally separated themselves from the Church of Connecticut.



Samuel Parker attended as deputy from the churches in Massachusetts and New Hampshire. On the 2d October, 1789, Dr. Parker agreed to the Constitution, as such deputy, and signed it on the third of that month.

In 1790, a constitution for the Church in the commonwealth ——— was submitted to the Convention of Massachusetts, and unanimously approved. It was directed to be submitted to the various churches in that state, in Rhode-Island, and in New Hampshire, with a recommendation that lay deputies be appointed who should, with the consent of the clergy, establish a constitution for the future government of the said churches. In January, 1791, the Convention of Massachusetts ratified that constitution unanimously, and on the same day a resolution passed, recommending the several congregations to instruct their deputies to the next convention, on the subject of adopting the constitution and form of prayer, set forth by the General Convention holden at Philadelphia, in October, 1789. The convention again met in May, 1791, when the following action took place: "The convention took into consideration the general constitution agreed on in Philadelphia in October, 1789, which was read and considered by paragraphs, and after some debate the question was put, 'shall the said constitution be adopted.' The result was a vote in the affirmative of 4 to 2 of the clergy, and 5 to 2 individually of the laity; or three churches to one."

I find no other action to have taken place in Pennsylvania, except that at the convention held in June, 1790, the Constitution of the Protestant Episcopal Church in the United States was read, and notice was given that it was proposed to consider and determine whether the House of Bishops should be invested with a full negative on the proceedings of the other House.

From the foregoing statement of facts it may fairly be deduced that the deputies to the General Convention of 1789

regarded themselves and were treated by their associates, as vested with full power to form a constitution for the Church; that this authority was afterwards generally recognized; and it then results that the constitution derived its power and became the controlling law from the assent of the deputies in the convention of 1789. The ratifications which took place in any of the states were not essential to its validity, however useful as recognitions and confirmations of the authorities of the delegates. Yet the conclusion need not be pressed further than this, that the constitution was binding on the original states, unless there was an act of disavowal and rejection. By the original states I mean New-York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia and South Carolina. It was rightfully within their power to judge whether their instructions had been adhered to, and to ratify or reject accordingly. It was within their power to have refused their consent at all. But when they did not assert a deviation from authority by their delegates, nor simply refuse an assent, their silence and acquiescence bound them, and bound them because of the powers they had bestowed upon their agents.

But as to Connecticut, the powers of the delegates having been expressly restricted, so that a confirmation was necessary, the constitution only became obligatory upon the ratification by the convocation in 1790, and the approval of the parishes prior to June 1792. So as to Massachusetts, it can scarcely be said that the Rev. Dr. Parker, appointed by the clergy who met at Salem, as their representative, was the representative of the whole church of that state. No instructions had been given—no competent power delegated; and it follows that Massachusetts came into the union by virtue of the act of its convention of 1791, in like manner as any other diocese has subsequently come in, adopting the general constitution by a positive act.

II. *But next*, what was the power of the convention of

1789, as to the enactment of canons? Upon this question, one fact has struck me as of marked importance. The convention of 1789 passed, on the 7th August, a series of canons, and, in point of time, passed them before the constitution itself was finally adopted. It is true that all the articles but two had been ratified on the first of August, and declared to be the rule of conduct of the convention; yet it is impossible, even in this view, to hold that the canons were passed under the constitution, because there is not a clause in that instrument which, as to the greater part of them, can be appealed to as the source of the power to enact them. This point will be more fully entered into hereafter.

On the 31st July, 1789, a committee was appointed to report a body of canons. On the 5th August, that committee reported. The canons submitted were discussed on that and two subsequent days, and on the 7th August were engrossed and adopted, and ordered to be signed by the president and secretary. It was subsequently, though on the same day, that the 3d and 9th articles of the constitution were adopted, and the whole ordered to be engrossed. On the 8th it was read, and signed. A committee was also appointed to prepare and report other canons to the next convention.

The canons passed in 1789, correspond substantially with the 1st, 3d, 25th, 8th, 19th, 15th and 20th of those of 1832, the 5th of 1838, and the 9th of 1844.

And these canons were received in the separate conventions, and treated as being of equal authority with the constitution.

In Virginia, on the 7th May, 1790, a resolution was passed which recognised the binding force of the 7th general canon; and on the 8th May another resolution was adopted, instructing the deputies to attempt its amendment.<sup>1</sup> The constitution

<sup>1</sup> *Contributions, &c.*, of Dr. HAWKS, vol. i. pp. 30 and 31 of the Journals.

and canons were directed to be printed with those of the diocese, and annexed to the journal.

The Convention of New-York, in November 1790, declared certain rules which had been before adopted, to be superseded by the canons of the General Convention; and at a subsequent meeting, it was referred to a committee to ascertain what part of the prior regulations required to be abolished or modified, by reason of such constitution and canons.<sup>1</sup>

In February 1807, a committee was appointed by the Convention of South Carolina, to inquire and ascertain whether the constitution and canons of the Protestant Episcopal Church of the United States had been adopted by the Church in South Carolina. The committee recited the resolution of 1790, adopting the constitution which has been before noticed, and reported in the affirmative. The convention divided the subject into two parts: first, as to the constitution and the canons of 1789; next, as to the canons subsequently passed. The first were unanimously declared to be in force; as to the last, some discussion arose, during which a resolution was offered, declaring such of the subsequent canons to be binding, as were not repugnant to the constitution.

The matter terminated by instructing the delegates to the General Convention to move for a repeal of the 2d and 9th canon of 1804, which were obnoxious to the churches of the state. These related to inductions and the dismissal of ministers, and were afterwards modified.<sup>2</sup>

A convention of New Jersey met in June, 1790. The deputies to the General Convention reported, "That agreeably to the powers committed to them, they had concurred in forming and establishing a constitution for the Protestant Episcopal Church in these states, certain canons for the government of such Church, and also a Book of Common Prayer,

<sup>1</sup> Journal New-York, p. 38.

<sup>2</sup> DALCHO'S *History*.

and administration of the Sacraments, &c." It was resolved, unanimously, that the convention and Church of this state are bound by said proceedings.

The committee to which, as before mentioned, the Journal of the General Convention was referred in Maryland, in 1790, also reported, "That upon an extensive examination of the canons framed by the said General Convention for the regulation of the whole Church, the committee are also of opinion that the same are entirely consistent with the said fundamental articles and doctrine, and that therefore they ought to be confirmed by this convention, and received as general canons for the government of the Church within this state.

That in order to adapt the canons of the Church within this state, to the constitution and canons framed by the General Convention for the government of the Church within the United States, the committee are of opinion that a select number of this convention be appointed to prepare and report a draft for their consideration, and to include therein such rules and canons as may be deemed necessary for the complete government of the Church within this state, the same not being inconsistent with the constitution or canons established by the General Convention."

This report was adopted.

The earliest notice I find of the canons in Massachusetts is in 1799, when a resolution passed that the constitution of the Church be printed, and added to the constitution and canons of the General Convention, if such be printed.

In 1802, a canon was adopted by which it was provided that disorderly and unusual conduct—neglect of duty, disregard to the constitution or canons of the General or State Convention, &c., were offences for which a clergyman ought to be censured.

The ratification of the Convocation of Connecticut, be-

fore stated, extended to all the acts of the delegates, and therefore comprised the canons. At the convention of 1790 in Pennsylvania, the constitution, as before observed, was read; but there was no distinct action in relation to the canons. In 1793, however, certain of the regulations of that Diocese were expunged, as being superseded by the canons of the General Convention.

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Upon this question of the force of the canons of the General Convention of 1789, and the power of that body to pass them, there are two theories. One is, that the convention had as ample power to pass these canons, as it had to adopt a constitution; the other, that the authority was assumed, and the canons became the law in the several states only when actually ratified, or from long acquiescence and submission.

It must again be noticed, that most of these canons are not to be supported upon any clause of the constitution—were framed irrespective of it—and were actually passed before the constitution was adopted.

Let us consider the consequences of the doctrine that the canons became the law only by ratification or acquiescence. By the one or the other, they became the settled law of the whole Church of the United States. What power, then, had any subsequent General Convention to repeal or modify them? Was not any act of repeal or modification in itself invalid, only capable of receiving validity from express sanction, or long submission?

And in the absence of express sanction to the repeal, what length of time would have amounted to proof of acquiescence, so as to render the repeal binding? If an express sanction to any set of canons had been given by a diocese, would it amount to a permission, or a compact? If the former, it was at any moment revocable. Would the revocation of an assent to the repeal have reinstated the repealed canons?

*Again*,—The original canons were, by a compact of the whole Church, (at least in the ten states,) the general law. If the General Convention could not repeal them, neither could any number of dioceses short of the whole, or short of a majority. Was the repeal in abeyance, until all or a majority had acted, or until such a period had elapsed as warranted the presumption of the assent of all?

*Once more*,—If the canons of 1789 depended for their obligatory power upon recognition positive or implied, then clearly in the latter case, and probably in the former, every diocese could supersede them, and establish a different law of its own upon the very subject matter of those canons.

From such difficulties, contradictions, and discordancies, what refuge have we except in that other and more comprehensive theory of the power of the General Convention of 1789? It may thus be stated. That convention, under the powers given to its delegates, strengthened by the ratifications of the dioceses, (even if strictly needless,) was constituted and approved as a body of supreme absolute power, to establish an ecclesiastical government for the whole Church of the United States. It seems useless to advert to the few limitations upon this power. Now it appears to me a clear proposition, that the authority to frame a whole code for the government of the Church could have been lawfully carried into effect, both by a constitution concentrating fundamental principles and perpetuating an organization, and by canons adapted to meet the various cases and details of government. The convention was equally competent for both. It could, by the very letter of its commission, have inserted in a constitution all regulations "respecting both the doctrine and discipline of the Church;" and if it could do this, it could embody such of them as it thought proper in a code of canons.

The question, then, before the convention of 1789, was one of selection and division; viz.: what points of govern-

ment should be inserted in a constitution, (only to render them more stable, and the difficulty of altering or reversing them greater,) and what should remain in the shape of laws alterable at any meeting.

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SECTION 3.

Assuming the soundness of this theory, we establish the binding force of the canons of 1789, but are yet to ascertain what is the power of subsequent General Conventions in relation to the laws of the Church—whence they have derived their power, and what is its extent? This was the second subject of examination.

The answer is plain. The development of the foregoing propositions inevitably leads to the conclusion that the power of the Convention of 1789 involved the power of rendering the system of government stable and enduring. Its office was not to establish a fugitive coalition, but a perpetual union. It possessed therefore the right of instituting and providing for the continuance of a body, with similar jurisdiction to its own; a body in which should reside all authority necessary for the purposes, and commensurate with the object of the Church; a body essentially of superior ultimate jurisdiction. Such a body was established when it was declared "that there should be a General Convention of the Protestant Episcopal Church of the United States." Provision was made for its renovation and perpetuity; the elements of its organization were prescribed, and certain self-imposed restrictions were proclaimed.

There is another and a higher view of the question. From the foundation of Christianity, there never has been a Church without a body in which resided the ultimate and absolute power of government. In its earliest age, even two apostles would not assume the office of deciding the question raised at Antioch as to the circumcision of the Gentiles, but referred



it to the judgment of the Council at Jerusalem. Passing by the great representation of the Church universal in the four first Councils, what national or provincial Church has ever been known without such a predominant body? It is anomalous and contradictory to speak of such a Church without it. When then, in 1789, the whole Church of the United States, through its competent representatives, declared, "there shall be a General Convention of the Protestant Episcopal Church in the United States," it enunciated the great principle that this was a national Church, and that such a Convention was to be its highest Council. The mere act of establishing this Council involved and attached to it every power inherent in such a body, and not expressly refused to it. Such powers are to be ascertained from the laws and practice of the apostles, the voice of ancient witnesses, the uninterrupted descent from age to age, from council to council, of known, and exercised, and unquestioned sway.

On the very day that the constitution went into effect the Church in the United States had all the essential elements of a national Church. It had its Bishops. It had three Bishops within its limits, competent to transmit the succession and sufficient to compose a Synod.<sup>1</sup> The earnest objections of the clergy of Connecticut strongly set forth in the letter of the Rev. Mr. Jarvis of 1783, and urged with such power in the address of the Convention of New Jersey in 1786, had been removed.<sup>2</sup> All the elements of a primitive apostolic Church in its perfection had been acquired. Imperfection existed in an undue conventional restriction of the power of the Bishops,

<sup>1</sup> On the 5th August, 1789, a resolution was unanimously adopted, that a complete order of Bishops, derived as well under the English as the Scottish line of Episcopacy, doth now subsist within the United States of America, in the persons of the Rt. Rev. William White, the Rt. Rev. Samuel Provoost, and the Rt. Rev. Samuel Seabury.—(*Journals of the Gen. Conv.* p. 53.)

<sup>2</sup> *Memoirs of the Church*, 332. *Ibid.* 357.

and in other details; but the seeds of truth and primitive order were there, and gradually ripened, expanded, and prevailed.

In this situation, on the 2d October, 1789, the constitution was adopted. On the 3d of that month it was resolved that agreeably to the constitution, there is now in the convention a separate House of Bishops, and the Bishops then withdrew. On the 5th October, the House of Bishops met, and it was provided that the senior Bishop should be the president.

What then prevents the conclusion, that thus was instituted the superior council of the Church of the United States? Not because there was no prelate answering to the Archbishop, or Metropolitan, found in provincial councils. In relation to such assemblies, he was no more than the summoning and presiding officer. The Bishops in council could overrule him, and he could not dissolve a meeting without their consent. Not because the inferior clergy formed a part of the council, with an equal voice in the enactment of laws. There are traces of their presence in almost every period, whatever may have been the extent of their power. But in England, especially since these bodies assumed the form of convocations, they have had a co-ordinate authority in this particular. In the province of Canterbury, also, they deliberated in a separate chamber. Nor again can it be, because the laity were admitted as members with a concurrent power in the making of canons.

Without entering into that discussion which the work of Sir Peter King produced, I content myself with the highest authority on one side of the question known to the American Church—that of Bishop Seabury. The main point of his objections to the introduction of the laity, contained in his celebrated letter of 1785, was their power to sit upon the trial of Bishops and Presbyters. But he united in a constitution which gave them co-equal authority in the formation of laws

for the general Church, and he consented to their introduction into the Convention of Connecticut. This is sufficient to prove, that in the judgment of that eminent prelate, the presence and power of the laity in councils was no violation of the principles of a primitive Church, if not literally in accordance with primitive practice.<sup>1</sup>

We must distinguish between the convention of 1789, and the General Convention established by it. The former was an imperfect body, constituted to legislate for an imperfect Church; but with power, when there were Bishops of the Church, to institute an organ for continuing and administering its government. The Bishops, two of them by their actual presence and participation, and the other by his then implied and subsequent express ratification, united in the formation of that body. These Bishops submitted to certain modifications of the model of a national or provincial council. In their judgment these changes were compatible with the apostolic constitution of the Church; and when the convention of 1792 assembled, it met as the pre-eminent synod, as the Protestant Episcopal Church of the United States by representation. And amongst its acts, at that meeting, was the republication, or re-enactment, of the canons of 1789. (*Journals, 1792, BLOREN.*)

The remarks on this most important subject have been much extended—a few observations will conclude them. In 1786, a constitution was first announced, and the deputies say, that “taking into consideration the importance of maintaining uniformity in doctrine, discipline and worship in the said Church,” they do declare and determine, “that there shall be a General Convention of the Protestant Episcopal Church in the United States.” Such was the article as

<sup>1</sup> I refer to a note to the Articles of the Constitution (post. Title 2) for authorities as to the composition of these councils, and in support of the above position.

adopted in 1789, and thus has it continued since. Now, what could possibly achieve the object of maintaining uniformity in discipline and worship, but this principle of ultimate authority in some constitutional body? What else could fulfil the primitive law of unity and perfection in a national Church—what else could have met the difficulties and exigencies of those days? Nothing saved us then, nothing but this can save us now, from being the dis severed members of separate congregations, and not the compact body of a national Church. I know there are some who look upon this union with distrust, and others with indifference; but the holiest and wisest of our fathers toiled for and prayed for it day and night—sorrowed as the cause was in tribulation, and rejoiced with joy unspeakable when it prospered. I believe that in spite of much that has been wrong, and more that has been imperfect, the prophetic visions of spiritual growth and beauty which arose upon their faith-brightened eyes, have been realized in the history of the Church, and realized through union.

Thus we have a theory of the power of the General Convention, adequate, consistent, and practical. There is neither safety, union, nor progress in any other; but there is every element of discord, and every omen of decay. I humbly trust that it will be found as well fortified by facts and argument, as it is simple and decisive.

And as to those dioceses which have subsequently come into union, the provisions of the fifth article of the constitution coupled with (though not receiving their force from) the declarative recognitions in the constitutions of such dioceses, give to the General Convention the same full authority and legislative power.<sup>1</sup>

<sup>1</sup> The following is the form, with slight verbal changes, in the constitution of North Carolina, Georgia, Mississippi, Louisiana and Ohio:—"The Protestant Episcopal Church in this state, adopts, ac-

It has been before observed, that the great bulk of the canons cannot be supported upon the ground that the power to pass them is derived from any clause of the constitution. This point requires further consideration.

Looking to the source of the power of the delegates, by whom the constitution and canons were formed, we might be led to the supposition that the analogies of the Constitution of the United States would prevail; and that the question upon any law of the convention would be, whether the power to make it had been expressly granted, or by a necessary implication was vested in it under some clause of the constitution.

But this rule of construction will be found inapplicable. It is impossible to find in that instrument, either in express language, or by any warrantable inference, any provisions on which to rest the validity of the greater part of the canons. Every power rightfully exercised by the Government of the United States in any of its branches, has its source and its bounds in some clause of the Constitution of the United States; but it would be vain to seek for such a sanction for most of our canons.

For example :—the present 37th canon defines the offences for which a minister may be tried and punished. By other canons, certain offences or neglects are punishable or censurable. There is not a sentence in the constitution upon which these provisions can be placed as their authority and warrant.

cedes to, and recognizes the general constitution of the Protestant Episcopal Church of the United States, and acknowledges its authority accordingly." In the constitution of Missouri, it is thus:—"This Church acknowledges the authority of the General Convention of the Protestant Episcopal Church in the United States of America." Of Wisconsin:—"The Church in the diocese of Wisconsin, desirous of entering into federal union with the Protestant Episcopal Church in the United States of America, does accordingly accede to, recognise and adopt the general constitution and canons of that Church, and acknowledges its authority accordingly." There is a similar clause in the constitution of South Carolina. There is none in that of Maine, New-York, Western New-York, or Maryland.

We may classify the articles of the constitution thus:

*First*, such as relate to the establishment and organization of a General Convention—its mode of performing business, and the alteration of the constitution. The first, second, third, fifth and ninth articles fall within this class.

*Second*. Such as confer upon the convention a power to legislate.

*Third*. Such as are in themselves positive acts of legislation.

Nothing falls under the second class but the first two sentences of the sixth article as to trying Bishops, and that part of the eighth article which contemplates a future action as to the Prayer Book. The fifth canon falls, in part, within the first, and partly within the second class. All other provisions are within the third.

We have here a very limited foundation for the legislation of the convention over the whole Church. In truth upon the doctrine of deriving authority from the constitution, there would be no power in it, except to regulate its own organization, to govern all changes in the Prayer Book, and to direct the trial of Bishops.

And from the view we have now taken, two classes of powers exist in this body—those conferred by the constitution and those possessed without being so conferred. I have before stated what fall under the first head.

And as to the other powers, they vest in the General Convention by reason of its inherent sovereignty, and from their very nature cannot receive a strict definition or circumscription.

From this doctrine, some general rules necessarily flow.

1st. That, generally speaking in instances of the first class, viz: those in which a power to legislate is expressly given, all authority of the separate dioceses upon the subject is superseded at once, and before and without any exercise of the power by the General Convention.

2d. That until an act of legislation upon any such subject as the convention can act upon within the second class of powers, the authority of the dioceses is entire and unrestricted.

3d. That when an act of the General Convention upon such a matter is passed, it becomes the supreme law ; superseding what has been done in a diocese or any power of a diocese at variance with it, and superseding the right to make any similar provision in a diocese *ad idem* ; but abridging the power of the dioceses only so far as the law by just intentment extends.

4th. That therefore the dioceses still retain the power to legislate upon the same subject matter beyond the legislation of the convention, if no repugnance exists between the different acts of legislation.

I proceed to some illustrations of the above principles.

1st. A part of the sixth article, as before observed, confers a power upon the General Convention to legislate. The provision is this :—“The mode of trying Bishops shall be provided by the General Convention. The court appointed for that purpose shall be composed of Bishops only.”

This clause was adopted in 1841. From the moment of its passage, I apprehend, the whole power of the diocese over the subject was annulled. The power thus conferred was exclusive in its very nature, and did not require that it should be exercised to produce an inhibition upon the dioceses.

It is true the General Convention passed a canon at the same session in which this part of the constitution went into effect ; but had they deferred it, still the dioceses could not have legislated in the matter ; and clearly there could be no concurrent legislation after the convention did act. The history of this article will, I think, render this more clear, and be instructive upon the subject at large. (See post. Article 6.)

2d. The eighth article furnishes an exemplification of the principles now suggested of another kind. It directs that a

Book of Common Prayer, &c., when established by this or a future General Convention, shall be used in the Protestant Episcopal Church in those states which shall have adopted this constitution.

The Book of Common Prayer was ratified and established by a resolution of the Convention, dated the 16th day of October, 1789, but it was provided that it should go into effect on the first day of October, 1790. Now, unquestionably, during this interim, as well as during any period until the convention acted, the Church in the several states had the same control over the Prayer Book to amend and establish it for each state, as the General Convention acquired for the whole Church.

The ninth article of the constitution of 1785 indeed left the whole matter to them. But after the 1st of October, 1790, this eighth article became permanent and perfectly exclusive. There did not remain the slightest power over the subject in any Diocesan Convention.

Thus we find that, in 1787, a resolution was adopted in New-York, that until further provision be made by the General Convention, the respective congregations of this Church be at liberty to use the new form of prayer or the old, as they respectively may think proper. (*Journals N. Y.*, p. 17.)

3. An illustration of the fourth proposition may be found in an act of the convention of Maryland, of 1847. A committee appointed for that purpose, reported a set of canons, marked with great ability and care. Among them was one (the fifth) declaring what offences of clergymen are punishable. This canon enumerated the offences declared in the 37th canon of the General Convention, and added other distinct offences taken from a former canon of Maryland respecting the laity. The committee say, "The language of our present 22d canon has the appearance of great vagueness. It has, therefore, been thought expedient to substitute for it an



enumeration of offences, taken partly from the 37th canon of the General Convention of 1832, and partly from the 17th canon of the old Maryland code, which defines the offences for which a layman is liable to trial." A minority report, signed by Mr. Carroll, and drawn up with great ability and admirable perspicuity, treated the proposed canon as unconstitutional. It would be extremely difficult for any one to refute the premises of this report; but the conclusion does not seem warranted.

The journal does not furnish the reasons by which the report of the committee was sustained. From the character of the gentlemen of that committee, they, no doubt, were far more full and convincing than those I proceed to suggest.

If the principles which I have supposed to exist are sound, they answer the argument of Mr. Carroll. There was no such exclusive power upon the subject vested in the General Convention as precluded a diocese from acting before the General Convention did act. But there was a power in that convention to act, and when they did so, their rule became absolute and paramount; yet absolute and paramount to the extent to which it went, and no further. That convention pronounced certain offences punishable. No diocese could reverse or modify that law. But it did not pronounce that such enumerated offences were the only offences punishable. This allowed the diocese to enlarge the number within its own limits, if it was thought proper. The 3d canon of the diocese of Connecticut must be illegal, if this of Maryland is so. It contains an enumeration of triable offences, some of which are not included in the general canon.

Such I consider to be the power of the General Convention, and the remnant of authority left to the dioceses. But there are some restrictions upon this power, which arises from its nature and the object of its establishment.

The following may, I think, be laid down as free from difficulty.

1st. The General Convention cannot pass a canon conflicting with the general constitution.

2d. It cannot adopt any canon for discipline of a limited and local operation. It must be for the whole Church, and uniform throughout the Church.

But is there not also some limit to its power in the constitutions and regulations of the churches of the dioceses—some subjects of internal government which it may not touch? The question is one of great moment and nicety. I proceed to state some facts and to make some suggestions upon the subject.

It would, on first consideration, appear indisputable, that the regulation of a diocesan convention, and the qualifications of its members, were exclusively within its own control. We might, in like manner, suppose that the bodies through which its internal government was to be carried on, would be constituted solely by the separate conventions, and in such manner as they thought fit. Yet, as to the latter, there has been, since 1789, a canon unquestioned and submitted to, directing that there shall be a standing committee appointed in every diocese; since 1808, another, declaring the duties of such committee; and since 1832, another, providing that these duties, *except as provided for in the canons of the General Convention*, may be prescribed by the canons of the respective dioceses.

With regard to the other point, there are historical facts and actions of conventions, of great importance and interest.

In the year 1804, the General Convention passed a canon declaring that no minister who may be hereafter elected into any parish or church shall be considered a regularly admitted and settled parochial minister in any diocese or state, nor shall as such have any vote in the choice of a bishop, until he shall have been inducted according to the office prescribed by this Church.

At the same time the Office of Induction was adopted.

Bishop White states (*Memoirs*, p. 255,) "that the requiring induction as essential to a valid settlement, was perceived to militate against the idea so generally prevalent in many places of dismissing ministers at pleasure. In Maryland the measure interfered directly with the vestry law. From Carolina there was a memorial desiring an alteration of the canon."

The vestry act of Maryland was passed in 1798, and gave to the vestry the power of electing a minister, and making a contract with him for his services. It vested him with the right to the glebe, rents, and other property of the parish, unless he otherwise contracted with the parish.

This act, it must be remembered, had been accepted and acted upon by the Church in that state. Dr. Hawks states other objections made to the canons.<sup>1</sup>

I have before noticed the action of South Carolina upon this subject. The opposition led to the modification in 1808, declaring that the canons, (this and the 2d canon of 1804,) should not be obligatory upon those states or dioceses with whose usages, laws or charters, they interfered. The phrase induction was also changed to institution.<sup>2</sup>

The canon of 1804 presented two points for consideration: 1st, the necessity of induction, to render a minister's settlement in a parish valid for any purpose: 2d, its necessity to render the minister capable of voting for a Bishop, or being a

<sup>1</sup> Vol. 2, p. 263. These objections spring from old habits, traces of which are to be found at a very early period. In Virginia, under an act of 1682, presentation was to be made by the vestry, and induction by the governor: without the latter the clergyman had no freehold in the living, but was removable at pleasure. Hence there were few of the clergy who could prevail on their vestries to present them for induction; the general custom, therefore, was to hire the minister from year to year. *Hawks' Contributions*, vol. 1, p. 88.

<sup>2</sup> Dr. Hawks considers that the terms were synonymous as used by the convention in 1804 and 1808.

member of the General Convention, or even of a diocesan convention.

My business at present is with the latter effect and bearing of the canon.<sup>1</sup>

And the action of New-York is here very important.

In 1802, the convention of that diocese unanimously adopted an office of induction into the rectorship of a parish, and also a canon prescribing the use of the said office at the settlement of every rector. It ran thus: "No minister shall be considered as regularly inducted or settled hereafter as the rector of any parish, except he has been inducted according to the Office of Induction prescribed by this convention."<sup>2</sup>

On the 8th of October, 1806, a resolution was moved and seconded, "That the General Convention of the Protestant Episcopal Church in the United States have no authority to prescribe the qualifications necessary to entitle a person to a seat and vote in this convention. Resolved, that by the constitution of the Church in this state, every officiating minister, regularly admitted and settled in some church within this state which is in union with this convention, has a right to sit and vote in this convention. Resolved, that the Rev. Mr. S. having been called and inducted as rector of the church of ———, in the manner prescribed by the laws of the state, he is regularly admitted and settled in the said church, and it being within this state, and in union with this convention, the said Mr. S. is entitled to sit and vote in this convention."

<sup>1</sup> With regard to the former question, the difficulty seems to have been that the institution tended to confer rights, and extend the period of a minister's connection with the parish, beyond what was agreed upon by the terms of the call.

As the office originally stood, there may have been ground for this comment, but only from the form of the letter of institution, not in the office itself, to which the wardens representing the parish, were parties.

<sup>2</sup> Journals N. Y. Convention, pp. 116-119.

It was moved and seconded that the foregoing resolutions be postponed for the purpose of introducing the following:—

“*Resolved*, that the ecclesiastical authority possesses the inherent and independent right to determine the qualifications of the members of its several judicatories, or ecclesiastical bodies; and that the Rev. Mr. S., not possessing the qualifications required by the authority of the Church, would not be entitled to a seat in the convention.

“*Resolved*, that agreeably to the constitution and canons of this Church, it being necessary that every presbyter should be inducted, according to the office of induction, before he can be considered as a regularly admitted and settled clergyman, a presbyter not so inducted cannot be entitled to a seat in this convention; the Office of Induction, prescribed by the General Convention of the Church, being the ecclesiastical recognition of his rectorship—but in no respects interfering with civil contracts—with the rights of vestries to settle duly qualified clergymen on whatever terms they may deem proper, or with the temporalities of parishes; which temporalities must be vested in the rector, by the vestries, before the bishop can give him authority to claim or enjoy them.”

These resolutions, as I am informed by Bishop Onderdonk, were generally understood to have been drawn by Bishop Hobart. No one can refrain from admiring the remarkable precision and legal accuracy of the language.

The question of postponement, for the purpose aforesaid, being taken, was decided in the affirmative, with only a few dissenting voices. And the question being taken on the last named resolutions severally, they were adopted with the same result.

In 1820 the following preamble and resolution were passed:

“It having been the usage of this diocese, previous to the passage of the 29th canon of the General Convention of 1808,

to consider as regularly admitted and settled parochial ministers in the sense of the third article of the constitution of this Church, all clergymen entrusted with the cure of parishes within the same—Therefore, Resolved, that all such, although not instituted agreeably to the office prescribed in the said 29th canon, shall hereafter be considered members of this convention.” Under this resolution a number of clergymen took their seats as members.

This resolution, at first, appears strange after the action of the diocese in 1802, respecting induction, and that of 1806. A close examination, however, will show some plausible distinctions on which inconsistency may be avoided. At any rate, the vote of New-York has given its testimony to two propositions—*first*, that the General Convention had the unquestioned power to prescribe institution as a qualification of members of a diocesan convention, or to entitle them to vote for a Bishop: and that the general canon of 1804 superseded the similar canon of the diocese, passed in 1802. *Next*, that the canon did not, and could not interfere with any state law, which regulated the right to the temporalities of a church or parish, and defined what should be a settlement for that purpose. Now, at that time, the constitution of the diocese of New-York directed, that the convention should be composed of the officiating ministers, being regularly admitted and settled in some church within the state, which was in union with the convention. (Article 3, Cons. 1796.) By the act of the legislature, then and now in force, the wardens and vestrymen constituted under the act, were to call and induct a minister. And upon an application to the convention, the new church having been duly organized under the statutes, and nothing objectionable appearing, was admitted into the convention.<sup>1</sup>

<sup>1</sup> The first instance I find recorded, (but it is clear there were others before,) is in 1796. (*Journal of that year.*) Two instances of the rejection of such an application are to be found previously, one in 1793, another in 1794.

And this, as I understand the case, was precisely the position of Maryland, under the vestry act and the constitution of that Church; and of South Carolina, under the statute and constitution in force in 1807, when the proceedings before stated took place. This, I believe, is their position now.

It is this matter which the modification of the canon in 1808 meets. The institution shall not be necessary where it interferes with the laws or usages of a Church in a particular diocese. The constitutions of Maryland, New-York, and South Carolina, prescribe the qualifications of clerical members of a convention. They admit those legally settled in a parish, under a law of the legislature. They do not by law or usage require institution; and the General Convention dispenses in such case, with the requisition.

But all this does not touch or impeach the power of the General Convention to have passed, or now to pass, the canon of 1804; or now to abrogate the qualification of 1808. I have added in the note some particulars which will tend to assist the judgment upon this point.<sup>1</sup> All that is now con-

<sup>1</sup> In Connecticut, an office of induction was directed to be prepared by the convention of 1799. In June, 1804, the office, as agreed upon by the bishop and clergy in convocation, was adopted. On the same day it was resolved, that no clergyman who shall hereafter be settled in this diocese shall be entitled to a seat in the state convention, until he produce a certificate of the Bishop, that he has been regularly inducted into some parish, agreeable to the office of induction adopted by this convention. This was before the session of the General Convention, when the canon of 1804 was passed. That session was in September of that year. I do not find any further action upon this subject until 1826, when a canon, (the 14th,) was reported, requiring all clergymen who had been settled within a certain period, and all who should be thereafter settled, to be instituted according to the form set forth by the General Convention. Another canon provided for the case of those clergymen who had been settled for more than a year; dispensing in their case with the institution.

A substitute was offered for these proposed canons, declaring that the 29th and 30th canons of the General Convention, relating to the institution office, shall be hereafter considered as obligatory in this

sidered is the power of the General Convention in the matter. Under the 30th canon, relating to the election and institution

diocese, any former usages or customs to the contrary notwithstanding. The whole subject was referred to a committee, and I do not find any further action upon it.

In New-Jersey, by the constitution of 1811, the members of the convention are to be, among others, "every priest or presbyter who has been duly instituted rector of any church in this diocese." It appears from the Journals of 1808 and 1810, that letters of institution were issued by the standing committee, there being no Bishop.

A striking confirmation of the distinction taken in the New-York resolution of 1806, is to be found in a proceeding in Maryland in 1844, although applied to the convention of the diocese. In the report of the minority in the case of Christ Church, Hagerstown, it is said—"it was suggested before the committee that the various acts of Assembly merely prescribe rules by which civil rights are to be acquired and regulated, but have no operation or influence of themselves in the decision, whether parties who have complied with these legal requisitions shall or shall not be adopted into union with the convention. It is asserted, that whether or not a new congregation shall be received as a member of this convention, is wholly independent of any civil law, but depends exclusively upon the canons of the Church, or upon the discretion of the body. In the general and abstract, the undersigned are not disposed to dissent from these doctrines."

I will close this note with a quotation from the canon of the Scottish Church, which illustrates the principle of the resolution of New-York: "Whereas it has never been the practice of this Church, nor the wish of her Bishops, to interfere, directly or indirectly, with the funds or temporalities of her congregations; it is therefore fully acknowledged that the right of presentation to any chapel within her pale, is vested in those who are appointed to manage its concerns, whether known by the title of trustees, church-wardens, vestrymen, &c., and who by virtue of their office, procure the means of the minister's support; yet to preserve the ancient and regular discipline of an Episcopal community, it is hereby enacted that no presbyter shall take upon himself the pastoral charge of any congregation to which he may be presented, before the deed of presentation be duly accepted by the Bishop." The form of the institution is annexed to the canons. It recites that a presentation has been made by the church-wardens, &c., in favor of ——, to the church of ——. That the Bishop has sustained the same, and does therefore institute and appoint the said ——, to be pastor or minister of the said congregation, to perform the duties, &c. (Canon 10, Church of Scotland, apud Burns, vol. 4, p. 694.)



of ministers, I have entered into other bearings of the subject of much consequence, and which Dr. Hawks has made the subject of an able and elaborate comment.

The principles which I have supposed to prevail respecting the power of the General Convention, and the clear reasoning and high authority of the resolution of New-York in 1806, lead to the conclusion that the General Convention possesses the power to prescribe institution as a qualification of the clerical members of a diocesan convention.

I enter not into any question respecting the expediency of such a provision, as to which it may deserve remark, that as far as I can ascertain, New-Jersey is the only diocese in the Union in which institution is made a necessary qualification of a delegate.

And if the right to pass such a canon as that of 1804, is conceded or established, it will be difficult to find a subject of Church discipline not within the province of the General Convention. I submit, (with much deference, upon a point almost untouched,) that upon every question of jurisdiction, the inquiry is not, whether the power has been conferred, but whether it has been denied or restricted.

I have now presented some views respecting the powers of the General Convention, and some examples to explain and enforce them. Others will arise in the course of the discussion of the separate articles of the constitution, to which I shall now proceed.

## TITLE II.

## THE ARTICLES OF THE CONSTITUTION.

## ARTICLE I.

(In force 1848.)

There shall be a General Convention of the Protestant Episcopal Church in the United States of America at such time in every third year, and in such place as shall be determined by the Convention; and in case *there shall be an epidemic disease, or any other good cause to render it necessary to alter the place fixed on for any such meeting of the Convention, the presiding Bishop shall have it in his power to appoint another convenient place (as near as possible to the place so fixed on) for the holding of such Convention.* (§ 1.)

Special meetings may be called at any other times in the manner hereafter to be provided for. (§ 2.)

This Church, in a majority of the *Dioceses*, which shall have adopted this con-

## ARTICLE I.

(1789.)

There shall be a General Convention of the Protestant Episcopal Church in the United States of America *on the second Tuesday of September, in the year of our Lord, 1792, and on the 2d Tuesday of September in every third year afterwards* in such place as shall be determined by the convention; and special meetings may be called at other times in the manner hereafter to be provided for; and this Church in a majority of the *States* which shall have adopted this constitution, shall be represented before they shall proceed to business, except that the representation from two *States* shall be sufficient to adjourn; and in all business of the convention freedom of debate shall be allowed.

stitution, shall be represented before they shall proceed to business; except that the representation from two *Dioceses* shall be sufficient to adjourn; and in all business of the convention freedom of debate shall be allowed. (§ 3.)

The changes in the Article will appear from the portions italicised. In the convention of 1823 it was put nearly in its present form; in 1838, the term "States" was changed to "Dioceses."

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§ 1. In a preceding part of this work, I have sought to establish the proposition that the General Convention was the national or provincial council of the Church of the United States, constituted by a body competent so to establish it—essential for attaining the objects of the constitution and of its framers—indispensable to the unity and perfection of an Episcopal Church, and necessarily endued with paramount power, except where it had been expressly restricted. A reference was made to this portion of the treatise for authorities to sustain some of the positions there taken, especially as to the resemblances and differences between the ancient councils and our convention. I proceed to notice some material elements of the organization of the former.

OF DIOCESAN,  
PROVINCIAL  
AND NATIONAL  
COUNCILS.

It is stated by learned writers that provincial councils were not held prior to the middle of the second century, and then first in the east. Now previous to that time the regulation of the Church and government of the clergy vested in the bishops for their respective dioceses, or as they were then termed *Paræcheses*. It is also stated that at first the clergy formed the senate or council of advice of the bishop. This

body consisted of the whole clergy; and as in early ages they surrounded the bishop and dwelt with him, and were deputed for spiritual duties where there was need, the presence of all was readily obtained.<sup>1</sup>

But as parishes were erected, and the clergy became located in and confined to them, the attendance of all must have been difficult, and sometimes impossible. In this manner may we easily account for what is the undoubted fact, that the cathedral chapter, that is the clergy who remained and officiated at the bishop's residence, became the substitute of the clergy at large, and formed the bishop's council. Here was observed the principle of representation.<sup>2</sup>

<sup>1</sup> Van Espen, in his chapter upon diocesan or episcopal synods, states their origin and office thus: "In the first ages of the Church the bishops were in the habit of convening their clergy whenever matters of importance occurred for deliberation. This was apparent from the epistles of Cyprian and other fathers. In the course of time these conventions came to be held twice a year, and when the provincial councils were fixed to be held annually, the episcopal synods were regulated in the like manner.

"Besides those who had the cure of souls, the members of these synods were ascertained not only by the provisions of canons, but by the varying customs of places." He then proceeds to state the mode of opening and conducting the synods. This conforms so closely to the precedent given in the Introduction to *Spelman's Concilia*, that I cannot but consider the last to be meant of a diocesan synod. It is observable that some of the laity were admitted at the opening of the meeting, but after certain prayers and ceremonies, they were excluded.

The offices of these Conventions are stated to be the correction and reformation of excesses and manners, especially of the clergy; in earlier times the determination of complaints and disputes between clergy and laity; and that the decrees of councils, general or provincial, should be more easily executed, and adapted to the particular diocese, in some articles.

<sup>2</sup> In the supplement to Van Espen's work (Tome 2, Tit. 8, ch. 1,) he says,—"It was observed in the text, that in the course of time, the cathedral chapter gradually came to be considered as the senate of the Church, and to represent the whole body of the clergy; so that what was at first done with the consent and advice of the clergy, began to be transacted with the advice of the chapter only, without regard to

We may go further. It is clearly proven by records of councils and comments of the learned, that these cathedral chapters were represented in provincial councils. The strong language of Van Espen deserves great attention. He speaks of some clergy as entitled *de jure* as well *de consuetudine*. Now it is not an unreasonable conjecture, that the bishops would wish to bring to the councils some of their own wise and learned assessors; and thus, perhaps, what only began in convenience ripened by usage into law. Here we have again a representation of the whole clergy of a diocese; first in its chapter, next in the procurators of that chapter in the provincial assemblies.<sup>1</sup>

My inquiries do not enable me to point out a record of any canons or regulations of a bishop's council in any age. Yet it is admitted that some were adopted, and covered certain subjects of government.<sup>2</sup>

the rest of the clergy. This power seems to have devolved upon the chapter in the tenth or eleventh century, about the time when the election of Bishops came to be transferred to the canons of cathedrals, to the exclusion of the other clergy." He then urges the advantages of an annual meeting of the clergy, or a body of them, to discuss the affairs of the Church for the remedy of abuses, and the welfare of souls. See further, *Juris. Eccl. Un. Pars.* 1 Tit. 8, ch. 1.

<sup>1</sup> See *post*.

<sup>2</sup> In the tract of Van Espen *De Synodis partialaribus* (apud *Tractatus Historico Canoniceus*, Pars. IX. § 4, vol. ii p. 181,) he says—"It is unquestionable that synods, not only œcumenical or general, but also national, or provincial, or diocesan, possess the authority of establishing those things which they judge to be for the benefit of the Church or people; and their regulations and decrees (*ordinationes et statuta*.) have the force of laws through the district which belongs to the synod, national, provincial, or diocesan. Wherefore that must be held for law which the respective synods, provincial, diocesan, or national have decreed." (See also *Jur. Eccl. Un. Pars.* 1 ch. 2, 10.) *Suarez* briefly observes, (*De Legibus*, Lib. 4, ch. 6, 8.) It is in the second place to be observed of those minor councils of which the authority is established, that they may make laws accommodated and proportioned to their jurisdiction, as well in regard to territory as to the subject matter of such laws. I deduce this from the common doctrine of the canonists.

It will be easily understood however, that as soon as provincial councils became common, the laws of such a synod would be few and limited. The Bishop himself was present and assisting at the former; a portion of his own council was, it is presumed, also present. The Metropolitan added his authority and influence. The laws and canons were no doubt more maturely framed, were of uniform and general operation, and would supersede the institutions of any separate diocese.

The duties and offices of the provincial councils are perspicuously set forth in a canon of the 4th council of Lateran. "According to the ordinance made of old by the holy fathers, the metropolitans together with their suffragans shall not

He then cites many authors. "These councils are of a triple order; such as are called national, in which are assembled, not only the bishops, but the archbishops, of every nation under one primate or patriarch. Others are provincial, of one metropolis, in which the suffragan bishops are convened with their archbishops; and lastly, others are synodal, not usually called councils but synods, in which are assembled the abbots and priests with cure (*Parochi*,) with their Bishops." The author proceeds to state that these cannot bind the whole Church for want of jurisdiction, unless the Pope ratified the laws, nor could they act in the more serious matters, but their laws were binding when conformable to their jurisdiction.

By the 31st canon of the Scottish Church, a diocesan synod is to be holden annually, and shall consist of the bishop, the dean, and such clergymen as shall have been instituted to their charges, and shall be attended by all the clergy of the diocese, unless hindered by some sufficient cause. A report is to be made of the state of the congregation, by every incumbent. "Every diocesan synod may also suggest rules for the regulation of ecclesiastical affairs, which if approved by the Bishop, and not inconsistent with the constitution and canons of the Church, shall have the force of laws within the diocese." (*Burns*, vol. iv. p. 781.)

The 32d canon regulates general synods.

Bishop Kennet, says—"Before the reformation every bishop had as full authority for a synod in his diocese, as the archbishop had for a synod in his province. And the *diocesan* constitutions, if not contrary to any more authentic declarations or general canons of the Church, were as obligatory within the smaller, as the *provincial* were within the larger district." (*Ecclesiastical Synods, &c.*, p. 180, Ed. 1701.)

omit to hold provincial councils in every year; in which is to be considered, the correction of offences and reformation of morals, especially of the clergy, as well as all canonical laws, and chiefly for enforcing (*relegandi*) those things which are ordained in the general council, so that they may be better observed, by inflicting a just punishment upon transgressors." (4th *Council of Lateran*, cap. 6, apud Binnii. *Concilia*, Tome 3, p. 1452. A. D. 1215.)<sup>1</sup>

A very important part of their office was the hearing and deciding the causes and offences of the clergy as well as of the laity in spiritual matters. It is needless to enter upon the question so abundantly discussed by the canonists, whether the Church could regulate the temporal affairs of its members, or the state could control in spiritual matters, or what related to them. A judicial power to a certain extent has for ever been exercised in the Church, and must be possessed. In early ages the ultimate authority and right of judgment was vested in these councils.<sup>2</sup>

<sup>1</sup> Van Espen also (*De Synodis Provincialibus*, Pars. 1, Tit. 20. cap. 2, Tome 1, 117,) enumerates their chief officers thus—"to inquire whether any bishop had acted according to law in repelling any one from the Holy Communion, to hear and determine all accusations of clergy or laity against the bishops, and indeed all criminal matters where the punishment might be deposition—to correct all vices and abuses, so that the conduct of all might be recalled to the discipline established by the sacred canons."

Again in speaking of the authority of the monarch in relation to the decrees of these councils, he says—"that the execution of synodal decrees is difficult and inefficient, unless the authority of the king or prince was added to them, is proven by experience. Hence whatever is ordained and decreed in the synod is presented to the king for his sanction." He quotes the precedent of the canons of the council of Zuronensis, (813,) presented to Charles the Good, "that he might order them to be observed throughout the province."

<sup>2</sup> In Fitzherbert's *Natura Brevium*, 269, is the form of a writ in the case of *Sawbee*, condemned for heresy. It recites that the venerable Thomas, Archbishop of Canterbury, Primate of all England, &c., with the advice and consent in Council, of his suffragan brethren, as well as of all the clergy of the province, in his Provincial Council assembled,

**MEMBERS.** These assemblies were, of absolute right and originally, composed only of the Archbishop or Metropolitan, with all the Bishops of his province. But other members were in the course of time admitted by custom, and it would seem that some obtained a right to attend. Among these were the cathedral chapters and colleges, or representatives from them, the abbots and others. It would appear however that in general, the office of such members was merely advisory, and that they did not possess a vote.

The Metropolitan was at the head of these councils; but ordinarily his power was only that of a summoning and presiding officer. The Bishops in council could over-rule him, and he could not dissolve the meeting without their consent. If in particular provinces a more extended authority prevailed, it is to be attributed to custom, or to some express exceptional regulation.<sup>1</sup> The 2d canon of the Church of Scotland,

after duly observing all legal requirements, did pronounce a definitive sentence upon, &c. &c. See also *Van Espen, Sup.* p. 1, Tit. 20, cap. 2.

<sup>1</sup> VAN ESPEN, Tit. de Syn. Prov., Tit. 20, cap. 1. JOHNSON'S *Vade Mecum*, Part 2, pp. 80—81. BEVERIDGE *De Metropolitanis*. The rights of Metropolitans arose from custom and circumstances, not from any apostolic regulation. VAN ESPEN, *Supplement*, Tit. 19. STILLINGFLEET, *Ecc. Cases*, p. 255.

In addition to the metropolitan and comprovincial Bishops, essential members of the Council, a number of the other clergy are found to have had a place in these assemblies in almost every age. Thus there were deputies of the cathedral chapters, abbots of various orders, deputies of collegiate churches, and others, sometimes present. It is said, indeed, that these had but an advisory office (*voce duntaxat consultivam*,) the Bishops and Metropolitan deciding all matters. The learned Van Espen (Tit. 20, cap. 16.) remarks: "*Qui vero præter Episcopos ad Synodum Provinciale vocandi sint, non e jure scripto duntaxat, sed vel maxime a consuetudine desumi debet.*"

A few examples may be useful. At the Council held at Rome, (A. D. 904,) the preamble to its acts, after stating the presence of the Pope, of numerous Bishops and a large number of presbyters by name, adds: *Astantibus Diaconis, videlicet, Benedicto Archidiacono, item Bonfilio Diacono, seu reliquis astantibus.* (Binnii Concil., tom. 3, p. 1065.) So in the Council of Rome, 1080, there were present, "Archbishops



appears to express and comprise the general attributes of his office. "Before the distinction of Archbishops was introduced

and Bishops of different cities, as well as abbots and a great number of clergy of different orders, and of the laity. (Ibid. p. 1287.)

At the Council of Eufurt, in 932, were present two Archbishops, many Bishops who are named, *necnon et Abbatibus, aliisque sacri ordinis viris*. (Ibid. 1056.)

In the year 888, in the reign of Amulphus, a Council was held at Magentium, at which were present three Archbishops with their suffragans, *ceterorum non modica multitudo abbatum scilicet, et aliorum sacerdotum*. (Ibid. 1025.)

With regard to England, the character of the Councils in Saxon times has been before largely discussed. (*Introduction*.) The subsequent Councils were chiefly those of the province of Canterbury, generally adopted in that of York. They are to be found in LYNWOOD, and in JOHNSON'S *Laws and Institutions of England*. The constitutions of Simon Mepham, Archbishop of Canterbury, made in London A. D. 1328, are made by the Archbishop by the authority of the present Council, with the consent *fratrum suffraganeorum*. (*Appendix to LYNWOOD*, p. 41.) The Council under John of Stratford, (1342,) was attended by all the provincial Bishops in person, or by procurators. (Ibid. p. 43.) The preamble to the constitutions of Thomas of Arundel, is: *De consilio et assensu omnium suffraganeorum nostrorum et alienorum Prælatorum in hac cleri convocacione præsentium et Procuratorum absentium, atque ad instantem petitionem Procuratorum totius cleri nostræ Provinciæ*." (Ibid. p. 65.)

The most full and decisive precedent which I have found, is that of the Council of London, in 1309. It is stated by Sir Henry Spelman, in his *Concilia*, p. 458.

*Concilium provinciale celebratum in Ecclesia S. Pauli, Londoniarum, die Lunæ proximâ post Festum S. Edmundi Regis et Martyris, Anno Domini MCCC. nono, per Dominum Robertum de Wynchelse, Cantuariensem Archiepiscopum, convenientibus tunc ibidem, ad citationem ejusdem Archiepiscopi, Dominis, R. London, H. Wynton, S. Sarum, J. Lincoln, J. Cicester, J. Norwycense, W. Exon, T. Roffensi, W. Wygorn, J. Bathon, et Wellen. D. Meneven, L. Assaven, A. Bangorensi, Episcopis; ceteris Episcopis Suffraganeis Cantuariensis Ecclesiæ, se excusantibus, propter infirmitatem et debilitatem corporum: Necnon Decanis et Procuratoribus Capitulum Cathedralium Ecclesiarum, Præpositis, Archipresbyteris, Archidiaconis, et Procuratoribus Cleri cujuslibet diocesis; Abbatibus, Prioribus, ac Procuratoribus Collegiorum, prout in Certificatorio London. Episcopi inferius descripto fit mentio.*

The order of celebrating a council, taken by Isidore Mercatore from the 4th Council of Toledo, is to be found in MANSI'S *Concilia*, Tome i. p. 10.] [It is not a general regulation, but governed, probably, the

into Scotland, one of the Bishops had a precedency under the title of *Primus Scotorum Episcopus*, and the Episcopal col-

councils of Spain.—After the entrance and seating of all the bishops, those presbyters are called, who for some sufficient reason are permitted to enter.<sup>1</sup> After these enter such approved deacons as the regulation permits to be present. Then such of the laity as by selection deserve to attend.<sup>2</sup>

The first two days were by this order of the Spanish councils devoted mainly to religious services, and exhortations. On the third day, all who had been present on the previous days for spiritual instruction were excluded, leaving in the council certain presbyters whom the Metropolitan had approved as so to be honored. The other presbyters, deacons, laics, who remained without, were called, if they had any matter to exhibit to the council. And on the day of the dissolution of the council, all the canons which in the Sacred Synod had been adopted were read in public before the whole Church.

A very learned author, who has entered upon the subject of the English Councils at great length, states broadly, that "it is the particular privilege of English priests to have a right to sit as constituent members in Provincial Synods, and are owned in all conclusive acts to have a negative on the bishops." (JOHNSON, *Vade Mecum*, part i. cap. 16.) This is stronger, as coming from a writer who sums up the general rule of the Church thus. After observing upon the composition of the first council at Jerusalem, he says: "In a word, this instance is sufficient to prove that the priests are capable of belonging to synods as constituent members; but which of that order shall be chosen to sit there, must be decided either by the pleasure of the bishops from time to time, or by the custom of the Church, introduced by the express and tacit consent of the bishops of each province or country, for several ages past." (*Ibid.* part ii. p. 53.)

In another part of the same work, he says: "They who allow the least to them, (the lower clergy) acknowledge that they were by degrees received into the Provincial Synod, which before consisted only of bishops and abbots, and were permitted to give their votes in all things that concerned the doctrine, discipline, and government of the

<sup>1</sup> *Vocentur deinde presbyteri quos causa probaverit introire.* The gloss upon these words is—The fathers of the Spanish Church did not by this regulation permit these, as presbyters or ministers, simply to assist at a council, but only certain selected presbyters of approved life and doctrine. Thus in the council of Eliberitamus, we find, besides the bishops, thirty-six presbyters to be assembled. But in subsequent Spanish councils, they were not so readily allowed a seat, unless they came in the place of absent bishops. And this we find to have been more strictly observed in the Œcumenical Councils, where there was no place assigned for them.

That is, (says the same authority) such deacons as the bishops deemed worthy of taking a part in the sacred Assembly. In subsequent Spanish councils they were not admitted.

<sup>2</sup> *Deinde ingrediantur et Laici qui electione concilii (concilio in margin) interesse meruerint.*

lege having for a century past adopted the old form, it is hereby decreed, that the Bishops shall without respect either to seniority of consecration or precedency of dioceses, choose a *Primus* by a majority of voices, who shall have no other privileges among the Bishops but the right of convocating and presiding, and that expressly under the following restrictions, &c."

These Councils were, by one of the apostolical canons, as they are termed, to be held once every year; and in pursuance of that direction Episcopal Synods were also to be held yearly.

The provincial councils ceased to be held in the Latin Church when the supreme power of judging causes was taken

Church; and have been for near three hundred years an essential part of the convocation. At first they sat in one room with the Lords Bishops, and when any affair was in agitation which did particularly concern them, they retired to some place by themselves, and reported their resolution to the Lords, by one or more eminent members; but Bishop Kennet doth allow, that by the beginning of the 15th century, they began to be a distinct house, and to have a settled Prolocutor regularly chosen at the beginning of the session, the first of whom, saith he, was the famous Lynwood." (*Ibid.* p. 101. Ed. 1731.)

Bishop Kennet's work upon the Ecclesiastical Synods and English Convocations is devoted mainly to a confutation of Mr. Atterbury, and to the establishment of the proposition that the superior clergy did not, for a very long period, form constituent members of the Provincial Synods of England. He insists upon the distinction between a Church Synod, properly so called, and a Parliamentary Convention. In the latter, the clergymen were in attendance as members, or by proctors, in order to tax themselves for aids and supplies to the crown. But for seven or eight reigns after the Conquest, he states, that the inferior clergy did not make an authoritative part of proper Ecclesiastical Synods, nor was their attendance necessarily required there. (p. 171.) Their right to attend and vote grew up by custom and the call of the archbishops. He states that the first instance in which they were summoned to attend a Provincial Synod was in 1283, (p. 136.) When the clergy did return select proctors of their own body, it was at first but to the same purpose of consenting to taxes, not to constitutions and canons. All the proper ecclesiastical acts were reserved, as before, to the archbishops and bishops as governors of the Church, till by slow degrees the inferior clergy were admitted to a share in the spiritual legislature, which we desire they may still preserve." (p. 146.)

from them. The learned Van Espen traces their decline to the promulgation of the false decretals, and the usurpations of the Popes by the system of appeals and other encroachments.

And there is a very powerful paper to be found among the documents published under the auspices of Leopold, Grand Duke of Tuscany, being a history of the assembly of the archbishops and bishops of Tuscany, held in 1787. It is written by a monk, Francis Barkovich. In speaking of the decretals he says—"The principal doctrines inculcated in this fraudulent collection are, that the Pope is Bishop of all Christendom; that all causes of importance ought to be brought by appeal before him; that causes relating to bishops belong exclusively to the Pope; that he ought to convoke and preside in all general councils; that no council, whether general or particular, is binding unless approved of by him; that he has authority to allow bishops to give up the churches to which they have been appointed, for the purpose of being appointed to a richer and more illustrious see; and that appeals to the See of Rome were usual before the Council of *Sardica*."<sup>1</sup>

<sup>1</sup> Life of Cardinal Scipio De Ricci, (London, 1829, vol. i. p. 287.) The work is full of striking papers against the powers of the Romish See, and of wise projects or improvements which, but for the reaction produced by the madness of the French Revolution, might have led to a sobered reformation in Italy. Among other documents is one presented to the Senate of Venice in 1769, and another called a defence of the Counsellor Joseph Raffaele, March 1770, from which I cannot refrain from quoting the following passage: "Finally Gregory the Twelfth mounted the papal throne, and reduced into a regular system the whole of that hitherto unshapely mass of privileges and exemptions which had been slowly constructed, partly on the ignorance and superstition of the people, and partly on the weakness and cowardice of governments. The two Councils of Lateran sanctioned this gigantic system by the adherence of deputies from the whole Church, who they said had been assembled in the name and by the authority of the Holy Spirit. From that period, whoever ventured to attack either the persons or the property of the clergy, was threatened with the spiritual

The diocesan synods fell into disuse when the provincial councils were abandoned;<sup>1</sup> and we cannot but be struck with the restitution in our own Church of that primitive order and system which the usurpations of the Popes broke down in the Latin, and its connection with the state has impaired in the English Church.

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To return to the first article of the constitution.

The matter of Special Meetings is regulated by Special Convention is in the Bishops. This right § 2 SPECIAL MEETINGS. the 49th canon of 1832. The right of calling a shall be exercised by the presiding Bishop, or in case of his death, by the bishop, who according to the rules of the House of Bishops, is to preside at the next General Convention,— provided that the summons shall be with the consent or on the requisition of a majority of the Bishops, expressed to him in writing.

The place of holding a Special Convention shall be that fixed on by the preceding General Convention for the meeting of the next General Convention, unless circumstances shall render a meeting at such place unfit; in which case the Presiding Bishop shall appoint some other place.

The Deputies elected to the preceding General Convention shall be deputies to such Special Convention, unless in those cases in which other deputies shall be chosen in the mean time by any of the Diocesan Conventions, and then such other deputies shall represent in the Special Convention the Church of the diocese in which they were chosen.

thunder of the Church, and its awful consequences both in this world and the next. The energies and intelligence of mankind were thus completely paralysed; and society, in the very period of its infancy, fell into the weakness and decrepitude of age.”—*Life of De Ricci*, vol. i. p. 274.

<sup>1</sup> *Van Espen Juris. Eccl. Un.* He deplores the fact that both of these councils have been so long neglected.

§ 3. QUORUM. There must be a representation of a majority of the dioceses which have adopted the constitution, before the convention can act. But what constitutes such a representation is not clear.

In the year 1844, a resolution was adopted referring it to the committee on canon law to consider and report to the next Convention, what alterations, if any, may be expedient in Articles I. and II. of the Constitution for the purposes of defining more exactly what constitutes a quorum of this house, and what a representation of both the clergy and laity in this house; and further what constitutes a majority of this house voting by dioceses and orders." (*Journal 1844*, p. 105.)

In the Convention of 1847, the committee reported "that a majority of the dioceses must be represented in order to constitute a quorum; and that each diocese should be considered sufficiently represented for that purpose, if one clerical and one lay deputy be present in convention. (*Journals 1847*, p. 107.)

The report was laid on the table, and not acted upon during that convention. It will be perceived that the committee omits to answer the second question. As to the latter part of the report, viz.: that a diocese is represented if *one* clerical *and one* lay deputy is present, it may be noticed, that under the second clause of the 2d article of the constitution, in certain cases (and among them a neglect to attend) one deputy, clerical *or* lay, will represent a diocese.<sup>1</sup>

Does not this clause apply to the question of a quorum in cases within it? There must be a majority of dioceses which have adopted the constitution represented. But what is a representation? As a clause of the second article is ma-

<sup>1</sup> I have seen the MSS. report of Bishop Whittingham, and the printed report of Bishop Hopkins. In both, the phrase is, *or one lay deputy*; in the disjunctive. This was no doubt a clerical error, and in a note of the Bishop of Vermont, he so treats it.

terial upon this point, some observations are submitted under it. See § 3, post. Art. II.

ARTICLE II.

(In force 1848.)

The Church in each *diocese* shall be entitled to a representation of both the clergy and laity, which representation shall consist of one or more deputies not exceeding four of each order, chosen by the convention of the *dioceses*.

In all questions when required by the clerical *and* lay representation from any diocese, each order shall have one vote; and the majority of suffrages by dioceses, shall be conclusive in each order, provided, such majority comprehend a majority of the *dioceses* represented in that order. The concurrence of both orders shall be necessary to constitute a vote of the convention.

If the convention of any diocese should neglect or decline to appoint clerical deputies, or if they should neglect or decline to appoint lay deputies, or if any of those of either order appointed, should neglect to attend, or be pre-

ARTICLE II.

(1789.)

The Church in each *state* shall be entitled to a representation of both the clergy and the laity, which representation shall consist of one or more deputies, not exceeding four of each order, chosen by the convention of the *state*; and in all questions when required by the clerical *or* lay representation from any *state*, each order shall have one vote; and the majority of suffrages by states shall be conclusive in each order, provided such majority comprehend a majority of the states represented in that order; the concurrence of both orders shall be necessary to constitute a vote of the convention.

If the convention of any state should neglect or decline to appoint clerical deputies, or if they should neglect or decline to appoint lay deputies, or if any of those of either order appointed, should neglect to attend or be prevented by

vented by sickness or any other accident, such diocese shall nevertheless be considered as duly represented by such deputy or deputies as may attend, whether lay or clerical.

And if through the neglect of the convention of any of the Churches which shall have adopted, or may hereafter adopt this constitution, no deputies, either lay or clerical, shall attend at any General Convention, the Church in such *diocese* shall nevertheless be bound by the acts of such convention.

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§ 1. NUMBER. One deputy of each order as fully represents that order in his diocese as four, which latter number cannot be exceeded. In the Convention of 1847, a majority of the committee on the canon law, reported that three clerical and three lay delegates would be amply sufficient instead of four. (*Journal* 1847, p. 107.)

The report was not acted upon.

It will be observed that the representation is to be chosen by the *convention* of the diocese. In the year 1847, a question arose under this clause. A number of deputies had been returned not chosen directly by the conventions of the dioceses, but under a provision of the constitution or canons, which devolved the duty in certain cases upon the Bishops, &c. For example, in Connecticut, the 14th article of the constitution provides for the appointment of delegates by the convention, and if a delegate declines,



the Bishop may appoint a substitute. Under this clause, a delegate was sent appointed by the Bishop. The regulations of Ohio, Western New-York, and many other dioceses, are upon this principle.

The committee on elections reported these cases specially. After various resolutions had been submitted and discussed, the following passed :—

“Resolved, as the sense of this House, that members appointed by the authority of the diocesan conventions, are, according to the practice of the House of Clerical and Lay Deputies, fully entitled to their seats.”

This undoubtedly disposes of the question, so far as relates to the cases then before the convention, and those of a similar nature. Upon examining the list of the delegates specified in the report of the committee, it will be found that the cases were all of a vacancy caused by death or resignation of persons chosen by the convention, and whose places were supplied by the bishop or others, under a general provision of the law of the diocese, except in two instances.

In the case of North Carolina, the substituted delegate was appointed under a resolution passed by the convention at the time it made the selection of deputies, and which resolution authorized the Bishop to fill up any vacancy. There is no general provision upon the subject in the constitution or canons of that diocese. The case of the deputy from Alabama was the same. (See *Journal, Alabama*, 1847, p. 18.)

Notwithstanding the generality of the language of the resolution above cited, it cannot, I presume, be supposed, that a general canon of a diocese would be valid, delegating the powers entirely and prospectively to a bishop or committee. Certainly the constitution contemplates an action by the diocesan convention for each General Convention; that the representation is to be of the direct appointment of the Convention. The necessity or great convenience of a case may well warrant

a delegation of power to fill a vacancy occurring when the convention is not sitting; and the course of North Carolina seems the most regular. Still it may also well be that a general canon may govern such a contingency; but a prospective general transfer of the right to choose representatives is scarcely consistent with the relation the diocesan convention is meant to bear to the General, nor with the just construction of the constitutional provision.

And indeed this view is applicable, though not so strongly, to a delegation by a convention of authority to choose the deputies in a particular case, for a particular convention.

In the same convention of 1847 a resolution was referred to the committee on canons to alter the second article of the constitution, by inserting after the words "convention of the diocese," the words "or in such manner as the said convention may prescribe, which choice shall not be delegated to any other person or persons." The committee did not report upon the matter at that convention. (*Journal*, 1847, p. 39.)

§ 3. MODE OF CHOOSING. The method of choosing delegates to the General Convention is left to the convention of each diocese. The regulations are not very uniform, although some points of resemblance are to be found in all. I select for an example the regulation in Wisconsin and New-York, and shall point out the material variances to be found in the rules of other dioceses.

Article 8, Sec. 1. At every annual convention, four clerical and four lay deputies shall be elected, by ballot, to represent this diocese in the General Convention of the Protestant Episcopal Church in the United States of America.

Sec. 2. The clerical deputies shall be presbyters canonically connected with this diocese, and having parochial charges.

Sec. 3. In case of a failure or neglect of the convention to elect deputies, those already in office shall continue until successors are chosen.

Sec. 4. The convention shall also elect, by ballot, a like number of supplementary deputies of each order, to serve as deputies contingently.

Sec. 5. It shall be the duty of the deputies elect to signify to the Bishop in writing, at least six weeks before the meeting of the General Convention, their acceptance of the appointment, and intention to perform its duties; in default of which the bishop shall designate [by certificate in writing] so many from those of the supplementary deputies as shall be necessary to insure a full representation of the diocese; and the persons so designated shall have all the power and authority of deputies duly elected by this convention.

The ninth canon of New-York is as follows:

Sec. 1. The Convention shall, at each regular annual meeting next preceding a stated meeting of the General Convention, elect, by the concurrent ballot of the clerical and lay members, four clergymen and four laymen, to act as deputies from this diocese to the General Convention. It shall also, in like manner, elect four clergymen and four laymen as provisional deputies, to act in the case hereinafter mentioned; which deputies and provisional deputies shall hold their respective stations until successors are appointed, and shall be deputies or provisional deputies for any General Convention which may be held during their continuance in office.

Sec. 2. Should a vacancy occur by resignation, removal from the diocese, death, or otherwise, among the deputies or provisional deputies, between the stated times of election, the vacancy shall be supplied by any convention, during or prior to which such vacancy shall occur.

Sec. 3. It shall be the duty of the deputies elect to signify to the Bishop, at least two days before the meeting of the General Convention, their acceptance of the appointment and their intention to perform its duties; in default of which

the Bishop shall designate from the list of provisional deputies so many as may be necessary to insure, as far as practicable, a full representation of the diocese. And the Bishop shall in like manner designate from the same list of provisional deputies one or more, as the case may be, to supply any deficiency in the representation of this diocese which may in any way occur. And the person or persons so designated by the Bishop, being furnished with his certificate thereof, shall have all the power and authority of deputies duly elected by the convention.

Sec. 4. In case of a vacancy in the Episcopate, or the inability of the Bishop to act, the power conferred upon the Bishop by this canon shall be exercised by the Standing Committee.

One important difference in the method pursued in these two dioceses is this,—In Wisconsin, the vote by ballot is of the members clerical and lay collectively, a majority determining. The practice in New-York is for the orders to ballot separately, and a majority in each order is requisite. Even if it were doubtful whether this was enjoined by the language of the canon itself, yet it follows from the provision of the 12th canon, directing “that when an election is by ballot, a majority of the votes in each order shall be necessary to a valid election.”

In Wisconsin in 1847, the votes having been inadvertently taken by orders instead of by individuals, a resolution was passed declaring the election void, and the convention proceeded to choose by a joint ballot. (*Journal*, p. 19.) This was the same year in which the Constitution was adopted.

The phraseology of the canon of Missouri is,—“Shall elect by the concurrent ballot of the clerical and lay members.” I am not aware, from an examination of the *Journal*, whether the balloting is individually, or by orders.

In Ohio, the rule is the same as in Wisconsin and ex-

pressed clearly. It is to be by a joint ballot of the clergy and laity, and a majority of votes shall be required for an election. (Article VII., Const. 1847.)

The canon (9 of 1847) of Illinois is exactly like that of Missouri, except in requiring the delegates to be communicants. But there is also a provision (Canon 13) precisely like that of the 12th canon of New-York before cited.

In Louisiana the election is by a majority of the votes of the clergy and laity together. In case of a vacancy, by death or resignation, a substitute or substitutes may be appointed by the Bishop; or if there be no Bishop, by the President of the Standing Committee. (Article VII. and IV., Constitution, 1847.)

I apprehend that the same rule prevails in Mississippi and in Florida. In the latter diocese, vacancies are supplied by the concurrent vote of the remaining clerical and lay deputies. (Canon 9, 1847.) This is also the regulation in Georgia. In South Carolina the provision of the 13th Article is, that at every annual Convention four presbyters and four laymen shall be chosen by ballot. By the 9th Article, the members are to deliberate and vote as one body, unless a separate vote of each order is called for in the manner prescribed—"and a majority of both orders shall be necessary for a decision."

In the year 1847, these clauses received a practical construction. I should observe that the provision as to choosing members of the standing committee is the same nearly as that relating to delegates.

The votes upon an election were directed to be taken by orders, and this was done both as to delegates and members of the standing committee.

A question arose as to the interpretation of the 9th Article of the Constitution, and it was ruled, that "a majority" there means "a majority in each order of the votes cast."

Now a similar provision exists, I believe, in every diocese, for compelling a vote by orders; and if this is applicable to an election as to a vote upon a measure, then the vote in orders may be had even where a joint vote of individuals is allowed.

In North Carolina, there is no direct enactment upon this subject. The 9th article of the constitution prescribes the mode of voting where no division is called for, and where it is. This provision is general as to all questions coming before the convention. In the Journal of 1847, it is stated generally, that the convention proceeded to ballot for delegates; and then a resolution was adopted, authorizing the Bishop to fill any vacancy which might occur.

In a number of dioceses, the direction to take the vote by orders is express. Thus in Connecticut, each order shall appoint delegates by ballot, but the delegates thus appointed must be confirmed by the concurrent votes of both orders in Convention.

It is submitted that the system prevailing in New-York, Wisconsin and some other dioceses, of guarding as much as possible against a vacancy by choosing deputies and provisional deputies, best comports with the spirit of the Constitution. The selection by a bishop or standing committee from these in cases of vacancy is a matter of expediency, and wholly unobjectionable.

Again, it is considered that a *right* to choose by orders ought to be retained in the system. Whether we look upon the delegates as representing the diocese, as they truly do, or the Convention, the right to prevent an overwhelming vote of one order forcing upon the other an unacceptable representative ought to exist. And a concurrence is necessary, because it is the diocese, and not the orders to be represented. With an amendment of this character, the provisions in Wisconsin appear both full and clear, and might be taken as a model to produce uniformity.

In one instance the General Convention has limited the choice of lay delegates. By Canon VI. of 1838, no person who is a candidate for holy orders in the Church shall be permitted to accept from any diocesan convention an appointment as a lay deputy to the House of Clerical and Lay Deputies.

In the Constitution, as twice published by § 4. CALL FOR  
Bioren in the Journals, (p. 61 and p. 75,) the VOTE  
requisition for a vote by orders may be made by BY ORDERS.  
the clerical *or* lay representation of any diocese. In the other copies of the Constitution I have examined the word is *and*. The practice requires a united request.

Upon such a requisition, the orders vote separately; and instead of there being a vote of the members in convention, there is a vote of the orders, each order being considered as having one vote. A majority of the clerical members of a diocese settles of course the vote of that order for the diocese; and so of the lay votes.

For example, if there is one clergyman only from a diocese, his vote is the vote of the order of that diocese. If two, and they differ, the diocese is divided, and the vote becomes in effect a negative. If more than two, a majority decides the vote of the diocese in the clerical order.

But although the majority of the number of dioceses settles the vote of the order, it must be a majority of the dioceses represented. Thus if there are twenty-eight dioceses, all represented, fifteen must unite to carry a measure. If one of the dioceses is divided, still it is represented so as to make the fifteen necessary. Fourteen would not be sufficient. An instance to illustrate this occurred in the Convention of 1847. (See p. 89 of the Journal.) Twenty-four Dioceses had a representation of the laity; 12 voted in the affirmative upon a resolution; 10 in the negative—2 were divided. Of course the resolution was lost in that order.

I am not aware whether the case has ever occurred of deputies of a diocese, lay or clerical, being present and refusing to vote. Is it to be considered that the diocese is still represented, so that it must be counted in order to decide whether a majority of the dioceses have voted for a resolution? The general test of representation is in practice the actual voting. The clerk considers and counts those Dioceses which vote as represented.

§ 5. CASE OF  
ABSENT  
DELEGATES. This branch of the article provides for the case of an omission of the convention to appoint lay delegates or clerical delegates, or of the neglect of any of those of either order to attend, or a prevention by accident or sickness. In such case the diocese is represented by any deputy, lay or clerical, who may attend.

Now undoubtedly this is not meant as a representation of both orders of a diocese, in such cases, by the presence of a deputy of one order. (See *HAWKS' Con. & Canons*, p. 21.) The distinction is between a representation of an order, and that of a diocese. A diocese may be represented by a single deputy of either order in the cases specified; and this leads to a qualification of the rule laid down by the committee on canon laws before quoted, that one lay and one clerical deputy must be present in order to proceed to business. I apprehend that a full representation of fourteen dioceses, with a clerical deputy from another, if all the lay delegates were prevented by sickness, &c., would suffice.

And with respect to the other clause of the inquiry addressed in 1844 to the committee, viz., "what constitutes a majority of the house voting by dioceses and orders," it may be suggested, that it is a majority of the votes of the dioceses present by a clerical representation, concurring with a majority of the votes of the dioceses present by a lay representation; the votes in each case being given separately.

Thus there are 28 dioceses. If 26 are represented in the



clerical order, 14 must vote affirmatively to carry a measure ; and it is wholly immaterial how many vote negatively, and how many are divided. If 23 dioceses are represented in the lay order, twelve must in like manner vote affirmatively. And if fourteen in the one order and twelve in the other do so, the measure is carried.

But to test the above views as to both questions submitted to the committee—1st, It is supposed to be clear that if there is a representation of fifteen dioceses in the clerical order, and thirteen in the lay order, (the lay deputies of all other dioceses being prevented by sickness, &c., or not appointed,) there are the requisites of a quorum to transact business.

Then upon a vote by orders, eight would be a majority of dioceses in the clerical order ; and seven in the lay order. It is submitted that such a vote would be legal, and bind the dioceses whose deputies did not attend.

But to put an extreme and test case.—Suppose a full representation in the lay order of fifteen dioceses, and no diocese, or but one, represented in the clerical order : would it be sufficient ? It is submitted, it would not.

The constitution must be so construed on this point, as that each provision in it may have effect. Now, a vote by orders may be required : and when required, the vote of the order is decided by a majority of the dioceses represented in it. Hence it seems necessary to meet this case, that there should be, *first*, a representation of each order ; and *next*, such a representation as admits of a majority. It is therefore presumed that there must be a representation in the case supposed, of at least three dioceses.

The conclusion then seems to be, that the convention is competent to transact business if there is a representation in one order of a majority of the dioceses in union, and a representation in the other order of three or more dioceses.

The question as to alterations of the constitution is very different, as will be afterwards noticed.

## ARTICLE III.

(1848.)

The Bishops of the Church, when there shall be three or more, shall, whenever General Conventions are held, form a separate house, with a right to originate and propose acts for the concurrence of the House of Deputies, composed of clergy and laity; and when any proposed act shall have passed the House of Deputies, the same shall be transmitted to the House of Bishops, who shall have a negative thereupon; and all acts of the convention shall be authenticated by both Houses.

And in all cases the House of Bishops shall signify to the convention their approbation or disapprobation (the latter with their reasons, in writing,) within three days after the proposed act shall have been reported to them for concurrence; and in failure thereof, it shall have the operation of a

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And in all cases the House of Bishops shall signify to the convention their approbation or disapprobation (the latter with their reasons, in writing,) within three days after the proposed act shall have been reported to them for concurrence; and in failure thereof, it shall have the operation of a law.

law. But until there shall be three or more Bishops as aforesaid, any Bishop attending a General Convention shall be a member *ex officio*, and shall vote with the clerical deputies of the *diocese* to which he belongs, and a Bishop shall then preside.

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In the constitution as proposed in 1786, the provision (the fifth) was this: "In every state where there shall be a bishop duly consecrated and settled, and who shall have acceded to the articles of this ecclesiastical constitution, he shall be considered as a member of the General Convention *ex officio*, and a bishop shall always preside in the General Convention, if any of the episcopal order be present."

In the constitution as adopted in August, 1789, the bishops, when there should be three or more, were to form a House of Revision, and any act of the convention was to be sent to them for concurrence. If not concurred in, it would yet become a law if three-fifths of the convention adhered to it. (*Bioren*, p. 61.) In October, 1789, the deputies from Connecticut, Massachusetts and New Hampshire expressed their willingness to join in the union, provided the third article was so amended as to give to the House of Bishops the right to originate acts, and a full negative. A committee of the convention<sup>1</sup> reported in favor of both propositions, "as having a tendency to give greater stability to the constitution, without diminishing any security possessed by the clergy or laity."

The convention adopted the first branch of the recommendation, but modified the right to a negative so as to enable

<sup>1</sup> Rev. Dr. William Smith, Rev. Dr. Robert Smith, Rev. Dr. Benjamin Moore, Richard Harison, and Tench Cox, Esqrs.

four-fifths of the House to pass the act. Bishop White states "that the report as to a full negative would have been adopted had not a gentleman from Virginia stated, that it might cause the measure to be disowned in that state. The eastern gentleman acquiesced, but reluctantly. Had there been no more than their apprehension of laws passing by a majority of four-fifths after a non-occurrence of the bishops, the extreme improbability of this would, it is thought, have been confessed by them. But the truth is, they thought that the frame of ecclesiastical government could hardly be called episcopal, while such a matter was held out as speculatively possible."

In 1792, a proposition was submitted to render this negative absolute, and in 1808, it was passed by six out of seven states represented, with the clerical vote of Pennsylvania; the laity not voting, though favorable to the measure, on the ground that the proposition had not been communicated to the state convention.<sup>1</sup>

Indeed the progress of this measure is a remarkable tribute to the prevalence of just Church views. In the year 1787, we find South Carolina instructing her delegates to insist as a condition of union, that she should not be compelled to receive a bishop. Through a series of years we find Virginia declaring among her canons, that the office of a bishop differed in no respect from that of other ministers, except in the powers of ordination and confirmation, the right of superintending the conduct of the clergy, and of presiding in ecclesiastical assemblies. So when the absolute veto was suggested we find the opposition to it invincible. But the feelings and prepossessions which induced all these actions have passed away, and I presume it would be difficult to find a Churchman in the United States who would now advocate either of them.

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<sup>1</sup> See *Journal*, 1803, p. 249, *Bioren*; and *Bishop White's Memoirs*, 258.

ARTICLE IV.

(1847.)

The Bishop or Bishops in every *Diocese*, shall be chosen agreeably to such rules as shall be fixed by the convention of that Diocese. (§ 1.)

Every Bishop of this Church shall confine the exercise of his episcopal office to his proper diocese, unless requested to ordain, or confirm, or perform any other act of the episcopal office by any Church destitute of a Bishop. (§ 2.)

ARTICLE IV.

(1789.)

The Bishop or Bishops in every *state*, shall be chosen agreeably to such rules as shall be fixed by the convention of that state; and every Bishop of this Church shall confine the exercise of his episcopal office to his proper diocese or *district*, unless requested to ordain, or confirm, or perform any other act of the episcopal office by any Church destitute of a Bishop.

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In 1838, the words, "or district," were stricken out, and the word *diocese* substituted for *state*. The article in 1785, was almost identical with the present.

I look upon the first clause of this article as adopted in order to exclude the General Convention § 1. MODE OF CHOICE. from passing regulations for the choice of a Bishop. It was deemed more appropriate for the action of the dioceses; yet but for this clause, a canon of the General Convention would have governed it.

Dr. Hawks has pointed out the use which was made of this part of the canon in the discussions respecting Bishop Meade, when elected Assistant Bishop in Virginia, in the year 1827. The convention had annexed a proviso to the act of election, declaring that such election should not be deemed to entitle him to the situation of Bishop on the death of Bishop Moore, the diocesan.

When the case was before the General Convention, various

objections were made to this provision. A considerable number were so opposed to it as to consider it sufficient to justify a refusal to sign the testimonial unconditionally; but they were willing that it should be delivered by the presiding Bishop, upon his receiving evidence of a resolution by Virginia, that the Assistant Bishop should succeed. A resolution passed the House of Bishops expressing their disapprobation of the provision, and one equally strong was adopted in the House of Deputies. (See *Journals*, 1829, pp. 24 and 83.)

At the next Convention of Virginia, the condition was rescinded, and thus another proof was given how surely moderation in the assertion of undoubted principles will lead to success.

In the General Convention of 1829, a canon was passed, preventing the recurrence of the difficulty, and meeting the case. After providing for the cases in which an Assistant Bishop might be elected, it was declared that he should in all cases succeed the Bishop in case of surviving him. The present canon is the 6th of 1832. This will be more particularly noticed in another part of the work.

The methods of electing a Bishop in the various dioceses, are in some particulars alike. In North Carolina, for example, the following is the provision: "The order of the clergy shall nominate and appoint by ballot, some fit and qualified clergyman for that office, and if this appointment be approved by the lay order, he shall be declared duly elected. In the nomination and appointment, a majority of each order shall determine the choice, provided that two-thirds of all the clergy entitled to vote be present, and two-thirds of all the congregations entitled to vote be represented; otherwise two-thirds of the votes of each order shall be necessary to determine the choice." (Const. Art. 10.)

The tenth article of the Constitution of South Carolina is similar; that of Florida is in precisely the same words; and

that of Wisconsin to the same effect. (Art. 11.) (Art. 6.) That of Mississippi is this: "In the election of a Bishop the clergy and laity shall vote separately, (the clergy individually, and the laity by congregations,) and the concurrence of a majority of each order shall be necessary to constitute a decision."

In New-York, the two orders must always vote separately; the clergy by individuals, and the laity by congregations. The concurrence of a majority of each order is necessary for a decision.

In Maryland, the clergy choose by ballot, and the vote of two-thirds of that order is necessary. The appointment is presented to the order of lay delegates, and must be approved of by two-thirds of that order. It may be observed, that there is but one lay delegate from every parish. The regulation in Virginia is the same, except that a majority of each order is sufficient.

In Connecticut, the two orders shall separate, and the order of the clergy choose a person by ballot, and communicate it to the order of lay delegates; and if on ballot, the person is approved by the lay order, he shall be declared duly elected. In the above-mentioned election, a majority of each order shall determine a choice, provided that two-thirds of all the clergy entitled to vote be present; otherwise two-thirds of the vote of each order present shall be necessary to determine a choice.<sup>1</sup>

From these examples it will be seen that great uniformity prevails, not only in requiring the assent of the laity to a choice, but also in conducting the election by a vote of orders; and generally in making the lay vote a vote of churches or congregations.

The necessity of a union of a representation of the Laity in the election of a Bishop, is but a recurrence to the practice

<sup>1</sup> These various provisions are taken from the different Journals of 1847.

of primitive times. It may be doubted indeed, whether the same well defined power of the people existed ; whether there was an absolute necessity for their approbation ; but at least they were consulted, and in some instances it certainly appears that the election was by the suffrage of the clergy and the people.<sup>1</sup>

§ 2. RESTRICTION TO DIOCESE. A Diocese signifies the circuit of a Bishop's jurisdiction. The method of ascertaining the boundaries on a question of jurisdiction is pointed out in *Burns' Ecclesiastical Law*.<sup>2</sup> Such a question can scarcely arise in our country, where the dioceses are usually co-extensive with states, and upon a division of a state are accurately fixed.

The rule which is embodied in this part of the constitution is among the oldest recorded in the legislation of the Church.<sup>3</sup> A bishop, however, may perform divine offices and use his

<sup>1</sup> I believe that Van Espen stands as high as a canonist as any other, especially among those who oppose the usurpations of the Pope upon the prerogatives of monarchs, or the authority of bishops. In his chapter De Elec. & Nom. Episcoporum, Part 1, Tit. 13, Cap. 1, may be found a full list of authorities. One of them runs thus: "*Sed et Laici nobiles ac cives adesse debebunt ; quoniam ab omnibus debet eligi, cui debet ab omnibus obediri.*" But in another passage he says: "Neque etiam eo tempore electio illa plebis jus aliquod ad rem dabat ipsi electo, sed potius erat simplex postulatio ipsius plebis et cleri, de persona sibi grata ordinanda in suum pastorem."

The same author points out how the election gradually fell upon the Cathedral chapters.

<sup>2</sup> Vol. 2, p. 157, a.

<sup>3</sup> Van Espen (Part 1, Tit. 16, Cap. 3,) enters largely into the subject. He cites the twenty-second canon of Antioch, A. D. 351: "In aliam civitatem quæ ei subjecta non est, non ascendat, nec in regionem quæ ad eum non pertinet ad alicujus ordinationem nec Presbyterum nec Diaconum constituat in locis alio Episcopo subjectis, nisi cum voluntate proprii illius regionis Episcopi." Again: "Hæcque disciplina confusionsi tollendæ adeo necessaria visa fuit, ut eam Ecclesia in hodiernam usque diem conservaverit, variisque canonibus frequenter stabilierit, interdixeritque severe Episcopis, in aliena Diœcesi quidquam ordinare aut agere sine licentia Episcopi Diœcesis illius," &c.



episcopal habit in the diocese of another.<sup>1</sup> Thus, all offices not strictly appertaining to the episcopal function—administering the communion, &c., may be performed by him.

The General Convention has passed a canon for the regulation of the performance of episcopal duties in vacant dioceses, or where the bishop is under a disability. This subject will be more fully discussed in another part of this work.

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ARTICLE V.

A Protestant Episcopal Church, in any of the United States, or any territory thereof, not now represented, may at any time hereafter be admitted, on acceding to this constitution. A new diocese, to be formed from one or more existing dioceses, may be admitted under the following restrictions:

No new diocese shall be formed or erected within the limits of any other diocese, nor shall any diocese be formed by the junction of two or more dioceses or parts of dioceses, unless with the consent of the bishop and convention of each of the dioceses concerned, as well as of the General Convention.

No such new diocese shall be formed which shall contain less than eight thousand square miles in one body, and thirty presbyters who have been for at least one year canonically resident within the bounds of such new diocese, regularly settled in a parish or congregation, and qualified to vote for a bishop. Nor shall such new diocese be formed, if thereby any existing diocese shall be so reduced as to contain less than eight thousand square miles, or less than thirty presbyters, who have been residing therein, and settled and qualified as above mentioned.

In case one diocese shall be divided into two dioceses, the diocesan of the diocese divided may elect the one to which he will be attached, and shall thereupon become the

<sup>1</sup> BURNS' *Ecclesiastical Law*, vol. 2, p. 158. He cites the Clem., 5, 7, 2: "*Simili modo concedimus episcopo ut in locis eisdem,*" &c.

diocesan thereof; and the assistant Bishop, if there be one, may elect the one to which he will be attached, and if it be not the one elected by the Bishop, he shall be the diocesan thereof.

Whenever a division of the diocese into two dioceses shall be ratified by the General Convention, each of the two dioceses shall be subject to the constitution and canons of the diocese so divided, except as local circumstances may prevent, until the same may be altered in either diocese by the convention thereof; and whenever a diocese shall be formed out of two or more existing dioceses, the new diocese shall be subject to the constitution and canons of that one of the said existing dioceses to which the greater number of clergymen shall have belonged prior to the erection of such new diocese, until the same may be altered by the convention of the new diocese.

In carrying out this article of the constitution the General Convention has passed the eighth canon of 1838.

§ 1. Whenever any new diocese shall be formed, within the limits of any other diocese, or by the junction of two or more dioceses or parts of dioceses, and the same shall have been ratified by the General Convention, the Bishop of the diocese within the limits of which another is formed, or in case of the junction of two or more dioceses or parts of dioceses, the Bishop of eldest consecration over the dioceses furnishing portions of such new diocese shall thereupon call the Primary Convention of the new diocese, for the purpose of enabling it to organize, and shall fix the time and place of holding the same, such place being within the territorial limits of the new diocese.

§ 2. In case there should be no Bishop who can call such Primary Convention pursuant to the foregoing provisions, then the duty of calling such convention for the purpose of organizing, and the duty of fixing the time and place of its

meeting, shall be vested in the Standing Committee of the eldest of the dioceses, by the junction of which, or parts of which, the new diocese may be formed. And such Standing Committee shall make such call immediately after the ratification of a division by the General Convention.

§ 3. Whenever one diocese is about to be divided in two dioceses, the convention of the said diocese shall declare which portion thereof is to be the new diocese, and shall make the same known to the General Convention before the ratification of such division.

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The first part of this article relates to the formation of a new diocese in a state or territory in which no diocese has before existed.

In 1789 the article was merely this—A Protestant Episcopal Church, in any of the United States, not now represented, may at any time hereafter be admitted, on acceding to this constitution.

In 1838 the words “or any territory thereof,” were inserted in the first clause, and the residue of the article added.

In the case of Wisconsin, in 1847, the following was the course of proceeding:—The missionary Bishop invited all the clergy canonically connected with him, and resident in Wisconsin, to meet at a certain place and time, and to bring with them a delegate or delegates, not exceeding four from each parish with which they were connected, for the vacant parishes in their vicinity. The meeting was organized, the missionary Bishop in the chair, and passed rules of order, adopted a constitution and canons, and appointed delegates to the General Convention.

At the General Convention, in October, 1847, the application for admission into union, together with a copy of the constitution, was presented, and referred to a committee.—*Journal*, p. 16.)

The committee reported that they had examined the constitution, and finding an accession to the general constitution and canons of the Church, recommended that the diocese of Wisconsin be admitted into union with the General Convention of the Protestant Episcopal Church in the United States. The House of Bishops concurred.

On some occasions the House of Bishops has exercised the right of passing upon the constitution and canons of the Church applying. Thus, in 1829, upon the application of Tennessee, the committee to whom was referred the constitution and canons, reported, that they recommended a concurrence with the resolution of the House of Clerical and Lay Deputies, but at the same time proposed "that it be recommended to the convention of that diocese to repeal the proviso to the third canon, passed July 2d, 1824, as highly inexpedient in itself, and not conformable to the principles of the Church."—(*Journal*, page 79.) With this the other house concurred.—(*Ibid.* p. 80.)

So upon the application of Kentucky, the committee reported that they had examined the constitution of the said diocese, and found it conformable to the principles and order of the Church.

In 1832, upon the application of Michigan, the clause of accession to the constitution of the Church was omitted in the constitution of that diocese. There was, however, other evidence in its journals of the fact. The committee reported that it was highly proper and expedient that the declaration of accession, and the acknowledgment of the authority of the constitution and canons, should appear in the constitution of any Church applying to be admitted into union. They recommended a resolution of admission, with the expectation that the omission would be supplied. The convention adopted the resolution.

§ 2. As before observed, the latter part of the article, and

the eighth canon under it, were adopted in the year 1838. This arose from the application of New-York for a division of the diocese.

It is not necessary to state the various views which were taken upon this subject, and the other measures preferred by a considerable body of the churchmen of the diocese. The discussions resulted in a vote of the convention, September 11, 1838, that the Protestant Episcopal Church in the state of New-York be divided into two dioceses, and that the line of certain counties, as established by law, be the boundary line between them; that the delegates be requested to present the resolution to the General Convention, &c., and request its ratification of and consent to the said division.

To this was added the consent of Bishop Onderdonk, of New-York, pursuant to the constitutional provision.

A resolution was then adopted, reciting the above mentioned documents, and declaring that the convention did ratify the said division of the diocese of New-York into two dioceses, by the formation within its limits of the new diocese above described, such division to take effect on the first of November next; and that this convention does hereby recognize the union with the General Convention of the new diocese west of the above named counties, &c.

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ARTICLE VI.  
(1848.)

The mode of trying Bishops shall be provided by the General Convention. The court appointed for that purpose shall be composed of Bishops only. In every diocese the mode of trying Presbyters and Deacons *may* be instituted by

ARTICLE VI.  
(1789.)

In every *state* the mode of trying clergymen *shall* be instituted by the convention of the *Church therein*. *At every trial of a Bishop there shall be one or more of the Episcopal order present*, and none but a Bishop shall pronounce

the convention of the *diocese*. None but a Bishop shall pronounce sentence of *admonition*, *suspension*, or degradation, on any clergyman, whether Bishop, Presbyter, or Deacon.

sentence of *deposition* or degradation *from the ministry* on any clergyman, whether Bishop, Presbyter, or Deacon.

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The article of 1789 was varied in 1838, by substituting the word *diocese* for *state*, and so continued until 1841, when the first two sentences were added to it, and the other alterations made. The words italicized will show the omissions and variations.

The first clause of this article will be adverted to hereafter, when the canon which has been adopted under it is examined; and the last clause under the head of SENTENCES. The change in the other clause requires particular attention.

In the article of 1789—and so it continued until 1841—the phrase was, “the mode of trying clergymen, in every state, *shall* be instituted by the convention of the Church therein.” It is now, “*may* be instituted.” Dr. Hawks, it will be seen, has twice adverted to the subject of the impossibility of obtaining uniformity in the judicial decisions of the Church, while each diocese is left to its own system of proceedings and rule of decision. (See *Constitution and Canons*, pp. 34 and 57.) He treats this as the weakest part of our ecclesiastical arrangement, and states that a canon had been prepared upon the subject, which lay over among the unfinished business of 1835 and 1838, but that it was doubtful whether a canon could accomplish it while this article of the constitution was in force. In 1841, as before observed, this article was changed, and the word *may* was substituted for the word *shall*. The clause is now, “that in every diocese the mode of trying clergymen *may* be instituted by the convention of the diocese.”

It is probable that this change was made with a view to this question of the authority of the General Convention, although I have not found any action or resolution to prove the supposition. But the point does not yet seem free from difficulty.

Let the case be supposed of a canon for trial of a clergyman passed in a diocese, and a canon of the General Convention afterwards passed, varying from and inconsistent with some portion of the diocesan law. Is the latter superseded? On the one side, this view may be presented—The separate dioceses had the original exclusive right to legislate upon the subject. Had the constitution of 1789 contained nothing respecting it, the right would have been vested in the General Convention, leaving the power in the diocese to legislate previous to an action by that body, but then superseding that power. But the several dioceses did in the constitution declare that the mode *should* be instituted by the particular conventions—thus, it must be admitted, excluding the General Convention from acting at all. Then came the alteration in 1841. Now this alteration amounts to a *permission* for the separate conventions to establish the mode of trial. It is consistent with, perhaps implies the existence of, the same power in another body. That body is the General Convention. But can that power be more than concurrent? And if no more, then, when a diocese has exercised the power, it will be difficult to sustain a right in the General Convention to supersede it. The analogous rule may apply, that where there is a concurrent jurisdiction, the tribunal which has first obtained control of the case retains it.

On the other side, this view of the question may be taken: If there was no article of the constitution, the General Convention would possess the power. The dioceses could, however, act until the General Convention acted. When the latter adopted a canon on the subject, that would be supreme and

exclusive in all points which it reached. Now the clause allowing the separate conventions to provide the mode, was merely a declaratory recognition of the law. They had the authority without it. These conventions, then, can be in no stronger position under the clause than they would have been without it. Their canons would be superseded by the act of the General Convention in the one case; they will be so equally in the other. The construction then is, that the dioceses may act until the General Convention does so.

It will be seen that this argument rests on the principle advocated in this work, of an inherent power in the General Convention, not derived from a grant in the constitution. If that principle is sound, then the latter view, in the judgment of the author, is the true one.

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#### ARTICLE VII.

No person shall be admitted to holy orders until he shall have been examined by the Bishop and by two Presbyters, and shall have exhibited such testimonials and other requisites as the canons in that case provided may direct. Nor shall any person be ordained until he shall have subscribed the following declaration :

“I do believe the Holy Scriptures of the Old and New Testaments to be the word of God, and to contain all things necessary to salvation; and I do solemnly engage to conform to the doctrines and worship of the Protestant Episcopal Church in the United States.”

No person ordained by a foreign Bishop shall be permitted to officiate as a minister of this Church until he shall have complied with the canon or canons in that case provided, and shall have also subscribed the aforesaid declaration.

This is precisely the form in which the article was adopted in 1789.



In 1786 the first clause ran thus—No person shall be ordained until due examination by the Bishop and two Presbyters, and exhibiting testimony of his moral character, signed by the minister and a majority of the vestry of the church where he has last resided.

The clauses of this article will be particularly referred to when the canons passed in accordance with it are treated of.

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ARTICLE VIII.

1848.

A Book of Common Prayer, Administration of the Sacraments, and other rites and ceremonies of the Church, articles of religion, and a form and manner of making, ordaining, and consecrating Bishops, Priests, and Deacons, when established by this or a future General Convention, shall be used in the Protestant Episcopal Church in those dioceses which shall have adopted this constitution.

No alteration shall be made in the Book of Common Prayer, or other offices of the Church, or the articles of religion, unless the same shall be proposed in one General Convention, and by a resolve thereof made known to the convention of every diocese, and adopted in the subsequent General Convention.

ARTICLE VIII.

(1789.)

A Book of Common Prayer, Administration of the Sacraments, and other rites and ceremonies of the Church, articles of religion, and a form and manner of making, ordaining, and consecrating Bishops, Priests, and Deacons, when established by this or a future General Convention, shall be used in the Protestant Episcopal Church in those states which shall have adopted this Constitution.

The second paragraph of this article was adopted by the General Convention of 1811, but without the words, "or the articles of religion." These were introduced in 1829.—*Journals* 1811, p. 274; do. of 1829, p. 23–27.

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### THE BOOK OF COMMON PRAYER.

The reformation for the people and the purity of the Church, can scarcely be said to have commenced until the reign of Edward the Sixth. That for the king, Henry the Eighth, was accomplished, when he had superseded the Pope, and plundered the monasteries. The statutes of the thirty-five and thirty-eight years of his reign, concerning the Six Articles, were parliamentary recognitions of gross papal errors. Some feeble attempts at framing a liturgy had been made, but in general the Mass Book and Breviaries remained in common use, with the exception of passages relating to the Pope, or the office of Becket.<sup>1</sup>

But the true light of the Reformation arose in the reign of the last of the Edwards, whom the historian and divine may vie in honoring—of "that royal and godly child, the flower of the Tudor name; that serious and holy child, who walked with Cranmer and Ridley, the fit associate for the Bishops and future martyrs of the Church." In the first year of his accession the statutes before referred to were repealed, and in the second year, the act to provide for a Book of Common Prayer was passed. With some changes, made in the time of Elizabeth, of James, and of Charles, that book was brought to the Church of the colonies, and there sustained the faith and awakened the devotion of our forefathers; with reverential hands was it modelled at the Revolution; and with sacred zeal has it been guarded since, and fidelity to it is the safety of the Church.

By the fundamental articles of 1784, it was proposed that

<sup>1</sup> GIBSON'S *Codex*, vol. i. p. 294.

the Church should adhere to the Liturgy of the Church of England, as far as should be consistent with the American Revolution and the constitutions of the respective states.

In September, 1785, a committee was appointed to consider and report such alterations in the Liturgy as shall render it consistent with the American Revolution and the constitutions of the respective states, and such further alterations as it may be advisable for this convention to recommend.

The report having been made, was discussed through several days, and on the 5th of October, 1785, it was resolved, "that the Liturgy shall be used in this Church as accommodated to the Revolution, agreeably to the alterations now approved of and ratified by this convention."<sup>1</sup>

It appears that the committee reported, and the convention acted separately, upon two branches of the resolution of reference; the one simply the alterations rendered necessary by the revolution, the other the suggested alterations of another character. The resolution before mentioned, of the 5th of October, covered the first case. On the same day, both in the morning and an evening session, the proposed alterations were discussed, and it was resolved, "that such alterations be proposed and recommended to the Protestant Episcopal Church in the states from which there are deputies to this convention."<sup>2</sup>

The fourth article of the General Ecclesiastical Constitution of 1785 directed that the Book of Common Prayer, Administration of the Sacraments, &c., should be continued to be used in the Church, as altered in a certain instrument in writing, passed by their authority, entitled "Alterations of the Liturgy of the Protestant Episcopal Church, in order to render the same conformable to the American Revolution and the constitutions of the respective states."

*Bioren*, 5-10.

<sup>2</sup> *Bioren*, p. 11.

As, however, this constitution required the ratification of the states to be binding, they were at liberty to use the book or not, as they thought proper.

The other branch of the alterations—those proposed to the Church in the states—was made the subject of the ninth article, declaring that they shall be used when ratified by the conventions which had sent deputies to that General Convention.

In 1786 the letter of the archbishops and bishops of England was written, in which they say: "We cannot but be extremely cautious, lest we should be the instruments of establishing an ecclesiastical system which will be called a branch of the Church of England, but afterwards may possibly appear to have departed from it essentially, either in doctrine or in discipline."<sup>1</sup>

On the 14th of June, 1786, the convention of New-York resolved, that (out of respect to the English bishops, and because the minds of the people are not yet sufficiently informed) the consideration of the Book of Common Prayer, with the proposed alterations, be deferred to a future day.<sup>2</sup>

The Church in Maryland had in effect approved of the Book, desiring, however, some alterations, which she directed her representatives to endeavor to obtain. The principal of these was that of the Nicene Creed.<sup>3</sup>

In Virginia, the book as proposed was adopted in May, 1786, with the single exception of the rubric before the communion service, which excluded evil livers from the Sacraments.<sup>4</sup>

The Church in New-Jersey, met in Convention, in 1786, and approved of all the political alterations in the Book of Common Prayer, and disapproved of the other changes. In a memorial to the General Convention they say, that they do

<sup>1</sup> *Bioren*, p. 20.

<sup>2</sup> *Journals, Onderdonk's ed.* p. 9.

<sup>3</sup> *HAWK'S Contr. &c.*, vol. 2, p. 307.

<sup>4</sup> *Ibid.*, vol. 1, p. 192.

not question the right of every national Church to make such alterations in the mode of public worship as upon mature consideration may be found expedient; but they doubt the right of any order or orders of men in an Episcopal Church, without a Bishop, to make alterations not warranted by immediate necessity, especially such as not only go to the mode of its worship, but also to its doctrines.

In the General Convention of June, 1786, the fourth article remained unchanged; the ninth was altered so as to provide that such book should be in use "till further provision is made in this case by the first General Convention which shall assemble with sufficient powers to ratify a Book of Common Prayer for the Church in these states."

On the 11th of October, 1786, an act of the General Convention was passed, reciting the articles of 1785, relating to the Book of Common Prayer, &c., the proposed alterations therein, the address to the Bishops of England, and their answer; and declaring their steadfast resolution to maintain the same essential articles of faith and discipline with the Church of England; and then proceeding to declare, "that, in the creed, the words 'he descended into hell,' shall be and continue a part of that creed," and that the Nicene creed should be inserted.

Finally, in October, 1789, the Prayer Book was established in the form in which it now exists.

In 1826, various alterations in the liturgy were proposed, and by a vote of the Convention sent to the several Dioceses for consideration.

The Convention of Connecticut unanimously resolved that the alterations proposed were inexpedient, (*Journal*, 1829, p. 42.) That of Virginia instructed the delegates to oppose them. I gather from an examination of the journals of New-Jersey, that no action was taken in the Convention. One step was taken there which deserves notice. The proposed altera-

tions were directed to be read by every clergyman to his congregation. (*Journal*, 1827, p. 24.

I have before observed, that the second paragraph of this article was not adopted until 1811. It must have been supposed that the clause making the Prayer Book binding when established by that or any *future Convention*, left it within the power of a Convention to alter it at any meeting; that the ninth article was, indeed, superseded by this clause. It deserves notice, also, that a majority of the Dioceses in union is not in terms required for alteration in the Prayer Book or Articles, as is made necessary by the 9th Article as to general alterations of the Constitution. This subject, however, and the import of the clause, I propose to discuss under the ninth article, to which I refer.

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ARTICLE IX.  
(1848.)

This Constitution shall be unalterable, unless in General Convention, by the Church, in a majority of the *Dioceses*, which may have adopted the same; and all alterations shall be first proposed in one General Convention, and made known to the several Diocesan Conventions, before they shall be finally agreed to, or ratified in the ensuing General Convention.

ARTICLE IX.  
(1789.)

This Constitution shall be unalterable, unless in General Convention, by the Church, in a majority of the *States*, which may have adopted the same; and all alterations shall be first proposed in one General Convention, and made known to the several *State* Conventions, before they shall be finally agreed to, or ratified in the ensuing General Convention.

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The word *States* was changed into *Dioceses* in 1838. I submit that this article may be thus analyzed :

<sup>1</sup> BIÖREN, p. 41.

1. The Constitution is unalterable, except by a majority of the Churches in those Dioceses which have adopted it.
2. But the action and consent of such majority must be expressed in General Convention.
3. This is carried into effect by a proposition being suggested in one General Convention, and ratified in the succeeding one.
4. That proposition must, in the interim, be made known to the several Diocesan Conventions.

Dr. Hawks has written an able and elaborate note on this article, and adopts the following conclusions :

1. That in all questions of constitutional or liturgical changes, the vote in the House of Clerical and Lay Deputies must be taken by Dioceses.
2. That any Diocesan Convention has a right to make known its opinion of the proposed change in the General Convention.
3. That the assent of a Diocese to a proposed change is to be presumed in General Convention, if it is silent, or has adopted no mode of making known its dissent.
4. If a majority of the Diocesan Conventions do make known their dissent to any change, the General Convention ought not, against such expression of dissent, to alter the Constitution.

It may also be a legitimate consequence of these positions, that the assent of a majority of the Diocesan Conventions shall control.

I have the misfortune to differ from the learned annotator upon the chief part of these propositions.

In the first place, the Diocesan Conventions are nowhere referred to as called upon to act, and the change made dependent upon their assent. The provision seems very clear that the majority of the Dioceses represented and acting in General Convention, are exclusively clothed with the power. Had

the intention been such as is supposed, explicit language would have been used. An analogous clause in the Constitution of the United States was before them, and would have averted doubt. The ratification of three-fourths of the Legislatures of the States is required in terms. The power to propose the change is admittedly in the Convention—the power to finally ratify it is in the same body. What restriction is there upon this authority? Merely the obligation to make the proposal known to the Diocesan Conventions. This may be for the purposes of consultation, of gathering views and information, of instructions to delegates. But it cannot rob the General Body of the ultimate and exclusive power of making or rejecting the change.

*Again*: The error seems to be this—in looking upon the Diocesan Conventions as represented in the General Convention, and the delegates as their representatives. But this is not the case. The Church in each Diocese is the body represented. The separate Convention is indeed the organ to choose the delegates, but they become then the representatives of the Church in the Diocese, as absolutely and independently in the General Convention, as the deputies to the Diocesan Convention are of the same Church in that.

If we consider various clauses of the Constitution and many canons, it will be seen that it is throughout the Church in the Diocese which is the body known in the Convention; and that there is not any just reason for saying that its constituency is the Diocesan Conventions.

Thus, in the first article, the phrase is, "This Church in a majority of the Dioceses which shall have adopted this Constitution shall be represented;" in the second article, "The Church in each Diocese shall be entitled to a representation of both the clergy and laity." "The Church and the Diocese is bound," where the Convention neglects to choose delegates. By canon five, *if the Church in a Diocese* desires the conse-



eration of a Bishop, steps are to be taken, &c. In short, the testimony is abundant that it is the Church, the aggregate of its clergy and laity, which is the true constituency.

The result appears to be clear. The Diocesan Conventions have, as such, no voice or standing in the General Convention. The Diocese speaks through its representatives, the delegates. The General Convention can listen to no other exponent of its will. The separate Convention has control enough of a question submitted, by having the selection of the delegates.

In other words, I read the article thus: The Church, by a majority of the Dioceses acting in General Convention, may alter the Constitution. Now the mode in which the Dioceses act in Convention, is through their delegates. The delegates then, and they alone, can alter.

Again, the question may be considered in two points of view; *first*, where a Diocese is not represented in General Convention; and *next*, where it is; and in each instance, several cases may occur. Thus if a Diocese is not represented, and the Diocesan Convention has taken no action upon a proposed change, it seems clear that the result must be the same as if there was a representation and the vote was adverse. There must be a majority of the Dioceses in union to pass the measure. There are at present twenty-eight Dioceses. There must be fifteen to effect a change. This number must assent. No matter (for the present view of the case) how that assent is expressed. In some manner it must be uttered.

But Dr. Hawks in his third proposition says, that the consent is to be presumed where the Diocesan Convention is silent. This proposition at least seems to me wholly untenable. Even if his main principle is sound, and the Diocesan Conventions are the actual bodies to pass upon the measure, it cannot be, that a presumption shall answer the requisition

of a consent; that other dioceses shall be bound by an assumption of acquiescence where a convention refuses to express its judgment in any mode.

*Again*:—Suppose the diocese is not represented, and passes a resolution of disagreement. This produces precisely the same result as if it was silent. The change must have the same number in its favor, whether one diocese does nothing, or votes hostilely. The resolution becomes immaterial.

And again: One other case may arise where there is no representation—that of a Diocesan Convention sanctioning the change by a formal resolution. Certainly it is in this case that Dr. Hawks' theory possesses the most plausibility.

But here also it is submitted, that this resolution could not be regarded, and that the vote of the diocese would be lost. It appears to me that the Diocesan Convention is not constituted for this purpose, and does not possess any power in the matter. I revert to the proposition that it is the Church of the diocese which is represented by the delegates, not the separate convention. The dioceses act through their delegates in General Convention. The diocesan body has exhausted its authority when as the attorney of the true constituency, it has appointed those deputies. Yet it would not necessarily follow, that if the General Convention accepted this secondary evidence of the will of a diocese, where it was not represented, it could at all regard it where it was.

But in the second place, the question is to be treated where there is a representation of the diocese.

If the Diocesan Convention has not acted upon the measure, of course the delegates are the only exponents of the will of the diocese. But suppose the convention passes a formal resolution of agreement or disagreement to the proposed change, and the delegates vote in General Convention adversely to the resolution:—in this way is the point to be tested and determined.

The principles above asserted lead of course to the conclusion that the General Convention must admit the votes of the delegates as decisive, and cannot regard the act of the particular convention. They, and they only, must be considered as the true representatives of the will of the diocese. They are the actual agents of the Church in the dioceses, as a substituted attorney under a power of substitution, is the true attorney of the principal.

It deserves, however, much consideration that the course of instructing delegates as to their votes upon a proposed alteration has been exercised by the conventions. Thus, in 1793, as to the negative of the House of Bishops, the Virginia Convention resolved, "that the deputies from the Protestant Episcopal Church in this state be instructed to express the highest disapprobation of this convention respecting the investing of the House of Bishops with such negative." (*Journal*, 1793, p. 60 ; 2 HAWKS.)

In New-York, in 1791, it was moved that the convention do instruct their delegates to vote in favor of conferring the power of a negative. But the clergy and laity being divided the motion was lost.

In 1801 the Convention of New-York instructed their delegates to oppose and vote against the proposed alteration in the first article of the constitution, as respects the change of the time of meeting, from three to five years. (*Journal*, 1801, p. 92.)

In New-Jersey, a resolution was passed by the convention of 1795, "that the convention agree to vest the House of Bishops with the aforesaid negative." (*Journal*, p. 60, 1795.) In 1801, the convention of the same diocese instructed the delegates from the Church in that state to the next General Convention, to agree to the alteration of the first article of the Constitution. (*Journal*, 1801, p. 5.)

The Convention of Connecticut, in 1801, resolved, that

the delegates who shall represent this convention in General Convention be *requested* to advocate an alteration of the constitution. (*Journal*, 1801, p. 27.)

That a suggestion or request to delegates may with propriety come from a Diocesan Convention is of course clear. It is frequently done by way of suggestion to the General Convention. It might be done by any vestry. But that instructions, if communicated to the General Convention, bind it to observe them, in opposition to the vote of the delegates, seems a wholly inadmissible proposition.

And upon the question of expediency there can be no doubt. The delegates should not be sent trammelled with directions, necessarily the result of a less comprehensive and matured consideration than will be had in the General Convention. They should be left free to think and decide for the whole Church, and to profit by the light of other minds.

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#### ARTICLE X.

Bishops for foreign countries, on due application therefrom, may be consecrated, with the approbation of the Bishops of this Church, or a majority of them, signified to the Presiding Bishop; he thereupon taking order for the same, and they being satisfied that the person designated for the office has been duly chosen and properly qualified. The order of consecration to be conformed, as nearly as may be in the judgment of the Bishops, to the one used in this Church. Such Bishops, so consecrated, shall not be eligible to the office of diocesan or assistant Bishop in any diocese in the United States, nor be entitled to a seat in the House of Bishops, nor exercise any Episcopal authority in said states.

This article was adopted in 1844. At the same time, Canon VII. was passed, and the article will be adverted to when that canon is considered.

## CHAPTER II.

### OF THE CONSTITUTIONS AND CONVENTIONS OF THE DIOCESES.

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#### TITLE I.

##### GENERAL OBJECTS AND NATURE OF THE CONSTITUTIONS.

It is not proposed to enter into any minute detail of the various provisions of the constitutions of the several dioceses; much less to state all their canonical regulations. But it will be useful to exhibit under some leading heads the rules which have been adopted for the establishment and conduct of conventions. Generally speaking, the constitutions are restricted to enactments of this character, and I have stated them as they exist in a large number of the dioceses; sufficient at least to indicate some principles which prevail in them all.

Thus the constitution of Virginia may be taken as the representative of almost all the others, and its provisions are found to be—

1. Those for the meeting, composition, mode of action, and officers of the convention or officers of the diocese.

2. The method of electing a Bishop, and 3d, The mode of altering the constitution. Every article, except the 5th and 12th, comes under the first class.

Some general observations upon the nature of our diocesan conventions may be useful. They represent the Episcopal synods of former periods of the Church, but with powers expressly defined. In the judgment of the author, it cannot be doubted, that in the earliest ages, as soon as a system of dioceses was established, and the Bishop of each was restricted to its limits, the power of legislation vested in him. The inevitable course of events, as well as the principles on which Episcopal authority rests, warrant this conclusion. At first, a regulation must have been adopted to meet, or was suggested by, a particular case. As similar instances occurred, and the fitness of the former rule was proven, it was applied, until it became the ordinary regulation, and as such was known and fixed in the Church. Doubtless this was the origin of those "usages and institutions of churches," which we find adverted to and recognized in provincial councils. In fact, the exercise of judicial power did precede, and was the source of legislation. From several decisions grew up a general law, and this was finally embodied and promulgated in a canon or institute. But that originally the Bishop, in his diocese, was clothed with the ultimate and exclusive power of government, and that this involved all judicial and all legislative authority, seems to the author the only doctrine consistent with the tenet of an Apostolic Episcopacy.

At what period the clergy of the diocese were united in council, as a senate, with the Bishop—and when they arose from being mere advisers to coadjutors in the business of legislation, my information is not sufficient to state. The exercise of the *judicial* authority was restricted as early as the council of Carthage, when a Bishop was prohibited from hearing causes, without the presence of his clergy, and Ignatius speaks of the clergy forming the Bishop's senate.

The author is aware of the strong opposition which has been made to the position, and the necessary consequences of

the position he has stated, as to this original and exclusive power. It is with unfeigned humility he expresses the opinion, which, after no little examination and thought, he has formed, that this great and conservative doctrine is apostolic, primitive, and clear—that every thing of limitation upon the original jurisdiction of a Bishop has been self-imposed, or has sprung from the laws of councils of superior authority, and to which he was a party—that therefore in every case in which there is no express enactment, or legitimate conclusion from an enactment, to control it, the question is, where is the evidence of the surrender of the power to rule the Church? If none can be produced, we have the Bishop's primitive jurisdiction to resort to for guidance and direction—a power without a shadow of claim to infallibility, but with an absolute claim to obedience.

And if this doctrine had no higher demand upon our dutiful assent, it would be recommended by the highest wisdom, as prudent and expedient. The system of our Church government is as liberal and free as any system can be which pretends to preserve an element of discipline. With the checks and restrictions in force—the watchfulness of clergy and laity—the power of public opinion—all brought to bear upon a Bishop, the imagination of his usurping authority and substituting his will for the law, appears most visionary. On the contrary, the danger may now be lurking among us of Episcopal authority being injuriously weakened or contemned.<sup>1</sup>

<sup>1</sup> In speaking of Provincial Councils, Bishop Kennet says—Diocesan synods have a better title to antiquity. The Bishop of each diocese had an original right to convene his own clergy, and with their advice and consent, to ordain such rules and orders as were proper to declare the doctrine, and regulate the discipline of their own body. (KENNET, *Ecc. Synods*, vol. 2, 109.)

The Bishop shall in every year hold a synod in his diocese of his clergy and abbots, and shall select other clerics and monks. (Dec. Pars. 1, Dist. 18, c. 16.)

The following is the language of Van Espen. It plainly appears

## TITLE II.

## MEMBERS OF CONVENTIONS, AND THEIR QUALIFICATIONS.

In order to class the members of the diocesan conventions in the most summary manner, and to show any important dif-

that in the first ages of the Church, there were frequent conventions of the Bishops with their respective clergy, as if in a senate. These assemblies were called Presbyteries, which at this day are termed Diocesan Synods.

These meetings did not at first take place at any designate period; but whenever any important matters occurred, the Bishop convoked his senate, that they might deliberate upon them together.

As to those who ought to assist at the synod, besides such as have the cure of souls, it is to be ascertained not only from the canons, but from the different customs of places."

Qui Diœcesanis sub sancta Carolo interfuerint ex ejus ad clerum oratione in ejus Synodo XI. Diœcesani habita, colligere possumus—Ita enim ad Synodum loquitur. "Quid agimus fratres? Synodum agimus; et quid Synodi nomen importat? Congregationem significat, atque conventum. Et quarum personarum? Nempe adeo excellentium et eminentium in sancta Ecclesia; Episcopi videlicet, et membrorum ei conjunctorum, Canonicorum Metropolitanæ hujus Ecclesiæ, tunc etiam aliarum, Præpositorum, Parochorum, Sacerdotum, Clericorum."

It seems that the power of calling all the clergy to these conventions was made a subject of abuse by the imposition of fines and penalties for non-attendance. This was remedied by a decree of the Council of Trent, admitting the clergy with cures, and some others, to send deputies. This system also prevailed in England, as the precedents before cited will prove. (*Ante* p. 135, n.) (VAN ESPEN, *Jur. Ecc. Und. Pars. 1 Tit. 18, cap. 19.*)

Again he says:—Porro constat undecim et amplius sæcula univcrsum clerum jurisdictioni et regimini sui respectivæ Episcopi fuisse subjectum, nec unquam per ea tempora in questionem venisse, num clerici decretis Episcoporum in his quæ morum et disciplinæ reformationem attinebant essent subjecti, eisque obedire deberent; ideoque nec ambigebatur quin clerici omnes etiam Synodorum Episcopaliū sanctionibus tenerentur iisque in omnibus se subicere juberentur.

He proceeds to show how, in subsequent ages, monks and others under the guidance of the Roman Pontiffs, asserted and attained exemption.

The following is the language of Calvin:—Sequitur altera pars disciplinæ quæ ad clerum peculiariter pertinet. Ea canonibus continetur quos sibi veteres Episcopi suoque ordini imposuerunt. Adjiciebantur,



ferences with the greatest brevity, I select an article of one of the constitutions, (Wisconsin,) which is drawn up with much perspicuity, and shall notice the correspondence or disagreement of others with it.

et pœnæ quibus ipsa canonum autoritas sanciebatur, nequis eos impune violaret. In hunc finem unicuique Episcopo committebatur cleri sui gubernatio, ut secundum canones suos clericos regeret, ac in officio retineret. (CALVIN'S *Inst. Book 4, cap. 12. § 22.*)

Reference may also be made to the REFORMATIO LEGUM. (*De Ecclesia, cap. 18—23.*) The following is one of the passages:—Decreta vero illius et sententias vel in Synodo per ipsum, vel per Archidiaconum in visitatione divulgatas, inferiores ministri ut validas et firmas retinebunt. Quod si quid in eis vel injustum vel absurdum contineri arbitrati fuerint, et ad Archiepiscopum deferent, cujus erit, ab Episcopo constitutum decretum aut sententiam, vel confirmare vel emendare, ita tamen ut qua parte illa non correxerit Archiepiscopus, vigorem suum et robur retineant.

The Lord Chancellor and the two Chief Justices of England, with the Chief Baron, declared in *Bird vs. Smith*, (*Moory Rep. 723.*) that at the common law, every Bishop in his diocese, and the Archbishops in convocation, could make canons to bind the clergy within the limits of their jurisdiction.

It is true that Lord Hardwicke, in Middleton's case, denies this position. But he probably does not advert to the qualification that this was the rule at common law; for I apprehend that it was the statute of William the Conqueror, and then of Henry the Eighth, which made the assent of the king necessary for the enactment of canons merely relating to spiritual matter. (KENNET, *Ecc. Synods, 2d, p. 254.*) With the qualification, that the Bishop must unite with his clergy in a synod, the proposition of *Bird vs. Smith*, appears to be true.

The sixth chapter of the 4th book of SUAREZ *de Legibus* is very full upon this subject. The struggle of the Romish writers is to reconcile the admission of a divine origin for Episcopacy, with the doctrine that all Bishops derive authority from the Pope. Many of them, and Suarez among the number, concede, that they are the successors of the Apostles, and thus in some sense the source of their power is of a divine nature, but always through the Pope, and in subordination to him. After speaking of the superior power of the Pope, Suarez says:—" *Dicendum igitur censeo, Episcopos habere potestatem legistivam in suis Diœcesibus jure ordinario humano, fundato aliquo modo in divino.*

Bishop Beveridge thus answers these advocates: "I confess myself utterly ignorant why or in what manner, a distinction should be drawn between an Apostolic and a divine right; and since the Apostles trans-

The third article of this constitution, (1847,) "of the members of convention," provides as follows:

The convention shall be composed of clergy and laity. The following clergymen shall be entitled to a seat in it:—

Every clergyman, canonically connected with the diocese, and having charge of some parish within it; *or*, officiating as a missionary within its bounds; *or*, having spiritual charge as president, professor, tutor or instructor in some college, academy, or seminary of learning, countenanced or constituted by ecclesiastical authority; *or*, being a chaplain in the navy or army of the United States.

The lay members shall consist of not more than four deputies from each congregation in the diocese, in union with the convention; a certificate of whose appointment shall be signed by either the minister of the parish, or one of the wardens, or the clerk of the vestry, and laid before the convention before his or their admission to a seat or vote.

§ 1. UNION OF  
CLERGY  
AND LAITY.      The union of clergy and laity in our diocesan synods prevails in every diocese. It was shown in the first chapter, that this was made a fundamental principle in the organization of the General Convention. In this we differ from the convocations of the English and Scottish Church. Yet the principle which dictated it is found in the English decisions exempting the laity from the obligation of canons passed without their assent by representation, and is sanctioned by no less an authority than that of Hooker. In the Ecclesiastical Polity he says—"that in all societies, companies and corporations, what severally each shall be bound unto must be, with all their assents ratified. As the laity

mitted the authority committed to them by Christ, to the Bishops, their successors, there seems to us nothing more agreeable to reason, nothing more necessary, than that this jurisdiction of Bishops over Presbyters should be referred to a divine institution." (*Lib. 2, cap. 1155—18 De Episcopis.*)

should not hinder the clergy's jurisdiction, so neither is it reason that the laity's rights should be abridged by the clergy. (*Book 8, p. 368, &c.*)

And a trace of this principle is found in monarchical governments. It was pointed out by Lord Hardwicke, in Middleton's case,<sup>1</sup> how the assent of the Emperor to Ecclesiastical regulations bound the people; and Van Espen states the same rule.<sup>2</sup>

This provision as to clergymen canonically settled may be said to be universal. The language § 2. SETTLED  
CLERGYMEN.  
indeed varies in different dioceses. Thus in North Carolina it is: "Each regularly ordained minister of either order, being settled with a parochial charge in this state;" in Virginia, "the officiating ministers who now are or may hereafter be regularly and canonically elected in parishes or churches in this state;" in Pennsylvania, "being a settled minister of some parish within the state;" in New-Jersey, "every Presbyter who has been duly instituted rector of any Church in the diocese;" and in New-York, "the officiating ministers regularly admitted and settled in some church within this state which is in "union with this convention."

In the year 1846, a full report was made to the convention of Connecticut upon this subject. It came, it is presumed, from the venerable Dr. Jarvis. It was proposed to amend the constitution of that diocese by striking out the existing sixth article, and substituting the following: "The Convention shall be composed of the Bishop, his clergy, and lay deputies from the several churches of this diocese."

In the report it was urged, that all the clergy of the Bishop without further qualification should be admitted to a

<sup>1</sup>Atkyns.

<sup>2</sup> [Tit. 20, ch. 4, 13.] *Neque enim credunt Auctoritatem Episcoporum aut Ecclesiasticorum extenderet in his quæ temporalia sunt laicis absque regio consensu legem ponunt.* (Of Diocesan Synods, Tit. 20, ch. 4, 13.]

seat. That this was according to the system of the early Church, in which Presbyters sat and deliberated with the Bishops in both consistorial and provincial councils and so as to deacons, who were sometimes allowed to give their voice in their own names. That the clergy sat not as representatives of parishes, or of seats of learning, or as missionaries, but by virtue of their office. That the clergy of the Bishop were those who had received orders from him, or his predecessors, unless under discipline which forfeited their right, or they had been canonically transferred; and in like manner all who by letters dimissory accepted by the Bishop, were admitted under his jurisdiction.

This report was accepted, and the alterations were at first adopted; but at the convention of 1847, the amendment was rejected. (See Journals of those years.) It was renewed, and again rejected in 1849.

The principle of this report is adopted in the constitution of Missouri. By the third article every clergyman of the Church canonically residing in the diocese, and not under ecclesiastical censure, is a member of the Convention.

In the convention of New-York of 1845, the composition of the convention both as to clerical and lay members, was the subject of much discussion, and several propositions. Among them was one that the convention should be composed of all presbyters and deacons canonically connected with the diocese, and not under ecclesiastical censure, and of lay delegates, &c. On the other side it was moved that the clauses admitting missionaries, or professors, or instructors of youth should be stricken out.

These propositions exhibit the extremes of opinion upon this subject. On the one side, the mere fact of a canonical connection with the diocese giving a right to every minister to a seat; on the other a connection with a parish being indispensable. The latter has been pressed with some very

plausible considerations; yet it seems to me both unjust and unwise. It entirely destroys the principle of the primitive Church, that its ministers as such form part of the Synodal Council, a principle deviated from in the qualifications imposed upon those who have not a cure, but not overthrown. It would rob a convention of the learning and talent of a class of men fitted to supply that in which ordinarily the parochial clergy may be found deficient; but above all, it tends to weaken the clergy as a body in the convention, to impair their independence, and to bring them under the control of the laity. This I look upon as a great evil. The imagination of undue priestly influence in our country is the wildest of fancies. The fact is that the laity have almost absolute control over a clergyman, and they sometimes use it most mercilessly. It is within the power of one active, persevering, ill-minded man to drive from a parish any one however fit and conscientious; and too often indeed is the wretched alternative presented to the victim of some crude notion of churchmanship, or some hasty and cherished prejudice, of poverty or subserviency.

It will be seen that deacons are in general admitted to seats as well as presbyters, if possessed of the prescribed qualifications. In New-Jersey the regulation is different, and I believe is not to be found in any other Constitution. By the 4th article, it is provided, that rectors elect, and deacons who belong to the diocese, and officiate statedly within it, are also admitted to seats, and may express their opinion on all subjects; but may neither vote, be appointed members of the standing committee, nor be elected deputies to the General Convention.

Missionaries within the diocese are entitled to a seat by the provisions of every constitution which I have examined.

§ 3. MISSIONARIES.

The ecclesiastical authority referred to in this clause of the constitution of Wisconsin means no

§ 4. PROFESSORS.

doubt that of the Church. A similar regulation exists in the diocese of Missouri. The professor, &c., must be connected with a college under the control of the Church. (*Article 4, 1847.*) But in several other constitutions this qualification is not to be found, neither in Connecticut, Western New-York, New-York, or Maryland, where the clergyman may be a professor, &c., of any institution of learning incorporated by law.

In Connecticut, however, the phrase in the constitution of the diocese, "any seminary of learning constituted by ecclesiastical authority," is held to mean all schools and seminaries established with the authority of the Bishop. (*Journal, 1842, p. 13.*)

§ 5. CHAPLAINS  
OF ARMY AND  
NAVY.      Chaplains of the army or navy, being ministers of the Church, are admitted to seats in Wisconsin, Maine, Florida, and (with certain restrictions as to the time of residence) in Massachusetts.

§ 6. RESIDENCE.      There is a provision to be found in several of the constitutions requiring a previous residence in the diocese for a certain period. Thus in Pennsylvania, every member must have been actually, as well as canonically, resident within the state, for the period of twelve months previous to the meeting of the convention, and for the same period been engaged in performing the duties of his station. An absence from the state on account of sickness, or an absence not exceeding two calendar months in any one year, with the written permission of the Bishop, or of the standing committee in case of a vacancy, shall be taken in account in computing the said residence.

In Connecticut the minister must have been actually, as well as canonically, resident within the state for the space of six calendar months next before the meeting of the convention, and for the same period been employed in performing the duties of his station, or *must have been canonically instituted.*

There is also a provision in many of the dioceses relating to clergymen who have once been members. I cite the language of the 4th Article of Pennsylvania as an example: "Provided also that no clergyman of advanced years or infirm health, who has been once entitled to a seat in the convention, shall lose his right to a seat therein by reason of his having ceased to have charge of a parish, or to be in the service of a seminary of learning, or to be a missionary as aforesaid." The provision in Connecticut is—"Provided, however, that no clergyman, otherwise entitled to a seat and vote in the convention, shall by reason of advanced years, or infirm health, or temporary absence, be divested of such privilege." And in Delaware—"No clergyman of advanced years or infirm health, who has been once entitled to a seat in the convention, shall lose his right thereto, by reason of his having ceased from the active duties of his calling."

7. FORMER  
MEMBERS.

Under the Article in Pennsylvania, a case occurred in 1847 of the resignation of a clergyman of his parish charge on account of ill health. He recovered, and asserted his right to a seat in convention, without having formed any new connection with a parish, or being within either of the other enumerated classes. He was admitted, but under a strong minority report, taking the ground that the canon applied only to the case of a continuance of the infirmity, not to place one who was incompetent to a charge, in a better position than other non-parochial clergymen, merely from his once having been a member.

The case is thus provided for in New Jersey—"Clergymen who have formerly been rectors in this diocese, but having resigned their charges, remain in it, or return to it after a period of absence, may also become, and shall hereafter be considered as members of the convention in full standing, provided all the instituted rectors present, and all the congregations represented at the meeting when any such

clergyman shall be proposed, give their votes in favor of it."

In 1833-4, the Article was amended, so as to require only a concurrence of two-thirds of the clergy entitled to vote, and two-thirds of the congregation represented at the meeting.

The provision in Maryland is this—"No clergyman who has once been entitled to a seat in convention shall lose his right to a seat therein, by reason of his having ceased on account of age or infirm health to have charge of a parish, or to be in the service of a college, &c., or to be a missionary." And by the first canon, "no clergyman shall be entitled to a seat as an infirm clergyman, unless he shall produce a certificate from some respectable physician that his state of health unfits him for the active duties of the ministry, and there be evidence that at the time his health became infirm, he was entitled to a seat in the convention."

This provision shows that the decision in Pennsylvania would not be the rule in Maryland.

§ 8. LAY DELEGATES. NUM- As to the number of the lay delegates, the regu-  
GATES. NUM- lations of the respective dioceses generally prescribe,  
BER AND QUALI- that there shall be one or more from each church or  
FICATIONS parish. This is the case, for example, in New-York,  
Western New-York, and New-Jersey.

In Virginia one delegate is to be chosen for each parish or church; but if there is more than one officiating minister, the parish may send as many delegates as it has ministers. The regulation in Maryland and Kentucky is similar.

In Wisconsin the number shall not exceed four; in Ohio and Mississippi three; in Missouri one at least; in Maine one or more, not exceeding five; and in Massachusetts any number not exceeding three.

In Connecticut each parish is entitled to one delegate, and if it consists of more than fifty families, to two. If any parish be composed of two or more congregations, having a



corresponding number of church edifices, such parish shall be entitled to a representation from each of such congregations.

In some of the Dioceses a lay delegate must be a communicant of the Church. This is the case in Virginia and Ohio.

In South Carolina a resolution was adopted in 1841, respectfully recommending to the several churches in the diocese, that in the election of delegates they should choose persons who are regular communicants of the Church.

In New-York, in 1802, a resolution was proposed that no lay delegates should be admitted to a seat in the Convention unless they were communicants. The following was unanimously adopted in its stead :

“That in the opinion of this convention the welfare and prosperity of the Church require, and it is in itself proper and right, that no lay delegates should be sent to this convention but such as are communicants of the Church, and have been so for at least one year previous to their appointment; and that it is recommended to the several parties to adopt this principle.”

Considerable discussion took place upon the subject in the convention of Pennsylvania, in 1847. A resolution to amend the constitution had been submitted in 1846, so as to require that the delegates should be communicants. After full consideration the proposition was negatived. The vote was 45 clergymen in favor, and 29 against it, and 34 laymen against it and 18 in its favor.

The Bishop previous to giving his vote, which was in the negative, gave some reasons for his course; that he greatly desired the accomplishment of the object, but thought that the end was likely to be attained by means less stringent; that the sudden and peremptory exclusion of non-communicants would leave some parishes without any representation—would cast out several exemplary members—and would impair the influence of pastors over many non-communicants who were kept from the table rather by pious scruples than indifference.

In the Convention of New-York, in 1848, a committee appointed at the previous convention submitted an alteration of the constitution, requiring the members to be communicants. This was adopted by a vote of the clergy 76 to 35, and of the laity 56 to 38. The amendment was laid over for the action of the next convention.

In the Convention of 1849, the subject was largely and thoroughly discussed, and the proposed amendment was lost by a non-concurrence of orders.

By a clause of the 2d canon of New-York, no one can be chosen a delegate from any church unless he is entitled to vote for its wardens and vestrymen. The same is the rule in Western New-York. (Canon 1, §2.) In Pennsylvania he must have been for six months previous to the election, a worshipper in the church or parish he is deputed to represent. In Massachusetts he must be a stated worshipper of the parish.

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### TITLE III.

#### EVIDENCE OF MEMBERSHIP.

§ 1. LIST OF CLERGY.      The revised canon of 1848 of the Convention of New-York was prepared with great care by a committee, and is as follows :

“ It shall be the duty of the Bishop, or in case there be no Bishop, or of his inability or disability to act, then of the Standing Committee of the diocese, to prepare and submit to the convention at its next session, a list of all the qualified ministers of the Church, who at the time of the passage of this canon are regularly admitted and settled in some church within this diocese, which is in union with this convention, specifying the names of the several churches in which they are admitted or settled, which list shall be authenticated by the Bishop or Standing Committee, and after having been

submitted to the convention, (which may correct the same if inaccurate in any particular,) shall be recorded by the secretary of the convention in a book to be provided by him and kept in accordance with the third section of the XXX. Canon of the General Convention of 1832.

“ And it is hereby declared that in all cases hereafter arising of a contested right to a seat in the convention, of any minister claiming by virtue of any admission or settlement prior to the passage of this canon, the said list or record shall be taken as presumptive evidence of the right of those whose names shall appear thereon, and of the right of none others, liable however to be rebutted by other evidence satisfactory to the convention.

“ § 2. The secretary of the convention shall record in the book mentioned in the preceding section all certificates that shall be transmitted to him in pursuance of said 2d section of canon 30 of the General Convention of 1832. And in case of a contested right to a seat in the convention of any clergyman who shall have been elected to any church or parish in the diocese after the passage of this canon, the evidence of settlement shall consist in the said record, or in the production to the convention of the certificate required by the said canon, together with a certificate of the Bishop, or of the Standing Committee, of his or their being satisfied that the person so chosen is a qualified minister of the Church. Which certificate, if not previously recorded, shall thereupon be recorded by the secretary in the aforesaid book.

“ § 3. Every minister who may be received into this diocese after the passage of this canon, shall procure from the Bishop, or in case of his inability or disability to act, from a majority of the clerical members of the Standing Committee duly convened, a certificate that he has been received into this diocese in compliance with the canon of the General Convention. And before he shall be entitled to a seat in the convention, he

shall cause such certificate to be recorded by the secretary of the convention in the book mentioned in the preceding section. And in case of the contested right to a seat in the convention of any minister who may be received into this diocese after the adoption of this canon, the production of such record, or of such certificate, shall be presumptive evidence of regular admission—which certificate, if not previously recorded, shall thereupon be recorded by the secretary in such book.

“ § 4. In case of a contested right to a seat in the convention of a clergyman claiming the right by virtue of being employed as a missionary under the direction of this convention, the evidence of such employment shall consist in the written certificate of the Bishop; or in case of a vacancy in the Episcopate, or of the inability or disability of the Bishop, in the written certificate of the chairman of the Missionary Committee of the diocese.

“ § 5. In case of a contested right to a seat in the convention of a clergyman claiming such right by virtue of his being engaged as a professor, or instructor of youth in a college, academy, or general seminary of learning, duly incorporated, the evidence of his connection with such college, academy, or seminary, shall consist in the written certificate of the president or secretary of such corporation, that he is so employed.”

In a large number of the dioceses there is a provision similar to that in Western New York, which is as follows:—  
“ The right of any clergyman of this diocese to a seat in the convention shall, if disputed, be determined according to the provisions of the third article of the constitution by the convention itself, whether his name be inserted in the list aforesaid or omitted.”

In these cases the list which is made out is of course only *prima facie* evidence of a right to a seat, and presumptive

evidence that none but those included in it have a right. In New-Jersey the rule is as follows: "On or before the day of meeting of the convention, it shall be the duty of the Bishop, or if there be no Bishop, of the president of the Standing Committee, to give to the secretary of the convention a certified list of the names of clergymen canonically resident in the diocese, specifying the instituted ministers and others entitled to seats and votes in convention."

An article of the constitution defines who are to be entitled to seats in the convention. In Wisconsin the first canon runs thus: "On or before the first day of the meeting of the Convention it shall be the duty of the Bishop, or if there be no Bishop, of the president of the Standing Committee, to give to the secretary of the convention a certified list of the names of clergymen canonically resident in the diocese, and entitled to seats and votes in the convention." The ministers so entitled are enumerated in an article of the constitution.

In Connecticut, Canon XI. provides, that "it shall be the duty of the Bishop and Standing Committee, or in case of vacancy in the Episcopate of the Standing Committee, previous to the meeting of any annual convention, to prepare an accurate list of the clergymen of this diocese entitled to seats in the convention, agreeably to the existing constitution and canons; to be presented and read by the secretary before any other business shall be transacted; and this shall be the list according to which the convention shall be organized."

Considerable discussion has at different times taken place in New Jersey, as to the conclusive effect of the list made out by the Bishop upon a question of a right to a seat. It has been determined that it is final.

The phraseology of the rule in Connecticut may perhaps settle the question in the same manner, upon the ground of express enactment; although the right, I understand, is not claimed in that diocese, and the practice is otherwise. But

in such cases as the provisions in New Jersey and Wisconsin present, it wears a very different aspect. When a Bishop of a diocese becomes a party to a compact by which a convention shall be formed, to be composed of clergymen and laymen, and in which the qualifications of those to be admitted as members are stated, that assent involves an assent that the convention shall judge of the possession of those qualifications. There must be a positive enactment to avoid this consequence. The provisions in the two dioceses named do not amount to such enactment. The case is very distinguishable from that elsewhere discussed, as to the right of a Bishop, as presiding officer, upon questions of order. The Bishops never relinquished the right of presidency. The constitutions always recognize, do not confer that right; and that right, it is considered, involves the right of determination, where there is no different regulation. But here the Bishop agrees to the establishment and composition of a body to which, presumptively, the privilege attaches of deciding upon its members' qualifications. There should be an express denial of the power, or an express bestowal of it elsewhere, to avoid this conclusion.

The first canon of Maryland (1847) provides for the evidence of a title to a seat with great precision.

1st. As to clergymen removing from another diocese into Maryland, none can be admitted to a seat as having been regularly and canonically elected into a parish or congregation, unless it shall have been signified to the secretary of the convention by the Bishop, or in case of a vacancy, by the president of the Standing Committee, that he obtained from him a certificate of his Episcopal ordination and religious character, nor unless he shall have received from the vestry and transmitted to the secretary the certificate required by the 30th canon of the General Convention of 1832.

The certificate referred to in the first clause is that which

is directed to be furnished by the fifth canon of 1844, on a removal from one diocese to another.

2d. In the case of a clergyman canonically resident in the diocese, and elected into a parish or separate congregation, he shall immediately after his acceptance of the appointment transmit to the Bishop a certificate from the wardens and vestry of his election.

The 30th canon of 1832 requires the *vestry* to deliver this certificate, and it is to be transmitted to the secretary of the convention. The canon of Maryland makes it the duty of the minister to cause it to be done.

3d. A clergyman claiming a seat in the convention as an instructor of youth in any seminary of learning, must produce a certificate from the rector and vestry, and if there be no rector, from the vestry of the parish in which it is situated, or of some separate congregation within such parish acknowledged as such by the convention, that he is so occupied.

4th. No clergyman shall be entitled to a seat as an infirm clergyman, unless he shall produce a certificate from some respectable physician that his state of health unfits him for the active duties of the ministry, and there be evidence that at the time his health became infirm, he was entitled to a seat in the convention.

By canon 13 of the Diocese of Pennsylvania, § 2. EVIDENCE the appointment of lay deputies shall be certified OF LAY-MEM- in writing by a warden and two vestrymen of the BERSHIP. proper church, and the certificate shall state that the deputy, or each of the deputies named in it (if the certificate is for more than one) is, and has been for not less than six months before the time of his election, a worshipper of the Church or parish he is deputed to represent; and no other certificate or evidence of the appointment of any lay deputy or deputies to the convention shall be allowed or received.

In Massachusetts a certificate of the appointment of a

lay delegate must be signed by the wardens or parish clerk, and laid before the convention. He must be a stated worshipper in the parish which he represents.

In Kentucky the delegate must exhibit to the convention a certificate signed by the rector, or the secretary of the vestry, or by one of the wardens, certifying that at a regular meeting of the vestry of—— Church, held, &c., he was appointed a lay delegate to represent the same in the convention to be holden on, &c.

In Ohio the regulation is the same.

In New-York, by the canon of 1848, the evidence of the appointment of a lay delegate, if made by the vestry, shall consist in a written certificate, signed both by the rector of the church, if there be one, or if there be no rector, then by the warden who presides at the meeting at which such delegate is appointed, and by the clerk of the vestry. If the appointment be made by the congregation, the evidence of such appointment shall consist in a certificate, signed by the same persons who are required by law to attest the election of wardens and vestrymen in the respective parishes. Every certificate of the appointment of a lay delegate shall show upon its face, that the appointment has been made in pursuance of all the requirements of the section; and shall certify that the delegate has the qualifications required by the third article of the Constitution, and by the succeeding section of the canon. And no other certificate or evidence of the appointment of any lay delegate than such as herein is required shall be allowed or received.

The section referred to in the preceding provision declares, that no lay delegate shall be entitled to a seat in convention unless he be entitled to vote for wardens and vestrymen of the Church which he is appointed to represent.

The Committee of New-York, to which was referred in 1845 the list of the clergy and credentials of the lay delegates,



reported, that with the exception of some eight or ten, there were none which might not be excepted to as insufficient in some particulars; very few showed upon their face the authority by which the appointment was made, the qualification of the delegate, and the official station of the presiding officer. In many cases, the appointment is stated to have been "at a meeting of the wardens and vestrymen." Such meeting is not necessarily a vestry meeting, nor does it necessarily appear that the appointment by such a meeting is an appointment by the vestry. The official title of clerk is one recognized and prescribed by the laws of the state as well as by the canon. The title of secretary is sometimes used. The secretary of a meeting of wardens and vestrymen may be a different person from "the clerk of the vestry," and the canon designates the latter as a returning officer.

These irregularities, it will be seen, were corrected by the canon adopted in 1848.

There are some differences in the dioceses as to § 3. MODE OF  
the mode of electing delegates, and the body from CHOOSING LAY  
which they are to be taken. DELEGATES.

In Louisiana they are chosen by the vestry; in Kentucky by the vestry from the congregation; (Canon 3,) in Missouri they are to be elected by the vestry or congregation, without specifying from what class; (Art. 4, *Const.*,) in Ohio by the vestry from among the communicants of the church or congregation to be represented. The provision in Florida is like that in Missouri—the delegates are to be chosen by the vestry or congregation. The canon of South Carolina provides that lay delegates shall be elected by the respective Episcopal churches from among the members of those churches, to be elected in such manner and time as each church shall deem proper. (*Const. Art. 3, § 4; Jour. 1847.*)

In Delaware they are chosen by the vestry, and if there is no vestry, by the congregation; and the regulation in Maryland is the same. (*Constitution, Art. 2.*)

In New-York, by Canon of 1848, § 6, the appointment of lay delegates to the convention, if they be chosen by the vestry of any church, shall be made at a regular meeting of such vestry held according to law: if they be chosen by the congregation, the like notice of the time and place of holding the election shall be previously given, and the electors must have the like legal qualifications, and the election shall be conducted in the like manner, as prescribed by law for the election of wardens and vestrymen of the parishes respectively in which they are held.

It will be observed that by the constitution of New-York, the lay delegates are to be chosen by the vestry or congregation.

By a canon of the same diocese a certificate of the incorporation of the church under a statute of the state is necessary to be produced in order to a union with the convention; and by the same act wardens and vestrymen must be chosen upon incorporating a church. Again, the statute requires that the rector, if there is one, and a majority of the vestrymen, be present for the transaction of business.

The congregation may then be called upon to appoint delegates, when from a vacancy, the vestry cannot be lawfully convened; but it is not perceived in what other cases this power could be exercised by it.

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#### TITLE IV.

##### OFFICERS AND COMMITTEES OF CONVENTIONS.

§ 1. PRESIDING      By the 5th article of the constitution of New-  
OFFICER—HIS York, the Bishop shall preside in the convention;  
AUTHORITY but in case of a vacancy, or necessary absence, the  
AND DUTIES. members shall elect a president from among the  
clergy. In South Carolina the Bishop of the diocese shall be  
ex-officio president of the convention, but in case of his ab-

sence or a vacancy in the Episcopate, the president of the Standing Committee shall be the president; and if he be not present, a presiding officer shall be elected from among the attending presbyters. In Delaware the Bishop and Assistant Bishop, where there is one, whether belonging to the diocese, or having charge of it provisionally, shall have a seat and vote in the convention, and one of them shall preside. If there be none, the convention shall elect for its president one of the presbyters attending. (*Journal*, Delaware, 1844.)

By the 2d article of the constitution of Kentucky, "the Bishop, clergy and representatives of the laity of the Church shall meet in convention." By the 4th article, "the Bishop, with such clergymen and lay delegates as shall at any time be duly assembled, shall constitute a quorum." By the 6th article, in case of vacancy of the Episcopate, or of the absence of the Bishop, the convention shall elect a president *pro tem.* by ballot, from among the presbyters.

In Connecticut, the 4th article of the constitution provides, "that the Bishop shall preside in convention; but in case of absence or vacancy in the Episcopate the convention shall elect a president *pro tem.*" (*Journal*, 1847.)

The 5th article of the convention of Massachusetts, is, "that the Bishop shall preside in the convention; but in case of vacancy or necessary absence the members shall elect a president from among the clergy." (1847.) The 5th article of the constitution of Pennsylvania, and of Western New-York, and the provisions in Maine are substantially the same. (*Journals*, 1847.)

In Maryland the regulation is this: (Article 6, Constitution, *Journal*, 1847.) "The Bishop of the Church in this state shall be president of the convention. In case of a vacancy or absence, the convention shall choose by joint ballot a president from among the order of priests." In New-Jersey, the Bishop of the diocese shall have a seat and a vote in the

convention, and shall preside at all its meetings. The Assistant Bishop, when there is one, shall have a seat and a vote, and in the absence of the Bishop shall preside. In case of a vacancy in the Episcopate, or of the absence of the Bishop, and of the Assistant Bishop, the members shall elect a president from among the instituted ministers. In Virginia, by the 6th and 7th articles, "the Bishop shall be the president of the convention; in case of a vacancy the convention shall choose a president from among the order of priests." (*Journal*, 1835.)

These examples will suffice to show the general nature of the provisions in the dioceses.

The right of a Bishop to preside in the council of his diocese is a fundamental law of the Church, and would exist without any provision to that effect. These provisions are but declaratory of the right. In Kentucky the right is assumed, not declared; and in Virginia, it was recognized at a time when the power of a Bishop was narrowly restricted. By the 11th rule of order of 1785, the privilege of presiding in ecclesiastical assemblies was expressly admitted. This article remained until 1793, when the regulation was adopted in the form in which it now stands.<sup>1</sup>

In a few of the dioceses there are some special regulations which require notice. In Delaware, the Bishop may at the close of the debate, and before a vote is taken, at his discretion express an opinion upon the subject. (Art. 5.) In South Carolina the Bishop or assistant Bishop, if there is one, is declared to be *ex officio* a member of the convention, with a right to vote on all matters requiring the suffrages thereof.

By the 4th article of the constitution of Wisconsin, the Bishop, or the Bishop in charge of the diocese, shall *ex officio* preside in convention and be entitled to vote on all questions.

By the 6th article of Maryland the Bishop shall be presi-

<sup>1</sup> *Journals*, 1785.

dent of the convention. He may make any motion which he shall judge conducive to the good of the Church, but shall not enter into debate; and he may deliver his sentiments on any subject after it has been discussed before a vote thereon. He has a vote upon all questions. By the 4th article of the constitution of Pennsylvania, the Bishop and Assistant Bishop, if there be one, shall have a seat and vote in convention. In Louisiana the Bishop or president is entitled to a casting vote.

It is to be noticed that all these declarations in the constitutions of the dioceses are merely declaratory of an inherent right, and do not create it. It would be an anomaly—it would not be a convention of an Episcopal Church, in which a Bishop was not recognized as entitled to preside and vote without a positive enactment. But the right which existed in former ages of a full negative upon the act of any diocesan synod or council, has been by the consent of the Bishops of our Church in almost all the dioceses, renounced.

I know of but one partial exception to this. By the constitution of Kentucky, (Article 8,) should the Bishop express his disapprobation of any canon regulation or resolution, it shall be returned to the convention for reconsideration, when a majority of two-thirds of both orders shall be necessary for its adoption. The same was the regulation in Missouri; (Art. 8, Const. in 1843,) but it is changed as appears in the constitution printed in the *Journal* of 1847.

POWER ON  
QUESTIONS OF  
ORDER. In the larger number of the dioceses the power of the Bishop as presiding officer upon questions of order has been specially regulated. Thus by the 15th rule of order of Maryland; “all questions of order shall be decided by the president. There shall be a right of appeal from the decision of the presiding officer to the convention.”

In 1844, a resolution was offered that the name and style of all official signatures upon the Journals of the Convention

should be in accordance with the constitutional and legal name of the Church, which is that of the Protestant Episcopal Church in Maryland.

The Bishop declared the resolution to be out of order, as pertaining to a matter not within the cognizance of the convention, to wit, the official signature of the Bishop. An appeal was taken, and the decision sustained.

The usual official signature is, I believe, "*W. M. W.*, Bishop of Maryland."

A similar provision to that in Maryland, viz., a right to decide questions of order with a right of appeal to the convention, is in force in New Hampshire, (*Rule 3, 1847*), Missouri, (*Rule 12*), South Carolina, (*Rule 22*), Virginia, (*Rule —*), Massachusetts, (*Rule 9, 1847*), Rhode Island, (*Rule 7, 1847*), Kentucky, (*Rule 13*), and Indiana, (*Rule 17, 1847*).

In South Carolina, in the Convention of 1844, the Bishop refused to receive certain resolutions offered to the House. The question of reception was demanded and carried in the affirmative. The Bishop then stated that he desired to be considered absent, and called the president of the Standing Committee to the chair. The resolutions were read, and by a vote of the convention laid upon the table. (*Journal 1844*, page 38.)

The rule in Louisiana is, that the Bishop shall have all the powers of presiding officers in deliberative assemblies to preserve order and decorum, and shall decide all questions of order subject to an appeal to the house. (*Rule of Order, 1844*.) The provision in Western New-York is in the same terms. (*Canon 2, § 3, 1847*.)

In New Jersey the Rule of Order is—"in any controversy respecting order, the president shall decide." (*Rule 5, Journal 1847*.)

Under this rule the Bishop of New Jersey exercises the right of decision without appeal, and attempts have been

repeatedly made to vary it by inserting a clause giving the right. The argument has been, that the convention is the creature of the constitution, and that its proceedings and officers ought to be controlled by the constitution or its own authority and the usages of deliberative bodies. In the convention of 1849 the subject was renewed, and there was a failure of a concurrent vote, the laity by a considerable majority favoring the change in the rule.

There are a number of dioceses in which this question would arise in its naked form. Thus, in Georgia, North Carolina, Delaware, Connecticut, Florida, Michigan, and Wisconsin, down to 1847, there was no specific rule upon the point, the Bishop in each being of course the presiding officer, and being usually declared to be such *ex officio*.

In these cases it is submitted, that the power of the Bishop is final. It was before observed that the right of presiding essentially attaches to his office; that there could not be a diocesan convention without the Bishop at its head. Where there is one, that right involves the right of determining questions of order, both because it belonged to Bishops as the heads of synods before, and upon general principles. That power, therefore, must be restricted by express regulation, to which the Bishop is a party. The expediency of giving an appeal to the convention is a different question, on which but little difference of opinion exists, at least among laymen; and it has received the sanction of the larger part of the dioceses.

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Another officer provided for in the several constitutions is a secretary. The 5th article of the constitution of Kentucky, for example, provides: § 2. SECRETARY OF CONVENTION.  
1. "A Secretary shall be chosen upon the assembling of the annual convention from the members thereof, by ballot, after *viva voce* nomination of candidates. In case but one is nominated, the balloting shall be dispensed with."

2. "The duty of the secretary shall be to take minutes of the proceedings of convention, to preserve the journals and records, to attest the public acts of the convention, to perform such other duties as shall be assigned to him by this constitution, or by canon made under its authority; and faithfully to deliver into the hands of his successor, all books and papers relative to the concerns of the convention which may be in his possession." (*Const.* 1847, *Art.* 3.)

This is an outline of the provisions of the other dioceses as to this officer. There are, however, additional regulations in some, deserving of notice.

In New-York the secretary is to remain in office until the meeting of the next convention. He is also to give due notice to each minister and vestry of the meeting of the succeeding convention; (Constitution, *Art.* 6,) and by the 5th Canon it is declared that he shall be chosen by ballot after *viva voce* nominations of the candidates, and shall continue in office until a new election is made.

§ 2. He shall transmit annually to each of the Bishops of the Protestant Episcopal Church in the United States, and to the secretary of the last House of Clerical and Lay Deputies in the General Convention, and to the secretary of every Diocesan Convention, a copy of the Journal of the Convention; and shall request the last to send copies of their respective journals in exchange.

§ 3. He shall also transmit to every General Convention, (in addition to the documents mentioned in the 3d section of the 7th canon of the General Convention of 1835—Canon 8 of 1841,) a certificate to be signed by himself, containing a list of the clergymen in this diocese, and the amount of funds paid or secured to be paid (distinguishing them) to the General Theological Seminary, together with the nomination of trustees of that seminary, and also a like certificate of the appointment of clerical and lay deputies.



§ 4. Any expense incurred by a compliance with the third section of this canon shall be paid out of the diocesan fund.

§ 5. Whenever there shall be a vacancy in the office of secretary of the convention, the duties thereof shall devolve upon the assistant secretary if there be one; if not, upon the secretary of the Standing Committee.

The secretary is also directed by Canon 3 of the diocese of New-York, to give notice of the time and place of a meeting of any convention by an advertisement signed by him, and published in three of the public papers, or Church journals printed in the diocese of New-York. When a special Convention is called for any particular purpose, the notice must specify such purpose. By the 8th section of the Canon of September, 1848, it is made his duty to transmit a copy of the 6th and 7th sections of that canon, together with blank printed forms of a certificate of the appointment of lay delegates to every church in the diocese in union with the convention, in the same manner with the notice, which by the constitution he is or may be required to give of the time and place appointed for the meeting of the succeeding convention. The 3d article of the constitution requires him to give notice to each minister and vestry of the time and place appointed.

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§ 3. TREASURER.

The 6th canon of New-York provides as follows:

§ 1. At every stated convention, there shall be chosen by ballot a treasurer of the convention, who shall remain in office until the next stated convention, and until a successor is appointed. It shall be his duty to receive and disburse all monies collected under the authority of the convention, and of which the collection and distribution shall not be otherwise regulated.

§ 2. His accounts shall be rendered annually to the convention, and shall be examined by a committee acting under its authority.

§ 3. In case of a vacancy in the office of Treasurer, it shall be supplied by an appointment to be made by the Standing Committee; and the person so appointed shall continue to act until an appointment is made by the convention.

The 8th canon of the diocese of Illinois, and the 12th of Ohio, are the same in substance.

The 10th canon of Missouri, in addition to the powers and duties above mentioned, declares, that the treasurer shall be subject to the direction of the Standing Committee in relation to the mode and place of depositing the funds received by him, and the mode of paying them out, and his accounts and books shall [be] at all times subject to the inspection of the Standing Committee, or any member thereof. Before entering on the duties of his office he shall give a bond to the Standing Committee, in such penalty and with such surety as they shall direct, conditioned for the faithful performance of his duties, and for delivery over to his successor of all funds, securities, books and papers pertaining to his office.

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[CANON IV., *General Convention*, 1832.]

§ 4. STANDING COMMITTEES. § 1. In every diocese there shall be a Standing Committee, to be appointed by a convention thereof, whose duties, except so far as provided for by the canons of the General Convention, shall be prescribed by the canons of the respective dioceses. They shall elect from their own body a president and secretary. They may meet on their own adjournment from time to time; and the president shall have power to summon special meetings whenever he shall deem it necessary.

§ 2. In every diocese where there is a Bishop, the Standing Committee shall be a council of advice to the Bishop. They shall be summoned on the requisition of the Bishop whenever he shall wish for their advice: and they may meet of their own accord, and agreeably to their own rules, when they may be disposed to advise the Bishop.

§ 3. Where there is no Bishop, the Standing Committee is the ecclesiastical authority for all purposes declared in these canons.

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The first provision was the seventh canon of July, 1789, directing that in every state in which there is no Standing Committee, such committee should be appointed at its next ensuing convention. The canon of 1795 was the same. The 4th and 24th canon of 1808 comprised the same regulations as the first two sections of the present canon, except the clause prescribing the duties of the committee.

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In the first ages of the Church, the presbyters who had a cure of souls constituted as it were but one body, and formed, together with the Bishop, a senate. Ignatius calls this body the *Sacred Consistory*, the *counselors* and assessors of the Bishop. "We have in the Church," says Hieronymus, "our senate, the assembly of presbyters."

ORIGIN.

But as the number of presbyters and clergymen largely increased, the Bishops began to choose from the clergy certain persons by whose council and advice they might govern the diocese, and these were called the cathedral canons, as attached particularly to the Episcopal cathedrals, and their assembly was called the Cathedral Chapter.<sup>1</sup>

The power of the chapter was in its origin and institution entirely subordinate to that of the Bishop.<sup>2</sup> When Cyprian writes, that from the commencement of his Episcopate he had determined to do nothing without the counsel of the clergy and consent of the people, (*sine consensu plebis*), it is

<sup>1</sup> VAN ESPEN, *Jur. Eccl. Un.*, Pars. 1, Tit. 8, cap. 1; Tome 1, p. 42. See also SUAREZ' *De Legibus*, Lib. 4, cap. 6.

<sup>2</sup> *Totius cleri Episcopum caput esse, eique præcipuam agendorum in sua Diocesi curam incumbere indubitatum est. (Ibid. cap. 2.)* Sine Episcopo nemo quidquam faciat eorum quæ ad Ecclesiam spectant.

obvious that this was a voluntary restriction upon his unquestionable power.

Some limitations are also to be found in the provisions of General Councils. These were generally binding. Of this nature, particularly, was the provision for the concurrence of the chapter in the trial and decision of causes. Van Espen refers to that of the Council of Carthage—*Ut Episcopus nullius causam audiat absque presentia suorum clericorum.*

The Popes also imposed other trammels, in pursuance of their design of breaking down the independence and authority of the Bishops. Pope Alexander the Third forbade the institution or dismissal of abbots and other ecclesiastical persons, without the assent of the chapter.

The modern doctrine was well expressed in a decree of Cardinal Pole. (*De Ref. Cleri. Anglicani.*) “*Canonicatum et Præbendarum instituendi et rationem et causam hanc fuisse, ut qui ad eas assumuntur Episcopo assistant, eumque in muneris sui functionis consilio et opera adjuvent, in divinis celebrandis Ecclesiæ inserviant.*”

The description of a chapter in the English law is this: “A chapter of a cathedral church consists of persons ecclesiastical, canons, and prebendaries, whereof the Dean is chief, all subordinate to the Bishop, to whom they are as assistants in matters relating to the Church, for the better ordering and disposing the things thereof, &c., and they are termed by the canonists, capitulum, being a kind of head instituted not only to assist the Bishop in manner aforesaid, but also anciently to rule and govern the diocese in time of vacation. The Dean and chapter is a body corporate spiritual, consisting of many able persons in law, viz., the Dean, who is chief, and his prebendaries; and they together make the corporation. They were originally selected from among the clergy by the Bishop, as counsel and assistants to him.”<sup>1</sup>

<sup>1</sup> GODOL. 56, 58. 2 *Roll. abd.* 451. BUNBURY *Exch. Rep.* 209.

It appears that by the concession, or weak acquiescence of Bishops, the chapter in many cases stepped beyond the natural and legitimate functions of its office, and exercised authority and claimed exemptions inconsistent with a canonical subordination. The nature and extent of these encroachments will be found in BURNS' *Eccl. Laws*, vol. 2, p. 93, and the authorities there cited.<sup>1</sup>

I have not found that during the colonial period any committee of this character was in existence, except that in Connecticut in 1776, (June 4,) there was a committee of five clergymen appointed by a convention. In the acts of the commissaries, and perhaps in the voluntary regulations of the clergy in conventions, is to be found whatever of internal, positive ordinance was enacted for the Church.<sup>2</sup>

But after the Revolution, and at the period of the adoption of the canons of 1789, a body called a Standing Committee is to be found in several of the states.

In Virginia, for example, by one of the rules and orders for the government of the Church, passed in May, 1785, a Standing Committee was appointed. It was to consist of four members, and by a resolution of the convention three clergymen and one layman were appointed. Its powers were considerable—among others, to receive complaints against the clergy and direct courts of examination.<sup>3</sup>

In Maryland, in 1788, a Standing Committee, composed of five clergymen and five laymen, was established for each shore; and all matters of government and discipline during the recess of the convention were assigned to them.

And in New-York, in 1787, a committee was appointed to call a special convention should the Episcopate become

<sup>1</sup> 1 BURROW'S *Rep.* 567. *ROLLS. Abr.* 229.

<sup>2</sup> HAWKS' *Contr.* vol. 2, p. 170, and *Appendix*, p. 501. Some notices of the convocations are to be found in CHANLLER'S *Life of Johnson*.

<sup>3</sup> HAWKS, vol. 1, 303.

vacant, and by another resolution the same gentlemen were to compose a standing committee, to advise with the Bishop in all matters in which he might think proper to consult them. There were three clergymen and three laymen appointed.<sup>1</sup> This committee was continued the next year, and in 1790 there was a regular election of members, viz., four of each order.<sup>2</sup>

These bodies then arose, in fact, from the necessities of the Church, and were the organs of government, where there was no Bishop, during the recess of the convention; and this may account for the 6th canon of 1789 appearing to refer to them as already known in the Church system.<sup>3</sup>

MEMBERS. It is believed, that, with the exception of Maryland and Connecticut, the standing committee of every diocese is composed of clerical and lay members. It appears, from the prefatory note to the edition of the journals of Connecticut, published in 1842, that the first standing committee was chosen by the convocation in October, 1790. No convention was formed until 1792. The committee chosen in 1790 consisted of five clergymen. The constitution of 1792 provided for the appointment of a standing committee annually. By the constitution at present in force, it is to consist of five clerical members, who shall be rectors of parishes or instructors of some seminary instituted by the ecclesiastical or civil authority of the State.

In Maryland, by the 9th article of the constitution, a standing committee, consisting of seven members, four on the Western and three on the Eastern shore, shall be chosen from among the order of priests, by a joint ballot of clergy and laity.

In general, the provision as to this committee is like that

<sup>1</sup> Journal, 1787.

<sup>2</sup> Ibid, 1790.

<sup>3</sup> See a note of Dr. Hawks' Con. and Canons 102, and his quotation from a pamphlet written by the present Bishop Hopkins.

of the diocese of New-York, which is as follows:—"At every stated convention, an election of a standing committee shall be made, which committee shall consist of four of the clergy and four of the laity, to be chosen by ballot, and by the concurrent vote of the members of each order." In New-Jersey each order chooses its own members, by ballot, subject to the approval of the other order. (*Art. 10, Const. New-Jersey.*)

By the regulation of most of the dioceses, the members are equally divided between the two orders. Thus, in Vermont, there are three clergymen and three laymen. In Missouri, there are three presbyters and two laymen; in North Carolina, a majority must be clergymen; in Delaware and Kentucky, three clergymen and two laymen, and the presence of two clergymen is necessary to form a quorum; and in Florida there are to be *five* laymen and *four* clergymen.<sup>1</sup>

In the dioceses of Wisconsin, Illinois, North Carolina, and South Carolina, the lay members must be communicants.

The powers and duties of a standing committee arise from three sources: 1st, the delegation of a <sup>POWERS AND</sup> specific duty or power by the general convention; <sub>DUTIES.</sub> 2d, a general authority conferred by the same; and, 3d, the duties prescribed and authority given by the laws of the respective dioceses.

1st. The General Convention authorizes the committee to elect a president and secretary from their own body; to meet on their own adjournment from time to time; to assemble at special meetings upon the summons of the president; and to meet of their own accord when they may be disposed to advise the Bishop. (*Canon 4, 1832.*) By the same canon, they may be summoned, and are bound to meet, upon the requisition of the Bishop, when he wishes their advice.

The numerous cases in which special duties are enjoined,

<sup>1</sup> In the Convention of 1848, I find but three clergymen and five laymen chosen.

and powers are conferred, by the canons, are stated, under the appropriate heads, in various portions of this work. Among their important powers is that bestowed by the Canon 15 of 1832, (the substance of which was enacted in 1789,) by which no person can be ordained a deacon or priest without testimonials from the committee.

2d. It is next to be noticed, that, by the third section of the Canon of 1832, where there is no Bishop in a diocese, the committee is the ecclesiastical authority for all purposes declared in the canons, that is, the canons of the General Convention.

This power is of much importance, and deserves special notice. What are the purposes declared in the canons for which the committee forms the ecclesiastical authority?

In 1841, a committee of both houses made a report upon the subject, under a resolution referring it to them to define the provision. They stated, that in Canon 4 of 1832, § 3, which is, that where there is no Bishop, the standing committee is the ecclesiastical authority for all purposes declared in the canons, it is implied that the Bishop, where there is one, is the ecclesiastical authority, unless otherwise declared in a canon; that in Canon 10 of 1832, the words, "or other ecclesiastical authority which may have the superintendence of candidates for orders," mean the clerical members of the standing committee, where there is no Bishop; that in Canon 17 of 1832, "Of Deacons," it means the clerical members of the committee, where there is not a Bishop; in Canon 19 of 1832, "Of the Titles of those who are to be Ordained Priests," the Bishop, or the standing committee at large, is intended; and that in Canon 23 of 1832, (now superseded by the 9th of 1844,) "Of Clergymen Ordained in Foreign Countries by Bishops in Communion with this Church," was meant the standing committee generally, when there was no Bishop. This is the case under the existing canon.



The preceding expositions were adopted by the convention, after which the subject was laid on the table.

The same committee also reported, that in Canon 33 of 1832, the phrase occurring twice meant the Bishop and the clerical members of the standing committee. This canon relates to the dissolution of the pastoral connection between ministers and their congregations.

It is not seen how the phrase can, in this instance, be so interpreted. The committee and the convention agree that, by the phrase "ecclesiastical authority," the Bishop, where there is one, is implied; and, by the canon, the standing committee generally is such authority, where there is not a Bishop. The phrase, when used without qualification, certainly means the Bishop, or standing committee proper.

In addition to the canon of the General Convention, there is an express provision in several dioceses upon the powers of the committee. In Pennsylvania, the 9th canon of 1829 is as follows: "In case of a vacancy in the Episcopate, the powers and duties to be performed by the Bishop, as regards discipline, except the pronouncing sentence of deposition, or degradation, shall belong to, and be performed by the Standing Committee. In case of such vacancy, the committee shall also have power to act in the granting of testimonials to clergymen removing into this diocese."

The 7th article of the Constitution of Wisconsin (1847) provides, "that the Standing Committee, where there is no Bishop, or he is incapable of acting, shall be the ecclesiastical authority of the diocese for all purposes declared in this Constitution." The eleventh canon of Illinois, and the tenth of Western New-York are as follows: "In case of a vacancy in the Episcopate, the powers and duties to be performed by the Bishop in matters of discipline, shall be performed by the Standing Committee, except in those cases in which such powers and duties are or may be specially delegated to or enjoined

ed upon the clerical members of said committee, in which case such powers and duties shall be exercised by said clerical members alone; provided that no sentence shall be pronounced upon a clergyman but by a Bishop."

The canon in New-York, previous to the convention of 1845, was precisely the same. That convention added, after the words, "vacancy in the Episcopate," the words, "or the inability or disability of the Bishop."

Now the power of a diocese to pass such a canon is undeniable. The strict constructionist, who limits the phrases, "vacancy in the Episcopate," "where there is no Bishop," and "without a Bishop," to their literal acceptance, finds a case omitted to be provided for by the General Convention, provided for here. The general canon itself has recognized the right of the diocesan conventions to prescribe the duties of the committee, except where prescribed by the General Convention. On the other hand, they who approve of the extended construction put upon these words by the Standing Committee of New-York in 1845, find in this action a recognition and confirmation of their interpretation, as far as relates to cases under the general canons, and a full express authority in all cases of discipline, under the constitution or canons of the diocese.

It is well known that in the unfortunate situation in which the Diocese of New-York was placed by the suspension of Bishop Onderdonk, the Standing Committee assumed the conduct of the business of the diocese to a great extent. In this they were supported by a vote of the Diocesan Convention, and the above alteration was made in the canon, "to strengthen the committee, and make it more clearly their duty to act in the manner proposed in the existing emergency." (*Report of the Committee of the Convention.*)

The course of reasoning by which the committee sustained their action will be found at length in a report of a

sub-committee printed at page 36 of the Journal of 1845. The conclusions were that Bishop Onderdonk was still the Bishop of the diocese, and that no other Bishop could be elected in his place; and yet that there was such an entire inhibition upon the exercise of his powers, as let in the authority of the Standing Committee, from the necessity of the case, and upon the doctrine of a constructive vacancy, for the purpose of government, not for any other.

It may be, at least, plausibly urged, that the action of the General Convention of 1847 decided that the sentence of suspension did not vacate the jurisdiction of the Bishop; but if this is disputable, at least it is clear that as a sentence must now be terminable on its face, the avoidance could not take place.<sup>1</sup>

The same question, then, which was agitated in New-York, might arise in almost every diocese except Wisconsin. The views which were taken by some of the Right Reverend Bishops, that the Standing Committee had no power in the premises, will be found cogently set forth in a letter of Bishop Doane to the Committee, in the Journal of New-York in 1845. On the other side, those who treated the sentence as entirely equivalent to a deposition, had no difficulty; and of this opinion was, as is understood, Bishop Freeman of Delaware, who recognized the action of the committee. The venerable prelate of Connecticut, after much deliberation, adopted the same course, but not upon the same principle. His letters containing the exposition of his views are to be found in the New-

<sup>1</sup> Bishop Elliott of Georgia, in his address to the Convention of 1848, says, that the General Convention had decided, and justly in his opinion, that the jurisdiction of a Bishop was not voided by a sentence of indefinite suspension, and while a canon was passed requiring that in all future cases where the penalty of suspension was inflicted, that it should specify terms and limits to the sentence, provision was made for the particular case which brought up the discussion of these principles.

York Journal of 1845. It will be noticed that the language of the Bishop is—"that he considers the Episcopal powers of the Bishop of New-York as fully suspended, and in a state of entire abeyance; and that in respect to their exercise, there is a *virtual* vacancy of the Episcopate. Under these circumstances, I am of opinion, after mature deliberation, that the Standing Committee may rightfully execute all the powers which would devolve upon them during an *actual* vacancy in the Episcopate; and that they will be justified in so doing, as well by the general spirit of our Church organization, as by the urgent necessity of the case." (*Letter* 20th May, 1845, p. 32.) In his letter of the 10th of April preceding, the Bishop had said, that, "in his opinion, the exigency had not arisen when the Standing Committee becomes, according to the constitution and canons of the Church, 'the ecclesiastical authority of the diocese'—that is, the diocese of New-York was not 'without a Bishop.'"

The result of these matured opinions certainly goes far to sustain the standing committee in their course of action, and upon their own reasoning.<sup>1</sup> After the resolution and change of the canon of New-York, in 1845, it is believed that no Bishop of the Church had scruples in recognizing the authority of that body.

<sup>1</sup> I cannot forbear stating a very high authority in the Church upon this question, which was not adverted to in the discussions upon the subject. Bishop Stillingfleet, in his letter on the right of jurisdiction, during the suspension of the Archbishop of Canterbury, in 1689, discusses the question, whether the authority had devolved upon the Dean and Chapter. After showing that, in case of a legal vacancy, the right belonged to them, he says:—"The canonists make the case to be the same in an interpretative as in a real vacancy. Parnormitan lays down this for a rule—*Episcopo mortuo naturaliter vel civiliter capitulum succedit in jurisdictione tam spiritualium quam temporalium*. He notices a decretal, settling the question in case of captivity, and quotes the following gloss:—*Et sic nota quod sicut capitulum cum vacat Ecclesia supplet vicem Episcopi in jurisdictione, sic et cum quasi vacat.*"

This resolution was, that "until effectual and permanent provision be made for the supply of Episcopal services, the standing committee shall continue, in its own name and authority, to invite the performance of such Episcopal acts for or within the diocese, as may be necessary, by Bishops of the Church."

Then, by the 4th canon of the General Convention in 1847, any Bishop, assistant Bishop, or missionary Bishop, may, on the invitation of the convention or the standing committee of any diocese, where there is no Bishop, or where the Bishop is for the time under a disability to perform Episcopal offices by reason of a judicial sentence, visit and perform Episcopal offices in that diocese, or in any part thereof; and this invitation may be temporary, and may at any time be revoked.

The cases in detail, in which the powers of a standing committee may be exercised, both in conjunction with a Bishop, and where there is none, will be stated in their proper places throughout the work.

3d. With respect to the powers specially conferred upon the committee by the canons of the respective dioceses, they will be found under various heads in the ensuing part of the work.

In several of the dioceses there are committees appointed for some purposes which may be briefly noticed.

§ 5. COMMITTEES OTHER THAN STANDING COMMITTEE.

In New-York, for example, the missionary operations of the diocese are conducted by a committee of the convention, chosen by ballot, consisting of ten members of the Church within the diocese, one-half of whom shall be clergymen, and the other half laymen, who, with the Bishop or Bishops of the diocese, shall compose a Board, to be called "The Missionary Committee of the Diocese of New-York," who, as agents of the convention, shall have the distribution

of all funds which may be raised for the support of missionaries in the diocese.

The Bishop shall be *ex-officio* President, and shall have the sole power of nominating missionaries for appointment by the committee. In case of a vacancy in the Episcopate, or of the inability or disability of the Bishop to act, any member of the committee shall have the right to nominate.

So, in Florida, by the 6th canon, a diocesan missionary committee is established, consisting of all the clergymen canonically resident in the diocese, and of four laymen residing in the same parish, to be elected by the convention.

The operations were conducted under the direction of the ecclesiastical authority, there being no Bishop in Florida in the year 1847.

Similar committees are appointed in many other dioceses, such as in Massachusetts, Western New-York, and Rhode Island.

In Rhode Island, by a canon passed in 1847, a Board of Commissioners for the building of churches was established. It consists of four laymen and the Bishop, who shall always be the chairman. The laymen are appointed annually, by a vote of the convention.

So, in Georgia, the convention shall appoint annually, by ballot, a committee of two clergymen and three laymen, of which committee the Bishop of the diocese, when there is one, shall be *ex-officio* chairman, whose duty it shall be to take in charge the Missionary, Bible, Common Prayer Book, Tract, and Sunday School operations of the Church of the diocese. The committee is to make a report of their proceedings to each annual convention. (*Canon 3, Journal 1847.*)

There are also other diocesan committees, of a special nature, in various dioceses; such, for example, as a committee on a diocesan fund, a committee for the relief of disabled

clergymen, and others. It is not necessary to enter into a detail of the provisions in such cases.

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TITLE V.

REGULATIONS OF LEGISLATIVE ACTION.

In Maryland, eight members of the clerical and eight of the lay order constitute a quorum for the transaction of business, but a smaller number may adjourn. In Massachusetts, the members present, on due notification, and duly organized, shall constitute a quorum for the transaction of the ordinary business of the convention. In Connecticut, one-third of the members of the clerical, and twenty members of the lay order are sufficient—a smaller number may adjourn. By the rule in Missouri, the Bishop, with such clergymen and lay deputies as shall at any time be duly assembled in convention, may act. The provision in Kentucky is the same. That of Delaware requires only two members of the clerical, and six of the lay order; and in Western New-York twenty clergymen entitled to vote in convention, and deputies from twenty congregations suffice.

The regulation of New-York by the canon of 1848, § 9, is that the presence of at least thirty clergymen entitled to vote in the convention, and of delegates from at least thirty congregations, shall be necessary to the transaction of business, except that a smaller number may adjourn from day to day.

By the second section of the 5th article of the Diocese of Wisconsin, the clergy and lay delegates shall deliberate in one body, and shall vote as such. On a call of any five members, the convention shall vote by orders. In such a case, the concurrence of both orders shall be necessary to give validity to any measure, and each parish shall be entitled to only one vote.

On every question the votes of a majority of those present ;

or when voting by orders, the votes of a majority of those present of the two orders respectively, shall decide the question.

The rule in Ohio is similar to this of Wisconsin. Unless a requisition to vote by orders is made, the vote is in one body; and as there may be three or four delegates from a parish, the preponderance of the laity in this mode of voting would be great. In Maryland and Virginia there is a similar rule, but then each parish sends but one delegate, or only so many as there are officiating ministers within it.

In New-York the regulation is more complex. By the 7th article of the constitution, the clergy and laity are to deliberate in one body, and in voting the clergy shall vote by individuals, and the laity by congregations; and when more than one church or chapel shall be united under one vestry, the delegate or delegates of such vestry shall be entitled to a vote for each church or chapel.

A majority of the votes of the two orders, jointly, shall be decisive; but if in any case it be required by five votes, the two orders shall vote separately, in the manner aforesaid—that is, the clergy by individuals, and the laity by congregations, and a concurrence of a majority of each order shall be necessary to constitute a decision.

In the election of a Bishop, the two orders shall always vote separately, and in the mode before mentioned.

In Pennsylvania, every member who shall be in the house when any question is put, shall, on a division, be counted, unless he be particularly interested in the decision. (*9 Rule of Order.*) So in New-Hampshire. (*9 Rule of Order.*)

In Maine, each church represented in convention shall have one vote, and no deputy shall represent more than one church. (*Const., Art. IV.*) The clergy and lay delegates vote and deliberate in one body; but, when requested by any



member, may vote in two distinct orders, and the concurrence of both orders is requisite. (*Art. III.*)

By a rule of Massachusetts, a question, being decided, shall not be reconsidered during the same session, without the consent of two-thirds of the members present, nor unless the motion to reconsider be made and seconded by members who voted in the majority on the original decision. A similar rule, as to two-thirds, prevails in Rhode Island, (*Rule 5, 1847,*) and in Pennsylvania and Delaware.

Various other regulations, more or less minute, prevail in the different dioceses; but it is thought sufficient to point out the above as of chief importance.



## CHAPTER III.

### OF PARISHES—THEIR SEPARATION AND DIVISION; AND THE ORGANIZATION OF CHURCHES, OR CONGREGATIONS.

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#### TITLE I.

#### OF PARISHES—THEIR DIVISION—THE FORMATION OF NEW ONES, AND THE BUILDING OF CHURCHES.

The Diocese was an early territorial division in Christian countries, and to the inferior clergy were only entrusted such villages or small districts as the Bishop chose to assign to them. The oblations paid were managed by him. He had entire control of all inferior churches within his diocese, formed by the act of the patron who founded and endowed the church, and who would regulate the extent of the parish limits, but the authority of the Bishop was necessary for the complete settlement of the ecclesiastical division.

Occasionally the Popes interfered, as in the instance of an injunction of Alexander III. to the Archbishop of York, enjoining him to divide a parish which was too large. Again, the royal power was sometimes invoked. Henry III., at the request of the Bishop, ordered a church to be suppressed in the town of Chichester, and two parishes to be joined into one.<sup>1</sup>

<sup>1</sup> See a Treatise by Sir John Conelly on the Law of Tithes in Scotland, and the authorities, particularly that of Selden, cited by him.

Bishop Stillingfleet says:—"There were at first no such parochial division of cures, here in England, as there are now; for the Bishops and their clergy lived in common, and before the number of Christians was much increased, the Bishops sent out the clergy to preach to the people as they saw occasion. But, after the inhabitants had generally embraced Christianity, this itinerant going from place to place was found very inconvenient. Thereupon the bounds of parochial cures were found necessary to be settled here, by degrees, by those Bishops who were the great instruments of converting the nation from Saxon idolatry."

The learned author then traces the progress of parishes in the Saxon times. "In the Council of Cloveshoo," (called the first of the National Councils, A. D. 742,) "we hear of presbyters placed up and down by the Bishops in the manors of the laity, and in several parts distinct from the Episcopal See. Every Bishop, as appears by the Saxon Councils, was bound to see parochial churches built, and the clergy to be settled in them."

"In the ancient Church," says Chief Baron Gilbert, "they had but one chief pastor to every particular church or diocese, and the other clergy were ambulatory, at the Bishop's pleasure, within the diocese; and tho', after the Council of Lateran, the parochial clergy were settled in each parish, the Bishop only retaining a chapter in the cathedral church as assistants to him, yet the Bishop was reckoned as the sole pastor of the church, and the others to have the cure under him. Hence, in provincial synods the Bishops only met, and were convened by the Metropolitan; and each Bishop also held a diocesan synod with his own clergy, in which he made rules and orders for the regulation of the diocese, provided they were not against the canons of the province."

<sup>1</sup> *Court of Exchequer*, p. 48. To show the great antiquity of the division into parishes, some Canonists cite a letter, ascribed to Pope

In several of the Southern dioceses, the territory had been divided into parishes by acts of the Colonial Assemblies.<sup>1</sup>

Dyonysius, of the year 269. (*Apud Collectio Conciliorum Mansi*, tome 1, p. 1006. *Ecclesias vero singulas singulis presbyteris dedimus, parochias et cemetria eis divisimus, ut unicunq̄ue jus proprium habere statuimus, ita videlicet ut nullus alterius parochiæ terras, terminos aut jus invadat; sed unusque suis terminis sit contentus, et taliter ecclesiam et plebem sibi commissam custodiret, ut ante tribunal æterni judicis, de omnibus sibi commissis rationem reddat, et non judicium sed gloriam pro suis actibus recipiat.*

It is, however, denied that this letter is rightly attributed to the Pope. Van Espen, speaking of its antiquity, says, that it was known in the time of Athanasius. (*De Pastoribus*, &c., tome 1, p. 10, tit. 3, 1, 2.) In his treatise *De Jure Parochorum*, (tome 2, p. 249, cap. 1, § 3.) he observes—*Dioceses sive Districtus Episcopales jam a pluribus sæculis in plures portiones quas parochias hodie dicimus fuisse distributas, notissimum est. Porra sicuti uno diocesi unicus Præfectus fuit Episcopus, ita et singulis parochiis datus fuit presbyter qui totius parochiæ curam spiritualem ageret; qui propterea parochus seu presbyter parochianus dicebatur.*

<sup>1</sup> In Maryland, by an act of 1692, the counties were divided into parishes. In 1725, a division to some extent took place, in furtherance of one of the schemes of Boardesley to ruin the Church. (*Hawks' Contr.* 2, pp. 70 and 177.) Other changes took place, but, as I understand, the diocese is still divided into parishes, whose boundaries are fixed by law—that is, either under the original division, or such changes as have been made by subsequent statutes, or by the Convention, by virtue of the law of 1798, giving that body the power to divide parishes. The separation of a parish, or the establishment of a separate congregation, is provided for in the 3d canon of 1847.

I have not been able to ascertain when the establishment of parishes first took place in Virginia. Justice Story, in *Terret vs. Taylor*, (1 *Wheaton*,) says “that the State was thus divided into parishes at a very early period.” They are referred to in an act of the Colony of 1629, and Dr. Hawks gives a list of those in existence in 1722, (*Contr.*, &c., vol. 1, p. 55;) fifty-four parishes in twenty-nine counties. He states that in many of the larger parishes there were chapels of ease.

In the act of 1784, the minister and vestry of each parish already in being, or thereafter to be established, were made a body corporate. The Convention of the Church was authorized to regulate all her religious concerns, settle all matters concerning doctrine, discipline or worship, and make such rules as should be just for orderly and good

These divisions prevail substantially, in some cases, to this day, although varied by law, or by the conventions of the Church.

In England, the adjustment of church boundaries generally depends upon ancient and immemorial custom, for they have not been limited by act of parliament, nor set forth by special commissioners, but have been established as circumstances of time and place did happen to make them greater or lesser.<sup>1</sup> Perambulations of parishes, in order to identify and preserve the certainty of bounds, were of ordinary occurrence, and were expressly directed and regulated in old institutions.<sup>2</sup>

government. This act was repealed in 1786. An ordinance for the general government of the Church was adopted by the Convention in 1787, after this repeal, and contained provisions similar to those in the act before mentioned.

As I understand, the original division into parishes remains, with such changes as have from time to time been made. The power to separate and create new parishes rests in the Convention. A canon of 1823, amended in 1839, regulated the exercise of this power.

In South Carolina, also, parishes were to a great extent defined by law. In the case of *Bankstead vs. The Vestry, &c., of Christ Church*, (STOBHART'S *Eq. Rep.*, 197,) the subject is explained. The Court say—"That by an act of 1708 the boundaries of several parishes were defined—that from an early period it was the custom of the General Assembly, when the boundaries of a parish were large, and convenience required it, to establish other places of public worship besides the parish church. These were called Chapels of Ease, and the statutes required the rector of the parish to perform ministerial offices in them at stated periods." The question in the cause arose from an application, by the vestry, of some of the funds to the payment of the minister's expenses when serving in the chapel. The decision supported the right to do so. The Court said that they would not interfere with the acts of a vestry unless their charter was transgressed.

It appears that the legislature often interposed to define the limits of parishes, to unite one or part of one with another, and to divide them. There are some instances of this after the Revolution. See BRENARD'S *Digest*, Tit. *Districts and Parishes*.

<sup>1</sup> BURNS' *Ecc. Law*, vol. 3, p. 74.

<sup>2</sup> *Injunctions of Elizabeth apud Gibson*, vol. 1, p. 239. "For the re-

The whole subject of the division of parishes has been regulated in England by the Act of 1 and 2 Victoria, cap. 106, § 26, and I deem it useful to state its leading provisions in a note.<sup>1</sup>

The erection of new churches within a parish is a branch of the same power as that of creating new, or dividing old parishes. Indeed, if a new church is erected, and occupied for services in a parish, it implies, to a certain extent, a division of that parish. To such an erection the canon law, both foreign and English, imperatively requires the sanction of the Bishop.<sup>1</sup>

THE BUILDING  
NEW  
CHURCHES.

taining the perambulation of the circuit of parishes, they shall once in the year, at the time accustomed, with the curate and the substantial men of the parish, walk about the parishes as they were wont, and at their return to the church, make their common prayers." The curate was, at certain convenient places, to admonish the people to give thanks to God for the abundance of the fruits of the earth, and to inculcate these or such sentences: "Cursed be he which translateth the bounds and dolles of his neighbour."

<sup>1</sup> When a Bishop shall consider that a place or district might be advantageously separated from any parish or mother church, and be instituted as a separate benefice, or united with any other parish, or that any extra parochial place may be usefully annexed to an existing parish, or be constituted a separate parish, he shall draw up a scheme in writing of the proposed alteration, and showing how it may be made with justice to all interested, as to ecclesiastical jurisdiction, glebes, tithes, and other rights and dues. This is to be presented to the Archbishop, with the consent in writing of the patron. If the Archbishop approve, he is to certify it to the Queen in council, who is to make an order for carrying it into effect. It shall be binding upon all, including the incumbent, provided such incumbent has given his consent in writing to the same; but if no such consent has been given, the order shall not go into operation until the next avoidance of the benefice by such incumbent.

<sup>1</sup> See the *Dissertation upon Benefices* by JOHN DE SELVA apud Molinæus, (Tome 4, p. 762 *et seq.* E.l. Paris, 1681.) In his sixth question he examines the point whether it is allowable to any one to erect a church and endow it on his own authority. After a minute statement of canonical authorities, he concludes with those doctors who hold the negative. He quotes also the opinion of a canonist, that no one should

The canonists lay down the rules with great unanimity, that the Bishop ought not to consent to the erection of a new parish within the limits of another without some reasonable cause therefor. Among such legitimate reasons is this, that the parishioners cannot, without great inconvenience, come to the parish church to receive the sacraments and attend the offices. But what the distance from the church, or the size of the parish should be, as it has not been declared by law, must be left to the discretion of the judge.

As the construction of a new church may injure the rights of the rector or patron of the old, the Bishop must not give his consent without citing and hearing the rector and others interested. But if the rector being thus cited and heard, re-

be allowed to establish an oratory in his own house without Episcopal assent, lest prejudice should be done to the parochial church, (p. 766.)

But the same author holds (p. 766, § 19, 20) that the Bishop may, upon reasonable cause, establish a new church, though to the prejudice of another; but it seems it must be with consent of his chapter.

So in the *Institutes*, Jur. Can. (Lib. 2, Tit. 18,) it is laid down, that a new church should be built when, by reason of the increase of the people within certain limits, the number of the faithful has become so large that one church is insufficient for them; and for the same reason that one Episcopal see may be divided into two with the consent of the Bishop, so also may the Bishop divide parishes with the assent of the rector, which, when done, that part of the congregation which is attached to the new church is released from the power of the first.

By one of the Novels, (131, cap. 10,) the Emperor Justinian declared, that none shall presume to erect a church until the Bishop of the diocese has been acquainted therewith, and shall come and lift up his hands to heaven, and consecrate the place to God by prayer, &c., and erect the symbol of our salvation there.

The 4th canon of the Council of Lateran was express upon this point—"No one shall build a monastery or church against the will of the Bishop of the city." This canon was adopted in England at the Council of Westminster in the time of King Stephen. *Nequis absque licentia Episcopi sui, in possessione sua ecclesiam vel oratorium constituat.* See GRAYSON'S *Codex*, vol. 1, p. 212. The argument of Bishop Gibson against Lord Coke's opinion, that the Barons could build churches of their own authority, seems very decisive. See also BURNS, by *Phillimore*, vol. 1, p. 223, 4.



fuses his consent, and the erection is still deemed necessary, it may be done in opposition to his remonstrance.<sup>1</sup>

It is also well settled, that the license of the Bishop is necessary to authorize any minister to officiate in an unconsecrated place; and by the law of England, the consent of the incumbent is equally essential.<sup>2</sup>

There is another principle of the General Law of the Church fully established. There can be no such thing as a church, in its true canonical sense, until the building has been consecrated by the Bishop.<sup>3</sup> In the nervous language of

<sup>1</sup> VAN ESPEN, Pars. 11, Tit. 16, cap. 2, *De Edif. &c. Ecclesiis*, particularly § 12-16. The 17th section is as follows: Si Rector citatus et auditus in nova parochiæ erectione consentire renuat et tamen erectio illa necessaria judicetur, poterit tunc etiam illo *inviato* procedi, ut no consensu resolvunt canonistæ.

<sup>2</sup> This law of the English Church was settled in the Council of London, under Archbishop Stratford, in 1342. It is in the first constitution of what are called the Extravagants. Nos de fratrum nostrarum et totius concilii assensu et concilio decernimus quemcunque in oratorias, capellis, aut domibus hujusmodi seu in loco minime dedicato seu delibato missarum solennia (Diocesani non obtenta licentia) contra canonum prohibitivum, celebrantem, suspensionem a divinatorum celebratione per mensem incurrere ipso facto. Then follows a passage recognizing the authority of the Bishop to give such license, and saving all such licenses as had been previously granted, and where custom had established the privilege. (See Oxford edition, 1679, of *Lynwood and John of Anthon*, ad finem p. 48.)

In the case of *Hodgson vs. Dillon*, (2 *Carter's Rep.* 388,) Dr. Lushington in his judgment observed, "I need not say that the ancient canon law of this country knew nothing of proprietary chapels, or unconsecrated chapels at all. The necessities of the times, and the want of accommodation in the churches and chapels of the metropolis and other large towns, gave rise to the erection of chapels of this kind, and to the licensing of ministers of the Church to perform duty in them. The license emanates from the Episcopal authority. The Bishop, however, cannot grant such a license without the consent of the rector or vicar of the parish."

<sup>3</sup> Lord Coke (4 *Just.*, p. 403) says, that the law takes no notice of churches or chapels until they are consecrated by the Bishop. A question, therefore, of church or no church, is to be settled by him. See

Ridley, "that the Patriarch or Bishop should challenge this jurisdiction over the new church seems most reasonable. For what did the patron do more than the man of Israel, who brought a lamb to the door of the Tabernacle, but the priest made it an offering and atonement. The patron, indeed, might perhaps choose the place, but until the prelate came and sanctified the ground, it might as well be a den of thieves as a house of prayer. The patron might bring the stone—the Bishop laid the foundation; or, if the workmen put the materials together, and made up a house, the Bishop made that a church. Till then there was nothing but the breathless body of a temple, the soul being yet to come. Therefore it was, that the privilege of a new church followed, not the building, but the consecration of it." He cites a law of King Alfred, confining the privilege of sanctuary to consecrated churches.

There was another rule in force—that no church should be consecrated without a sufficient maintenance being provided for it.<sup>1</sup> The ancient manner of founding churches was this: After the founders had made application to the Bishop of the

also 3 *Inst.*, 203. So chapel or no chapel ought to be tried by the spiritual judge; for a chapel dependent on a mother church cannot be founded but with license of the ordinary. GRIBSON 1, p. 236.

<sup>1</sup> This was made the law of the Church of England by the 16th canon of the Council of London. "A church shall not be consecrated until necessary provision be made for the priest." The canon law required the endowment to be ascertained before they began to build, and the same was the rule of the civil law.

The same law was enacted in the Council of Toledo. St. Chrysostom calls it the dowry of the bride. (SPELMAN *De Non Temerandis Ecc.* p. 5.) Justice Story thus states the English law: "The true legal notion of a parish church is a consecrated place, having attached to it the right of burial and the administration of the sacraments. Every such church ought to have a manse and glebe as a suitable endowment, and without such endowment it cannot be consecrated, and until consecration, it has no legal existence as a church." (1 WHEATON, 414.)

diocese, and had his license, the Bishop or his commissioners set up a cross and set forth the ground where the church was to be built, and then the founders might proceed with the building of it; and when the church was finished, the Bishop was to consecrate it, but not till it was endowed; and before this, the sacraments were not to be administered in it.<sup>1</sup> So the canon law was very strict upon the subject of demolishing or enlarging the old churches and erecting new buildings in their place. By a constitution of Otho, which is only a repetition of the fixed rule of that law, neither abbots nor rectors should presume to pull down ancient churches without the consent of the diocesan, under pretext of increasing the size or beauty. The Bishop was carefully to consider whether he would give or refuse this permission. Othobon added a provision, that the rector of every new church should apply to the Bishop within a year for its consecration, or should be suspended. (*Apud* GIBSON, vol. 1, p. 210, 211.)

The authority to divide parishes and erect new ones is recognized, in several dioceses, to exist in the Convention.<sup>2</sup> It

<sup>1</sup> DEGGE'S *Parson's Counsellors*, part 1, c. 12.

<sup>2</sup> In Virginia, in a canon of 1823, it was recited that, from the great extent of many of the parishes, and from other reasons, it might be expedient to permit the division of some of them,—and it was enacted, that, whenever it should be made to appear to the satisfaction of the Convention that such division is expedient, or when the desire of the people of the parish shall be manifested in the way pointed out, the petitioners may be received as a distinct parish.

In 1839, this canon was amended, by adding a provision that due notice should be given, at least three months previously, to the rector and churchwardens of the original parish, of such proposed division.

In 1848, a revision of the canons took place. The 2d canon, entitled, "Of the Division of Parishes," provides, that whenever the members of the Church, residing in a particular portion of a parish, shall desire to separate from the parish of which they form a part, it shall be lawful for them to assemble, and appoint a committee to take such measures as may be necessary.

The committee must give to the Bishop, and to the vestry of the parish, if there be one, a formal notice of their intention to apply for

is shown, by the authorities cited in several preceding notes, (p. 229,) that, by the general canon law, as well as that of England, this power (being in effect almost identical with

such purpose, which notice shall contain a description of the proposed lines of division, and must be sent to the Bishop and vestry at least three months before the meeting of the Convention at which the application is to be made.

Such application shall be in the form of a petition, setting forth the considerations rendering the division desirable; whereupon the Convention, if they deem it expedient, may proceed to divide such parish.

By the 12th canon, entitled, "Of the Formation of New Congregations," when any number of persons belonging to any parish or congregation, sufficient to build a house of worship and provide for the support of a minister, shall choose to separate from such parish or congregation, they may proceed according to the directions given in the eleventh canon, except that, in such case, the direction as to a line or lines of division is inapplicable. The Convention may, on such petition, constitute the applicants a separate congregation.

The Committee on Canons, in the year 1848, reported "that they found on the Journal of the last Convention the following resolution:

"Resolved, That the Committee on Canons take into consideration the canon or canons relating to the division of parishes or formation of new ones, and to inquire into the expediency of abolishing so much of the canons as requires that the boundaries of parishes shall be defined.

"Your committee suppose that the division of parishes and formation of new ones will be sufficiently provided for by the adoption of the canons presented in the preceding report, (the 11th and 12th canons.) And with regard to parish boundaries, it will be perceived, by a reference to Canon 31 of the General Convention of 1832, that to abolish them entirely is not within the power of the Diocesan Convention. We might do away with those to which we have been accustomed, but this would only bring us within the provisions of the general canon, which ordains that where no boundaries are defined by law or otherwise, the city, borough, village, town, or township limits shall be recognized for the purposes contemplated."

The Vestry Act of Maryland, of 1798, gave full power to the Convention of the Church to divide or unite parishes, as occasion might require, and to alter their bounds, and to constitute new parishes. (§ 33.) And, by the 3d canon of that diocese, (1847,) no part of a parish shall separate itself from the residue thereof as a distinct parish, nor shall any number of the members of a church in a distinct parish associate themselves as a separate congregation therein, with-

that of building new churches) was vested in the Bishop, so far at least as that his consent was necessary; and the provision of the English statute was adverted to, showing that,

out first obtaining leave of the Convention, who shall judge of the necessity or expediency thereof.

By a resolution of the Convention, adopted in 1811, it was determined that no consent would be given to the division of a parish, unless it should appear that the petitioners for the same had set up notices of their intended application, three months previous to the same, at the parish church, if there be one, and also at the other public places within such parish, and shall lay before the Convention correct information of the lines of the parish so to be divided, the situation of the churches or chapels already therein, together with the intended lines of the new parish.

This resolution is now in force, and in 1849 the Committee on New Parishes recommended the rejection of several applications, on account of the neglect to give the prescribed notice; which was assented to.

At the same Convention, an application to form a new congregation within a parish, being assented to by the rector and vestry, was granted. And two new parishes were formed, and defined by metes and bounds, out of existing parishes, the assent of the rector being obtained.

The system in Maryland is thus, in general, canonical in principle and wise in the details. The notice to the rector and vestry is provided for; the consent is sought; but, if refused, there is a power in the Convention to carry out a division, notwithstanding the refusal. It may be allowed to suggest, whether, in omitting to provide for the assent of the Bishop, it is not imperfect.

By the 8th canon of the diocese of Connecticut, it is made the duty of the Convention, from time to time, to examine and determine the limits of the several cures within the diocese; and, in the settlement and maintenance of clergymen, the several parishes shall strictly adhere to such arrangement, except in cases of imperious necessity, and with the advice and consent of the ecclesiastical authority. See the proceedings for the formation of St. James Parish Zoar, in Newtown, Journal 1830, by petition to the Convention. The object was to form a separate parish out of that known as Trinity Parish.

By a canon of the diocese of Alabama, (1849,) when any portion of a parish, in connection with the Convention, shall desire to separate from the parish to which they belong, and to form a new parish, they shall first secure the consent of the parish, adopt articles of association, and apply to the Convention for admission. In case the parish should not consent to the proposed division, the fact shall be made

while the Bishop originates, the Archbishop must approve, and the Queen must ratify. It was also shown that, by the English law, the division cannot be perfected during the incumbency of a minister, without his consent.

But, in this, the English differs from the general canon law. The authorities cited prove that the Bishop could (after duly hearing the rector) divide a parish, and erect a new church, against his consent. And the canonical regulations and resolutions in Virginia and Maryland, before quoted, tend to prove the same thing, but vesting the power ultimately in the Convention.

See further upon this subject, *post*, Tit. 7, Of the Admission of Churches into Union, and also Chap. VI., upon the 31st Canon of 1832.

known to the Convention, which shall then decide upon the expediency of the separation.

By a canon of the Scottish Church, (39 of 1838,) should any number of Episcopalians, living in any town or village in which there is an Episcopal chapel already in existence, entertain a desire to be formed into a congregation in communion with the Church, they are to pursue the method pointed out. A meeting is to be held upon public advertisement, and resolutions expressive of the wish, and the reasons for it, are to be signed by the applicants, and transmitted to the Bishop of the diocese. The Bishop is to consult the presbyters. If he follow the advice of a majority of such presbyters, his decision shall be final; but, if he decide against that advice, an appeal may be made to the College of Bishops. Should the Bishop sanction the application, the congregation may then proceed to elect a minister, and present him to the Bishop, according to Canon 10.

It appears that in the Established Church of Scotland the division of parishes is regulated by the law of the State. (See SIR JOHN CONNELL'S *Law of Scotland as to the Erection, Union, and Disjunction of Parishes*, 1818.) The course (at least at that time) appears to be this: The Presbytery of the bounds perambulated the parish—the heritors represented the case to the General Assembly, which judged of the propriety of the measure; and, if the decision was favorable to it, instructed the Procurator of the Kirk to prosecute the affair according to law.

## TITLE II.

## THE ORGANIZATION OF CHURCHES.

This subject comprises, *first*, the method provided by the legislatures of various states for effecting a legal incorporation, or organization of churches; and *next*, the provisions of conventions for effecting an organization where there are no legislative enactments.

§ 1.  
INCORPORATION UNDER CIVIL LAWS.

It would be a work of much labor, and without a corresponding advantage, to state in detail the statutory regulations prevalent in various dioceses. It will be sufficient to present them as they exist in some of the older, with an occasional comparison with others. Some general principles will be found to prevail throughout.

In New-York, for example, an act was passed in 1784 to enable religious denominations in the state to appoint trustees, who should be a body corporate, for the purpose of taking care of the temporalities of their respective congregations, &c. It is needless to state the provisions of this act, as one was subsequently passed relating especially to the incorporation of churches of Episcopalians. The tenth section may, however, be noticed. It was provided "that nothing therein contained should be construed, adjudged, or taken to abridge or affect the right of conscience or judgment, or in the least to alter or change the religious constitutions or government of the said churches, congregations, or societies, so far as respects, or in any wise concerns the doctrine, discipline, or worship thereof."<sup>1</sup>

<sup>1</sup> There was a statute in force in Connecticut in the year 1807, under which congregations of all denominations might organize. It appears from the address of Bishop Jarvis of that year, that some of the churches had dropped the words, "wardens and vestrymen," and "parish," and substituted "committee," and "society." This practice he condemns, and observes, that as far as the law extends to the Church, the wardens and vestrymen have all the powers of what is termed a Society's Committee. (*Journal*, 1807.)

In the convention of 1840, a committee was appointed to inquire

I shall make the statute of New-York the guide of my remarks upon this head, adverting to the analogous provisions in other dioceses.

The statute at present in force was passed in 1801, revised in 1813, and amended in 1819. Some further clauses were adopted in 1826. The following are the provisions of the existing law, broken into sections for convenience, but the language is given literally.

“It shall be lawful for the male persons of full  
WHO MAY  
UNITE. age belonging to any church, congregation, or religious society, in which divine worship shall be celebrated according to the rites of the Protestant Episcopal Church in this state, and not already incorporated, at any time to meet for the purpose of incorporating themselves, and of selecting churchwardens and vestrymen.” (*Act of March 5, 1819, § 1.*)

By the act of 1813, it was requisite that the persons should have belonged to the congregation for the last twelve months preceding the election and incorporation, and should

into the expediency of applying to the legislature for the passage of some act suited to the organization of the Protestant Episcopal Church in the diocese. In 1841 the committee reported, and a further committee was appointed to prepare and report some suitable legislative measure. At the same convention a report was made and accepted—that as the Seventh Article of the Constitution of the state declares that each and every society or denomination of Christians in the state shall have and enjoy the same and equal powers, rights, and privileges, no special act in behalf of any one religious denomination could be obtained of the legislature, and that it would be better to endure the evils of the present imperfect laws on the subject of religious societies, than to attempt to effect a special alteration in our favor, and fail.”

In 1842, however, a provision was added to the General Statute of the state, declaring that the acts which had been done by ecclesiastical societies in the state, organized under the Episcopal order, should be deemed valid, and that the wardens and vestrymen of such societies, shall have all the powers in managing the affairs of such societies as are granted to the committees of religious societies.



have possessed the qualifications which are required at all subsequent elections. By the amendment of 1819 these were dispensed with at the meeting to organize.

The statute of the state of Wisconsin appears to have been taken nearly verbatim from the act of 1813 of New-York, making these qualifications indispensable at the first, as well as at future elections. (*Journal Wisconsin, 1847, Appendix D.*)

By the 5th section of the act of New Jersey of 1829, the qualifications of electors at the annual elections shall be conformable to the constitution and principles of the Episcopal Church in that state. These are prescribed by Canon 6, declaring, that every person shall be entitled to vote who professes to adhere to the church, and contributes to its support in the mode prescribed in his particular congregation, and shall have been a worshipper in said church six months previous to the election.

And, by the first section of the act referred to, "where any congregation of the Protestant Episcopal Church in the state, duly organized according to the constitution and usages of such Church, desire to form themselves into a body corporate," notice may be given, and proceedings had as directed in that and the succeeding section.

The course in Maryland, if I correctly understand it, is this:—The colonial distribution of the state into parishes has been retained, and recognized (for the purposes of the Episcopal Church) in the act of 1798. Every Episcopalian, therefore, belongs in fact to some parish, when he is attached to any church. A new congregation or church is then formed by a division of a parish, or a separation of a part and its addition to another.

Accordingly, by the 33d section of the Vestry Act of 1798, it is provided, that it should be lawful for the convention of the Protestant Episcopal Church in this state to divide or

unite parishes, as occasion may require, and to alter their bounds, and to constitute new parishes; and vestrymen and church-wardens of such new parishes shall be chosen as hereinbefore provided, and shall have perpetual succession, and be incorporated by the name of the vestry of such new parish, and shall have all the powers granted in the act to other vestrymen and church-wardens; provided, that a majority of the members of the Protestant Episcopal Church, qualified to vote for vestrymen, residing in any parish, or part or parts of a parish or parishes, proposed to be added to any new parish or parishes, or to be constituted into a new parish, shall consent thereto.

The qualifications of voters for vestrymen are declared in the 2d section of the act. Every free white male citizen, a resident of the parish six months previous to the election, who shall have been entered on the books of the parish one month previous as a member of the Protestant Episcopal Church, and shall have contributed to the charges of the parish such sum as a majority of the vestry of the parish shall have declared, not exceeding two dollars annually, is entitled to vote.

The third canon of the diocese has provided, that no part of a parish shall separate itself from the residue thereof, as a distinct parish, nor shall any number of members of the Church in any parish associate themselves as a separate congregation therein, without first obtaining leave of the convention, who shall judge of the necessity and expediency of such separation or association. But no parish or congregation, though constituted with such consent, shall be considered part of the Church in the state without a strict conformity to the use of the Liturgy of the Church, nor without a compliance, in the case of a parish, with the provisions of the Vestry Act of 1798, or, in the case of a congregation, with those of an act "to incorporate certain persons in every Christian

church or congregation in this state," and the supplements thereto.

It will be seen that the canon contemplates two cases—the creation of a separate parish within the precincts of an established one, and the formation of a new church or congregation within a parish. The statute last cited, passed in 1802, by its 10th section, authorized any number of persons, belonging to any church or congregation, sufficient to build a place of worship and maintain a minister, to separate from the church or congregation of which they had formed a part, and to erect a house of worship, and employ a minister of their own; and, by the 12th section, so much of the act for the establishment of vestries for each parish, as was inconsistent with this section, was repealed.

In the convention of 1844, it was held, that these statutes did not impair the power of the convention to prescribe any regulations for the admission of a new church into union with itself. The distinction was taken, and admitted by all, that while the Church could not prevent any body of individual members from associating under this act, it could refuse admission into union to such an association, unless it submitted to the canonical regulations of the Church. Among these is the entire right of the convention to judge of the propriety of the new organization, sanctioned by the Vestry Act, and embodied in the canon before mentioned.

It appears, that when a congregation is organized under the act of 1802, they may select not less than five nor more than thirteen persons, who are constituted a body politic and corporate, to act as trustees, upon being duly registered; and there are various provisions to provide for their succession, and to regulate their powers. All the male persons above twenty-one years of age, belonging to the church or congregation, may vote for these trustees. (§ 2.) Perhaps the third section qualifies this, where Episcopalians elect.

No part of the Vestry Act of 1798 is repealed, except (as before mentioned) that portion which is inconsistent with the 10th section, and a clause authorizing wardens to act as officers of the peace. It is presumed, therefore, that there may be an organization of a new church either under the Vestry Act, or the Act of 1802. Among the documents set forth in the late compilation of the laws affecting the Church in Maryland, is the form of an organization under the Act of 1802, recommended by the convention. Whether a congregation, duly established under the Vestry Act, can substitute an incorporation under the Act of 1802, I am not prepared to say.

The only other state whose enactments I shall advert to is Pennsylvania. By a statute of 1791, and a further act of 1841, any number of persons, who mean to associate for any charitable, literary, or religious purpose, with the powers and immunities of a corporation, may prepare an instrument in writing, specifying the objects, name, &c., intended. This is to be presented to the Court of Common Pleas or Supreme Court. Certain preliminary measures, by advertisement, &c., are to be taken; and if the object and conditions appear to the Court to be lawful, and not injurious to the Commonwealth, the Court directs the instrument to be recorded, and the applicants are admitted to be a corporation. (DUNLOP'S *Ed. Laws*, 132, 824.)

FIRST ELECTION. The first election under the statute of New-York, is not only for the purpose of incorporating the congregation, but "of electing by a majority of voices two churchwardens and eight vestrymen, and to determine on what day of the week, called Easter week, the said offices of church wardens and vestrymen shall cease, and their successors in office be chosen." (*Act 1813, § 1.*)

NOTICE OF FIRST ELECTION. "Notice of the first election shall be given in the time of morning service on two Sundays previous thereto by the rector, or if there be none, by

any other person, belonging to the said church or congregation." (*Ibid.*)

This notice should be explicit as to all the objects of the election; viz: the incorporation of the church, the choice of church-wardens and vestrymen, and the determination of the day in Easter week on which the officers shall cease, and successors be chosen. Although the phrase is, that notice be given "on two Sundays previous," the practical construction is, that it must be on the two Sundays next preceding the day of election.

The statute of Wisconsin is in this particular a transcript of our own. In New-Jersey, notice must be given of the intention to form a body corporate ten days previously, by an advertisement set up in open view at or near the place where the congregation usually assembles for divine worship, designating the day when, and the place where it is designed to meet for the purpose.

I do not find any provision in Maryland for a notice where a new parish is formed, with the sanction of the convention. By an act of 1823, where there is no vestry in a parish, any two or more members of the Episcopal Church in it may call a meeting of the members at the parish church, or if there be none, at any convenient place in the parish, first giving ten days notice of the time and place of such meeting, by advertisement in writing set up at the most public places in such parish, to elect by ballot eight vestrymen.

The notice under the statute of New-York must be given *in the time of morning service*. This may be at any time previous to its close. And this, with the previous clause, tends to prove that there must be a minister officiating in order to render the notice valid.

"The rector, or if there be none, or he be necessarily absent, then one of the churchwardens or vestrymen, or any other person called to the

PRESIDING OFFICER.

chair, shall preside at such first election." (§ 1, *Act 1813, New-York.*)

The provision in New-Jersey is, that the rector or minister, or if there be no rector or minister, or he be necessarily absent, one of the churchwardens or vestrymen, shall preside at the meeting. (§ 2, *Act 1829.*)

In the statute of Maryland, of 1823, before noticed, the members of the church, when convened as directed, shall have power to choose a chairman and secretary, the former to preside at such meeting, and to determine who of the members convened shall be entitled to vote, and the latter to record or take minutes of the proceedings. (*Act 1823, ch. 189, § 1.*)

The right of presiding involves the right of determining upon the qualifications of the voters. Those in New-York are, as has been seen, very simple for the first election, being merely that the persons are of full age, and have belonged to the congregation. The habit of worshipping with it for a period however brief, appears to be sufficient.

ELECTION AND CERTIFICATE. "The election shall be determined by a majority of voices; and the presiding officer, together with two other persons, shall make a certificate, under their hands and seals, of the churchwardens and vestrymen so elected, of the day of Easter week so fixed on for the annual election of their successors, and of the name or title by which such congregation shall be known in law.

"This certificate, being duly acknowledged or proved, by one or more of the subscribing witnesses, before one or more of the Judges of the Supreme Court, or one of the Judges of the Court of Common Pleas, of the county where such church or place of worship of such congregation shall be situated, shall be recorded by the Clerk of such county, in a book to be by him provided for such purpose." (*Act 1813, N. York, § 1.*) (*Note 1.*)

So, in New-Jersey, by the second section of the statute of

1829, the congregation, having met at the time and place appointed, and appointed a secretary, "shall proceed, by a vote of the majority of those present, to designate the corporate name or title by which the church shall be known, which shall be in the manner and form as follows:—'The Rector, Wardens and Vestrymen of ——— Church in ———.' The congregation shall then choose two wardens, and not more than ten nor less than five vestrymen, and shall also fix and determine the day annually on which elections of officers shall take place. A certificate of these proceedings, under the hands and seals of the president and secretary of the meeting, shall be transmitted to the Clerk of the Court of Common Pleas of the county, whose duty it shall be to record the same."

The statute of Maryland, of 1802, after providing, in the 2d section, that the male persons, above the age of twenty-one, of any church or society, may elect not less than five nor more than thirteen persons, constitutes such persons a body politic or corporate, upon being registered as prescribed; and, by the 5th section, the time and manner of future elections of trustees is to be fixed at the first election, as well as the name or style of the corporation. Thereupon, the plan, agreement, or regulation, is to be entered in a book to be kept by the corporation, and the same shall be acknowledged by the trustees before mentioned, and certified by one of the Judges of the General Court; and the same, so acknowledged and certified, shall be filed, by the trustees, with the Clerk of the County Court where the said church or congregation, or the greater part of them, shall reside, within six months thereafter.

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I judge, from an examination of the Journal § 2.  
of Mississippi as late as 1847, that there is no ARTICLES OF  
statute of the State for the incorporation of reli- ASSOCIATION.  
gious societies. The first canon provides for the case in this

manner: "Whenever any number of persons shall associate to form an Episcopal congregation, they shall adopt articles of association for their government, in which they shall acknowledge and accede to the constitution, canons, doctrine, discipline, and worship of the Protestant Episcopal Church in the United States, and the constitution and canons of the Episcopal Church in the diocese of Mississippi; they shall assume a suitable name by which their church or parish shall be designated, and appoint not less than three nor more than eleven vestrymen and two wardens.

A certified copy of the articles of association, and of the proceedings at their adoption, shall be laid before the convention, and if approved by that body, delegates from that congregation or parish may take seats in the convention, and the congregation shall be considered as united to the convention, and subject to its decision.

Every parish so organized shall annually on Easter Monday, or as soon afterwards as may be, elect the same number of vestrymen, who shall, as soon as may be, upon their election, assemble and appoint two wardens, a register, and treasurer.

It shall be the duty of the rector, agreeably to the ancient usage of the Church, to preside in all parish and vestry meetings; but in case of his absence, one of the wardens shall preside."

The form of an organization of a parish is this: "We the subscribers, assembled for the purpose of organizing a parish of the Protestant Episcopal Church in the town of —, county of —, and state of Mississippi, after due notice given, do hereby agree to form a parish, to be known by the name of — church, and as such do hereby acknowledge and accede to the constitution and canons of the Protestant Episcopal Church in the United States of America, and the constitution and canons of the same Church in the diocese of Mississippi, and



we do accordingly now appoint [not less than seven, nor more than eleven persons, naming them,] to be the first vestrymen of the church, and [ten persons, naming them,] to be the first wardens, to continue in office until Easter Monday in the year —, and until others be chosen in their place; and an election of vestrymen shall hereafter be held on Easter Monday of each successive year, or as soon thereafter as may be. Witness our hands," &c.

By the fourth article of the constitution of that diocese, new parishes may be admitted into union with the convention on motion by a majority of votes; provided they shall have laid before the convention written evidence subscribed by the wardens and vestry that they are duly organized, and accede to the constitution and canons of the Church.

The proceedings in Missouri appear also to be by articles of association. I have not found any statute of the state upon the subject. These articles are drawn up much in detail, and contain several important, and some admirable provisions for government.

In two of the dioceses, (Illinois and Wisconsin,) there is an incorporation act of the state, and also a regular form of a parochial organization. In the former there is a statute for the incorporation of religious societies, (*Revised Code*, 120,) and by the third section of Canon 6, the vestry shall be considered trustees of their respective churches in accordance with the provisions of that law. By the fourth Canon, the form of a parochial association is established. Each parish organized according to it is to report the fact to the secretary of the convention, certified by the minister under whose direction the organization took place. And by Canon 5, upon an application for admission into union with the Church, the vestry is to submit the certificate of organization signed by one of the wardens or the clerk of the vestry; and also a certificate of the Bishop, or in case of his absence or of a

vacancy in the Episcopate, of the major part of the Standing Committee, that he or they approve of the organization of such Church. (*Journal*, 1847, p. 13-14.)

In the diocese of Wisconsin, the system of government is very complete. The constitution, after declaring the adherence of the Church in the diocese to the constitution and canons of the General Convention, provides for annual conventions, the members, president, and officers of the same, the mode of acting and determination, the Standing Committee, delegates to the General Convention, for a Special Convention, the election of a Bishop, admission of parishes and further alteration of the constitution. The canons regulate various matters of discipline, particularly the trial of a clergyman; and there is also the constitution of a parish, in which is a clause declaring its recognition of the constitution and canons of the General and of the Diocesan Convention—providing for the uses of church buildings, the authority and duty of the rector and minister in various particulars, of the wardens, and vestrymen, the annual elections, vestry meetings, officers of the vestry, and for alterations. Many of these regulations are noticed in the course of this treatise.

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§ 3. By the Statute of New-York, the persons qualified as mentioned in the act, shall in every year after the first election, on the day in Easter week which has been fixed for that purpose, elect churchwardens and vestrymen.

Whenever a vacancy shall occur before the stated annual election, by death or otherwise, the trustees (*the vestry proper*) shall appoint a time for holding an election to supply such vacancy, of which notice shall be given in the time of divine service, at least ten days previous thereto.

These annual elections must be holden immediately after morning service. The rector, if there be one, is to preside at these elections. If there be none, or he be absent, one of the churchwardens shall preside, receive the votes of the electors, and be the returning officer. The presiding officer must enter the proceedings in the book of minutes of the vestry, and sign his name thereto, and shall offer the same to as many of the electors present as he shall see fit, to be by them also signed and certified.

The statute of 1819, before referred to, dispensed for the first election with the qualifications QUALIFICATION OF VOTERS. prescribed in the act of 1813, but expressly provided, that no person not possessing these qualifications should be permitted to vote at any subsequent election of wardens and vestrymen.

The persons qualified are male persons of full age, who shall have belonged to the congregation or church for the last twelve months preceding the election, and shall have been baptized in the Episcopal Church, or shall have been received therein either by the rite of Confirmation, or by receiving the Holy Communion, or by purchasing or hiring a pew or seat in said church, or by some joint act of the parties and the rector, whereby they shall have attached themselves to the Protestant Episcopal Church.

The qualifications are, therefore, 1st, The being of full age, belonging to the Church for the preceding twelve months, and baptism in the Church. 2d, The same extent of connection with the Church, and if not baptized in it, then a reception therein by confirmation, or communing, or purchasing or hiring a pew or seat, or some other joint act showing that the party has attached himself to the Church.

In Maryland, by the Vestry Act, the elections TIMES OF ELECTIONS. are to be held on every Easter Monday, but if Easter Monday is suffered to pass without an election, then it may be held on any other day appointed for

that purpose at any day after, although it may be in a subsequent year.

Notice of such election must be given by the rector immediately after divine service, on two succeeding Sundays; and if no rector, then by any two vestrymen, or of those persons who last possessed the powers of vestrymen, by writing set up at the door of the church ten days before the day of meeting. The qualifications of voters at any future election are the same as those prescribed for the first.

So in this canon it is provided that in case there should be, from any cause, no election at such annual period, then the officers of such church or congregation shall hold over until the next annual election, or until a special election shall be called by such vestry, or church, or congregation, which may be done by notice to be given as in case of an election to fill vacancies.

By the 15th section of the New-York Statute, no religious corporation shall be deemed to be dissolved for neglecting to hold elections on days before or after any moveable feast observed by such Church, the intervening time between such elections being more than a solar year:

And by the 3d section of the act of February, 1826, it shall be lawful for the members of any church, congregation or society, qualified to vote for trustees, wardens, or vestrymen, or for a majority of them, at any stated annual meeting to appoint and fix any day in the succeeding year as the day on which the choice of officers of such church, congregation, or society shall be held; and the elections held on that day shall be as valid for all purposes, as if the same had been made on the day formerly appointed for that purpose.

By the 4th canon of Missouri, (1847,) the parishioners are to elect a vestry of not less than three, nor more than eleven members. Out of these the rector appoints a senior warden, and the vestry a junior warden.

In New Jersey, by Canon 6, any person of good general character may be eligible to office in any parish, or entitled to vote at an election of officers, who professes to adhere to the Protestant Episcopal Church, and contributes to its support in the mode prescribed in his particular congregation, and who shall have been a worshipper in said church six months next before the election.

The qualifications of voters in Maryland at all subsequent elections are the same as those required at the first. (*See ante*, p. 251.)

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### TITLE III.

#### THE VESTRY AS TRUSTEES—POWER AND OFFICE.

The election being duly had, certified and recorded, the Statute of New-York proceeds to constitute a corporation as follows: "The church-wardens and vestrymen so elected, of themselves, but if there be a rector, then, together with the rector of such church or congregation, shall form a vestry, and be the trustees of such church or congregation, and such trustees and their successors shall thereupon by virtue of this act be a body corporate by the name or title expressed in such certificate." § 1.

CORPORATE  
CHARACTER.

Two points of importance are here to be noticed. *First*, That if there is a rector, he, with the wardens and vestry, constitute the vestry. Each and all must exist to form that body. If there is no rector, then the wardens and vestrymen form it. With this the Statute of New Jersey exactly agrees.<sup>1</sup>

*Next*, These persons, that is, rector, wardens and vestry-

<sup>1</sup> "The rector, wardens, and vestrymen appointed as aforesaid, shall be a body corporate and politic in law and in fact, to have continuance for ever under the same restrictions, and with the same rights and privileges as are expressed in the act to incorporate trustees of religious societies, passed the 12th of June, 1799—provided, nevertheless, that if at any time the church be without a minister or rector, the same rights and privileges shall be vested in the wardens and vestrymen."

The Statute of Wisconsin is the same in this particular as that of New-York.

men in one case, and wardens and vestrymen in the other, are the trustees of the church, and constitute the body corporate.

By the 2d section of the vestry act of Maryland, the eight vestrymen chosen at the election, "with the rector of the parish for the time being, shall be deemed and considered the vestry of the parish for the ensuing year; and the rector of the parish shall always be one of the vestry." In the ninth section they are designated as the trustees of the parish.

The Act of 1785 of Virginia, and the ordinance of the convention, after that act was repealed, contained a similar provision. See also the statute of the 3d of February, 1842.

§ 2.           The statutes which create an incorporation  
GENERAL       either particularly of a vestry in cases of Episco-  
POWERS.       pal churches, or trustees generally, give the usual powers to take and hold real estate, to manage all the property and temporalities of the body, to have succession, and the other powers attendant upon the formation of a corporation aggregate.

Thus by the Act of 1813 of New-York, (§ 4) the trustees of every church or society organized under it are authorized and empowered to take into possession and custody all the temporalities of such church, whether the same consists of real or personal estate, and to hold and enjoy all rights and privileges, debts and demands, and all churches, meeting-houses, parsonages, and burying places, with the appurtenances, and all estates belonging to such church or society, and to demise, lease, or improve the same for the use of such church or society, or other pious uses—also to repair and alter their churches and meeting-houses, and to erect others if necessary; to erect dwelling houses for the use of the minister, and school houses for the use of the church. They have also power to regulate and order the renting the pews, and the perquisites for breaking the ground in the cemeteries or parish

churchyards, and all other matters relating to the temporal concerns of such church or congregation.

By the ninth section of the vestry act of Maryland, the vestry of each parish, for the time being, as trustees of the parish, shall have an estate in fee-simple in all churches and chapels, and in all glebes and other lands, and shall have a good title and estate in all other lands or property heretofore belonging to the Church of England, or which shall hereafter belong to the said Church, now called the Protestant Episcopal Church in Maryland; and it shall be lawful for such vestry so to manage and direct all such property as they may think most advantageous to the interest of the parishioners; and they shall also have the property in all books, plate, and other ornaments belonging to said churches or chapels, or any of them.

The 28th section gives the right of succession, and of holding lands and of leasing and managing them, and to take all money or goods given or bequeathed to them, provided the clear annual value shall not exceed \$2000, exclusive of rents of pews, collections in churches, funeral charges, and the like.

By the 2d section of the act of Wisconsin, any church or corporation incorporated under it, shall have power to purchase and hold, or lease any real estate for the site of a church, or house of public worship, and suitable yards or grounds for the same, and for a parsonage and school house, and to erect all such buildings thereon proper and suitable for such church or house of worship and school house, and to purchase or take by gift or otherwise any real estate or other property, and to sell, dispose of and lease the same. The church is restricted from holding real estate, the annual value of which shall exceed five thousand dollars, except the site of the church, parsonage and school house.

They shall also have power to sell, rent or otherwise dispose of all slips, pews or seats in such church, and to rent,

sell, or otherwise dispose of all the real estate of such church or congregation; to sue for all rents, demands or dues; and generally to manage all the fiscal affairs of the Church.

And in New-Jersey, the act of June 1799, adopted in that of 1829, gives the trustees of a religious incorporation general powers to take and hold land, goods, &c., not exceeding \$2000 in annual value, and to make such rules and ordinances and do every thing needful for the good government and support of the Church.

§ 3.  
ALIENATION. By the common law, the fee of the glebe and lands of the Church, vested in the incumbent, and of course his union in any alienation was indispensable. Justice Story, in *Terry vs. Taylor*,<sup>1</sup> thus states the law: "At a very early period the religious establishment of England was adopted by the colony of Virginia, and of course the common law upon that subject, so far as it was applicable to the circumstances of that colony. The minister of the parish was, during his incumbency, seized of the freehold of the inheritable property as emphatically *persona ecclesiæ*, and capable, as a sole corporation, of transmitting that inheritance to his successors." It was decided in the case, that as there was no statute which invested the fee in the vestry alone, they could not alien without the rector's consent, and a sale could not be made unless he joined in it.

There were, however, at the common law, some restraints upon the general power of alienation. A rector could not convey without the consent of the Bishop and the patron; and the Bishop could not do so without the assent of his chapter.<sup>2</sup>

These restraints proving insufficient, further restrictions were imposed in a series of statutes passed in the reigns of

<sup>1</sup> WHEATON'S *Rep.*, 206.

<sup>2</sup> See the *Constitution of LANGTON* cited 2 BURNS, 208; 1 INS., 144, and 3 COKE, 75. The rules of the canon law were very express and guarded upon this subject. See VAN ESPEN *De Admin et Alienatione*, Tome 1, Tit. 36.



Elizabeth and Edward the Sixth. In substance these limited alienations to leases for a definite period, either of 21 years or for three lives.

In the case of *St. Peter's Church vs. De Ruyter*, (3 BARBOUR'S *Ch. Rep.*, 121,) Chancellor Walworth held—That by the common law corporations aggregate, ecclesiastical as well as lay, had the same right to alienate real estate which they had the capacity to take and hold, and for the same purposes and objects as natural persons.<sup>1</sup>

That the English statutes restraining this right, and limiting the duration of leases, formed part of the law of England at the time of the settlement of the state; under the charter of the Duke of York, and probably formed part of the law of the colony brought by the colonists with them.

That it must have been considered that the law of such restrictions prevailed in the state from the fact, that by a section of the act of 1787, it was made lawful for the chancellor of the state, if he thought proper upon the application of any religious incorporation, to make an order for the sale of any real estate belonging to such corporation, and to direct the application of the monies arising therefrom to such uses as the said corporation, with the consent of the chancellor, should consider to be most for the interest of the society.

I may take the liberty of observing upon this point of the learned chancellor's decision, that the opinion of the profession in New-York has generally been, that this section of the statute was not a mode of liberating these corporations from restrictions, but a mode of restraining what otherwise would be an unlimited power of alienation.

In many of the dioceses the mode of alienation has been made the subject of special provision.

In Maryland, the 29th section of the vestry act provides

<sup>1</sup> KENT'S *Com.*, 281.

that no vestry shall sell, alien or transfer any of the estate or property of the Church without the consent of five at least of their body, of which number the rector shall always be one, together with the consent of both churchwardens, and in case there be no rector, then the consent of the Bishop must be obtained.

By the 8th of the Articles of Association of Missouri, no conveyance of any lands or tenements belonging to a parish or association shall be made without a vote of the vestry, two-thirds being present and concurring.

The act of the legislature of Illinois (*Revised Code*, p. 120) directs that the trustees may sell and dispose of the real estate belonging to the church, except such has been specially devised or given to it for pious purposes.

In New Jersey, the act of the 12th of June, 1799, adopted in that of 1829, gives to the trustees of a religious incorporation power to acquire, receive, have, and hold, any lands and tenements, goods and chattels, not exceeding the annual value of \$2000, and the same, or any part thereof, to sell, assign, dispose of, and alien.

But I apprehend in that state no alienation would be valid without the union of the rector. By the act of 1829, when there is a rector, he, with the wardens and vestrymen, constitute the Board of Trustees, in which Board is vested the power of disposition.

By a provincial statute of Massachusetts, 28 Geo. II., cap. 9, re-enacted in 1786, no alienation of parsonage lands is valid in the case of a minister of an Episcopal church, without the consent of the vestry.<sup>1</sup>

And the regulation in Virginia (Canon 17) is, that the vestries shall hold all glebes, lands, parsonage houses, churches, books, plate, or other property now belonging, or hereafter accruing to the Protestant Episcopal Church of the

<sup>1</sup> 2 Mass. Rep. 500, *Weston vs. Hunt*.

Diocese of Virginia, as trustees for the benefit of the parish or church for whose use the same were, or shall hereafter be purchased, or otherwise obtained, and may improve, demise, or otherwise dispose of the lands or houses allowed for the minister's habitation or use, with the minister's consent; if there be no minister, with the consent of the Bishop, or in case there be no Bishop, and the Episcopal office be vacant, then not without the consent of the Standing Committee. But when there are trustees, under the act of the legislature passed Feb. 3, 1842, authorised to hold real property, such real property shall not be subject to the provisions of this canon.

The right and power of the trustees of a church over the pews has been discussed and judicially determined in several cases, especially in New-York. The conclusions appear to be these :

§ 4.  
RIGHT OVER  
PEWS.

That the right of property in the pews of a church vests in the trustees, the right of use and occupation at all customary times being in the purchaser. The latter may maintain an action on the case for a disturbance of this right. The power of destroying the pew when necessary for carrying out proper reparations of the church is in the trustees; and they may sell the church without the owner of the pew being able to prevent it, and the question of remuneration, or an equivalent right to a pew in a new church, if erected, must be left to subsequent adjustment.<sup>1</sup>

In the case in Vermont, cited in the note, a distinction is taken, that where the house of worship is taken down for convenience or taste, the pew-holder is entitled to compensation; but if taken down as matter of necessity, because it has

<sup>1</sup> Kearny vs. St. Peter's Church, 2 EDW. Rep. 612. In the matter of the Brick Presbyterian Church, 3 EDWARD'S Rep. 156. Bronson vs. Wood, Sup. Ct., N. York, 7 Jud. District, Sept. 1, 1849, *Law Reporter*, Boston. Kellogg vs. Dickinson, 18 *Vermont Rep.* 266. Daniel vs. Wood, 1 *Pich.* 102.

become ruinous, and unfit for the purposes, no compensation is to be made.

In *Bronson vs. Wood*, the trustees of St. Peter's Church, Auburn, had granted and sold a pew by its number to Wood, his heirs and assigns. The court observed, that although its language would import a conveyance in fee simple, such a conveyance would be void, as the trustees had no power to make it; they could only, under the statute, demise, lease, and improve the same—and have power to regulate and order the renting of the pews. The pew-holder acquires a right of possession, so that he can maintain trespass against an intruder; but this right of possession is in subordination to the more general right of the trustees in the soil and freehold.<sup>1</sup>

§ 5. It has been decided in New-York, that where  
 VAULTS. the corporation possesses land for the purposes of a cemetery, the trustees may remove the bodies of the dead, and cannot be prevented upon the application of relatives. (*Winat vs. German Reformed Church, Sand's Ch. Rep.*, 474.)

By an act of the legislature of 1842, no religious incorporation can mortgage any burying ground without the consent in writing of three-fourths of the congregation or society; and the like consent is required upon a sale before any human remains can be removed from any burying ground which has been used as such within three years.

Where, however, the form of the conveyance of a vault was such as to pass a right to the land, and not to confer a mere temporary use and privilege to construct vaults, the property could not be sold without the consent of the vault owners. (In the matter of the Presbyterian Church, 3 EDWARDS, *Rep.* 168.)

By the 3d section of an act passed March 30, 1850, it was enacted that the authority given by the "act concerning

<sup>1</sup> See also *Presbyterian Church vs. Andrews*. ZABRISKIE'S *N. Jersey Rep.*, 330.

the acquisition of burial places by religious corporations in the city of New-York," passed April 11, 1842, to purchase, acquire, and hold land for the purpose of a burial ground or cemetery, and to erect thereon suitable buildings for purposes connected with the burial of the dead, is hereby extended to religious corporations in every part of the state, and such purchases heretofore made or hereafter made in the city of New-York or elsewhere, and the erection of buildings thereon as authorized by the said act, are hereby confirmed and declared valid, notwithstanding any restriction contained or supposed to be contained in the "act to provide for the incorporation of religious societies," passed April 5, 1813, or in any special charter of any such corporation.

The members of the vestry hold their office in § 6.  
New-York until the expiration of the year for <sup>TENURE OF</sup>  
which they shall be chosen, and until others are <sup>OFFICE.</sup>  
chosen in their stead. In New-Jersey, the first eight sections of the act of 1799, are by the act of 1829 made applicable to the Protestant Episcopal Church. By the 4th section, a new election may be had upon the same notice as is prescribed for the first elections, either to fill up vacancies, or for the election of all or any new trustees in place of the others, or of any of them.

The statute of Wisconsin is the same as that of New-York.

The articles of association in Illinois contain a clause that the vestry annually elected shall continue in office until their successors be chosen. That of Missouri is substantially the same.

"No meeting of the board of trustees shall be § 7.  
had unless at least three days notice shall be given <sup>MEETINGS OF</sup>  
in writing under the hand of the rector, or one of <sup>THE VESTRY.</sup>  
the churchwardens."<sup>1</sup>

<sup>1</sup> Act of 1813, § 1.

In Wisconsin, quarterly meetings are to be held on the first Mondays of May, August, November, and February; and special meetings may be called at such time as the minister or any two of the members may desire.

So in Maryland, under the vestry act, regular meetings are held on the same days as in Wisconsin; and by the 24th section of that act, special meetings may be called by the rector when necessary, but if there be no rector, or he be absent, or refuse, or neglect to call a meeting, then any two of the vestry may summon it.

A very important provision is found in the statute of New-York, which I do not trace in any other state or diocese. No board of trustees shall be competent to transact any business unless the rector, if there be one, and at least one of the churchwardens, and a majority of the vestrymen be present.

In Wisconsin, the provision is that "no such board shall be competent to transact any business, unless the rector, or one of the wardens and a majority of the vestrymen be present." (*Act of 1847, § 1.*)

By the vestry act of Maryland, any four vestrymen together with the rector, if he shall attend, if not, any four without him, shall be a sufficient quorum for the transaction of any business whatever, which they are authorized to do by the act, and whatever shall be thus done by a majority of such quorum, or of the members attending, if more than above directed, shall be valid and obligatory as if done by the whole vestry; provided that due notice of all adjourned and special meetings shall be given to all the members of the vestry. (§ 7.)

§ 7. By the 10th section of the act of 1813, every  
DUTY AS TO ACCOUNT. religious incorporation in New-York, Albany and Schenectady, was directed to render an account and inventory of their property, every three years, to the chancellor or one of the justices of the Supreme Court. By

the 1st section of the act of March 30, 1850, no church or religious society now incorporated shall be deemed dissolved, nor shall any of its rights or privileges be impaired or affected by reason of the trustees or other persons entrusted with the management of its temporalities, having omitted to exhibit an account and inventory of the real and personal estate belonging to said church or society, or of the annual income, or revenue arising therefrom, and any forfeiture incurred by reason of any such omission is hereby waived and discharged; and no such account and inventory shall hereafter be required from any incorporated church or religious society, unless the annual income of its property shall exceed six thousand dollars.

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An important provision was adopted in the statute of March, 1850: "Whenever any religious incorporation incorporated under the 'act to provide for the incorporation of religious societies,' passed April 5, 1813, or by any special charter, shall deem it necessary or expedient for the accommodation of its members, in consequence of their numbers or dispersed habitations or otherwise, to increase the facilities for public worship, the vestry or trustees thereof may purchase and hold grounds in the same village, town or city, and may erect thereon suitable associate meeting houses or churches, or convenient chapels, or may hire or purchase and hold any such ground with suitable buildings already erected thereon for the like purpose, notwithstanding any restriction contained or supposed to be contained in the said act, or in any such charter, and the persons stately worshipping in any such associate meeting-house or church, or in such chapel, may, with the consent of the vestry or trustees of said corporation, be separately organized and incorporated."

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## TITLE IV.

## THE RECTOR.

In the present connection, nothing is properly to be considered except the powers and rights of the rector in connection with the temporalities of the church or parish, the use of the building, &c., and the management of its secular affairs. Many of these topics are necessarily discussed under other heads.

§ 1. The right of presiding at a vestry meeting is recognised in the statutes of various states, and in the canons of most of the dioceses. It may be stated as a universal rule.

By the provision of the Statute of New-York, the rector, if there be one, and if not, then the churchwarden present, or if both the churchwardens be present, then the churchwarden who shall be called to the chair by a majority of voices, shall preside at every meeting of a board, and have a casting vote. (§ 1, *Act* 1813.)

In Maryland, the rector shall preside in the vestry, collect the votes, and shall, upon an equal division of those present, have a vote, except where he is in any manner particularly interested.<sup>1</sup> In Ohio, his right to preside is implied in the 2d canon of 1847. In Mississippi, and other dioceses, it is recognized in the canons.

The right of presiding at a meeting of parishioners in vestry assembled is an undoubted rule of the English law, This was the subject of an elaborate decision of Sir John Nichol in *Wilson vs. Mackmatho*. (3 *Phillimore* 67.)

“The minister is *not*, in consideration of law, a mere individual of a vestry; nor is he in any instance so described. On the contrary, he is always described as the first, and as

<sup>1</sup> § 8, *Act* of 1798. The 6th section of the 9th Canon of Virginia is exactly the same. The 1st section of the 3d Article of Wisconsin is as follows: The rector is ex-officio president of the vestry and of the congregation, and has the casting vote in case of a tie, on all questions brought before it.



an integral part of the parish. The form of citing a parish proves this position, namely, 'the *minister*, churchwardens and parishioners,' he being specially named."

"So far, therefore, from being a mere individual, the proper description of a parish in vestry assembled is, "the *minister*, churchwardens and parishioners in vestry assembled." The minister is denominated the *rector parochiæ*, the *præses ecclesiasticus*. The vestry is an ecclesiastical meeting of an ecclesiastical district, namely, a parish—it is held in an ecclesiastical place, in the church or in a room which is part of the church, part of the consecrated building, from which the meeting itself takes its name of *vestry*, as being held in the room where the priest puts on his *vestments*. It meets for an ecclesiastical purpose; for though the sustentation of the poor has become of modern times more of a temporal concern, yet anciently it was a matter immediately of ecclesiastical duty and superintendence.

In these meetings, then, of the parish, assembled in the church for an ecclesiastical purpose, that the *rector parochiæ* should not preside, but be considered as a mere individual would be most strangely incongruous! On sound legal principle, he is the head and *præses* of the meeting.

To pronounce, then, against a right thus founded in usage, and supported by reason, convenience and propriety, would require some very clear and decided authority negating the right, and establishing a different rule." See also Baker vs. Wood, 1 *Curteis* 522, and Rex vs. D'Oyly, 4th Perry & Davison, 58.

While it may be stated as a general rule, that the title and legal estate, with the collection and enjoyment of the rents and profits, is in the vestry acting in most dioceses as trustees under an act of incorporation, it remains to be seen what are the particular

§ 2.  
RIGHT TO THE  
GLEBE, &c.

rights of the rector or minister in the property of the church, or in the church edifice, or the appurtenances.

These may sometimes conflict with the general right and power of the vestry.

In some of the dioceses, there are special regulations upon this subject.

By the 15th section of the vestry act of Maryland, the vestry may choose one or more ministers to officiate, for such time as they shall think proper, and may agree and contract with such minister for his salary, and respecting the use and occupation of the parsonage-house, or any glebe or other land or property belonging to the parish, and on such terms and conditions as they may think reasonable; and their choice and contract shall be entered among their proceedings. By the 10th section, if any rector shall commit waste on any glebe-land, or other land belonging to the vestry of his parish, or if he shall do any injury to the parsonage, or to his parish-library, he shall be liable to pay treble damages, to be recovered of him by the vestry in their corporate name, in the same manner as if he was not one of the vestry.

The second section of the third article of the constitution of a parish in Wisconsin provides, that the churchbuilding shall be open to the minister for public common prayer, catechetical or other religious instruction, for marriages, baptisms, funerals, and all other rites and ceremonies authorized by the Protestant Episcopal Church, at such times as he may deem proper.

It appears to me that a true rule is stated in a decision reported by Dr. Hawks, as having taken place in Virginia in the year 1748. Under an act of 1727, "every minister received into any parish by the vestry" was entitled to his salary. The usual mode of proceeding was for the vestry to receive some clergymen recommended by the commissary and governor.

By direction of the vestry of Lunenburg parish, an individual entered upon the glebe lands contrary to the wishes of the incumbent, the Rev. Mr. Kay. The latter brought an action of trespass against the intruder, and in 1784 the suit came before the general court for judgment upon the single point whether the bare reception of a minister by the vestry under the act of 1727, there having been no formal *induction* in the case, would enable the minister to sustain an action of trespass against one who entered on the glebe lands by order of the vestry. Judgment was finally rendered for Mr. Kay on this point, but it was by a divided court.

The phrase made use of in the statute of New-York, is that the vestry shall have power to *call and induct a rector* to such church or congregation as often as there shall be a vacancy therein. I apprehend that this phrase is used in the sense which it had received in the practice of the colony of New-York. The governor issued a letter of induction after a minister had been called to a church; and the legislature intended to substitute the vestry for the governor.<sup>1</sup>

It cannot be necessary for a compliance with the statute, that the formal proceedings of an induction should be pursued. It is presumed that a delivery of possession, or acquiescence in its being taken, will suffice.

The call then—the actual use of the church for the appointed services—the actual occupation of a parsonage or glebe would, it is presumed, be equivalent, in a civil tribunal, to an induction attended with all its formalities; and whatever rights such an induction would have conferred, will be possessed without it.

Difficulties may attend the solution of various questions connected with this subject. It is thought, however, that some general principles are warranted by the law as it stands, and will furnish a safe guide.

<sup>1</sup> See DR. BERRIAN'S *History of Trinity Church*, p. 69-75, also p 162.

The law of the Church at large, and especially the law of the Church of England, the common law itself, vested the right over the church edifice and its employment, in the rector. The authority of churchwardens was subordinate to his.<sup>1</sup> When the Church avails itself of an act of incorporation, or other statute of the civil power, it is bound to take it in its true extent and meaning, but no further. The title, then, to the church, and all church property, is in the trustees, collectively, for all corporate purposes; but there is another class of purposes purely ecclesiastical, as to which the statute did not mean to interfere or prescribe any rule. These are to be controlled by the law of the Church.

One conclusion seems, for example, deducible from these principles—that the control and possession of the church edifice upon Sundays, and at all times when open for Divine Services, appertains exclusively to the rector. This, it seems to the author, is implied in his call, essential to his office, and must be paramount.

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#### TITLE V.

##### WARDENS AND VESTRYMEN.

Wardens and vestrymen are repeatedly referred to in the canons of the General Convention, and in almost every diocese are constituent parts of the organization of a church. Indeed, in several dioceses, a church cannot be organized for legal purposes, or be admitted to union with a convention, without wardens and vestrymen. Such is the case in New-York, Western New-York, and Wisconsin. The Statute of New-York requires a vestry for the act of incorporation, and the union with the Diocesan Convention depends upon the production of a certificate of such incorporation. So in nu-

<sup>1</sup> Lee vs. Matthews, 3 Haggard, p. 173. 1 Lee's Rep., 129. Hutchins vs. Denziloe, 1 Hagg. C. R., 173.

merous instances the delegates to a convention must be chosen by a vestry, although there are cases in which this does not necessarily imply wardens as well as vestrymen.

Bishop Jarvis of Connecticut, in his address to the convention of 1807, says, that "a practice had been introduced of choosing a committee to supply the place of wardens and vestry; and in the room of *parish*, of substituting the word *society*. I have before observed, that as far as the law extends to us, the wardens and vestry have all the powers of what is termed a Society's Committee. As these are, therefore, the ancient ecclesiastical officers of a parish, to substitute a *committee* in their stead is to needlessly change the principles of the Church, and to adopt those which are independent and congregational." (*Journal Connecticut*, 1807.)

In New Jersey, in the year 1804, Dr. Croes, afterwards Bishop of that diocese, in conjunction with the Rev. Andrew Fowler, made a report upon the duties of churchwardens and vestrymen, which Bishop Doane speaks of as embodying the whole practical wisdom of the subject. In that report, the duties of these officers are minutely set forth, and will be hereafter adverted to. At some period between that year and 1811, a resolution was adopted which was in force in 1827, and I believe now prevails, to the following effect: "That in the opinion of this convention, the regular mode of church government of congregations in the Protestant Episcopal Church is by a body composed of a minister, (styled in this state a rector,) churchwardens, and vestrymen. And this formality of two wardens and a vestry will be expected of all congregations which shall hereafter apply to be admitted in convention.<sup>1</sup>

The duties of churchwardens, and their office § 1. in the Church of England, are thus described by WARDENS. Lord Stowell:<sup>2</sup> "I conceive that their duties were originally

<sup>1</sup> See *Journal of 1827*.

<sup>2</sup> ST. LEE'S *Reports*, 129.

confined to the care of the ecclesiastical property of the parish, and over which they exercise a discretionary power for certain purposes. In all other respects it is an office of observation and complaint, but not of control with respect to divine worship. So it is laid down in Ayliffe, in one of the best dissertations on the duties of churchwardens, and in the canons of 1691. In these it is observed that the churchwardens are appointed to provide the furniture of the church, the bread and wine of the holy Sacrament, the surplice and the books necessary for divine worship, and such as are directed by law; but it is the minister who has the use.)

“If the minister introduces any irregularity into the service, they have no authority to interfere, but may complain to the Ordinary. I do not say there may not be cases in which they would be bound to interpose. In such cases they may repress, and ought to repress, all indecent interruptions of the service, and are the most proper persons to repress them, and they desert their duty if they do not. And if a case could be imagined in which even a preacher himself was guilty of an act grossly offensive, either from natural infirmity or disorderly habits, I will not say that the churchwardens and even private persons might not interpose to preserve the decorum of public worship. But that is a case of overbearing necessity that supersedes all ordinary rules. . . . They have only custody of the church under the minister. If he refuse access to the church on fitting occasions, complaint must be made to higher authority. Churchwardens are the guardians and keepers of the church, and representatives of the body of the parish.”<sup>1</sup>

By the fourth article of the constitution of a parish in

<sup>1</sup> See also *Lee vs. Mathews*, 3 Hagg. Rep. 173. By one of the laws of the Duke of York, 1664, churchwardens were to present to the sessions, at a fixed period, all offences which had come within their knowledge—profaneness, Sabbath breaking, and other sins. (*Collect. N. Y. Hist. Society*, vol. 2, p. 334.)

Wisconsin, it is recommended that the wardens, as advisers of the minister, be communicants. They are to have a care that the church building be kept from all secular or other uses not authorised by the second article, and that it be kept in good repair, as becometh the house of God.

The wardens, according to seniority, are to preside at all meetings of the vestry and of the congregation; and by the fifth section, they are to give notice to the Bishop of any offence of a clergyman.

In the report made to the Convention of New Jersey before mentioned, the duties of wardens and vestrymen are thus stated :

*“ The duties of churchwardens are :*

1. To provide for the churches of which they have the care, a Prayer-book and Bible of suitable size at the expense of the parish.

2. To make the collections which are usual in the parishes.

3. To provide, at the expense of the congregation, a sufficient quantity of fine white bread, and good, wholesome wine, for the celebration of the Lord's Supper.

4. To provide a proper book, at the charge of the parish, in which shall be written by the rector, or in case of vacancy by one of the wardens, the name of every person baptized, married and buried in the church, and the time when such baptism, marriage and burial took place.

5. To present to the Bishop of the diocese, or, if there is no Bishop, to the chairman of the Standing Committee of the Church in the state, every priest and deacon residing in the parish to which they belong, who has voluntarily relinquished his sacerdotal office, and uses such employments as belong to laymen.

6. To take care that the church of which they have the charge be kept in good repair, well glazed, and free from dirt and dust, as becomes the house of God ; that the church-

yard be decently fenced, and to cause that order be preserved during divine service.

7. To diligently see that the parishioners resort to church on Sundays, and there continue the whole time of divine service; and to gently admonish them when they are negligent.

8. To prevent any idle persons continuing in the church-yard or porch during divine service, by causing them either to enter the church or depart—and to prohibit the sale of anything in the yard.

[9. To give an account to the corporation of the church, if it has no treasurer, at the expiration of each year, of the money they have received, and what they have expended in repairs, &c.; and when they go out of office, to give a fair account of all their money transactions relative to the church, and deliver up to their successors the church property in their possession.

*The duties of vestrymen, or trustees, are :*

To transact all the temporal business of their respective churches—to collect the monies stipulated to be paid to the minister; and, at the expiration of any year, if there be a deficiency of the sum requisite, to give information thereof to the congregation, convened for that purpose, and, if necessary, to enforce the payment of the sum deficient; also, in the absence of the wardens, to do the several duties which are more particularly assigned to them.”

§ 2. It will be remembered that in England, except  
 VESTRYMEN. in cases of special custom, there is no regular delegated body known as a vestry. All the parishoners, when convened in a manner prescribed, and for parish purposes, are described as assembled in vestry.<sup>1</sup>

There were, however, excepted cases of select vestries, consisting of a limited number of persons chosen by the ratea-

<sup>1</sup> WOOD'S *Inst.*, 90. 2 PHILLIMORE'S *Rep.*, 373. ADAM'S *Rep.*, 139.



ble parishioners.<sup>1</sup> This was the case in London.<sup>2</sup> In an act of parliament (9 Ann, cap. 22) for erecting new churches near London, a similar system was adopted; and in the late act of 2 and 3 Victoria, it is allowed as to all parishes, and prescribed as to some.

In the colonies, the method of the parishioners acting through a select delegated body, was used at the earliest period. In New-York, for example, by the Duke of York's laws of 1664, it was provided that for the orderly management of all parochial affairs, eight of the most able men of each parish be chosen by the major part of the householders to be overseers, out of which number, the constable and such eight overseers shall yearly make choice of two to be churchwardens.

And in the act of 24 March, 1693, we find that the ministers are to be called to officiate by the vestrymen and churchwardens respectively. In the four counties of New-York, Westchester, Richmond and Queens, the justices were to summon the freeholders to meet for the purpose of choosing ten vestrymen and two churchwardens.

In Maryland, by an act of 1692, the free-holders of each parish were to meet and elect six vestrymen, who were made bodies corporate to receive and hold property, with power to fill all vacancies. (Hawks' *Cont.* vol. 2, p. 71.) In 1779, an act to establish select vestries was passed, which was repealed by the act of November, 1798, next mentioned.

The latter statute is now in force, and is recognized by the convention of the diocese as part of its system of Church government. Its provisions are numerous and greatly in detail; many of which have been before noticed.

<sup>1</sup> GIBSON'S *Codex*, 262. GREY'S *System*, p. 88. 2 STRANGE, 728.

<sup>2</sup> *Statute 15*, Car. 2, c. 5. See also the Braintree Election Case, 4 MOOR'S *Privy Council Rep.*

So in Virginia, vestries were part of the Church organization at a very early date.<sup>1</sup>

§ 3. In Maryland, the vestrymen are to be elected out of the persons qualified to vote. (§ 1, *Act of ELIGIBILITY OF VESTRYMEN.* 1798.)

In New Jersey, by Canon VI, any person being of good moral character may be eligible to office in any parish, or entitled to vote at an election of officers, who professes to adhere to the Protestant Episcopal Church, and contributes to its support in the mode prescribed in his particular congregation, and who shall have been a worshipper in said Church six months next before the election.

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#### TITLE VI.

##### UNION OF A CHURCH WITH THE CONVENTION.

The regulations in the different dioceses upon this subject are very similar. That of Illinois may be taken as an example :

“To entitle a church hereafter to admission into union with the Protestant Episcopal Church in this diocese, it shall be required that the vestry submit to the convention, or to a committee appointed by it, the certificate of organization, signed by one of the wardens, or the clerk of the vestry.

“Every organized church, applying for admission into union with the convention of this diocese, shall also produce to the convention a certificate of the Bishop, or in case of his absence, or of a vacancy in the Episcopate, of the major part of the Standing Committee, that he or they approve of the organization of such church.”

The article in Missouri is nearly the same; requiring, however, that notice should have been given to the Bishop or

<sup>1</sup> See for example the form of a letter of induction about 1642, in *DR. HAWKS Cont.*, vol. 1, p. 54.

Standing Committee, of the organization having taken place, three months previous to the convention.

The 12th article of the constitution of South Carolina directs, that "whenever a church or congregation, not now entitled to a representation, shall be desirous of uniting with the convention of the Church in this diocese, they shall apply by letter to the Bishop, or when there is no Bishop, or he be absent, to the Standing Committee, stating the due organization of the church, the election of vestrymen and churchwardens, their means or prospects for the support of a minister, and their willingness to conform to the constitution and canons of the General Convention, and the constitution and canons of the convention of this diocese, which are now, or may hereafter be enacted by authority of the same. And, at the convention next succeeding the receipt of such application, the Bishop or Standing Committee shall communicate the same to the convention for their decision therein. Should the convention make a favorable decision, the church shall then be considered as in union."

It was before shown, that the legislature, ever since the Revolution, exercised the power of dividing and annexing parishes, or parts of them. I am not aware of any ecclesiastical regulation in that diocese, which bears upon this subject, except this canon.

By the 15th canon of the diocese of Pennsylvania, the articles of organization, or the charter, if any, are to be submitted to the Bishop and Standing Committee, prior to an application for admission into union. The approval by both, of the articles or charter, is necessary. If he or they disapprove them, their reasons are to be stated to the convention. The whole matter and the documents are referred to a committee, who are to report thereon to the convention, for its final determination.

The canon of Ohio directs a notice to be given to the

Bishop, at least one month before the convention, of the organization having taken place, but does not require that the approval of the Bishop should accompany the application for admission.

In several dioceses, also, even such a notice is not required. Thus, in Mississippi, a certified copy of the articles of association, and of the proceedings at their adoption, shall be laid before the convention, and, if approved by that body, delegates from that congregation or parish may take seats, and the congregation shall be considered as united to the convention. The provisions in Louisiana and Massachusetts are similar.

By Canon 4 of Western New-York, "To entitle a church to admission into union with the Protestant Episcopal Church in this diocese, it is required that there be submitted to the convention of the same, at a stated meeting :

"1. A certificate from the Bishop, or in case of his absence, or of a vacancy in the Episcopate, of a major part of the Standing Committee, that he or they did, on notice thereof previously given, approve of the incorporation of such church.

"2. The certificate of incorporation, duly proven and recorded, or a copy thereof, certified by the clerk of the county."

The 4th canon of the diocese of New-York is as follows :

"§ 1. To entitle a church to admission into union with the Church in this diocese, it shall be required that the vestry submit to the convention, or to a committee appointed by its authority, the certificate of incorporation, duly recorded, or a copy thereof, certified by the clerk of the county.

"§ 2. Every incorporated church, applying for admission into union with the convention of this diocese, shall also produce to the convention a certificate of the Bishop, or in case of his absence, or of a vacancy in the Episcopate, of the major part of the Standing Committee, that he or they approve of the incorporation of such church."

Prior to the year 1825 there was no such provision in New-York. The course was pursued of a direct application to the convention for admission. Thus in 1796, several churches were admitted upon petition of the churchwardens and vestrymen.

In 1793, a memorial was presented by the trustees of a society composed of former members of Trinity Church, but since separated, stating that they had erected a house of public worship, and praying to be admitted into union.<sup>1</sup>

The vestry of Trinity Church had remonstrated against this admission. In 1794 the application was renewed and again rejected. In 1801, upon the renewed memorial of the corporation of Christ Church, it was resolved that the convention could not with propriety act upon it, while the Church was destitute of a Bishop. And in 1802, it was further resolved, that when the Bishop shall express to this convention that he is satisfied with the acknowledgments made to him by the rector and congregation of Christ Church, that they be received into communion with the Church. At a subsequent day, the Bishop declared his satisfaction, and the rector and delegates were admitted.

In 1825, a canon was passed as follows: "Whereas the due, regular, and discreet admission of churches into union with this convention is of importance to the peace and welfare of the Church in general, it is hereby ordained, that from and after the final adjournment of the present convention, it shall be and it is hereby made requisite for every body corporate applying for admission into such union, to produce to the convention a certificate of the Bishop, or in his absence, or if the Episcopacy is vacant, of the Standing Committee, that he or they have approved of the said incorporation."

Since 1825, the course of proceeding has been for the convention to appoint a committee on the incorporation of

<sup>1</sup> *Journal of Convention, 1793, p. 68.*—ONDERDONK'S ED.

churches, which examines the certificate of the record and the approval of the Bishop. In general, if they are found correct, the report for admission is made. The circumstances of any special case would be specially reported upon.

It was before noticed that in Maryland it had been formally determined that the act of incorporating under their statute gave no right of itself to an admission into union.<sup>1</sup> A similar decision was made by the Standing Committee of New-York, in the year 1850, in the case of Christ Church, New Brighton. I add the judicious remarks of the committee on canons, of the diocese of Wisconsin upon this subject. "The organization of a parish is strictly and solely an ecclesiastical procedure, constituting the parish a component part of the Protestant Episcopal Church, and as such only entitling it to ecclesiastical rights and privileges; that is, to the rights and privileges granted by the General and Diocesan Constitution and Canons. The ecclesiastical organization gives no civil or corporate powers to the parish. And further organization simply, though it admits a parish into *union with the Church*, does not admit it into union with the convention.

The constitution of Wisconsin directs that the organization as a parish should have lasted twelve months, then that the church be incorporated, and then it *may*, by a majority of votes, be admitted into union."

Thus the important distinction between an ecclesiastical organization and a civil incorporation is clearly observed; and as on the one side it is plain that the ecclesiastical organization confers no corporate powers, so on the other it is manifest that the civil incorporation cannot control any canonical or diocesan relation. In truth, to hold that it can do so, is to revive the supremacy of the state over the Church.

The extent of the authority of the Bishop in approving or disapproving an act of incorporation, under the provisions in

<sup>1</sup> *Ante* page ? 241.

New-York, Western New-York and Pennsylvania, is adverted to under the head of the canon relating to the officiating of ministers in the cures of others. *See post, Chapter 5.*

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## TITLE VII.

## UNION OF A CONGREGATION WITH ONE IN ANOTHER DIOCESE.

By the 43d canon of 1832 it is provided as follows:—

“Whereas a question may arise whether a congregation within the diocese of any Bishop, or within any diocese in which there is not yet any Bishop settled, may unite themselves with the Church in any other diocese, it is hereby determined and declared, that all such unions shall be declared irregular and void; and that every congregation of this Church shall be considered as belonging to the body of the Church of the diocese within the limits of which they dwell, or within which there is seated a church to which they belong. And no clergyman, having a parish or cure in more than one diocese, shall have a seat in the convention of any other diocese than that in which he resides.

The first canon on this subject was the 8th of 1795. The only difference between that and the present canon was in the use of the word “state” as well as “diocese” in certain parts.

[The 37th of 1808 was in precisely the same words as that of 1795.

The first canon of 1817 was temporary in its character. It permitted the Episcopal congregations in Virginia and Pennsylvania, westward of the Alleghany mountains, to place themselves under the provisionary superintendence of any Bishop who might be consecrated for any state or states westward of such mountains.

In 1820 this canon was repealed.

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The principle and rule of the Church, by which a Bishop was restricted to his own diocese and had almost exclusive authority therein, was adopted with a view both to his efficiency and responsibility. It naturally follows from this principle, that the duty of all congregations within his limits is co-relative. The destruction of all unity would ensue, if particular congregations in a diocese could select any neighboring Bishop to minister to them, whose services they most favored. The canon has gone further, and wisely provided against such an union, even where there is no Bishop. The present convenience might be considerable, but the future evils would be as great as in the other instance.

Dr. Hawks states that the origin of the Canon of 1795 was the union which took place of a church in Narragansett, Rhode Island, with the diocese of Massachusetts. A convention of clergy and delegates, of various churches in Rhode Island, had declared that Bishop Seabury should be the Bishop of the Church in that state. The Standing Committee of Massachusetts applied to Bishop Provoost, of New-York, who ordained a clergyman for the Narragansett church. A committee of the convention of Rhode Island reported that "this proceeding of the authority in Massachusetts was inconsistent with every principle of Episcopal government, and had an evident tendency to induce disorder and promote schism." (*Constitution and Canons*, p. 130.)



## CHAPTER IV.

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### TITLE I.

#### ELECTION AND INSTITUTION OF MINISTERS.

[CANON XXX., *General Convention, 1832.*]

§ 1. It is hereby required, that, on the election of a minister into any church or parish, the vestry shall deliver or cause to be delivered to the Bishop, or, where there is no Bishop, to the Standing Committee of the diocese, notice of the same, in the following form or to the following effect :

“ We, the churchwardens, [or, in case of an assistant minister, We, the rector and churchwardens,] do certify to the Right Rev. [naming the Bishop] that [naming the person] has been duly chosen rector [or assistant minister, as the case may be,] of [naming the church or churches].” Which certificate shall be signed with the names of those who certify.

§ 2. And if the Bishop or the Standing Committee be satisfied that the person so chosen is a qualified minister of this Church, the Bishop, or the President of the Standing Committee shall transmit the said certificate to the secretary of the convention, who shall record it in a book to be kept by him for that purpose.

§ 3. But if the Bishop or the Standing Committee be not satisfied as above, he or they shall, at the instance of the parties, proceed to inquire into the sufficiency of the person so chosen, according to such rules as may be made in the

respective dioceses, and shall confirm or reject the appointment, as the issue of that inquiry may be.

§ 4. And if the minister be a Presbyter, the Bishop or president of the Standing Committee, may, at the instance of the vestry, proceed to have him instituted according to the office established by this Church, if that office be used in the diocese. But if he be a deacon, the act of institution shall not take place until after he shall have received priest's orders. This provision concerning the use of the office of institution is not to be considered as applying to any congregation destitute of a house of worship."

The former canons on this subject were the 17th of 1789, the first of 1804, the 29th of 1808, and the second of 1814. It will only be important to point out the material variations. That of 1789 was the same as the three first sections of the present canon, the phrase *induction* being used for *election* in the first section. In that of 1804, a clause was added—"that if the minister elect be a presbyter, the Bishop or president of the Standing Committee shall proceed to have him inducted according to the office established by the Church. But if he be a deacon, the act of induction shall not take place till after he shall have received priest's orders, when it shall be the duty of the Bishop or president to have it performed." And there was also the following clause: "No minister who may hereafter be elected into any parish or Church shall be considered as a regularly admitted and settled parochial minister in any diocese or state, or shall as such have any vote in the choice of a Bishop, until he shall have been inducted according to the office prescribed by this Church."

In 1808, the canon of 1804 was re-enacted with the following changes: The word "induction" was altered to "institution," and it was newly provided: "This canon shall not be obligatory on the Church in those dioceses or states, with whose usages, laws, or charters it interferes. Nor shall any

thing in this canon, or in any other canon, or in any service of the Church relative to the office of associated rector, apply to the Church in those states or dioceses where this office is not recognized by the constitution, laws, or canons thereof."

"But it is to be understood that this Church designs not to express any approbation of any laws or usages which make the station of a minister dependent on any thing else than his soundness in the faith, or worthy conduct. On the contrary, the Church trusts that every regulation in contrariety to this, will in due time be reconsidered; and that there will be removed all hindrances to such reasonable discipline as appears to have belonged to the Churches of the most acknowledged orthodox and respectability."

In 1814, this 29th Canon of 1808, was repealed so far as it required the institution of an assistant minister, in order to make him a settled minister, and entitled to vote for a Bishop, and so far as it excluded a deacon from a seat and vote in any convention when he is not excluded by the constitution and canons of the Church in the diocese. And the provision as to the use of the office of institution was not to apply to any congregation destitute of a house of worship.

The certificate or notice is the substitute of the presentation of the English law: "The word presenta-  
§ 1.  
THE CERTIFICATE OR NOTICE OF ELECTION.  
 tion is a known term of the law, and when spoken of a benefice with cure imports the patron's presenting his clerk to the ordinary to be admitted and instituted."<sup>1</sup>

It is a right of a purely temporal nature, and if the patron die during the vacancy, the right devolves upon his personal representative.

The consequences of neglecting to transmit this certificate are pointed out in canons of several diocesan conventions. For example, in New-York, by the canon as amended and pass-

<sup>1</sup> *Short vs. Carr.* 2 Bro. P. Ca: 173. <sup>2</sup> *Reynolds vs. the B: ho,* of Lincoln, 8 BINGHAM'S Rep. 550.

ed in 1848, it is provided that the secretary shall record in a book as therein specified all certificates transmitted to him in accordance with the second section of canon 30 of the General Convention of 1832. In case of a contested right to a seat in the convention, the evidence of settlement shall consist in such record, or in the production of the certificate. So by canon first of the diocese of Maryland, (1847,) the clergyman, to entitle himself to a seat in convention, must transmit to the Bishop a certificate of the wardens and vestry of his election. And by the second canon of the diocese of Western New-York, evidence of a settlement in the Church shall consist in proof of a compliance with the 1st, 2d and 3d sections of the 30th canon of 1832.

§ 2. It will be noticed that the Bishop, if not satisfied of the sufficiency of the person, may, at the instance of the parties proceed to inquire whether the chosen person is a qualified minister of the Church. That this does not mean that he is merely to ascertain whether the party has been ordained, appears plain from the subsequent section, as well as from other considerations. Under that section, the term *qualified* must receive a more comprehensive meaning. Its provisions are superfluous if nothing is to be passed upon but the fact of ordination.<sup>1</sup>

The Bishop or Standing Committee is then to be satisfied of the general fitness of the party elected; and it may be suggested that the test should be the continuance and present possession of those qualities which originally entitled him to ordination. Thus a double-guard would be afforded, first against the intrusion of an unfit person into the Church at all; and next an intrusion into a parish brought into connection with the Church organization.

“The general rule,” says Bishop Stillingfleet, “is, and it

<sup>1</sup> See an Article in the *True Catholic*, vol. 5, p. 248. Also DR. HAWKS' *Constitution and Canons*, p. 269.

was so resolved by the judges, that all such as are sufficient causes of deprivation of an incumbent are sufficient causes to refuse a presentee. But by the canon law more are allowed—*Multa impediunt promonendum quæ non dejiciunt.*" In the constitutions of Othobon, the Bishop is required to inquire particularly into the life and conversation of him that is presented.<sup>1</sup>

If, therefore, upon the information already possessed, or acquired by an informal inquiry, the Bishop is not satisfied, the parties may require an inquiry, and the appointment is to be confirmed or neglected according to the result. If the minister is found unqualified, the church cannot be admitted into union with him as its rector, nor can he be treated as canonically settled.

The power which thus resides in the Bishop, and which this canon recognizes, is amply supported and illustrated by English authority. Indeed, there is no point more clearly settled, and as to which the interference of the civil tribunals is more restricted.<sup>2</sup>

But if the power is thus clearly established, the next question is, what is its extent, and what remedy is there for its abuse?

<sup>1</sup> STILLINGFLEET'S *Eccl. cases* cited 1 BURN'S *Eccl. Law*, p. 157. Ed. 1842.

<sup>2</sup> As long ago as the time of Edward the Second, (*articuli cleri*), it was answered by the king—"Of the ability of a parson presented unto a benefice of the Church, the examination belongeth to a spiritual judge. So it hath been used heretofore, and shall be hereafter."

Lord Coke thus comments upon this passage: "*De Idoneitate personæ*. This idoneitas consisteth in divers exceptions against parsons presented. 1st, Concerning the person, as if he be under age or a layman; 2d, concerning his conversation, as if he be criminous; 3d, concerning his inability to discharge his pastoral duty, as if unlearned, and not able to feed his flock with spiritual food. And the examination of the ability and sufficiency of the person belongeth to the Bishop, who is the ecclesiastical judge; and in this examination he is a judge, and

In England, it is laid down by the highest authorities that the Ordinary is not accountable to any temporal court for the measures he takes, or the rules by which he proceeds in examining and judging; only he must examine in convenient time, and refuse in convenient time. Again, it is held that the clerks having been ordained, does not take away or diminish the right which the statute (*articuli cleri*) doth give to the Bishop to examine and judge.<sup>1</sup>

The remedy in the rare cases in which the temporal courts can interfere is by the writ of *mandamus*. There was also a mode of redress in the ecclesiastical tribunals, by a writ of *Duplex Quærsela*. This was a monition to the Bishop, and at the instance of the clerk, that within a certain time he admit the party complaining, and also a citation to show cause why, by reason of his neglect, the right has not devolved upon the superior judge.<sup>2</sup>

not a minister. This act is a declaration of the common law and custom of the realm." (2 *Inst.*, 631.)

"The inquiry," says Lynwood, "is, whether the party be *comendandus scientia et moribus*." (GIBSON'S *Codex*, 806.)

By canon 39 of the canons of 1603, "no Bishop shall institute any to a benefice who has been ordained by any other Bishop, except he first show unto him his letters of orders, and bring him a sufficient testimony of his former good life and behavior, if the Bishop require it; and lastly, shall appear upon due examination to be worthy of the ministry."

<sup>1</sup> GIBSON'S *Codex*, 807. SHOWER'S *Parl. Cases*, 88. *Hele vs. the Bishop of Exeter*, 4 *Modern.*, 134. In the leading case of the King vs. the Archbishop of Canterbury and others, (15 EAST, 117,) the following points were determined: That the writ of *mandamus* will lie at the instance of the patron, so as to compel the Bishop to return the reasons of his refusal to admit a person presented; that in his return he should specially state the grounds of his refusal—that as it is his duty to examine, an examination in some proper mode should be instituted, and would be compelled; but that with these qualifications, his right to proceed and his decision could not be inquired into.

<sup>2</sup> 1 BURNS' *Eccl. Law*, Ed. *Phillimore*, p. 159.

As our canon enjoins that if the Bishop is satisfied, he is to send the certificate to the secretary of the convention, this act of transmission is equivalent to an admission. If, therefore, he neglect to transmit this certificate without good cause, it would be a violation of this part of the canon, and presentable under the third canon of 1844; and whether he had good cause would then be investigated. So if he refused to direct an inquiry when asked for by a party, the like relief could be had. This at any rate would be one method in which the decision might be investigated.

The canon directs that the Bishop or Standing Committee is to inquire according to such rules as <sup>§ 4.</sup> <sup>THE METHOD</sup> <sup>OF INQUIRY.</sup> may be made in the respective dioceses.

I do not find that any regulation has been made for the conduct of such an inquiry in any of the dioceses, whose canons I have had the opportunity of examining.

It is however submitted, that until such rules are prescribed, the power of the Bishop *virtute officii*, is amply sufficient. The whole body of the canonical law is to this effect, and the civil courts in England have recognized the authority. They have recognized it as older than the declarative statute passed in the time of Edward the II. In fact when the canon confers the power, and enjoins the duty of judging, it would of itself (if that argument was necessary) involve the authority to direct a mode of investigation.

In the case before cited from 15 East Rep. 117, the right of the Bishop in a somewhat similar case was much discussed. The 19th section of the act of uniformity was in question, that no one should be permitted to lecture or preach unless he be *approved* of and *licensed by the Bishop*. Lord Ellenborough said that the Bishop was to adopt the requisite means of informing his conscience in order to the correct exercise of this duty. He adverts to the statute *articuli cleri*, and notices that the phrase there used is "*examination*,"

which taken strictly may be understood to mean a personal examination. But no contemporary or subsequent practice had put this interpretation upon the act in question in the cause.

“The word of the statute is ‘approve,’ and the Bishop must exercise that approbation according to his conscience, upon such means of information as he can obtain; and every thing that can properly minister to his conscientious approbation or disapprobation, and fairly and reasonably induce his conclusion, though it might not be evidence in a court of law, may be fitly taken into his consideration.”

If the inquiry is as to qualifications in learning and theology, the course upon admitting a candidate to orders would seem a proper one. If it refer to moral disqualifications, an investigation by a commission of inquiry, or other reasonable mode, is within the power of the Bishop.

The history of the canonical regulations of the  
 § 5. Church upon this subject is before given. (*Ante*  
 INSTITUTION  
 OR INDUCTION. pp. 120–126.)

Dr. Hawks has made this branch of the canon the subject of a long and able note. He has entered fully into the nature of these offices in England. I will add some authorities in order to explain my views. Burns says, that the whole matter of admission, institution and induction, is well explained in the following passage of Sir Simon Degge’s Parson’s Counsellor. “If the Ordinary, &c., upon the examination of the clerk, find him fit in all points, then he admits him in these words: *Admitto te habilem, &c.*, and thereupon the Ordinary institutes him in these words: *Instituo te rectorem ecclesiæ parochialis de C., et habere curam animarum, et accipe curam tuam et meam.* When the Bishop hath instituted the clerk, the ordinary maketh a mandate under seal to the arch-deacon of the place, or to such other clergyman as he pleases, to induct the clerk; and it may be made by the dean and chapter, but not by the



patron : for though by the institution the Church is full against all persons except the King, yet he is not complete parson till induction ; for by the institution he is admitted *ad officium*, to pray and preach, yet he is not entitled *ad beneficium* until he be formally inducted ; which may be done by delivery of the ring of the church door, or latch of the church gate, or by delivery of a clod or turf and twig of the glebe ; but the most common and usual mode is, and therefore the safest, by delivery of the bell rope to the newly instituted clerk, and the tolling of the bell.”<sup>1</sup>

In order fully to understand the subject, we must look into another part of the English law, viz. that relating to donations. Justice Blackstone (*Commentaries*, vol. 2, p. 23.) says—“ An advowson donative is when the King, or any subject by his license, doth found a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron, and vested absolutely in the clerk without presentation, institution, or induction. This is said to have been anciently the only way of conferring ecclesiastical benefices in England, the method of institution by the Bishop not being established more early than the time of Archbishop Becket in the reign of William II. Others contend that the claim of the Bishop to institute is as old as the first planting of Christianity in this island, and in proof of it they allege a letter from the English nobility to the Pope in the reign of Henry III., recorded by Mathew Paris, which speaks of presenting to the Bishop as a thing immemorial. The truth seems to be that if a benefice was to be conferred on a mere layman, he was first presented to the Bishop to receive ordination, who was at liberty to examine and refuse him ; but when the clerk was already in orders, the living was usually vested in him by the sole donation of the patron till about the middle of the 12th century, when the Pope and his Bishops endeavored to introduce a kind of

<sup>1</sup> *Eccl. Law*, vol. 1, p. 167.

feudal power over ecclesiastical benefices, and in consequence of that began to claim and exercise the right of institution universally as a species of spiritual investiture.”<sup>1</sup>

Watson says:—“Donative was the ancient way of conferring benefices, and the institution to churches was not ordained by any temporal law, there being only a papal provision, and was not received in some places here in England; and where it was not received, they still went on in their old way and method of conferring benefices, which afterwards were called Donatives.”<sup>2</sup>

But to this view of the matter may be opposed the high, perhaps as high authority as is known in the English canon law—that of Bishop Stillingfleet. He says:<sup>3</sup>—“The name of Patron in the sense of the feudal law is the same with Lord of the Fee, and so *beneficium* is a feudal term; and, till the feudal law prevailed, the name of Patron is rarely used in this sense. And when it came to be used, the Patrons in France would have brought those who had their benefices to a kind of feudal service, and to have received investiture from them. This Mr. Selden drives at, as though the Patrons had the right of investiture belonging to them, because some such practice is often complained of in the French canons, and as often condemned, not merely by ecclesiastical canons, but by as good laws as any were then made. It cannot be denied

<sup>1</sup> So FITZHERBERT *Natura a Brev. fol. 35.* A donation is a benefice merely given and granted by the patron to a man, without either presentation to the ordinary, or institution by the ordinary, or induction by his commandment.

<sup>2</sup> *Clergyman's Law*, cap. 15, p. 170, cited in *The Queen vs. Toley, Rep. Common Bench*, 1846, vol. 1, p. 664. In this case the learning on the subject is extensively gone into, although the decision itself is of little general importance. The case depended on the construction of a particular deed.

See the form of a donative in CUNNINGHAM'S *Law Dictionary*, vol. 1, tit. *Donative*.

<sup>3</sup> *Of the Duties, &c., of the Parochial Clergy*, 162.

that bad practices are the occasion of making good laws; but doth it follow that those practices which were against law, were the law of that time? Yet this is Mr. Selden's way of arguing. He grants that *there were laws made, but they were little obeyed*. Must we, therefore, conclude these illegal practices to have been the standing law, and the laws themselves to be illegal? There were two things aimed at by these Patrons. 1st. To keep the clergy in a sole dependence on themselves, without regard to the Bishop's authority. 2d. To make such bargains with them as they thought fit. Both these were thought necessary to be redressed by laws, since the canons were slighted by them."

He proceeds to cite numerous laws and canons. Among them, the 123d and 57th Novell of Justinian, in the fifth century, which contain the very law of our Church, in substance, at this day. It was decreed, that if any man should erect an oratory, and desire to present a clerk thereunto by himself or his heirs, if they furnish a competence for his livelihood, and nominate to the Bishop such as are worthy, they may be ordained. And the Bishop was to examine them and judge of their qualifications, and when these were sufficient, he was obliged to admit the clerk.

Again, the Bishop, in his *Treatise concerning Bonds of Resignation*, has entered into a refutation of Mr. Selden's views of the matter, and, it appears to me, with great success. See particularly page 335. It is also certain that, in the opinions of modern English jurists, these donatives, where they now exist, are treated as having arisen from the Bishop's consent, or the grant of the Crown; and, as they are hostile to all just notions of Episcopal power, they are narrowly restricted; so much so, that if the holder of a donative do once present to the Ordinary and suffer institution, its character of a donative is lost, and it becomes presentative.<sup>1</sup>

<sup>1</sup> See the case of *The Queen vs. Toley*, before cited, and Bishop Gibson's note at page 865. (2 *Croke* 63, *Styles' Rep.* 172.)

In our colonial history, the general system which prevailed was a right of presentation by the vestry or the parish, and of induction by the governor.

Thus, in Virginia, by the statute of 1642, the induction of a clergyman, into any parish which should make presentation of him, was to be performed by the governor; but it was at the option of the parish to make or withhold the presentation.<sup>1</sup> Dr. Hawks states that this right was, he believes, continued to be exercised up to the period of the Revolution. The form of induction was:—"A. B., His Majesty's Lieutenant and Governor-General, &c., To the Vestry of \_\_\_\_\_ Parish, in \_\_\_\_\_: In virtue of the presentation which you have made to me of \_\_\_\_\_ to be your minister, I do induct him into the real and corporal possession of the parish of \_\_\_\_\_ in \_\_\_\_\_, with all the rights, profits, and appurtenances thereof."

In 1793 a canon was adopted, and re-enacted in 1799, entitled "Of the Induction of Ministers into Parishes," which prescribed that the right of presentation, or appointing ministers, should continue in the vestries, and no person should be received into any parish within the commonwealth, as a minister, until he should have entered into a contract in writing with the vestry or trustees, on behalf of the society within such parish, by which it shall be stipulated and declared, that he holds the appointment subject to removal agreeably to the rules and canons of the convention of the Protestant Episcopal Church of the state. (HAWKS, vol. 1, *App.*, 63, 76.)

In Maryland, under the proprietary government, a different course was taken. The lord proprietor appointed a clergyman to a living, the Bishop of London gave him a license, and the governor inducted him. In consequence of this, Lord Baltimore insisted that all the livings in Maryland were donatives.<sup>2</sup>

<sup>1</sup> HAWKS' *Con.*, vol. 1, p. 53, 88.

<sup>2</sup> HAWKS' *Contr.*, vol. 2, p. 190. *Ibid.*, 239, 357.

In New-York, by the 6th section of the act of 1693, the ministers were to be called to officiate in their respective precincts by the respective vestrymen and churchwardens. They were presented to, and inducted by the governor.<sup>1</sup> In Dr. Berrian's History of Trinity Church the forms are stated in full of the presentation of Rev. Mr. Barclay to the governor, the Act of Admission, the Letter of Institution, and the Mandate of Induction. These precedents completely display the law in New-York, and probably in most of the other Episcopal colonies. The presentation requests the governor to admit, institute, and induct the clerk, and the acts of admission, institution and induction, are all separate instruments.

Dr. Hawks, in his able note upon the canon, has been led to the conclusion that the change in the title of the Church office from induction to institution, was not designed to change its object and operation; that it still remains the method through which the right to the temporalities, and especially the control of the church edifice, is to be obtained; and he presses the importance of the office being observed with a view to this point.

I cannot think, however, that in the diocese of New-York, (and the reasoning will apply to other dioceses,) this conclusion is entirely accurate. I apprehend that the call itself, (which should always be in writing,) with the occupation of the church and performance of the duties in it, would entitle the clergyman to every right and authority which he would possess by usage, or civil or canonical law, had the office of induction been used, or the word induct employed in the written call. What is the extent of the right of possession and other rights has been before partially noticed. (*Ante* p. 265.)

In a case in 1845, the Standing Committee of New-York adopted the following report and resolution: "Application having been made, &c., and it appearing that under the

<sup>1</sup> See DR. BERRIAN'S *History of Trinity Church*, 42.

29th canon of the General Convention of 1808, and a resolution of the convention of the diocese of New-York, passed October, 1820, letters of institution are not necessary in this diocese for the enjoyment of any privilege or the exercise of any right, by either a parish or its rector, and that the institution office of the Church is not generally used herein; and taking into consideration the peculiar situation of this committee, therefore, resolved, that this committee decline issuing such letters in the present case."

It was considered by the committee that the phrase in the canon, "if the same is used in the diocese," meant a general usage. The practice is by no means uncommon in the city of New-York, although not universal. It is rarely used in other parts of the diocese. After the convention of 1845, letters of institution were issued in this and other cases.

It is to be noticed, that the term employed in the canon is *may proceed*. Yet if the vestry apply for it, the word would probably be considered to mean *shall*. Again, the application of the vestry is a pre-requisite.

In a previous part of this work, (*Chapter I.*, pp. 120-126,) I have entered at length into the subject of this canon with a view to the question of the powers of the General Convention, and have before made some suggestions as to the effect of the institution office upon the contracts between parishes and ministers. I beg to refer to this, and to state here the results which I submit are deducible upon the whole matter.

1st. It is within the power of the General Convention to establish any rules respecting the qualifications of members of that body: of course to say, that no clergyman not instituted according to the office shall be a member.

2d. It is also within its power to declare that no clergyman shall (after the passage of the canon) be a member of any diocesan convention, unless he has been instituted into some church according to the office.

3d. That the institution office is not essential to give to a minister any right to the emoluments attending the cure ; but such (in the absence of express stipulation) are as recoverable in the civil tribunals without as with it.

4th. Neither is it necessary, in order to vest the incumbent with that use of, and power over, the church building and precincts which is attendant upon his office, and requisite for its proper performance ; that what such power is, may be ascertained from the law of the Church, judicial decisions, and the reason of the thing—that the delivery of the keys has no more legal effect upon this question than the call and an occupation pursuant to it.

5th. That nothing in the office itself, to which the wardens and vestry are parties, has any operation upon any previous contract between the parties. The symbolical delivery of possession would be regulated as to extent, term, and nature of possession by the private contract, where one was made.

6th. And as to that clause in the letter of institution which relates to the ultimate power of the ecclesiastical authority to judge of the propriety of a dissolution, even if omitted, it leaves the 33d canon of 1832 in full force, and imposes upon any particular church the task of showing a law, usage, or charter, interfering with that canon.

While I should greatly regret, with a view to the protection of the clergy, that the positions thus presented should prove erroneous, there can be no doubt of the propriety and advisability of using the office throughout the Church.

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## TITLE II

## OF PAROCHIAL INSTRUCTION.

[CANON XXVIII. of 1832.]

“The ministers of the Church who have charge of parishes or cures, shall not only be diligent in instructing the children in the catechism, but shall also, by stated catechetical lectures and instruction, be diligent in informing the youth and others in the doctrines, constitution, and liturgy of the Church.”

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The 22d canon of 1808 was the first upon this subject, and was in precisely the same words.

By the rubric to the office of catechism, the minister of every parish shall diligently upon Sundays and holy days, or on some other canonical occasions, openly in the church instruct or examine so many of the children of his parish sent unto him as he shall think convenient, in some part of that catechism.

By the English rubric, “the curate of every parish shall diligently, upon Sundays and holy days, after the second lesson at evening prayer, openly catechise the children.”

Archdeacon Sharp says that some of the strictest men in rubrical matters have justly observed, that no obligation can be urged from hence that ministers should catechise on all Sundays and holy days; but if they do it as often as occasions of their parishes require, and do it on such days and at such times as are specified, they fulfil the intention and the letter of the rubric.<sup>1</sup>

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<sup>1</sup> *Rubrics and Canons*, p. 67.



## TITLE III.

## OF THE KEEPING A PARISH REGISTER.

[CANON XXIX. *Gen Conv.* 1832.]

“§ 1. Every minister of the Church shall keep a register of baptisms, confirmations, communicants, marriages, and funerals, within his cure, agreeably to such rules as may be provided by the convention of the diocese where his cure lies; and if none such be provided, then in such manner as in his discretion he shall think best suited to the uses of such a register.

And the intention of the register of baptisms is hereby declared to be, as for other good uses, so especially for the proving of the right of church-membership of those who may have been admitted into this Church by the holy ordinance of Baptism.

§ 2. And further, every minister of this Church shall make out and continue, as far as practicable, a list of all families and adult persons within his cure, to remain for the use of his successor, to be continued by him, and by every future minister in the same parish.”

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The first canon on this subject was the fifteenth of 1789. It differed from the existing canon in directing the register to be kept agreeably to such rules as *the ecclesiastical authority* should provide, instead of the convention of the diocese as at present.

There was also the following clause in that canon which is not in the present: “And no minister shall place on the said list the names of any persons, except those who on due inquiry he shall find to have been baptized in the Church, or who, having been otherwise baptized, shall have been received into this Church, either by the holy rite of Confirmation, or by receiving the holy Communion, or by some other joint act

of the parties and of a minister of this Church, whereby such persons shall have attached themselves to the same."

The canon was adopted in the same form in 1808, and so remained until that of 1832, now in force.

Certain rules have been adopted in various dioceses under this law.

In New-York, the 7th canon provides as follows: "Whereas, by the 29th canon of the General Convention of 1832, it is made the duty of each clergyman of this Church to keep a register of baptisms, confirmations, communicants, marriages and funerals within his cure, agreeably to such rules as may be provided by the convention of the diocese where his cure lies, it is hereby ordered that

" § 1. The record shall specify the name and time of the birth of the child baptized, with the name of the parents and sponsors; the names of the adult baptized; the names of the parties married; the names of the persons buried, and also the time when each rite was performed. These registers shall be kept by the minister in a book to be provided for that purpose belonging to the vestry of each church, which book shall be the parish register, and shall be preserved by the vestry as a part of the records of the church.

" The list of communicants shall embrace all within his cure, as nearly as can be ascertained, and he shall also keep a list of the families and adult persons in his cure, as far as practicable, and also an accurate list of persons confirmed from time to time by the Bishop.

" § 2. And whereas, by the 8th canon of the General Convention of 1841, every minister of the Church shall present, or cause to be delivered, on or before the first day of every annual convention, to the Bishop of the diocese, or where there is no Bishop, to the president of the convention, a statement of the number of baptisms, confirmations and funerals, and of the number of communicants in his parish or church,

and of all other matters that may throw light on the same: it is further ordered, that in reporting the number of communicants, he shall distinguish the additions, removals and deaths since his last report.

“In every case where a parish is destitute of a minister, the register contemplated by this canon shall be kept by some person appointed by the vestry for that purpose; and the annual parochial reports shall be presented or forwarded to the Bishop by the wardens of the parish.”

The canonical regulations are nearly the same in Delaware, Ohio, and Western New-York.

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Parish registers began to be kept in the 30th year of Henry VIII., being established by Cromwell when Vicar General. The duty was enforced by injunctions of Edward Sixth and Queen Elizabeth, and also by the 70th canon of 1603. Various statutes were made concerning them at different times, but they were all condensed in a full act for a national registration, that of the 6th and 7th William IV., c. 86.

Parish registers are, to a certain extent, admitted in evidence, and great care should be used in making the entries.<sup>1</sup>

By the statute of the state of New-York, (2 R. § 139,) it is provided, § 7, that the minister or magistrate by whom a marriage is solemnized, pursuant to the provisions of the statute shall furnish, on request, to either party a certificate thereof, specifying

1. The names and places of residence of the parties married, and that they were known to such minister or magistrate, or were satisfactorily proven, by the oath of a person known to him, to be the persons described in such certificate,

<sup>1</sup> *Jackson vs King*, 5 COWEN, 236. Sworn copies of entries of baptisms and marriages in the records of the Reformed Dutch Church in the city of New-York were admitted to prove those facts. See 5 PETERS, 470; 6 BINNEY, 416.

and that he had ascertained that they were of sufficient age to contract matrimony.

2. The name and place of residence of the attesting witness or witnesses : and

3. The time and place of such marriage.

The certificate shall also state, that after due inquiry made, there appeared no lawful impediment to such marriage ; and it shall be signed by the person making it.

Every such certificate signed by a magistrate, if presented to the clerk of the city or town where the marriage was solemnized, or to the clerk of the city or town where either of the parties reside, within six months after such marriage, shall be filed by such clerk, and shall be entered in a book to be provided by him, in the alphabetical order of the names of both the parties, and in the order of time in which such certificate shall be filed.

If the certificate is signed by a minister, it may be filed and recorded in like manner, provided there be endorsed thereon, or annexed thereto, a certificate of any magistrate residing in the same county with such clerk, setting forth that the minister by whom such certificate is signed is personally known to such magistrate, and has acknowledged the execution of the certificate in his presence ; or that the execution of such certificate by a minister or priest of some religious denomination was proved to such magistrate by the oath of a person known to him, and who saw the certificate executed.

Certain provisions are then made in the statute as to the form of the entry by the clerk, and it is then provided, that every such original certificate, the original entry thereof made as directed, and a copy of such certificate, or of such entry duly certified, shall be received in all courts and places as presumptive evidence of the fact of such marriage.

This statute, as reported by the revisers, required all marriages to be solemnized in the manner pointed out by the fore-

going provisions, with a view to prevent abuses, to furnish the means of proving marriages, and to authenticate and preserve such proof. The joint committee and the legislature concurred in the utility of providing means for authenticating the proof; and in reference to cases *where the parties required their marriages registered and authenticated*, they concurred in the expediency of prescribing the solemnities to be observed; but they did not concur in the utility of providing that all marriages should be solemnized in the manner prescribed. Several sections were therefore stricken out, and others were amended. A further clause was added, "that the provisions of the article should not require the parties to any marriage, or any minister or magistrate to solemnize the same in the manner therein prescribed; but all lawful marriages contracted in the manner before in use in the state, should be as valid as if the article had not been passed."

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#### TITLE IV.

##### DUTY OF MINISTERS ON EPISCOPAL VISITATIONS.

[CANON XXVI., *General Convention 1832.*]

§ 1. It shall be the duty of ministers to prepare young persons and others for the holy ordinance of Confirmation. And on notice being received from the Bishop of his intention to visit any church, (which notice shall be at least one month before the intended visitation,) the minister shall give immediate notice to his parishioners individually, as opportunity may offer; and also to the congregation on the first occasion of public worship after the receipt of said notice. And he shall be ready to present for confirmation such persons as he shall think properly qualified, and shall deliver to the Bishop a list of the names of those confirmed.

§ 2. And at every visitation, it shall be the duty of the

minister, and of the churchwardens or vestry, to give information to the Bishop of the state of the congregation, under such heads as shall have been committed to them in the notice given as aforesaid.

§ 3. And further, the ministers and churchwardens of such congregations as cannot be conveniently visited in any year, shall bring or send to the bishop, at the stated meeting of the convention of the diocese, information of the state of the congregation, under such heads as shall have been committed to them, at least one month before the meeting of the convention.

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The first canon was the 11th of 1789. The only other, prior to 1832, was the 21st of 1808. The canon of 1789 differed from the present in these particulars merely: Instead of the words "young persons," the word "children" was used in the first line of the first section.

The clause directing the minister to give notice to his parishioners individually, and to the congregation on the first occasion of public worship, was not comprised in it, nor the word "vestry" after churchwardens in the second section.

In 1808, the only variation made was the insertion of the word "vestry" in the second section.

It is necessary, in order to understand some questions upon this subject, to advert to the 25th canon of 1832.

That canon regulates Episcopal visitations. It provides, § 1. That every Bishop in the Church shall visit the churches within his diocese, for the purpose of examining the state of his Church, inspecting the behavior of the clergy, and administering the apostolic rite of Confirmation. And it is deemed proper that such visitations be made once in three years at least, by every Bishop, to every church within his diocese, which shall make provision for defraying the necessary expenses of the Bishop at such visitation. And it is

hereby declared to be the duty of the minister and vestry of every church or congregation to make such provision accordingly.

§ 2. But it is understood, that to enable the Bishop to make the aforesaid visitation, it shall be the duty of the clergy, in such reasonable rotation as may be devised, to officiate for him in any parochial duties which belong to him.

§ 3. It shall be the duty of the Bishop to keep a register of his proceedings at every visitation of his diocese.

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It deserves notice, that in the first section of this canon the phrase is, "of examining the state of *his* (the Bishop's) Church." This was the phrase in the preceding canons, viz., the 3d of 1789, the 1st of 1795, and the 20th of 1808.

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The principle of diocesan authority and supervision which we find in the early Church, will lead us to an understanding of the object of a visitation, and the power of a Bishop when making it. When the diocese was small, the duties were performed by himself, or with the aid of certain of his clergy: afterwards, delegates of his clergy from the body assembled around him officiated in his stead in designated places. And lastly, as the necessities of the Church required, and the bounty of patrons gave the opportunity, some of the clergy were located in certain defined limits, with the care of souls therein committed to them; and the superior power of the Bishop over his Church came to be exercised occasionally and by visitation.<sup>1</sup>

<sup>1</sup> Bishop Stillingfleet says, in his Discourse at the Visitation of Worcester Cathedral: "The right of a visitor is a legal right, and well known, and implies diligence and care in inspecting, and authority to reform abuses and to punish offenders, without which it would be an insignificant title."

"In the old churches, which were not altered by Henry VIII., the Bishop acts by virtue of his original jurisdiction, and visits as Bishop of

Accordingly, we read, these visitations were regulated by canons at a very early period. A canon of the 3d Council of Tarracona speaks of the duty of an annual visitation as one established by old custom.<sup>1</sup>

The leading objects of the visitation, as stated by the canonists, were not merely to see that the fabric and ornaments

the diocese, who is bound to look after the clergy not only in parochial churches, but in communities, especially that of the cathedral, where the Bishops' authority was first fixed, and from whence persons were sent to preach in different parts of the diocese, before the endowment of parochial churches, which was a work of time, and not so early as is commonly thought. But by degrees, in these cathedral churches, the Bishops thought fit to limit the exercise of their own jurisdiction to certain times, but still reserving the right of appeal and the power of visiting at such limited time in ordinary course; and within that time all that interior jurisdiction, which was in the Dean Chapter, and was originally derived from the Bishop, was suspended, and returned again when the visitation ended."

So in his Treatise on the Antiquities and Legality of an Archdeacon's Visitation, he says: "After the Christian Church became so much enlarged that the dioceses of Bishops were looked on as too great for the particular care of one person, by a general consent of the Christian Church some presbyters were particularly appointed to have an inspection over the remoter parts of the diocese, but in subordination to the Bishop."

In the Preface to the Duties and Rights of the Parochial Clergy, he says: "The Bishops were resident in their own sees, and had their clergy then about them, whom they sent abroad, as they saw cause, to those places where they had the fairest hopes of success; and according thereto, they either continued or removed them, having yet no fixed cures or titles. All the first titles were no other than being entered on the Bishop's register as of his clergy, from which relation none could discharge himself without the Bishop's consent."

See also the Discourse on the Bonds of Resignation, (*Cases*, 309.)

In the 9th chapter of KEMBLE'S *Saxons in England*, (vol. 2, p. 430,) we find it stated: "In the theory of the ancient Church, the whole district subject to the rule of the Bishop formed one integral mass; the parochial clergy, even in spirituals, were but the Bishop's ministers or vicars, and in temporals they were accountable to him for every gain which accrued to the Church."

<sup>1</sup> VAN ESPEN, Tome I., Tit. 17.



of the churches were preserved and increased, but chiefly that the ancient Christian discipline was restored, both among clergy and people—to inquire into the conduct of both, and to correct those who are depraved.<sup>1</sup>

Van Espen, in speaking of exemptions, cites two cases in the Gallican Church, in which it had been held, that in one instance, an Archbishop, and in another a Bishop, had been in the habit of visiting a particular church of the holy order of St. Anthony, “the baptismal fonts, and chapel, or parochial church, with everything annexed to the same, and of performing therein everything which related to the cure of souls, in the same manner as in other beneficed cures of his diocese.”<sup>2</sup>

By some regulations, the Bishop was not to act judicially at these periods, or take cognizance of such notorious crimes as were the subjects of judicial process. His office then, was rather to correct in a summary mode, and without form or publicity, whatever he found wrong.<sup>3</sup> So in COMYN’S *Digest*, Tit. *Visitor*, C., we read, that the Bishop is to proceed *summarie, simpliciter, et de plano, sine strepitu aut figura judicii*.

And the ablest among the canonists hold that no exemption, no custom, no incorporation, can possibly exempt any places, regular or secular, from the visitation of Bishops, without the entire destruction of Episcopal authority and hierarchical subordination.<sup>4</sup>

Ayliffe observes, from the sixth book of the Decretals, that among the orders to be observed by Archbishops, Bishops, and

<sup>1</sup> VAN ESPEN, citing various authorities, Tome I., Tit. 17, cap. 1–11.

<sup>2</sup> “Fontes baptismales, et capellam, sue parochialem, cum omnibus suis anneris, atque in his exercendi, omnia quæ curam animarum spectant, sicut in aliis beneficiis curatis suæ Diocesis. Item judicatur pro episcopo Ambiamensi. *Ibid.*, cap. 3, 9.

<sup>3</sup> *Ibid.*, cap. 4, 4.

<sup>4</sup> *Ibid.*, cap. 3, 9. See also the 8th canon of the Council of Chalcedon.

others in their visitations, the first is, that they ought to preach the word of God by giving the congregation a sermon.<sup>1</sup>

In the English Church, during a visitation, the power and jurisdiction of all inferior persons is superseded and inhibited. A custom arose, from the inconvenience of this rule, of granting relaxations, often of an unlimited nature, and sometimes, "of leave to confer orders, confirm, grant fiats for institution, institute, or correct."<sup>2</sup> In these latter instances the visitation was of course by the Archbishop.

With respect to the visitations by Archdeacons, as to which so much is found in the English books, I content myself with referring to the Treatise of Bishop Stillingfleet, of the Antiquity and Legality of Archdeacons' Visitations, and to Gibson's Codex, Tit. *Visitation*. It will be sufficient to observe, that the chorepiscopi, or rural Bishops, had inspection over the remotest parts of the diocese, in subordination to the Bishop. The Council of Laodicea (anno 300) forbade this practice, and directed that no *Bishop* should be placed in country villages, but only visiting presbyters. It seems, however, that the title continued, and that great disputes arose as to the extent of their power, they claiming, in some cases, the right to confer orders. At the Council of Aken in 803, orders conferred by them were declared null, and their office was abolished. This was also done by a capitular of Charles the Great, and canons were then made for the visitation by the Bishops personally of their whole diocese once a year.

The Bishops, however, probably from the necessity of the case, substituted certain of the clergy in place of the *chor-episcopi*, to discharge similar duties; and as the archdeacon was near the Bishop, and mainly trusted by him, a delegation of authority came to be committed to him. "He was, at first," says Bishop Gibson, "employed generally throughout

<sup>1</sup> *Parer.*, 515.

<sup>2</sup> GIBSON, p. 958.

the diocese at the pleasure of the Bishop, and his power in the ancient state was chiefly a power of *inquiry* and *inspection*.<sup>1</sup>

An important case was decided in the Queen's Bench in 1841, involving some points which it may be useful to notice. An abstract will be found in the note.<sup>2</sup> It is principally valuable in settling the right of a Bishop to make inquiries by a delegation of power, a point which has been several times discussed in relation to various canons.

A case of great interest occurred in Maryland in the year 1847,—the case of the Rev. Mr. Trapnell.

<sup>1</sup> *Codex*, 100, &c.

<sup>2</sup> The Dean of York's case, *apud* 1 BURNS by *Phillimore*, 15, &c.

The Archbishop of York held a visitation of the Dean and chapter of that cathedral church, and appointed Dr. Phillimore his commissary to carry it into effect. The Dean being charged with simony in the sale of livings, denied the jurisdiction of the commissary to try him. He was proceeded against, however, and sentence of deprivation pronounced. A prohibition was applied for. The question turned mainly on the statute 30th Victoria, and the effect of a proviso in that statute. The statute had enacted "that no criminal suit or proceeding against a clerk in holy orders, for any offence against the laws ecclesiastical, shall be instituted in any ecclesiastical court, otherwise than according to the provisions of that act."

The proviso was, "that nothing in the act contained should be construed to affect any authority over the clergy of their respective provinces or dioceses, which the Archbishop or Bishops may now, according to law, exercise personally, and without process in court."

The court first held, that as soon as the visitor proceeded to examine the proof of an ecclesiastical offence charged, with a view to punishment by deprivation or otherwise, a criminal proceeding was undoubtedly instituted.

*Next*, that as by the statute, the proceeding to be within the act, must be one in an ecclesiastical court, they were brought directly to the question, whether a Bishop as visitor, had a power to deprive without process of court. This would solve the point whether the proviso was applicable or not. Lord Denman then entered upon the authorities, and came to the conclusion, that no such power of deprivation had ever been exercised without a judicial process. He concludes: "Up to the point of the sentence, the Archbishop unquestionably had power to inquire with a view to ulterior proceedings, and it seems that the Lord Chancellor discharged an application for a prohibition that had been made to him before sentence, on that very ground."

The principal charge against him was for insubordination, in refusing to permit the Bishop to administer the Holy Communion at his annual visitation; and the charge was framed under that part of the canon of Maryland enumerating among canonical offences, "conduct incompatible with the character of a minister of Christ."

One objection to the presentment was, that the offence was not one of those enumerated in the 37th canon of the General Convention, that no presentment could be made except under that canon, and the canon of Maryland was void if it constituted a new triable offence.

This was overruled, and a part of the argument of the Church advocate was precisely that heretofore advanced in this work: That the canon did not contain the full penal code of the Church—that its title was "Of Offences for which a Clergyman may be Tried," not of "*the*" offences. That no exclusive legislation was designed. It was only meant to specify some offences for which a clergyman *must* be tried, leaving the code to be filled up as the separate conventions might think proper.

The other leading points of the powerful argument of the Church advocate were—

1. That the Bishop is a minister of the word and sacraments; in other words, a priest.
2. That he has jurisdiction throughout his diocese.
3. That visitation is an exercise of his jurisdiction.

Having established these positions in an argument of marked ability and learning, he draws the conclusion that the Bishops, being originally clearly endowed with the power of preaching and ministering in every part of their dioceses, had not parted with that right, although they had circumscribed its exercise to the periods of visitation. And he then proceeds to a critical examination of those portions of the ru-

brics and canons which were relied upon as settling the non-existence of the right.

The determination of the court was, "that even in the absence of canonical legislation on the subject, the Bishop, in order to the discharge of his Episcopal functions, possesses the right to administer the holy Communion on occasions of canonical visitations."

The question was again revived in Maryland in the year 1850, in the case of Christ Church, Baltimore, and the position of the court in the case of the Rev. Mr. Trapnell, above stated, was supported by the convention. I annex in a note the reports of the committee to which the matter was referred.<sup>1</sup>

<sup>1</sup> "The committee to which was referred so much of the Bishop's address as related to his recent notice of a visitation to Christ Church, Baltimore, and the revocation of that notice, and also the correspondence between him and the rector of that church, and the letter of its vestry to certain other Bishops, beg leave respectfully to report,

"That they have endeavored to consider these subjects with the care and dispassionateness which their importance and their delicacy demand. The committee do not regard it as a matter submitted to their consideration whether the terms of this correspondence are exceptionable in respect to the language or tone in which it is expressed. The object of it was obviously to make a question as to the relative right of the diocesan and the rector on an occasion of a regular canonical notice of an Episcopal visitation; and the question is distinctly raised, and the harmony of the diocese will, it is believed, be best promoted, by an authoritative judgment of the convention on the questions involved.

"Your committee is of opinion that the true solution of these questions does not rest on any mere verbal criticism of canons and rubrics, although entirely consistent with the results of such criticism, when rightly employed. Their true solution rests on principles, much deeper and more vital principles, which lie at the foundation of the Church itself. In reasoning with Churchmen it is lawful, it is indeed only respectful to them, to take as axioms those truths which the Church clearly maintains, however they may be doubted or denied by those out of her pale. Among such truths are the following: 1st, that Bishops are successors to the Apostles in the ordinary powers of their office, though not in the extraordinary qualifications and endowments of those first ministers of Christ. 2ndly, that as such the apostolic

A great point in the argument of the Rev. Mr. Trapnell and his counsel, reiterated in the report of the minority in

commission embraces them, and that they too are enjoined and authorized to go into the world and teach or disciple all nations, baptising them in the name of the Father and of the Son and of the Holy Ghost. 3dly, that consequently Bishops as such have the right to preach and administer the Sacraments, as well as rule in the Church. 4thly, that these Episcopal rights are to be exercised in their dioceses, these being their appointed fields of labor. 5thly, that consequently every Bishop has a right to preach and administer the Sacraments in his diocese, independently of any parochial cure; and in every part of his diocese, for if there be any part of his diocese in which he cannot exercise episcopal rights, then in that part he is not Bishop.

“On these principles the committee found their clear conviction of the general right of a Bishop to preach, to administer the Sacraments, and to rule, in his whole diocese, and in every part of it. It would seem a necessary conclusion that if there be a church in a diocese, in which the Bishop can never preach or administer the Sacrament, and the like, without being in such instance authorised by another, that he really has not Episcopal power in that Church. It may be asked, Is there no limitation to these principles? Can a Bishop at any time, in any part of his diocese, perform any ministerial act he pleases? The committee will not keep back their belief that in the beginning it was even so—that in the earliest ages of the Church, presbyters did not preach when Bishops were present, and that, as we are taught by the learned Bingham, it was a notable event, when St. Augustine, while still a presbyter, was permitted to preach in the presence of the Bishop. The institution of the parochial system has, however, produced a mighty revolution in the relations of Bishops and presbyters. Presbyters are now made responsible for the spiritual state of the souls in their parishes, and their power must bear some relation to their responsibility. The committee consequently conceive that the mere presence of a Bishop does not, by the present established system of the Church, take away the right and duty of a presbyter to teach in his own person, and administer the Sacraments by his own hands to the people of his charge. And yet the Bishop, on the principles first laid down, must also have the right to teach and administer the Sacraments in every part of his diocese. These apparently conflicting rights are, as the committee believe, perfectly reconciled in the admirable system of the Church by confining the Bishop in the exercise of his, to those comparatively rare occasions on which he goes officially, in his very Episcopal character, in visitation of a parish. If he have it not then, he never has it, and one of two conclusions must follow; either that

the case of Christ Church, depended upon the principle, that a Bishop was but a priest with some superadded powers ;

the Bishop, as such, is not authorised to preach and administer the Sacraments, or that being thus authorised by his very office, this authority is afterwards taken from him by the rubrics and canons which regulate that office. Are we to believe that the Church has so stultified herself? and that having in the consecration office given these powers in obedience to Scripture, the moment the consecration is complete she takes them away by her rubrics and canons which the Bishop is bound to observe? Such a conclusion any one who loves or honors the Church will be slow to receive. On what ground are we asked to receive it? Mainly on this, that in the ordinary Communion Office, the minister is usually described as "priest," and that when the Bishop is specially spoken of, it is in contradistinction from "the priest" in giving the absolution. An obvious reply to this, is, that every Bishop is necessarily a priest, and that the word here means only an officer distinct from layman or deacon, and that the effect of the rubric concerning absolution in the Communion Office, as compared with the other rubrics of that office, is, that when the Bishop is present, he must pronounce the Absolution, while he may or may not perform the other parts of the office.

"But that the term 'priest' in the rubrics of the Communion Office is used inclusively and not exclusively of Bishops, appears to the committee indisputably certain from this consideration, that in the Liturgy of the Church of England, in the Ordination Service, the Bishop is required to administer Communion, and that the only form provided in that Church is the form containing the same rubrics with our ordinary form. Consequently those rubrics in the English Liturgy must be so interpreted that the term "priest" includes Bishops as well as presbyters. But as we have adopted the rubrics with a fixed interpretation, we have necessarily adopted the interpretation. If it be said in reply to this that *our* Church has a special Communion Service to be used by the Bishop on occasion of ordination, this must be remembered in connection with that service, that there is no rubric in it, and certainly there is no canon, confining it to any special occasion; but that it is just the office which a Bishop might naturally and properly use whenever he administered the Communion, and that in this none of the rubrics which have perplexed some minds are to be found.

While on these grounds the committee are of opinion that on occasions of visitation a Bishop generally in our Church has, and ought to have, the right to preach and administer the Sacraments, and perform other ministerial acts in any parish of his diocese, they consider that the question as to the law of this particular diocese was settled some three years

that such additional powers were conferred by the acts of the Church in councils or synods; that we are to ascertain what

ago, by the decision of the only ecclesiastical tribunal before which it would judicially come. Of course this decision might be set aside by a declaratory canon, and perhaps otherwise; but until superseded the committee consider it as having a binding force on all who belong to this diocese. They consequently regard the Bishop as fully authorised to issue his notice of visitation to Christ Church, Baltimore, in the form used by him, and when he had received notice in reply from the rector, that he could not consent to his exercising these rights, the committee consider that the Bishop acted wisely, gently and properly, in revoking his notice; the alternative being his sacrifice of what he believed, and what the judicial authority of his diocese had decided to be his right, or by attempting to enforce it, involving one of his presbyters in an ecclesiastical offence, and exposing him to a presentment. In all times, but especially in troublous times like these, the committee approve of that course, which, without sacrificing principle, will most probably avoid strife and scandal.

“In conclusion, the committee recommend the adoption by the convention of the following resolutions, viz:”

The first of these resolutions, the only one important here, was as follows:

“*Resolved*, that a Bishop in order to the exercise of his Episcopal functions, possesses the right, on occasion of canonical visitations, to control the services, and to take to himself such portions of them as he may think proper.” This was adopted by a vote of 64 to 11 of the clergy, and 42 to 20 of the laity.

The report of the minority of the committee was as follows:

“The undersigned, being the minority of the committee to whom was referred so much of the Bishop’s Address as related to his revoking of an appointment for the visitation of Christ Church, Baltimore, and the correspondence connected therewith; being unable to coincide with the sentiments of the majority of said committee, do very respectfully present the following Report:

“The issue created in the correspondence is clearly this—with what rights is a Bishop clothed at a visitation? It is obvious that said visitation refers to the exercise of certain functions; hence the office is distinct from other orders in the ministry; and just as obvious is it that all such exercise of functions is under restrictions from the regulations and laws of the Church from the days of the Apostles. In the language of the learned expounder of the constitution and canons of our Church—the Rev. Dr. Hawks—the *usage of regulating the exercise of a Bishop’s functions by certain fixed rules, is as ancient as the office of a Bishop.* There is as much of venerable antiquity in the



has been conferred in each church; and hence that the sole guide in the inquiry was, whether the right to preach, and

custom of making *laws* for Bishops, as there is in making Bishops themselves. It may be safely affirmed, that since the days of the Apostles, they never were left with no guide but their own discretion. A law cannot indeed be made wholly to *prevent* a Bishop from doing a Bishop's appropriate duty; but the history of the Church is full of legislation, to regulate the *mode* in which he shall perform that duty. The right of ordination belongs to a Bishop—it was his from the beginning—he would very properly treat with utter contempt any canon which professed to take it from him, and give it to deacons for instance. But who, from this fact, supposes that the rights and prerogatives of our Episcopate are violated, because our portion of the Church of Christ forbids a Bishop to ordain until certain pre-requisites are complied with? But we are unwilling to speak further without adducing the clear testimony of the venerated Bishop White. On the promise of obedience in the ordination of deacons, he thus writes: 'When the passage speaks of godly admonition, it must have reference to some standard, by which they should be directed. This standard must be the various *established institutions of the Church, and not the private opinions of the Bishop*. It is well known that the Church from which this is descended, like the State to which it is allied, is a *government of law, and not of will*, and we cannot suppose that ours, professing to follow in the leading features of its system, should have designed to reject this so congenial to the still more moderate degree of authority, which it will be possible in present circumstances to exert. If it should be asked—who shall be the arbiter on any question which may be raised as to the fitness of the interposition of the Bishop? The answer is—the question being understood of admonition out of the line of strict ecclesiastical proceeding, *which ought to be governed of course by a determinate standard*, that each party may judge for himself, as he shall answer for this, and every other part of his conduct to Almighty God.'

"Here it is proper to ask—has this Church spoken on the subject of Episcopal Visitation? Uudoubtedly she has! First, in the way of limiting all such visitations to a particular diocese, and restraining them from all others, except as in the cases, and under the restraints specified. Second, in the 25th canon of 1832. Here we have the purpose of the visitation set forth, viz: To inspect the state of the Church—the behavior of the clergy, and administering the Apostolic rite of Confirmation. There is in this canon, also, an opinion given as to the frequency of such visitations. Beyond this, the canon offers nothing on the matter before us. Again—canon 26, of the same year,

administer the Communion on a visitation, was anywhere expressly bestowed by canon or rubric of the Protestant Episcopal Church in the United States.

To those who can regard this proposition as sound, there is an end of the question, and the claim of the Bishop cannot

specifies the duties of the clergy in relation to such visitations. But here we have simple provision made for carrying out the foregoing canon. Obviously there is here no provision for administering the Communion, or ordering and taking up a collection, as constituting any part of an Episcopal Visitation. But if the Bishop, by virtue of the Divine right of office, may insist on the latter, why are regulations placed around him in the exercise of the other rights pertaining to his office on such occasions, and none here? As we have specific canons regulating the duties of both Bishop and presbyter on these occasions—but in reference to neither is there any requisitions made on the points involved in this correspondence—we conclude this Church gives no such right to the Bishop, nor imposes any corresponding obligation on the presbyter. The same conclusion, precisely, would follow a fair induction and interpretation of the rubrics wrought into our Communion service. So also, we should reach the same results from the careful specification and provision made for the administration of the Communion by the Bishop, as invariably accompanying certain Episcopal acts—as at the consecration of Bishops—ordinations of presbyters and deacons, and consecration of churches.

“But further—this whole matter has been up for action before an ecclesiastical tribunal of this diocese. Here we might look for a decision; but we find none. *No law is cited*, nor is any definitive opinion offered on the point now before us. *The accused was acquitted on this charge*. The court even admit the absence of all canonical legislation then; and the absence of all subsequent action leaves the matter just where it stood. There being no law of the general Church—nor any distinct legislation in our own diocese—and there being a manifest and careful refraining from all explicitness of expression as to a decision by a *court appointed* in a given case in this diocese, on this very point, it is plain to the undersigned that the question yet remains without the initiatory step to a decision.

“The undersigned further report, that the refusal of the Bishop to administer the rite of Confirmation, and visit the parish of Christ Church, Baltimore, virtually involves the exclusion of said congregation from all the benefits of the Episcopal office, and that on grounds and for reasons not satisfactory to the undersigned, and inconsistent with the constitution, rubrics and canons of this Church.”

be sustained. In the humble judgment of the author it seems wholly untenable.

But again, another position was taken, a very proper and legitimate subject for argument and criticism, viz: that the rubrics and offices and canons of the Church justified the conclusion, that the power upon a visitation was restricted to the acts enumerated, and directed to be performed, and thus excluded, by a just inference, any direction of the services, except in the few special cases mentioned. To this part of the argument I have endeavored to do justice in the note. <sup>1</sup>

<sup>1</sup> It was insisted on the part of the Rev. Mr. Trapnell, that the 31st canon of 1832 applied to the case. It forbids any clergyman of the Church from officiating either by preaching, reading prayers or otherwise in the parish or parochial cure of another, without his express permission. That the term *Clergyman* included a Bishop, and hence as a general thing, the canon excluded him. Any exceptions must arise from the rules established in other canons. These exceptions were to be found in the 25 canon declaring that the Bishop shall visit for the purpose of examining the state of his Church, inspecting the conduct of his clergy, and administering the rite of confirmation. And that the admitted custom of a Bishop's preaching at a visitation, rested upon the basis of courtesy of the Rector.

The answer to this argument was, that the canon was undoubtedly adopted for a different purpose and with another intent. It was to prevent the intrusion of brother clergymen into a parochial cure, and setting up rival congregations. Mr. Trapnell, to a certain extent, agrees with this. (p. 102.) That if it is made out, that the Bishop as chief pastor had the right of officiating upon a visitation, it would be a very strained and unwarranted construction of the canon to hold that it meant to abolish the right entirely. Something more explicit was demanded. The difference is very marked. The 31st Canon is, as to ministers, other than the Bishop, only declaratory of the long established law of the Church, and regulating the application of that law. But clearly, the laws of the Church, unless we have none but what has arisen from our own enactments, gave the Bishop a right to officiate on these occasions before the canon; and if so, then, as clearly, there should be something more decisive to annul that right.

Again, it was pressed that the enumeration in the 25th canon, section 1, that the Bishop shall visit the churches in his Diocese, "for the purpose of examining the state of his Church, inspecting the

And here the author cannot but remark that the argument on behalf of those who deny a Bishop's right seems to resolve itself into a narrow point. The leading position is "that the Bishop has no authority antecedently to ecclesiastical law," (*Trappell's case*, p. 110)—meaning, it is presumed, express institution of the Church. If the question is met on this narrow basis, the supporters of the right may insist that by *such* ecclesiastical law, the power claimed has been recognized and exerted in every age and every church of which we have a record; that a known and universal dogma of that law, viz: the chief pastorship of a Bishop, involves the authority—that com-

behavior of his clergy, and administering the Apostolic rite of confirmation," restricted and defined the objects of the visitation, and the power of a Bishop upon the same.

The answer was, that, if a power to visit, and a power then to direct the services, is proven to have been vested in a Bishop by the long settled law of the Church, it could not be taken away by an enumeration merely of some of the offices he was to perform on such an occasion, and of some of the objects to be obtained. The Bishops are directed to visit—a declaration of what was their undoubted right and duty independently of the Canon. They are directed to visit for the purposes pointed out as specially to be observed. Now if the power and obligation to visit had emanated solely from the Canon, the argument would have been irresistible, which would make that canon the limitation of the authority. But where are the words of exclusion—of a withdrawal of a pre-existent power?

*Again*—the rubric in the Communion Office was relied upon—that the Priest was to "order the bread and wine," "to say the prayer of consecration, &c," while it is provided that the absolution and the benediction must be pronounced by the *Bishop if present*.

It was answered that the phrase could not mean parish priest exclusively, or it would not merely negative a Bishop's power ever to administer the communion, but prevent the communion in a parish where there was no priest called, and even the reading of the absolution by a minister invited to officiate for a day. It meant Priest as designating a member of that order which could administer the communion, and a Bishop was clearly such; that in directing that he only when present, *must* perform a certain part of the office, he was not excluded from the rest.

This course of reasoning, it will be seen, is clearly put forth in the report of the majority.

ing closer to our own time, it is a power existing in our mother Church, and brought with the office of Bishop, to our own. When a Bishop exercises a right recognized or conferred by law, he is as strictly under the law, as when he refrains from an act prohibited by that law, or adheres to the forms prescribed by it for any exertion of power. Thus in the author's view the position of the opposers of a claim must rest upon this. That a Bishop has no power in our Church, except such as by its express enactment or by necessary inference from such enactment is conferred. If this, in the author's opinion indefensible proposition, is true, then they who deny the power are right, but not otherwise.

Another case in relation to the visitation of a Bishop occurred in Ohio in 1848. In the address of the Bishop to the Convention of that year, he says:—"If there be any thing which the discipline of the Church must be considered as designed to secure, it is that the Bishop of a diocese in his visitation of parishes shall have his official acts therein recognized and respected by the parishes as official, and not treated directly and purposely as being a mere private affair, which the parish might notice or not, respect or not, at its pleasure." The case which produced these observations was in substance this:—A pamphlet which it was alleged reflected grossly upon the Bishop, had been placed or inserted upon the records of the parish. The Bishop pointed out the improper use thus made of the records. On a subsequent visitation the Bishop stated that he should visit the parish no more until the relation between himself and the parish were rectified.

The facts were stated to the Convention, with a clear intimation of the Bishop's opinion that the redress he possessed, viz.—of a public admonition, and a refusal to visit the parish, was exhausted, and that the remedy was with the Convention by declaring a forfeiture of the right of representation and union. The Convention ultimately resolved that the conduct

of the parish met with its decided and emphatic condemnation. That it approved of the determination of the Bishop to abstain from further visitation until the authorities gave him assurances that the pamphlet had never been entered in the records, and would never be; or else had been or should be removed therefrom; and until they recalled certain communications and charges particularized.

There is also a case in Massachusetts connected with the Visitatorial power and office. The Bishop has for several years refused to visit the Church of the Advent. The grounds of this refusal are not any violation on the part of the Rector or congregation, of any rubrical or canonical express regulations. The Bishop has considered certain arrangements adopted and certain forms observed in the services within the chancel as of evil tendency, and injurious to the Church.

Now what is the principle most prominent in all these cases in our Church? Decidedly the principle, that there is planted in a Bishop some authority not indebted for its birth to the written law of this particular Church; a power transmitted and inherent, which positive enactment is necessary to limit, not to bestow. Where is the written law which enables the Bishop of Massachusetts to say that he will not visit a particular church, though bidden to visit every church, because in his conscience he believes that church is wandering into error, but not by violating any express commandment? Where is the written clause in this Church's laws, which justifies the Bishop of Ohio in refusing his visitations, when the vestry of a church has placed upon its records, what to him is a disparaging and offensive document? Where is the published enactment in our code, which sanctions the refusal of the Bishop of Maryland to visit, because a Rector denies him the right to administer the Communion? Each of these cases rests upon the great principle of a power which positive enactment of our own never gave—which must be found to be annulled or cur-

tailed by constitution or canon, by usage, or consent, or else remains in its primitive, its scriptural, its impregnable force, dignity, and extent.

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TITLE V.

OF THE USE OF THE BOOK OF COMMON PRAYER.

[CANON XLV., *General Convention*, 1832.]

“Every minister shall before all sermons and lectures, and on all other occasions of public worship, use the Book of Common Prayer, as the same is, or may be established by the authority of the General Convention of this Church. And in performing said service, no other prayer shall be used than those prescribed by the said book.”

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The first canon on this subject was the tenth of 1789, which was as follows:—Every Minister shall before all sermons and lectures, use the Book of Common Prayer, as the same shall be set forth and established by the authority of this or some future General Convention; and until such establishment of an uniform Book of Common Prayer in this Church, every minister shall read the Book of Common Prayer directed to be used by the convention of the Church in the State in which he resides; and no other prayer shall be used, besides those contained in the said book.

The 34th Canon of 1808 was identical with the present.

The last clause of the canon of 1789 became inoperative after the Book of Common Prayer was adopted.

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The eighth article of the Constitution prescribed that a Book of Common Prayer, &c., when established, should be used in all the dioceses. That book was established—and thus became the law of every clergyman in conducting all public worship. He is forbidden to use any other prayer than these

set forth, and he can neither vary, nor properly omit any of them as directed to be used. Further, by the 7th article of the Constitution, he is required to subscribe a declaration, a part of which is this—"I do solemnly engage to conform to the doctrines and worship of the Protestant Episcopal Church in these United States." The Prayer Book is the formula of this worship, and the rubrics being a portion of it, are equally binding as the rest.

Thus I apprehend that conformity to the Book of Common Prayer, and the rubrics as part thereof, is as absolutely binding in our country upon every clergyman, as it is in England under the acts of Uniformity.<sup>1</sup>

The neglect and omission to use the Book on the occasions prescribed—the addition of any thing in the shape of prayer to it, at any rate before sermon,<sup>2</sup> is therefore a violation of the constitution and canons, and presentable of course. Whether a publication in support of opinions tending to what is termed the depravation of the Prayer Book is presentable, has not I believe been judicially settled in any case in our Church. Upon that subject the case of *Sanders vs. Head* is very instructive. An abstract of it is inserted in the note. The 37th canon of 1832, it may also be observed, includes "disorderly conduct," among the triable offences.<sup>3</sup>

<sup>1</sup> The acts of Uniformity are chiefly the 13 and 14 Car. 2, cap 4.—Also the 3 Ed. 6; c. 1. 5 Ed. 6. cap. 1. and 1 Eliz. c. 2. Sir John Nicholl in *Kemp vs. Fricks*, 3 Phillimore, 268, says, that the directions contained in the rubric are of binding obligation and authority. The rubrics form a part of the statute law of the land.

<sup>2</sup> See Dr. Hawks' note to *Const. and Canons*, p. 377.

<sup>3</sup> *Sanders vs. Head*, 3 Curteis' Rep. 565. Mr. Head was proceeded against by articles for having offended against the laws, statutes, constitutions and canons ecclesiastical of the realm, in having written and published, or caused to be published in a newspaper, a letter entitled, &c. "in which it was openly affirmed and maintained that the Catechism and the order of Confirmation in the Book of Common Prayer contains erroneous and strange doctrines; and wherein were also openly affirm-



ed and maintained other positions in derogation and depravation of the said Book of Common Prayer.”

The articles are set forth at length ; they recite, but in general terms, what were the laws and canons against the offence ; that the party was a Minister in holy orders instituted to a particular parish named ; the publication of the letter, with time and place ; and in a separate article set forth certain passages of the letter to substantiate the general charge.

The publication being admitted, the questions which arose were as to the legal sufficiency of the articles, and whether the passages in the letter were in depravation of the Prayer Book.

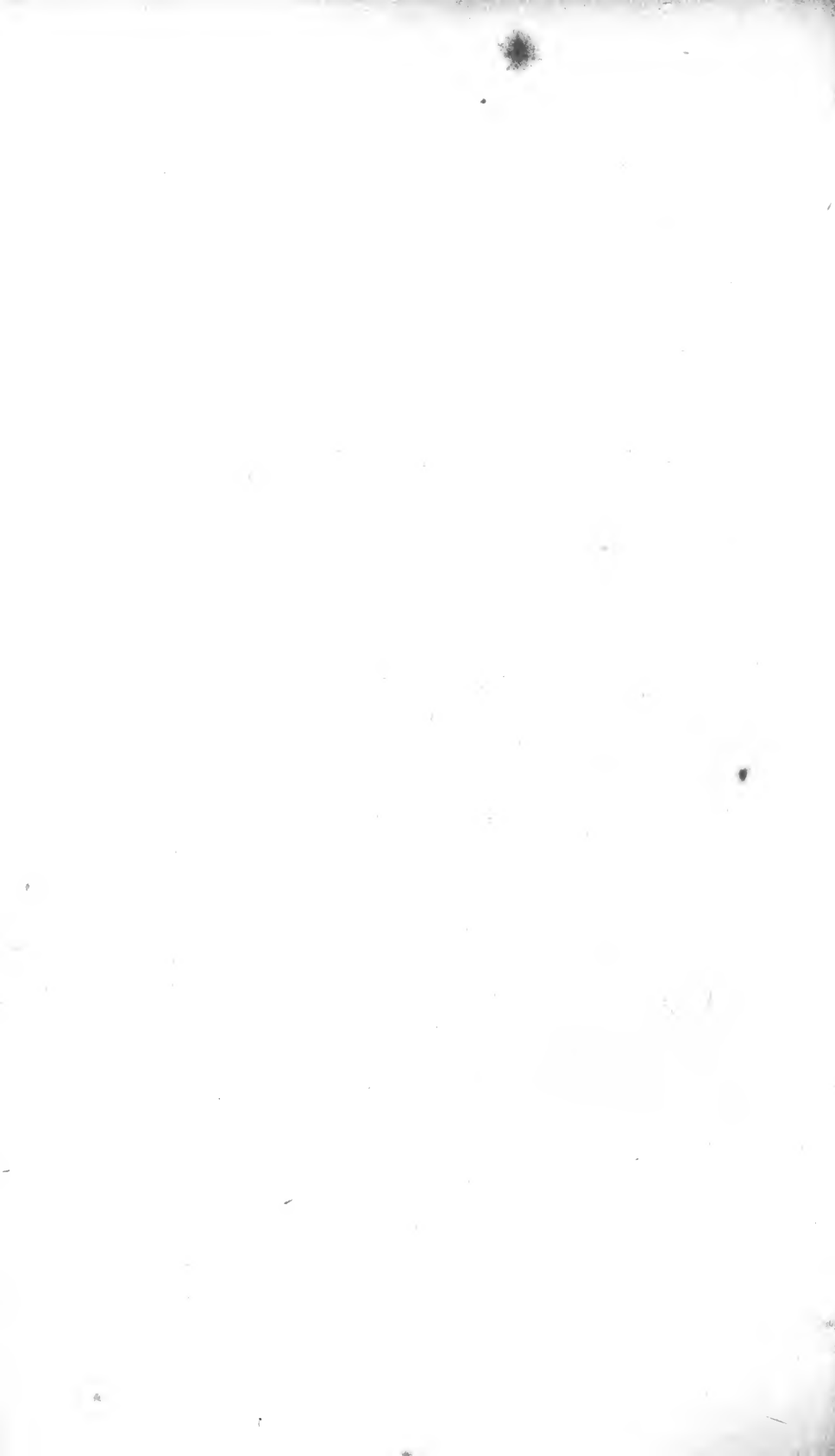
One objection was that the statute or canon under which the offence was to be brought, was not specifically set forth. This was overruled, and upon this ground, that whenever the general law ecclesiastical is relied upon, it is not necessary to plead specifically ; where the offence is one generally cognizable in the Ecclesiastical Court, the particular statute or canon need not be pointed out. That this point was fully discussed in *Witson vs. McMath* (3 Phillimore 67.) Where however it is intended to proceed for a particular penalty or punishment given in a particular statute, the statute should be set out.

It is not necessary to cite the passages which the Court quote as proving the truth of the allegation. They are calculated to shock the mind of every one who remembers the ordination vow of a priest with regard to the Book of Common Prayer.

The learned judge then proceeds to a point of no little moment upon a question which may arise with us.

He states that the counsel of Mr. Head had contended that the case must be brought within the 4th section of the act of Elizabeth, providing that if any minister shall preach, declare, or speak any thing in derogation or depraving of the Book of Common Prayer, or any thing contained therein, or any part thereof, and shall be lawfully convicted, he shall be punished, &c. But he says, that the present was not a proceeding under that statute, but on the general law by which every clergyman is bound to conform to the Book of Common Prayer, under his subscription, and the canon or general law of the Church ; and that a clergyman could, after this, publish any thing he saw fit against the Liturgy or Prayer Book, would be a monstrous proposition.

Caudrey's case, 5 Coke 1, is stated minutely from the Report itself, and deserves much consideration.



## CHAPTER V.

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### TITLE I.

#### DIFFERENCES BETWEEN MINISTERS AND CONGREGATIONS.

[CANON XXXIV. of *General Convention, 1832.*]

“In cases of controversy between ministers who now or hereafter may hold the rectorship of churches or parishes, and the vestry or congregation of such churches or parishes, which controversies are of such a nature as cannot be settled by themselves, the parties, or either of them, shall make application to the Bishop of the diocese, or in case there be no Bishop, to the convention of the same.

“If it appear to the Bishop and a majority of the presbyters convened after a summons of the whole belonging to the diocese, or if there be no Bishop, to the convention, or the Standing Committee of the diocese, if the authority should be committed to them by the convention,) that the controversy has proceeded such lengths as to preclude all hopes of its favorable termination, and that a dissolution of the connection which exists between them is indispensably necessary to restore the peace and promote the prosperity of the Church, the Bishop and his said presbyters, or if there be no Bishop, the convention or the Standing Committee, if the authority should be committed to them by the convention, shall recommend to such ministers to relinquish their titles to the rectorships on such conditions as may appear reasonable and proper.

“If such rectors or congregations refuse to comply with such recommendation, the Bishop and his presbyters (or the convention or Standing Committee, if authorized, with the aid and consent of a Bishop) may, at their discretion, proceed according to the canons of the Church to suspend the former from the exercise of any ministerial duties within the diocese or state, and prohibit the latter from a seat in the convention, until they retract such refusal and submit to the terms of the recommendation; and any minister so suspended shall not be permitted, during his suspension, to exercise any ministerial duties in any other diocese or state.

“This canon shall apply also to the cases of associated rectors and assistant ministers and their congregations.”

The former canons on this subject were the 4th of 1804, and the 32d of 1808. That of 1804 was the same as the present canon, with a few verbal variations. That of 1808 was also the same, but the following clause was added:

“This canon shall not be obligatory upon the Church in those states or dioceses, with whose usages, laws or charters it interferes.”

This was omitted in 1832. Dr. Hawks states that the origin of this canon was to meet a pressing and particular case.<sup>1</sup>

Bishop White says, “The canon deserves the name of a necessary, but it is hoped only a temporary evil. The apprehension of the abuses of it has been verified.”

The Bishop questioned its principle on the ground that there should be no severance from a pastoral charge except as the result of a trial for alleged misconduct, which is most agreeable to the idea of exalting law above will.<sup>2</sup>

The case referred to by Dr. Hawks is stated in the note.<sup>3</sup>

<sup>1</sup> *Constitution and Canons*, 34.

<sup>2</sup> *Memoirs of the Church*, p. 248, written it is supposed about 1820.

<sup>3</sup> The case which led to this canon was that of a minister in New

The first point in consideration is from whom § 1.  
 the application should come, and the method of APPLICATION,  
 making it. In February and March, 1849, the BY WHOM.

Jersey, and the history of it will throw light upon the meaning and intent of the canon.

On the 6th of June, 1804, a memorial was presented to the convention from the churchwardens, vestrymen, and sundry members of Trinity Church, Newark, stating that unhappy differences existed between the rector and congregation, requesting the convention to interfere, and devise some means to put an end to such divisions, which threatened the existence of the Church.

A committee appointed for that purpose reported, that considering that the usefulness of a minister essentially depends on the preservation of harmony between him and his congregation, and that the cause of religion and prosperity of the Church must be materially affected, while the disputes and discontents continued in the Church, they recommended, as the only means in their opinion of restoring peace, that the Rev. Dr. U. Ogden do resign the rectorship and surrender the property belonging thereto; and that \$250 be allowed and secured to him from the funds of the church during his life.

The vestry of Trinity Church assented to the terms proposed. The Rev. Dr. Ogden refused.

The canon of the General Convention was passed in September, 1804.

A special convention was then held in New Jersey in December, 1804. Dr. Ogden read a paper declaring that he withdrew himself from the Protestant Episcopal Church, but that he would still continue to discharge his duty as rector of Trinity Church, Newark, and as a minister of the Church of England, conformably to the constitution and charter of his Church and his letters of orders from the Bishop of London. He then withdrew.

A memorial was then presented from the wardens and vestry of Trinity Church, Newark, stating that a very unhappy controversy existed between the Rev. Dr. Uzal Ogden, the rector, and the wardens, vestrymen and congregation of the said church, which was of such a nature as to threaten the very existence of the church; that it had proceeded such lengths as to preclude all hopes of an amicable termination, and that, in their opinion, nothing short of a dissolution of the connection between them could restore the peace of the church.

The facts being established to the satisfaction of the convention, it was resolved as follows:

"It appearing to this convention that certain controversies are now existing between the Rev. Dr. U. Ogden, &c., and the vestry and

canon received much consideration in a case in the diocese of New-York. Among other points, this one was discussed.

It was agreed to by all the members of the Standing Committee, that where the application purported to come from the vestry, a majority of the members must be parties to it; that is, one churchwarden and the major part of the vestrymen.

It was insisted, and by the highest law authority in the committee, that this should be the action of a vestry strictly, that is, when duly convened and acting; not of the vestrymen, as distinguished from the legal corporate body. By the statute of New-York, the wardens and vestrymen form a vestry by themselves, if there is no rector; but if there is a rector, then they together with the rector form it; and although a meeting may be held, upon notice either of a rector or a warden, yet the board is not competent to transact any business unless the rector, if there be one, be present.<sup>1</sup>

congregation of, &c., which are of such a nature as cannot be settled by themselves, and which have proceeded such lengths as to preclude all hope of a favorable termination, and that a dissolution of the connection which exists between them is indispensably necessary to restore the peace and promote the prosperity of the said church, it is therefore resolved, that this convention advise the said Rev. Dr. U. Ogden to resign his title to the rectorship of said church within thirty days from this date, and they advise the congregation, upon such resignation, to secure to him the sum of \$250 per annum during his life. And if he shall refuse to comply with the terms above-mentioned, then, and in such case, authority is hereby given to the Standing Committee of this state, with the aid and consent of a Bishop, at their discretion, to proceed according to the canons of the Church, to suspend the said Rev. Dr. Ogden from the exercise of any ministerial duties within this state.<sup>17</sup>

It appears that in May, 1805, the Standing Committee acted under the resolution, and requested the Right Rev. Bishop Moore to meet them at Newark to give his aid and consent to the proceedings. And subsequently Dr. Ogden, with the assent and confirmation of the Bishop, was suspended from the exercise of ministerial duties within the state.

<sup>1</sup>Act of 1813. Sess. 36, Ch. 60. 2 R. L., p. 212.

To this it was objected that the canon would thus be made of no effect at the pleasure of the rector, so far as a vestry application was concerned; that by providing for the case of a difference between a rector and a vestry, it presupposed a distinction and separation of the two, and that the phrase should be construed vestrymen.

The provisions as to presenting a clergyman were referred to. In North Carolina and Florida, for instance, the presentment may be made by "the vestry of the parish." In Georgia, "by the wardens or vestrymen of the church." In Illinois, "by the major part in number of the vestry of the church." In Delaware, by a "majority of the vestry in a meeting duly convened."<sup>1</sup> In New-York, in all the canons prior to 1834, the phrase was, that the presentment should be by *the vestry* of the church. In October 1834, it was changed to the present form, "the major part in number of the members of the vestry." The question thus arising was not passed upon, because there was not a majority even of vestrymen signing the application.

Again, in the same case, it was discussed in what manner the first step should be taken on the part of the congregation, where the vestry did not apply. The general opinion was that the congregation should be convened by a notice, which any members were competent to give, stating the object of the meeting, so that a public expression of views should be had. A resolution to the effect that a controversy existed between the rector and congregation, which could not be settled by themselves, and that an application be made pursuant to the canon in such case provided, would be the proper mode.

After the communication of this opinion, a vestry meeting having been called by the rector, a resolution was adopted by a regular majority, setting forth that controversies existed which

<sup>1</sup> These provisions will be found in the canons of the dioceses named.

in the opinion of the vestry could not be amicably settled, and that application be made to the standing committee for proceedings under the 34th canon. This of course was a regular and sufficient application.

From the statement in the preceding note of the Rev. Mr. Ogden's case, I cannot determine whether the wardens and vestrymen had regularly met as a vestry, and adopted the memorial or not.

In the case of Rev. Cave Jones, in 1811, the vestry was regularly convened, (he was however an assistant minister,) and the resolution recited, that differences and controversies existed between the Rev. Cave Jones, one, &c., and this vestry, arising out of the publication entitled "A Solemn Appeal to the Church," which are of such a nature as cannot be settled between them. And it was resolved that application be made to the Bishop of the diocese pursuant to the 32d canon of the General Convention. And that he be requested, with the assistance of his presbyters, to proceed upon the subject matter according to such canon.

§ 2.           The application being made in a sufficiently formal and regular mode, the Bishop becomes justified in taking the next step under the canon, that is to see that notice of the application has been or shall be given.

In the case of Mr. Ogden, this was done by the Convention ordering the Secretary to serve a copy of their resolution upon him, and the Standing Committee gave him notice of their proceedings. In the case of Mr. Jones, the Bishop, upon receiving the resolutions of Trinity Church, directed a copy of the proceedings to be served upon him, with a notice of the time and place of his convening the presbytery. And in the case in New-York in 1849, before mentioned, the committee intended to give the rector notice, and a copy of the papers laid before them before proceeding. He however had procured



them, and transmitted his own reply and documents before that could be done.

Although such a notice to and hearing of the rector is not prescribed, yet it is suggested that it would be proper to give it before a call of the presbyters.

The next, and a very important point of the canon is, as to the inveteracy of the disputes; whether the controversies cannot be amicably settled. Undoubtedly the ecclesiastical authority is not bound to interfere until it is fully satisfied that the dissensions are so fixed and obstinate that an amicable settlement is almost impossible. In determining whether the initiatory step should be taken, regard may be had to the matters which are prescribed in the canon as justifying what is in fact a sentence of resignation of a cure. The ecclesiastical authority is to find that *all hope of a favorable termination of the controversy is precluded—that a dissolution of the connection is indispensably necessary to restore the peace of the Church, and promote its prosperity.*

Again, what is the description and extent of the dissensions which warrant an interference under this canon? No strictly correct definition can be made. On the one side, however, they are not to be such as are the proper subjects of a presentment, or duty to the Church requires that proceeding. On the other side they ought not to be those occasional and almost unavoidable differences or bickerings which will arise between a pastor and portions of his congregation. The question can only be rightly determined according to the circumstances of each case, cautiously bearing in mind the sound principle, that the door should not be too readily opened for such applications, and that such a severance of the relation is against the policy and wishes of the Church.

As to precedents—in the case of Dr. Ogden the ground of difference was a tendency to doctrines and practices incon-

§ 3.  
NATURE OF  
THE DISPUTES.

sistent with the principles and rules of the Church, an overbearing conduct and assumption of control in temporals. In the case of the Rev. Mr. Jones, a pamphlet had been published which the committee of the vestry thus speak of:

“The committee having considered the subject referred to them, are of opinion that the pamphlet lately published by the Rev. Mr. Jones, calls for the serious attention of the Board. The evident tendency of appeals to the public on the subject of private differences between ministers of the Gospel, must in all cases be to weaken the respect justly due to the clerical office, to destroy its influence, impair the discipline and government of the Church, and to bring reproach upon the cause of religion.”

This report was adopted by the vestry. The denial of the imputed tendency of the publication, the assertion of the right to issue it, surely constituted a difference of a very serious nature.

§ 4. It will be noticed that the Bishop is to summon  
 WHO ARE  
 TO BE  
 SUMMONED. all the presbyters belonging to the diocese to act in the case. This summons of the whole number seems indispensable, and Dr. Hawks remarks that it renders the canon very inconvenient, and that the practice has been to convene a portion only. (*Constitution and Canons*, p. 316.) This can scarcely be right. Although a majority of the presbyters who actually assemble will be sufficient to decide, yet all should be called. It is not stated in the report of the case of the Rev. Cave Jones how the presbyters were summoned, but the act of suspension recites that that was done by the Bishop and the majority of the presbyters assembled.<sup>1</sup>

Again, in case of there being no bishop, the application is to be made to the convention, and I presume that under the canon, the convention may act without any formal convocation of the presbyters. Indeed these are supposed to be present.

<sup>1</sup> DAVIS' *Report of the Case*, p. 11.

Another question arises: Suppose the power is delegated by the convention to the standing committee, may they not act without summoning the presbyters? This seems the true meaning of the canon, although the convention in delegating the power might prescribe such a summons, or direct a certain number of presbyters to be convened. But as to the final act of sentence upon a refusal to abide by the decision, the standing committee must call in the aid of a Bishop, and so, I apprehend, must the convention. Indeed the general canon as to sentences makes this necessary.

By the 6th canon of the diocese of Maine, in case of differences between the ministers and their congregations, when the diocese is without a bishop, the standing committee shall have the power of settling such differences, agreeable to canon 34, of the General Convention of 1832.

In 1847 the Committee on Canons, proposed a new canon in place of the present, providing that whenever a difference shall exist between a rector, whether a Bishop or presbyter, and the congregation or congregations of his parish, and there is no probability of an amicable adjustment, the same, not being the subject of impeachment or canonical censure, may be referred to the determination of arbitrators.

The mode of appointing the arbitrators is then prescribed, and the award it is declared shall be binding and conclusive upon the parties. The proposition was not acted upon.

The provision in the Scottish Church is this—(Canon 35 of 1838. 4 *Burns* 701.) “In any differences which may arise between a pastor and members of his flock, which cannot be amicably settled, the matter in dispute must be carried in the first instance before the ordinary; and if either party think himself aggrieved by his decision, then the case may be appealed by letter or petition to a synod of Bishops, and no appeal against the ordinary’s decision shall be admissible unless the contending parties solemnly promise to hold the sentence of a

majority of the Bishops present final and conclusive." By the 34th Canon a synod of Bishops is to be held annually, and not less than three must be present.

As far as my information extends, the canon is not now looked upon with the same disfavor as it was by Bishop White. The fact is, the canon is a compromise between the principle of indissolubility of the relation of pastor and people, except on grounds justifying a presentment, and the absolute right of the people to dismiss at will. There are sometimes occasions of disagreement, which without much fault on either side, poison the connection and destroy its benefits. Perhaps the Church has acted wisely in suffering a separation in such cases; at least she has been wise in requiring the interposition of her highest authorities, and their sanction in effecting it.<sup>1</sup>

It may be submitted whether the appointment of arbitrators to act as a quasi tribunal for the carrying out the discipline of the Church has any precedent in its history, especially as the arbitrators are to be or may be laymen exclusively; and that a decision may be followed by the suspension of a

<sup>1</sup> The author would suggest for consideration, an amendment of the Canon of the following nature:

The clause in the first paragraph "in case there be no Bishop, to the Convention of the same," to be altered to, "the Standing Committee of the same."

The Bishop shall direct the Standing Committee, or if the application is made to the latter, the Standing Committee shall proceed, to inquire whether such controversy has proceeded, &c. (following the language of that clause of the canon.)

In making such inquiries, the Standing Committee may depute one or more of their own body when they shall deem it advisable, to make inquiry as to facts, and to report in writing upon the same.

Where the application has been made to a Bishop, the Committee shall report the facts to him, with their opinion upon the case.

The Bishop, or Standing Committee, if satisfied that the case is within the canon, shall recommend to the Minister to relinquish his Rectorship; (pursuing the residue of the canon, with some apparent necessary alterations.)

clergyman.<sup>1</sup> It appears to the author (he submits it with great respect) that the novelty of the proposition is against its admission; that in this, and in similar cases, the Standing Committee of a Diocese in its ordinary capacity, is the proper body to take all the initiatory measures, to make all the requisite inquiries, to institute necessary proceeding, and collect and embody facts; and then to present the result to the Bishop for final decision, with an expression of their own opinion.<sup>2</sup>

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## TITLE II.

### DISSOLUTION OF THE PASTORAL CONNECTION.

[CANON XXXIII of *General Convention*, 1832.]

“ § 1. When any minister has been regularly instituted or settled in a parish or church, he shall not be dismissed without the concurrence of the ecclesiastical authority of the diocese; and in case of dismissal without such concurrence, the vestry or congregation of such parish or church shall have no right to a representation in the convention of the diocese until they make such satisfaction as the convention may require.

<sup>1</sup> It is true that arbitrators, in the usual sense of judges chosen by mutual consent, are well known in the canon law. But their decisions were subject to a reduction by the usual tribunals, being equivalent to an appeal. (VAN ESPEN, *Tit. Arb.*, Tome 2.) The proposed canon gives the right to either party to make the application, and coerce the arbitration. The decision also is to be final.

<sup>2</sup> In Feb. 1849, a case under the canon occurred in Ohio. The Bishop and a number of the clergy assembled to consider the case of the Rev. Mr. Loutrel. They agreed to recommend the relinquishment of the party's title to the rectorship, his salary to be paid to the date of the sitting of the Council. A resignation followed.

The canon was also applied in the case of the Rev. Norman Nash, in New Jersey, in the year 1834.

“Nor shall any minister leave his congregation against their will without the concurrence of the ecclesiastical authority aforesaid; and if he shall leave them without such concurrence, he shall not be allowed to take a seat in any convention of this Church, or be eligible into any church or parish, until he shall have made such satisfaction as the ecclesiastical authority of the diocese may require.

“§ 2. In case of the regular and canonical dissolution of the connection between a minister and his congregation, the Bishop, or if there be no Bishop, the Standing Committee, shall direct the secretary of the convention to record the same. But if the dissolution of the connection between the minister and his congregation be not regular or canonical, the Bishop or Standing Committee shall lay the same before the convention of the diocese, in order that the above-mentioned penalties may take effect.

“This canon shall not be obligatory upon those dioceses with whose usages, laws or charters it interferes.”

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The previous canons were the 2d of 1804, and the 30th of 1808. The former was almost identically the same as the present. In the latter the last clause, as to its obligation in particular dioceses, was inserted.

This was induced by the action in South Carolina and other states, before mentioned. (*Chap. I.*, p. 121.)

The framers of this canon sought to discourage the too common change of the relation of pastor and people. To the 29th canon of 1808 was added a clause peculiarly applicable to the present subject: “It is understood that the Church designs not to express an approbation of any laws which make the station of a minister dependent on anything else than his own soundness in the faith, or worthy conduct.”

And such has been the universal policy of the Church. It seems to have been felt that there was a nearness and sacred-

ness of tie between such parties as admitted not of severance, but for legal offences, or with the intervention of grave authority. The beautiful language of Lord Stowell as to another relation may well be applied to this: "When people understand that they must live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation, that yoke which they know they cannot shake off. They become good husbands and good wives from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties it imposes."<sup>1</sup>

We find at the close of this canon also the clause before adverted to, that it shall not be obligatory in dioceses, with whose laws, charters or usages it interferes.

Now, by both the canon and the common law, it was well settled that an incumbent once duly instituted was in for life, and could not be removed by the patron. He could only be dismissed upon a just sentence. The authority of Lord Coke as to the common law is frequently given.<sup>2</sup>

Yet a resignation into the hands of the Bishop was permitted, while one into the hands of the patron was forbidden by both laws.<sup>3</sup> We can have no better judge in this case than Lynwood, who says positively, that "*Renuntiatio facta in manus Laici etiam sponte non tenet*," and therefore it must come into the hands of him who hath the ordinary jurisdiction, and therefore hath power to admit.<sup>4</sup>

The learned founders of our canons had undoubtedly this

<sup>1</sup> *Evans vs. Evans*, 1 HAG. Cons. Rep., p. 36. The reasoning of Mr. Hume is also very strong, and admirably expressed. (Essay 19, on *Polygamy and Divorce*.)

<sup>2</sup> 1 *Inst.*, 343, b. 2 *Inst.*, 357. *NOY'S Rep.*, 157.

<sup>3</sup> This was forbidden by various canons, (among them, the 3d of the 4th Council of Lateran.) They are stated in BISHOP STILLINGFLEET'S *Discourse on Bonds of Resignation*, p. 318.

<sup>4</sup> *Ibid.*, p. 319. *NOY'S Rep.*, 157. 2 COKE, 63, 198. GIBSON'S *Codex*, vol. 2, page 869.

great principle deeply fixed in their minds. They also found a system of usurpation upon this principle by the laity, extensively prevalent. They were compelled to respect it so far as to insert in the canon the clause in question ; but the qualification annexed to Canon 29 of 1808 equally applies. The phrase employed in the first part of the canon is, *regularly instituted or settled* ; thus meeting the case when the office of institution has not been used.

As to the mode of proceeding, the Standing Committee of the diocese of New-York, in a case in June, 1848, adopted the following : “ A copy of a resolution of a vestry was received fully dismissing the minister, and asking a concurrence therein. The committee resolved that, in their opinion, a written application should be made by the vestry, setting forth the grounds and reasons why a dismissal was sought, and which rendered it expedient or necessary, and asking the concurrence of the committee to such dismissal being made ; that an absolute dismissal without it was premature and irregular.”

Afterwards, a copy of a resolution of the vestry was transmitted, resolving that an application be made for the concurrence of the ecclesiastical authority in a dismissal, with a written application, setting forth the reasons and facts on which it was grounded. A copy of this had been sent to the minister, with notice that it would be presented to the committee.

The reasons assigned being satisfactory, a resolution was passed to the following effect : “ Application having been made to this committee by the vestry of — Church, in the town of —, for its concurrence in the dismissal of the Rev. — for certain reasons therein stated ; and it appearing that such reasons are satisfactory, and notice of this application having been given to the said the Rev. —, and he not appearing to oppose the same, thereupon it is resolved



that the assent and concurrence of this committee, as the ecclesiastical authority of the diocese, be, and the same is hereby given to the dismissal of the said the Rev. —— from the parish and Church of ——.”

The canon, it will be perceived, forbids both the dismissal of the minister by the congregation, and the relinquishment by the minister. It has been considered in Connecticut, that a resignation and acceptance should receive a formal concurrence of the ecclesiastical authority. In the journal of that diocese for 1814, are to be found two cases, in which the intention to resign, and the acquiescence of the parishioners in such request at a regular meeting, was recited; and thereupon, the Standing Committee made a formal record of their concurrence in the resignation, and declared the pastoral relation to be thenceforth dissolved. (*Journals* 1814, p. 35, Ed. of 1842.) I believe that the ordinary practice is to receive and file the notice of the resignation and assent of the vestry. The concurrence of the committee may be implied from this, yet a resolution upon the minutes would be preferable.

A question of some interest arose in a case before the Standing Committee of New-York, under this canon. The minister of the parish had ceased to officiate within it for about three months, and had officiated for the most of that time in another and vacant parish. It was not yet ascertained, however, whether this was under a regular call, or a temporary invitation renewed from time to time. An opinion was expressed by the author, and agreed to by some of the other members, that if the fact of a formal call and acceptance had been made out, the incumbency of the first parish would have been *ipso facto* vacated, so that the vestry could have made a new call, and the committee could have issued letters of institution to a new minister. Care, however, should be taken that sufficient documentary evidence of the fact is

supplied.<sup>1</sup> It was unanimously agreed, that the facts as they stood, warranted a concurrence in the act of dismissal.

<sup>1</sup> Bishop Gibson states that a voidance of one benefice takes place by the acceptance of another, incompatible without a dispensation. This is the effect of an act of parliament, where the first benefice is of the yearly value of eight pounds or over; if under eight pounds, it was void by canon law, and the patron might present a clerk, and require institution immediately. *Codex*, p. 832, Tit. 34.

The Council of Lateran, held in 1215, passed a canon declaring that whoever shall take any benefice with cure of souls, if he before shall have obtained a like benefice, shall *ipso jure* be deprived thereof; and if he shall contend to retain the same, he shall be deprived of the other; and the patron of the former, immediately after his acceptance of the latter, shall bestow the same upon whom he shall think worthy.

The canons of this council are recognized as adopted into the English ecclesiastical law.

In *Alsten vs. Atlay*, 7 ADOL. & ELLIS (*Exch. Chamber*) 811, the court (per C. J. Tindall) said: "There is no doubt that the right of presentation [upon acceptance of a second benefice] accrued by the canon law, namely by the fourth Council of Lateran; but it is equally clear that this canon has been recognized in this country, and has become part of the common law of the land. *Holland's case*, (4 *Rep.* 75, and *Digby's case*, 4 *Rep.* 78, and *Evans vs. Ascough, Latch*, 243.) The point to be decided is, what is the nature of that right given by that canon to the patron. Is it an immediate right of presentation in the then patron, when he chooses to exercise it without doing anything positively to avoid the interest of the then incumbent, or is it only a right to avoid that interest by some act, and then to present, or to avoid it by the act of presentation only, such interest of the incumbent being valid, and the church full in the meantime?"

"That although the books use some variety of expression on the subject, yet the substance of the authorities is, that the patron has a complete right to present upon the cession by institution to the second benefice. No further act is necessary in order to make his presentation valid."

The Chief Justice then states the authorities: "*Digby's case* is a prominent one, where Chief Justice Popham and the whole court said, "that the first benefice is void by institution to the second, without deprivation or sentence declaratory; although no lapse shall incur unless notice be given to the patron."

It may be useful to notice, that upon a vacancy of a benefice, if the patron does not present within six months, the right falls to the Ordinary, which is termed a lapse.

The case of *The King vs. Priest*, SIR W. JONES, 335, is also thoroughly in point.

After quoting the canon of Lateran, he says: "The fair construction

## TITLE III

## RELINQUISHMENT OF THE MINISTRY.

[CANON XXXVIII, *General Convention 1832.*]

“ § 1. If any minister of the Church, (against whom there is no ecclesiastical proceeding instituted,) shall declare to the Bishop of the diocese to which he belongs, or to any ecclesiastical authority for the trial of a clergyman, or where there is no Bishop, to the standing committee, his renunciation of the ministry, and his design not to officiate in future in any of the offices thereof, it shall be the duty of the Bishop, or where there is no Bishop, of the standing committee, to record the declaration so made.

“ § 2. And it shall be the duty of the Bishop to displace him from the ministry, and to pronounce and record in the presence of two or three clergymen, that the person so declaring has been displaced from the ministry in this Church.

“ § 3. In any diocese in which there is no Bishop the same sentence may be pronounced by the bishop of any other diocese invited by the standing committee to attend for that purpose.

“ § 4. In the case of displacing from the ministry as above provided for, it shall be the duty of the Bishop to give notice thereof to every bishop of this Church, and to the standing committee in every diocese wherein there is no bishop. And in the case of a person making the above declaration for causes not affecting his moral standing, the same shall be declared.”

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The earliest canon which contained any regulation upon this subject, was the first of 1801. By that it was provided, that if any person having been ordained in this Church, or of the canon is, that upon acceptance of the second benefice, the clerk is deprived of the first *jure ipso*.”

having been otherwise ordained and admitted a minister in this Church, shall discontinue all exercise of the ministerial office without lawful cause, *or shall avow that he is no longer a minister of the Church*, or shall live in the habitual disuse of the public worship, or of the holy eucharist, according to the offices of this Church, such person on due proof of the same, or on his own confession, shall be liable to be degraded from the ministry.

In the 26th canon of 1808, these provisions were inserted in the canon enumerating the offences for which ministers shall be tried. The punishment however, was to be admonition, suspension, or degradation, as the case might require.

Then followed the 2d canon of 1817, in the words of the present 38th canon, except that the words, (against whom there is no ecclesiastical proceeding instituted,) are not to be found in it; and that the punishment might be admonition, suspension, or displacement.

By the 7th canon of 1820, that of 1817 was repealed, and another enacted precisely the same in substance, and merely with the insertion of a few words to prevent a doubt which might have arisen under the former, as to the right to displace.

Neither of these preceding canons, contained the clause as to no ecclesiastical proceeding being instituted against the minister. That clause was introduced in the 3d canon of 1829, which also directed that the sentence to be pronounced should be displacement exclusively.

Then in the revision of 1832, the present canon was adopted almost identically the same as that of 1829.

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§ 1. To understand what cases are within the canon, CASES WITHIN THE CANON. it will be useful first to advert to the general law of the Church independently of it.

By the 6th of the Apostolical canons it was provided that

no Bishop, Priest or Deacon should undertake any secular employ upon pain of deposition. Bishop Beveridge observes that for a clergyman to engage in any lawful business for the necessary defence or good of the Church, such as to attend synods or state assemblies, comes not within this, or any similar canon. Bingham thus states the rule. (Antiq. Book vi. cap. 4, § 1.) "I come now to speak of a third sort of laws which were like the Jews *sepimenta legis*, a sort of by-laws and rules made for the defence and guard of the former. Among these we may reckon such laws as were made to fix the clergy to their proper business and calling, such as that which forbade any clergyman from deserting or relinquishing his station without just ground or leave granted by his superiors. In the African Church, from the time any man was made a reader, or entered into any of the lower orders of the Church, he was presumed to be dedicated to the service of God, so as thenceforth not to be at liberty to turn secular again at his own pleasure. And much more did this rule hold for Bishops, presbyters, and deacons. Therefore Cyril of Alexandria, as he is cited by Harmenopilus says in one of his canons, that it was contrary to the law of the Church for any priest to give in a libel of resignation, for if he is worthy, he ought to continue in his ministry, and if he be unworthy, he should not have the privilege of resigning, but be condemned and ejected. The Council of Chalcedon orders all such to be anathematized as forsook their orders to take upon them any military office, or secular dignity, unless they repented, and returned to the employment which for God's sake, they had first chosen."

One of the Constitutions of 1571 was thus: *Semel autem receptus in sacrum ministerium ab eo imposterum non discedit; nec se aut vestitu, aut habitu, aut in ulla vitæ parte geret pro laico* (*Apud. GIBSON'S Codex, Vol. 1, p. 184.*)

And the 76th canon of 1603 declares that no man, being

mitted deacon or minister, shall from thenceforth voluntarily relinquish the same, nor afterwards use himself in the course of his life as a layman upon pain of excommunication.

As elucidating the English law, I refer to the case so much discussed, of the Rev. Mr. Shore in 1844.<sup>1</sup> It is necessary to understand clearly the point decided.

Mr. Shore being in priest's orders in the Church of England, had received a license from the Bishop of Exeter to officiate in a private unconsecrated chapel. That license was subsequently revoked. Notwithstanding this revocation he continued, as the libel alleged, to read the services and perform the offices of the church in that chapel. For this he was prosecuted.

It is to be here noticed that there is not a rule of English canon law, more entirely settled than that which forbids any minister from officiating in an unconsecrated place without a license; nor that other rule which authorizes a Bishop to revoke such license.

Mr. Shore defended himself chiefly on the ground that he had qualified himself as a dissenting minister under one of the Toleration Acts, by which, upon the taking certain oaths, and observing other provisions, a party was exempted from the penalties for non-conformity imposed by previous acts of Parliament.

The reply given by both the judges who pronounced upon the case was this—That what was pleaded in defence was sufficient to exempt him from the statutory penalties; but that did not touch the case. By his ordination vows, and the canons of the Church which he was subject to, he could not relinquish the ministry and have his orders cancelled of his own will and without the consent of his diocesan, unless by process of law; that as neither of these facts appeared, he therefore remained a minister of the Church, and as such punishable for offences committed against her rules of government.

<sup>1</sup> 1 ROBERTSON Ecc. Cases 335. 8 ADOLPHUS & ELLIS 640.

Thus Sir Herbert Fust in his opinion says: "Mr. Shore admitted that he received the order of priest from the Church of England. Here again it was to be proved that a clergyman can divest himself at his pleasure of his orders; but I heard nothing to establish that position. The spirit of the canon is certainly at variance with such a position, as well as common sense."

And Lord Denman when the case was in the Queen's Bench observed: "Mr. Shore cannot divest himself of the character of a priest in holy orders with which he has been clothed by the authority of the Church of England when he was ordained by one of the Bishops, and when he promised canonical obedience to that Church; from that character, or from that vow and promise, he can only be released by the same authority which conferred the one, and enjoined and received the other."

In a letter of the Bishop of Exeter published in the *English Churchman* in 1848, he says, "that it is utterly untrue that Mr. Shore is interdicted by the law of England, from preaching the Gospel under pain of being immured within the walls of a prison. There is no law ecclesiastical or temporal, in this part of Great Britain, which would subject Mr. Shore to imprisonment for a single hour for such an act. True it is, that having been ordained a deacon and presbyter in the Church, he cannot at his mere good pleasure divest himself of the sacred characters which under the most solemn vows to God and man, he sought and received from his Bishop. A judicial process is necessary, which however, is a matter of very easy and inexpensive accomplishment to any one, who is earnest in seeking from conscientious motives to be relieved."

It must be remembered in judging of the case of Mr. Shore, that he did not disclaim his character of a minister of the Church, nor unite himself with the Dissenters, and thus open the door for the judicial proceedings referred to; but he insisted upon retaining his station—claimed to be in orders—and actually

read the morning services, and otherwise officiated in an unconsecrated place, after the revocation of his license.

I find in the proceedings of the Church in Connecticut, two cases in which the principle of a renunciation was recognized before the first canon; but I am informed that in both instances the minister was a deacon, and that the distinction was taken by Bishop Jarvis between the case of a deacon and a priest in this particular.<sup>1</sup>

Our own canon has fully met the case by substituting what may be termed an admission, for the articles and process of the English system. It remains to be seen in what instances it may be applied.

It is clearly applicable to the case of a clergyman renouncing the ministry with a view to fall into the ranks of the laity. If upon an unhappy discovery that the assumption of his vows was made with haste and improvidence, or that subsequent development of character, or subsequent events have forced the conviction of unfitness upon his mind, he seeks to re-

<sup>1</sup> The following act took place at a convocation held at Stratford, June 3, 1795. Present, Bishop Seabury, &c. "Whereas the Rev. D. P. has requested of the Bishop and his clergy in convocation, liberty to resign the pastoral charge of the parishes of R. &c., as well as to relinquish totally the exercise of ecclesiastical functions—therefore, voted that his request be granted, and the resignation of his letters of orders be accepted. (MSS. *Minutes of Convocation.*)

So in the year 1804, the convocation resolved as follows: "Whereas, Ezra Bradley, having been ordained deacon in this Church, hath declared his determination of relinquishing all claim to the character and function, and for a long time hath discontinued all exercise of the said office of deacon, and as appears fully to our satisfaction hath lived in the disuse of the public worship and holy eucharist according to the offices of the Church—therefore with the approbation of the clergy in convocation, we Abraham, Bishop of Connecticut, degrade the said Ezra Bradley from the office of deacon, and do pronounce the ordination of the said Ezra Bradley to the holy office of deacon, to be henceforth of no force or effect."

It will be noticed that this sentence proceeds upon other clauses of the canon of 1801, as well as that of a declared relinquishment.



tire, the Church has opened to him this ready and quiet mode of departure. The seeds of affection may still linger in his breast, and prompt him, as little as possible, to affect her peace. The pressure of conscience forbids him to remain in his station, and the pride of human nature may rebel at an open trial and public exposure. The procedure under the canon affords the opportunity of enforcing discipline in the spirit of peace.

Again, the canon has been treated as applicable to those who have been guilty of moral depravity, in the ordinary significance of the word. We have the authority of Bishop Onderdonk of New-York, for saying that he was informed by Bishop White that the original and leading motive for its introduction, was the great difficulty of obtaining testimony in cases of this very nature. Bishop Onderdonk was then Secretary of the Convention.

Upon this topic I add an extract from the report of a sub-committee of the Standing Committee of New-York, made in the case of Dr. Forbes and others in February, 1850: "It is also certain that this canon has been used in the diocese of New-York for the displacement of clergymen chargeable with immoral conduct, and with respect to whom the requisite testimony for the support of the charge might have been obtained. It would be painful to mention names, but a reference to the report of Bishop Hobart for 1823, and of Bishop Onderdonk for 1843, will furnish to those who were acquainted with the parties, adequate proof of the assertion. Indeed, it is known to have been the opinion of the former, and is that of the present Bishop, that even where testimony can be procured, there are many cases in which the summary mode afforded by the canon of ridding the Church of an unworthy clergyman, is much better than to encounter the uncertainties, delay, scandal, and often great expense which attend a trial."

*Again*, the canon has been applied, and legally applied, to the

case of a clergyman whose moral character, in the usual sense is unassailed, but who renounces from an unhappy change of opinion as to doctrine or government; and even expressly with the view and intention of uniting himself with some other denomination. In the report before referred to, it is stated as follows: "It is believed that this canon has been, from the first, considered to be applicable to the case of clergymen desiring to leave the ministry of the Church, for the purpose of connecting themselves with other denominations. It was so applied in this diocese between the conventions of 1822 and 1823, in the case of the Rev. Asahel Davis, who became a Universalist preacher. It was also applied in the case of the Rev. Mr. Tatham and the Rev. Jas. R. Bailey.

"It has also been so administered in other dioceses. In Massachusetts, in the case of Mr. Askins, who joined the Romish Church, in that of Mr. Thorn in Delaware, who joined the Lutherans, and Mr. Meham in Virginia, who united with the Methodists."

It appears to have been sometimes considered that displacement is a punishment of less severity, or at least less ignominious, than degradation. But the 39th canon of 1832 has effaced all such distinction, if it ever existed. "Deposition, displacing, and all like expressions, are equivalent to degradation." Whether the conviction proceeds upon charges involving the most gross criminality, or upon changes of opinions which preclude the further serving at the altar of the Church, the sentence is the same, and cannot be greater.

And even prior to the passage of this canon, it appears to have been the opinion of Bishop Ravenscroft, that the sentence of displacement would preclude a restoration of the sentenced clergyman to orders. Dr. Hawks states, that the Bishop would not degrade a minister who retired from conscientious scruples, but displaced him; yet, according to his recollection, thought that he could not be restored. I believe

that the term displacement is not to be found in any other canon than the present, and in the 39th of 1832.<sup>1</sup>

The question of the form of the renunciation § 2. underwent much consideration in the case of the THE FORM OF Rev. Dr. Forbes, in New-York, in 1849-1850. I RENUNCIATION. add the statement and reasoning of the sub-committee upon that subject, which express in substance the opinion of the majority of the Standing Committee.

“It is requisite that there should be satisfactory proof of the declaration having been made, for if the proof is defective, as it would be if the language were ambiguous, it would be in the power of the clergyman at a subsequent period to deny the fact of the declaration, and to claim that the action of the ecclesiastical authority, and the sentence pronounced upon it, were void.

“What the proof of such renunciation shall be—whether it shall be oral or written—whether in the precise words of the canon, or in other words of equivalent import—and whether the declaration shall be recorded in the very words in which it was made, or in substance merely, are all points which are undefined by the canon, and are consequently left to the discretion of the ecclesiastical authority. The canon does not prescribe any formula in which the relinquishment is to be made. It does not even *require* that it should be in writing.”

“Impressed with a sense of the necessity of the caution requisite in the exercise of this power, the Bishop of this diocese in the year 1839, addressing the Standing Committee as his council of advice, requested their opinion, whether the expression to him by a clergyman in reference to the ministry: “I have resolved to abandon it forever,” or words of similar

<sup>1</sup> In several of the former canons of Virginia, the phrase “Dismission,” and “Dismissed,” were used, and once in a sense distinguished from Degradation. See *Canon* 28 and 33 of 1785, 27 and 28 of 1787, and 27 and 28 of 1791.

import, might be taken for the declaration supposed by the canon, and whether in recording a declaration, he was to state the words actually used, or to make the record in the precise terms of the canon. In reply, the Standing Committee, acting as a council of advice, gave it as their opinion, "that *the most safe and convenient rule will be to require from every clergyman desirous to relinquish the ministry, a written declaration under his hand, not only of his renunciation of it, but also of his design not to officiate in future in any of its offices; and 2d, that the declaration should be recorded in the very words of the original.*"

"In deference to this precedent, as well as from a conviction of its wisdom, the Standing Committee has made it a rule to request of every clergyman relinquishing the ministry, a written declaration in the words of the canon. But this rule is one of their own creation, not prescribed by any law, but adopted as the 'most safe and convenient mode' of carrying out the provisions of the Church. As a matter of course, it will operate in all ordinary cases; but instances may occur, in which it will be found safe and expedient to relax it. In one case in this diocese, the letter of relinquishment was sent from a foreign country, and was in words substantially of the same import as those in the canon, but not in the very language. It was received and the clergyman displaced."

"The renunciation, where the offence is not of moral depravity, may be considered as the substitute of the proof of any charges which should be preferred. It is of itself a plain confession of unfitness for the ministry, and being accompanied with a resolution to forsake communion, is a confession of having rejected the Church herself, with all her authority, decrees, and institutions. Why then convene a court and summon witnesses to prove a violation of ordination vows in specific instances, or to substantiate particular charges of

heresy or schism, when the renunciation itself is a confessed violation of all ordination vows, and of every standard of doctrine, Prayer Book, Offices, Articles and all! This seems much like torture after confession."

The first clause of the canon is, that "if any minister of this Church, against whom there is no <sup>§ 3.</sup> ECCLESIASTICAL proceeding instituted, shall declare to the Bishop, &c., his renunciation of the ministry, it shall be the duty of the Bishop to displace him from the ministry." CAL PROCEED-  
ING DEPEND-  
ING.

The only case under this clause which I am aware of, besides that in New-York in 1850, (afterwards noticed,) is the case of the Rev. Mr. Dashiell in Maryland, in 1815. The Standing Committee reported to the Bishop, that common report charged Mr. Dashiell with scandalous, immoral and obscene conduct, and recommended an investigation. This was commenced. The accused objected to the inquiry, and to the tribunal which was to conduct it. He addressed a letter to the Bishop, requesting that the proceedings might be stopped, and if not stopped, that his letter might be considered as a renunciation of all connection with the Episcopal Church. That renunciation was not accepted or recognized by the Bishop. The Standing Committee resolved, that considering such unrecognized renunciation made to escape investigation, as utterly invalid, the Rev. Mr. Dashiell be informed that the trial must proceed. He failed to appear, and was deposed.

In the year 1828, the following proceeding took place in Connecticut. The Rev. Mr. M. Raynor was presented "for being in the habit of countenancing and disseminating opinions which are contrary to the doctrines of the Protestant Episcopal Church in the United States, for being in the habit of public preaching without using the liturgy, and that his conduct had been unbecoming the Character of a christian minister."

The Standing Committee being informed by the Bishop that Mr. Raynor would immediately make the declaration required by the 7th canon of 1820, to enable the Bishop to suspend him from the ministry without a trial, proceedings on the charge were postponed.

At a subsequent meeting, information was received from the Bishop that the Rev. Mr. Menzies had been suspended.

And it appears from the address of Bishop Brownell that Mr. Menzies had relinquished the ministry and connected himself with another religious communion. He had communicated "the relinquishment of his official standing as an Episcopal Clergyman in the Diocese," that "I might record the same," and also "take such other measures as in my judgment the canon might require." (*Journal Conn.* 1828.)

Now in 1829, at the meeting of the General Convention first ensuing this act, the clause as to the existence of an ecclesiastical proceeding was adopted.

The case of the Rev. Dr. Forbes in New-York, in 1849-50, caused so much consideration and discussion of this portion of the canon, that a full statement of it, will, it is thought, aid the judgment upon its meaning.

The facts were these: On the 21st of November, 1849, a letter was addressed by Dr. Forbes to the president of the Standing Committee, as follows. This was not according to the letter of the canon. The president was informally advised by one or two members to pursue the same course as had been taken in the case of Mr. Shimeall,<sup>1</sup> and endeavor to obtain a communication strictly in its terms. The attempt

<sup>1</sup> In the case of Mr. Shimeall, the letter of relinquishment was couched in language quite as explicit as that of Dr. Forbes. The Standing Committee was about acting upon it as sufficient, when reference was made to the case of Mr. Harison, as reported by Dr. Hawks. The letter of Mr. Shimeall was, "that from that date he withdrew from all further connection with the Protestant Episcopal Church as a presbyter thereof, and proposed to ratify such act by participating in

was made, and a reply procured, still not containing the very language. In this position, and on the 27th of December, 1849, a presentment, dated that day, was handed to the Standing Committee, and that presentment was, as defined by the presenters in a subsequent paper, "for schism and non-conformity to the worship and discipline of the Protestant Episcopal Church of the United States."

On the same 27th of December, a sub-committee was appointed to consider and report upon the whole subject, and advise the course of action. On the 28th of December, a member of that committee having had some communication with Dr. Forbes, received a message from him, and thereupon addressed an inquiry in writing to him, whether he understood that message aright; viz: that "he (Dr. Forbes) intended in his letter to the President to declare his renunciation of the ministry of the Protestant Episcopal Church, and his design no longer to officiate in any of the offices thereof." To this an answer in the affirmative was made in writing, and subscribed by him.

On the 8th day of January, 1850, the Standing Committee ordered the declaration to be recorded, reciting these communications. A remonstrance was addressed by the Rev. Presenters asking for a reversal of this action, and a copy was laid before the Right Rev. Bishop Chase of New Hampshire.

the holy Communion next Sunday, in the Presbyterian Church, of which the Rev. Dr. Phillips is pastor." The Committee requested the President to communicate to Mr. Shimeall their view of the propriety of a more explicit letter. This was done, and a further letter was received couched in the very words of the canon.

The letter of Dr. Forbes was as follows: "You may conceive that it is with no ordinary emotion that I feel myself constrained to declare to you as President of the Standing Committee, that it is my intention no longer to exercise the ministry of the Protestant Episcopal Church, it having become my conscientious conviction that duty to God requires me to unite myself to the one holy catholic and apostolic Church, in communion with the See of Rome."

The Committee did not change their decision, and the sentence was pronounced by the Bishop on the 26th day of February, 1850.

In coming to this determination, it was assumed by some of the members, and not controverted by any, that apart from the presentment, the two communications brought the case within the very terms of the canon, even in the judgment of the one who most strictly required a scrupulous conformity. And it is confidently submitted, that had there been no presentment, this position could not admit of cavil.

Next, it is indisputable, that the period contemplated at which the ecclesiastical proceeding has been instituted, is the time of the declaration by the minister. It is not the time of the record, nor of course that of pronouncing the sentence. By way of example, if a perfect renunciation was written, and transmitted to the President, but from absence or accident, was not laid before the Committee at the time when a presentment of subsequent date was received, and even acted upon, action would be superseded by the renunciation when subsequently communicated.

And this is defensible upon two grounds. In the first place it seems to be the intention of the Church to give *a right* to the minister, complying with the prescriptions of the canon, to bring her condemnation upon himself in this manner, and to be shielded from a public trial and exposure of his weakness or his crimes.

And in the next place, if this were doubtful, yet when there was in existence a renunciation sufficient to a common intent before presentment, and made sufficient to the letter afterwards, not induced by the fear of it, there must be a discretionary power in the ecclesiastical authority to say, that the fallen member might in this mode be cut off, and the sentence in this mode reached.

Upon such views, as well as others which influenced them,



the course of the majority of the members of the Standing Committee was clear. They had held that the original letter was sufficient, but upon reasons of prudence and expedience, that it was best to seek for a more literal declaration.

The Committee had not rejected that letter. It remained before it, and was open for its action. And when the presentment was considered, and the questions, delay, and agitation, it would produce were weighed, they held that a higher expediency, in the secured peace of the Church, overruled the expediency which had induced their former course, and warranted their resorting to the first letter as containing at its date a sufficient relinquishment. They proceeded upon the ground that they and the committee had never gone further, than to seek for more than the first letter contained, and had never pronounced it insufficient, nor deprived themselves of the power to act upon it.

The author of the present work differed in one particular from his associates, and as he was alone in the opinion, he feels how improbable it is, that he should be right. But he cannot refrain from stating the point.

In his judgment, the letter of renunciation must be in the identical words of the canon. It is to be followed by the highest penalty known to the Church, the irremissible and final excision from her orders. The analogy of criminal law, though by no means to be followed in all its technical nicety, furnished a valuable and safe principle of guidance. It is settled that where an offence is created by statute, it is not enough to lay the indictment in equivalent terms, or words sufficient to a common understanding. The *ipsissima verba* must be employed. If a presentment had been framed under this canon, it would have been necessary to have employed its very language; and the evidence must have been co-extensive with the allegations. Now here the letter of renunciation under this canon was to supply the place of

presentment and proof. It ought to be as full and as direct, as they must be.

If this view may sometimes be attended with inconvenience, the remedy is under the second section of the 37th canon of 1832.

But the author was equally clear as his associates, in the right and duty of the Standing Committee to proceed under this canon, and for these reasons. The last communication of Dr. Forbes was not a new renunciation—it was not even a statement, that he *now* wished his previous letter to be interpreted as an entire compliance with the canon. It was a full, positive, unequivocal exposition and declaration of what that first letter did mean, and was intended to mean, and to be. It expressly announced, that in using the language he then used, he did intend “to declare his renunciation of the ministry, and his design not to officiate in future in any of the offices thereof.” This was done, when, as the sub-committee was satisfied, he was ignorant of the presentment, made the day before. The last communication could justly be treated as relating back to the former, as forming part and parcel of it, and could upon sound principles justify the considering the date of the first as being the date of the whole.

§ 4. The last clause of the canon is, that in the case  
 CLAUSE AS TO of a person making the declaration for causes not  
 MORAL STAND- affecting his moral standing, the same shall be  
 ING. declared.

From the context, it would seem as if it were only necessary to insert the clause in the notice. And as in the diocese in which the case occurs, the record shows the ground on which the sentence proceeds, this is probably all that is requisite. In the cases in the diocese of New-York in 1849, 1850, of a relinquishment in order to join, in the one case the Presbyterian, and in the other the Romish Church, not involving immorality in its popular sense, the clause was omitted. In the case of

the Rev. Mr. Huntingdon in 1850, in a case of the same character, the notice given by the Bishop of South Carolina did not contain it.

Dr. Hawks, in his comments upon the 39th Canon, questions the wisdom of the rule of the Church, in rendering a restoration to office impossible in every case after a sentence of degradation, and applies his objections particularly to the case of a minister imbibing and preaching false and erroneous doctrines. And by the 31st canon of the Church of Scotland, (1838) when any clergyman shall disobey any of the canons, he shall, after the first and second admonition by the proper judge be rejected, and publicly declared to be no longer a clergyman of the Episcopal Church in Scotland. But afterwards, on giving sufficient evidence of a sincere repentance, he may be restored to his former station by the sentence of a majority of the Bishops.

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The discussions of the cases in New York in 1849, 1850, gave rise to the inquiry how those who had been degraded from their offices as ministers of the Church stood in relation to communion with it, and the expression of an opinion by several, that some regulation was expedient. About the same period, the same subject was undergoing great consideration in England. The case of the Rev. Mr. Shore led to a bill called the Clergy Relief Bill, brought in first in 1848; again with material changes in March 1849; and as amended by a select committee, in April of that year. That committee, composed of members of very different views, at last agreed upon the following provisions: the party was to sign a certificate declaring that he was a Protestant and a Dissenter from the United Church of England and Ireland; that this should be transmitted to the Bishop, who within thirty days after its receipt, should record the same in his registry, and should further record in his registry sentence of deprivation of such person of

all preferment he may hold within the diocese, and also sentence of deposition of such person from holy orders.

These sentences were to have the like effect to all intents and purposes as if they had been pronounced by an Ecclesiastical Court having jurisdiction.

Another provision was added that "no clergyman shall be prosecuted, or proceeded against, punished or held liable for damages in any court or otherwise, for refusing to administer any rite or sacrament of the said United Church to or in respect of any such person."

Mr. Bouverie, the author of the measure, and some others of the committee retracted their consent, and ultimately opposed the bill.

It was repugnant to the opinions of two opposite parties. One body of Churchmen thought it did not go far enough; that it ought to recognize and provide for the exercise of the right of the Church to pronounce sentence of excommunication upon the seceders, in conformity with the spirit of several of her canons directed against schism and schismatics. Another party opposed the proviso clause, exempting any clergyman from punishment who should refuse to administer any of the offices of the Church to such a seceder. It is urged with irresistible strength of reasoning, in an article in the London Quarterly Review, (January, 1850,) that under such a doctrine, the dissent which is recognized by the law has no limit of belief—its only condition being that it differs from the belief of the Church of England; and as the persons so dissenting shall not lose their title to exact from the clergy, under civil penalties, the administration of the rites, or of certain of the rites of the Church, consequently religious belief is to be no condition of membership in the Church, or of its spiritual privileges. In this legislation is involved the four-fold principle, of tyranny towards the clergy, of ecclesi-

astical anarchy, of absolute religious indifference, and of public demoralization."

With equal force does this writer vindicate the right of the Church to exclude from her fold one who has abandoned her service. "To allow that the one clergyman who refuses the administration of her rites to such a person, shall be exempt from punishment—and another, of different views, may administer them, is a violation of her discipline, is grossly unjust to her integrity, and pregnant with evil."

Yet the Churchmen of England would have accepted the bill as reported by the committee, in spite of that anomalous and exceptionable clause. The opposition to it is the most extraordinary of all those late assaults which have struck alarm into the heart of the Church of England. To refuse her the power, which every denomination of Christians in the kingdom, nay, every petty association for any business object, possesses and exercises, of driving utterly from her bosom her erring members, is the merest wantonness of intolerance. It is a startling proof of that untameable ferocity with which her enemies pursue her.

The position of the law in our own Church is not free from embarrassment. Fortunately, the question is not entangled with any connection with the law of the state. Yet this delicate case may occur. A clergyman possesses the right to demand the administration of the communion. That right is not effaced by a sentence of degradation. He is yet in lay communion. Unless, therefore, his case is brought within the rubric admitting of repulsion, it will be difficult to say that he can be lawfully excluded; and if the sentence has proceeded upon the ground of a renunciation, for example, for causes not affecting moral character, under the rubric, great doubt would exist whether the repulsion would be justifiable.

One mode of meeting this difficulty is suggested—that

the Bishop may, when a clergyman is suspended or degraded, pronounce also a sentence of separation from the communion of the Church, provided, that that part of the sentence, in case of degradation, be remissible by a majority of the Bishops of the Church, when assembled as a House of Bishops, or otherwise, under any canon.

The author makes this a suggestion merely, well aware with how much caution legislation should proceed on such a subject.

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#### TITLE IV.

OF A MINISTER ABSENTING HIMSELF FROM HIS DIOCESE.

[CANON II. *General Convention*, 1841.]

“When a clergyman has been absent from his diocese during two years, without reasons satisfactory to the Bishop thereof, he shall be required by the Bishop to declare in writing the cause or causes of his absence, and if he refuse to give his reasons, or if these are deemed insufficient, the Bishop may, with the advice and consent of the clerical members of the Standing Committee, suspend him from the ministry, which suspension shall continue until he shall give in writing sufficient reasons for his absence, or until he shall renew his residence in the diocese, or until he shall renounce the ministry according to Canon 38 of 1832.”

In the case of such suspension as is above provided for, “it shall be the duty of the Bishop to give notice thereof to every Bishop of his Church, and to the Standing Committee of every diocese wherein there is no Bishop.”

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There was no previous canon upon this subject.

It contemplates, though it is not confined to, a case of absence at the time when the reasons are required; and the Bishop is then to make the requisition. Care must therefore

be taken that the requisition be brought home to the party, and sufficient proof of this must be made. This may sometimes be very inconvenient, or impracticable. It may be suggested whether two years absence, without reasons given by the party himself, should not be sufficient to ground the suspension. It is always in his power to communicate with the Bishop.

The sentence of suspension ought to specify the conditions upon which it will terminate. (See *Canon 3 of 1847.*)

There ought to be, as I apprehend, a formal declarative record by the ecclesiastical authority of the termination of the sentence, and probably this authority should be the same which pronounced the sentence, viz., the Bishop with the advice and consent of the clerical members of the Standing Committee.

This is the rule in England in cases of excommunication. Under a former system, when a sentence was pronounced, and a party imprisoned under the writ *de excommunicato capiendo*, he was absolved and released by a writ *de excommunicato deliberando*. This issued upon a certificate of the Bishop. (GIBSON'S *Codex*, 1102.) Under the statute 53 Geo. III., cap. 127, the writ *de contumace capiendo* is substituted, and a writ of deliverance issues, upon satisfaction being made. (BURNS *by Phill.*, vol. 3, p. 211, *et seq.*) In FLOYER'S *Proctor's Pract.*, p. 156, is the form of a decree of absolution from a sentence of excommunication.

Again, it is almost an invariable rule that, even in cases in which a party is declared excommunicate or suspended *ipso facto*, a judicial declaration and promulgation is necessary. Bishop Gibson does not entirely admit this, but the late case of *Titmarsh vs. Chapman* (3 CURTEIS' *Rep.*, 618) appears to establish it conclusively. The Bishop admits it to be rule at common law.

The Institutions of the Church, collected by Johnston, are

full of cases in which the penalty of excommunication or suspension is pronounced to be incurred *ipso facto*, yet a judicial sentence is essential; and what has in this formal manner been adjudged, should in the like manner be discharged.

So in a Constitution of Othobon it was directed: Statuimus ut cum aliquem Excommunicationis, Suspensionis, vel Interdicti sententia contingerit relaxari, mandetur alicui, ut relaxationem hujusmodi publice nunciet locis et temporibus opportunis. (*De Publ. Absol.*)

Athon adds, "*Ubi fuit publicatus Excommunicatus, &c.*"

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#### TITLE V.

OF THE REMOVAL OF A MINISTER FROM ONE TO ANOTHER  
DIOCESE, &c.

[CANON V. of *General Convention*, 1844.]

" § 1. No minister removing from one diocese to another, or coming from any other state or territory, which may not have acceded to the Constitution of this Church, shall be received as a stated officiating minister by any parish of this Church, until he shall have presented to the vestry thereof a certificate from the ecclesiastical authority of the diocese to which said parish belongs, approving him as a clergyman in regular standing. And in order to obtain such certificate, every minister desirous to change his canonical residence, shall lay before the ecclesiastical authority of the diocese in which he designs to reside, a testimonial from the ecclesiastical authority of the diocese in which he has last resided, in the following form, viz :

" ' I hereby certify that A. B., who has signified to me his desire to be transferred to the diocese of ———, is a presbyter (or deacon) of this diocese, in regular standing, and has not, as far as I know or believe, been justly liable to evil report



for error in religion or viciousness of life, during the three years last past.’

“When the ecclesiastical authority thinks proper, further statements may be added to the above letter. But in case the minister desiring to be transferred has been subjected to inquiry or presentment, on any charge or charges of misconduct, thereby rendering the terms of the aforesaid testimonial inadmissible, he may nevertheless be transferred if the charges have been withdrawn with the approbation of the ecclesiastical authority, or if he have been acquitted on trial, or if he have been censured or suspended, and the sentence has had its course, so that he has been restored to the regular discharge of his official duties. And in all such cases, the ecclesiastical authority of the diocese concerned, shall instead of the foregoing testimonial, certify to a statement of the facts, with as much detail as may be necessary to inform the ecclesiastical authority to which he desires to be transferred, of the true standing of the party.

“§ 3. No clergyman canonically under the jurisdiction of any diocese of this Church, shall be considered as having passed from under such jurisdiction to that of any foreign Bishop, or in any way ceased to be amenable to the laws of this Church, until he shall have taken from the Bishop with whose diocese he was last connected in this Church, or from the standing committee of such diocese, if it have no Bishop, the letter provided for in section 1 of this canon, and until the same shall have been accepted by some other Bishop, either of this or some other Church.

“§ 4. The ecclesiastical authority in all cases under this canon, is to be understood to refer to the Bishop, or in case there be no Bishop, to the majority of the clerical members of the standing committee, duly convened. And if the clergyman desiring to be received come from a state or territory, not in connection with this Church, and having no convention,

then the above testimonial or statement shall be signed by at least three presbyters of this Church. Nor shall any minister so removing be acknowledged by any Bishop or convention as a member of the Church to which he removes, until he shall have produced the aforesaid testimonial or statement.

“ § 5. The above testimonial or letter of dismission, shall not affect the canonical residence of the minister receiving it, until he shall be received into some other diocese by the Bishop or ecclesiastical authority thereof. And if the clergyman to whom the letters of dismission are given shall not present them to the Bishop or ecclesiastical authority to whom they are directed, within three months from the date thereof, if designed for the United States, and within six months from the date thereof, if designed for the Church in a foreign country, the letters *may* be considered null and void by the said Bishop or ecclesiastical authority, and *shall* be null and void if not presented as above in six months after date if intended for this country, and in twelve months after date if intended for a foreign country.”

The first canon on this subject was the 3d of 1804, the next the 31st of 1808; then the 4th of 1829, the 35th of 1832, the 4th of 1835, and the 7th of 1841.

Dr. Hawks, (Cons. and Canons 32, &c.) has pointed out the various defects in the canons prior to that of 1835, and the successive amendments adopted to remove them. The first two sections of that of 1835 correspond precisely with the first two of the present law. The third section was the same as the present fourth. The present section 3 was not in that canon. The present 5th section embraces section 4, and the last clause of the fifth section, with this difference. By the former provision, if the letters of dismission were not presented within three months after the party had taken up his abode in the diocese to which he had removed, the letters were declared absolutely null and void. It will be seen that the reg-

ulations of the present canon in this respect are much more practical and definite.

It is to be noticed that strictly letters dimssory was a term applied only to the instrument by which one Bishop sanctions the ordination of a deacon or priest by another Bishop.<sup>1</sup> By the general canon law, if a Bishop ordained a priest without such letters, his punishment was a sentence of suspension for one year. This was the rule established at the Council of Lyons in 1271. But in England, by the Constitution of Peckham (1230) the punishment was a suspension from conferring the same order until he made sufficient satisfaction. This was the law, as I gather, until the canon of 1603, (the 34th) by which the Bishop ordaining without such letters, was to be suspended from making either deacons or priests for two years. This prohibition extended to ordaining an inhabitant of another diocese to be a deacon, as well as ordaining a deacon to be a priest.<sup>2</sup>

But the letters commendatory (*literæ commendatitiæ*), of the canon law, more closely resemble our letters of dismissal. They are mentioned in the provincial constitutions of Walter, and of Thomas Arundel.<sup>3</sup>

In the latter, "it is provided that no one not born or ordained in the province should be admitted to officiate, unless he brought with him his letters of orders, and letters commendatory of his diocesan."<sup>4</sup>

<sup>1</sup> Lynwood thus defines the meaning; *Dicuntur dimissoriæ quia per eos Episcopus dimittit subditum suum et licentiat ut alibi posset promoveri, et quod alius Episcopus possit cum ordinare.*

<sup>2</sup> All this appears in the Codex, vol. 1, p. 163, 164.

<sup>3</sup> See these constitutions at the end of the edition of Lynwood and John of Athon, printed at Oxford, 1679.

<sup>4</sup> It may be noticed, however, that Lynwood quotes a canon of Innocent, to the following effect: *Literæ Dimissoriæ*, Hæc dicuntur per quas aliquis dimittitur a jurisdictione, seu potestate sui prælati." (*Lib. 1, Tit. 9, DE PEREG. Clericis.*)

It is stated by Bingham, (Book 2, cap. 4, § 5,) that according to the rules and practice of the ancient Church, no Christian could travel without taking letters of credence with him from his own Bishop, if he meant to communicate with the Church in a foreign country. These letters were of several kinds, according to the different occasions or quality of the persons who carried them. They are generally reduced to three kinds—commendatory, communicatory, and dismissory. The first were such as were granted only to persons of quality, or to persons whose reputation had been called in question, or to the clergy who had occasion to travel into foreign countries. The second sort were granted to all who were in the peace and communion of the Church, whence they were also called pacifical, and ecclesiastical, and sometimes canonical. The third sort were given only to the clergy when they were removing from one Church to settle in another, and they were to testify that the bearers had their Bishop's leave to depart, whence they were called dimissory, and sometimes also pacifical. All these went under the general name of *formed* letters, because they were written in a particular form, with some particular marks and characters which served as special signatures to distinguish them from counterfeits. Respecting all of them it is to be observed, that it was the Bishop's prerogative to grant them, and no other person might presume to do so, at least without his authority and permission."

In some of the dioceses, a communicant changing his residence, and thus dissolving his connection with a parish, shall be required to present a certificate of good standing from the minister of such parish, or if there be no minister, from one of its wardens, before being enrolled as a communicant of any other parish. (*Canon 15 of Ohio.*)

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## TITLE VI.

OF A CLERGYMAN OF ANY DIOCESE CHARGEABLE WITH MISDEMEANOR  
IN ANY OTHER.

[CANON XL. of *General Convention*, 1832.]

“ § 1. If a clergyman of the Church in any diocese within this Union, shall in any other diocese conduct himself in such a way as is contrary to the rules of the Church and disgraceful to his office, the Bishop, or if there be no Bishop, the Standing Committee, shall give notice thereof to the ecclesiastical authority of the diocese to which such offender belongs, exhibiting, with the information given, the proof of the charges made against him.

“ § 2. If a clergyman shall come temporarily into any diocese under the imputation of having elsewhere been guilty of any crime or misdemeanor, by violation of the canons or otherwise, or if any clergyman, while sojourning in any diocese, shall misbehave in any of these respects, the Bishop, upon probable cause, may admonish such clergyman and forbid him to officiate in such diocese; and if after such prohibition the said clergyman so officiate, the Bishop shall give notice to all the clergy and congregations in said diocese, that the officiating of such clergyman is, under any and all circumstances, prohibited; and like notice shall be given to the Bishop, or if there be no Bishop, to the Standing Committee of the diocese to which the said clergyman belongs; and such prohibition shall continue in force until the Bishop of the first named diocese be satisfied of the innocence of the said clergyman, or until he be acquitted on trial.”

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The former canons were the 2d of 1792 and the 28th of 1808.

The were the same as the first section of the present canons, introducing the word district as well as diocese.

The continued superintendance of a Bishop over a clergy-

man, although out of his diocese, is recognized in old and modern canons. A Bishop was prohibited from receiving a minister from another diocese without permission. By the 16th of the apostolical canons, if he did not receive him, he was to be excommunicated as a teacher of disorder.

Dr. Hawks (p. 355) observes, that a case may arise not free from difficulty, where a clergyman, a mere visitor in a diocese, violates some canon of that diocese, there being no such canon in his own, and where a penalty is annexed to the violation of the canon in the diocese in which he offends. He concludes that such a clergyman is bound to know the canons of the diocese in which he resides, that the offence should be punished by his own Bishop, but whether by the infliction prescribed in the diocese in which the offence is committed or not, should be in the latter Bishop's discretion.

I presume that the phrase "proofs," in this section, means only the statements or documents, or voluntary affidavits, which may have been laid before the Bishop. No judicial inquiry could be instituted by him.

There was a case decided in the Court of Delegates in Ireland, in 1838, which bears upon this subject. (The Office of the Judge, &c., vs. Nixon, 1 MILWARD'S *Rep.*, 390, *n.*) Nixon, rector of one parish, went into another, and as a clergyman belonging to a society called "The Home Mission," read some prayers, sung a hymn, and preached in the market house. He had been previously warned not to do so by the rector. He was cited before the Archbishop of Armagh, the diocese in which the act was committed, for having preached in a private house without permission of the diocesan or vicar. An exception to the jurisdiction was taken, because the party was not, at the time of issuing the citation, or for three months previous, a resident of that diocese.

The court referred to the 21st, 38th and 39th canons of the Irish Church, and held that the offence was in the nature

of a contempt or violation of the authority of the Bishop of the diocese in which the offence had been committed, and was consequently local, and subject to the jurisdiction of that diocese only.

That the general rule of the ecclesiastical law was, undoubtedly, that the dwelling place of the accused is the forum to which he is to be cited. But there were exceptions which took the case out of the general rule that *forum sequitur reum*, and gave locality of jurisdiction from the place of *delictum*. That Lynwood supported this view, *De Jud.*, Lib. 2, Tit. 1.

The citation in such cases is served with the aid and consent of the jurisdiction where the offender resides.

We see that the principle of this case, is so far adopted in the second section of our canon as to admit of an admonition by the Bishop of the diocese where the offence is committed, and a prohibition from officiating within it.

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#### TITLE VII.

##### OF MINISTERS OFFICIATING IN THE CURES OF OTHER CLERGYMEN.

[CANON XXXI. *General Convention, 1832.*]

“§ 1. No clergyman belonging to this Church shall officiate either by reading, praying, preaching, or otherwise, in the parish or within the parochial cure of another clergyman, unless he has received express permission for that purpose from the minister of the parish, or cure, or, in his absence, from the churchwardens, and vestrymen, or trustees, of the congregation.

“§ 2. When parish boundaries are not defined by law or otherwise, each city, borough, village, town, or township, in which there is one Protestant Episcopal Church or congregation, or more than one such church or congregation, shall be held for all the purposes of this canon, to be the parish or

parishes of the Protestant Episcopal clergyman or clergymen having charge of said church or churches, congregation or congregations.

“§ 3. But if any minister of a church, shall from inability or any other cause, neglect to perform the regular services to his congregation, and refuse without good cause his consent to any other minister of the Church to officiate within his cure, the churchwardens, vestrymen, or trustees of such congregation, shall on proof of such neglect and refusal before the Bishop of the diocese, or if there be no Bishop, before the standing committee, or before such persons as may be deputed by him or them, or before such persons as may be by the regulations of this Church in any diocese vested with the power of hearing and deciding on complaints against clergymen, have power to open the doors of their church to any regular minister of the Protestant Episcopal Church.

“§ 4. In case of such a vicinity of two or more churches, as that there can be no local boundaries drawn between their respective cures or parishes, no minister of the Church other than the parochial clergy of the said cures, shall preach within the common limits of the same, in any other than in one of the churches thereof, without the consent of the major number of the parochial clergy of the said churches.”

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The first canon on this subject was the sixth of 1792. It was precisely in the language of the first clause of the present canon, marked § 1, and it gave the unqualified power to a minister of a parish to exclude the services of any other, and did not provide for the case of his inability to officiate, and refusal to permit another to do so.

The 5th canon of 1795, made provision for such a case in the language of the present canon, retaining the first clause, and adding what I have marked § 3.



In the seventh canon of 1795, the clause of the present, which I have marked § 4, was adopted.

The 33d of 1808 embodied all the previous regulations into one enactment. In 1829, the clause was adopted which I have marked as the second section of the present canon. The reason for the passage of this section is thus stated by Dr. Hawks.<sup>1</sup> A clergyman of another state had accepted an agency of the American Sunday School Union, and addressed the scholars in a Presbyterian Church, near the only Episcopal Church in the place, contrary to the remonstrance of the rector, who was answered, that it was intended to address Presbyterians and Congregationalists, who were not within his parochial cure.

It may perhaps be questioned, whether such an address to persons of other denominations, or scholars, is even now within the canon.

In 1832, the canon was passed as it now stands, with all the preceding provisions embodied in it.

In 1844 a resolution was offered to amend this canon by inserting, after the word congregation in the first paragraph, (marked § 1,) the following: "Provided always, that said restriction do not extend to the organization of new parishes within the limits of another, nor to the officiating of clergymen in said parish when duly invited by the authorities thereof." (*Journal* 1844, p. 37.) The Committee on Canons reported that it was inexpedient to adopt it, inasmuch as the object of the proposed amendment was sufficiently provided for in the canon as it now stands, (*Ibid.* p. 41.)

The Committee on Canons reported in the year 1847 an amended thirty-first canon, which contained the following clause:—No new congregation or parish shall be organized within the limits of an existing parish or parishes as defined in section 1, without the previous consent of the minister or

<sup>1</sup> *Constit. and Canons*, p. 291.

ministers of such parish or parishes, unless the same shall have been permitted by the Diocesan Convention, or in its recess by the Standing Committee.

This subject of intrusion is one of great delicacy, and no little difficulty. It is to be observed, that the defining of boundaries *by law* which the canon mentions, is the law of the state; and it was before shown that except in some Southern Dioceses, the limits of a parish, as such, are rarely so defined.

But when there is no such law defining the boundaries, then the canon provides that the limits of a village, city or town are to designate them. If there is but one church in a city or town, the case is plain. The parish is commensurate with the town or city; the clergyman of the single church is the minister of the parish. But if there are two or more churches in the town or city, with ministers in each, then such town or city shall be held to be the parishes of such ministers for the purposes of the canon. As I understand it, this means, that the city, &c., comprises as many parishes as there are congregations or churches with ministers in charge of them within its limits; and that each of such ministers has a parish within such city.

To a certain extent this furnishes a definite rule. Thus the church edifice and precincts, such as the burial ground, are exclusively within the parochial cure of the rector, for the purposes of this canon. Every service therefore performed within these limits, may be performed by another with his consent, and may not be performed without it.

But as to services, such as baptisms and marriages, performed beyond the precincts of the church, the meaning of the phrase must be extended to embrace them. By treating the term church or congregation, (which *prima facie* is used collectively,) as comprising the members of the church or congregation—those who have legally united themselves with

it, the object of the canon will be obtained, and I think its true meaning reached. The marriage or baptism of any members of the Church or their children in private places, without the clergyman's consent, is equally forbidden, and a matter of discipline. If this view is not correct, then either the consent of all the ministers in a city or town is required for such private service, or any clergyman is at liberty to perform them without any consent.<sup>1</sup>

By the last clause of our canon, the consent of a majority of the parochial clergy is also made necessary, a requisition extremely inconvenient in large cities with many churches. A practice has therefore grown up of getting the consent of the rectors in the vicinity, which may be the only practical exposition, but is not defensible under the canon. Upon the latter part of this section of the canon Dr. Hawks remarks: "A question arises under the last sentence of this canon not without interest. It concerns the erection of new churches in our large cities and towns. The usual mode pursued is (and such is the regular and canonical course) for the clergyman who desires to raise a new congregation to apply for the assent of such of his brethren as may have churches near the scene of his intended operations. Although a body of laymen may erect an edifice, yet no minister would have a right to officiate in it without the consent of the major number of the parochial clergy who have charge of the churches and cures already existing."

This statement of the learned annotator shows, I think,

<sup>1</sup> There is a provision in the canon law applicable to such a case. Van Espen, after quoting a canon of the Council of Trent, says, "Whoever will consider the view and intention of the council in these words expressed, will readily understand that the decree of the council is fulfilled wherever parishes have not fixed bounds, but have certain people and certain families, that the Sacraments be not promiscuously administered, but the priests recognize their own people." (*Jur. Ecc. Un.*, Pars. 1, Tit. 3)

the necessity of some legislation upon this matter. Here is a requisition for the consent of a majority, and a practice to take that of a few in the vicinity.

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Having stated the progress of our legislation on this subject, with the proposed amendments, I proceed to a consideration of various questions which arise under the canon. The 1st, 2d and 4th clauses, as I have marked them, should be considered in connection.

There is no part of the law of the Church which has occasioned the author more perplexity; none more calculated to excite strong personal feelings, and none which requires a more thorough interposition of the General Convention.

An important case came before the Standing Committee in 1849 and 1850, which led to great discussion of the canon, and no little warmth of controversy. Happily, by the counsel of friends, the matter was amicably settled. The case had been anxiously examined by a sub-committee,<sup>1</sup> whose conclusions upon several points of general interest it may be useful to state.

The material facts were these :

By a charter of Queen Ann, the whole of Staten Island was created into the Parish of St. Andrew's, the parish church being at Richmond. By a colonial act, re-adopted in 1784, again in 1813 and in 1830, the island was divided into various towns, with specified boundaries, of which Castleton was one.

Prior to 1832, the parish church of St. Andrew's was the only church on the island. This was in the town of Richmond. But there had been erected a chapel of ease at Factoryville, in the town of Castleton, at which the rector of St. Andrew's occasionally officiated.

In this state of things, and in the year 1833, a new church was organized and incorporated. Its incorporate title

<sup>1</sup> Rev. Dr. Seabury, Chief Justice Jones, and the Author.

and name adopted in the act was, "The Rector, Churchwardens and Vestrymen of St. Paul's Church in the Town of Castleton." By this name it was reported upon favorably by a committee of the convention, and by this name it was admitted into union in 1834, and delegates from it were received.

In the year 1849, a new church was organized in what was termed New Brighton, in the town of Castleton. The Rector of St. Andrew's attended at the preliminary meetings, and aided in the incorporation.

The Rector of St. Paul's Church, on a written application for his assent, convened his vestry, and with their approbation declined granting it, and remonstrated against it. Upon its being incorporated, the new church applied for the sanction of the Standing Committee for admission into union. The rector of St. Paul's Church remonstrated against it, and the subject was sent to a sub-committee for examination.

Upon this state of facts the sub-committee came to these conclusions:<sup>1</sup>

<sup>1</sup> There was another question of some general interest raised. There was a great deal of testimony to show, that St. Paul's Church was almost universally known and spoken of as St. Paul's Church, Tompkinsville; indeed, there were several important acts of the vestry done under that appellation. Tompkinsville was not incorporated as a village, but was termed such by common repute. It had not any known or ascertained bounds, yet there could be no difficulty in saying it did not extend to New Brighton, a village also unincorporated.

Now, undoubtedly, had the church been incorporated for the village of Tompkinsville, and the boundaries of that village fixed, those would have been the limits of the parish; and the author's impressions were, that it was competent for the committee to enter into a consideration of the testimony, as the case stood.

But the majority judged otherwise. They considered it very doubtful whether we could go behind the title taken in the act of incorporation, and by which the church was admitted into union. They inclined to the opinion that the convention never meant to use the term village in a sense capable of so much difficulty, but that the true meaning was, that the village should be incorporated, or its boundaries other

1. That the express permission of the canon, not being required to be in writing, was to be construed as a permission clearly manifested and established. The permission for the organization of a new church could be proven by the presence and participation of the rector at the preliminary meeting; by officiating in the new church after its organization; by acquiescence with knowledge, in its admission into union; by the absence of any remonstrance for a reasonable period of time; or by any other satisfactory evidence of approval.

That the assent of the rector of St. Andrew's to the organization of St. Paul's by its corporate title must be assumed from his failure to remonstrate at the Convention, which admitted that church, although, as appeared by the journal, he was present—and from the lapse of so long a period.

2. That but for the existence of the chapel at Factoryville, the surrender of rectorial jurisdiction for the whole town of Castleton would have been complete; and that town would have formed under the canon, the parish of St. Paul's. But that the existence of that chapel within the town worked a reservation of authority in the rector of St. Andrew's—caused the case to fall within the other clause of the canon; and thus there were two churches, with two settled ministers, having, for the purposes of the canon, co-equal authority. This was wise legally settled. And if these propositions were doubtful, they concluded that the evidence was insufficient to vary the case as it appeared on the official records.

As connected with this subject, reference was had to the following authorities: COWEL'S *Interpreter in voce*, Statute 13 and 14, Car. 2, c. 12; 1 *Inst.*, fol. 115. Lord Coke says, "A village must consist *de pluribus mansionibus et vicinis*. 5 MAULE & SELWYN, 381. See the case of the *Borough of West Philadelphia*, 5 WATTS & SERG. 383. An act of the legislature empowers the quarter sessions to incorporate any town or village containing three hundred inhabitants. "The words," says Chief Justice Gibson, "do not embrace a champagne country, but a collection of houses collocated after something like a regular plan in regard to streets and lanes, without intervening farm land, but with a convenient curtelage attached to each."

subject to the necessary exception of an exclusive power in each, in his own church-building and precincts, and among his own people. Of course the rector of St. Andrew's had an entire right to officiate in the incorporation of Christ Church.

3. That the rector of the parish, who was opposed to the formation of a new church, could have no prohibitory redress. He could not enjoin the worshippers from meeting and going through the formalities of the statute. Whether he could present the minister who should officiate previous to such meeting (as in New-York is necessary for two Sundays,) must depend upon the question whether a minister subsequently officiating was within the canon, or not. If the organization and incorporation exempted the latter from the operation of the canon, it must extend to the acts of those who fairly assisted in the necessary steps to effect that incorporation.

4. That such organization and incorporation did not of itself entitle the church to admission into a union with Convention. The power to admit or refuse was absolute and unrestricted in that body, and although in New-York, an incorporation was a pre-requisite to admission, it did not constitute a title to it.<sup>1</sup>

<sup>1</sup> The following is an extract from the report of the sub-committee on this point: "Another view which has been presented on behalf of the applicants is, that the mere fact of an incorporation under the statute takes the case out of the operation of the canon. With this view, the committee can by no means agree.

"The incorporation of the church is nothing but the consent of the civil authority that, upon certain conditions and forms being observed, the church should be invested with the franchises and privileges of a corporate body. It is the assent of the state, as far as any powers of the crown have devolved upon it, to the formation of new churches or parishes.

"The ecclesiastical organization of a church is entirely distinct. The government of its ministers is a matter unaffected by the civil laws. The state never intended, and never should be permitted, to interfere with these. The eleventh section of the act of 1784, contains the sound principle. The precedent in Maryland, in the case of Christ

5. That for reasons similar to these which led to this result, as well as other considerations, the statutory incorpora-

Church in 1844, and that of Louisiana in 1848, bear pointedly upon the question; and the language of Bishop Onderdonk, in his address of 1840, is very pertinent.

“‘ Nothing herein contained shall be construed in the least to alter or change the religious constitutions or governments of either of the said churches, congregations or societies, so far as respects or in anywise concerns the doctrine, discipline, or worship thereof.’ (*Act of 1784.*)

“In the case of St. Peter’s, Bethel Church, New Orleans, in 1848, an act of incorporation under a law of the state was produced. The committee reported that if St. Peter’s was an independent congregation, formed as every other has been in New-Orleans, for the accommodation of certain members of the laity, who designed to buy lands, build a church, and afterwards sustain it by the contribution of its members, the committee did not see any objection to its admission, but that it was an important fact that St. Peter’s Church, as presented for admission, is actually engrafted on a congregation, that was already gathered by the Rev. Mr. Withall, as a mission station of the city mission of New Orleans, and designed to be for ever a free Church for seamen and boatmen in New Orleans. The committee proceed to state various reasons showing that the proposed organization would interfere with the objects sought by the mission society, and concluded with a resolution that it was inexpedient to grant the application. In this the convention concurred.

“In the address of Bishop Onderdonk to the convention of 1840, he says: ‘These corporations are indeed composed of members of the Church, as citizens of the commonwealth. But it should be remembered that they avail themselves of this civil privilege as members of the Church. I presume it will be conceded that there is a fair and honorable compact with the civil authorities, that when they seek civil rights in their capacity as a Church institution, it is solely that they may be exercised for the Church, and in subordination to its principles and views.’

“The case of Christ Church, Hagerstown, in Maryland, is also in point. In the minority report, it is said—‘It is asserted that whether or not a new congregation shall be received as a member of this convention is wholly independent of any civil law, but depends exclusively upon the canons of the Church, or in the absence of any canonical provision, upon the mere discretion of the body, to be governed by questions of expediency. In the general and abstract, the undersigned are not disposed to dissent from these doctrines, &c.’

“The majority reported, that the proposal to incorporate grew out



tion could not affect or limit any purely ecclesiastical regulation for the conduct or duty of ministers. The whole question was, then, whether the 31st canon, upon received principles of construction, comprised the case; and in the judgment of the committee it did so.

That no injury to the Church, or at least one of a mere temporary nature, could arise from this view. If the opposition of the minister was unjustifiable, redress, if from no other quarter, could clearly be had from the diocesan convention. The power to divide parishes, to agree to the formation of new ones, to the organization and establishment of a new church, was in that body; and an act of admission into union did, in fact, amount to a ratification of the whole proceedings, and would supersede the application of the canon.<sup>1</sup>

of dissensions in the parish, and that the object of the parties was to sit under the preaching of some gentleman with whose doctrines they could more entirely agree, than with those of the rector of St. John's. That these were not legitimate grounds of separation of a parish.

"In New-York, upon the remonstrance of the vestry of Trinity Church, Christ Church, though incorporated, was refused admission into union at three different conventions.

"Nothing can be more clear or more important, than the distinction between the ecclesiastical organization and the civil incorporation of a Church.

"The statute itself recognizes and presupposes that the former is accomplished to a great extent. But it is not perfect under our system, until a union with the convention is had. There is no such thing as an inherent right to admission by reason of having completed a parish organization with a rector and vestry, nor can the statutory incorporation give such a right."

<sup>1</sup> A practical difficulty was seen to exist in New-York and some other dioceses. There must be an incorporation of the church before it is admitted into union; and the services of a minister are necessary at the preliminary meetings for two Sundays. But such minister would be within the canon—intruding into the cure of another. The incorporation would be no doubt legal under the statute, but would be canonically irregular. The decisive answer to this appears to be, that a difficulty which the convention could remove by a canon, as in Virginia or Maryland, perhaps by special legislation in a particular case, ought not to be sufficient to overrule what seemed the true meaning of the general canon, and actual rights under it.

6. That under the canon of this diocese (New-York) the act of incorporation is to be approved of by the Bishop; and that power is now vested in the Standing Committee. It would be a very anomalous proceeding to give such approval, and then to be compelled to entertain a presentment of a minister officiating without permission. The consent, therefore, could not be granted in opposition to the decided written remonstrance of the rector.<sup>1</sup>

7. And lastly, that they could not enter into the consideration

<sup>1</sup> In the first place the terms of the canon are perfectly clear, and sufficiently comprehensive to include the case. If the policy of the Church is sound, to protect a clergyman from an unauthorized interference with his flock, the injury to him will be as great, where a body of his parishioners is gathered together under the forms of an organization, as where he is subjected to occasional and broken intrusions. At any rate this point was one lying on the very surface of the subject, and the General Convention made no qualification of the generality of its language.

*Next*, the framers of the canon employed the familiar language of the English law. "There is no rule of ecclesiastical law," says Dr. Burns, "more firmly established than this, that it is not competent for any clergyman to officiate in any church or chapel within the limits of a parish, without the consent of the incumbent." (Vol. 1, p. 306.)

"The consent of the incumbent to the erection and use of a Church or chapel, is requisite," is the language of Lord Stowell. It is an inference of the strongest character, that when they used such terms, with a knowledge that such was the English law, and used them without qualification or exception, they used them in the sense of that law.

It may be useful on this important point to advert further to the canon law in relation to this matter, as well as to some authorities in our own country. It may be observed that in some sense the organization of a new church, (even in a city,) is the erection of a new parish, or at least the establishment of a new parochial cure.

By the English law, the consent of the rector of a parish to its division, or the erection of a new church within its limits, is indispensable. Lord Stowell, (DUKE OF PORTLAND and BINGHAM, 1 *Cons. R.* 161,) says: "No decision that I know of has gone the length of laying down that even in the case where the necessity of an increased population was urgent, and where the consent of the incumbent has been causelessly and obstinately withheld, the authority of the Bishop could yet be interposed to remove the obstruction. When such a case arises, it may

of any objection to the right of the church of St. Paul's to remonstrate, resting upon the alleged illegality of its own incorporation. To try such a question indirectly, and after a

require grave consideration to find the proper remedy against so improper an abuse of the general right."

This principle is adhered to in the statute of 1 and 2 Victoria, cap. 32, although the division of a parish and building of a new church be sanctioned by the Bishop, then by the Archbishop, and lastly by the Queen in Council, yet if the incumbent refuses his consent, it cannot be completed until a vacancy occurs.

But in this the English law differs from the whole body of the canon law, and is perhaps founded on the rights to tithes and dues attached to a cure. It is well settled in the general law of the Church, that new parishes may be formed, or new churches built in opposition to the will of the rector, if upon hearing him, the Bishop should deem it for the interest of the Church that it should be done. With this rule a canon of the Episcopal Church of Scotland coincides." (See ante p. 230.)

"Now in several of our dioceses, this power is expressly asserted to exist in the diocesan conventions, and is exercised and regulated by them."

The report proceeded to cite the regulations in Maryland, Virginia, and Alabama, before stated. (Ante. p. 233.)

"The committee have been referred by the applicants to two cases. One was in the diocese of *South Carolina*, four or five years since—the case of "Grace Church, Charleston." In this instance every thing necessary for the erection of an edifice had been prepared, when it was signified to the vestry that a majority of the parochial clergy of Charleston would object to the officiating of the minister whom the vestry desired to call. So general had been the construction of the canon, which gave the power to the city rectors, that at first it was thought that the enterprise would have to be abandoned. A closer examination of the canon, however, led to the conviction that it was not intended to affect the erection of new churches, and the organization of new parishes; but simply to prevent the officiating of one minister within the bounds of others' parishes unless permission were first granted; that so far as any canon of our Church is concerned, the organization of a vestry, even within the bounds of another parish, constitutes it a distinct ecclesiastical body, with power to call a minister, as clear and undisputed, as that which the vestry of the original parish possesses. The case was thus presented to the parochial clergy objecting, and after due deliberation, all opposition was waived upon the precise ground above stated. Objection was subsequently made to the

formal union with the convention for such a length of time, was wholly inadmissible.

admission of "Grace Church" into union at the meeting of the convention, but it was voted down, and the enterprise succeeded.

"The second instance referred to, occurred in the diocese of Pennsylvania, in 1839-40, in the case of the Church of the Advent, Philadelphia. That church was organized by laymen from the parish of the Rev. George Boyd, Rector of St. John's Church, N. L., Philadelphia. They organized—hired a temporary place of worship near the parent church, and called the Rev. John J. Kerr as their minister. Dr. Boyd and others presented the Rev. Mr. Kerr for a violation of canon 31. The presentment was dismissed by Bishop H. U. Onderdonk, (who, it is reported, is the author of canon 31, as it now stands,) on the avowed ground, that it has no reference whatever to organized parishes, or to the clergymen duly called thereby; and that to give such a construction to it would be to put it in the power of any minister first settled in any city, township or village, to prevent the extension of the Church therein; a thing never contemplated by those who drew and passed the canon, and one never to be tolerated in a country like ours. At the ensuing diocesan convention, when the question came up on "the Church of the Advent" into union, Dr. Boyd opposed: when under the advice and opinion of Mr. Horace Binney, the church was admitted on the precise ground above stated."

"On the other side, in the year 1849, in the diocese of Wisconsin, a committee appointed in the previous year for preparation of instructions for the organization, &c., of parishes reported—"That care should be taken not to interfere with the canonical rights of any other clergyman by organizing within the bounds of his parish." The 31st canon is then quoted, and it is observed—If there be two or more organized parishes within the above defined boundaries, then the consent of the major number of the parochial clergy of the said churches or parishes, must be first obtained. The first step, therefore, to be taken when about to organize a parish, is to obtain in writing the consent of the minister or ministers, within whose parochial bounds it is proposed to organize a new parish. This consent will prevent the possibility of the minister who may be called to the new parish, being persecuted for violating the requirements of the general canon above referred to."

This report was submitted to Judge Miller, of the United States District Court, and approved of by him.

"While the committee look upon the precedents in South Carolina and Pennsylvania with great respect, they are unable to yield to them as authorities. The former resolves itself into the opinion of able and conscientious men, changing their first impressions. The admission

The author ventures to suggest in the note a series of regulations upon this subject. In his judgment, either the system should be wholly abandoned, as has been suggested in Virginia, or the rules should be freed from what is supposed to be great obscurity and difficulty.<sup>1</sup>

into convention in that diocese, and also in the case in Pennsylvania, has no weight whatever upon the question. Nothing can be clearer than the power of a convention to assent to the formation of a new parish, and thus for the future at least, to prevent the application of the canon. An admission into union is such an assent. Thus, the precedent in Pennsylvania is reduced to the strong authority of Bishop H. U. Onderdonk. But the committee must suggest that the reasons assigned by him do not seem well founded. The right of a convention to meet the case by a canonical regulation supplies an answer to them all."

<sup>1</sup> I. A new parish may be established, or a new church or congregation organized within the limits of any parish whose limits are prescribed by law or otherwise, or within the limits of any city, town, village, or borough, in the following manner:

1. Upon the written consent of the minister or rector having charge of a church or congregation within such limits, when there shall be but one church or congregation with a minister in charge thereof; or of the wardens and vestry of such church or congregation, where such church or congregation is without a minister.

2. Where there are more than one such church or congregation, and less than four, upon the written consent of a majority of such ministers.

3. And where the number of such churches or congregations shall exceed three, then upon the written consent of the ministers of the two churches or congregations, whose places of public worship shall be the nearest to the place proposed as the place of worship of such new parishioners.

The written consent, in the preceding cases, shall be filed with the secretary of the Standing Committee previous to any measures being taken for the organization of such new parish.

In each of the preceding cases, the consent in writing of the ecclesiastical authority must be given to the establishment of such new parish.

II. If the consent of the minister or ministers as aforesaid is denied or withheld, application may be made to the ecclesiastical authority for the establishment of such new parish; of which application two months' previous notice shall be given to the minister or ministers whose consent is so denied or withheld.

The decision of the ecclesiastical authority, if in favor of the ap-

3d. Under the 3d subdivision of this canon it may be remarked, that the inability to perform the services must be coupled with an unjustifiable refusal of consent to employ another—that proof of such neglect and refusal must be made to the Bishop or Standing Committee, and that either of these may depute persons before whom the proof shall be made.

Again, if by the law of any diocese there should be a set of persons appointed to hear and decide complaints against clergymen, that body may receive such proof. This, no doubt, must be a permanent body, established for such a purpose. The Ecclesiastical Court appointed in Maryland in 1847 would be of this character.

*Next*, although the canon declares simply that the churchwardens shall, on proof of the neglect and refusal, have power to open the doors of the church to any minister, yet no doubt there must be some formal act of the authority applied to, sanctioning the proceeding. The proof is to be not only of inability, but of the refusal, and its reasonableness. There should be a decision on these points, and some record of such decision.

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#### TITLE VIII.

##### OF PERSONS OFFICIATING, NOT MEMBERS OF THE CHURCH.

[CANON XXXVI. *General Convention, 1832.*]

“No person shall be permitted to officiate in any congregation of this Church without first producing the evidences of his being a minister thereof, to the minister, or in case of a vacancy or absence, to the churchwardens, vestrymen, or trustees of the congregation.”

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The first canon was the 5th of 1792. It was the same as  
plication, shall be final; but if otherwise, the case shall be reported to the convention, with the reasons for withholding an assent, for the final action of that body.

the first paragraph as the present one, using the word, "stranger" instead of "person." There was an additional clause, that in case any person not regularly ordained should assume the ministerial office, and perform any of the duties thereof in this Church, the minister, &c., should cause his name and offence to be published in as many public newspapers as thought fit.

The 35th canon of 1808, which was the next, differed only in substituting the word *person* for *stranger*.

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It is justly remarked by Dr. Hawks, (*Cons. and Canons*, 333,) that by the other laws of the Church, the person must be known or proven to be a clergyman, before he can be permitted to officiate, and in case he is a foreigner, must produce a certificate of the Bishop, or Standing Committee. It would therefore be a case of discipline upon the admitting clergymen who should permit the services, without being duly and canonically satisfied.





## CHAPTER VI.

### OF THE PENAL LAW OF THE CHURCH.

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#### TITLE I

#### AMENABILITY OF MINISTERS.

[CANON V. of *General Convention*, 1835.]

“Every minister shall be amenable for offences committed by him, to the Bishop, and if there be no Bishop, to the clerical members of the standing committee of the diocese, in which he is canonically resident at the time of the charge.”

By the 3d canon of 1804, every minister was made amenable to the ecclesiastical authority of the diocese in which he resided, *for any offence committed by him in any diocese.*

In the 4th canon of 1829, the words italicised, were omitted.

The 35th canon of 1832, was the same as the present.

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After a long struggle, commencing in colonial times, the question has been finally settled of the exclusive liability of a clergyman to a clerical tribunal. From 1804 to 1832, in many of the states destitute of a Bishop, there was no constituted body, except the standing committee, which could answer to the title of the ecclesiastical authority. In almost every state, laymen formed part of this committee, and the trial of a clergyman might be had before them, though not before them solely.

In New-York, for example, by one of the resolutions of 1786, the convention was the tribunal for the trial of offences,

and when the sentence was deprivation of office, an appeal was allowed to the general convention. In the note I have stated the course in two other states. That in Virginia is peculiarly instructive.<sup>1</sup>

<sup>1</sup> *Journal New-York Convention*, p. 16, ONDERDONK'S ED.

In Maryland, a standing committee was appointed by a canon of 1788, composed of five clergymen, and five laymen, to whom belonged all matters of government and discipline during the recess of the convention. In 1795, and later, the system prevailed, of an examination into an alleged offence by the standing committee, who reported the facts to the convention, by which body, composed of clergy and laity, sentence was passed, which the Bishop pronounced; but he was only the organ of the convention in declaring it. (2 HAWKS' *Conv.* p. 303. *Ibid.* p. 316.)

In Virginia the mode was similar. By the act of the Legislature of 1784, the ministers and laymen, met in convention, shall have full power to remove from a parish any minister accused of unworthy conduct or neglect of his duties. The convention, however, was prohibited from making any general rules whereby the minister could be turned out of his parish without the consent of a majority of the vestry. It was under this act that the first convention was organized, and its provisions were accepted and acted upon. Bishops were amenable to the convention, which was constituted a court to try them without appeal. For clergymen, a court was to be established, consisting of three vestrymen taken from the nearest parishes. (1 HAWKS' *Con. App.* p. 1. *Ibid.* p. 7.)

In 1786, this act was repealed. In 1787, the convention adopted an ordinance embodying many of its provisions, and leaving to the convention the power to regulate the Church, its doctrine, discipline, and worship. The canons of 1785, were then in substance newly enacted.

One of these was, that no Bishop should inflict any censure upon, or exercise any power, over the clergy under his inspection, other than he was allowed to do by the laws and institutions of the Church made in convention.

Through successive variations of details, the principle was retained of a tribunal composed of clergymen and vestrymen. In 1799, the canons were revised, and all prior regulations were repealed. This provision, however, was retained and continued to be the law of the Church until 1815, when a new body of canons and a constitution were adopted. The standing committee, consisting of three clerical and three lay members, was then constituted the court. In the revision of 1823, the same method was preserved. But in 1824, a radical change

In a previous part of this work, I have noticed the attempt in South Carolina at a very early period to engraft the principle of lay jurisdiction into the code of the Church, the resistance it met with in the colony, and its decided condemnation in the House of Lords. The attempts in Maryland were also averted to.

Although, in general, ecclesiastical jurisdiction in England is administered by laymen, yet the theory of the Church is, that they are but the deputies of the Ordinary; and act by delegated authority. The charter of William the Conqueror, which abolished the holding of pleas in the hundred by the Bishop, established his Consistory Court in every diocese, and enabled him to assign to particular persons what share of Episcopal jurisdiction he thought fit. From this source arose the authority of chancellor, official, &c.

The Dean of the Arches is the official principal of the Archbishop of Canterbury.<sup>1</sup>

took place. The standing committee was directed to inquire into any allegation against a clergyman; and if sufficient cause of trial was found, a council of presbyters, not less than three, was organized under the direction of the Bishop, for the trial.

<sup>1</sup> GIBSON'S *Codex*, Vol. 2, p. 970. STILLINGFLEET'S *Ecc. Ca.*, p. 237, *et seq.* Lord Hale says, "Every Bishop, by his election and confirmation, even before consecration, hath ecclesiastical jurisdiction annexed to his office as *Judex Ordinarius*, within his diocese." (HALE'S *Hist. Com. Law*, 28.) By a constitution of Archbishop Chicheley, it was ordained: "We, following the footsteps of the holy canons, do decree, that no clerk married, nor *bigamist*, nor layman, shall upon any pretence in his own name, or in the name of any other, exercise any spiritual jurisdiction," &c.

The statute 37 Henry VIII., c. 17, enacted, that "all or any persons, whether lay or married, being doctors of the civil law, lawfully create, who should be appointed to the office of Chancellor, Vicar General, Commissary, Official or Register, may lawfully exercise all ecclesiastical jurisdiction;" but the statute does not interfere with the appointment of these officers.

The courts are of two classes—those which arise under the Archbishop's authority, and those which spring from the Bishop's jurisdic-

By a canon of the Irish Church, of the year 1634, no chancellor, commissary, official, or any other person, shall exercise any ecclesiastical jurisdiction over a minister in causes criminal, unless he himself have been admitted into the holy order of priesthood. (4 BURN'S *Ecc. Law*, 686.)

So in Scotland, by the 36th Canon of 1838, the accusation must be brought before the Bishop sitting in Diocesan Synod, who shall appoint the dean or some other presbyter to state the charge, and bring forward the evidence, and after a full hearing and taking the opinion of each member of the synod, shall pronounce the sentence. An appeal is given to the college of Bishops.

By the Act 3d and 4th Victoria, cap. 86, the Bishop of the diocese within which the offence is alleged to have been committed, may issue a commission of inquiry to five persons, whether there is *prima facie* ground for instituting further proceedings. If the commissioners report that there is ground, the Bishop himself, or the party complaining, may file articles in the registry of the diocese. If the party appear and admit the truth of the articles, the Bishop or his commissary, specially appointed, shall proceed to sentence. If otherwise, the

tion. The first are the Provincial Court of Canterbury, the Court of Arches, being the Supreme Court of Appeal, the Prerogative or Testamentary Court, and the Court of Peculiars. In the province of York is the Prerogative or Testamentary Court, and the Chancery Court. In the second class are the Diocesan Courts, being the consistorial court of each diocese, the court of one or more commissaries appointed by the Bishop to exercise general jurisdiction within prescribed limits, the courts of Archdeacons or their officials exercising general or limited jurisdiction according to their patents or local custom. There are also peculiars having some jurisdiction in various dioceses.

An appeal from the provincial courts lies to the king, who formerly appointed certain persons as delegates to hear it. This court was abolished, and an appeal given to the Judicial Committee of the Privy Council by an act of 2d and 3d William IV. An examination of the law, as stated by Burns and Dr. Phillimore, under the various heads of Archdeacon, Arches, Chancellor, &c., will establish the proposition in the text.

Bishop is to proceed, with the assistance of three assessors, one of whom must be an advocate of five years standing, or a sergeant at law, or barrister of not less than seven years' standing, and another shall be the dean of his cathedral church, &c.

The Bishop determines and pronounces sentence thereupon according to the ecclesiastical law. He may also send the case, by letters of request, to the Court of Appeals of the province.

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TITLE II.

OF PUNISHABLE OFFENCES.

[CANON XXVII. *General Convention, 1832.*]

“ § 1. Every minister shall be liable to presentment and trial, for every crime or gross immorality, for disorderly conduct, for drunkenness, for profane swearing, for frequenting places most liable to be abused to licentiousness, and for violation of the constitution or canons of this Church or of the diocese to which he belongs ; and on being found guilty, he shall be admonished, suspended, or degraded according to the canons of the diocese in which the trial takes place, until otherwise provided for by the General Convention.

“ § 2. If any minister of this Church shall be accused by public rumor of discontinuing all exercise of the ministerial office without lawful cause, or of living in the habitual disuse of public worship, or of the Holy Eucharist, according to the offices of this Church, or of being guilty of scandalous, disorderly, or immoral conduct, or of violating the canons, or preaching or inculcating heretical doctrine, it shall be the duty of the Bishop, or if there be no Bishop, the clerical members of the Standing Committee, to see that an inquiry be instituted as to the truth of such public rumor ; and in case of the individual being proceeded against and convicted, according to such rules or process as may be provided by the conventions

of the several Dioceses, he shall be admonished, suspended, or degraded, as the nature of the case may require, in conformity with their respective constitutions and canons.”

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The first Canon on this subject was the 13th of 1789, the next the 1st of 1801, then the 25th of 1808, and the 2nd of 1829.

That of 1789 was as follows:—No ecclesiastical person shall, other than for their urgent necessities, resort to taverns or other places most liable to be abused to licentiousness. Further, they shall not give themselves to any base, or servile labor, or to drinking or riot, or to the spending of their time idly; and if any offend in the above, they shall be liable to the ecclesiastical censure of admonition, or suspension, or degradation, as the nature of the case may require, and according to such rules or process as may be provided, *either by the General Convention, or by the convention in the different states.*

The Canon of 1801 was an addition to the former and contained merely an enumeration of some of the particular offences contained in the 2nd section of the present Canon.

That of 1808 combined the previous provisions, but omitted the words “either by the General Convention or,” which are above italicised.

In 1829 the Canon of 1808 was repealed, and one adopted precisely the same as the 2nd section of the present Canon of 1832, except that the phrase “Ecclesiastical authority” was used instead of “the clerical members of the Standing Committee.”

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In general the provision in the Dioceses as to triable offences is similar to that in South Carolina, which is as follows:—“A clergyman shall be subject to a trial for offences enumerated in the Canon of the General Convention ‘Of

*Offences for which a Minister shall be Tried and Punished,* and in the Canons of this Convention.”<sup>1</sup>

I have before stated the discussion which took place in Maryland in 1847, and the objections raised to Canon 5, which was an enumeration of offences for which a clergyman might be brought to trial. That Canon was passed, and is as follows: “Every presbyter or deacon of this diocese who shall wilfully disobey the Constitution, or any Canon of the General Convention of this Church, or of this diocese, *or any rubric*, or shall fall into a general neglect of public worship, or engage in gaming or any other vicious or corrupting amusement, or shall frequent places most liable to licentiousness, or commit any disorderly or scandalous action, *or violate any of the Divine precepts, or his ordination vow*, or shall teach or publicly avow any heretical doctrine, or shall without lawful cause discontinue the exercise of his ministerial office, *or separate himself from the Communion of the Church*, shall be liable to ecclesiastical trial and censure.”

The committee which reported this Canon state, that it was taken partly from the 37th Canon of the General Convention, and partly from the 17th Canon of the old Maryland Code, which defines the offences for which a layman is liable to trial. (*Journal 1847*, p. 48.)

In like manner in Connecticut by Canon 3, (1825,) it is enacted as follows:—“Disorderly and immoral conduct, vicious or unseemly diversions, neglect of duty, disregard of the Constitutions and Canons of the General or State Conventions, *or deviation from the rubrics, and disseminating or countenancing opinions which are contrary to the doctrines of the Protestant Episcopal Church in the United States*, are offences for which a clergyman may be brought to trial.”

The committee of Maryland, in their able report upon this subject, notice the impossibility of enumerating all the offences

<sup>1</sup> Article 11. of the Constitution. The same is the form in Wisconsin.

for which a clergyman ought to be subject to censure. That the same strictness of construction, as in case of crimes against civil society, is unadvisable here. Dr. Hawks also mentions the case of Bishop Smith of Kentucky, where it was insisted, that the general phrase in the first section of Canon 37, "any crime or gross immorality," was qualified by the subsequent words; and that no minister could be tried for any offence but those enumerated in the section. Hence that there was no law to try the accused for falsehood, the offence charged. The court—Bishops McIlvaine, Kemper and McCoskry—negatived this construction at once, and held that a clergyman was liable to trial for any offence against religion and morals, though not specified in any Canon.<sup>1</sup>

The terms employed in the general canon would appear to comprehend every possible violation of the positive law of the Church, and every offence against morals or religion. In the first place, the phrase "any crime," may be taken in its general legal acceptation, "the commission or omission of an act in violation of a public law forbidding or commanding it."<sup>2</sup> And yet, it may be urged, that it is to be taken in its more popular and restricted sense—a violation of what is termed the moral law.

Again, the phrases, "gross immorality," and "disorderly conduct," would seem broad enough to embrace every deviation from virtue or order, which can reasonably be treated as censurable by the infliction either of the lowest or highest grade of punishment. Offences against our own *Lex Scripta*, the *mala prohibita*, seem amply provided for in the clause respecting the constitution and canons of the General or Diocesan Conventions.

And yet, how some of these terms are to be interpreted can only be settled by induction from judicial determinations.

<sup>1</sup> Constitution and Canons, 338.

<sup>2</sup> STEPHEN'S *Criminal Law*, p. 1. 4 BLACK. *Com.*, 5.



And while a full enumeration and specification of offences is neither practicable, nor would be wise, the author suggests that some of the clauses in the canons of Maryland and Connecticut, especially that of "separation from the Church," ought to be included.

Indeed, it seems very desirable that the canon of the General Convention should be rendered as perfect as possible, and supersede all canons of the separate dioceses. We might then expect, in the course of time, to have an approach at least to uniformity of exposition and settlement of our penal code.

The cases in New York in 1849, of Dr. Forbes and others, led to the discussion informally of an interesting point.

A question raised was, whether a presentment for schism simply, (whatever may be the specifications,) but with no other offence charged, can be canonically proceeded upon. It is not whether acts which have been or are treated as schismatical by the Church may not be punished, but whether the offence *eo nomine* is presentable.

It is to be remembered that the party accused must be found guilty of the charge. If the proof of the specifications established an offence really presentable, but the charge is not such, the party must escape. It is also to be noted that schism is not enumerated among the offences for which a minister may be brought to trial in any canon of the General Convention.

The first inquiry is, what is the canonical meaning of the phrase? I limit my inquiry to its sense in English law. I have searched in vain for an authoritative definition of it, nor can I find a proceeding in the English ecclesiastical courts expressly for it. Its true meaning I think must be gathered from the specification of what is pronounced schismatical in the English standards of rule.

Now in the 9th Canon of 1603, entitled "Authors of

Schism in the Church of England censured," it is thus provided: "whoever shall hereafter separate themselves from the communion of saints as it is approved by the Apostles' rule in the Church of England, and combine themselves together in a new brotherhood, accounting the Christians who are conformable to the doctrine, government, rites, and ceremonies of the Church of England, to be profane and unmeet to join in the Christian profession, let them be excommunicated *ipso facto*, and not restored, but by the Archbishop, after their repentance and public revocation of such their wicked errors."

So in the 10th Canon (1603) entitled, "Maintainers of Schismatics in the Church of England censured." "Whoever shall affirm that such ministers as refuse to subscribe to the form and manner of God's worship in the Church of England, as prescribed in the Communion Book, and their adherents, may truly take unto them the name of another church not established by law, and dare presume to publish that this, their pretended church, has of long time groaned under the burden of grievances imposed upon it and upon the members thereof by the Church of England, let them be excommunicated."

The 27th Canon is headed, "Schismatics not to be admitted to the Communion." The minister is forbidden to administer it to any that refuse to be present at public prayers according to the orders of the Church of England, or to any that are common and notorious depravers of the Book of Common Prayer and administration of the Sacraments, or of any thing that is contained in any of the articles agreed upon in Convocation in 1562, or of anything contained in the book of ordering the Priests and Bishops, or to any that have spoken against and depraved His Majesty's sovereign authority in causes ecclesiastical.

Now from the 9th canon it is plainly deducible that a separation from the Church, by not attending its services, combined

with a union with another brotherhood (denomination) is schism.

This idea of schism is then precisely what in the canon of Maryland (of 1847) is termed separation from the communion of the Church, and is made presentable by that canon.

And it is also plain from the English authorities, that the holding and proclaiming schismatical opinions, that is the assertion, that a separation from the communion of the Church with or without union with another is defensible, is punishable as the maintaining of schism or schismatics.

The Toleration Acts do not extend to ministers of the Church so as to enable them, by taking the prescribed oaths, to free themselves from subjection to the laws of the Church, although they are freed from the penalties in the statutes of Uniformity. This is clearly shown in the cases of Carr *vs.* Marsh, (2 PHILL., *Rep.* 253) and the case of Mr. Shore before cited. So in Keith's case before Lord Hardwicke (2 *Ath.* 500.) The defendant was cited into the Bishops Court for officiating as a clergyman of the Church of England without being licensed by the Bishop, and was condemned. Lord Hardwicke said: "The Act of Toleration (1 *Wm. & Mary*, cap. 18) was made to protect persons of tender consciences, and to exempt them from penalties; but to extend it to clergymen of the Church of England who act contrary to the rules and discipline of the Church, would introduce the utmost confusion."

A quere is made by some canonists (*apud* MOLINEUS, Tome 4, p. 876,) whether schism could exist without heresy, upon which point see VAN ESPEN, *Juris. Ecc. Un.*, pars. iii., cap. 2, § 52.

He notices an important distinction, viz., that if the schism is joined with heresy, or based upon heresy, the crime is merely ecclesiastical, and to be determined by the ecclesiastical judge. But if it is schism without heresy, then the

secular judge has cognizance of it. This was so declared by the Concordat of Brabant.<sup>1</sup>

Now, Lord Mansfield says, that non-conformity was not punishable by the common law. The offence was the creature of statute. But this must be understood of the punishment inflicted by the laws of the state. Non-conformity, by the law ecclesiastical, has been an offence punishable by the Church ever since it was founded.

But the question is not as to the power of the Church in its councils to legislate upon this matter, nor even as to the power of a Bishop to entertain a presentment, had there been no legislation, but the material inquiry is, whether the Church has not actually legislated so as to provide substantially for the very case.

Now, under the constitution, Dr. Forbes subscribed a declaration of conformity to the doctrines and worship of the Protestant Episcopal Church. By the 8th article of the same, a Book of Common Prayer, when established, was to be used, &c. Such Book was by authority established, &c. The same prescribed, and declared the worship of the Church. A part of the same was an office entitled the Form and Manner of Ordering of Priests.

Dr. Forbes was ordained a priest, and when so ordained, he promised and vowed "to give faithful diligence always so to minister the doctrine and sacraments, and discipline of Christ, as the Lord hath commanded, and as this Church has received the same," &c.

It was capable of proof, that prior to the date of his letter he had resigned his charge of St. Luke's Church. An allegation should be made that he had ceased to minister, following the words of the ordination vow; that this was done with, and was proof of, an intention no longer so to minister, &c. Then, in further proof, to set forth his letter with its date, declaring,

<sup>1</sup> See also AYLIFF, p. 480.

“that it was his intention no longer to exercise the ministry, &c,” and followed by an allegation that he had ceased from that time so to minister.

*Again*, an article of the presentment could certainly be framed under that portion of the canon which relates to the discontinuance of the ministerial office, and living in the habitual disuse of public worship according to the offices of the Church. This, if made out, was in truth schism in its sense of separation from the communion of the Church.

When a course of procedure effective and clear appeared applicable to the case, it seemed very unwise to rest upon a charge of schism merely.

Yet to unite them, and raise the question for the consideration of the Church, might be expedient.

The letter of Dr. Forbes, in its last clause, afforded sufficient proof for an article based upon the maintaining schismatical opinions, distinguished from the overt act of schism. He avows his conviction, that duty to God requires him to unite himself with the Church in communion with the see of Rome.

In the case of the Rev. Mr. Roberts in Indiana, in 1850, the presentment appears to have been for heresy, schism, slander, and a violation of ordination vows.

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### TITLE III.

#### MODE OF TRIAL.

The method of presenting an offending clergy- § 1.  
 man, or of bringing a complaint against him, as <sup>PRESENTMENT</sup>  
 well as the inquiry founded on public rumor, has <sup>OR CHARGE.</sup>  
 been left under both sections of the 31st canon of 1832, to the regulation of the dioceses respectively. The General Convention has only made one provision upon the subject, that relating to the service of citations. (Canon 5, 1835, § 2.) Accordingly the rules adopted vary much in detail, and sometimes in principle.

In North Carolina, the presentment may be made by the convention, by the vestry of the parish to which the clergyman belongs, or by three or more presbyters of the Church. The charges must be distinctly specified. (*Canon of 1817.*) In South Carolina, a charge is first to be made to the standing committee in writing, under the signature of at least two persons, one of whom must be a presbyter of the diocese. If the standing committee consider the offence charged to be within the enumerated offences of the General or Diocesan Convention, and that it ought to be presented, they shall present the same to the Bishop in the following form :

“To the Right Rev. &c.,

“The Standing Committee of the diocese of South Carolina, respectfully represent, that A. B. has been accused under the hand of C. D. and E. F. of having been guilty of (insert the charge or charges,) and the committee are of opinion that there is sufficient ground to present the said A. B. for trial, agreeably to the canon in such case provided.” (*Canon 3, Journal 1847.*)

The regulation in Georgia, requires the presentment to be by two or more clergymen, or the wardens or vestrymen of the Church, to the Bishop, or if no Bishop, to the standing committee. (*Canon 2, Journal 1847.*)

In Florida, it is to the Bishop, or if none, to the clerical members of the standing committee, by the convention, by the vestry of the parish, or by three or more presbyters of the Church. The charges must be distinctly specified. (*Canon 11, Journal 1846.*) In Mississippi, it is to be made to the Bishop, or if there be none, to the standing committee, in writing, signed by the party making it, and either by the convention, by the vestry and churchwardens of the parish, or by one or more presbyters. (*Canon 4, § 1, Journal 1847.*)

The course in Ohio, is this : The application is to be made in writing to the standing committee, with the name of every

one engaged in it subscribed thereto. If it appear to the committee that the evidence is sufficient to demand a trial, they shall forthwith present the clergyman to the Bishop, specifying the offence with reasonable certainty as to time, place, and circumstances. (*Canon 1, 1847.*) I do not find that the parties to make the application are designated.

The 14th canon of Illinois prescribes, that whenever the Bishop shall have reason to believe, on information given by a major part in number of the vestry of any church of which the accused is a minister, or by any three presbyters entitled to a seat in the convention, or from "public rumor," that a clergyman is under imputation of being guilty of a triable offence, he shall appoint three persons to examine the case, and if they find sufficient ground for a presentment, they shall present him to the Bishop.

By the canon of Missouri, if any clergyman of the Church offend in any one or more of the particulars enumerated in the canons of the General Convention or of this convention, complaint may be made to the Bishop, which shall be done in writing by two presbyters, or by three laymen, being communicants of the Church. The charge or charges must be distinctly specified, and the Bishop, if he thinks fit, shall appoint at least three presbyters, who shall constitute a court for the trial of the party. (*Canon 13, Journal 1847.*)

In Wisconsin, if any clergyman offend against any canon of the General Convention of the diocese, complaint may be made to the Standing Committee, which shall be done in writing, by any two persons who shall be communicants, and one of them shall be a presbyter of the Church. The Standing Committee, if they deem the charges well founded, shall present the clergyman to the Bishop for trial. (*6th Canon, 1847.*)

The method in Pennsylvania is a presentment in writing, specifying, with reasonable precision, the crime or misdemea-

nor charged. It is to be made to the Bishop, either by the convention, or by the vestry of the parish to which the accused belongs, or by any three presbyters of the diocese. It must be accompanied with a statement of the names of the witnesses and the purport of their evidence.

In New-York, and in Western New-York, the presentment may be made by the major part in number of the members of the vestry of the church of which the accused is a minister, or by three presbyters of the diocese entitled to a seat in the convention. Where the inquiry arises from the action of the Bishop, upon public rumor or otherwise, a preliminary investigation is made by five presbyters appointed for the purpose.

In Delaware, the presentment is to be in writing, made to the Bishop, or in case of a vacancy in the office of Bishop, to the president of the Standing Committee. It must specify the offences charged, and be signed by the persons making it, and is to be made by a majority of the vestry, at a vestry meeting duly convened, or if the accused is not connected with any parish, by the vestry of the parish in which he resides, or by four or more male communicants of the same, or by two presbyters of the diocese; a presentment always being made by one of the above classes, exclusive of the others. (Art. 10, *Const. Jour.*, 1844.)

By the 1st Canon of 1846, of Massachusetts, "information of the offence shall first be given in writing to the Standing Committee, which information any member of the Church is hereby declared competent to give. The Standing Committee shall proceed to a preliminary consideration of the case, and if they see fit, may make a formal presentment of the offence to the Bishop."

The presentment must be in writing, addressed to the Bishop, specifying the offences with reasonable certainty as to time, place and circumstances, and if there is no Bishop,



then the Standing Committee shall request the Bishop of some other diocese to receive the presentment, who may proceed in the case, and exercise the same powers as belong or are granted to the Bishop of the diocese.

In Connecticut a charge is to be made in the first place to the Standing Committee in writing, under the proper signature of at least two persons, one of whom shall be a presbyter of the diocese; and if the Standing Committee shall deem the offence charged to come within the offences enumerated in the canons of the Diocese of Connecticut, or of the General Convention, they shall present the same to the Bishop in the following form.<sup>1</sup>

It is provided in Virginia, that whenever the Standing Committee from their own knowledge, or from information derived from others, shall be of opinion that a presbyter or deacon of the diocese has been guilty of misconduct, for which he is liable to be tried under the 37th canon of the General Convention, it shall be its duty to present the offender to the Bishop, making the presentment in writing, and specifying the charges. But nothing herein contained shall be regarded as interfering with the duty of the Bishop to institute an inquiry on his own motion, according to the said 37th Canon."

And in Maryland, whenever the Bishop, shall either from his own observation, or from information, which he shall deem worthy of notice, have reason to believe that there are grounds for an investigation into the conduct of any priest or deacon of this diocese, he may in his discretion convene the standing committee, and lay before them the information in his possession; and whenever the standing committee, or a majority of them shall from any information so laid before them by the Bishop, or from any other information which they may think

<sup>1</sup> Canon 4, *Journal* 1847. The form is like that adopted in South Carolina (*Ante*. p. 386.)

worthy of notice, be of opinion that a judicial investigation should take place, they shall present that fact to the Bishop, with such a general statement of the facts of the case as may serve for a ground-work on which charges may be drawn. It shall be the duty of the Bishop to cause the charges to be drawn with reasonable certainty. They are prepared by a Church Advocate, who is appointed by the Bishop.

I shall now advert to the law of England on this head. A very elaborate act of Parliament was passed in the 3d and 4th Victoria, cap. 86, 1840. It was provided that in the case of any clerk who may be charged with any offence against the ecclesiastical laws of the realm, or concerning whom there may exist scandal or evil report, as having offended against the said laws, it shall be lawful for the Bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall see fit on his own mere motion, to issue a commission to five persons to make inquiry as to the grounds of such charge or report.

One of the commissioners must be the vicar-general, or an archdeacon, or rural dean, of the diocese. The others may be laymen. Fourteen days notice of the intention to issue the commission, with an intimation of the nature of the offence, together with the name, addition, and residence of the party on whose motion or application it is about to issue, must be given to the accused.<sup>1</sup>

Prior to this statute the mode of proceeding was by articles in the proper court; and any person might promote a suit against a clergyman for a neglect or violation of clerical duty. (*Burns* by PHILLIMORE, 3, p. 365.)

It deserves notice that a bill was introduced into Parliament, February, 1848, to repeal this act, and to establish a system in several particulars differing from it. In all cases

<sup>1</sup> See the Statute in PHILLIMORE's *Ed. of Burns*, 3, p. 358.

of heresy, schism, false doctrine, or blasphemy, the proceedings are to be had before the same courts, and in the same manner as before a certain statute of William IV., that is to say, are to be had in the consistorial courts. In all other cases the jurisdiction is recognized as in the Bishop of the diocese. The provision as to a preliminary inquiry, is this,—“The Bishop either on the complaint of any person, or on his own mere motion, at any time before articles are filed, may cause a preliminary inquiry to be made privately, and may admonish the clerk of the charge, the same being previously reduced to writing, and he may either personally, or by one or more clerks in holy orders, to be nominated by him under his hand and seal, make inquiry thereof, and for that purpose may examine witnesses on oath; but this can only be upon the consent of the accused. If the party confess the truth of the charges, and agree that the Bishop proceed to sentence, the same sentence may be pronounced as would be made in an ecclesiastical court upon a trial.”

In this method it will be seen that the private inquiry is attended with no particular result unless the accused party consent to the examination of witnesses, and to the rendering of a judgment. And it is only in such a case that the inquiry prevents the exhibition of articles for a trial.

It is to be noticed that in a considerable number of the dioceses the information or charge, is first to be given to the standing committee, and that this body examines or collects facts, and judges of the propriety of making a presentment. This is the case, with some variations of detail, in South Carolina, Ohio, Wisconsin, Massachusetts, Connecticut, Virginia, and Maryland. The convenience and advantage of this system appear to the author to be very great.

It will be noticed that in the rules of numerous dioceses it is directed that the presentment shall specify the offence with reasonable certainty as to time, place,

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FORM OF PRE-  
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and circumstances. This is presumed to be absolutely necessary in every case, although it may not be directed in a canon. Whether the presentment is assimilated to the articles of the canon law, the libel of the civil law, the bill of the Court of Chancery, or the indictment of the criminal code, the rule is universal. The specifications of the charge must be attended with a reasonable precision as to time and place.<sup>1</sup>

In the application of this rule some latitude is necessarily allowed. To fix it with legal certainty is impossible. To allege for example, that an offence was committed at various times within a Diocese would be absurdly illegal. To aver that it was committed at various times, or at some time within a certain year would not be sufficient. But to allege the act to have been done within a particular city or town, in a particular month of a certain year, would, it is presumed, be legal.

In the case of Bishop Onderdonk of New-York in the year 1845, the ninth article was stricken out by a resolution of the court as being without reasonable certainty as to time, place, and circumstances. The article was that at sundry other times within the last seven years, and within the limits of the Diocese of New-York, the Bishop had been guilty of, &c.

There is great force in the views which were taken by several of the Bishops upon the trial of Bishop Onderdonk as to the nature of the proceedings for the trial of a clergyman or Bishop in our country, viz: that the course of proceeding should be regulated by the rule of the common law, and that the presentment was in the nature of an indictment. One marked advantage of this would be, that upon the plea of not guilty, every objection to the presentment for insufficiency in form or substance may be taken on the trial, or in arrest of sentence.

<sup>1</sup> Haggard's *Rep.* vol. 1. p. 43. Gibson's *Codex*, 1052. Stephens' *Criminal Law*, 266. 1 Chitty's, *Ibid*, 227, 228. Lube's *Eq. Pld.* 260. 3 Hagg., *Rep.* 25.

(4 BLACK. *Com.* 334.) In this manner the complexity and delay of civil law proceedings is avoided. The forms of that law ensure great precision, but at a heavy price.

Still it must happen that the very identity of the offences, and of the general principles of ecclesiastical law common to the universal Catholic Church, will lead to a frequent resort to the rules and practical regulations of that law. Among these are the rules which relate to the framing of the presentment.

A presentment ought always to commence with a distinct statement of what the offence is, and where it is a breach of any express canon, it should be as nearly as possible in the language of the canon. What is termed the *præsertim* (and especially) in an article, is always construed as setting forth the nature of the principal charges; the general words only include subordinate charges *ejusdem generis*, (3 HAG., *Rep.* 25.)

There is another very important characteristic of the Articles of the canon law, which distinguishes them from the proceedings of other systems. They may comprise numerous different and distinct charges if the offences are *ejusdem generis*. The authorities cited show that this may be done even under the general words, if the other offences are of the same character as those specified. I am inclined to think also, that offences of a dissimilar nature may be comprised in the same presentment, but they must be specifically alleged. In *Burgoyne vs. Freer*, the articles comprehended charges for drunkenness, lewd and profligate life and conversation, and neglect of divine services on divers Sundays.<sup>1</sup> So far as the analogy of the criminal law applies, the rule appears to be that in cases of felony, if two or more distinct offences are contained in the same indictment, it may be quashed, or the prosecutor driven to an election. But in misdemeanors several distinct offences may be joined.<sup>2</sup>

<sup>1</sup> 2 ADDAMS, 414. The articles are stated at length in COOTES' *Pro.* 158.

<sup>2</sup> 8 WENDELL'S *Rep.* 211, *Kane vs. The People*.

It is also presumed, that the general rule which is to be found in every form of pleading under every system, would be adhered to under a presentment, viz: that the testimony could not go to matters not stated in the allegations. The maxim of the civil law is, *Quicquid deponitur extra Articulum, deponitur extra Legem*, and the principle of this maxim finds a place in every code.

By the regulations of several dioceses before stated, the presentment is to be passed upon by the Bishop or standing committee, and approved before any steps are taken under it. Undoubtedly it is the duty as well as right of the Bishop, or committee, to see that the presentment is proper both in form and substance. By the canon of New-York, it may be dismissed, or amended.

§ 2. In almost all the dioceses the tribunal for the trial of offences, is constituted separately for each case. Indeed, I believe that in Maryland alone is there a permanent court established.

I proceed to state the regulations in a number of the dioceses in which the first mentioned system prevails.

In Massachusetts, the canon (2d of 1846,) provides that the Bishop shall as soon as may be, cause a copy of the presentment to be served on the accused, and shall also nominate nine presbyters of the diocese, entitled to seats in the convention, and not being parties to the presentment, nor witnesses in the cases, and shall cause a list of their names to be served on the accused, who shall within thirty days after such service, select five of them and notify their names in writing to the Bishop, and if he shall not give such notification within that time, the Bishop shall select five who shall form an ecclesiastical court for the trial of the accused.

The canon of South Carolina, directs as follows: "A presentment being made, the Bishop shall proceed, from among those entitled to a seat in the convention, other than the

members of the standing committee, to designate twelve presbyters, and cause a list of their names and a copy of the presentment to be furnished to the accused, or left at his usual place of abode, if he be not found. Within thirty days thereafter, the accused shall select five of the twelve presbyters and give notice thereof to the Bishop, and in case of his failure to do so, the Bishop shall select five; and in either case, the selected presbyters shall constitute a council for the trial of the accused.

The regulation in New-York, and Western New-York, is as follows: A presentment being made, the Bishop, if the facts charged shall not appear to him to be such as to constitute an offence, may dismiss it, or if it alleges facts, some of which do, and some do not, constitute an offence, he may allow it in part, and dismiss the residue, or he may permit it to be amended. When it shall be allowed in whole, or in part, the Bishop shall cause a copy of it to be served on the accused, and shall also nominate twelve presbyters of this diocese entitled to seats in the convention, and not being parties to the presentment, and cause a list of their names to be served on the accused, who shall within thirty days after such service select five of them and notify their names to the Bishop, and if he shall not give such notification to the Bishop within said thirty days, the Bishop shall select five, and the presbyters so selected shall form a board for the trial of the accused, and shall meet at such time and place as the Bishop shall direct, and shall have power to adjourn from time to time, and from place to place, (but always within this diocese,) as they shall think necessary.

With some variations, not material except as to the number of triers, these regulations prevail throughout the several dioceses. In Missouri, the Bishop appoints three presbyters to constitute the court. I find no provision for a selection by

the accused out of a larger number. There is a provision for a new trial.

In Wisconsin, the regulation is the same as to the number and as to a revision. In Florida, the Bishop, or the clerical members of the Standing Committee, appoint three presbyters.

In Illinois, the Bishop is to preside upon the trial, and not less than three, nor more than five presbyters shall be his assessors to try the facts in issue. They are to be selected out of a list of eight to be furnished by the Bishop, and if the accused refuse, the Standing Committee shall make the selection. If there be no Bishop, or he decline sitting on the trial, the Standing Committee shall designate some one member of the court to preside in his stead. (*Canon 14, 1847.*)

In Ohio, the Bishop nominates eight presbyters, and the accused chooses five. In other particulars, the regulations are almost identically the same as in New-York. In Georgia, the Bishop, or in case of a vacancy, the Standing Committee, nominates five presbyters, and the accused chooses three. In North Carolina, the Bishop appoints three, who constitute a board. And in Connecticut, the Bishop is to summon nine presbyters, five of whom shall constitute the court. If more than five attend, the accused may object to any individual over that number in his discretion.

I have before observed, that I believe the only diocese in which a permanent court is established, is that of Maryland. In the note I have set out the canon in full.<sup>1</sup>

<sup>1</sup> CANON VIII. *Of Ecclesiastical Courts.*—"There shall be an Ecclesiastical Court for the diocese of Maryland, to try such charges as may be preferred against any priest or deacon of said diocese. It shall be composed of seven presbyters, not members of the Standing Committee. They shall be appointed by the Bishop, by and with the advice and consent of a majority of the diocesan convention, and shall continue in office until others shall have been chosen in their places, unless sooner removed by a vote of the convention. The Bishop, by and with the advice and consent of the majority of the convention, shall have power to fill all vacancies which may occur by such removal,



The method of proceeding before a court or § 3.  
 board of triers, is very similar in all the dioceses. MODE OF PRO-  
 I select the canons in two of them, Ohio and New- CEEDING.  
 York, as sufficiently exhibiting it.

The 8th section of the canon of Ohio is this. When the board proceed to trial, they shall hear such evidence as may be produced, which evidence shall be reduced to writing by the secretary, and signed by the witnesses respectively; and

or by death, resignation, removal from the diocese, or election into the Episcopate or Standing Committee. Whenever a charge or charges against any priest or deacon of this diocese shall have been reduced to writing by the Church advocate, agreeably to the provisions of the canons, it shall be his duty to deliver to the Bishop two copies of the same signed by his own hand. It shall then be the duty of the Bishop to transmit to the accused one of such copies, together with notice of the time and place of trial, both of which the Bishop shall prescribe. The charges and notice shall be delivered to the accused, or left at his place of abode at least thirty days before the time appointed for the trial. The Bishop shall also issue a precept directed to all the members of the Ecclesiastical Court, requiring them, or any five or more of them, to proceed to the trial of the accused at the prescribed time and place, which precept, together with another copy of the charges signed by the Church advocate, shall be transmitted by the Bishop to the president of the court, whose duty it shall be, upon receipt of the same, to cause all the members of the same to be summoned to meet at the prescribed time and place; any five of them, who shall attend in pursuance of such summons, shall constitute the court. It shall be the duty of the members of the court to convene at a time and place to be appointed by the Bishop, and elect from their body a president and secretary. It shall be the duty of the president, within five days after such election, and after every change in the office of a president, to notify the Bishop of the name of the person chosen president."

By Canon VII., whenever it shall be determined to bring to trial any clergyman, the Bishop shall appoint one person as Church advocate, whose duty it shall be to prepare the charges, and conduct the trial on the part of the Church.

He shall conduct the case with a single eye to eliciting the truth, and shall regard himself as much bound to protect the interests of the accused, except in matters merely technical, as those of the Church. The Church advocate shall be considered the party on one side, and the accused on the other.

some officer authorised by law to administer oaths may, at the desire of either party, be requested to administer an oath or affirmation to the witnesses; and the examination of witnesses, and all the proceedings, shall be in public, if desired by the accused.

Application being made to the Bishop by either party setting forth satisfactorily that any material witness cannot be procured, upon the trial, the Bishop may appoint some clergyman or layman to act as commissioner to take the testimony of such witness; and the party applying as above shall give to the other party at least five day's notice of the time and place of taking such testimony. And if the person or persons on whom the notice is served, reside more than forty miles from the place of examination, an additional day's notice, exclusive of Sunday, shall be given for every additional twenty miles of the said distance. And both parties may attend and examine the witness, and the questions and answers shall be reduced to writing, and signed by the witness, and shall be certified by the commissioner, inclosed under his seal, and transmitted to the Board, by which it shall be received in evidence. A witness examined before such commissioner may be sworn or affirmed in manner aforesaid.

The 7th section of the 16th canon of Western New-York, and the 8th of canon 17, of New-York, are precisely the same as that of Ohio, except that in the latter, the Secretary is to reduce the testimony to writing. Section 8 corresponds with the 9th section of Ohio. The 5th and 6th sections of canon 2, of Massachusetts are also almost identical.

Under canon 4, (1825,) of Connecticut, at the time fixed for the trial, the members of the court shall choose a president from their own number, and a secretary from their own number or otherwise, as they shall see fit, and they shall before they proceed, adopt and declare the rules by which the trial shall be conducted.

There are provisions also in most of the dioceses for an adjournment from time to time, and place to place, within the diocese. (§ 2 of *Massachusetts*, &c.)

There is also a provision as to organization of the court at the first meeting, which in Western New-York, is this. If at the time appointed for the first meeting of the board, the whole number of five shall not attend, then those who do attend may adjourn from time to time; and if after one adjournment, or more, it shall appear to them improbable that the whole number will attend within a reasonable time, then those who do attend, not being less than three, shall constitute the board and proceed to trial, and a majority of them shall decide all questions. By the analagous clause in *Massachusetts*, the decision to be binding, must be unanimous.

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In *Massachusetts*, advocates shall be allowed on § 4.  
both sides at the pleasure of the parties, provided COUNSEL.  
they are clergymen canonically resident in the diocese, or laymen, who have been communicants of some parish of the same, at least two years before the time of trial.

In *Connecticut*, no layman shall advocate for either party on the trial, though both parties may at their option employ and consult legal or other advisers. (Canon IV. 1825.)

The regulation in *Ohio* is precisely the same. In *New-York* and *Western New-York*, the accused shall have the privilege of appearing by counsel; in which case, and not otherwise, they who present shall have the like privilege, which counsel shall in all cases be members of the Protestant Episcopal Church. In *Maryland*, the accused shall have a right to call in any one person to assist him. The Church advocate conducts the prosecution. The regulation in *Missouri* is the same as in *New-York*, except that the counsel must be communicants of the Church, not members merely, (Canon 12, § 9.) And in *Mississippi*, advocates or proctors shall be allowed

on both sides, provided they are clergymen canonically resident in the diocese, or laymen communicants of some parish of the same at least two years before the trial.

I have before stated the canon of Maryland constituting a Church advocate for carrying on the prosecution. In South Carolina also there is a provision of a similar nature. The standing committee, by their president, or some one whom they shall appoint to perform the office, shall collect and present evidence in support of the accusation, and otherwise appear in behalf of the prosecution. (§ 5, *Canon 3, Journal 1844.*)

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§ 5. By the second section of the 5th Canon of 1835, NOTICE, CITATIONS, SERVICE. it is directed, that "unless a State Convention shall otherwise provide, a citation to any minister to appear at a certain time and place for the trial of an offence, shall be deemed to be duly served upon him, if a copy thereof is left at his last place of abode, within the United States, sixty days before the day of appearance named therein; and in case such minister has departed from the United States, by also publishing a copy of such citation in some newspaper printed at the seat of government of the state in which the minister is cited to appear, six months before the said day of appearance."

A copy of the presentment is by the rules of all the dioceses, to be served upon the accused within a limited time before further proceedings are taken. This varies; but in general thirty days is assigned for this purpose.<sup>1</sup> In Pennsylvania a copy is to be served by a summoner.

§ 6. By the sixth section of the canon of New York, REFUSAL OR NEGLECT TO APPEAR. if the clergyman presented, after having due notice, shall not appear before the board of presbyters appointed for his trial, the board may never-

<sup>1</sup> So in Massachusetts, South Carolina, New-York and various other dioceses.

theless proceed as if he were present, unless for good cause they shall see fit to adjourn to another day. The rule in New Jersey is precisely the same. (*Canon 13, 1837.*)

By Canon 11 of Maryland, if any clergyman accused of any offence shall neglect to attend at the time and place appointed, the court shall report the fact to the Bishop, who shall suspend such clergyman from the ministry for contumacy until he shall appear and demand a trial. If he apply to the Bishop within six months, a court shall be convened, and the trial proceed in the manner provided for in the canons. If he shall not apply within six months, the Bishop shall pronounce sentence of degradation upon him.

By Canon 12, if a clergyman is charged with wilfully discontinuing the ministry, or with separating himself from her communion, and shall, after being duly notified of the time and place of trial, neglect to appear, the court may hear the case in his absence; and if a majority shall find him guilty, may report to the Bishop as if he had appeared; and the Bishop shall proceed to pass sentence.

In Connecticut, if the accused shall neglect or refuse to appear or answer, the court shall order judgment to be rendered against him by default. (*Canon 4, 1825.*)

By section 4 of Canon 2 of Pennsylvania, the neglect to appear is punishable with a suspension for six months, and if the party does not within that time apply for a trial, he is to be degraded. The canons of Missouri and Wisconsin are precisely the same.

In Ohio, the Board of Triers upon such neglect are to report the contumacy to the Bishop, and sentence of suspension from the ministry shall pass upon the party; such sentence to be reversed if he appear and ask a trial in three months; if he do not, the Bishop may, if he think proper, pass sentence of degradation upon him.

The provision in South Carolina is substantially the same.

§ 7. If on or during the trial, the accused shall confess the truth of the charges contained in the presentment, the board may dispense with hearing further evidence, and may proceed at once to state to the Bishop the sentence which they think ought to be pronounced. (*Canon 13, § 6, New Jersey.*)

The regulation in New-York is, that if a clergyman shall confess the truth of the facts alleged in the presentment, the Bishop shall proceed to pass sentence; and if he shall not confess them before the appointment of a board for his trial, he shall be considered as denying them.

In Virginia and South Carolina the regulation is this—“if at any time the accused shall confess the truth of the charges, the Bishop (such confession being made to him or certified to him by the council) shall proceed to pass sentence. In Illinois, if the clergyman, at any time before the commencement of the trial, confess the facts charged in the presentment, the Bishop shall proceed to pass sentence; otherwise he shall be considered as denying them. (*Canon 14, Journal 1847.*) The provision in Ohio is the same in substance. (*Canon 6, Journal 1847.*)

In Pennsylvania, if the clergyman presented confess the truth of the facts alleged in the presentment, the court shall in writing certify the same to the Bishop, and state their opinion as to the sentence that ought to be pronounced; and it shall be the duty of the Bishop to proceed and pass sentence. (*Canon 2, § 4.*)

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§ 8. The provision as to the publicity of a trial is substantially the same in South Carolina and Virginia, viz: that it shall be in public if desired by the Standing Committee or the accused. The Standing Committee, it will be remembered, is the prosecuting party. In Delaware, the regulation is this: “All trials, whether of

clergymen or laymen, shall be in public if the accused party so require, unless the judicatory are of opinion that such publicity will occasion unholy scoffing, and be contrary to edification. When a public trial is refused, the accused may have present six male communicants of the church, and the party presenting or prosecuting may have the same number present."

In the diocese of Florida no charge can be sub- § 9.  
stantiated on the testimony of less than two wit- NUMBER OF  
nesses. The same rule prevails in North Caro- WITNESSES.  
lina,<sup>1</sup> and also in Maryland, with the addition of the clause,  
"or upon the oath of one witness, whose testimony is corroborated by pregnant circumstances." I have not found a similar provision in any other diocese.

In relation to the judgment, the provisions of § 10.  
the various dioceses differ but little. I annex the DECISION, OR  
canon of Massachusetts of 1846. JUDGMENT.

The court, having deliberately considered the evidence, shall declare in writing, signed by them or a majority of them, their decision on the charges contained in the presentment, stating whether the accused is guilty or not guilty of such charges respectively, and also stating the sentence which, in their opinion, should be pronounced; and a copy of such decision shall be without delay communicated to the accused; and the original decision, together with the evidence, shall be delivered to the Bishop, who shall pronounce such canonical sentence as shall appear to him to be proper, provided the same shall not exceed in severity the sentence recommended by the court; and such sentence shall be final. Before pronouncing any sentence, the Bishop shall summon the accused, and any three or more presbyters of the diocese to meet him, at such time as may, in his opinion, be most convenient, in some church to be designated by him, which for that purpose shall

<sup>1</sup> *Journal* 1847.

be open to all persons who may choose to attend, and the sentence shall then and there be publicly pronounced by the Bishop.

The Bishop, if he is satisfied that justice requires it, may grant a new trial to the accused, in which case a new court of presbyters shall be appointed, the proceedings before whom shall be conducted as before mentioned.

The 9th section of the canon of the diocese of Western New-York, the 9th of that of New-York, and the 10th section of that of Ohio, are almost precisely like that of Massachusetts.

In Maryland, the 13th canon (1847) is as follows :

If the accused, after a canonical trial, shall be found guilty by a canonical majority, the opinion of the court, together with all their proceedings, including the testimony taken in the case, shall be transmitted to the Bishop before it is transmitted to the accused, or in any way made public. The court shall also declare to the Bishop the punishment which, in their opinion, the offence or offences deserve. Should he concur in opinion with the court, he may proceed to reprove, suspend, or degrade, as the offence may be thought by him to deserve, always provided that he shall inflict no punishment beyond that recommended by the court.

And by the 14th canon, the promulgation of the sentence is to be as follows: All sentences of reproof, suspension or degradation, shall be pronounced by the Bishop. A copy of the sentence of suspension shall be sent to the accused, and another to the vestry or vestries of the parish or parishes, or congregation or congregations with which he may be canonically connected, and such other publicity may be given to it as the Bishop shall think expedient. A sentence of degradation shall be made known in the manner directed by Canon 39 of the General Convention of 1832.

I find it provided in the diocese of Florida and in that of North Carolina, that the decision of the court for conviction must be unanimous. (*Canon 2, N. Carolina, Canon 12, Florida.*)



## TITLE IV.

## OF SENTENCES.

The Constitution has recognized three kinds of ecclesiastical censure—admonition, suspension and degradation. It prohibits any but a Bishop from pronouncing either of them upon a Bishop, priest or deacon.<sup>1</sup>

They are also mentioned in the 37th canon of the General Convention.

It may be useful in the first place to advert to the sentence of deprivation, so familiar to the English canon law, and to explain why the term is not found in our system. DEPRIVATION.

Although, by the third section of Canon 42 of the General Convention, in the case of great heinousness of offence, members of the Church may be proceeded against to the *depriving* them of all privileges of Church membership, yet this, whatever it may be, refers to the laity, and only to spiritual privileges or connection.

In the rules and regulations adopted in New-York in 1786, there was a provision that the penalties should be admonition, or suspension, or deprivation of office; suspension not to be longer than one year, and in case of deprivation of office, an appeal might be had to the General Convention.<sup>2</sup> The phrase in this instance plainly means deposition.

The sense of the term in the English law is, the exclusion from ecclesiastical possessions and profits, emoluments, and preferments. It affects all benefices and promotions, but not the ministerial character, nor the exercise of ministerial functions. It therefore assumes, and is correlative with, the possession of a benefice, or some emolument or profit annexed to the cure, or the station of clerk.<sup>3</sup>

<sup>1</sup> *Constitution*, Article 6.

<sup>2</sup> *Journal N. Y.*, p. 16.

<sup>3</sup> Deprivation is an ecclesiastical censure whereby a clergyman is deprived of his benefice. (*GREY'S System*, p. 407.) This work is an

Although the term benefice is to be found in many of the older canons of Virginia, yet it is not applied in the technical sense of the English law, but merely, I apprehend, to the ordinary emoluments of an incumbent. The beneficed clergyman seems, indeed, only to mean one having charge of a parish.

But I do not see, that with a view to the point now discussed, there is any distinction between the benefice in English law, and the right of a minister to the salary and emoluments attached to a rectorship. The former is fixed by donative or law, the latter is usually adjusted by agreement of the parties. There are also many cases in which a fund is given by will or gift for the special support of a rector for the time being of a particular church.

I apprehend that the omission in our canons has arisen

abstract of the Codex. See also BURNS, by *Phillimore*, vol. 2, p. 141. "Deprivation is an ecclesiastical censure, whereby a clergyman is deprived of his parsonage, or other spiritual promotion or dignity."

The case of Dr. Pechell (11 *State Trials*, p. 1339) was one in which the delinquent was deprived of his Vice Chancellorship of Cambridge, and suspended from his Mastership during the king's pleasure. Clew's case (1 Hagg. Cons. Rep., *Appendix* 4) and Rich's case (*Ibid.*, p. 8) are examples of a sentence of deprivation solely.

In Stone's case, (1 Hagg. Rep., 424,) Lord Stowell, after delivering his opinion, said, that the canons of the Church had provided, that when sentence of deprivation is to be passed it must be by the Bishop. The Bishop of London was then introduced, and took the judge's chair. He was informed of the offence, &c., and stated he had read the depositions, and pronounced the sentence of deprivation.

In Mr. Coote's late work (1847) on the practice in the Ecclesiastical Courts, (p. 243,) is the form of the sentence of deprivation, pronounced in *Kelson vs. Loftus*, Michs. Term, 1845, Arches. It runs thus :

"We, therefore, do hereby pronounce, decree and declare, that the said the Rev. A. Loftus ought by law to be deprived of all his ecclesiastical promotions within the province of Canterbury, and especially of the vicarage of, &c., &c., and of and from the glebes, tithes, rents, salaries, and all other ecclesiastical dues, rights and emoluments belonging and appertaining to his said ecclesiastical promotions, and we do deprive him of them accordingly by this our definitive sentence and final decree."

from the adoption of the principle, that it was not competent for our Church tribunals to adjudge directly upon rights of property, real or personal; that the civil courts were alone proper for this duty; and thus we have extended the rule of the English law, under which, when property was in question, the common law courts to a great extent superintended and controlled ecclesiastical proceedings.<sup>1</sup>

By many of the ancient canons admonition was § 1.  
always to precede suspension. The rule, however, ADMONITION.  
does not now prevail in England. In the case of a layman it is required by the canon of Maryland.

Still for certain offences, admonition is in practice the first censure. Thus in the case of *Pullen vs. Clewer*, (1st ADD. Rep. Appendix, p. 4,) the offence being a neglect of duty, the party was admonished; then again admonished *sub pœna suspensionis*; afterwards he was suspended, and finally deprived.

In *Barnes vs. Shore*, (1 ROB. Ecc. Cases, 399,) the judge said that from the frame of the articles and the circumstances of the case, he could go no further than admonition to the accused to refrain from a repetition of the offence. It was reading prayers, &c., in an unconsecrated chapel without license. And so in *Taylor vs. Morley*, (1 CURTEIS, 470,) where the Bishop had revoked a license before granted to preach in a

<sup>1</sup> See upon this subject the paper called *Articuli Cleri* in LORD COKE'S 2d *Institute*, p. 601; also an abstract of Justice Foster's Tract upon the Doctrine of Bishop Gibson, 2 *State Trials*, p. 156. It is admirably said by Dr. Burns, after adverting to the contests between the courts Christian and of common law: "It is the glory of the present age that these ferments have at length subsided. Persecution hath departed to its native hell, and fair benevolence hath come down from heaven. The distinctions which were introduced during the plenitude of papal power have fallen away by degrees, and we shall naturally recur to the state wherein Popery took us up, in which there was no thwarting between the two jurisdictions, but they were amicably conjoined, affording mutual help and ornament to each other." (Vol. ii., p. 52.)

proprietary chapel, and the party continued to do it, he was admonished to desist under pain of contempt.

The admonition which our constitution contemplates may be, it is presumed, either public or private. But the 9th section of the seventeenth canon of New York appears to make it necessary to pronounce even this sentence publicly.

In a case in Maryland in 1847, in which the right of a Bishop upon a visitation was involved, the clergyman having been found guilty of conduct unbecoming a minister of Christ, but with several extenuating circumstances, was reprov'd by the Bishop. This was done by a letter addressed to him, reciting the sentence of the Court.

§ 2. It was before observed, that one of the modes of SUSPENSION. censure known in our code was suspension. By the third canon of the General Convention of 1847 it is provided, that wherever the penalty of suspension shall be inflicted on a Bishop, Priest, or Deacon, the sentence shall specify on what terms, or at what time the penalty shall cease.

In the case of Bishop Onderdonk, which led to this canon, two points were discussed; the validity of the sentence of indefinite suspension there pronounced, and the effect of such sentence assuming its validity, as to the powers of the Standing Committee, by creating a vacancy absolutely, or to what extent.

It may be observed that the opinion of those who supposed that this sentence was indefensible, upon the doctrine of English law and the sound construction of our own canons, was a speculation merely. Submission was taught and practised, and not with the least implicitness by those, who most questioned the lawfulness of the sentence.

But the other question was open not merely to discussion, but for action; and on this the judgment of Churchmen in the diocese varied. The Standing Committee held that there was no actual vacancy created by that sentence—that the Bishop remained the Bishop of the diocese, inhibited from the per-

formance of duties ; but so much its Bishop, that to fill the seat by the election of another was impossible ; and yet that there was a constructive vacancy, in which case, under well settled legal principles, the power, given by the canons to the Standing Committee, in the case of an actual vacancy, could be exercised.

It is needless to state the course of reasoning by which this view was sought to be sustained. The convention of the diocese almost unanimously ratified the course taken by the committee in exercising the same powers as were conferred by the canons had the Bishop been dead. By a canon of the diocese in force before 1845 it had been provided, that in case of a vacancy of the *Episcopate*, the powers and duties to be performed by the Bishop in matters of discipline, should be performed by the Standing Committee, except in cases in which the powers had been delegated to the clerical members ; and this canon, in order to avoid all question, was amended in 1845 so as to add the words "or the inability or disability of the Bishop" after the word "Episcopate."

It is obvious that those Churchmen who regarded the diocese as absolutely vacant would of course ratify the *action* of the standing committee, although they did not accede to the distinction taken by them. It was with those who took a view adverse to the validity of the sentence, or whose opinions led them to a stricter construction of the canons, that the chief difficulty existed. Those doubts were gradually and generally dispelled, and unanimity of sentiment was very nearly obtained.

The canon passed by the General Convention of 1847, contains the principle of a mere *quasi* vacancy in all cases of suspension. Still the question as to the powers of a standing committee in the case of a suspended Bishop is not definitely settled. In Pennsylvania, and in Wisconsin for example, there is a canonical provision very similar to that of New-

York.<sup>1</sup> The question might arise in either of those dioceses; and indeed, though with more difficulty of decision, in any diocese. It may therefore be useful to add a very strong authority to those which were referred to by the standing committee of New-York in justification of their course.<sup>2</sup>

The canon of 1847, requiring that a sentence of suspension should express the terms or period of its expiration, had been adopted in principle by a canon of Wisconsin in the month of June in the same year, and it accorded with the practice, if indeed it was not the law of England.<sup>3</sup>

<sup>1</sup> Canon 9 of Pennsylvania, § 3. Article 7, of Constitution of Wisconsin—"When there is no Bishop, or he is incapable of acting, the standing committee shall be the ecclesiastical authority of the diocese for all purposes declared in the constitution." By the 7th canon of Missouri, in case of a vacancy of the episcopate, the powers and duties to be performed by a Bishop in matters of discipline shall be performed by the standing committee, except such powers and duties as are, or may be specially delegated to the clerical members thereof.

<sup>2</sup> The authority is that of Bishop Stillingfleet, who appears to me the most clear and able writer upon these subjects I have consulted. It is contained in his letter to the Bishop of London on the right of jurisdiction during the suspension of the Archbishop of Canterbury, dated August, 1689. The question was, whether the jurisdiction had devolved upon the Dean and Chapter of Canterbury. The Bishop, after showing that in case of a legal vacancy, the right belonged to them, says—"The canonists make the case to be the same in an interpretative as in a real vacancy. Parnormitan lays down this for a rule: "*Episcopo mortuo naturaliter vel civiliter capitulum succedit in jurisdictione spiritualium quam temporalium.*" He notices a decretal settling the question in case of captivity, and quotes the Gloss, as follows, "*Et sic nota quod sicut capitulum cum vacat Ecclesia, supplet vicem Episcopi in jurisdictione, sic et cum quasi vacat.*"

<sup>3</sup> Amid the profusion of learning with which the question of suspension was discussed in the General Convention of 1847, less attention, it appeared to the author, was given to the English authorities than they deserved. I will but glance at some of them, partly as matter of historic curiosity, and partly that they are applicable to the question of the effect of a suspension upon rights to salary, &c. There is a copious note in Lynwood upon the subject. (De Const. Lib. 1, Tit. 2, *verbo suspensionis.*) The various kinds of suspension known to the

Mr. Coote in his late work upon ecclesiastical practice has made a collection of the cases in which sentence of suspension

canon law, (24 in number) are stated. The English law knows but four at the extent. *Ab officio, ab beneficio*—from the two combined; and *ab ingressu ecclesiæ*. Among the many points discussed, is one whether a sentence of suspension *simpliciter*, was or was not a sentence from both office and benefice. That point was distinctly settled in *Rowland v. Jones*, (2 LEE'S *Rep.* 191,) viz: that such a sentence always means suspension *ab officio* only.

In the Gloss of John of Athon, upon the constitution of Otho, (*de con. cler. verbo suspensi*;) the general doctrine, which is quoted and adopted by Gibson and Burn, is thus stated—“*Ad majorem evidentiam scias, quod depositus dicitur qui privatus est beneficio et officio licet non soleniter; degradatus dicitur qui ruetroque est privatus, soleniter insignis sibi ablatis. Suspensus autem dicitur, qui est privatus utroque ad tempus, non in perpetuum. Secundum quosdam, differentia est inter Depositionem et suspensionem sicut inter Deportationem quæ est perpetua, et Relegationem quæ est temporalis.*”

In the second Disputation of Strykius, (cap. 5, 23,) we find an explanation of these terms. Relegation was banishment from a city or province for a defined or an undefined period, but retaining all civil privileges and right of property. Deportation was necessarily perpetual, and involved the loss of civil rights and privileges. In chap. 6, p. 28, of the same Disputation it is stated, that some authors hold that where a Relegation is decreed without fixing a period, it is to be understood as lasting for ten years. The commentator remarks that this must depend upon the nature of the crime which caused the sentence. All this is very vague and very unsuitable to the genius of English law, exacting scrupulous precision in all sentences.

The work of Van Espen contains a very full article upon the nature of this censure. *Juris' Ecclesiastici Universi*, Pars. 3, cap. 10. The 20, 21, and 22d clauses are very explicit. *Cujuscunque naturæ aut extensionis sit suspensio, certum est quod tantum ipsum clericum ab officio vel beneficio suspendat; id est impediatur quo minus suo officio libere fungatur, functionesve ei annexas exerceat, aut emolumenta percipiat: nequaquam autem ipsum privet officio aut beneficio.*

Hinc ipsa suspensio quamvis ad nullum certum durationis terminum limitata sit, nihilominus ex se denotat quandam remissibilitatem et spem restitutionis; eo quod officium et beneficium clerico suspensio integrum relinquat.

Ex his quoque manifesta est differentia inter simplicem suspensionem et depositionem. Hæc enim non tantum ab executione officii et beneficii suspendet clericum, sed absolute deponet, atque officio et be-

has been pronounced, with the nature of the offence. It may be in several respects useful, and I have copied it in the note. That note also contains the form of a sentence declared in the case of the Rev. John Hurst, in 1845.<sup>1</sup>

necicio absolute privat, titulum que aufferit; in tantum ut sine nova collatione et titulo ad officium vel beneficium redire nequeat.

Every sentence of suspension to be found in the reports of English decided cases since the commencement of the time of Sir George Lee, is for a definite period, or on definite terms.

<sup>1</sup> For profligacy of life and conversation, fornication and incontinence, suspension for three years, ab officio et beneficio, or deprivation of office.—*Watson vs. Thorp*, 1 PHILL., 270. *Pawlet vs. Head*, 2 LEE, 565. *Trower vs. Hurst*, Easter Term, Arches.

Drunkenness, accompanied by profaneness, &c., suspension ab officio et beneficio for three years.—*Saunders vs. Davies*, 1 ADD., 291. *Burder vs. Speer*, 1841, Arches. *Binder vs. Jenkins*, Trinity Term, 1838. *Bishop of London vs. Day*, Michaelmas Term, 1845. Drunkenness, not aggravated by other circumstances, suspension ab officio for twelve months.—*Rowland vs. Jones*, 2 LEE, 191.

For advisedly maintaining or affirming doctrines contrary to the articles of religion, &c, suspension *ab officio et beneficio*, or ab officio merely.—*Bishop vs. Stone*, 1 HAGG., C. R., 424, 434. *Saunders vs. Head*, 3 CURTEIS, 565. *Hodgson vs. Oakley*, Trinity Term, 1846, 1 ROBERTS, *Eccle. Cases*. For neglect of duty, suspension for three years from office and benefice. *Arger vs. Holdsworth*, 2 LEE, page 515. *Bennet vs. Borraker*, 3 HAGG. Rep., p. 24. The material part of the sentence in the case of the Rev. John Hurst ran thus: "That the said J. H. be suspended for the space of three years (from the time of publishing the sentence in manner after mentioned) from the discharge and execution of all the functions of his clerical office; that is to say, from preaching the word of God, administering the Sacraments, and performing all the duties of such his clerical office in the said parish and parish church, and elsewhere in the said province of Canterbury, and from receiving any of the profits and benefits of the said rectory and benefice, that is to say, from receiving and taking the fruits, tithes, rents, profits, salaries, and the dues and emoluments belonging and appertaining to such rectory and benefice. And we order and decree, that at the expiration of said three years, the said — shall exhibit and leave in the registry of this court a certificate under the hand of three beneficed clergymen in his vicinity, of his good behavior and morals during the time of his suspension, and such certificate be approved of by the court before such suspension be taken off or relaxed, and that such certificate be



There was a provision in a canon of Virginia in 1793, which I do not now find in force in any diocese. It was directed, that if a clergyman while under sentence of suspension should continue the exercise of the functions of the clerical office, on satisfactory proof thereof being made to the Bishop, or Standing Committee if there be no Bishop, the sentence of degradation shall be passed upon him.

It cannot be doubted that upon general principles he could be proceeded against for disobedience to, and contempt of, a sentence. If the services were rendered by consent of another minister, after the regular promulgation of the sentence, such clergyman would be also open to discipline.<sup>1</sup>

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In the case of *Fullen vs. Clewer*, (1 HAGG. SUSPENSION  
*Rep.*, Appendix 3,) the judge having heard advo- PENDENTE LITE.  
cates, decreed that suspension *pendente lite* be granted; and that a proper minister, to be approved by the

filed and approved of, or the suspension shall continue in full force notwithstanding the expiration of the three years." It is this clause which Sir John Nicoll doubted, respecting its insertion in a sentence; and which witnesses on the record commission thought probably invalid. In *Sanders vs. Head*, 3 CURTEIS, 565, the sentence, after pronouncing a suspension from his clerical offices and the execution therefrom for three years, directed that a copy of the decree be certified into the Consistory Court of Exeter, in order that sequestration be there issued.

In the case of the Rev. Cave Jones in New-York, 1812, the mandatory part of the sentence was thus: "Now, therefore, according to the power vested in us by the 32d Canon of the General Convention of, &c., we do hereby declare that the Rev. C. Jones be suspended from the exercise of all ministerial duties, until he should retract such refusal and submit to the terms of the recommendation. And I, the said Right Rev. B. Moore, Bishop, &c., do suspend him accordingly; and we, the said presbyters, as far as the said canon may require, do concur in the same."

<sup>1</sup> See VAN ESPEN, *Jour. Ecc. Un.*, pars. 111, cap. x., § 23. Tametsi clericus ab ordine suspensus non privetur absolute suo ordine, nihilominus si durante suspensione exerceat functiones sui ordinis, a quo suspensus est, sit irregularis.

Ordinary, be appointed, and the profits of the vicarage be sequestered.

In a rule of order in Virginia, in 1785, it was provided, that the salary accruing during the suspension of a minister or deacon who is afterwards found guilty, shall go to the vestry for the use of the church. (HAWKS' *Contr.*, *Appendix* 10; *Ibid.*, 25, 1787.)

By a canon of Mississippi, adopted in 1847, it is enacted, "The Bishop, with the advice of the Standing Committee, shall be empowered to suspend from the functions of the ministry, any minister who shall be charged with improper, irreligious, or immoral conduct; and this suspension shall be continued until the disposal of the charges against him by a canonical trial, unless the Bishop and Standing Committee are satisfied, from testimony laid before them, of a thorough reformation of his life. Provided, that no minister shall be suspended until he shall have been notified by the Bishop or Standing Committee of the nature of the charge against him."

In the bill proposed to Parliament, in February, 1848, there was also a provision upon this subject; and the 14th section of the statute, 3d and 4th Victoria, directs that where from the offence charged it shall appear, that great scandal is likely to arise from the party continuing to perform the services, while the charge is under investigation, or that his ministrations will be useless while such charge is pending, the Bishop may inhibit him from performing any services within the diocese after the expiration of fourteen days after service of a notice; such inhibition to continue until sentence shall be given.

The accused party may nominate a person to the Bishop to supply his place during the suspension, and if he omit it, the Bishop may do so, and in all cases he may assign a stipend not exceeding a moiety of the net annual income of the bene-

ficce ; and may provide for the payment of such stipend, by sequestration if necessary. The Bishop may at any time revoke either the inhibition or the license.

In 1 Term. Rep. 526, is a minute of an opinion of Sir E. Simpson, king's advocate and judge of the admiralty, to the effect, that if a clergyman be suspended *ab officio et beneficio*, and upon an appeal declared innocent, he shall recover the profits of his living.

The possession of a benefice, &c., by sequestrators during a suit, was provided for in a constitution of John of Stratford, 1342. See it at length in the Codex p. 1113, with the Gloss of Lynwood.

There is one question of no little moment and delicacy connected with this subject of suspension, and that relates to the salary or emoluments attached to the office of a rector, accruing during suspension. I speak of a suspension upon a sentence.

The action of the General Convention in 1847, and as I consider, the whole force of the canon law recognized by us, leads to the conclusion that a sentence of suspension, terminable on its face as it must now be, does not sever the connection between a minister and his parish—does not destroy his character as its rector, nor his right to the salary ; in short that the rule laid down by Van Espen in the passage before cited, is the law of our Church.

This difficulty was felt and met in the diocese of Wisconsin. In June 1847, when a canon was passed requiring that a sentence of suspension should express its period of duration, or conditions of termination, another was adopted declaring that a sentence of suspension should *ipso facto*, sever the connection between the clergyman and his parish. (*Canon 3, § 9, 1847.*)

That this terminates all question so far as any Church enactment can terminate it, is perfectly clear ; yet many objec-

tions will occur to the adoption of such a rule in general. At least, as it is entirely new, it deserves mature consideration. How can the matter be treated where no such regulation exists?

I have before observed, under the head DEPRIVATION, upon the necessity, or at least policy of the Church, in avoiding in its sentences all action upon the rights of property connected with a clergyman's situation; and upon the best consideration I can give the subject, it appears to me that a convention may enact to this point, and no farther. It may provide that during the existence of a sentence of suspension, the Bishop may, with the consent of the suspended party, assign the profits of the cure or any part thereof for the support of a clergyman to officiate during the period; and in case of a refusal to give such consent, may proceed to degrade the suspended party. Thus there would not be the shadow of a pretence of interference with the province of the civil tribunals to adjudicate directly upon the matter.

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[CANON 39. *General Convention 1832.*]

§ 3. "Whenever any minister is degraded from the DEGRADATION. holy ministry he is degraded therefrom entirely, and not from a higher to a lower order of the same. Deposition, displacing, and all like expressions are the same as degradation. No degraded minister shall be restored to the ministry.

"Whenever a clergyman shall be degraded, the Bishop who pronounces sentence shall, without delay, give notice thereof to every minister and vestry in the diocese, and also to all the Bishops of this Church; and where there is no Bishop to the Standing Committee."

The former canons were the 3rd of 1792 and 27th of 1808.

By that of 1792 (and that of 1808 was precisely the same) whenever a clergyman shall be degraded agreeably to the canons of any particular Church in the Union, the Bishop who pronounces sentence, shall, without delay, cause the sentence

of degradation to be published from every pulpit where there may be an officiating minister throughout the diocese or district in which the degraded minister resided, and also shall give information of the sentence to all the Bishops of the Church, and where there is no Bishop to the Standing Committee.

I do not find that by the canon law, there was any substantial difference between deposition and degradation. By both, the clergyman was deprived of the holy orders which he once had. Dr. Grey in his *Epitome of the Codex* says, "Degradation is an ecclesiastical censure, whereby a clergyman is deprived of his orders. It is also called deposition from the ministry. There are two sorts of degradation by the common law—one summary by word or sentence only, the other solemnly by divesting the party of those ornaments and rights which be the ensigns of his order or degree.

According to Papal authors the Pope alone could restore a degraded minister. (MOLINÆUS, vol. 4, p. 796; *Ibid.*, p. 187, on the *Decretals*.) If a presbyter is deposed from all his orders, the Pope alone can restore him.

The sentence of degradation was formerly executed with great solemnity. Thus in the case of William Santre, prosecuted for heresy in the 21st of Henry IV, A. D., 1400, (1 *State Trials* 163,) the sentence and mode of execution is set forth at length. The sentence by Thomas, Archbishop of Canterbury, first declared the articles proven, and denounced the party as an heretic, and refallen into heresy. It then proceeded—"And by the conclusion of all our fellow brethren, fellow Bishops, prelates, council provincial and of the whole clergy, we, &c., do degrade and deprive thee of thy priestly order; and in sign of degradation and actual deposition from thy priestly dignity, we take from thee the paten and the chalice, and do deprive thee of all power and authority of celebrating the masse, and also we pull from thy back the casule, and

take from thee the vestment, and deprive thee of all priestly power. And you, the said ——, being in the habit and apparel of a deacon, with the New Testament in your hands, we also declare thee, &c. ; and in token of thy degradation and actual deposition, we take from thee the book of the New Testament and the stole, and do deprive thee of all authority in reading of the gospel, and all and all manner of dignitie of a deacon.”

Similar forms were used in taking from him the insignia of an acolyte and reader.

The sentence and degradation upon Archbishop Cranmer in 1553, is set forth at length in 1st *State Trials*, 842, 853. The whole formula seems to have been sent from Rome. It is very minute in the details, following him through all his offices, and degrading him from each successively, taking away from him some portion of apparel or emblem of his office at each step.<sup>1</sup>

In the case of the Rev. Samuel Johnson (11 *State Trials*, 1348, A. D. 1666,) the sentence was, “that he should be deprived of his rectory—that he should be a mere layman and no clerk, and should be deprived of all right and privilege of the priesthood—that he should be degraded thereof, and of all habits and vestments of the same.”

It is stated, that upon the execution of this sentence, when they came to the ceremony of putting the Bible into his hands, and taking it from him again, he was much affected, and parted with it with difficulty.

After a careful search through the state trials and the reports in the ecclesiastical courts, I have not found an instance of a sentence of degradation formally executed since that of Mr. Johnson.

<sup>1</sup> There is a paper at the conclusion of this sentence drawn up by Whiston, as to the authenticity of Cranmer's recantation, which, at least, makes a very plausible case against it.

In the case of Dr. Watson, Bishop of St. David's, (14 *State Trials*, p. 463,) the sentence was deprivation and degradation, and in this the term depose is made use of. The sentence runs thus: "And the said Thomas Watson, from his former dignity and station of the church of —, and from all Episcopal office and function, and from all ecclesiastical benefice, (justice demanding it,) we do by these presents deprive, remove, and depose, commanding and interdicting him from hereafter wearing the habit of the Episcopal order, or the Episcopal emblems of authority."

In the 122d canon of 1603, the term degradation is not found. The phrase is "deprivation from his living, or deposition from the ministry."

In *Clark vs. H—*, (Arches, 1 ROBERTSON'S *Ecc. Rep.*, 379,) Sir J. Hurbert Furst, Official Principal, doubted whether he could pronounce sentence of degradation without the Archbishop; that, according to Ayliff and other authorities, there ought to be a certain number of Bishops present. That the justice of the case would be answered by a sentence of deposition, which he could pronounce. "When a sentence is presented to depose Mr. H. from the ministry, that is from all authority to officiate, I shall be ready to sign it."

The following sentence was signed: "Therefore, we the said H. J. F., having maturely deliberated upon the proceedings had in this cause, and the offences sufficiently proved, exacting by law inhibition from the exercise of the ministry, and all discharge and function of his clerical office and the execution thereof within the province of Canterbury, have thought fit to pronounce, and do accordingly pronounce, decree and declare, that the said the Rev. H. ought by law to be inhibited from the exercise of the ministry, and from all discharge and function of his clerical office and the execution thereof—that is to say, from preaching the word of God and administering the Sacraments, and celebrating all other du-

ties and offices whatever within the province of Canterbury; and we do strictly inhibit him therefrom under pain of the law and contempt of this our definitive sentence." See the sentence at length in Cook's *Eccl. Prac.*, p. 245, who terms it an inhibitory sentence.

I do not find the term inhibition in this sense used by any writer. The inhibition, which is a familiar term in ecclesiastical practice, is the injunction from proceeding after an appeal, and issues from the judge *ad quem*.

§ 4. This ecclesiastical censure, the mighty engine  
EXCOMMUNI- of papal dominion, and the most powerful instru-  
- CATION. ment for the restraint of the lawless, is not mentioned in terms in any of our general canons. And Dr. Hawks observes, that no one ever heard of the excommunication of a layman by our branch of the Apostolic Church. "The law is a dead letter. There is not a clergyman in the Church who, if he were desirous of excommunicating an offender, would know how to take the first step of the process." He is speaking of the 42d Canon of 1832, § 3, as to the offences of members of the Church for which they may be deprived of all privileges of membership.

Yet it can scarcely be doubted, that it was this sentence which the convention had in view when the section referred to was drawn up.

In the rubric before the burial service the term is employed, and the fact of the sentence having taken place is recognized. It directs the office to be used for all persons except those excommunicated, &c.

And by the 23d Article, that person who, by open denunciation of the Church is rightly cut off from the unity of the Church, and excommunicated, ought to be taken of the whole multitude of the faithful as a heathen and a publican, until he be openly reconciled by penance and received into the Church.



Bishop Tomline says, "there was two sorts of excommunication, the greater and less; by the former men were excluded from partaking of the Eucharist, but they were allowed to attend the other parts of divine worship; by the latter they were entirely expelled from the Church. The former was temporary, the latter perpetual, unless the delinquent gave full proof of his repentance. Most of the reformed Churches asserted the power of excommunication. It makes a part of our Church discipline, but has of late been rarely exercised."

By the 3d canon of North Carolina, (1817,) it is provided, that the sentence upon a clergyman duly convicted upon trial may be, admonition, suspension, degradation from the ministry, or excommunication, and shall be pronounced by the Bishop. This I believe is still in force. (*Journal*, 1844.)

In Maryland also, by Canon 23 of 1847, as to the offences of a lay-communicant, the minister, wardens and vestry are to try the party, and if found guilty, the minister is to pronounce the sentence, which may be either reproof before the vestry and wardens, suspension from the Holy Communion, or excommunication.<sup>1</sup>

The sentence, then, is not unknown to our Church. In the case of laymen it may be proper, perhaps necessary, in order to exclude a repelled party from all communion in another diocese, if not in his own; and in the case of a clergy-

<sup>1</sup> I have elsewhere (Title of *Lay Discipline*) submitted some remarks upon this canon. But I suggest whether it is strictly correct to apply the term excommunication to an act done by a minister. The power to pronounce and to relax such a sentence is vested solely in a Bishop. I have, in the part above referred to, shown that the act of the minister under the rubric in the English Book of Common Prayer is merely suspensory. The Ordinary is to proceed to the decisive sentence. See also the *Codex*, p. 1095, Note 3, from which it appears that although a presbyter sometimes pronounces it, yet it is only by appointment of the Bishop to sit with a lay judge for the purpose.

man, it may sometimes be a necessary sentence, because it does not of course follow suspension or degradation.

It was provided in many ancient constitutions, that if a person excommunicated in one city or diocese went to another, whoever received him to communion should be also excommunicated; for which reason no strangers were to be admitted to communion until they showed their letters of recommendation; and this rule was adopted in the Council of London in 1026.<sup>1</sup>

If a clergyman officiated after excommunication he was by the canon law to be deprived.<sup>2</sup>

The lesser excommunication was chiefly used in cases of contumacy of court. It would be irrelevant to enter into the consideration of all the provisions by which the secular power aided the Church in the infliction of this sentence. (See 3 BURNS by *Phillimore*, p. 249.) It may be well to notice, that while by numerous canons and constitutions, excommunication *ipso facto* is attached to an offence, yet a declaratory judicial sentence is absolutely necessary. The clause only serves to define the punishment.<sup>3</sup> In the note will be found a sentence pronounced by Bishop Seabury in 1793, in which what may be termed excommunication was united with a suspension.<sup>4</sup> A canonical regulation upon the subject is also submitted for consideration.

<sup>1</sup> *Codex*, 1049. By the 6th of the Canons of Antioch, if any one has been excommunicated by his own Bishop, let him not be received by any other (unless indeed he be previously received by his own Bishop until a synod has met, and he having come before it and made his defence and satisfied the synod, has received a different sentence; an let this decision hold good with respect to laymen and presbyters and deacons, and all who are reckoned among the clergy. See also 12 and 13 of the *Apostolical Canons*.

<sup>2</sup> *Codex*, 1049.

<sup>3</sup> 3 CURTEIS' *Rep.*, 840.

<sup>4</sup> SAMUEL, by divine permission, Bishop of Connecticut and Rhode-Island, to the Clergy of the Church in Connecticut and Rhode Island, Greeting.

WHEREAS, the Rev. Mr. James Sayre, formerly Rector of Trinity

Two general principles will be found to regulate the removal of a sentence; the one that the

§ 5.

REMOVAL.

Church in Newport in Rhode Island, having removed into Connecticut, hath behaved himself in a very undutiful and unchristian manner, in depraving the Liturgy, contravening the government, and despising the discipline of the Protestant Episcopal Church in America—in traducing, reviling, and misrepresenting the Bishop and Clergy of Connecticut, thereby endeavoring to excite schisms and divisions, and to destroy the peace and unity of the Church; and hath also withdrawn himself from her Communion:

Be it known to all whom it may concern, That the said Rev. Mr. James Sayre is hereby declared to be out of the Unity and Communion of the Church, and is forbidden to perform any Ecclesiastical Offices belonging to it, until he shall by repentance and reformation of his conduct be qualified for, and shall be restored to its Peace and Communion. And all the members of the Protestant Episcopal Church, both Clergy and Laity, are hereby cautioned against holding communion, or any ecclesiastical fellowship with him the said Rev. Mr. James Sayre.

You, therefore, the clergy of Connecticut and Rhode Island, are hereby directed to make this declaration public, by reading it in your several congregations immediately after sermon, on the Sunday next after it shall come to your hands.

SAMUEL, Bp. Connect. and Rhode Island.

*Done at New Milford, in Connecticut, this 25th day of September, 1793.*

It may be suggested whether the law of the Church may not be defined by a declaratory canon to the effect that the sentence of excommunication as known in this Church is applicable in the following cases only.

When a Bishop, Priest, or Deacon, has been degraded from his office, sentence of excommunication may be also pronounced in the discretion of the court recommending, and the ecclesiastical authority pronouncing the sentence.

Where a Bishop, Priest, or Deacon, has been suspended from his office, he may also be excommunicated, in the discretion of such court and authority, for the period during which such suspension shall remain in force; or for some lesser period.

Where a layman has been repelled from the Holy Communion, and on appeal such repulsion has been confirmed, the ecclesiastical authority may also proceed to excommunicate such party.

Notice of every sentence of excommunication shall be given in like manner as is provided for the notice of a sentence of degradation, by canon 39, of 1832.

The effect of an excommunication shall be that no minister of this

same authority, or a higher, which declared it, should remit it; the other, that a similar formality should attend the removal as attended the infliction. Thus, in case of an excommunication and a writ *de contumace capiendo* issuing, upon the party being absolved, a writ *de excommunicato deliberando* formerly issued upon a certificate of the Ordinary. (Fitzh. Nat. Bro., fol. 63; BURNS, vol. 2, &c.)

So in many cases of a suspension, a declaration of the relaxation is formally entered. In England it has become a settled practice, in case of suspension for habitual viciousness, such as drunkenness or incontinence, to require a certificate of three clergymen, that the party has reformed and deserves to be restored. This is made part of the sentence, without which it would not be legal to demand it.<sup>1</sup> And in such cases, as well as where the sentence is to remain until acknowledgment and reformation, a declaratory relaxation is necessary. Where, however, the sentence is for a definitive period of time, it must cease upon the efflux of that time.

In the case of the Rev. T. Clowes, in New-York, the instrument of revocation was as follows: "The Rev. T. C. having, in reference to the sentence of suspension pronounced on him on the 21st Oct., 1817, made full and satisfactory acknowledgement, whereby ecclesiastical discipline and the honor of the ministry are sustained, I do hereby revoke the said sentence of suspension, and I do declare that it is revoked,

Church shall admit the party to the Holy Communion, and shall be punishable for so doing, unless he certify that he was ignorant at the time, of such sentence being pronounced, or ignorant of the identity of the party.

The sentence of excommunication where it is not terminable by its own limitation, shall be remissible, in the case of degradation, by the House of Bishops; and in the case of a layman, by the Bishop of the diocese, with the advice and consent of the minister who repelled the party. Notice of such remission shall be given in the same manner.

<sup>1</sup> See the cases cited COOTE'S *Ecc. Trs.*, 252.

and that the said the Rev., &c., is restored to the exercise of the functions of the office of a presbyter of this Church.”<sup>1</sup>

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TITLE V.

DISCIPLINE APPLICABLE TO THE LAITY.

The rubric prefixed to the order for the Holy Communion, is as follows:—“If among those who come to be partakers of the Holy Communion, the minister shall know any to be an open and notorious evil-liver, or to have done any wrong to his neighbors, by word or deed, so that the congregation be thereby offended, he shall advertise him that he presume not to come to the Lord’s Table until he have openly declared himself to have truly repented and amended his former evil life, that the congregation may thereby be satisfied, and that he hath recompensed to parties to whom he hath done wrong, or at least declare himself to be in full purpose so to do, as soon as he conveniently may.”

§ 1.  
OF CRIMES  
AND SCANDALS  
TO BE CEN-  
URED.

“The same order shall the minister use with those betwixt whom he perceiveth malice and enmity to reign; not suffering them to be partakers of the Lord’s Table until he know them to be reconciled. And if any one of the parties so at variance be content to forgive from the bottom of his heart all that the other hath trespassed against him, and to make amends for that wherein he himself hath offended, and the other party will not be persuaded to a godly unity, but remain still in his frowardness and malice, the minister in that case ought to admit the penitent person to the Holy Communion, and not him that is obstinate.

“Provided that every minister so repelling any as is herein specified, shall be obliged to give an account of the same to the Ordinary as soon as conveniently may be.”

<sup>1</sup> *Journals N. Y. Convention, 1823.*

At the same time with the adoption of this rubric, a canon was passed, declaring that if any persons within this Church offend their brethren by any wickedness of life, such persons shall be repelled from the Holy Communion, agreeably to the rubric, and may be further proceeded against to the depriving them of all privileges of Church membership according to such rules or process as may be provided, either by the General Convention, or by the Conventions in the different States. (Canon 12, 1789.)

This was re-enacted in 1808, adding only the word *Diocese*. In 1817, a canon was passed, the same as the second section of the 42d Canon of 1832, which canon is as follows, and is now in force :

“ § 1. If any persons within this Church offend their brethren by any wickedness of life, such persons shall be repelled from the Holy Communion, agreeably to the rubric.

“ § 2. There being a provision in the second rubric before the Communion service requiring that every minister repelling from the Communion shall give an account of the same to the Ordinary, it is hereby provided, that on the information to the effect stated being laid before the Ordinary, that is, the Bishop, it shall not be his duty to institute an inquiry, unless there be a complaint made to him in writing by the repelled party. But on receiving a complaint, it shall be the duty of the Bishop (unless he think fit to restore him, from the insufficiency of the cause assigned by the minister,) to institute an inquiry, as may be directed by the canons of the diocese in which the event has taken place ; and the notice given as above by the minister shall be a sufficient presentation of the party repelled.

“ § 3. In the case of great heinousness of offence, on the part of members of this Church, they may be proceeded against to the depriving them of all privileges of Church membership, according to such rules or process as may be provided by the General Convention, and until such rules or process shall be

provided, by such as may be provided by the different State Conventions.”

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The rubric of our Prayer Book is almost an exact copy of that in the English office, which is part of the Statutes 2 & 5 Edw. VI., and 13th, 14th, Char. 2d.

By an act 1 Edw. VI. cap 1, it was declared that the minister should not, without a lawful cause, deny the Communion to any person who will devoutly and humbly desire it, any law or ordinance, or custom to the contrary notwithstanding; and I apprehend that this is the law of our Church.

In a case in England, an action at law was brought against the minister, for refusing the sacrament. It was decided against the plaintiff, but on technical grounds. (Siderfin's Rep., p. 14.) See an analogous case, Hetly 11 Wm. Jones, 305.

But with us at any rate, such an action would not lie. It would be inconsistent with the principles I have endeavored to show govern such cases in our civil tribunals. Bishop Brownell justly observes:—"In repelling an evil-liver or a wrong-doer from the Communion, the minister will not be liable in an action of defamation, if he proceeds according to the rules of the society to which he belongs. As we have no state or national religion, every man connecting himself with a particular denomination of Christians tacitly or expressly agrees to be bound by its regulations. This is the dictate of reason. It has been settled as a principle of law in, at least, one of the states, and I doubt not it would be so received in every state. But the minister must proceed in strict conformity with the regulations of the ecclesiastical body to which he belongs. It will not do for him to set up qualifications of his own dictating, such as a particular religious experience, or the refraining from certain amusements."

The English canons of 1603 (the 26th, 27th, and 109th) made upon the basis of the rubric, provided, that every min-

ister so repelling any person, shall upon complaint, or being required by the Ordinary, signify the cause thereof unto him, and therein obey his order and direction; and by the rubric (passage added 13, 14, Car. 2) the minister was positively directed to give the account to the Ordinary within fourteen days. The Ordinary was then to proceed to punish, according to the canon. This, no doubt, is canon 109, by which it was provided, "that the Ordinary was to punish such offenders with the severity of the law, and not to admit them to the Communion till they be reformed."

This power is vested in the first instance in the minister, but only to be exercised in the cases specified, and subject to the Bishop's revision; and the understood construction of the English rubric is, that admonition must be first resorted to.

The following is the substance of the law in the English Church, as stated by Dr. Wheatly, (on the *Book of Common Prayer*, 253, Ed. 1842.) After quoting the rubric, he distinguishes between absolutely repelling and shutting out any one from the communion as by a judicial act, and only suspending a party for a time, till the minister has an opportunity to send the case to the Ordinary. The first of these, he says, is what the rubric cannot be understood to imply, for by the law of the land, both ecclesiastical and civil, none are to be shut out from this Sacrament but such as are notorious delinquents; and none are notorious, but such as the sentence of the law hath, either upon their own confession or full conviction, declared to be so.

He quotes St. Austin as to the practice of the Church:

"We cannot repel any man from the Communion unless he has freely confessed his offence, or hath been accused and convicted in some ecclesiastical consistory or secular court."

"That all this plainly refers to the power of seclusion from the Communion *judicially*, and with *authority*; whereas the design of this rubric is only to enable the curate to refuse to



administer to any of his congregation (of whose ill life and behaviour he has received sudden notice) till he can have an opportunity of laying his case before the Ordinary."

Again he says, "that notoriety in the sense of the rubric is to be taken in a lower degree than those made notorious by sentence of law for crime. It refers to those whose evil living is supposed to be unknown to the Ordinary, yet so open as that the congregation is offended, and which the minister is to communicate to him.

"That in the meanwhile the curate is empowered by this rubric (which is itself a law, being established by the Act of Uniformity) to refuse the Communion if, after due admonition to keep away, he obstinately offers himself to receive it. That this was conformable to the practice of the ancient Church, in which, although all open offenders as soon as known were put to censure, yet if before censure they offered themselves at the Communion, they were repelled." He quotes a striking passage from St. Chrysostom.<sup>1</sup>

The theory then is, plainly, that the power of the minister is only suspensory. It is his duty to put the case immediately before the Ordinary. If the party does not submit, he is entitled to a revision of the act, and to a restoration if the grounds are proven insufficient.

The difficulties which a minister is under in England, arising from the statute and the decisions of the courts, are well stated in ARCHBISHOP SHARP'S *Third Visitation Charge*, p. 41, &c.

<sup>1</sup> The close of which is this, "Though he be a general or provincial governor, or the emperor himself, that cometh unworthily, forbid him, and keep him off; thy power is greater than his. If any such get to the Table, reject him without fear. If thou darest not remove him, tell it to me. I will not suffer it. I will yield my life rather than the Lord's Body to any unworthy person, and suffer my own blood to be shed, before I will grant that holy blood to any but to him that is worthy."

In a case before the Standing Committee of New-York, hereafter more particularly noticed, it was discussed whether the repulsion by a minister would be treated as sufficient to exclude the party from being admitted to communion by any other minister of the diocese. It was generally agreed by the clergy present that such would be the case.

There does not appear, however, any legal ground for supposing that another clergyman would be authoritatively bound. The act is suspensory merely, at least if appealed from, and the rectorial jurisdiction is limited. It would be binding if confirmed by the Bishop. The provision suggested, under the head of Excommunication, (*ante p.* 433,) would meet the difficulty.

The appeal to, and revision by the Bishop is a matter of right. Bishop Brownell states, (*Prayer Book*, p. 282, Note,) "that the proviso must suppose a power in the Bishop to ratify or reverse the sentence, and a right of appeal in the person who is repelled. It is taken from the English rubric, which is predicated on such a power, and the 6th Article of the Constitution of the Church in this diocese provides, that in case of such an appeal, the minister shall, within one month, make a statement to the Bishop of the charges on which he proceeded, and the evidence by which they were supported."

I do not find any such provision in the present constitution of Connecticut, (1847,) or among its canons. It is found in the Constitution of the 6th of June, 1792, and was omitted afterwards when the existing constitution was adopted. The 6th article was as follows: "If any presbyter shall exclude from the Holy Communion any person belonging to his congregation, the presbyter shall transmit to the Bishop an account thereof within one month, with the nature of the offence, and the evidence by which the charge is supported. And the sentence of the Bishop in convocation shall be deci-

sive, unless the person under suspension should appeal to a Council of Bishops."

Although the requisition of the rubric, that an account be given to the Bishop, may be satisfied by stating the fact of repulsion only, yet the canon contemplates something more, by providing that the Bishop may restore the party for the insufficiency of the cause assigned. Certainly such a statement as Bishop Brownell mentions would be advisable; perhaps the minister could be called upon to make it.

As to the power of the Bishop, it cannot admit of any question. He would possess it by virtue of his inherent Episcopal authority in matters of government, independent of any right to be inferred from the rubric or canon.

But these are sufficiently explicit. An analogous case before Bishop McIlvaine of Ohio may be adverted to. A layman made a formal complaint to the Bishop against his rector for an oppressive administration of discipline under the 15th canon of that diocese.<sup>1</sup>

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The canon provides, that if the Bishop does not § 2.  
restore the party, upon the insufficiency of the METHOD OF  
cause assigned, he is to institute an inquiry as may INQUIRY.  
be directed by the canons of the diocese.

The Bishop has thus the power, under the canon, to replace the party, if he judge the reasons assigned are insufficient to warrant the rejection. Such a power would, it is presumed, be only exercised in cases of plain legal insufficiency. And Dr. Hawks with great force urges against this power in the Bishop to proceed without giving notice to the minister.

Some of the dioceses have adopted regulations upon the subject.

In Massachusetts, by a canon of 1846, it is provided, that whenever the Bishop shall institute an inquiry on the subject

<sup>1</sup> *Journal of 1847*, p. 17.

of repelling a person from the Holy Communion, according to the rubric and the canons of the General Convention, he shall summon a council of two presbyters, and two laymen, of which he shall be president, to decide upon the case.

In Wisconsin, by canon 4, (*Journal* of 1847, p. 32,) the regulation is, that when a person who has been repelled from the Holy Communion appeals to the Bishop, and is not restored by him, the Bishop may, and if the person demand it, it shall be his duty to appoint three presbyters, who shall make inquiry into the truth of the causes alleged, and shall make a report thereof, with their opinion thereon, to the Bishop.

By the 7th canon of the diocese of Delaware, (*Journal* 1844,) if a layman repelled from the Communion, according to the rubric, shall complain thereof to the Bishop, according to canon 42 of the General Convention of 1832, the Bishop, (or his assistant Bishop,) whether belonging to this diocese, or having provisional charge thereof, shall, unless he restore him to the Communion, according to the said canon, appoint two disinterested clergymen and two disinterested laymen, who are communicants, to inquire into and try the case. If they report to the Bishop that the repelled person should be restored, the Bishop shall so direct, and no minister of this diocese shall deny him the Holy Communion. If they report otherwise, or make no report within three months from their appointment, the repulsion shall continue in force. If the judicatory be equally divided, they may elect an umpire, clerical or lay; and if they do not define the term of the repulsion, the Bishop (or his assistant Bishop) may restore the repelled part, according to the rubric.

The 11th canon of New-Jersey (1837) directs, that when a person who has been repelled appeals to the Bishop, and has not been restored by him, the Bishop may, and if the person repelled demand it, shall appoint one presbyter and two laymen, who shall make inquiry into the truth of the facts al-

leged, and shall report thereof, with their opinion thereon, to the Bishop, who may proceed to restore the individual, or otherwise, as he may deem proper.

And in Pennsylvania, by canon 2 of 1847, the party repelled may present his complaint in writing to the Bishop. The notice given by the minister shall stand in the place of a presentment of the party, and the proceedings are then to be the same as upon a presentment of a clergyman for an offence, except that in addition to the four clerical assessors, four laymen are to be appointed in the manner designated, and the eight are to choose a layman as an additional member. They are to proceed as in the case of a clergyman, and to report whether the party has been rightfully repelled, according to the rubric or not; and whether his repulsion ought or ought not to continue. If the judgment direct a farther continuance of the repulsion, it shall still be subject to the conditions and provisions of the rubric.<sup>1</sup>

By this canon, the judgment of the assessors is final, unless the Bishop grants a rehearing; which seems to be his only control over it.

But no rules have been adopted in a large number of the dioceses. There is none in New-York.

In such cases, the method of inquiry must be determined by the Bishop. The power of revising by an inquiry involves this right, where no canonical regulation of the mode has been made. By analogy to a case of an inquiry into the qualifications of a party presented for institution, the method of investigation merely is wholly in his power, provided only it is in some ordinary mode, and with notice. (*See ante p. 285.*)

Accordingly, in the case of B. L. W., before the Standing Committee of New-York, January, 1849, the following course was adopted:—

The committee resolved that the whole power which a Bish-

[<sup>1</sup> See also a canon of the diocese of Rhode Island.

op could possess in the matter was vested in them, under the circumstances in which the diocese was placed. (*See note 1.*)

That there being no canon of this diocese regulating the mode of proceeding, the Bishop, and therefore the committee, had the full power of prescribing it, observing those great rules which govern judicial investigations.<sup>1</sup>

<sup>1</sup> The substance of the following observations was prepared for a sub-committee, and circumstances led to its expansion and restatement. For the reasons adduced the author is therefore solely responsible.

“The first topic of inquiry is, whether the Standing Committee possess any authority in the case. The Minister has recognized the jurisdiction by addressing his account under the rubric to this body acting as the Ordinary, and the repelled party has made his appeal in a similar manner. But waiving the argument deducible from this submission, the following is urged in vindication of the power of the Committee.

“*First.* That the phrase in the 42d canon of 1832, (section 2), following the word *Ordinary*, viz: ‘that is the Bishop,’ is a cotemporaneous expression of what the word *Ordinary* means in the rubric. The original canon was passed by the same convention which adopted the Prayer Book. We are to consider the question precisely as if the word Bishop had been used in the rubric instead of the word Ordinary. That word is not found in any other canon, and the rubric is an exact copy of the English form, which accounts for its being there employed. It was expedient to explain a term but once employed in the canons.

“*Second.* By the tenth canon of our Diocese as amended in 1845, in case of a vacancy of the Episcopate, or *the inability or disability of the Bishop*, all the powers of the Bishop in matters of discipline shall be exercised by the Standing Committee, except such as are expressly delegated to the clerical members thereof. A similar canon, omitting the words italicised, is found in Pennsylvania and Missouri.

“*Third.* It does not admit of question that in this Diocese the question must be considered precisely as if there was an actual vacancy by the death of the Bishop. Supposing then such a case, the canon referred to appears conclusive, if that canon is legal. It is a case of discipline. It is a case in which the Bishop would have the power as a matter of discipline. Is then the provision lawful?

“*Fourth.* It can only be proved illegal from being forbidden, or because at variance with the constitution or canons of the General Convention, or the constitution of the Diocese. There is nothing in either constitution inhibiting the power. There is nothing in the canons

The letter of appointment which is set forth in the note, was finally adopted, and will exhibit the leading principles recognised by the committee.

unless the phrase referred to in the 42d canon has that effect, which it is apprehended it cannot have. But the fourth canon directs that the duties of the Standing Committee may be prescribed by the canons of the respective Dioceses. The power to fulfil attends upon duties imposed.

“*Fifth.* The only question which seems doubtful is, whether the clerical members of the Committee alone do not possess the power. But this is the offence of a Layman; so it is treated by the canon. The account given by the Minister is a presentment of the offender. The canon in Pennsylvania regards the case in the same manner. True, the conduct of the minister may come indirectly in question. It may turn out that he has wantonly exercised his power. But this is neither a necessary consequence, nor the case or issue raised. That is the presented offence of a Layman. The offence of the Minister would arise, when, and if he refused communion, after a judgment of restoration. And then his offence would be triable by Presbyters, and be subject to the canon which prohibits any one but a Bishop from pronouncing sentence. What then is the power of a Bishop in such a case? The canon has imposed upon him the duty to inquire, and has given to the repelled party a right to have an inquiry. It declares that the inquiry shall be had as may be directed by the canons of the particular Diocese. The omission by a Diocese to regulate the method of investigation could not relieve the Bishop from the obligation, nor rob the party of the right. The Convention had the power of prescribing the course, and when prescribed, that became binding; but until such action, as the Bishop was bound to inquire, he must have the power of settling the method of inquiry.

“If we couple this reasoning, with the doctrine of the Church as to a Bishop’s jurisdiction in matters of discipline, the point will be made more clear. Independently of any canon or rubric the Bishop possesses the right of determining the case of a party repelled from the communion. The authority of Hooker, Gibson, Stillingfleet, the consecration office, the abundant canons, and the decisions of English courts, all recognize this. (See *Ecclesiastical Polity*, Book, 7, p. 239.) *Introduction to Gibson’s Codex*, p. 1, 3. *Stillingfleet’s Eccl. Cases*, 94, 95. *Bishop Brownell’s Prayer Book* and note, p.

“It may be useful to add some explicit authority as to the right of a Bishop to perform part of his jurisdiction by Delegates. Bishop Stillingfleet, after pointing out the office and authority of Deans, Chancellors, &c., says, ‘the Bishop by appointing a Chancellor does not dives,

The course of the Standing Committee in this case, has met with the disapprobation of several divines whose opinions are entitled to the highest respect. This is placed upon grounds

himself of his own ordinary power, but he may delegate some part of it by commission to others, which goes no further than is expressed in it. For it is a great mistake in any to think that such who act by a delegated power can have any more authority than is given them where a special commission is required for the exercise of it. For by the General Commission no other authority passes but that of hearing causes; but all acts of voluntary jurisdiction require a Special Commission, which the Bishop may restrain as he sees cause.' (*Eccle. Cases*, p. 330, Ed. 1702. See also COWEL'S *INTR. Verbo Ordinary*.)

"In the case of the Prebend of Hatcherties (Noy's Reports, 153), a Dean having ordinary jurisdiction makes a Commissary by his deed, which is confirmed by the Chapter. The Dean dies. The question was if that was good to bind his successor. By Dodderidge, J.: Such a jurisdiction is judicial and the grant is but a delegation; the actual power at all times remaining in the Ordinary. True it is that ecclesiastical jurisdiction in judicial acts may be exercised by substitute, but in law they are the acts of him who substituted the other.

"It is therefore submitted that the power of the Committee in this case is the same as that of a Bishop in full jurisdiction; that the method of inquiry in the absence of a Diocesan regulation is within the discretionary power of a Bishop, and therefore within that of the Committee; and that such inquiry may be made personally, or by a delegation to take the testimony, and express an opinion upon the facts, subject to revision. See also the case from East, cited ante, p. 285, also the case at 305."

The Letter of Appointment was as follows:—

"To the Rev. ——— &c. &c.

"Whereas the Rev. L. did by a written notice, dated the 4th of December, 1848, give an account to the Standing Committee of the Diocese of New York of his having repelled A. B. from the holy Communion as guilty of publishing a grossly false and malicious libel upon the character of the Rector of St. ——— Church, &c., and for previous publications of a similar character, published, &c. which account was accompanied with sundry documents as connected with such act of discipline, marked, &c. And whereas, the said A. B., did not on the present a complaint to the said Standing Committee in the nature of an appeal from the act of the said the Rev. &c., repelling him from the Holy Communion as aforesaid, and accompanied the same with various documents, marked, &c. Now therefore the Standing



of a general nature, which would equally condemn the principle of the canons of most of the dioceses, which have made any provision on the subject.

The reasons assigned are substantially these, that in point of fact, the clergyman himself is upon a trial—his own con-

Committee of the Diocese of New York, exercising the ecclesiastical authority, and jurisdiction of the Ordinary therein in the premises, do hereby authorise and appoint you, the above named, Commissioners diligently to make inquiry into the truth of the charges and the allegations against the said A. B., contained in the said account given by the said, the Rev. ———, and whether the said has been rightfully repelled according to the rubric and canon of the Church or not, *and whether his repulsion ought or ought not to continue*, and to report your opinion thereon to us. And for such purpose we have transmitted to you such account and such appeal, and all the documents which have been laid before us; and you are to take such testimony, and the evidence of such witnesses as may be produced to you, which evidence shall be reduced to writing, and signed by such witnesses respectively, and some officer authorized by law to administer oaths, may administer an oath or affirmation to such witnesses; and the examination of witnesses and all your proceedings upon such inquiry shall be in presence of the parties, and of their counsel only if attendance of counsel is desired by either of them; and all the testimony which you shall take in the premises you are to return to us together with your report. And such notice as you will deem reasonable, is to be given to the said parties, of your proceedings in the matter, and you are authorized to continue the same by adjournment from time to time as you shall see fit."

The clause in this letter of appointment which is italicised, was inserted because certain communications had taken place, between the parties after the act of repulsion, and which had been transmitted with the account. They seemed to warrant the clause, although it ought to have been, and was at first, limited to the effect of those communications. The author has had the advantage of very full communications with the Honorable Luther Bradish, one of the members of the commission, and fully agrees with his suggestion, that this clause would not be proper in ordinary cases.

Indeed the author, after the benefit of hearing and reading much from able divines and others, upon this subject, is inclined to the opinion that it would be most expédient at least to restrict the powers of the Commissioners to the mere collection of the evidence, and embodying an abstract of the facts.

duct must be the subject of inquiry and judgment. If the act of repulsion is reversed, it involves his own condemnation, and this is effected by a body composed in part of laymen, when by the law of the Church he is amenable only to a Bishop, or to members of his own order.<sup>1</sup>

Passing by the fact, that in a great number of cases, the error of the minister would be only a misinterpretation of the rubric or canon, or misinformation as to facts, let the question be viewed, where a censure would, indirectly indeed, but unavoidably, follow a reversal.

Undeniably the minister is not the party put upon his trial on the record. The sentence of restoration is totally inoperative upon *his* station, office, or rights. It may in its consequences, and in these alone, wound his reputation. On the other side, the rejected layman is stripped of the great privilege of a Christian man, is severed as an unworthy member from Christ's body; and stands before the Church first as the condemned, and on his appeal as the accused party. It is in this light, (and the observation is of great importance,) that the canon regards him. Upon his appeal, the notice given by the minister, is to be deemed the presentment of the layman. He then is the party charged—the party put on trial—the party directly and practically affected by the sentence to be given. I cannot think that the establishment of a court partly composed of laymen for such an investigation, violates the settled and

<sup>1</sup> I quote the language of a Minister of the Church, strongly expressing these views. The circumstances do not admit of a more particular reference. "I should even have submitted the case to a Court of Presbyters, with a simple and formal protest against its being canonical, and then would have abided by their decision, but I never did, and never will submit my acts performed as a Minister of Christ's Church, to the investigation of laymen. As a Clergyman I have relinquished not one solitary right which I possess as a citizen, and in becoming a Clergyman I oblige myself to obey no authority which is not either legal or inherent. Call it by whatever name they may, an appearance before such a Committee of Laymen is a trial however informal."

the sound principle of the exclusive amenability of ministers to a tribunal of their own or of a superior order, when charged with, and to be tried for offences.

With so much care did the Church in ancient times watch over this power of repulsion, that it was one of the offices of its highest councils to revise the decisions even of Bishops upon the matter. By the 5th canon of the Council of Nice, concerning these, whether of the clergy or laity, who have been excommunicated by the Bishops of the several provinces, let the sentence of the canon prevail which pronounces that those persons who have been cast out by one Bishop are not to be received again into communion by any others. Inquiry should, however, be made whether they have been excommunicated through the peevishness, or contentiousness, or other such like bitterness of the Bishop. The canon then provides, that for making such inquiries, synods should be assembled twice every year, in every province; that all the Bishops of the province being assembled together, such questions may be examined into, and the offender justly condemned may appear to be excommunicated by all the Bishops, until a more lenient sentence is pronounced by the General Assembly.

Yet every regulation which makes any decision final except that of a Bishop, where there is one, seems to the author objectionable. The substitution of a Standing Committee in some cases is matter of necessity; and in the present situation of the country, perhaps even these cases may be met without much inconvenience.

In examining the provisions of these various dioceses, we are struck with two points of moment. First, that in all instances but one, laymen participate in the investigation. In two instances, Pennsylvania and New-Jersey, a majority are laymen. In Wisconsin alone is the inquiry made by clergy-men solely. The next observation is, that in two instances,

Pennsylvania and Delaware, the judgment of a court thus constituted is made final. This seems an innovation upon a Bishop's judicial ultimate power, scarcely defensible.

There are some other regulations in the dioceses upon this subject, which deserve notice.

In Maryland, by the 23d Canon of 1847, the minister is first to admonish the party privately; and if, after this, he deem it necessary, he may convene the vestry and churchwardens, first giving the party reasonable notice in writing of the charge, and of the time and place appointed for the meeting to inquire into it. The minister, wardens and vestry, or a majority, shall examine into the charge, and if a majority of those in attendance should be of opinion that the accused is guilty, the minister shall pronounce such sentence as the offence may, in his judgment, deserve, which shall be either reproof before the vestry and wardens, suspension from the Holy Communion, or excommunication.<sup>1</sup>

In Virginia, by Canon 6 of 1837, a member of the Church being a communicant, conducting himself or herself in a manner unworthy of a Christian, may and ought to be admonished or suspended by the minister of the parish or congregation, according to the rubric. And in cases where it may be deemed expedient by the minister, or may be requested by the accused party, the churchwardens, or either of them, if communicants, shall be summoned to assist the minister in ascertaining the facts of the case; provided, that if such wardens or warden shall refuse or fail to act within ten days, the minister shall proceed to act under the rubric of this Church.

In the Convention of 1850, this canon was amended by inserting, after the words *according to the rubric*, the following clause: "And gaming, attendance on horse-racing and theatrical amusements, witnessing immodest and licentious

<sup>1</sup> See ante, Tit. *Excommunication*, Note.

exhibitions or shows, attending public balls, habitual neglect of public worship, or a denial of the doctrines of the gospel, as generally set forth in the authorized standards of the Church, are offences for which discipline should be exercised. This enumeration, however, shall not be construed to include all the subjects of discipline in the Church."

A highly respectable minority opposed the adoption of this canon on the grounds, first, that it was unconstitutional, and next, that it was inexpedient. The author has been favored with a pamphlet, setting forth with ability and calmness the reasons of this opposition.

The principles, however, which have been supported in this work, tend to sustain the validity of the canon. The powers of the General Convention to legislation, it has been stated, were of two classes—those specially conferred by the constitution, and those inherently possessed by that body. The great bulk of the canons rest upon the latter for their source and warrant. But as to all this class of powers, the authority is concurrent with that of the dioceses. The right to legislate upon the given subject is in the dioceses, until an act of the General Convention has been passed upon it. That act will form the paramount law; and will supersede any regulation of a diocese repugnant to it already passed, and the right to make any such repugnant regulation in future. But the fact of inconsistency must be established; the two acts of legislation must be *ad idem*. The power of the diocese is so far fully superseded, and no farther.

Undoubtedly, there may be cases in which the application of this doctrine may be delicate and difficult; but not more so than is every day occurring in the tribunals of justice, in bringing the general maxims of law to bear in particular instances.

The legislation of the General Convention on the matter in question is contained in the third section of the 42d canon of 1832, providing, that for cases of *great heinousness* of of-

fence, the members may be proceeded against, according to rules to be provided, &c.

Now if the offences enumerated in the Virginia canon—of attending a theatre, for example—are not of *great heinousness* within the general canon, then the two acts of legislation are upon two distinct matters; not indeed in kind, but in degree.

Had the canon of the General Convention contained any words of exclusion—had it declared that the offences for which a layman might be proceeded against, should be those enumerated, and those only, or used any words importing a full enumeration of offences, there would be an end of the controversy.

No doubt a question may fairly be raised in this, as well as in many other cases, as to what makes an act of legislation exclusive, and it might be urged here, that in providing that one class of offences should be punishable, a negation of all other cases was implied.

But in the author's humble opinion, this is not tenable. It seems that something more is necessary to work a prohibition. Offences differ largely in their degree; and the enactment in question appears to cover only that aggravated degree of crime, to which the highest penalty, viz., that of excommunication, is to be attached. The character of the offence is marked by the severity of the punishment, and that severity indicates the offences legislated for. It leaves a body of lesser violations, to which a lesser censure is appropriate, for the regulation of those conventions which, before the canon was passed, possessed the right of acting upon the whole subject. The Virginia canon provides for an admonition, or repulsion from the table only.

Another view, which appears to have been taken by some of the advocates of the canon, rests on the supposition that the specific cases may be treated, by fair interpretation, as within the words, *great heinousness of offence*. The canon

of Virginia is then but declaratory of the meaning of the terms used in the general canon.

The difficulty attending this view is, that it is superfluous, and perhaps mischievous. If a case occurred before a Church tribunal of Virginia, involving the construction of the phrase, it would be bound to judge without regard to the construction of the convention. It would be its duty to act as the judicial interpreter of the law of the General Convention, not as the agent to declare and enforce the interpretation of another body. The declaratory resolution could, justly, possess no other authority, than the opinions of wise and eminent men are entitled to. But the very fact of the expression of that opinion in so formal a manner by a Convention, would produce an undue influence upon the judgment of any court.

I shall close the consideration of this important subject with a few suggestions.

In the first place, the ground of a repulsion is, "the being an open and notorious evil-liver;" the force of which phrase is explained by Wheatly in the passage I have cited. *Next*, "that the party has done a wrong to his neighbor, by word or deed, so that the congregation be thereby offended." These are the rubrical requisitions. Then the canon provides, that "if any persons within this Church offend their brethren by any wickedness of life," they may be repelled; and "in the case of great heinousness of offence, may be deprived of all privileges of Church membership."

It has been discussed whether the power could be exercised by a minister in a case in which a slander was uttered against himself, assuming the congregation to be offended. And Bishop Onderdonk countenances the negative opinion, in a case cited by Dr. Hawks as taking place in New-York in 1832.<sup>1</sup> I do not look upon it as a decision of the case on that point, for the judgment of the Bishop was plainly right on the fifth of

<sup>1</sup> *Constitution and Canons*, p. 369

the reasons given by him. With the greatest deference for the experience and strong judgment of the Bishop, this opinion may be doubted. The rejection is warranted by the language of that clause of the rubric, "doing wrong to a neighbor by word or deed." There is no other redress open to an assailed and calumniated minister within the discipline of the Church; and if he may not repel, the shocking scene may be exhibited of the reviler receiving the emblems from one he has slandered, and the reviled administering them, while the feelings of resentment and dislike are struggling for sway in his bosom.

Yet undoubtedly there should be some restriction upon the exercise of the right in such a case. I have been informed, that in a similar instance, all the facts, (principally resting on documents,) were submitted to a brother clergyman, and his opinion obtained, that if the party repelled were his parishioner, and had made the same accusations against the minister whose parishioner he was, he would proceed. A canonical regulation to this effect might be advisable.

*Again,* The act of repulsion is, in England, suspensatory merely; and it was so declared in the article of the old constitution of Connecticut, which, probably, was drawn by Bishop Seabury. The account is then given to the Ordinary. In England, as I understand it, he must proceed to inquire. Not so here, unless a complaint is made. If no complaint is filed, and no restoration for insufficiency takes place, the act of suspension remains in force, remissible under the rubrics, and by the minister. If an appeal is taken, and the act of the minister is reversed, a sentence of restoration is given. But if confirmed, two courses may be pursued. First, to declare that the act of repulsion was warranted by the rubric and canons, and that the suspension of the party should continue, subject to the provisions of the rubrics. But next, I think the Bishop may go farther, and not merely ratify the repulsion, but pro-



ceed to a deprivation of the privileges of Church membership, that is, to the lesser excommunication.

The effect of this would be twofold. It would definitely settle the question of exclusion from the table in every other church, and I think in every other diocese; and it would require that a remission should be pronounced by the Bishop. The authority of the minister is at an end.

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TITLE VI.

TRIAL OF A BISHOP.

(Canon 3 of 1844 is as follows:—)

§ 1. The trial of a Bishop shall be on a presentment in writing, specifying the offence of which he is alleged to be guilty, with reasonable certainty as to time, place, and circumstances. Such presentment may be made for any crime or immorality, for heresy, for violation of the constitution or canons of this Church, or of the Church in the diocese to which he belongs. Said presentment may be made by the convention of the diocese to which the accused Bishop belongs, two-thirds of each order present concurring: *Provided*, that two-thirds of the clergy entitled to seats in said convention be present: and *Provided also*, that two-thirds of the parishes canonically in union with said convention be represented therein; and the vote thereon shall not in any case take place on the same day on which the resolution to present is offered; and it may also be made by any three Bishops of this Church. When made by the convention, it shall be signed by a committee of prosecution, consisting of three clergymen and three laymen, to be appointed for that purpose; and when by three Bishops, it shall be signed by them respectively, in their official characters.

“ § 2. Such presentment shall be addressed “ To the Bishops

of the Protestant Episcopal Church in the United States," and shall be delivered to the presiding Bishop, who shall send copies thereof without delay to the several Bishops of this Church then being within the territory of the United States: *Provided*, that if the presentment be made by three Bishops, no copies shall be sent to them: and *Provided further*, that if the presiding Bishop be the subject of the presentment, or if he be one of the three Bishops presenting, such presentment<sup>t</sup> shall be delivered to the Bishop next in seniority, the same not being one of the three presenting; whose duty it shall be, in such case, to perform all the duties enjoined by this canon on the presiding Bishop. Upon a presentment made in either of the modes pointed out in section 1 of this canon, the course of proceeding shall be as follows:

“ § 3. The presiding Bishop shall, without delay, cause a copy of the presentment to be served on the accused, and shall give notice, with all convenient speed, to the several Bishops then being within the territory of the United States, appointing a time and place for their assembling together; and any number thereof, being not less than seven, other than the Bishops presenting, then and there assembled, shall constitute the Court for the trial of the accused: he shall also, at the same time, cause at least thirty days' notice of the time and place of meeting to be given, both to the accused, and to the parties presenting him, by a summoner to be appointed by him; and shall also call on the accused by a written summons to appear and answer. The place of trial shall always be within the diocese in which the accused Bishop resides. If the accused Bishop appear before proceeding to trial, he shall be called on by the court to say whether he is guilty or not guilty of the offence or offences charged against him; and on his neglect or refusal, the plea of *not guilty* shall be entered for him, and the trial shall proceed: *Provided*, that for sufficient cause, the court may adjourn from time to time: and *Provided also*, that the

accused shall at all times during the trial have liberty to be present, to produce his testimony, and to make his defence.

“ § 4. When the court proceeds to trial, some officer authorized by law to administer oaths, may, at the desire of either party, be requested to administer an oath or affirmation to the witnesses, that they will testify the truth, the whole truth, and nothing but the truth, concerning the matters charged in the presentment, and the testimony of each witness shall be reduced to writing. And in case the testimony of any witness whose attendance on the trial cannot be obtained, is desired, it shall be lawful for either party, at any time after notice of the presentment is served on the accused, to apply to the court, if in session, or if not, to any Bishop, who shall thereupon appoint a commissary to take the deposition of such witness. And such party, so desiring to take the deposition, shall give to the other party, or some one of them, reasonable notice of the time and place of taking the deposition, accompanying such notice with the interrogatories to be propounded to the witness; whereupon it shall be lawful for the other party, within six days after such notice, to propound cross-interrogatories; and such interrogatories and cross interrogatories, if any be propounded, shall be sent to the commissary, who shall thereupon proceed to take the testimony of such witness, and transmit it, under seal, to the court. But no deposition shall be read at the trial unless the court have reasonable assurance that the attendance of the witness cannot be procured, or unless both parties shall consent that it may be read.

“ § 5. The Court having fully heard the allegations and testimony of the parties, and deliberately considered the same, after the parties have withdrawn, shall declare respectively, whether, in their opinion, the accused be guilty or not guilty of the charges and specifications contained in the presentment, in the order in which they are set forth; and the declaration of a majority of the court being reduced to writing,

and signed by those who assent thereto, shall be considered as the judgment of the said court, and shall be pronounced in the presence of the parties, if they choose to attend. And if it be that the accused is guilty, the court shall, at the same time pass sentence, and award the penalty of admonition, suspension, or deposition, as to them the offence or offences proved may seem to deserve: *Provided*, that if the accused shall, before sentence is passed, show satisfactory cause to induce a belief that justice has not been done, the court, or a majority of its members, may, according to a sound discretion, grant a rehearing; and in either case, before passing sentence, the accused shall have the opportunity of being heard, if he have aught to say in excuse or palliation: *Provided*, that, the accused shall not be held guilty unless a majority of the court shall concur, in regard to one or more of the offences charged, and only as relates to those charges in which a majority so concur.

“ § 6. If the accused Bishop neglect or refuse to appear, according to the summons of the court, notice having been served on him as aforesaid, except for some reasonable cause, to be allowed by the said court, they shall pronounce him to be in *contumacy*, and sentence of suspension from the ministry shall be pronounced against him for contumacy by the court; but the said sentence shall be reversed, if, within three calendar months, he shall tender himself ready, and accordingly appear, and take his trial on the presentment. But if the accused Bishop shall not so tender himself before the expiration of the said three months, the sentence of deposition from the ministry shall be pronounced against him by the court. And it shall be the duty of the court, whenever sentence has been pronounced, whether it be on trial or for contumacy, to communicate such sentence to the ecclesiastical authority of every diocese of this Church; and it shall be the duty of said ecclesiastical authorities to cause such sentence to be publicly read

to the congregations of each diocese by the respective ministers thereof.

“ § 7. All notices and papers contemplated in this canon, may be served by a summoner or summoners, to be appointed by the Bishop to whom the presentment is made, or by the court, when the same is in session; and the certificate of any such summoner shall be evidence of the due service of a notice or paper. In case of service by any other person, the fact may be proved by the affidavit of such person. The delivery of a written notice or paper to a party, or the leaving of it at his last place of residence, shall be deemed a sufficient service of such notice or paper.

“ § 8. The accused party may have the privilege of appearing by counsel, and in case of the exercise of such privilege, but not otherwise, those presenting shall have the like privilege.

“ § 9. If at any time, during the session of any General Convention, any Bishop shall make to the House of Bishops a written acknowledgment of his unworthiness or criminality in any particular, the House of Bishops may proceed, without trial, to determine, by vote, whether the said offending and confessing Bishop shall be admonished, or be suspended from his office, or be deposed; and the sentence thus determined by a majority of the votes of the House of Bishops, shall be pronounced by the Bishop presiding, in the presence of the said House of Bishops, and entered on the Journal of the House, and a copy of the said sentence, attested by the hand and seal of the presiding Bishop, shall be sent to the said Bishop, and to the Standing Committee of his diocese, and to the ecclesiastical authority of every diocese of this Church; and it shall be the duty of said ecclesiastical authorities to cause such sentence, unless it be the sentence of admonition, to be publicly read to the congregations of each diocese, by the respective ministers thereof.

“ § 10. Any Bishop of this Church not having ecclesiastical jurisdiction, shall be subject to presentment, trial, and sentence, as hereinbefore provided, but shall not be included in any other provision of this canon.

“ § 11. Canon IV. of 1841 is hereby repealed.”

The former and first canon was the fourth of 1841. This was adopted upon the addition to the 6th article of the constitution being made, that the mode of trying Bishops shall be provided by the General Convention.

The committee on canons reported in 1847 a canon materially changing and adding to the provisions of that of 1844. No action took place upon it, and the subject will undoubtedly receive farther consideration, and some legislative action. It is as follows:—

“ § 1. The trial of a Bishop shall be on a presentment, in writing, specifying the offence or offences of which it is alleged that he is guilty, with reasonable certainty as to time, place, and circumstances. Such presentment may be made for any crime or immorality, for heresy, teaching and maintaining doctrines contrary to those of this Church, or for a violation of the Constitution or Canons of this Church, or of the Diocese to which he belongs. Such presentment in the case of heresy, teaching and maintaining doctrines contrary to those of this Church, may be made by any one Bishop of this Church. In the case of crime, immorality, or violation of a Constitution or Canon, it shall be made by the Convention of the Diocese to which the accused Bishop belongs, a majority of each order concurring. But, two-thirds of the Clergy entitled to seats in such Convention, and a Lay representation from two-thirds of the parishes canonically in union with said Convention shall be present at the time of taking the vote; and the vote shall not be taken, in any case, upon the same day on which the resolution to present is offered. When such presentment is made by a Bishop, it shall be signed by him in his official

capacity, and when the Convention, by a Committee of three Clergymen and three Laymen, to be appointed by the Convention for that purpose. But no charge or specification shall be founded upon any fact which has not occurred within the five last years preceding the date of such presentment.

“§ 2. Such presentment shall be addressed to the Bishops of the Protestant Episcopal Church in the United States, and shall be delivered to the junior Bishop, not being the presenter, nor the party presented.

“§ 3. The Bishop receiving such presentment shall without delay, cause a copy of the said presentment to be served on the accused, and shall give him written notice to attend at some place not more than one hundred miles from the place of residence of the accused Bishop, and at some time not less than twenty days after the time of serving such notice, either personally, or by some agent authorized by him, in writing, to act for him in the premises, for the purpose of selecting by lot, the Bishops who shall form the Court for the trial of the said accused Bishop upon the said presentment. He shall also give notice of the time and place appointed for such selection to the presenting Bishop, or to the first signer of the presentment, if the same shall have been made by a Convention. At the time and place appointed in the notices, the Bishop who has given the notices shall attend, and in the presence of the accused Bishop, or of his agent authorized as aforesaid, or if neither of them shall attend, in the presence of two Presbyters of the Church, named by the Bishop who has given the notices, and also in the presence of the presenting Bishop or Committee, or of such person or persons as may attend in his or their behalf, the said Bishop shall cause to be placed in a box the names of all the Bishops of this Church, then being within the territory of the United States, except the accused and the presenting Bishop. He shall then cause eighteen of the said names to be drawn in the presence of two or three witnesses,

by a child under the age of twelve years, to be selected by him. The names so drawn shall be entered upon a list as they are drawn, and the list, or a copy thereof, delivered or sent without delay to the accused Bishop, who shall within five days strike from the said list any nine names which he may choose, and return the said list to the Bishop from whom he has received it. The said Bishop shall then without delay, send to each of the nine Bishops whose names remain on the list, or if more than nine remain, to each of those nine of them whose names were first drawn; and if the accused Bishop shall not within the limited time return the said list, then to each of the nine Bishops whose names were first drawn, copies of the said presentment, and shall cause at least thirty days notice of the time and place of trial to be given to each of the said Bishops, and to the presenting Bishop, or the first signer of the presentment, if it has been made by a Convention. The said nine Bishops, or any seven or eight of them assembled at the time and place appointed for the trial in such notice, shall constitute a court for the trial of the accused. The accused shall also be summoned by a written summons, signed by the Bishop, who shall have received the presentment, to appear and answer such presentment. The place of trial shall always be within the Diocese in which the accused Bishop resides. If the accused Bishop appear, before proceeding to trial, he shall be called upon by the Court to say whether he is guilty or not guilty of the offence or offences charged against him; and on his neglect or refusal so to do, the plea of *not guilty* shall be entered for him, and the trial shall proceed; *Provided*, That, for sufficient cause, the Court may adjourn from time to time: *And, provided, also*, That the accused shall at all times, during the trial, have liberty to be present, and in due time and order to produce his testimony and to make his defence.

“§ 4. No testimony shall be received at the trial except



from witnesses who shall have taken an oath or affirmation, to be administered by some member of the Court, that they will testify the truth, the whole truth, and nothing but the truth, concerning the matters charged in the presentment, and the testimony of each witness shall be reduced to writing. And in case the testimony of any witness whose attendance on the trial cannot be obtained, is desired, it shall be lawful for either party, at any time after the Bishops who are to compose the Court have been selected, to apply to the Court, if in session, or if not, to any member thereof, who shall thereupon appoint a Commissary to take the deposition of such witness. And such party so desiring to take the deposition, shall give to the other party, or to some one of them, reasonable notice of the time and place of taking the same, accompanying such notice with the interrogatories to be propounded to the witness, whereupon it shall be lawful for the other party, within six days after such notice, to propound cross interrogatories, and such interrogatories and cross interrogatories, if any be propounded, shall be sent to the Commissary, who shall thereupon proceed to take the testimony of such witness, upon oath or affirmation, to be by him administered, and transmit it under seal to the Court. But no deposition shall be read at the trial, unless the Court have reasonable assurance that the attendance of the witness cannot be procured, or unless both parties shall consent that it may be read. And no fact shall be regarded as proved, unless by the testimony of two witnesses, or by that of one corroborated by circumstances.

“ § 5. If any person, being a member of this Church, shall be summoned to attend as a witness any Court, constituted under this Canon, sitting within a reasonable distance of his or her residence, or being present in such Court, shall refuse to testify, or be sworn or affirmed, or shall refuse to appear before any Commissary appointed as aforesaid, at a suitable time and place, upon reasonable notice, or being before him,

refuse to testify or be sworn or affirmed, such person may be sentenced by the Court in a summary manner to admonition, and the sentence of admonition shall be drawn up in such form as the Court may approve, and read during Divine service by the officiating minister, in such place or places of worship as the Court may direct, and it is hereby made the duty of every Clergyman of this Church to obey the directions of the Court in the matter.

“ § 6. The Court having fully heard the allegations and proofs of the parties, and deliberately considered the same, after the parties have withdrawn, shall declare respectively whether, in their opinion, the accused is guilty or not guilty of each particular charge and specification contained in the presentment, in the order in which they are set forth; and the accused shall be considered as not guilty of every charge and specification of which he shall not be pronounced guilty by two-thirds of the members of the Court. The decision of the Court as to all the charges and specifications of which two-thirds of the members of the Court have found him guilty, shall be reduced to writing, and signed by those who assent to it; and a decision pronouncing him not guilty of all those charges and specifications of which two-thirds shall have pronounced him guilty, shall also be drawn up and signed by those who assent to it; and the decisions thus signed shall be regarded as the judgment of the Court, and shall be pronounced in the presence of the parties, if they shall think proper to attend.

“ § 7. If the accused shall be found guilty of any charge or specification, the Court shall proceed to ask him whether he has any thing to say before the sentence is passed, and may, in their discretion, give him time to prepare what he wishes to say, and appoint a time for passing the sentence; and before passing sentence, the Court may adjourn from time to time, and give the accused reasonable opportunity of showing cause to induce a belief that justice has not been done, or

that he has discovered new testimony, and the Court, or a majority of its members may, according to a sound discretion, grant him a new trial. Before passing sentence, the accused shall always have the opportunity of being heard, if he have aught to say in excuse or palliation.

“§ 8. The sentence may be admonition, suspension or degradation: *Provided*, that the sentence for a violation of a Canon or Constitution, not involving immorality, shall be only admonition, or suspension for a limited time; the sentence for heresy shall be, for the first offence, suspension until the party shall recant the heresy, and for a subsequent offence, deposition; the sentence for all other offences may be either admonition, suspension for a limited and definite time, or to be determined upon some event or some act of the suspended Bishop, or degradation; but degradation shall not be inflicted unless by the consent of two-thirds of the members of the Court. Such sentence of degradation shall not involve excommunication, unless the Court shall expressly so direct.

“§ 9. If the accused Bishop neglect or refuse to appear, according to the summons, notice having been served on him as aforesaid, except for some reasonable cause, to be allowed by the Court, they shall proceed to pronounce him in contumacy, and sentence of suspension from the Ministry until he shall appear, and take his trial, shall be pronounced against him for contumacy by the Court; but the said sentence shall be relaxed, if within three months he shall tender himself ready, and accordingly appear and take his trial on the presentment. But if the accused Bishop shall not tender himself before the expiration of the said three months, the sentence of degradation from the Ministry shall be pronounced against him by the Court. And it shall be the duty of the Court, whenever sentence has been pronounced, whether it be on trial, or for contumacy, to communicate such sentence to the Ecclesiastical authority of every Diocese of this Church;

and it shall be the duty of said Ecclesiastical authorities to cause such sentence, unless it be a sentence of admonition, to be publicly read to the congregation of each Diocese by the respective Ministers thereof.

“ § 10. All notices and papers contemplated in this Canon may be served by a summoner or summoners to be appointed by the Bishop to whom the presentment is made, or by the Court when the same is in session ; and the certificate of any such summoner shall be evidence of the due service of a notice or paper. In case of service by any other person, the fact may be proved by the affidavit of such person, the delivery of a written notice or paper to a party, or leaving it at his residence, or last known residence, shall be deemed a sufficient service of such notice or paper.

“ § 11. The trial of every accused Bishop shall be conducted by a Church advocate, to be appointed by the Court. The accused may, if he think proper, have the aid of counsel, and if he should choose to have more than one counsel, the Church Advocate may have assistant Advocates ; but in every case the Court may regulate the number of counsel who shall address the Court or examine witnesses, and in no case shall any Clergyman of this Church appear before the Court as an advocate.

“ § 12. If, at any time during the session of any General Convention, any Bishop shall make to the House of Bishops a written acknowledgement of unworthiness or criminality in any particular, the House of Bishops may proceed, without trial, to determine by vote, whether the said offending and confessing Bishop shall be admonished, or be suspended from his office, or be degraded ; and the sentence thus determined by a majority of the votes of the House of Bishops, shall be pronounced by the Bishop presiding, in the presence of the said House of Bishops, and entered on the journal of the House ; and a copy of the said sentence, attested by the hand and seal

of the presiding Bishop shall be sent to the said Bishop, and to the Standing Committee of his Diocese, and to the Ecclesiastical authority of every Diocese of this Church; and it shall be the duty of said Ecclesiastical authorities to cause such sentence, unless it be the sentence of admonition, to be publicly read to the congregations of such diocese by the respective ministers thereof; provided that no sentence of suspension shall be passed by virtue of this section, which might not have been passed by a Court.

“§ 13. Any Bishop of this Church not having Ecclesiastical jurisdiction, shall be subject to presentment, trial, and sentence, as is hereinbefore provided, but shall not be included in any other provision of this Canon.

“§ 14. Canon III. of 1844, is hereby repealed.”

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TITLE VII.

ECCLESIASTICAL JURISDICTION—AND THE EFFECT OF ECCLESIASTICAL SENTENCES.

In the earliest ages of the Church, before Christianity received the encouragement, and submitted to the power of monarchs, it may be assumed, that the determination of controversies between Christians was generally made by members of the Church. The exhortation of the Apostle in the 6th chapter of Corinthians, would be greatly respected by all the disciples. It is not understood by the commentators, that a submission to the least esteemed of the members was enjoined to the exclusion of the rulers of the Church; but merely that recourse should be had to these, even the lowest in order, rather than to the tribunals of the heathen. The censure was of the accuser who summoned the party to such tribunals, not of the accused who defended himself when driven there. And farther, the direction of our Lord<sup>1</sup> to resort at last to the

<sup>1</sup> Matthew, chap. 18: 2, 15.

decision of the Church, if interpreted as a permanent injunction, would be looked upon with still deeper respect.

In consonance with these views, during the reign of pagan emperors, when Christians were not permitted to be judges, they were allowed the privilege of submitting their controversies to arbiters of their own selection. In this situation, nothing was more natural, than that the determination of controversies, whatever might be their nature, should devolve upon the Bishops. Their undoubted superintendance in all matters of spiritual government and discipline—their office—and generally, their experience and learning, pointed them out as the most fitting persons for this duty. The Christian emperors supported the system which they found in use. Constantine decreed that litigants might withdraw their causes from the civil tribunals, and refer them to the decisions of the Bishops, whose judgments should be of like force as if pronounced by the emperor; and the governors of provinces were to aid in their execution.<sup>1</sup>

It is, however, understood, that the ratification, by the emperors, of the practice, was at first by treating the Bishops as arbiters merely, chosen with the consent of both parties. This was changed by an edict, attributed sometimes to Constantine, but more probably enacted by Theodosius. By this, all causes might be carried from the civil forum to the Bishop, at any period of the cause, and at the will of either party.<sup>2</sup>

<sup>1</sup> About A.D. 359.

<sup>2</sup> The chief authority for the above statement, is the Tract of Van Espen, *De Jur. Ecc. in Civilibus*, pars. iii., tit. i. I have not been able to ascertain, from the sources within my power, the date of the edict of Theodosius. It was probably after 383, when Gratian died, and must have been before 395, the period of his own death.

An edict of Charles the Great recognised this rescript in its full force; and thus the law seems to have existed, in France and adjoining countries, until about the 13th century. A compact of the French barons to restrain this right, made in 1246, was followed by various edicts of the monarchs, especially by one of Charles V. in 1371, and by an

With regard to the controversies of clergymen, of whatever nature, the law of the Church was announced at an early period, with great decision. The council of Carthage decreed, that the clergy should be condemned by the synod, who disobeyed the authority of the Bishop in terminating their disputes.<sup>1</sup>

Yet ample as were the concessions of Christian emperors, to the exercise of an ecclesiastical power over all matters which concerned the members of the Church, the doctrine of an ultimate jurisdiction in themselves is exhibited at a very early period. The memorable act of Constantine, in restoring

ordinance of 1486, in Flanders, until the jurisdiction was limited to the few cases, such as matrimonial causes, still within the control of ecclesiastical courts.

There was an edict of Gratian, A.D. 376, declaring, that the customs which were in use in the civil judicatures should obtain in Church matters, and that the final decision and determination of ecclesiastical causes should be made in their proper places, and by the synod of every diocese. (*Apud Dawson Origo Legum*, p. 67.)

The 20th canon of Antioch provided for the meeting of synods of Bishops twice in every year, for the settlement of controversies; at which presbyters and deacons, and all who think they are any way aggrieved, may come and obtain the judgment of the synod.

<sup>1</sup> By the 9th canon of the council of Chalcedon, (A.D. 451,) "if any clergyman have a suit against another clergyman, let him not leave his own Bishop, nor have recourse to the secular courts of justice; but let him first try the question before his own Bishop, or with the consent of the Bishop himself, before the persons whom both parties shall choose to have the hearing of the cause. But if any clergyman have a matter either against his own Bishop, or any other Bishop, let him be judged by the synod of the province. But if any Bishop or clergyman have a cause against the Bishop of the province himself, let him have recourse to the Exarch of the diocese, or to the throne of the imperial city of Constantinople, and plead his case before him."

The Exarch was the patriarch of the diocese, and the Bishop of Constantinople, is designated by the other clause.—*Beveridge*.

The 11th and 12th canons of the council of Antioch, A.D. 341, denounced any of the clergy who should go to the emperor without the consent, in writing, of the Bishops of the province, and especially the metropolitan.

Athanasius when deposed by the Arian Bishops, is a proof of the most striking character. And the canons of Antioch themselves, while reprobating the practice of appeals, allow them to be made with the assent of the Bishops of the province and metropolitan; and it is perfectly clear, that at a subsequent period, the Church was compelled, as the price of her predominance and endowments, to recognise the authority. The 123 Novel of Justinian, cap. 21, defined the extent of the jurisdiction, and specified the cases in which an appeal to the secular tribunals would lie, and the mode of making it.<sup>1</sup>

After this, the usurpation of the papal power, in claiming the right of appeal, introduced a new and influential element of discussion and strife. In resisting this, the independent Bishops and clergy of many kingdoms had a common cause with their princes, and in opposing the glaring and baneful encroachment of the popes, yielded more readily to a similar claim on the part of their own monarchs.<sup>2</sup>

The demands of the see of Rome extended not merely to the establishment of this right to entertain an appeal, but also to the entire control of all causes which concerned eccle-

<sup>1</sup> It was provided in this Novel—If any one shall have cause of complaint against any clergyman or monk, or deaconess, nun, or recluse, let him first go before the most holy Bishop, to whom each may submit. He will determine the case between them, and if both parties acquiesce in his decision, we command that it be executed (or perfected) by the local judge.

But when sentence is pronounced by the Bishop, and either of the parties desires to contest it within ten days, the judge of the place shall examine the cause; and if he find it rightly decided, he shall confirm it by his own judgment, and see to its execution; and no second appeal shall lie. But if the sentence of the judge is contrary to that of the Bishop, then an appeal may be had from his decision, to be carried on according to the ordinary law.

<sup>2</sup> The discussion of Dupin upon the subject of these appeals, is the most full and satisfactory of any within the author's knowledge. (*De An. Ecc. Disc. Diss.* 2, p. 96, Paris, 1686.) His argument consists in an exposition of the 6th canon of Nice; a refutation of the Popish commentators upon it; the confirmation of his own argument in the decrees



siastics, whether of a spiritual or temporal nature; and of all causes which concerned the laity connected with spiritual matters.

By a singular coincidence, the identical tenet of Rome upon this point was adopted by some of the leading churches of the Reformation. The subserviency of the civil to the spiritual power in all matters which concerned the members of the Church, no matter what was its nature, was a dogma of a prominent body of Protestants. The claim as *custos utriusque tabulæ*, was forced upon the Church by the emperors of the East, and the monarchs of England, in order to plant civil supremacy above the rights of religion; and by popes and Genevese divines, in order to rear a spiritual domination in all things temporal and divine.

In our land, the evils of an undue assumption of power by the clergy in temporal matters, is a dream. It is not so certain that the temporal authority may not encroach upon the just offices and power of the spirituality.

of subsequent councils; and a statement at large of other authorities and arguments.

Van Espen also treats the subject very elaborately. See also *Molinæus*, tome 4, p. 307.—Commentary upon the edict of Henry II.

It is stated, that the first instance of such an appeal in England, was in the case of Wilfred, a Bishop, about the year 673.

A canon for the division of sees, with the increase of Christians had been adopted at Hertford, through the influence of Theodore. For resisting the application of this canon, Wilfred had been deprived. In the presence of the King and Archbishop, then sitting in judgment, he announced publicly, that he appealed to the see of Rome for redress. "This appeared a thing so new and singular to the audience, that it occasioned a general laugh, as a thing quite ridiculous." (*Carte. Gen. Hist.*, 249, 250, and authorities.)

But the perseverance of Popes, the infidelity of part of the clergy, and the necessities or weakness of Kings, at last established this right—not, however, without a strenuous resistance. The recognition of the authority was in the reign of Stephen.

It was first checked by the constitutions of Clarendon, in the reign of Henry II., then the statutes of provisors in the time of Edward III., and Richard II.; and received its death-blow in the 24th of Henry VIII.

It would be difficult upon this great subject—a subject which has been the mother of revolutions, and torn kingdoms to pieces—to find the law of right and truth better concentrated, than in the statute of 24th Henry VIII. “Causes spiritual must be judged by judges of the spirituality; and causes temporal by temporal judges.”

It would extend this discussion too far, to enter upon the question of the original right of the monarchs of England to a final control of ecclesiastical causes. For a short period, the independence and liberty of the Anglican Church was supported. The statute of 24 Henry VIII., cap. 12, § 8, gave an appeal from the archdeacon or his official to the Bishop; from the Bishop or his commissary to the Archbishop; from the archdeacon of an Archbishop to the Court of Arches; and from this to the Archbishop himself. If the cause had been commenced before the Archbishop himself, his decision was final; and in cases in which the king was concerned, an appeal was to be taken to the spiritual prelates, and other abbots and friars of the upper House of Convocation. In all these cases, the determination was definitive and final, and in all by an ecclesiastical court.

But this statute lasted in its full force only until the 25th year of Henry VIII., when the act of submission of the clergy and restraint of appeals, gave the right of appeal to the king, in his court of chancery, to be exercised by a commission to delegates, and the 6th section of the act vested in the king all the jurisdiction which the popes had ever claimed in the decision of causes.

With the substitution of the judicial committee of the privy council for the delegates, the power has remained in full force to this day.

The principle of supremacy which established this right of final determination, led to the supervision of the king's courts of law over the proceedings of ecclesiastical tribunals. Hence

has arisen the formidable instrument of authority, the writ of prohibition, breaking in as often upon the legitimate domain of the ecclesiastical forum, as checking its unwarrantable encroachments.

But in our country, so happily has the power of the state moved in its separate and lawful sphere, and the discipline of churches been confined to their spiritual and peculiar office, that this writ has never, I believe, found a place in our proceedings; and moderation and good sense will avert the possibility of a collision. Our courts of justice act through the medium of a mandamus, or a bill and injunction in those cases in which the right to property and civil privileges is involved; and in no others; and sometimes they are called upon to determine the force of the sentences of Church judicatories, in settling such rights.<sup>1</sup>

This leads to the question—What is the effect of a sentence of an ecclesiastical tribunal in the civil courts?

It is to be observed, that such a question can only arise where the decision is brought to bear upon right to property, or some civil privilege.

In England, the rule is well settled, that such a sentence is binding and conclusive in all courts where the subject matter was within the jurisdiction of the court, and there was no

<sup>1</sup> *Rushel vs. Winemiller*, 4 *Harris and McHenry*, 429—Mandamus to show cause why Mr. Rushel should not be restored to the place and function of minister of the congregation of the German or High Dutch Reformed Church at Frederickstown, to the use of the church and the pulpit thereof, with all liberties to the same belonging.

<sup>2</sup> *Burr*, 1045—“Mandamus is the true remedy to restore a person wrongfully dispossessed of an office, or function, which draws after it temporal rights.

“Every endowed minister, of any sect or denomination of Christians, who has been wrongfully dispossessed of his pulpit, is entitled to the writ of mandamus to be restored to his function, and the temporal rights with which it is endowed.”

In the case of *The People vs. Steele*, 2 *Barbour*, Sup. Court, Rep. 398, this subject was elaborately discussed.

fraud or collusion in obtaining the decision. (*Hatfield vs. Hatfield*, 5 B, P. C. 100; *Duchess of Kingston's case*, 20 HOWELL'S *State Trials*, 538; *Houlditch vs. Lord Donegal*, 8th *Bligh*, 301; *Medowcroft vs. Hugenin*, 4 *Moore, Pr.*, C. *Rep.*, 393.)

In the late case of *Barry vs. Jackson*, 1 PHILLIPS' *Rep.* in Chancery, p. 582, the subject was gone into both before the vice-chancellor, and on appeal. The question was as to the effect of a sentence declaring certain persons to be the next of kin; and it was held that the sentence was conclusive. The case of *Bouchier vs. Taylor*, in the House of Lords, in 1776, was greatly relied upon.

The general rule in our own country may be stated thus: That sentences or judgments of a domestic or foreign tribunal are conclusive upon the point decided, unless they can be impeached for fraud in obtaining them—for the want of jurisdiction in the court which pronounced them—or want of due notice to the party. What is due notice, is governed by the law of the forum, pronouncing the judgment; whether it must be personal notice to appear, or any substitute, such as leaving it at the domicile of the party, or by prescribed advertisement.<sup>1</sup>

There are, however, several cases in our own country, in which the decisions of Church judicatories have come more immediately in question.

And the case of *Smith vs. Nelson*, 18 *Vermont Rep.* 514, is first to be noticed, because, in the judgment of the author, and speaking with the greatest respect, it embodies principles hostile to the due enforcement of discipline in every Church, and tending to revive in a dangerous latitude, the supremacy of the civil tribunals over matters of a purely spiritual nature.

The main points decided in the cause were these: 1st. Although religious denominations in the state may form consti-

<sup>1</sup> The law is nowhere better stated, than in *Bimeler vs. Dawson*, 4 *Scammon's Rep.* 536, (*Illinois.*)

tutions, enact canons, laws, or ordinances, establish courts, or make decisions, yet they can have only a voluntary obedience ; cannot affect any civil rights, immunities, or contracts. Obedience to their requirements may be exacted under the penalty of spiritual censures ; but whether one submits to or defies their proceedings, depends on his conviction of their regularity or irregularity ; they can only affect his conscience ; how far they affect it, he must be the judge.

2d. There cannot be claimed, in this country, for the decisions of a synod, or of any ecclesiastical judicatory, the same effect which is given to the decisions of ecclesiastical courts in England.

3d. The proceedings of the synod of the associate Church, as a court of the last resort, are not to be held conclusive and absolute in this country, when they come in question directly or collaterally in courts of law ; but the regularity and effect of their proceedings may be examined and be determined in courts of justice, upon the same principles which subject the proceedings either of inferior courts, or voluntary associations, to inquiry and adjudication.

The court then entered upon the question, deemed of great importance in the case, whether according to the rules or discipline of the associate Church, the Rev. Mr. Pringle had been regularly and properly suspended and deposed from the ministry. It is pronounced necessary to decide this question, in order to determine the cause.

The court also proceeded to inquire into the validity of the suspension and deposition of the Rev. Dr. Bullions, a point also treated as arising in the case.

The material ground on which the court proceeded in relation to the Rev. Mr. Pringle, and the presbytery of Vermont, was, that the synod had no jurisdiction to dissolve a presbytery at the time it did so. Nor if it had, could it delegate a power to do so, and to depose the ministers, as had been done

in the case. It may be remarked that this is one of the cases in which the sentence or judgment of any other tribunal is examinable.

But as regards the case of Dr. Bullions, the court proceeded to declare the illegality of his deposition, upon grounds every one of which it was entirely competent for the court below, and the appellate court, to have passed upon. Thus the most prominent of them all was, that a majority of presbyters who pronounced his sentence in the lower court, were the very persons for slandering whom, he was proceeded against. It appears distinctly, that Dr. Bullions took an appeal to the synod from the sentence pronounced against him, which appeal, however, was not duly prosecuted. The whole case on the merits was, however, afterwards brought before that court, by an arrangement of the parties, and the judgment below confirmed. It is also clear that he could have taken advantage of every proper objection at that time.

However repugnant it may be to our notions, that persons so situated should be judges, the only question was, Did the law of that Church sanction it? And either the superior tribunal did sanction it, or the question could have been brought before and been settled by it. In either event, that was the court to adjudge it.

Passing by all other points of irregularity in the proceedings, the one I have referred to, raises the question in its strongest form.

The same proceedings, so far as they regarded the sentence against Dr. Bullions, were brought under review before Judge Willard of New-York, sitting as vice-chancellor, in 1844.<sup>1</sup> I have been favored with a copy of his opinion. The principles he adopts are thus clearly stated:—"It remains to inquire whether the deposition and excommunication of Dr. Bullions, by the presbytery of Cambridge, and the subsequent confirma-

<sup>1</sup> *McGeogh vs. Bullions*. The complainants were adherents of the associate Church.

tion of the sentence by the associate synod, are conclusive upon the parties in this suit, or whether this court can look behind the sentence, and inquire into its legality." After discussing this point, and citing some authorities, especially *Dean vs. Bolton*, afterwards noticed, he proceeds:—"This decision is right upon principle. A question arises in the administration of a trust, whether Dr. Bullions was a minister in good standing in connection with the associate presbytery of Cambridge at a given time. How else can this be decided than by the record and proceedings of the presbytery itself? If by them it appears that he has been deposed and excommunicated, it follows that he is no longer a member of that body. Whether he has been rightfully or wrongfully deposed, does not alter the fact that he has ceased to be a member of that presbytery. But lest I may be mistaken, in holding the sentence of the presbytery and synod conclusive, it is expedient to examine the grounds upon which the defendants seek to avoid its effect."

The learned vice-chancellor proceeds in this examination, and, among other matters, discusses the declinature interposed by Dr. Bullions to the jurisdiction of the presbytery. This was, substantially, that the fragment remaining, after the exclusion of several members from their seats, could not constitute a legal body. It will be seen that this comprises the grounds so much relied upon the court in Vermont. The fact of this declinature being pronounced unwarrantable by the synod, when the case was brought before it, is there noticed; and the decision of that body on that point, declared conclusive.

There was an appeal from the decree of the vice-chancellor, which was brought to hearing, before the present Supreme Court of the 4th circuit. Justice Willard, being one of the court, did not sit. By a majority of the court, the decree was modified, reversing that part which removed the trustees; but as the author is informed by one of the judges, not affecting

the principles of the vice-chancellor.<sup>1</sup> Justice Cady delivered an opinion, sustaining the decree entirely.

In support of the views taken by the vice-chancellor and Justice Cady, some other authorities may be referred to. In *Dean vs. Bolton*, 7 HALSTED'S Rep. 220, Ch. J. Ewing says: "At a meeting of the classis of Bergen, to which classis the congregation of English Neighbourhood belonged, the Rev. C. T. Demarest, then the minister of that congregation, was suspended from the office of the ministry. Was this suspension within the jurisdiction of the classis? The jurisdiction I understand to be expressly given by the 39th explanatory article. The shortness of the notice given to the minister to appear and defend himself, was the subject of some forcible remarks at the bar; and when we recur to the deliberate procedure of courts of law, the time seems indeed to have been brief. I find, however, no rule prescribed in the constitution of the Church, and of course it is subject to the discretion of the classis. The sentence of suspension, then, appears to have been the judgment of a competent court, within its jurisdiction, having authority over the party and the subject, subject to an appeal to a higher tribunal by any one aggrieved—from which, however, no appeal was taken; and to which, therefore, we are bound, sitting in another judicatory, to give respect and effect, without inquiring into the truth or sufficiency of the alleged grounds of the sentence."

So in the case of *The German Reformed Church vs. Seibert*, 3 BARRS' Penn. Rep. 290, the relator in mandamus had been refused admission as a voter, because he was no longer a member, having been excommunicated. Rogers, Justice, said—"The consistory, it seems, excommunicated the relator, and he contends that they have the only power of excluding from

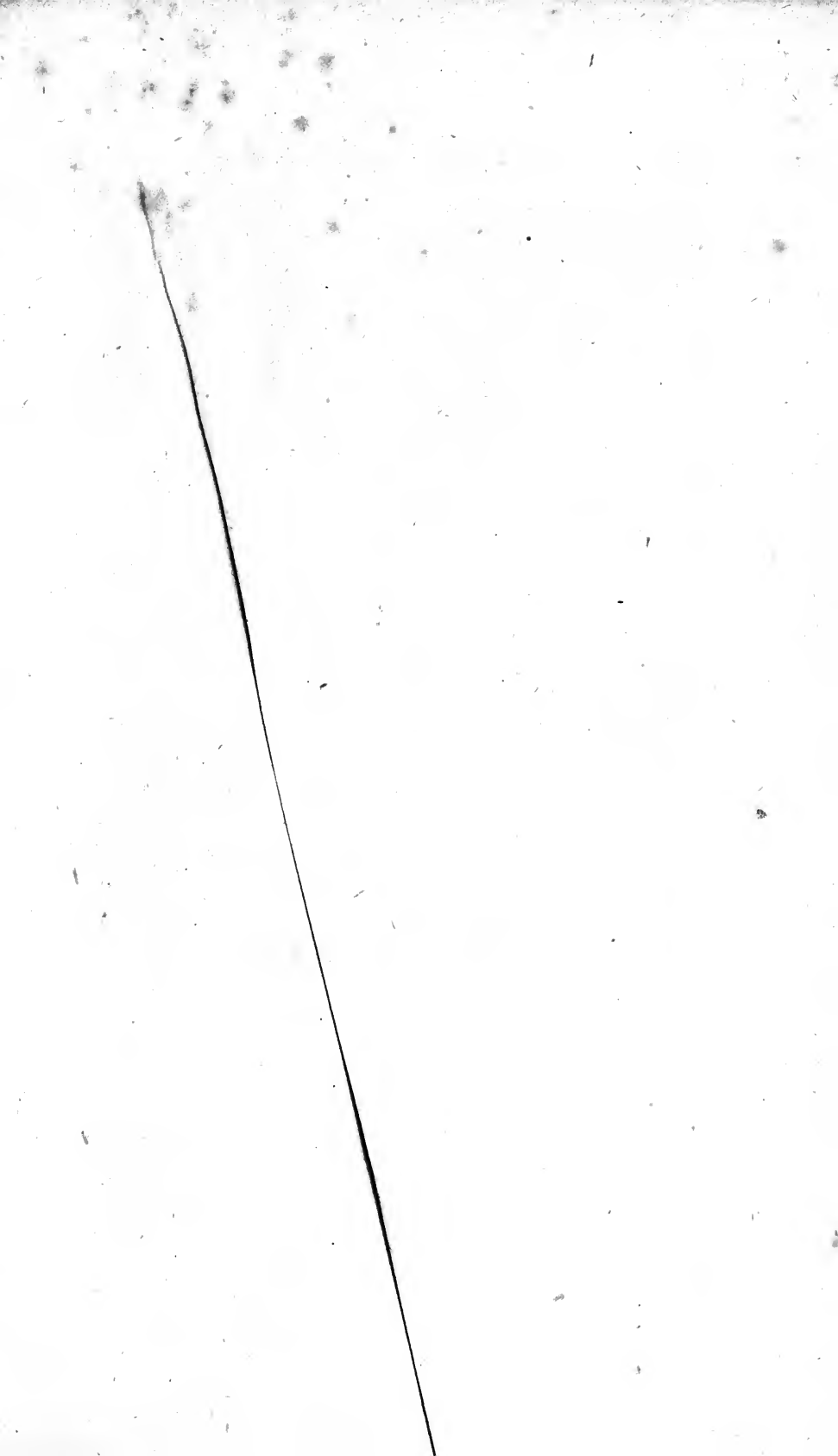
<sup>1</sup> The author has not seen the opinion of Judge Hand; but it has been stated, by Judge Paige, that the above is its result. The vice-chancellor speaks of the defendants having acted conscientiously.



the Lord's Table ; and where it is intended to separate a member from the Church, the consent of the congregation is requisite. And this seems to be the import of the fifth and sixth articles of the Church Discipline. Now whether this assent was given, does not expressly appear ; but granting that it was without consent, the remedy was by appeal to a higher tribunal." He points out the course of an appeal as provided in the system of that Church ; and adds—" The decisions of ecclesiastical courts, like every other judicial tribunal, are final ; as they are the best judges of what constitutes an offence against the word of God, and the discipline of the Church. Any other than those courts must be incompetent judges of matters of faith, doctrine and discipline ; and civil courts, if they should be so unwise as to attempt to revise their judgment on matters within their jurisdiction, would involve themselves in a sea of uncertainty and doubt, which would do any thing but improve religion or morals. There is no ground for a mandamus until the decision of the highest court is made."

In *Harmon vs. Desher*, Court of Appeals, South Carolina, 1 SPEARS' Eq. Rep. 90, (1843.)—for various reasons, after various proceedings, the synod of the Lutheran Church of South Carolina had expelled Mr. Desher from their body. The court say—" He stands therefore convicted of the offences alleged against him by the sentence of the spiritual body of which he was a voluntary member, and whose proceedings he had bound himself to abide by. It belongs not to a civil power, to enter into or review the proceedings of a spiritual court. The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority. The judgments, therefore, of religious associations, bearing upon their own members, are not examinable here."

These decisive authorities, emanating from distinguished judges, will, it is hoped, place this subject on its true foundation. Let the sentences of Church judicatories be clothed with the same authority that is accorded to the judgment of all established courts, and with no more. Scrutinise the existence of their jurisdiction, as to the party and the cause; demand that due notice shall have been given, and in a mode not alien to civil regulations; and watch that the judgment is unstained with collusion or fraud. On what possible ground of analogy, justice, argument, or Christian duty, can the civil tribunals require more? If they do, and sanction the investigation of every point involved—of law, or of fact—of form, or of merits—they will shake the foundation of government in every Church; will bring disrepute upon the administration of its laws; and do dishonor to religion itself. The ecclesiastical jurisdiction, in its legitimate sphere, that is, over ecclesiastical matters, must be upheld, or Christianity will become torpid. Let us not be affrighted from the support of discipline, because of the harsh excesses with which it has sometimes been enforced. It is not made the less essential, because bigots and tyrants have employed the sword or the flames in its execution. A Church without discipline, must become, if it be not already, a Church without religion. Some coercive and excluding power is indispensable, wherever faith in its integrity, or life in its purity, would be vindicated or sustained.









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