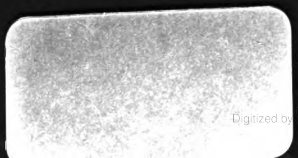

ECCLESIA VINDICATA.

A TREATISE ON APPEALS IN MATTERS SPIRITUAL.

WITH SUGGESTIONS FOR AMENDING THE COURSE OF PROCEEDING IN APPEALS FROM THE ECCLESIASTICAL COURTS TO THE JUDICIAL COMMITTEE OF PRIVY COUNCIL.

DEDICATED BY PERMISSION TO

THE EARL OF DERBY, K.G.

CHANCELLOR OF THE UNIVERSITY OF OXFORD, ETC. ETC. ETC.

BY JAMES WAYLAND JOYCE, M.A.

Late Student of Christ Church, Oxford; Author of "England's Sacred Synods—A Constitutional History of the Convocations of the Clergy;" "The National Church;" &c.

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1862.

Erratum, p. 23, line 7, *dele* " and Civil."

TO THE

RIGHT HONOURABLE

THE EARL OF DERBY, K.G.

CHANCELLOR OF THE UNIVERSITY OF OXFORD,

ETC. ETC. ETC.

My Lord,

I AVAIL myſelf, with the livelieſt ſatisfaction, of your permiſſion to inſcribe on the front of this ſmall book the honoured name of your Lordſhip, as Chancellor of the Univerſity of Oxford, in all ages of her hiſtory the faithful and conſtant handmaid of the Church of England.

This favour has been granted by your Lordſhip, under the diſtinct underſtanding that your aſſent is in no way thereby pledged to any of the contents of the following pages;

ſtill I venture to hope that they may generally commend themſelves to your approbation.

A laſting remembrance abides within the Church of the valuable ſupport given by your Lordſhip in Parliament to meaſures formerly propoſed for correcting the preſent courſe of Final Appeals in matters Spiritual.

As a grateful though ſlender teſtimony of ſuch remembrance on my part, this treatiſe on the ſubject is now moſt reſpectfully dedicated to your Lordſhip, by

Your Lordſhip's humble

and obedient ſervant,

JAMES WAYLAND JOYCE.

Burford Rectory, Tenbury.
June, 1862.

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CHAPTER I.

GENERAL DISSATISFACTION WITH THE PRESENT ORDINARY COURT OF FINAL APPEAL IN MATTERS SPIRITUAL.

I. *Introduction.*

BY thoſe who have given any attention to the ſubject, the preſent condition of the Engliſh law, which preſcribes the ordinary Court of Final Eccleſiaſtical Appeal, is commonly acknowledged to be highly unſatisfactory. Complaints on this ſubject are not confined to this or that party: they are not peculiar to clergy or laity; but almoſt all perſons of competent information agree that ſome amendment is

CHAP. I. needed. And although the difficulties ſurrounding meaſures for improvement in this reſpect, involving, as they do, the delicate relations of Church and State, as well as ſome other complicated queſtions, naturally render both divines and ſtateſmen ſomewhat unwilling to approach the ſubject, ſtill, it is not likely that the general diſſatisfaction with the exiſting ſtate of things will permit it to abide perpetual.

II. *Former Endeavours to improve Final Appeal Court.*

THOUGH attention has not lately been publicly called to this important matter, yet it ſhould be remembered that a few years ago it was the ſubject of grave conſideration among our moſt learned divines and moſt eminent ſtateſmen. The preſent unſatisfactory ſtate of the law dates indeed only from the year 1833: and yet, even ſo ſoon after its enactment

as in the year 1847, the late revered Biſhop of London introduced a Bill into the Houſe of Lords[a] to remedy the acknowledged grievance. The object of that Bill was to ſubſtitute a new Court of Appeal for the Judicial Committee of Privy Council:[b] the propoſition was then carefully conſidered and fully aſſented to by the Select Committee to whom their lordſhips referred the Bill: and as that Committee included, with one exception[c] only, all the peers who had filled high legal offices, there is ample proof that ſtateſmen fully qualified to judge thought at that time that ſome change was needed. Circumſtances prevented this Bill from being carried through Parliament during the Seſſion of 1847. It was, however, re-introduced,[d] as amended by the Select Committee, in the Seſſions of 1848-1849, but again, from various cauſes of delay, was ſuffered to remain in ſuſpenſe.

[a] Hans. 3 S. vol. 111, p. 601.

[b] Houſe of Lords' Select Committee.

[c] Hans. 3 S. vol. 111, p. 601.

[d] Ibid.

Still, the matter was deemed ſo import-

CHAP. I.

ant that it was not permitted long to ſlumber, and in the early part of 1850[e] a freſh Bill was introduced, varying in ſome particulars from its predeceſſors, but ſtill having the ſame object embodied in one of its clauſes—a reconſtitution of the ordinary Court of Final Eccleſiaſtical Appeal. On that occaſion the late Biſhop of London thus expreſſed the ſentiments which then and now generally prevail among thoſe who have given attention to this ſubject:—

[e] Hans. 3 S. vol. 108, p. 334.

"With[f] reſpect to the diſcuſſion of queſtions affecting matters of religion it is quite clear that the Judicial Committee of Privy Council is not the moſt fitting tribunal. . . . At this moment a great number both of the clergy and the laity of the Church feel their conſciences burdened by the fact of queſtions of hereſy and falſe doctrine being ultimately referred to ſuch a tribunal. . . . Not only was it not provided that any member of

[f] Hans. ut ſup.

the Epiſcopal bench ſhould ſit as a member of the Committee, but no care was even taken that the members of it ſhould be members of the Church of England. It might happen that the majority of the members of that tribunal might be diſſenters from the Church." The Right Reverend Prelate then, after ſome obſervations on the alterations propoſed in the exiſting Court, added,[s] "If her Majeſty would allow the Convocation to aſſemble to take this ſingle point into conſideration it would create in the Church great ſatiſfaction." And ſubſequently, when commending the matter to their lordſhips' deliberations, he aſſured them that "the conſtitution of the Ultimate Tribunal of Appeal involved in a degree that they could hardly imagine the ſafety and proſperity of the Church of England."

[s] Hans. 3 S. vol. 108, p. 335.

The preſent Archbiſhop of Canterbury alſo on that occaſion expreſſed his concurrence in theſe obſervations and added

CHAP. I.

the weight of his teſtimony to them, declaring that "the[h] preſent ſtate of the law on the doctrine and diſcipline of the Church was acknowledged to be exceſſively defective."

[h] Hans. 3 S. vol. 108, p. 335.

III. *Epiſcopal Bench conſulted.*

BUT not only have we the authority of a Select Committee of the Houſe of Lords and of the two eminent prelates above mentioned, for aſſerting that ſome change in the Court of Final Appeal is required: a general agreement to the ſame effect was ſubſequently expreſſed by a large majority of our biſhops and by many of our leading ſtateſmen. The Bill laſt mentioned was withdrawn, as it was thought deſirable to deal with the queſtion of the Court of Appeal by itſelf and to make it the ſubject of a diſtinct ſtatute, inaſmuch as the principle it involved was regarded of ſuch importance as to throw into the ſhade all other meaſures for the

regulation of Church discipline. With a view, therefore, of preparing a fresh Bill on the subject, the Archbishop of Canterbury called together the bishops of England and Wales in the spring of 1850. The matter was considered[1] at several meetings attended by twenty-five out of the twenty-eight prelates of our two provinces, and the result was an almost unanimous agreement to introduce a Bill which ensured questions of doctrine on appeal being referred for decision from the Judicial Committee of Privy Council to the Bench of Bishops. And though the assembled prelates were not entirely agreed as to its provisions, yet any difference which prevailed related rather to the details than to the general principle of the proposed measure. Thus it is plain that there was then a general agreement among the members of the Episcopal bench that a remedy should be applied to an acknowledged disorder.

[1] Hans. 3 S. vol. 111, p. 602.

IV. *Late Bishop of London's Bill in* 1850.

CHAP. I. THE Bill, as prepared after the deliberations above referred to, was introduced into the House of Lords on the 3rd of June, 1850,[k] and the memorable debate which ensued on that occasion testifies to the deep sense of the necessity for some change which was then entertained by our most eminent divines and most honoured statesmen. The right reverend promoter of the Bill, when speaking of the acceptance or rejection of measures for relief, said, "My Lords,[l] I am not apt to indulge overstrained or extravagant feelings of hope or fear, but I do assure your lordships, in the words of truth and soberness, that I believe it to be impossible to over-rate the momentous consequences of the issues which hang upon that alternative. . . . It is enough to say that they involve not only the peace

[k] Hans. 3 S. vol. 111, p. 598.

[l] Ibid.

but the integrity of the Church of this empire." To the ſame effect the Biſhop of Oxford ſpoke; and having drawn attention to the important petitions preſented in favour of an alteration in the law, concluded an eloquent appeal by addreſſing this exhortation to the opponents of the meaſure:—"Do[m] not alienate from you as a party the whole body of the Engliſh Church, by ſhowing them that at your hands they muſt not look even for juſtice. Deal more liberally and juſtly with her. Liſten to her complaints. Do not rudely repulſe her when ſhe comes to you for redreſs, and ſeeing her value her purity of doctrine and teaching more than earthly poſſeſſions, haſten to remedy her wrongs."

[m] Hans. 3 S. vol. III, p. 668.

V. *Opinions of Lay Peers on the Biſhop of London's Bill*, 1850.

THAT a ſenſe of the grievance under which the Church labours was by no means con-

CHAP. I. fined to thoſe of the ſacred order, the ſupport given to this meaſure by ſome of the leading lay peers in the Houſe of Lords on that occaſion bears conſpicuous teſtimony. The preſent Earl of Derby added all the weight of his great authority to the claim for relief. "It was notorious," his lordſhip ſaid,[n] "that a great and practical evil exiſted. That great evil was this, that at this moment the Church of England was placed in a poſition more diſadvantageous than any other religious body on the face of the globe.... Nothing was more certain than that at the time of the Reformation it was intended to confirm to the Church the fulleſt powers of authoritatively declaring her own doctrines." And then, after quoting the royal declaration now prefixed to the 39 Articles, he added, "It was impoſſible that words could be more clear to ſhow that it was intended that a ſpiritual body under the authority of the Crown

[n] Hans. 3 S. vol. 111, p. 649.

ſhould, from time to time, not introduce new innovations or freſh arguments, but ſhould explain and expound the doctrine and teaching of the Church of England, and that ſuch explanations ſhould be entruſted not to all, but to ſpiritual perſons only."

Lord Derby alſo added, in caſe the Houſe of Lords "ſhould[o] determine to apply no remedy, ſhould declare that they would do nothing to remedy the grievance of which Churchmen loudly and juſtly complained, that they would run the riſk of ſeparating from the Communion of the Church, ſo fettered and controlled by the State, a number of its ableſt and moſt devoted members." And in concluſion, his lordſhip, ſtigmatizing the exiſting ſtate of the law as "a great and grievous evil,"[p] declared his conviction "that[q] it would be a matter of ſatisfaction to the great body of Churchmen in this country if they knew that upon any queſtion

[o] Hans. 3 S. vol. 111, p. 651.

[p] Ibid. p. 653.

[q] Ibid.

CHAP. I. raiſed they had an opportunity of obtaining—not the direction of the judges, not the direction of the legiſlature, but for their own guidance, as dutiful members and ſons of the Church, the authoritative declaration of the united heads of the Church in matters affecting doctrine."

Lord Redeſdale, Lord Lyttelton, and the late Duke of Cambridge alſo ſpoke in favour of redreſſing the grievance which the Biſhop of London's Bill was meant to remedy, and expreſſed their determination to ſupport it.

But not only was this teſtimony to the deſirableneſs of a change in the law borne by the ſupporters of the Bill, its opponents, while diſapproving of ſome of its proviſions, frankly acknowledged the need of amendment in the preſent ſyſtem. Lord Brougham, even while oppoſing the meaſure as it ſtood, expreſſed his deſire that ſome ſpiritual perſons ſhould be ap-

pointed to adviſe the Judicial Committee in trying appeals on matters of faith. "He ſpoke," were his words,[r] "as a member of the Judicial Committee over which he had preſided for ſeventeen years, and he declared that in ſome caſes he required the aid of a ſpiritual body in forming his judgment. He had felt the want of it in *Maſtin* v. *Eſcott* ſeverely. He had now ſtated his opinion in the hope that theſe ſuggeſtions . . . would be adopted. He was againſt the Bill as it ſtood, for he thought it perilous in the extreme; but, as a ſincere member of the Church, he hoped they would at leaſt ultimately be aſſented to. This was his earneſt hope and truſt, for he found from all the communications he had received how alarming and vexing this queſtion was to ſincere members of the Church, of whom he was one."

CHAP. I.

[r] Hans. 3 S. vol. 111, p. 633.

Some even of thoſe noble lords who maintained a more determined oppoſition,

CHAP. I. on this occaſion, to the meaſure ſuggeſted, reſiſted the propoſition rather upon the details of the Bill than upon the general principle involved. The Marquis of Lanſdowne, then Preſident of the Council, ſaid,[s] "If the queſtions to be decided by the Privy Council were . . . queſtions relating to the doctrines that ought to be taught, and requiring for their deciſion the careful ſtudy of theology, he would entirely agree . . . that ſuch a tribunal ought to be conſtituted of ſpiritual perſons and of ſpiritual perſons only." And though oppoſing the Bill then before the Houſe, his lordſhip conſidered it deſirable that ſome modification in the exiſting ſyſtem ſhould at a proper time be made, and with this view ſuggeſted ſome regulations which he ſaid[t] "might very advantageouſly be a ſubject for future conſideration."

[s] Hans. 3 S. vol. 111, p. 624.

[t] Ibid. p. 628.

Again, Lord Harrowby, though ſpeaking againſt the plan then propoſed, uſed

theſe words,[u] "I do not ſay that the exiſting tribunal might not be amended;" and while deprecating, at that particular time, and for a particular reaſon, legiſlation on the ſubject, yet ſaid,[x] "Conſider at a proper time . . . on its own merits, any ſuggeſted improvement of a tribunal which certainly was not ſpecially conſtituted for its preſent purpoſe, and which may well admit of amendment to ſatisfy ſcruples and apprehenſions."

[u] Hans. 3 S. vol. 111, p. 660.

[x] Ibid. p. 663.

VI. *Objections raiſed againſt the Biſhop of London's Bill,* 1850.

IT may be here remarked, by the way, that three main objections were raiſed to the Biſhop of London's Bill at that time, objections which probably were the chief cauſes of its failure.

1. The time was ſaid to be inopportune, as any legiſlation on the ſubject, immediately following a deciſion of the Judicial Committee of Privy Council on

CHAP. I. a question of doctrine, which had caused much excitement throughout the country, would be very undesirable. That objection now certainly no longer exists, for the excitement consequent on the case has passed away even if the remembrance of it abides. 2. The second objection was, since it was proposed by the Bill that questions of doctrine coming before the Judicial Committee should be decided by the Bench of Bishops, as Assessors to the Court, that a difference of opinion among that venerable body would be more injurious to the cause of religion than a miscarriage in the Court itself as at present constituted. 3. The third objection, and this certainly one of great weight, was, that the judgment of the Bishops would, by the provisions of the Bill, be binding on the members of the Judicial Committee, who, meanwhile, were bound by their oaths to decide according to the conviction[y] of their own minds. And this

[y] Hans. 3 S. vol. 111, pp. 623-673.

certainly appears an almoſt inſuperable difficulty to the meaſure as then propoſed. However, it is not impoſſible but that theſe two laſt objections alſo might be altogether avoided by another mode of dealing with the matter which ſhall be examined hereafter. CHAP. I.

VII. *Deſirableneſs of a Remedy for the Preſent Grievance.*

Now from the foregoing matter it is quite clear that the Ultimate Court of Appeal in matters ſpiritual is no ſentimental grievance. They are no fanciful complaints which are made. They are not peculiar to this party or to that, to one claſs of men or to another. It is really idle to ſay that this can be an imaginary evil which the united Epiſcopate of England almoſt unanimouſly ſought to remedy, which right reverend prelates, moſt juſtly honoured, denounced in ſevereſt language, which ſome of our moſt emi-

CHAP. I. nent ſtateſmen repreſented as urgently requiring redreſs, and which was admitted, even by thoſe among the members of the Houſe of Lords who oppoſed the particular remedial method propoſed, as demanding at a proper time the graveſt attention.

The laity, as well as the clergy, intereſted in having a truſtworthy tribunal for deciding matters connected with their religious faith, are not inſenſible to the grievance of the exiſting ſyſtem. It is a grievance felt acutely by thoſe who are not the moſt reſtleſs or the moſt noiſy of our countrymen, but who feel all the more deeply in proportion as they believe the intereſts involved to be the moſt important. To ignore its exiſtence is neither wiſe nor politic, to deny a remedy is neither gracious nor juſt. To allow thoſe who are beſt diſpoſed towards the inſtitutions of their country to ſmart under a ſenſe of a grievous wrong

unredreſſed is not the part of a well-ordered State or of prudent ſtateſmen, more eſpecially where that wrong enters the domain of religion and inſinuates itſelf among the deep foundations of Divine Truth. The poet of imperial Rome, complaining of her neglected fanes, uttered a warning to his country of abiding ills:— CHAP. I.

"Donec[z] templa refeceris
Ædeſque labentes Deorum, et
Fœda nigro ſimulacra fumo."

[z] Hor. Od. III. 6. 2-4.

But the material buildings of external worſhip ſhould not be regarded with ſuch jealous care, or tended with ſuch watchful anxiety, as the fair but more delicate fabric of the national faith.

CHAPTER II.

Statement of the Present Condition of the Law governing Ecclesiastical Appeals.

I. *Plan of Subject.*

Chap. II.

THAT the thoughts now to be ſuggeſted may be reduced into method, the ſubject will be divided into the four following heads:—

1. A ſtatement of the preſent condition of the law governing Eccleſiaſtical Appeals.

11. Hiſtorical detail of the Legiſlation which has led to the preſent condition of the Law.

111. Juſt grounds of complaint againſt

the present ordinary Court of Final Appeal. CHAP. II.

IV. Suggestions for a remedy of the grievance.

II. *Necessity for a Court of Final Appeal.*

AN appeal has been rightly[a] declared to be "a natural defence essential to every legal constitution." And the objects of such a proceeding have, by high authority in the English Church, been defined to be, "not[b] for depriving any man of justice, but for the repairing a grievance, for correcting injustice or unskilfulness in the judge, and sometimes for removing the effects of ignorance on the part of an injured person." Now wherever a Christian Church has a regularly organized constitution, and where differences arising among its members have to be settled by authoritative judgments, this natural defence is every way needful. More espe-

[a] Dyer, apud Gib. Cod. 1080.

[b] Ref. Leg. de Appell. c. 26.

CHAP. II. cially is this the caſe with ſuch a Church as that exiſting in England, becauſe here not only are ſacred matters of faith and doctrine involved, but rights of property depend on thoſe judgments; conſequently, queſtions of extreme difficulty ariſe embracing conſiderations connected with traditional belief, formularies of faith, canon, ſtatute, and common law. And this complication ſupplies an additional reaſon why every poſſible ſafeguard ſhould be thrown around final deciſions. Not only is this ſafeguard demanded by the complication of the principles on which the deciſions are baſed, but by the paramount importance of a great part of the ſubject-matter involved being nothing leſs in ſome caſes than the faith of the National Church. Now whether the preſent condition of the law governing Eccleſiaſtical Appeals in Final Reſort is ſuitable to the ends in view, whether it is juſt to this Church, worthy of this nation,

and creditable to the wiſdom of the Engliſh legiſlature, the reader will have an opportunity of judging as we proceed.

III. *Preſent Gradation of Eccleſiaſtical Appeals.*

A DISTINCTION exiſts between the right of appeal in eccleſiaſtical cauſes and thoſe which are not eccleſiaſtical. From judgments in Criminal and Civil Courts, even in the loweſt, ſuch as thoſe of Petty Seſſions, no appeal lies unleſs it is given expreſsly by ſtatute. From eccleſiaſtical judgments, on the other hand, there always has been, of common right, an appeal from the inferior to the ſuperior judge, whether given by written law or not. To direct, however, the application of this common right, the gradation of eccleſiaſtical appeals has been laid down by the Conſtitutions of Clarendon, and five ſtatutes of the realm paſſed reſpectively in the years 1164, 1533, 1534,

CHAP. II.

1832, 1833, and 1840, which, under the ſecond head of this inquiry will be conſidered in detail. The gradation is as follows at the preſent time:—

I. If the cauſe is commenced in any dioceſe the appeal[c] lies from the Archdeacon, or his official, to the Biſhop Dioceſan; from the Biſhop of the dioceſe, or his commiſſary, to the Archbiſhop of the province; from the Archbiſhop[d] to the Judicial Committee of Privy Council.

[c] 24 Hen. VIII. c. 12. s. 6.

[d] 25 Hen. VIII. c. 19. s. 4; 2 & 3 Will. IV. c. 92. s. 3.

II. If the cauſe is commenced in an archdioceſe, the appeal[e] lies from the Archdeacon of any Archbiſhop, or his commiſſary, to the Court of the Arches, or audience of the ſaid Archbiſhop; from the laſt-named courts to the Archbiſhop himſelf; and from the Archbiſhop[f] to the Judicial Committee of Privy Council.

[e] 24 Hen. VIII. c. 12. s. 7.

[f] 25 Hen. VIII. c. 19. s. 4; 2 & 3 Will. IV. c. 92. s. 3.

III. If the cauſe does, ſhall, or may touch the Crown, the appeal[g] lies directly from the Court where the contention is

[g] 24 Hen. VIII. c. 12. s. 9; 25 Hen. VIII. c. 19. s. 3.

commenced to the Upper House of Convocation, where final judgment is to be given, for, in this case, statute law specifically forbids an appeal to any other authority[h] whatsoever. CHAP. II.

[h] 24 Hen. VIII. c. 12. s. 9.

IV. *Courts of Appeal in Final Resort.*

THUS in all ecclesiastical appeals the final resort, save in causes touching the Crown, is (with one qualification hereafter to be noticed) to the Judicial Committee of Privy Council, a Court thus composed,—

The President of the Privy Council, the Lord Chancellor, such members of the Privy Council as hold any of the following offices—Lord Keeper, Chief Justice of the Queen's Bench, Master of the Rolls, Vice-Chancellor of England, Chief Justice of the Common Pleas, Chief Baron of the Exchequer, Judge of the Prerogative Court of Canterbury, Judge of the High Court of Admiralty, Chief Judge of the Court in Bankruptcy; also all members of the Privy Council who have been President of that body, or

CHAP. II. have been Lord Chancellor, or have held any of the other offices before mentioned; and further power is given to the Crown to appoint by ſign manual any two other Privy Councillors to be members of the Judicial Committee.

Such is the uſual Court of Final Eccleſiaſtical Appeal ſtatutably exiſting in England. And from its conſtitution, not one ſingle ſpiritual perſon appearing among its ſpecified members, it hardly commends itſelf as fit to deal in the laſt reſort with deep myſteries of faith and abſtruſe queſtions of theological learning.

The qualification, however, above-mentioned muſt here be explained. The legiſlature, perceiving the unreaſonableneſs of having aſſigned in 1833 ſpiritual queſtions to a purely lay tribunal in the laſt reſort, endeavoured, when framing the Clergy Diſcipline Act in 1840, to remedy the anomaly in ſome ſort by enacting[1] that if any appeal ariſing under that ſtatute ſhould be heard before the Judicial Committee,

[1] 3 & 4 Vic. c. 86. s. 16.

every Archbiſhop and Biſhop of the Church of England and Ireland, being ſworn of the Privy Council, ſhould be a member of the Court for hearing the particular caſe. But the application of this partial remedy, for an acknowledged general diſorder, is really a moſt unhappy ſpecimen of legiſlative cobbling. For thus an abnormal Appeal Court is conſtituted, by a particular ſtatute, for ſuch cauſes as ſhould be commenced under its proviſions, to the excluſion of that regularly conſtituted Court, to which, by the general law of the land, thoſe cauſes would be referred. The principle is hardly commendable, that particular ſtatutes, in dealing with offences, ſhould each conſtitute its own final Court of Appeal. Should ſuch an example be commonly followed there would be but ſlender guarantees for unity in legal proceedings. Some ſtrange complications would enſue, and the ſame ſubject-matter on appeal

CHAP. II. might branch out into ſome very perplexing ramifications.

Having then ſeen—1. that by the general law eccleſiaſtical cauſes are ordinarily referable in final reſort to the Judicial Committee of Privy Council—a purely lay tribunal; 2. that ſuch as are commenced under a particular ſtatute are referable to a Court ſpecially created by that ſtatute itſelf; and 3. that ſuch as touch the Crown are referable to the Upper Houſe of Convocation; the next diviſion of this ſubject leads me to give an hiſtorical detail of the legiſlation which has led to the preſent condition of the law.

CHAPTER III.

Historical Detail of the Legislation which has led to the Present Condition of the Law.

I. *Appeals in Early Times.*

IT would be beyond the requirements of the preſent caſe to inveſtigate at length the hiſtory of eccleſiaſtical appeals in England before the Reformation. It may, however, be remarked here that ſpiritual cauſes were certainly then confined ſtrictly to ſpiritual courts, and within the realm took the ſame[a] courſe as that aſſigned to them by our preſent law, with the exception only of the Final Court, the ſubject

[a] Conſtit. Clarendon, VIII.

CHAP. III. of our ſpecial inquiry. Such cauſes were, during the earlier periods of our hiſtory, generally definitively decided by the Archbiſhops' Courts, though on ſome occaſions, with ſpecial permiſſion, they were carried beyond the limits of the country, and applications were made to Rome.

Yet it is abundantly clear that ſuch proceedings were generally oppoſed to the Engliſh mind and the Engliſh laws. This is plain from the continual oppoſition manifeſted to papal interference, as teſtified in numerous inſtances, and among them, by the conduct of the laſt of our Anglo-Saxon Archbiſhops, Stigand, who, though Pope Alexander II. had proceeded to the extremity[b] of ſuſpenſion, yet reſiſted ſtrenuouſly for years that aſſumption of authority.

[b] Coll. i. 529; Thierry, i, 144.

And even after the deluge of Roman aggreſſion which overwhelmed this Church and nation at the Norman Conqueſt, the right of appeal to Rome was ſtill com-

monly denied and that reſort repeatedly forbidden by law. In the reign of King William II. the Biſhops and Barons declared to Anſelm, who was maintaining ſuch a courſe, that "it was a thing unheard[c] of for any one to go to Rome (*i.e.* by way of appeal) without the King's leave." The oppoſition to ſuch appeals was again manifeſted in the time of King Henry I, as appears by this complaint of the Pope of that date, "That the King would ſuffer no appeals[d] to be made to him." And though the point was yielded for a ſhort ſpace in the reign of King Stephen, under the influence of Henry de Blois, Biſhop of Wincheſter, yet we are aſſured on high authority that this was a new encroachment on national rights. "For in England," Huntingdon[e] tells us, "theſe appeals were not allowed until Henry of Wincheſter, when he was legate, by ill example cruelly enforced them."

[c] Gib. Cod. p. 96.

[d] Eadmer, 113, apud Gib. Cod. 96.

[e] L. 8. p. 395, apud Gib. Cod. 96.

CHAP. III.

And indeed this uſurpation was nationally repudiated in the following reign of Henry II, for the Conſtitutions of Clarendon then reſumed and maintained the ancient common right of deciding ſpiritual caſes finally within the realm. The eighth of thoſe Conſtitutions[f] declaring that the Court of the Archbiſhop ſhall be held the final reſort: "*Ita*[g] *quod non debeat ultra procedi abſque aſſenſu Domini Regis;*"[1]

[f] Spelm. Conc. ii. 63.

[g] Conſtit. Clarendon, VIII.

[1] From taking their information at ſecond hand the learned Barons of the Court of Exchequer fell into a ſad complication of error in delivering a judgment, July 8, 1850, on the ſubject of Eccleſiaſtical Appeals. They ruled that 25 Hen. VIII. c. 19, by giving appeals in cauſes eccleſiaſtical to the King and no further, "*did but reſtore the ancient law of the land as ſettled on this point by the Conſtitutions of Clarendon in the reign of Henry II, Anno Domini* 1164." Now as the Eighth Conſtitution of Clarendon is the only one which deals with the matter in hand, and as that inſtrument lays down a principle totally at variance with the judgment delivered, one muſt conclude that the learned Barons failed to conſult the ancient records before deciding upon their contents. It may be that the Court was

i. e. not to Rome. Theſe Conſtitutions were[h] again renewed in the Parliament of Northampton. Not only were appeals to Rome thus generally guarded againſt, but their exerciſe in ſpecial caſes was forbidden, under ſevere penalties, by numerous ſtatutes (including thoſe of proviſors and præmunire) paſſed[i] in the reigns of Ed. I, Ed. III, Rich. II, Hen. IV, and Hen. V.

[h] Hoved. f. 426, 433, 465, ap. Gib. Cod. 97.

[i] 35 Ed. I; 25 Ed. III. 6; 27 Ed. III. 1; 38 Ed. III; 12 Rich. II. 15; 13 Rich. II. 2; Ibid. 3; 16 Rich. II. 5; 2 Hen. IV. 3; 7 Hen. IV. 8; 3 Hen. V. 4.

Now, though notwithſtanding theſe ſtatutes, it is clear that appeals to Rome were ſometimes made, partly owing to the infuſion of foreign eccleſiaſtics into this Church, partly ariſing from a tendency in high places to wink at ſuch proceedings, yet it is equally plain that the mind of the

miſled by the blunder of Sir William Blackſtone[j] on this point, and ſo lent its high authority to perpetuate his error. If ſo, a ſignal warning may be thence derived againſt the too common practice of taking information at ſecond hand on grave queſtions, and relying on text-books inſtead of authentic records for inſtruction in conſtitutional law.

[j] Comm. 3. 66.

CHAP. III.

nation was oppoſed to them, and this not only from the evidence of public records, but from the hiſtory of the private conduct of many of our countrymen. The remonſtrances of the clergy of Engliſh blood againſt Roman aggreſſion were of conſtant recurrence. It certainly is not to their conſent that the uſurpations of the Vatican can with juſtice be mainly imputed. If the truth of the caſe is fairly inveſtigated, it will be found that ſuch grievances may be traced to other ſources. Our kings were far from being blameleſs in this matter. King William I, King Stephen, on one occaſion King Henry II, King John, King Henry III. contributed to the introduction here of papal authority; and, on the other hand, manifeſt oppoſition to it was diſplayed by our clergy in their Synods,[k] and individually by ſuch men as Langton[l] and Edmund,[m] Archbiſhops of Canterbury; Sewal,[n] Archbiſhop of York; Fulco,[o]

[k] Conc. Mag. B. 1. 647-686.

[l] Hume, xi. 114.

[m] Conc. Mag. B. 1. 647.

[n] Coll. 2. 548.

[o] Conc. Mag. B. 1. 709, 710.

Biſhop of London; Walter,[p] Biſhop of Worceſter, and the Abbot[q] of Buildwas Abbey, who certainly, in language quite unmiſtakable, reſented the exerciſe of Roman authority over this Church.

CHAP. III.

[p] Conc. Mag. B. 1. 709, 710.

[q] Ibid. 712.

II. *Change introduced by 24 Hen. VIII.* 12.

HOWEVER, to apply ourſelves to the ſubject immediately under conſideration, the courſe of Eccleſiaſtical Appeals, as ſettled by the Conſtitutions of Clarendon, 1164, prevailed here down to the year 1533; and by the eighth of thoſe Conſtitutions it will be remembered, as above ſtated, that the final reſort was limited to the Court of the Archbiſhop, beyond which the cauſe could not be carried without royal conſent to Rome. The change made in the year 1533, by the ſtatute 24 Hen. VIII. 12, was this. Whereas with the King's leave an appeal was previouſly allowed from the Archbiſhop's Court to

CHAP. III. Rome, no appeal could henceforward "be uſed[r] but within this realm," and every caſe was to be finally decided here in the Archbiſhops' Courts "without any other appellation[s] or provocation to any other perſon or perſon's Court or Courts."

[r] Gib. Cod. 1080.

[s] 24 Hen. VIII. 12. 6.

One proviſo, however, was attached to the Act of 1533, a proviſo exiſting in full force to this day, that, in any caſe "*touching the King*," the appeal ſhould be to the Upper Houſe of Convocation, where a final decree ſhould be made, "never[t] after to come in queſtion and debate, to be examined in other Court or Courts." Such was the effect of the ſtatute 24 Hen. VIII. c. 12, an Act entituled, "No appeal ſhall be uſed but within this realm." And thus ſtood the law in 1533; the final appeal in ordinary caſes lying to the Archbiſhop.

[t] Ibid. 9.

A few words may here be properly introduced on the ſubject of the proviſo above referred to. This Act was paſſed

in the early ſpring of 1533, *n. s.*, that is, between Feb. 4 and April 7 of that year, which was the period during which the Parliament ſat. Now at that very time a caſe very nearly touching the King was pending in the Convocations of Canterbury and York, being nothing leſs than his Majeſty's divorce from Queen Catharine of Arragon. The real queſtion at iſſue was whether King Henry's marriage to Queen Catharine, who was his brother Arthur's widow, was valid, the marriage having been contracted under a diſpenſation[u] from Pope Julius II. And it is difficult to overrate the importance of this great State queſtion, inaſmuch as in it is involved the legality of the King's ſecond marriage to Ann Boleyn, and conſequently the legitimacy of the inheritor of the Crown in the perſon of the iſſue of that marriage, Queen Elizabeth. Two queſtions, therefore, were then propoſed for the arbitration of the Engliſh Con-

CHAP. III.

[u] Coll. 4. 2.

CHAP. III. vocations. 1. *Was the marrying*[x] *a deceaſed brother's wife, after the conſummation of marriage, prohibited by God's law and above the Pope's diſpenſation?* 11. *Was the marriage between Prince Arthur and Queen Catharine conſummated?* Both theſe queſtions were decided in the affirmative in the two Convocations: in Canterbury,[y] on a diviſion as to the firſt queſtion, by 263 votes to 19; as to the ſecond, by 41 affirmatives. In York, as to the firſt[z] queſtion, by 51 votes to 2; as to the ſecond, by 49 or 50 votes to 2. On the 5th of April Dr. Tregonwell appeared as Counſel for the King in the Canterbury Synod, and on May the 13th Maſter Rolland Lee appeared in the ſame capacity at York, and the neceſſary inſtruments, in accordance with the above deciſions, having been drawn, the formal ſentence[a] of divorce was pronounced on the 23rd of May, 1533, in the church of St. Peter,

[x] Conc. Mag. B. 3. 756.

[y] Ibid.

[z] Ibid. 767.

[a] Ibid. 759.

Dunſtable, that place being choſen as neighbouring[b] to the reſidence of Queen Catharine at Ampthill. The united authority of the Engliſh Provincial Synods here emphatically diſclaimed the authority of the Pope to grant ſuch a diſpenſation for King Henry's marriage to Queen Catharine as had been given. And as it was all-important, not only upon perſonal, but upon State grounds, that no appeal ſhould be even contemplated from this deciſion, one does not wonder at the proviſion in 24 Hen. VIII. 12. 9, that in caſes touching the King the Upper Houſe of Convocation ſhould be an authority in final reſort.

[b] Coll. 4. 215.

III. *Change introduced by 25 Hen. VIII.* 19.

WE now proceed to the next change which took place in the law regulating the Court of Final Appeal in Cauſes Eccleſiaſtical. That change took place in

CHAP. III. the following year, 1534, and was effected by the ſtatute 25 Hen. VIII. c. 19.

It muſt be remembered that in this year the formal ſeverance of the Church of England from the Church of Rome took place by the acts of this national Church herſelf. She then, by her own voice, aſſerted her ancient independence in her Provincial Synods. For the following deciſion was carried from the Lower Houſe[c] of Canterbury to the Upper on March 31, 1534, and was ratified at York[d] on May 5 following:—

"THE POPE OF ROME HATH NO GREATER JURISDICTION CONFERRED ON HIM BY GOD IN HOLY SCRIPTURE, IN THIS KINGDOM OF ENGLAND, THAN ANY OTHER FOREIGN BISHOP."

[c] Wake MSS. Ch. Ch. Oxford, ad an. 1534; Conc. Mag. B. 3. 769.

[d] Ibid. 782, 3; Wake's App. 221.

And not only was the renunciation of the Pope's ſupremacy and the aſſertion of national independence thus ratified by the Engliſh Synods; the ſame courſe was purſued by the ſeveral religious bodies

throughout the country. Original inſtruments executed by them on this ſubject remained for many generations preſerved in the Exchequer. The learned Mr. Wharton[e] had in his cuſtody no leſs than 175 copies thence tranſcribed, containing the ſubſcriptions of the biſhops, chapters, monaſteries, colleges, and hoſpitals of thirteen dioceſes. He alſo ſaid, that, to his certain knowledge, the ſubſcriptions of the remaining dioceſes were lodged elſewhere, ſo completely was the rejection of papal authority here ratified by the acts of the Engliſh Church herſelf. In the face of ſuch hiſtorical facts one is really ſomewhat ſurpriſed at the ſtatements ſo boldly made, and ſo frequently reiterated, that the emancipation of this Church from Roman trammels, and the recovery of her national independence, were effected by the authority of the State alone, and in oppoſition to the will of the clergy themſelves.

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[e] Coll. 4. 267.

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However, in this year, 1534, when the independent nationality of this Church was juſt being reſtored, and when the principle conſecrated in Magna Charta, the footſtone of our conſtitution, that—

[f] Magna Carta, 1.

"the Church[f] of England ſhall be free and ſhall have all her whole rights and liberties inviolable,"[2]—ſhould, from ſurrounding circumſtances, have been moſt ſcrupulouſly reſpected, a change, by no means in accordance with that principle, was effected by 25 Hen. VIII. c. 19. It was by the above ſtatute enacted that the courſe of appeals ſhould be the ſame as

[g] 24 Hen. VIII. 12.

that laid down in the Act[g] of laſt year, but with this remarkable addition, that the Archbiſhop's Court ſhould not be final as then ſettled, but that a further appeal ſhould thenceforward lie to the King in Chancery, and that—

[h] 25 Hen. VIII. 19. 4.

"Upon[h] every ſuch appeal a Commiſſion ſhall

2 "Eccleſia Anglicana libera ſit, et habeat omnia jura ſua integra et libertates ſuas illæſas."

be directed, under the Great Seal, to ſuch perſons as ſhall be named by the King's highneſs . . . to hear and definitively determine ſuch appeals . . . and that ſuch judgment and ſentence . . . ſhall be good and effectual and alſo definitive, and no further appeals to be had or made from the ſaid Commiſſioners for the ſame."

By this clauſe was eſtabliſhed a new and hitherto unheard-of authority for the purpoſes in hand, namely, the Court of Delegates. After deciſion in the Archbiſhop's Court, the cauſe might now be ſignified to the Crown in Chancery, and a Commiſſion thence iſſued by the Lord Chancellor or Keeper, under the ſign manual[i] of the King; and the perſons ſo appointed were "commonly called[k] Delegates," on account of the ſpecial "delegation[l] they receive from the Prince for the hearing and determining every particular caſe." Thus, an authority which was in this age of our hiſtory formally withdrawn from the Pope, King Henry VIII. greedily endeavoured to graſp

[i] Gib. Cod. 1082.
[k] Ibid.
[l] Ibid.

CHAP. III. for himſelf. Nor is it much to be wondered at that he ſucceeded in his enterpriſe, and prevailed with his Parliament to confer on him this new and ſtrange power, in times when that body was ſervile enough to enact[m] that royal proclamations ſhould override ſtatutes of the realm, and was contemptible enough to ſubmit tamely to the inſult of being told by their ſovereign, among other ſneers, that they were "not to be judges[n] of their own fantaſtical opinions and vain expoſitions."

[m] 31 Hen. VIII. 8.

[n] Conc. Mag. B. 3. 872.

IV. *Court of Delegates.*

HERE, then, we have arrived at another important ſtep in the courſe of our inquiry, the eſtabliſhment of the Court of Delegates; a Court which, from the year 1534, ſtatutably received appeals from the Courts of the Archbiſhops, and ſo placed the final deciſion of all eccleſiaſtical cauſes (ſave thoſe touching[o] the King,

[o] 24 Hen. VIII. 12. 9.

which remained as before, and ſtill remain[p] with the Upper Houſe of Convocation) in the hands of nominees of the Crown, appointed for the ſpecial caſe in hand. It is here obſervable that no court of ſpecified individuals was now eſtabliſhed, but only that a power was given to the Crown of appointing perſons to hear any particular caſe *pro hâc vice;* a moſt undeſirable mode of proceeding, and one which has ſlender grounds of recommendation. Indeed, ſo far as the ſtatute is concerned, the Crown might have nominated as judges perſons notoriouſly hoſtile or friendly to one of the parties in the caſe; and further, though ſpiritual cauſes were contemplated, it was not ſtatutably neceſſary that one ſingle ſpiritual perſon ſhould be a member of the Court. But however contrary to the natural reaſon of things and the general tenor of our conſtitution in Church and State, as ſpecifically laid down in the ſtatute of appeals,[q] this

[p] 25 Hen. VIII. 19. 3.

[q] 24 Hen. VIII. 12.

CHAP. III.

may appear, yet ſuch was the effect of the Act[r] which conſtituted the Court of Delegates as the final reſort in Cauſes Eccleſiaſtical. As a fact, however, notwithſtanding the power veſted in the Crown of appointing laymen upon this Court, "there are no footſteps[s] of any of the nobility or Common Law Judges in Commiſſion till the year 1604 (*i. e.* for ſeventy years after the erecting of the Court), nor from 1604 are they found in above one commiſſion in forty, till the year 1639, from whence (*i. e.* from the downfall of biſhops and their juriſdiction which enſued) we may date mixtures in that Court."

[r] 25 Hen. VIII. 19. 4.

[s] Gib. Cod. xxi. citing Reg. Offic. Cur. Delegat.

V. *A Digreſſion on Courts of Review, Star Chamber, and High Commiſſion.*

HAVING now, in the proſecution of our inquiry, arrived at the eſtabliſhment of the Court of Delegates in 1534, a Court of final Eccleſiaſtical Appeal which exiſted

for 298 years, that is, from 1534 down to the year 1832, it may be uſeful to pauſe in our inquiry into the point directly before us, in order to make a brief digreſſion. That digreſſion will not embrace ſubjects abſolutely eſſential to our preſent purpoſe; ſtill, for a full elucidation of the matter in hand, they ought to be briefly glanced at.

Court of Review.

ON ſome occaſions after a cauſe had been decided by the Court of Delegates above mentioned, the Crown granted what has been termed a "Commiſſion of Review" to reviſe the ſentence. It has been ſaid that this was a Commiſſion which the King might "grant as Supreme[t] Head to review the definitive ſentence given on appeal in the Court of Delegates." And the following ſpecified reaſons have alſo been given for the exerciſe of this power by the Crown. "1. *Becauſe*[u] *it is not*

[t] Jacob, Law Dict. ſub tit. Appeal to Rome; Vid. Gib. Cod. 1083.

[u] Gib. Cod. 1083; Coke Inſt. 4. 341.

CHAP III. *reſtrained by the ſtatute.* 2. *For that after a definitive ſentence the Pope, as Supreme Head by the Canon Law, uſed to grant a Commiſſion ad Revidendum. And ſuch authority as the Pope had, claiming as Supreme Head, doth of right belong to the Crown, and is annexed thereunto by the ſtatutes* 26 *Hen. VIII. c.* 1. *and Eliz.* 1. *c.* 1." In conformity with ſuch reaſoning, which, for many reaſons, is by no means admitted as convincing, this Court of Review has at times been put in motion, and certainly on occaſion with rather odd effect. For inſtance, " The Dean of Wells[x] was deprived of his deanery by the Commiſſary of the Biſhop of Bath and Wells. From this ſentence the Dean appealed firſt to the Archbiſhop, who affirmed it; and ſecondly exhibited an appeal to the King in Chancery, but found no relief there, for the King granted the deanery to one Turner. However (Anno 1 Mar.) the deprived Dean obtained another Com-

[x] Dyer, 273.

miſſion to the Delegates, and by their ſentence was reſtored to his deanery; and then, laſtly, after the death of Queen Mary (1 Eliz.), Turner had a Commiſſion of Review, and he was in turn reſtored. Again,[y] in the 39th Queen Elizabeth, a party againſt whom ſentence was given appealed to the Archbiſhop, who affirmed the judgment; then an appeal was made to the Court of Delegates, who reverſed both the former ſentences, on which the Crown granted a "Commiſſion ad Revidendum," the deciſion of the Court of Delegates.

[y] Jacob, Law Dict. ſub tit. Appeal to Rome.

Such was the "Court of Review." To an unprofeſſional mind it is ſomewhat difficult to comprehend how a commiſſion authorizing this tribunal could ever have been conſtitutionally granted by the Crown, with power to reverſe a deciſion of the Court of Delegates, when it is remembered that the ſtatute eſtabliſhing the latter Court is couched in this language:—

CHAP. III.

[z] 25 Hen. VIII. c. 19. s. 4.

"Such[z] judgment and ſentence as the ſaid Commiſſioners ſhall make and decree in and upon any ſuch appeal ſhall be good and effectual and alſo definitive, and no further appeals to be had or made from the ſaid Commiſſioners for the ſame."

Now, if there is any truth in the principle, "Rex intra leges non ultra leges," to a common underſtanding it would appear from the foregoing enactment that the deciſion of the Court of Delegates was ſtatutably final, and therefore could not be diſturbed by any new intervention of the Crown. However, ſuch was not the view taken by legal authorities of conſiderable eminence, when this queſtion was debated at certain conjunctures of our national hiſtory. The reaſons which appear to have ſatisfied the profeſſional mind, that a review of judgments in the Court of Delegates could be conſtitutionally granted, have been adverted to above,[a] and may be ſeen more fully expreſſed at page 1083 of Gibſon's Codex.[b] The arguments, however, relied on, when

[a] Pp. 47, 48.

[b] Citing Inſt. 341; Littl. 232.

diveſted of all decoration, amount to this, that the word "*definitive*" in the ſtatute[c] does not mean "*final;*" and that the clauſe thus worded, "*no further appeals to be had or made from the ſaid Commiſſioners*" does not exclude a freſh hearing of the caſe. The canons of interpretation applied to the Engliſh language for obtaining theſe reſults are not ſpecified. However, in the reigns of King James I. and King Charles I, either from a deſire to extend the royal prerogative or from ſome darker reaſon, this interpretation ſeems to have commended itſelf to the acceptance of the learned in Weſtminſter Hall. Whether it would meet with an equally favourable reception within thoſe precincts in the preſent day it does not become one of my profeſſion to hazard an opinion. One thing however, at leaſt, is clear enough, and it is this, that outſide thoſe walls it would certainly fall ſhort of giving any ſatisfaction whatſoever.

[c] 25 Hen. VIII. 19. 4.

Aboliſhment of Court of Review, Star Chamber, and High Commiſſion.

CHAP. III. HOWEVER, it is hardly neceſſary to ſpeculate on the ſubject, for this Court of Review has, by 2 & 3 Will. IV. c. 92. s. 3, beyond controverſy, been conſigned irrecoverably to the ſame limbo as the Courts of Star Chamber and High Commiſſion, the one owing its exiſtence, at leaſt in its later form, to King Henry VII, the other initiated by 1 Eliz. c. 1. s. 18. Into their hiſtory, their proceedings, and their myſterious relations with the Privy Council it would be out of place juſt at this moment to inquire. It is ſufficient for our preſent purpoſe to know that the Star Chamber and the Court of High Commiſſion are no more. The former was annihilated by 16 Car. I. c. 10. sec. 3. The power to appoint the latter was ſpecially "annulled,[d] revoked, annihilated, and utterly made void for ever," by 16

[d] Gib. Cod. 56.

Car. I. c. 11. s. 3. And, moreover, it was enacted[e] by the ſame ſtatute, that, from and after the firſt day of Auguſt, 1640,—

[e] Gib. Cod. 57.

"No new Court[f] ſhall be erected, ordained, or appointed within this realm of England, or dominion of Wales, which ſhall or may have the like power, juriſdiction, or authority, as the ſaid High Commiſſion Court now hath or pretendeth to have; but that all and every ſuch Letters Patents, Commiſſions, and Grants made or to be made by his Majeſty, his heirs, or ſucceſſors, and all powers or authorities granted, or pretended or mentioned to be granted thereby, and acts, ſentences, and decrees to be made by virtue or colour thereof, ſhall be utterly void and of none effect."

[f] See 5.

And though, at the reſtoration of the royal family, the ſtatute of Queen Elizabeth,[g] which had originally eſtabliſhed the High Commiſſion Court, was again revived by 13 Car. II. 12, yet two clauſes[h] were ſpecially introduced to bar any revival[i] of that Court itſelf. And further, ſtill later on in our national annals, when

[g] 1 Eliz. 1. 1.

[h] 13 Car. II. 12. 2 & 3.

[i] Gib. Cod. 58.

CHAP. III. King James II. had, by an illegal and unconſtitutional renewal of High Commiſſion powers, outraged the rights of the Univerſity of Oxford, the legiſlature again declared formally by ſtatute,[k] "*That the Commiſſion for erecting the late Court of Commiſſioners for Eccleſiaſtical Cauſes, and all other Commiſſions and Courts of like nature are illegal and pernicious.*" To this hour theſe ſtatutable determinations of the Engliſh legiſlature meet in many quarters with hearty approval and unqualified aſſent. And it is certain that the High Commiſſion Court, the Star Chamber, and the Court of Review have all thus received at leaſt apparent deathblows, from which it is moſt earneſtly to be hoped that there may be no recovery.

[k] 1 Will. Mar. c. 2. s. 36.

VI. *Change in the Law of Final Appeal.*

REVERTING now from the foregoing digreſſion, not abſolutely eſſential to our ſubject, (for the Court of Review was

unſtatutable and thoſe of Star Chamber and High Commiſſion were Courts of firſt inſtance rather than of appeal,) but ſtill touching on matters connected with it, it muſt be remembered that, for receiving appeals from the Archbiſhops' Courts in the laſt reſort, the Court of Delegates was eſtabliſhed[1] in 1534. From that date this Court laſted, as before ſaid, through a long period of our national hiſtory, extending down to the year 1832. In the laſt-named year, however, a remarkable change was again made in the law of Final Eccleſiaſtical Appeal—a change which was not effected without previous conſultation and advice. The very ſlender effect which that conſultation and advice had upon ſubſequent legiſlation on this ſubject the ſequel will ſhow.

[1] 25 Hen. III. 19. 4.

Firſt Commiſſion for recommending a New Court of Final Appeal.

In the year 1831 a Commiſſion, including the names of Archbiſhop How-

CHAP. III. ley, the Biſhops of London, Durham, and S. Aſaph, Chief Juſtices Tenterden and Tindal, Sirs John Nicholl, Chriſtopher Robinſon, Herbert Jenner, and Dr. Luſhington, reported that "*the Privy Council, being compoſed of Lords Spiritual and Temporal, the Judges in Equity, the Chiefs of the Common Law Courts, the Judges of the Civil Law Courts, and other perſons of legal education and habits, who have filled judicial ſituations, ſeems to compriſe the materials of a moſt perfect Tribunal for deciding appeals from the Eccleſiaſtical Courts.*" And here it is obſervable that one of the reaſons ſpecified for commending the Privy Council, as compriſing materials of a moſt perfect Tribunal for deciding Eccleſiaſtical appeals, was this—that it is partly compoſed of Lords Spiritual. Thus it muſt be fairly aſſumed that the Moſt Reverend, Right Reverend, and learned perſons, of whom this Commiſſion was compoſed, did not exclude

from their conſideration the deſirableneſs of having at leaſt the aſſiſtance of ſome ſpiritual judges in deciding ſpiritual cauſes. However, as we ſhall ſee in the final event, ſuch aſſiſtance was entirely diſpenſed with, ſo far as the requirements of the conſequent legiſlation prevailed. And thus the commendation of the Commiſſioners on this head was wholly ignored.

Second Commiſſion on the foregoing Subject.

IN the following year, 1832, the report of a ſecond Commiſſion, ſigned, among others, by the Archbiſhop of Canterbury, the Biſhops of London, Durham, Lincoln, S. Aſaph, and Bangor, the Chief Juſtices Tenterden, Wynford, Tindal, Sirs John Nicholl, Chriſtopher Robinſon, Herbert Jenner, and Dr. Luſhington, adopted the views of the previous Commiſſion, and recommended that Eccleſiaſtical appeals in the laſt reſort ſhould be transferred

CHAP. III. from the Court of Delegates to the Privy Council.

VII. *Aboliſhment of the Court of Delegates.*

THE foregoing recommendation was ſpeedily acted upon; for on the 7th of Auguſt, 1832, the ſtatute 2 and 3 Will. IV. c. 92, became the law of the land, by which the Court of Delegates was abo-
[m] Sec. 1. liſhed,[m] and the juriſdiction previouſly exerciſed by it was conferred on the Privy Council.

VIII. *Juriſdiction of Court of Delegates transferred to Privy Council.*

THE above-mentioned Act, after having recited, among other matter, that part of
[n] 25 Hen. VIII. c. 19. the ſtatute[n] of King Henry VIII. conſtituting the Court of Delegates, proceeded to enact as follows:—

[o] 2 & 3 Will. IV. c. 92. s. 3. "And[o] be it further enacted, that, from and after the firſt day of February, 1833, it ſhall be lawful to and for every perſon who might heretofore, by virtue

of either of the ſaid recited Acts, have appealed or made ſuit to his Majeſty in his High Court of Chancery, to appeal or make ſuit to the King's Majeſty, his heirs or ſucceſſors, in Council, within ſuch time, in ſuch manner, and ſubject to ſuch rules, orders, and regulations for the due and more convenient proceeding as ſhall ſeem meet and neceſſary, and upon ſuch ſecurity, if any, as his Majeſty, his heirs and ſucceſſors, ſhall from time to time by order in Council direct. And that the King's Majeſty, his heirs and ſucceſſors, in Council, ſhall thereupon have power to proceed to hear and determine every appeal and ſuit ſo to be made by virtue of this Act, and to make all ſuch judgments, orders, and decrees in the matter of ſuch appeal or ſuit as might heretofore have been made by his Majeſty's Commiſſioners, appointed by virtue of either of the hereinbefore recited Acts, if this Act had not been paſſed. And that every ſuch judgment, order, and decree ſo to be made by the King's Majeſty, his heirs and ſucceſſors, ſhall have ſuch and the like force and effect in all reſpects whatſoever as the ſame reſpectively would have had if made and pronounced by the aforeſaid High Court of Delegates. And that every ſuch judgment, order, and decree ſhall be final and definitive. And that no Commiſſion ſhall hereafter be granted or authorized to review any judgment or decree to be made by virtue of this Act."

Thus in cauſes Eccleſiaſtical the final

CHAP. III. appeal to the Crown in Chancery was annihilated, the Court of Delegates thence appointed was aboliſhed, and the juriſdiction, now withdrawn from Chancery, was conferred on the Crown in Council, to be thenceforward exerciſed by the Privy Council, ſubject to ſuch rules and regulations as his Majeſty by order in Council ſhould direct.

IX. *Relations between Star Chamber and the Privy Council.*

Now the relegation of Eccleſiaſtical appeals in the laſt reſort to the Privy Council has not altogether an encouraging aſpect, eſpecially when the myſterious relations between that body and the notorious Court of Star Chamber in times paſt are called to mind. In real truth, this laſt-mentioned Court, by thoſe who have inveſtigated the ſubject moſt carefully, is conſidered to have been the Privy Council under another name. Doubtleſs the origin and powers

of the Star Chamber are ſomewhat obſcure; ſome aſſerting that its juriſdiction was merely the original juriſdiction of the King's Council; others referring its modern authority entirely to the ſtatute 3 Hen. VII. At any rate, in the time of James I, when it was in full activity, the learned in the law could hardly reconcile their diſputes[p] on the ſubject, and even Plowden was pronounced in error. Its very name is ſhrouded in ſome myſtery. Its eulogiſt, Hudſon, denies the ordinary derivation aſſigned. "The Camera Stellata," he tells us, "is moſt aptly named,[q] not becauſe the Star Chamber where the Court is kept is ſo adorned with ſtars gilded, for ſurely the chamber is ſo adorned becauſe it is the ſeal of that Court." And then he adds, "The ſtars have no light but what is caſt upon them by the ſun, being his repreſentative body; and as his Majeſty was pleaſed to ſay, when he ſat there in his royal perſon, repreſentation

[p] Arnold, Prize Eſſay, 1860, p. 46.

[q] Ibid. p. 47.

CHAP. III. muſt needs ceaſe when the perſon is preſent, ſo in the preſence of his Great Majeſty, the which is the ſun of heaven's glory, the ſhining of theſe ſtars is put out; they not having any power to pronounce any ſentence in this Court, for the judgment is the King's only." However, notwithſtanding this courtly compliment, the account rejected by Hudſon is probably true; for the Court of Star Chamber, as its records prove, is the Privy Council meeting in the "Starred Chamber," ſo called in all likelihood from the decorations of ſtars with which its ceiling was emblazoned. The hiſtory of the name has at leaſt this importance, of being an indication that the Court of Star Chamber was nothing more or leſs than the Privy Council exerciſing judicial functions; and it certainly would be no matter of ſurpriſe if, in ſome ears, the revival of thoſe functions ſhould awaken unwel-

come echoes of the paſt, and tell forth ſignal warnings of extreme alarm. CHAP. III.

X. *Privy Council too ungainly a Body to wield the Power now aſſigned to it.*

BUT, to waive all ſentimental objections, on the ſcore of paſt hiſtory, to the relegation of Eccleſiaſtical cauſes in the laſt reſort to the Privy Council as a body, it is beyond all queſtion clear that it was far too large and heterogeneous an aſſembly to wield with any ſatisfaction, as an integral Court, the juriſdiction now aſſigned to it by the ſtatute of 1832;[r] and, indeed, our legiſlature, by its ſubſequent proceedings[s] in 1833, acknowledged the fact. In truth, this incapacity had been previouſly diſcovered by earlier experience; for the appeals carried thither from India[t] and the Colonies had before this time been heard by a Committee of the Council, which made reports, upon which which final de-

[r] 2 & 3 Will. IV. c. 92.
[s] 3 & 4 Will. IV. c. 41.
[t] Preamble 3 & 4 Will. IV. c. 41.

CHAP. III. termination in Council was given. We have, however, now to conſider the effect of a ſpecific ſtatute, not to ſpeculate upon any practice or uſage which previouſly prevailed. The power at this time given by ſtatute to the whole Council to hear Eccleſiaſtical appeals, ſubject to "ſuch orders and regulations" as the Council itſelf ſhould adopt, might, under the very terms of the Act of Parliament, have been exerciſed in the moſt exceptionable manner; and a return to ſome managements was now ſtatutably rendered poſſible, which have impreſſed on the pages of our paſt hiſtory records of the moſt odious tyranny.

The unwieldy ſize of the Council, as well as its heterogeneous elements, neceſſarily unfitted it, as was ſaid, for the functions now aſſigned to it; for its very capacious boundaries have in later times been extended until it has embraced a vaſt multitude of perſons, varying in rank, pro-

feſſion, character, qualifications. There is no unity whatever in the elements of which it is compoſed. In truth, commonly the ſtrongeſt claim for admiſſion into that auguſt body is the fact of being antagoniſtically oppoſed on great ſtate queſtions to thoſe who have laſt received the honour of appointment. Had the Privy Council retained ſomewhat of its ancient ſize, conſtitution, and qualifications, it might have been leſs unfit to exerciſe the judicial functions now confided to it; but the changes which have paſſed over it have prevailed to change its whole character.

In early times the Privy Council conſiſted of a ſmall body appointed to adviſe the Crown; but it gradually increaſed, and in King Edward VI.'s reign its number amounted to forty perſons.[u] In the reign of King Charles II. it became ſo numerous that, to quote from his own declaration, it was "unfit for the ſecreſy and

[u] Burn. Ref. vol. ii. pt. ii. p. 121.

CHAP. III.

diſpatch that are neceſſary in many great affairs." Impreſſed with this conviction, that monarch formed a Special Committee,[v] or (to uſe a term adopted in his father's reign) a "Cabinet," to which alone the ſecrets of ſtate policy were confided. Thenceforth the action of the whole Privy Council as a body ceaſed. In fact, King Charles II.'s own words, in the Royal Declaration of 1679, pretty clearly deſcribe the reaſon and the effect of this change:—"*His Majeſty*," were his words to the Councillors, "*thanks you for all the good advices you have given him, which might have been more frequent if the great number of this Council had not made it unfit for the ſecreſy and diſpatch that are neceſſary in many and great affairs. This forced him to uſe a ſmaller number of you in a foreign Committee* (the Cabal[3]), *and*

[v] Arnold, Prize Eſſay, 1860, p. 65.

[3] In 1671, Clifford, Arlington, Buckingham, Aſhley, and Lauderdale were the Committee appointed. The initials of their names give the word.

ſometimes the advices of ſome few among them upon ſome occaſions for many years paſt." CHAP. III.

Thus what we now call the Cabinet, a body really unknown to the Engliſh conſtitution, really grew out of the Privy Council; but the change was not effected without a ſtruggle, nor was the Privy Council diveſted of its active functions without an endeavour to retain its ancient authority; for Sir William Temple deviſed a ſcheme for combining the old ſyſtem of government by a Council with the modern plan of government by a Cabinet, compoſed of the Parliamentary notabilities of the day. By his ſcheme the Council was made to conſiſt of thirty perſons. Three principles were to govern the appointments. 1. The Council was, as aſſerted, to embrace a repreſentation of the chief intereſts of the realm. Thus the Biſhops were "to take care of the Church;" the Lord Chancellor and Chief Juſtice were

CHAP. III. "to inform the King well of what concerns the laws." 2. There was to be an acceſſion of powerful members of Parliament. 3. The Council was to derive weight from the collective amount of property belonging to its members. This laſt principle ſeems to have been adhered to in carrying out the plan with conſiderable tenacity, as the perſonal wealth of thoſe who compoſed it was calculated to have amounted to 300,000*l.* a-year—a tolerably large ſhare of the goods of this world for thirty individuals. Now, had this ſcheme ſucceeded, the country would have been in a fair way of groaning under that moſt deteſtable of all deteſtable forms of government—an oligarchy, and that, too, an oligarchy deriving its authority, at leaſt in part, from that vulgareſt of all vulgar qualifications, the poſſeſſion of money. Happily this plan of Temple, though eulogized as "a[w] thing fallen from heaven into his Majeſty's heart," ap-

[w] Temple's Memoirs, p. 233.

proved by Sunderland, and lauded fantaſtically by Eſſex, ſignally failed. It was ſtifled in its birth; Temple himſelf ſtrangling his own progeny by conſenting to form part of a Council within the Council.

The intereſt of this paſſage in hiſtory conſiſts in this, that it ſeems to mark the tranſition from government by the whole Privy Council to government by a Cabinet; for, from 1679, no idea has been entertained of making all Privy Councillors reſponſible for the political acts of the Crown. The whole Council has, indeed, as a matter of formality, been ſometimes convened, as, for inſtance, on the occaſion of the ſignature of the Peace of Utrecht; but this uſeleſs form is now abandoned. In proportion, however, as the political functions of the Privy Council have decreaſed its bulk has been augmented; and though, figuratively viewed, it may be charged with important powers, it is

CHAP. III. in its entirety never called upon to exerciſe any; and is, in reality, compoſed of a ſomewhat confuſing and heterogeneous liſt of names, among which may be found thoſe of ſome perſons who have taken but little part in public buſineſs, are likely to take leſs, and are now qualified to take none.

However, this very large and ſomewhat anomalous body of perſons it ſeemed fit to our legiſlature, in 1832, to conſtitute, by ſtatute, as the tribunal for hearing, among other cauſes, Eccleſiaſtical Appeals in the laſt reſort. The very ſenſible alarms which our anceſtors felt, and oftentimes[x] expreſſed, at the exerciſe of judicial functions in that neighbourhood, ſeem to have paſſed away. And, moreover, conſidering the effect of the judgments which the Privy Council was called upon to pronounce, very ſlender regard appears to have been paid to the previouſly expreſſed unwillingneſs of the

[x] 16 Car. I. 10; 1 Will. & Mary, 2. 36.

Engliſh legiſlature to recognize that body as a Court of Juſtice, an unwillingneſs declared in theſe very intelligible terms:— CHAP. III.

"Be[y] it likewiſe declared and enacted . . . that neither his Majeſty nor his Privy Council have or ought to have any jurisdiction, power, or authority by Engliſh bill, petition, articles, libel, or any other arbitrary way whatſoever to examine or draw into queſtion, determine, or diſpoſe of the lands, tenements, hereditaments, goods, or chattels of any the ſubjects of this kingdom, but that the ſame ought to be tried and determined in the ordinary Courts of Juſtice and by the ordinary Courts of Law."

[y] 16 Car. I. c. 10. s. v.

Still, notwithſtanding the unwillingneſs of our anceſtors to confide judicial functions to the Privy Council, notwithſtanding its total unfitneſs, in its entirety, to exerciſe ſuch functions, from its unwieldy ſize, and in the main from its component parts, it was, as before ſaid, ſtatutably conſtituted by the legiſlature,[z] in 1832, as the Ultimate Court of Appeal in Spiritual Cauſes among others. And here, then, we have come to another reſting-place in

[z] 2 & 3 Will. IV. c. 92.

CHAP. III.

our journey, and find the whole body of the Privy Council ſtatutably erected into the Final Court of Eccleſiaſtical Appeal, ſubject only to ſuch "rules,[a] orders, and regulations" as the Crown ſhall "by order in Council direct." And here the reader may well pauſe to conſider the magnitude of the change effected, the unfitneſs of the body, as a whole, charged with theſe freſh and ſurpriſing powers, the ſlender amount of regard paid to ſenſible warnings of our earlier hiſtory, and the ſlight reſpect ſhown to previous determinations[b] of the national legiſlature.

[a] 2 & 3 Will. IV. 92. 3.

[b] 16 Car. I. cc. 10, 11; 13 Car. II. c. 12; 1 Will. & Mary, c. 2.

XI. *Freſh Alterations in the Conſtitution of Court of Final Eccleſiaſtical Appeal.*

To proceed. The Engliſh legiſlature ſeems to have ſoon diſcovered that it had confided appeals in the laſt reſort to a very unſatisfactory, and it may be ſaid, if advantage in management had been taken of ſome proviſions in the ſtatute,

a moſt dangerous tribunal. And ſo, deſirous to correct this confeſſed ſhortcoming, our legiſlators proceeded in the very next year, 1833, to make another change in the law. From that change is dated the exiſtence of the preſent Court of Final Eccleſiaſtical Appeals. But the legiſlative miſmanagement which then occurred is worthy of ſome lengthened remark and of careful conſideration.

XII. *Transference of Appeal from the Privy Council to a Judicial Committee.*

ENDEAVOURING to correct the ſhortcomings of 1832, the legiſlature enacted, in 1833, the ſtatute 3 & 4 Will. IV. c. 41, by which a Court denominated the Judicial Committee of Privy Council was ſubſtituted in the place of the Privy Council itſelf for hearing appeals. That Committee is the preſent ſtatutable Court of ordinary Final Eccleſiaſtical Appeal, and conſiſts of the perſons ſpecified in a former paſſage.[c]

[c] Vide ſup. pp. 25, 26.

XIII. *The Legiſlature here acted "per incuriam."*

CHAP. III. Now it muſt be confeſſed that the legiſlature at this time was guilty of ſome grievous error or overſight. It is impoſſible to believe that it meant to do what it did. One cannot force oneſelf to the belief that it intended to refer eccleſiaſtical appeals, along with others of a totally different character, to the Judicial Committee of Privy Council as now conſtituted, though ſuch was the effect of its enactments.[d] For if it did ſo intend, how came it to paſs, in the firſt place, that, in detailing the names of the Courts whence cauſes ſhould be carried to the Judicial Committee on Appeal, the Eccleſiaſtical Courts were never mentioned at all in the enacting clauſes of the ſtatute?[e] They ſpecify the Courts of Admiralty, the Vice-Admiralty[f] Courts, the Courts in the plantations of America, and other his Majeſty's dominions abroad, the

[d] 3 & 4 Will. IV. 41.

[e] Ibid.

[f] Sec. 2.

Courts of Sudder Dewanny Adawlut,[g] in the three preſidencies of India, deſignating each ſeverally by name, the Courts of Judicature to the eaſtward[h] of the Cape of Good Hope. But not one word is there mentioned of any one Eccleſiaſtical Court of England, nor is the ſlighteſt reference there made to any appeal of ſpiritual contention. It is really a moſt unpardonable omiſſion, under the preſent ſuppoſition, that a large branch of judicature of the moſt ſolemn character ſhould have been never even hinted at in the ſpecified detail if there was a deliberate intention of including it. This would, indeed, argue a moſt careleſs and inexhauſtive method, by no means creditable to any legiſlative compoſition, and indeed altogether incomprehenſible.

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[g] Sec. 22.

[h] Sec. 24.

And, in the ſecond place, if there was a deliberate intention to commit ſpiritual appeals in the laſt reſort to this Judicial Committee, how comes it to paſs that not one ſingle ſpiritual perſon was by the

CHAP. III.

ſtatute placed upon it? And this omiſſion, too, in the very face of the recommendation of the commiſſions which had reported on the ſubject of the transference of ſpiritual appeals from the Court of Delegates in the years 1831 and 1832. Thoſe commiſſions had reported that "the Privy Council .... ſeems to compriſe the materials of a moſt perfect tribunal for deciding appeals from the Eccleſiaſtical Courts," for this reaſon, among others, that it was partly "compoſed[i] of lords ſpiritual." Yet the ſpiritual element in ſelecting the members of the Judicial Committee, as now ſpecified, was entirely ignored. It was to conſiſt, as we have ſeen, of the Preſident of the Privy Council[k] and ſuch members of it as ſhould hold the offices of Lord Chancellor, Lord Keeper, Chief Juſtice of the King's Bench, Maſter of the Rolls, Vice-Chancellor of England, Chief Juſtice of the Common Pleas, Chief Baron of the

[i] Pp. 53-57. ſup.

[k] 3 & 4 Will. IV. 41. 1.

Exchequer, Judge of the Prerogative Court of Canterbury, Judge of the High Court of Admiralty, Chief Judge in Bankruptcy, together with ſuch members of the Privy Council as are ex-Preſidents, ex-Lord Chancellors, or as have held any of the other aforeſaid offices. Now, is it for one moment to be believed that our ſtateſmen, at the time under conſideration, ſo far diſregarded the advice of the Commiſſioners who had reported on the matter in hand, ſo far forgot their duty to God and the Church, and ſo completely ſet all precedent, reaſon, and propriety at defiance as conſiderately and intentionally to aſſign appeals in the laſt reſort, on ſpiritual matters of faith and doctrine, to a body of men among whom not one ſingle ſpiritual perſon appears? This is, indeed, altogether incredible. It is manifeſt that to entertain ſuch a ſuppoſition would be exceedingly unjuſt to the memory of our legiſlators of that day, and would be an

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unreaſonable imputation upon them, to ſay the leaſt, of moſt reckleſs negligence or ſcandalous impropriety.

The truth is that the legiſlative mind was ſo pre-occupied with the Admiralty, Vice-Admiralty, Colonial and Sudder Courts, and the manner of their appeals, that the queſtion of the Eccleſiaſtical Courts, at leaſt ſo far as it involved matters of doctrine (as has been admitted by an eminent legiſlator engaged in the tranſactions), was *per incuriam* overlooked while the legiſlation,[1] which finally conſtituted the Judicial Committee of Privy Council as an appellate Court of judicature, was paſſing through its various ſtages. Lord Brougham himſelf ſaid, when ſpeaking of the "Gorham" caſe,[m] "He could not help feeling that the Judicial Committee of Privy Council had been framed without the expectation of queſtions like that . . . . being brought before it. It was created for the conſideration of a

[1] 3 & 4 Will. IV. 41.

[m] Hans. 3 S. vol. 111, p. 629.

totally different claſs of caſes, and he had no doubt but that if it had been conſtituted with a view to ſuch caſes as the preſent, ſome other arrangements would have been made." And ſo, though in the preamble of 3 & 4 William IV. 41. Eccleſiaſtical appeals are certainly mentioned, yet by the time the enacting clauſes were arrived at the ſubject had ſlipped from memory; and ſuch appeals never would, in fact, have paſſed to this tribunal but for ſome very capacious and wide terms undiſtinguiſhingly introduced into the 3rd ſection of the ſtatute. Thoſe terms were by no means intended to ſecure the anomalous effect in regard to appeals involving ſpiritual queſtions which is ſo deplorable, but rather originated in that unfortunate love of verbiage which often prevails among thoſe learned perſons who are charged with the duty of drafting Acts of Parliament. The words are as follow:—

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[n] 3 & 4 Will. IV. 41. s. 3.

"And[n] be it further enacted, that all appeals or complaints, in the nature of appeals whatever, which either by virtue of this Act, or of any law, ſtatute, or cuſtom, may be brought before his Majeſty, or his Majeſty in Council . . . . . ſhall, from and after the paſſing of this Act, be referred by his Majeſty to the ſaid Judicial Committee of his Privy Council."

Now, there are among others two ſerious faults in compoſition, and thoſe faults are ſpecially to be avoided where weighty intereſts are concerned, as in the caſe of drafting Acts of Parliament. One is to write inexhauſtively, the other to uſe terms over-capacious in their graſp; and certainly the perſon who drafted this Act, and the legiſlators who ſubſequently ſanctioned it, cannot eſcape one of the horns of this dilemma. If there was any intention to include the Eccleſiaſtical Courts, the method is ſadly inexhauſtive in failing to ſpecify thoſe Courts among the others detailed. If, on the other hand, there was no ſuch intention, then theſe undiſtinguiſhing terms of the 3rd ſection, which

are ſo wide as to include thoſe Courts, are diſcreditably over-capacious in their graſp. The latter alternative is the true one; and the fact is that, "*per incuriam*," that moſt important branch of judicature, which governs deciſions on faith and doctrine in the laſt reſort was conſigned to the Judicial Committee of Privy Council, ſtatutably a purely lay tribunal, by addiction to exceſſive verbiage. The Church of England has here ſerious and juſt matter of complaint, to which no reaſonable perſon can turn a deaf ear.

XIV. *Clumſy Attempt of the Legiſlature to remedy the "Incuria" before mentioned.*

SEVEN years after the afore-mentioned legiſlative overſight had occurred, entailing the moſt ſerious conſequences on the Church of England, and eſtabliſhing a tribunal for the purpoſes under conſideration neither fitted for the functions aſſigned to it, nor in harmony with the

CHAP. III. conſtitutional compact between Church and State, an attempt was made to remedy this moſt unfortunate and deplorable miſhap; but the enterpriſe has complicated matters, and, in a conſtitutional point of view, done more harm than good. In the year 1840, by the Clergy Diſcipline Act (3 & 4 Vict. c. 86. s. 11.) it was enacted,—

"That every Archbiſhop and Biſhop of the United Church of England and Ireland, who now is, or at any time hereafter ſhall be, ſworn of her Majeſty's moſt Honourable Privy Council, ſhall be a member of the Judicial Committee of Privy Council for the purpoſes of every ſuch appeal as aforeſaid (*i. e.* in cauſes commenced under the recited Act). And that no (ſuch) appeal ſhall be heard before the Judicial Committee of the Privy Council unleſs, at leaſt, one of ſuch Archbiſhops or Biſhops ſhall be preſent at the hearing thereof."

Now, from this laſt ſentence it is clear beyond controverſy that the Legiſlature had by this time diſcovered the unſatisfactory character and reſults of its former Act, in remitting ſpiritual cauſes in the

laſt reſort to a tribunal in which, ſtatutably, no ſpiritual perſon had a ſeat; and ſo it endeavoured, ſo far forth as the preſent ſtatute was concerned, to amend that error by forbidding the Judicial Committee to hear an appeal in any cauſe commenced under its proviſions without the addition, at the leaſt, of one ſpiritual member to its body. However, it muſt be ſaid that this partial cobbling in conſtitutional matters is ſeldom commendable; and eſpecially in this caſe, that it affords a ſpecimen of a moſt clumſy attempt at a compromiſe, and entails reſults little creditable to our ſyſtem of judicature. In the firſt place, to a Court thus conſtituted of mixed elements, lay and ſpiritual, there are many objections well known to thoſe who have paid attention to ſuch matters, and conſidered by them of great weight. Into theſe, however, it is not neceſſary at this moment to enter. But ſecondly, a very ſimple and palpable objection, intelligible to all men,

CHAP. III. exiſts to this management. Two diſtinct Courts of final appeal are thus ſtatutably conſtituted for the ſame cauſes. One the Judicial Committee of Privy Council, as ſpecified by the ſtatute 3 & 4 William IV. 41, a purely lay tribunal; the other a mixed Court, compoſed of the aforeſaid Committee, with the addition of the ſpiritual element ſpecified in 3 & 4 Vict. c. 86. And thus theſe two diſtinct tribunals are ſtatutably erected to decide on cauſes in themſelves identical. The fact which decides the queſtion as to which of theſe ſeparate final appeal Courts ſhall hear the cauſe is only the form of the legal proceedings in the caſe. If they are commenced under the Clergy Diſcipline Act, the appeal is to the latter tribunal; if in any other way, to the former. Now that theſe two diſtinct appeal Courts ſhould exiſt concurrently under ſuch circumſtances has an odd aſpect; and, irreſpective of any grounds of complaint

which the Church may have on the ſubject, it may with ſome confidence be left to the judgment of any one, who has a regard for the proprieties of Engliſh judicature, to ſay whether ſuch a ſtate of things is in any way creditable to our country.

XV. *Recapitulation.*

HAVING now given an hiſtorical outline of the legiſlation by which the preſent ſtate of "the Courts of final appeal in matters Eccleſiaſtical" has been brought about, it may be well, before proceeding to the next diviſion of the ſubject, to ſet down a condenſed recapitulation of the changes which have from time to time taken place.

1. In 1164 the eighth Conſtitution of Clarendon, in accordance with previous uſage, declared that the Archbiſhop's Court[o] ſhould be here the Court of final appeal, and that no appeal ſhould be taken further, *i. e.* to Rome, without Royal aſ-

[o] Spelm. Conc. 2. 63.

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ſent. 2. In 1533 the Legiſlature enacted[p] that this permiſſive appeal to Rome ſhould be taken away, and that the Archbiſhop's Court ſhould be the laſt reſort in ordinary caſes, and the Upper Houſe of Convocation[q] in ſuch as touched the King. 3. In 1534 it was enacted[r] that from the Archbiſhop's Court there ſhould be an appeal to the Crown in Chancery, whence was appointed the Court of Delegates,[s] to give definitive judgment. 4. The Courts of Review, Star Chamber, and High Commiſſion exiſted concurrently for ſome time with the Court of Delegates. They were not, however, ſtatutably conſtituted as appeal Courts, and have all been ſtatutably aboliſhed.[t] 5. In 1832 the Court of Delegates was annihilated,[u] and an appeal from the Archbiſhop's Court given to the Crown[x] in Council, *i. e.* to the whole Privy Council. 6. In 1833 the Judicial[y] Committee of Privy Council was ſubſtituted inſtead of the Privy Council itſelf.

[p] 24 Henry VIII. 12. 6.

[q] Sec. 9.

[r] 25 Henry VIII. 19. 4.

[s] Ibid.

[t] 16 Car. I. 10; 16 Car. I. 11; 2 & 3 Will. IV. c. 92. s. 3.

[u] 2 & 3 Will. IV. 92. s. 1.

[x] Ibid. s. 3.

[y] 3 & 4 Will. IV. 41. 1.

7. In 1840 a mixed tribunal, compoſed of the Judicial Committee of Privy Council and ſome ſpecified prelates, was conſtituted[z] to hear appeals from the Archbiſhop's Court, in caſe the proceedings were commenced under a particular Act,[a] but not otherwiſe.

[z] 3 & 4 Vict. 86. 16.

[a] Ibid.

The foregoing is a ſummary of the changes which have been made here in the conſtitution of Courts of final appeal in cauſes Eccleſiaſtical. Thoſe Courts are at this moment three.

I. The Upper Houſe[b] of Convocation, in caſes touching the King.

[b] 24 Henry VIII. 12. 9.

II. The Judicial Committee of Privy Council united[c] with ſome ſpecified prelates, in caſes commenced under a ſpecial ſtatute.[d]

[c] 3 & 4 Vict. 86. 16.

[d] Ibid.

III. The Judicial Committee of Privy Council[e] in ordinary caſes.

[e] 3 & 4 Will. IV. 41. 1.

CHAPTER IV.

Just Grounds of Complaint against the Present Ordinary Court of Final Appeal.

I. *Preſent Law preſcribes Three Courts. Conſiderations now confined to one only.*

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IT is clear that under the preſent law the three Final Appeal Courts, deſcribed at the end of the laſt chapter, are now ſtatutably eſtabliſhed in England. And this is by no means a ſatisfactory ſyſtem, that for cauſes identical in ſubject-matter there ſhould be three totally diſtinct and diſſimilar Courts to which application may be made, under varying circumſtances, in the laſt reſort. However, to waive, in the future diſcuſſion of the ſubject,

this cauſe of diſſatisfaction, and to paſs over ſome grave objections which might be ſuggeſted againſt the two firſt Courts eſtabliſhed for ſpecial caſes, 1. the Upper Houſe of Convocation, and 2. the Judicial Committee of Privy Council united with ſome ſpecified prelates; attention will henceforth be directed excluſively to the third or ordinary Court of Final Eccleſiaſtical Appeal, conſtituted by the Act of 1833, *i.e.* the Judicial Committee of Privy Council, pure and ſimple. And ſome grounds of complaint againſt that Court will now be pointed out, no account of courſe being taken of the acknowledged makeſhift by which ſpiritual prelates have been on occaſion called in to adviſe.

II. *No Sufficient Security for Doctrine under the preſent Syſtem.*

Now the firſt juſt ground of complaint againſt that Court is that there is no ſufficient ſecurity for the maintenance of true doctrine.

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And here it is perhaps hardly neceſſary to ſay, what is fully admitted on all hands, that the object and duty of a Court are not to make doctrine, but to apply doctrine already ſettled to the particular caſe under view. "The Judicial Committee," in Lord Campbell's words,[a] "was merely a Court of conſtruction. Its duty was to explain the meaning of legal documents." Theſe are facts univerſally allowed, and which have been frequently declared alſo by the Court itſelf. The framers of doctrine for any national Church certainly are not Courts, but the Synods of that Church. The Liturgy, Articles, and Canons of the Engliſh Church are the exponents of her doctrine, and they have been framed by her Synods. And this is the very footſtone of the compact between Church and State: that the code thus framed and ſubſequently accepted by the civil power is the law which every Court in this country has to apply in queſtions of doctrine to each

[a] Hans. 3 S. vol. 111, p. 643.

caſe ſubmitted to its judgment. To uſe the words of an eminent and accompliſhed member of the Court, uttered in my hearing, with reference to writings charged with hereſy, "It is for the Court to decide whether the paſſages are conſonant or not with 'the Articles.' . . . That is the function of the Court and cannot be delegated." Now theſe facts being admitted, and I ſuppoſe no one of competent information will deny them, it has been ſaid, if the Court has only to apply doctrine already framed to the caſe in hand, and not to frame new doctrine, that no inſecurity in this reſpect is entailed by the preſent ſyſtem. CHAP. IV.

But to this propoſition it is upon conſideration no way poſſible to aſſent. For though the Court is, as all admit, not charged with the power of making new doctrine, the practical effects of its deciſions may be to do ſo. And even though the Judicial Committee has itſelf diſclaimed either the intention or the power

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of framing doctrine, yet every one is aware, to uſe the words of the late Biſhop of London on this ſubject,—

[b] Hans. 3 S. vol. 111, p. 609.

"How[b] much of the law of the land has been made by the deciſions of the judges. Every deciſion of a point of doctrine by the Judicial Committee would form, as in other Courts of Final Appeal, a precedent. Such precedents ſettle or modify the law, and at laſt become law themſelves. And thus a Supreme Court of Juſtice may, in ſome ſenſe, not only adminiſter but make laws. . . . Can (it) give any deciſion upon a queſtion which turns upon a point of doctrine without affecting, to ſome extent, the doctrine itſelf, as one which is inſiſted upon or not by the Church? Take any one caſe of this kind. Suppoſe (it) called upon to decide a queſtion whether ſuch or ſuch a doctrine is or is not the doctrine of the Church of England. The judgment may be to this effect: It cannot be denied that the doctrine in queſtion is the doctrine of the Church of England, but we do not think it indiſpenſably neceſſary that a perſon ſhould believe that doctrine, in order to the exerciſe of his miniſtry in the Church. Who does not ſee that a ſucceſſion of ſuch judgments would injure the character of the Church of England as a teacher and maintainer of the truth?"

It is impoſſible to deny the force and juſtice of theſe remarks. For it is plain, by a ſucceſſion of judgments permitting certain doctrines or forbidding certain doctrines to be taught, that the Court would either practically encourage the teaching of thoſe doctrines, or, on the other hand, practically prevent their being enforced throughout the whole region of the Church's inſtructions. And theſe events would neceſſarily enſue notwithſtanding that the Court meanwhile reiterated its declarations that it neither had the power nor entertained the intention of altering doctrine. Thus, while the faith of the Church, according to the Court's declarations, abode untouched, the inſtructions given to the people would aſſuredly be affected; and ſuppoſing the Court to err, that which was not the Church's doctrine might be taught with impunity, or that which was the Church's doctrine might not be ſo taught, by her ac-

CHAP. IV. credited teachers to the people committed to her care. The effect of a ſeries of erroneous deciſions would clearly be moſt diſaſtrous, for even though a Churchman might point to the Articles and Liturgy and Creeds, and ſay, theſe are the ſtandards of my Church, the deciſions of a Court cannot affect them; yet, if teaching according to thoſe ſtandards was legally forbidden, or teaching in contravention of them legally authorized, the practical effects would be ſuch as it is not needful at greater length to deſcribe. And thus, while the duty aſſigned is ſimply to interpret, not to conſtruct, the graveſt riſk is run that under the guiſe of interpretation the work of conſtruction might be carried on by a very different authority from that to which the latter function properly belongs.

And this riſk is all the more alarming in proportion as the authority is leſs qualified for interpretation. "The Judges[c]

[c] Hans. 3 S. vol. 111, p. 608.

of our Courts of Law," in the words of the late Biſhop of London, "when called upon to decide new caſes, decide upon certain fixed principles, perfectly familiar to them, which they have only to apply to the facts of the particular caſe. Theſe deciſions are looked upon as faithful and true expoſitions of the law, becauſe they proceed from thoſe whoſe thorough acquaintance with the whole ſyſtem of Engliſh juriſprudence, both in theory and practice, renders them perfectly competent to give them, and ſo it may be that thoſe who are ſet to adminiſter the law do in ſome caſes make it. So in caſes of doctrine, the judges who are ultimately to decide them may, by degrees, alter or modify the laws which relate to them. But then they are not verſed in divinity, as the judges of the temporal Courts are in the common and ſtatute law, and in the rules of equity." Now if this be ſo, and doubtleſs thoſe learned perſons would be

CHAP. IV. the very firſt to admit the truth of this aſſertion, interpretation, which may have at leaſt the effect of conſtruction, cannot, with any ſatisfaction, be conceded to them. This firſt cauſe of complaint againſt the preſent ſyſtem, that there is no ſufficient ſecurity for doctrine, appears, upon conſideration, well-founded. And the words of that experienced and accompliſhed nobleman, who for ſeventeen years preſided over the deliberations of the Judicial Committee, ſeem fully juſtified, when, ſpeaking of its preſent juriſdiction in matters ſpiritual, he ſaid, appealing meanwhile to the learned lord on the woolſack for a confirmation of his aſſertion, that "it[d] did take away from the Church, to a certain extent, the ſecurity which ſhe had poſſeſſed for the ſoundneſs of her doctrines."

[d] Hans. 3 S. vol. III, p. 629.

III. *Incompetency of the Court.*

THIS inſecurity is all the more alarming

when the incompetence of the Court for the functions assigned to it is considered. And this is the second just ground of complaint against the present system. CHAP. IV.

It must at the outset be confessed, that this subject should be approached in the most cautious manner, and treated with a careful touch in no way calculated to give just offence. No man is worthy to be listened to for a moment on this head who should fail to express any other than the very highest respect for the characters and talents and attainments of those exalted persons who constitute the Judicial Committee of Privy Council. It is quite impossible to overrate, perhaps difficult even to estimate duly, their eminent qualifications for deciding cases which fall within their proper functions. For they are the very flower of a profession which, in intellectual attainments and perspicuous judgment, is probably equalled by none other in the world. It would be hard to

CHAP. IV. deviſe a Court which, in all queſtions involving maritime, colonial, common, and ſtatute law, would be calculated to perform its duty more admirably than the Judicial Committee. But when ſpiritual queſtions are involved the caſe aſſumes a different aſpect. "In all matters," ſaid the late Biſhop of London,[e] "requiring judicial acuteneſs and calmneſs, impartiality and firmneſs, for the diſcovery of the truth of facts, and for the explanation and application of the law, nothing more is to be deſired. It is only when queſtions of doctrine ariſe, and points of faith are to be determined, that I object to that tribunal as incompetent. It is competent to decide all queſtions of eccleſiaſtical law, but not matters purely ſpiritual, involving queſtions of divine truth. For this office it is not properly qualified with reference either to the Church's original conſtitution, or to the perſonal qualifications of the judges."

[e] Hans. 3 S. vol. III, p. 606.

It is, indeed, quite likely that no judicial tribunal would be conducted to the beſt advantage which was not preſided over by a lawyer. There is a peculiar aptitude of mind acquired by ſtudy and long practice—a peculiar habit of obſervation and thought, the reſult of long and laborious training—which enables a lawyer to detect a flaw in an argument, to ſee at once the ſtrength and weakneſs of a caſe, to graſp it in all its bearings, and to apply to it the rules of law. All this is very hardly to be found in other men. And it is certainly moſt deſirable that thoſe peculiar powers ſhould be employed upon any legal queſtions incident to Eccleſiaſtical cauſes. But thoſe powers do not qualify their poſſeſſors to decide points of religious doctrine. There is what may be called the theological as well as the legal mind, and that, too, requires its peculiar training. No ſmall amount of laborious application and ſpecial ſtudy is here alſo

CHAP. IV. requiſite. It is, indeed, well known that ſome ornaments of the judicial bench have been extremely well read in theology, and the literature of our country gives moſt unexceptionable teſtimony to the fact; but this is not commonly the caſe, as thoſe moſt learned perſons of which it is compoſed would be the very firſt to admit. They are not by their previous ſtudy and habits of thought generally qualified to deal with purely ſpiritual queſtions, and they are not conſequently qualified, in the caſes under view, to deal with a conſiderable part of the ſubject-matter of their judgments.

It may, perhaps, be ſaid that every educated member of the Church has a competent knowledge of her doctrines. Now, even were this true, it would not meet the preſent exigency, as the members of the Court under conſideration are not neceſſarily members of the Church of England. But it is not true. There

are many grave queſtions[f] in theology, and thoſe the moſt likely to come under the conſideration of the Judicial Committee, which ſcarcely ever engage the attention of the laity, eſpecially of thoſe whoſe time is otherwiſe taken up, and whoſe profeſſion neceſſarily leads their minds to other ſubjects. It is eaſy to conceive a caſe ſubmitted to the deciſion of the Court in which the ſubject-matter would be altogether new to the members, and very hardly to be underſtood by them in the abſence of previous ſtudy and thought. The terminology itſelf might be puzzling, and they might hardly comprehend the exact meaning of ſuch expreſſions as, to perſons verſed in theology, would appear the mere alphabet of the ſcience. It muſt be ſaid that, under ſuch circumſtances, the members of the Court would be quite incompetent to decide ſatisfactorily queſtions involving perhaps in their conſequences the peace and unity of the

[f] See Biſhop of London's Speech; Hans. 3 S. vol. 111, p. 607.

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Church,[g] "when all their previous ſtudies had lain in an entirely different direction, and when their minds had not been prepared by the habitual conſideration of ſuch matters to take an exact and comprehenſive view of the caſe before them in all its bearings."

[g] Hans. 3 S. vol. 111, p. 608.

But not only is there an abſence of the neceſſary training in the legal mind for the ſolution of theological queſtions, it may very juſtly be ſuſpected that a poſitive lack of neceſſary information, for the deciſion of the matters ſubmitted to the Court, would often be found. The field of Chriſtian doctrine and the national faith is a very wide one. To have maſtered its details implies no inconſiderable amount of reading, and that in ſeveral languages. And here, for one, I muſt proteſt againſt a very prevalent notion, that an opinion of any value can be formed by running to text-books, or turning out a word in an index, and referring to iſolated paſſages

bearing on the matter. In the first place, some of our most renowned text-books mislead most grossly, and the most serious and mischievous blunders[h] have in the highest quarters been made within a very few years by placing confidence in them. But even where they are right, and supposing them to be quite right in any particular case, it is very certain that a sudden application to a new subject, and a cursory glance at sources of information previously unstudied, do not ordinarily qualify any one for forming a correct judgment. Previous acquaintance with a subject is no more than necessary for such a purpose.

[h] Judgment Court of Exchequ. July 8, 1850.

And in corroboration of the suspicion that the Final Appeal Court, as at present constituted, does not possess the requisite information for the spiritual functions assigned to it, it must be frankly said that *obiter dicta* have been heard to fall from that tribunal by those who take an interest in attending its proceedings, which plainly

CHAP. IV. teſtify that ſome very ſtrange miſapprehenſions ſometimes find place there in the judicial mind on very ſimple elements of theological learning. Indeed, a very high ornament of the legal profeſſion, and one charged with the moſt important functions, has been known to declare, if it fell to his lot to decide ſome queſtions of ſpiritual learning, that, after having heard the elaborate and, at times, ſomewhat perplexing arguments of counſel on the matter in hand, he ſhould be compelled to reſort to the expedient of toſſing a coin of the realm into the air and concluding his judgment according to that ſide of the piece which fell uppermoſt. If this was ſaid in joke it is a joke which very ſurely is founded on ſolid and ſober truth. When the noble lord, who ſo long preſided over the deliberations of the Judicial Committee, declared (as before ſaid) that "in ſome caſes[1] he required the aid of a ſpiritual body in forming his judgment," he aſ-

[1] Hans. 3 S. vol. 111, p. 633.

ſuredly ſpoke words of truth and ſoberneſs, for doubtleſs the need of full previous information on the matters ſubject to adjudication cannot rightly be diſpenſed with on ſuch grave occaſions.

There is another poſſible condition of circumſtances under which the competence of the Court lies open to ſtill graver ſuſpicion. And that is a condition by no means improbable. Indeed, it is ſaid that it has been very lately realized. Suppoſe a new hereſy invented, and that there are no poſitive documents which could be cited preciſely bearing on the point. Then if the Court is only a Court of interpretation, as is conſtantly aſſerted and fully admitted, the very elements upon which to found a deciſion would be abſent. Some external information would certainly here be requiſite beyond that ſupplied by the authorized formularies themſelves. A more extended inſight into theological learning would be quite needful for arriving at

CHAP. IV. juſt concluſions; and this is an inſight which could very hardly be expected, ſave in thoſe who had made the ſubject their ſpecial ſtudy.

From the foregoing conſiderations, it is no wonder if a very general impreſſion prevails that a more ſpecial training of the mind, and a more comprehenſive and more exact knowledge of the ſubject-matter involved, than is now the caſe, is needed by the members of the Judicial Committee of Privy Council for the ſatisfactory deciſion of ſpiritual queſtions. And though it is impoſſible to over-eſtimate the high qualifications of that Court for the performance of all its other functions, ſtill one ventures to hope that no juſt offence will be given by expreſſing grave doubts of its competence to diſcharge ſatisfactorily thoſe now under view.

IV. *Diſſenters poſſible Members of Court.*

THE third ground of complaint is that the members of the Court are not neceſſarily members of the Church of England. And that this is a juſt ground of complaint we have the teſtimony of the noble lord the chief author of the ſtatute which eſtabliſhed the Judicial Committee. Some years after that tribunal had been in exiſtence he aſſured the Houſe of Lords, when ſpeaking on the ſubject of judgments involving doctrine, that "he[k] conſidered that any member of the Council, not being a member alſo of the Church of England, ought not to ſit in ſuch caſes." The juſtice of this grave opinion, given on ſuch grave authority and on ſo grave an occaſion, will hardly be diſputed. In this age great uneaſineſs is expreſſed in many quarters at any limitations, however juſt, at any reſtrictions, however

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[k] Hans. 3 S. vol. 111, p. 628.

CHAP. IV. wholeſome, being aſſigned, by proper authority, as boundaries of faith and doctrine. But to have ſuch limitations and reſtrictions defined in matters of the national faith, by perſons who do not even profeſs to hold that faith, is a ſtrange anomaly. Yet againſt ſuch an anomaly there is no guarantee whatſoever under our preſent ſyſtem. And not only is there no guarantee againſt this anomaly, but it would be ſtatutably legal. It muſt, moreover, be ſaid that there is ſome riſk of ſuch a ſtate of things occurring, when a Privy Councillor has thought it conſiſtent with his duty to enrol himſelf as a member of the "Liberation Society," an inſtitution chiefly remarkable for its bitter animoſity and untiring hoſtility to the Church of England.

Not only is this ſtate of things an anomaly,—that is far too mild a deſcription;—it is a cruel hardſhip. We do not think highly of the management of conquerors,

even Chriſtian ones, who have forcibly compelled the vanquiſhed to accept their victors' faith. But if they had gone about to ſit in judgment on the terms of their victims' own religion, to model and define that by their foreign arbitration, we ſhould perhaps think worſe of them ſtill. It is really a barbarous exerciſe of power, and one to which none but the moſt ſlaviſh diſpoſition would quietly ſubmit, that the definition of the doctrines of any man's religion ſhould be committed to the arbitrament of thoſe who hold a different faith. But that a Chriſtian nation ſhould ſtatutably ſubject its own faith to ſuch a proceſs is, indeed, paſſing ſtrange. And every Churchman in this land has juſt ground of complaint on public as well as perſonal grounds againſt ſuch inhuman legiſlation as this:— CHAP. IV.

οὐκ ἔστι νόσος
τῆς δ' ἥντιν' ἀπέπτυσα μᾶλλον.
Prom. V. 1105-6.

V. *Preſent Court an Anomaly in Juriſprudence.*

CHAP. IV. THE fourth ground of complaint againſt the preſent Court of Final Appeal is that the ſyſtem now eſtabliſhed is in direct contradiction to the whole genius of Engliſh juriſprudence. That Spiritual queſtions ſhould be tried by Spiritual Courts, or at leaſt by Courts in which the ſpiritual element prevailed, was the univerſal practice in this country, until the legiſlation of 1833 relegated them, in the laſt reſort, to a purely lay tribunal. That a very abſurd anomaly was thus introduced into our judicial ſyſtem may perhaps be demonſtrated by an illuſtration better than by any other means. Suppoſe that, under the preſent ſtate of things, the patron of a living were to enter an action, under the form of *quare impedit*, in a Common Law Court, againſt a Biſhop for refuſing to inſtitute a clergyman to that benefice;

ſuppoſe the Biſhop were to plead in defence that the Clerk in queſtion held, and had preached, the doctrine, ſay, of "Patripaſſianiſm:" the Judge of the Common Law Court would ſurceaſe from proceeding, on the ground that the plea would be good in caſe "Patripaſſianiſm" was contrary to the doctrine of the Church of England. Of that point he would ſay that the Common Law Court, as being a lay tribunal, was no judge, and he would deſire an iſſue to be tried in the Spiritual Courts to decide the queſtion. Suppoſe the Spiritual Court to find that the Clerk was a heretic. From ſuch deciſion an appeal would then lie on the doctrinal queſtion to the Judicial Committee of Privy Council, a purely lay tribunal, a Court of civil judicature, not one ſpiritual perſon being ſtatutably a member of it. Thus a cauſe which had been relegated from a Common Law Court, on this very ground that it was a lay tribunal, to a Spiritual Court, CHAP. IV.

CHAP. IV. would be carried back, in the final event, to a tribunal lying under the very ſame incapacity as that which, according to the received principles of Engliſh juriſprudence, neceſſitated the firſt relegation. But really ſuch flagrant contradictions as theſe in legal proceedings are not creditable, nor do they appear more tolerable when it is remembered that the ſyſtem which entails them is of muſhroom growth. The alternative ſeems patent enough; either our traditional and more venerable method of procedure muſt have been erroneous, or this modern plan muſt be altogether indefenſible.

VI. *Juriſdiction obtained by an Accident.*

THE fifth ground of complaint againſt the preſent Court of Final Appeal is that the juriſdiction it exerciſes over the very higheſt ſubject-matter—that of faith and doctrine,—fell to its lot by an accident.

It is unneceſſary to repeat the unanſwerable evidence of this fact, as detailed above at pp. 74-81. The teſtimony, however, of the late Biſhop of London, and of Lord Brougham, may fitly be here cited. The former, when ſpeaking of the ſubſtitution of the Judicial Committee for the Court of Delegates, ſaid that on that occaſion the queſtion of doctrinal appeals was "not[1] alluded to." "The reaſon of which," he added, "I ſuppoſe was this, that appeals to that Court in ſuits involving queſtions of doctrine had been ſo exceedingly rare . . . that the contingency of ſuch an appeal came into no one's mind." Lord Brougham alſo admitted that juriſdiction in caſes of doctrine fell *per incuriam* to the Court. His words, as before quoted, were, "He[11] could not help feeling that the Judicial Committee of Privy Council had been framed without the expectation of [ſuch] queſtions . . . being brought before it. It was

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[1] Hans. 3 S. vol. 111.

[11] Ibid. p. 629.

CHAP. IV. created for the conſideration of a totally different claſs of caſes, and he had no doubt that, if it had been conſtituted with a view to ſuch caſes . . . ſome other arrangement would have been made."

It was ſhown above, pp. 79, 80, how this unhappy cataſtrophe really occurred in the year 1833. And ſo from inadvertence on the one hand, and a careleſs uſe of terms on the other, in drafting an Act[m] of Parliament, one of the higheſt and moſt important branches of judicature, involving intereſts connected not only with this world, but the next, fell, by a hap-hazard chance, to a Court no way qualified for the duties aſſigned, and to which thoſe intereſts never would have been committed with deliberate purpoſe and on ſufficient conſideration. This ſurely ſupplies good ground for complaint, and amply juſtifies the loudeſt appeals for a remedy.

[m] 3 & 4 Will. IV. 41.

It is further to be noted that the eccleſiaſtical authority of this Court cannot

plead a word on the ſcore of antiquity in its favour. The unfortunate miſchance which conferred this juriſdiction in matters ſpiritual is of very recent date, ſo that no ancient uſage or cuſtom can throw any mantle of defence round it. Venerable antiquity might confer on it ſome conſtitutional claim for reſpect, even though its origin was remotely traceable to an error. But it cannot boaſt even of the recommendation of ancient cuſtom to reconcile us to its exiſtence. It is of muſhroom exiſtence, a creation comparatively of yeſterday. It ſprung up indeed at firſt unobſerved and in retired obſcurity, but from its ſudden expanſion, its ſtrange growth, and its dangerous qualities, it ſoon attracted unenviable notoriety, and has become the ſubject of juſt ſuſpicion, alarm, and complaint. CHAP. IV.

VII. *Spiritual Queſtions referred to a Lay Tribunal.*

THE ſixth and laſt ground of complaint

CHAP. IV. now to be mentioned againſt the Court of Final Appeal is, that, under the preſent law, ſpiritual queſtions are referred to lay judges. Now to ſome minds this appears to be the greateſt offence of all in the preſent ſyſtem, indeed, ſo great as to caſt all others into the ſhade. Yet, of courſe, I am aware that to other minds this may appear to be no offence at all. That is to ſay, that the mere fact of the Court's being a lay tribunal, irreſpective of any other diſqualification, may appear to them to afford no juſt ground whatever for diſſatisfaction. However, as I ſuggeſt this as a diſtinct ground of complaint, it behoves me at leaſt to endeavour to ſhow it to be a juſt one.

(*a.*) Now, in the firſt place, to refer ſpiritual queſtions to the arbitration of lay judges is againſt the original conſtitution of the Church of Chriſt.

"There is," ſaid the late Biſhop of London, when addreſſing the Houſe of

Lords on this ſubject,[n] "an inherent and indefeaſible right of the Church to teach and maintain the truth by means of her ſpiritual paſtors and rulers, a right inherent in her original conſtitution and expreſsly granted to her by her Divine Head in the terms of the apoſtolical commiſſion." "Go[o] ye, therefore, and teach all nations," were the Lord's words on the Galilæan mount. That was a duty committed alone to His apoſtles and thoſe who ſhould ſucceed them, and, ſo far as can be ſhown by juſt example, may not be publicly uſurped by any others.

CHAP. IV.

[n] Hans. 3 S. vol. 111, p. 619.

[o] S. Matt. xxviii. 19.

This fundamental principle of the Chriſtian Church,—that thoſe who were ordained to her miniſtry, and thoſe only, ſhould be the arbiters of her doctrine—then eſtabliſhed by her Lord as an original part of her conſtitution, formed the footſtone of her authoritative proceedings, in reſolving thoſe doubts which early aroſe within her borders. And that

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has remained a fixed principle ever ſince ſave in inſtances of unjuſt uſurpation. Within about ſeventeen years of our Saviour's crucifixion a diſcuſſion aroſe as to whether the Gentile converts ſhould be taught the neceſſity of circumciſion on their admiſſion into the Chriſtian Church. To determine this queſtion it was agreed that S. Paul and S. Barnabas[p] ſhould go up to Jeruſalem; and on their arrival "the[q] apoſtles and elders came together to conſider of this matter." The deciſions arrived at were forwarded to Antioch in the name of the apoſtles and elders, and of the whole Church. And though the whole Church at Jeruſalem then conſented to the judgment, yet it is obſervable that it was to the apoſtles and elders,[r] and to them only, that S. Paul and S. Barnabas were ſent about the matter under diſcuſſion. They were the apoſtles and elders, and they only, who came together to "conſider[s] of this matter." And further,

[p] Acts xv. 2.

[q] Ibid. 6.

[r] Ibid. 2.

[s] Ibid. 6.

the judgment then given is afterwards mentioned in Holy Writ as having been determined by the apoſtles and elders and by them only. For when S. Paul proceeded on his ſecond journey, in company with Silas, as they paſſed through the cities "they[t] delivered them the decrees for to keep that were ordained of the apoſtles and elders which were at Jeruſalem."

CHAP. IV.

[t] Acts xvi. 6.

Now this element of the original conſtitution of the Chriſtian Church, as eſtabliſhed by her Lord Himſelf, and thus illuſtrated by apoſtolic practice, prevailed throughout all the firſt ages of her exiſtence. All her early hiſtory, all accounts of her firſt Councils teſtify to this fact, that the arbitration of ſpiritual queſtions was confined to ſpiritual judges. And when on occaſion laymen conjoined their authority to that of her ordained miniſters, by ſigning their names to recorded judgments, the ſignatures[u] of the clergy ran—*ego definiens ſubſcripſi*,—thoſe of the laity

[u] Field, Of the Church, p. 646, ed. 1635.

CHAP. IV. in quite a different form,—*ego conſentiens ſubſcripſi.*

And ſo to refer the law divine to the arbitration of laymen is againſt the original conſtitution of Chriſt's Church.

(*b.*) In the ſecond place, to refer ſpiritual queſtions to the arbitration of lay judges is againſt the practice which prevailed in Chriſtian ſtates in the early ages of the Church.

That great change in the world's hiſtory, the adoption of Chriſtianity by the civil power, was allowed to work no change in this reſpect on the original conſtitution of the Church. We continually find the perſonal teſtimony of the higheſt authorities in thoſe times accorded to this principle, that ſpiritual queſtions ſhould be reſtricted to the arbitration of ſpiritual judges. The Emperor Conſtantine, at the Council of Nice, teſtifying his joy at being ſurrounded by ſo auguſt an aſſembly, declared that "he[x] himſelf deſired

[x] Conc. Nic. July 3, 325.

to appear in the Council ſimply as one of the faithful, and that he freely left to ths Biſhops the ſole authority to ſettle queſtions of faith." Valentinian the Elder, when the condemnation of Arianiſm was propoſed, ſaid that "he[y] himſelf being one of the laity might not meddle in ſuch matters, and thereupon willed that the clergy, to whom the care of ſuch things belongeth, ſhould meet and conſult together by themſelves where they thought good." Theodoſius the Great declared that it was unlawful for a layman, however exalted, "to[z] interpoſe in religious affairs." To the ſame purpoſe are the words of the Emperor Baſilius, "Laymen[a] muſt by no means meddle with cauſes eccleſiaſtical, nor oppoſe themſelves to the unity of the Church or Councils Œcumenical." In fine, the practice of the early Chriſtian emperors is fully expreſſed in thoſe pregnant words of Caſaubon, "The[b] pious emperors ſanctioned

CHAP. IV.

[y] Soz. lib. vi. c. 7; Eccl. Pol. 3. 337.

[z] Coll. Eccl. Hiſt. vi. 247.

[a] Jer. Taylor, Works, vii. 210.

[b] De Lib. Ecc. ii. 5.

CHAP. IV. the reception of thoſe things by all the people which the Fathers of the Church had decreed."

And ſo to refer ſpiritual queſtions to the arbitration of lay judges is againſt the practice which prevailed in Chriſtian ſtates in the early ages of the Church.

(*c.*) In the third place, to refer ſpiritual queſtions to the arbitration of lay judges is contrary to the principles laid down by an unbroken ſucceſſion of the moſt truſtworthy authorities.

De Marca, ſpeaking of the proceedings of the Emperor Theodoſius, with reſpect to eccleſiaſtical juriſdiction, ſays:—

[c] De Concord. Sacerd. et Imperii. tom. iii. fol. 200, Bamb. 1788.

"Eximiâ[c] profectò auctoritate potiti ſunt Imperatores Romani in rebus et judiciis eccleſiaſticis. Sed nullum, ut exiſtimo, proferri poteſt exemplum judicii canonici ab uno Epiſcopo redditi, de quo ſtatim rectâ viâ querela delata eſt ad principem. Illi judices eccleſiaſticos dabant, nunquam autem de re canonicâ cognitionem ſuſcipiebant, ſed de ordine judiciorum."

[d] De Promulg. Leg. Ecc. tom. iv. fol. 164, Lovan. 1753.

Van Eſpen writes in the ſame ſenſe:—

"Indubitatum,[d] eſt examen ac deciſionem fidei, Eccleſiæ ejuſque miniſtris, non autem principibus

laicis, a Deo concreditam. . . . Nec id unquam Principes Catholici ſibi attribuerunt, ſed ipſos Pontifices et Epiſcopos et Eccleſiæ paſtores, judices doctrinæ nunquam non agnovêre."

Again, that ſame writer thus diſtinguiſhes between the civil and eccleſiaſtical functions touching matters ſpiritual:—

"Aliud[e] enim longe eſt principem ſe interponere promulgationi novæ legis per ſuas provincias ejuſque executioni, et aliud velle judicare de ipſis articulis et dogmatibus, ſive quid de fide credendum, vel non credendum definire."

[e] De Promulg. Leg. Ecc. tom. iv. fol. 164, Lovan. 1753.

The diſtinction thus expreſſed by the greateſt of modern canoniſts regulated the exerciſe of the imperial or royal ſupremacy in the "*Appellationes tanquam ab abuſu*,"—the "*Appel comme d'abus*,"—a ſubject which has received great attention from the French lawyers and divines. It has been largely treated[f] of by M. Lainé, as quoted by M. Dupin, in his "Manuel du droit Eccléſiaſtique." And the interference of the civil power is by them repreſented as being ſpecially limited to three caſes. 1. When eccleſiaſtical autho-

[f] See Biſhop of London's Speech; Hans. 3 S. vol. 111, p. 612.

CHAP. IV. rities had exerciſed an exceſs of ſpiritual power; 2. When they had violated the laws of the kingdom and the rights of citizens; 3. When they had committed outrage or violence in the exerciſe of eccleſiaſtical functions. But under that form of appeal no right of interference was ever claimed by the civil power in the determination of purely ſpiritual queſtions. The doctors of the Sorbonne ſtrenuouſly aſſerted the liberties of National Churches in this reſpect, upon the principle that, as in queſtions of faith they could decide independently of the Pope, *à fortiori*, they could decide independently of the Prince. Pope Clement VII. was addreſſed by one of their moſt celebrated writers, Petrus Alliacenſis, in the name of the whole faculty, on the ſubject, and he aſſerted that to exclude Biſhops from the examination and deciſion of ſpiritual queſtions was "*contra jus tum divinum quum huma-*

num." In maintaining this principle of independence in matters ſpiritual the celebrated Boſſuet afterwards bore a conſpicuous part in his defence of the liberties of the Gallican Church. And in the eccleſiaſtical law of France that principle is ſtill acknowledged, for though the "*Appel comme d'abus*" yet exiſts, it is admitted only where the rights of ſubjects are involved, not in queſtions of faith and doctrine.

But to come to the authorities of our own country, we have the teſtimony of our moſt renowned Juriſts very plainly recorded on this ſubject,—Sir Edward Coke, Lord Bacon, Sir William Blackſtone, may all be quoted. Sir Edward Coke's words are:—

"Certain it is that this kingdom hath been beſt governed, and peace and quiet preſerved, when both parties, that is when the juſtices of the temporal Courts and the Eccleſiaſtical judges, have kept themſelves within their proper juriſdictions, without encroaching or uſurping one upon another, and when

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

Sir Edward Coke alſo ſaid, in the caſe of *quare impedit*,—

"If the cauſe of refuſal to inſtitute be ſpiritual, the Court ſhall write to the Metropolitan to certify thereof."

Lord Bacon, ſpeaking of queſtions touching the law divine, ſays that they ſhould be—

[i] Works, vol. ii. p. 512, 513.

"Left[i] to the holy wiſdom and ſpiritual diſcretion of the maſter builders and inferior builders in Chriſt's Church."

Sir William Blackſtone ſays:—

[k] Comm. vol. i. p. 389.

"If[k] the cauſe be of a ſpiritual nature (as hereſy particularly alleged) the fact if denied ſhall be determined by a jury, and if the fact be admitted or found, the Court, upon conſultation and advice of learned divines, ſhall decide its ſufficiency."

In *Specot's* caſe the Court of King's Bench ruled that—

"It doth not appertain to the King's Court to determine ſchiſms and hereſies; and where the ori-

ginal cauſe of the ſuit is matter whereof the King's Court hath cognizance, the King's Court is to conſult with divines to know whether it be ſchiſm or not." CHAP. IV.

And the evidence of all this high legal authority may finally be ſummed up in the words of Bracton, contained in one of the moſt ancient, as well as the moſt methodical and accurate, treatiſes on Engliſh law ever written. In ſpeaking of the diſtinction between civil and eccleſiaſtical juriſdiction he ſays:—

"Cum[1] diverſæ ſint hinc inde juriſdictiones, et diverſi judices, et diverſæ cauſæ, debet quilibet ipſorum imprimis æſtimare an ſua ſit juriſdictio, ne falcem videatur ponere in meſſem alienam." [1] Lib. v. c. 2, p. 401. Ed. Lond. 1569.

And again, in the ſame ſenſe, he writes:—

"Non[11] pertinet ad regem injungere pœnitentias, nec ad judicem ſecularem, nec etiam ad eos pertinet cognoſcere de iis, quæ ſunt ſpiritualibus annexæ." [11] Ibid.

Such teſtimony we have on this point upon the foregoing authority of the moſt learned Canoniſts and Juriſts.

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Of courſe the teſtimony of divines might be quoted to an indefinite length on this head, but perhaps ſome perſons might be diſpoſed to give leſs weight to their opinions from a lurking ſuſpicion that they were over-favorable to the authority of their own order. However, the evidence of ſome ſhall be produced.

A public epiſcopal document of King Henry VIII.'s time contains the following words: "In[m] matters of faith and interpretation of Scripture no man made definitive ſubſcription but Biſhops and Prieſts, foraſmuch as the declaration of the word of God pertaineth unto them." The great ſchoolman, Field, when ſpeaking on the ſubject of ſpiritual deciſions, ſays: "We[n] all teach that laymen have no voice deciſive, which may be confirmed by many reaſons." On three of thoſe reaſons that learned author dilates; the firſt being drawn from the nature of the relationſhip between a paſtor and a flock; the

[m] Atterbury: Rights, pp. 15, 16.

[n] Of the Church, bk. v. p. 646.

second from the apostolic dissertation on the gifts which He who "ascended[o] up on high gave unto men;" the third is based on historical precedent. Hooker says, "Of[p] this most certain we are, that our laws do neither suffer a Spiritual Court to entertain those causes which by the law are civil, nor yet if the matters be indeed spiritual, a mere Civil Court to give judgment of it." Jeremy Taylor designates the introduction of lay judges into matters spiritual as "an[q] old heretical trick." And speaks of it as "a[r] pretty pageant, only that it is against the Catholic practice of the Church, against the exigence of Scripture, which bids us require the law at the mouth of our spiritual rulers." The learned Barrow, who never committed himself to any assertion which would not stand the test of strictest scrutiny, asserts that "the[s] power of managing ecclesiastical matters did, according to primitive usage, wholly reside in spiritual guides." And, finally, the

[o] Eph. iv. 8.

[p] Ecc. Pol. 3. 359, 360.

[q] Works, vol. 7. p. 208.

[r] Ibid. 209.

[s] Serm. 57. vol. iii. p. 311.

CHAP. IV. united judgment of thoſe learned perſons who, at the period of the Reformation, compiled the digeſt of eccleſiaſtical law, then intended for the regulation of the Engliſh Church, and known as the "*Reformatio legum Eccleſiaſticarum*," lent the whole weight of their authority to the principle now contended for. On the ſubject of an appeal carried, in a ſpiritual cauſe, to the Crown, their language is as follows:—

[t] Ref. Leg. deApp.c.11, p. 283.

"Quo[t] cum fuerit cauſa devoluta, eam vel concilio provinciali definire volumus ſi gravis ſit cauſa, vel a tribus quatuorve Epiſcopis."

And ſo to refer ſpiritual queſtions to the arbitration of lay judges is contrary to the principles laid down by an unbroken ſucceſſion of the moſt truſtworthy authorities.

(*d.*) In the fourth place, to refer ſpiritual queſtions to the arbitration of lay judges is a breach of the compact between the Church and the State of England.

That compact can be found wholly

represented in no one instrument. It can be traced to no one specific date. It is made up of various elements, and must be sought in decisions of great Councils, in Canons of Synods (which need not be particularly specified), in acknowledged obligations of the Crown, in Acts of Parliament, in declarations of Princes, in the Common Law, and in immemorial usage. To such various sources for information on this subject we must have recourse. CHAP. IV.

Now in Saxon times we find this compact very early existing. The first clause in the Acts of the Mixed Council of Brasted, A.D. 696, enacted by King Withred, with the assent of his Princes and the whole assembly, runs thus—"*Let*[u] *the Church be free and maintain her own judgments.*" That is the footstone on which the union of Church and State was then laid. In the later ages of the Saxon period it is well known that the Bishop and the Sheriff,

[u] Spel. Conc. I. 194.

CHAP. IV. or Alderman, preſided in the County Court, the one for the deciſion of ſpiritual, the other for that of civil cauſes. And this principle, that ſpiritual queſtions ſhould be confined within the province of the ſpiritual judge, is plainly laid down in the laws of King Edgar:—

[x] Leg. Ed. "Celeberrimo [x] huic conventui Epiſcopus et Aldermannus interſunto, quorum alter jura divina, alter humana, populum edoceto."

The words of that ſame monarch to Archbiſhop Dunſtan and his ſuffragans (A.D. 969) are to the ſame purport, enforcing the diſtinction between civil and ſpiritual authority. "I," [y] ſaid he, "wield the ſword of Conſtantine, you that of Peter."

[y] Conc. Mag. B. 1. 246.

And when the changes introduced by the Norman inſtitutions effected a diſtinct ſeparation between the Eccleſiaſtical and Civil Courts, it was expreſsly forbidden that ſpiritual cauſes ſhould be ſubmitted to lay judges. This was definitely laid

down by the Charter of King William I, A.D. 1085, in the following words:— CHAP. IV.

"Nec[z] cauſam, quæ ad regimen animarum pertineat, ad judicium ſecularium hominum adducant. Sed quicunque ſecundum Epiſcopales leges de quâcunque causâ vel culpâ interpellatus fuit, ad locum, quem ad hoc Epiſcopus elegerit et nominaverit, veniat, ibique de causâ vel culpâ ſuâ reſpondeat. . . . Hoc etiam defendo et meâ authoritate interdico, ne ullus vicecomes aut prepoſitus ſeu miniſter regis, nec aliquis laicus homo de legibus, quæ ad Epiſcopum pertinent, ſe intromittat."

[z] Charta Reg. Will. I; MS. Lynd. ad init. my copy.

The Eighth Conſtitution[a] of Clarendon expreſſly laid down that every ſpiritual queſtion ſhould here be terminated in the Court of the Archbiſhop, thus reſtricting to ſpiritual arbitration, within this land, all cauſes involving doctrinal contention.

[a] Spel. Conc. vol. ii. p. 63.

Then comes the keyſtone of Engliſh liberty, the charter of our national freedom. And what are the very firſt words of that time-honoured document? Magna Charta thus begins:—

CHAP. IV. "Libera ſit Eccleſia habeatque ſua jura libertateſque illæſas."

It ſhould be remembered that this charter of the rights and liberties of the Church received freſh national confirmation in the reigns of King Henry III, King Edward I, King Edward III, King Richard II, King Henry IV, and that in ſome inſtances ſeveral times repeated. And the very firſt of thoſe rights and privileges is to arbitrate on her own doctrines.

The thirteenth chapter of the ſtatute "Articuli Cleri," deſcribed by Lord Coke, not merely as enacting, but as declaratory of, the common law and cuſtom of the realm, runs thus:—

[b] Cited in Hans. 3 S. vol. 111, p. 610.

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

The anſwer is,— CHAP. IV.

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

Even in the reign of Henry VIII, that moſt rapacious graſper of rights and privileges no way appertaining to him, when by ſtatute (26 Henry VIII. c. 1.) "*the King's Grace was authorized to be Supreme Head,*" this capacious title was by no means interpreted to confer authority on the Crown to give final judgment by lay authority on matters of faith. It is explained to a much more inoffenſive ſenſe in a State Paper lately diſcovered by Mr. Froude[c] in the Rolls Houſe MSS, the words of which are as follow. The King does not—

[c] Hiſt. Eng. vol. ii. p. 326.

"Pretend thereby to take away any power from the ſucceſſors of the Apoſtles that was given to them by God . . . ." Nor did "the King's Grace, his nobles, or ſubjects intend to decline or vary

CHAP. IV. from the Congregation of Chriſt's Church in anything concerning the Articles of the National Faith."

Indeed, whatever may have been falſely ſaid to the contrary, it is quite plain that throughout this reign queſtions of the law divine were generally thought to be conſtitutionally reſtrained to the ſpiritualty. For though Acts of Parliament frequently dealt with ſpiritual matters; yet it is evident to thoſe who take the trouble to inveſtigate dates, that ſuch matters were previouſly ſettled in the Provincial Synods, and ſubſequently ratified by the civil legiſlature. And indeed this courſe was followed not only in matters of pure ſpiritual cognizance, but often in ſuch as only touched on eccleſiaſtical juriſdiction. The nullification of Queen Catherine of Arragon's marriage was wholly the act[d] of the Convocations. The divorce of Queen Anne Boleyn was ſanctioned[e] by the ſame authority. The nullification of Queen

[d] Conc. Mag. B. 3. 756-767. 759.
[e] Ibid. 803, 804.

Anne of Cleves' marriage was entirely decided by the ſame tribunal, and its hiſtory affords a moſt impoſing inſtance[f] of the judicial functions then exerciſed by the ſpiritualty. To have ſubmitted a queſtion of faith and doctrine to lay judges would certainly then have excited a meaſure of ſurpriſe ſtrangely contraſting with the indifference with which ſuch a courſe is at this day witneſſed. CHAP. IV.

[f] Conc. Mag. B. 3. 851-854.

Nor were matters in this reſpect changed in the next generation.

It is notorious that the Supremacy Act[g] above referred to, having been repealed in the reign of Queen Mary, was, among others in like condition, revived in the firſt year of Queen Elizabeth, but in a more inoffenſive form, the term "Supreme Governor"[h] being then ſubſtituted for that of "Supreme Head." And even leſt that leſs ſurpriſing title ſhould ſeem to challenge defining authority for the Crown in matters purely ſpiritual, her

[g] 26 Hen. VIII. c. 1.

[h] 1 Eliz. c. 1.

CHAP. IV. Majeſty thought fit, by her injunctions, to diſclaim ſuch an interpretation in the words following:—

[i] Qu. Eliz. Injunct. A.D. 1559. Spar. Coll. p. 83.

"Certainly[i] her Majeſty neither doth nor ever will challenge any authority than that was challenged and lately uſed by the noble Kings of famous memory, King Henry VIII. and King Edward VI, which is and was of ancient time due to the Imperial Crown of this realm, that is, under God, to have the ſovereignty and rule over all manner of perſons born within theſe her realms, dominions, and countries, of what eſtate, either eccleſiaſtical or temporal, ſoever they be, ſo as no other ſovereign power ſhall, or ought to have, any ſuperiority over them."

Here, again, we find the civil power reſtrained to ſovereignty over perſons, *i. e.* excluding Roman aſſumption, and to that meaſure of authority of ancient time due to the Imperial Crown of this realm. And ſuch meaſure of authority moſt unqueſtionably never extended anciently to arbitration in queſtions of faith.

Again, the royal declaration prefixed to the Articles of Religion in King Charles the Firſt's reign, and pledging ſubſequent

Sovereigns by its preſence, clearly reſtrains ſpiritual queſtions to ſpiritual arbitrament:—

"If[k] any difference ariſes about the external policy concerning the injunctions, canons, and other conſtitutions whatſoever thereto (*i. e.* the Church) belonging, the Clergy, in their Convocation, is to order and ſettle them."

[k] Pref. to 39 Articles.

The Bill of Rights, another defence againſt uſurpations, ſet forth a virtual repetition of thoſe memorable enactments of the Council of Braſted and of Magna Charta,—"Let the Church be free,"—when it reprobated the relegation of ſpiritual cauſes to a civil tribunal in theſe words:—

"The[l] Commiſſion for erecting the late Court of Commiſſioners for Eccleſiaſtical Cauſes, and all other Commiſſions and *Courts of a like nature*, are illegal and pernicious."

[l] Echard, Hiſt. Rev. p. 264; 1 Will. & Mary, c. 2. s. 36.

Eight out of the then twelve Judges, with the Attorney and Solicitor General, in Queen Anne's time, added the weight of their authority to enforce the principle that ſpiritual queſtions ſhould be decided

CHAP. IV. by ſpiritual judges when they gave this opinion on a caſe ſubmitted to them by the Crown :—

[m] Card.Syn. 2. 762. "We[m] humbly lay before your Majeſty that all our law books that ſpeak of this ſubject, mention(ing) a juriſdiction in matter of hereſy and condemnation of heretics, as proper to be exerciſed in Convocation . . . and none of them that we find making any doubt thereof."

The Common Law of England, in the matter of prohibitions, is true, and always has been, to the principle here contended for. It is diſtinctly laid down that—

[n] 2 Roll. Rep. 439; 1 Bulſt. 159. "If[n] the Eccleſiaſtical or Spiritual Courts proceed wholly on their own Canons they ſhall not be prohibited by the Common Law, for they ſhall be preſumed to be the beſt judges of their own laws."

And again,—

[o] March.92. "When[o] the Eccleſiaſtical Court hath the ſole cognizance of a cauſe their proceedings are not examinable at Common Law, though erroneous, and no prohibition will lie."

And again,—

[p] 2 Lill. 386. "If[p] a matter is properly determinable in the

Spiritual Courts, and they make an erroneous decree, the King's Bench will not grant a prohibition." CHAP. IV.

Thus this venerable compact, that—"*the Church ſhould be free and maintain her own judgments*,"—has been ratified over and over again, and confirmed in all ages of our hiſtory, by acts of Councils, by Canons of Synods, by acknowledged obligations of the Crown, by Acts of Parliament, by declarations of Princes, by Common Law, and by immemorial uſage. The principle now maintained is ſo diſtinctly embodied in the preamble of the ſtatute (24 Hen. VIII. 12) that it ſhall be here tranſcribed. And as that document is the exact expreſſion of the preſent compact between the Reformed Church of England and the State of England; its contents deſerve the moſt careful conſideration, and ſhould be the foundation of all legiſlation which affects their joint intereſts.

Speaking of "this realm of England," it ſays:—

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[q] 24 Hen. VIII. 12. Preamble.

"The [q] body ſpiritual, whereof having power, when any cauſe of the law divine happened to come in queſtion or of ſpiritual learning, then it was declared, interpreted, and ſhowed by that part of the ſaid body politic called the ſpiritualty, now being uſually called the Engliſh Church, which always hath been reputed, and alſo found of that ſort, that both for knowledge, integrity, and ſufficiency of number, it hath been always thought, and is alſo at this hour, ſufficient and meet of itſelf, without the intermeddling of any exterior perſon or perſons to declare and determine all ſuch doubts, and to adminiſter all ſuch offices and duties as to their rooms ſpiritual doth appertain."

And laſtly, this ancient compact between the Church and the State, ſo heedleſsly broken in the year 1833, was from time to time ſolemnly ratified by the oath of every ſovereign, under our preſent conſtitution, who aſcended the throne of this realm. "Will you,"[r] inquired the Archbiſhop, on thoſe auguſt occaſions, "preſerve unto the Biſhops and Clergy of this realm . . . all ſuch rights and privileges, as by law do, or ſhall, appertain unto them, or any of

[r] Cor. Oath. Blacks. Com. 1. 235.

them?" "All this I promiſe to do," was the anſwer. And then, touching the holy Goſpels, the Sovereign added, "The things which I have here before promiſed I will perform and keep, ſo help me God," and then kiſſed the book. CHAP. IV.

And ſo to refer ſpiritual queſtions to the arbitration of lay judges is a breach of the compact between the Church and the State of England.

VIII. *Commiſſion of the Galilæan Mount.*

AND why is it that this compact between the Church and State—that the Church ſhould be "*free in her judgments*"—has been ſo emphatically declared, ſo frequently repeated, and ſo ſtringently ratified? Surely, becauſe it has ever been held, and rightly held, by both, that an authoritative judgment on faith and doctrine is the very higheſt expreſſion of the "teaching of the Word," for the intended effect and end

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of ſuch a judgment is to govern and direct the miniſtration of the Word throughout the whole region of the national Church. Such judgment is, in truth, a teaching of far wider extent and of far larger effect and influence than the teaching of any individual preacher or any number of individual preachers, becauſe it is directed to prevail throughout the entire range of the Church's inſtructions, whenever and wherever given. And this function of teaching the Word has never, till lately, been held to belong to the civil power.

The compact between the Church and State was originated, ratified, and continued upon the fundamental principle before quoted that it is "*the*[s] *inherent and indefeaſible right of the Church to teach and maintain the truth by means of her ſpiritual paſtors and rulers, a right inherent in her original conſtitution, and expreſsly granted to her by her divine Head*

[s] Bp. London, Speech, Hans. 3 S. vol. 111, p. 619.

in the terms of the Apoſtolical Commiſſion." CHAP. IV.

The words which the Lord, multiplying earthly ſupplies for the fainting multitudes in the wilderneſs, addreſſed to His miniſtering ſervants,—"Give ye them to eat,"—are but typical of that duty of feeding His people with the bread of life, which He finally enjoined on the mountain in Galilee, when He bade His Apoſtles "Go,[t] . . . and teach all nations." And this duty has been entailed, with the promiſe of Chriſt's preſence annexed,[u] on thoſe who, in unbroken ſucceſſion from thoſe Apoſtles, have been inveſted in the Church with the office of diſpenſing His divine word to her ſons, in her and through her, the food of their ſpiritual life.

[t] S. Matt. xxviii. 19.

[u] Ibid. 20

Of courſe it is, unhappily, too certain that by many perſons ſuch claims of authority, through apoſtolical ſucceſſion, will be received with a ſneer; but I muſt take leave to ſay that for the preſent

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purpoſe I am no way bound to eſtabliſh them by any argument, nor to ſhow that, in the words of Archbiſhop Bramhall, "Apoſtolical[y] ſucceſſion is the nerve and ſinew of Apoſtolical unity," nor that, in the words of Biſhop Beveridge, "Apoſtolical[x] ſucceſſion" is "the root of all Chriſtian communion." I am no way called upon for the preſent purpoſe, either to prove on the one hand the hiſtorical fact of a direct Apoſtolical ſucceſſion in our Church, nor on the other the neceſſity of it, whether to the perfection or to the exiſtence of a Church. Thoſe ſubjects might well demand proof on proper occaſions, but the preſent argument by no means requires it. For the State has fully, formally, and emphatically adopted the belief of the fact and all the conſequences thence enſuing.

[y] Works, vol. i. p. 112.

[x] Serm. vol. i. p. 23.

The belief in the direct tranſmiſſion of ſpiritual authority to teach the Word is the very groundwork of our ſecond

Ordination Service, unleſs indeed its terms contain a trap ſet to enſnare the conſciences of our biſhops, and practiſe a ſhameleſs deception on every man who receives prieſt's orders at their hands. And that ordinal has not only been accepted by the State, but has had the ſeal of ſtatute law ſet to it. So it is no way needful for the preſent purpoſe, in a queſtion as between the Church and the State, to adduce proof for that which an Act[y] of Parliament joins in ſolemnly enforcing. CHAP. IV.

[y] 13 & 14 Car. II. c. 4.

VIII. *Recapitulation.*

THE foregoing, then, are the grounds of complaint againſt the preſent Court of Final Eccleſiaſtical Appeal. 1. That there is no ſecurity for doctrine; 2. that the Court is incompetent; 3. that diſſenters are poſſible members; 4. that the preſent ſyſtem is an anomaly in reſpect of legiſlation; 5. that the juriſdiction was veſted in the Judicial Committee by an over-

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fight; 6. that ſpiritual queſtions are ſubmitted to a lay tribunal; and that this laſt courſe is againſt the original conſtitution of the Church of Chriſt, againſt the practice which prevailed in Chriſtian ſtates in the early ages of the Church, againſt the whole ſtream of truſtworthy authority, and is a breach of the compact between Church and State. For that venerable and ſolemn contract is ſadly rent by the preſent application of the proviſions of the Privy Council Act,[z] raiſing againſt the Church of England a threatening front of hoſtile defiance.

[z] 3 & 4 Will. IV. 41.

"... Quæ[a] cauſa fuit conſurgere in arma,
..... et fœdera ſolvere furto?"

[a] Virg. Æn. x. 90, 91.

CHAPTER V.

Suggestions for a Remedy of the Grievance.

I. *Introduction.*

IT is comparatively eaſy to find fault with moſt human ſyſtems, but to utter complaints without ſuggeſting any means of remedy is worſe than a uſeleſs employment. An inquiry will therefore now be made, whether ſome cure for the diſorders above ſpecified might be ſatisfactorily provided. This ſubject, however, as involving matters of great delicacy and difficulty, is to be approached with conſiderable diffidence, with due reſpect for

CHAP. V. the opinions of others, and with all proper conſideration for the acknowledged rights of the State as well as of the Church.

It is thought by many that the Church's abſolute freedom of judgment in doctrinal queſtions cannot be reconciled in the conſtitution of a Final Appeal Court with the Royal Prerogative and Supremacy. The Crown, inheriting ſuch attributes, and as the repreſentative of the State wielding the ſword, will never conſent, it is ſaid, to part with judgment in the laſt reſort in any cauſe whatſoever. Now let this be fully conceded, that the Crown, being ſupreme in all cauſes and over all perſons, ſhould give final judgment. But the preciſe queſtion before us is, how ſhould that judgment be arrived at? The fact being admitted that the Crown is ſupreme in external co-active juriſdiction, how ſhould the Crown, without infringing the liberties of the Church, come to a right and juſt determination, before pronouncing,

through the conſtituted Courts, a final deciſion? This is the real queſtion to be ſolved. And, as it ſeems to me, it may be ſolved, and ſolved ſatisfactorily, with due regard to all the privileges, authorities, rights, and intereſts involved. Before, however, proceeding to ſuggeſt any means for attaining ſo deſirable an end, it is needful to clear the way with ſome remarks. CHAP. V.

II. *Royal Supremacy.*

Now there are ſundry looſe and undiſtinguiſhing notions floating about in ſome minds on the ſubject of the Royal Supremacy, which are no way warrantable. An over-capaciouſneſs of graſp is frequently aſſigned. It cannot be reaſonably imagined that by this attribute the monarch is perſonally and individually empowered to give judgment in any eccleſiaſtical cauſe whatſoever, whether in inferior, ſuperior, or final Courts. "That[a] Kings

[a] Hooker, vol. iii. p. 348.

CHAP. V. may perſonally ſit in the Conſiſtory where the Biſhops do, hearing and determining what cauſes ſoever do appertain unto the Church; that Kings and Queens, in their own proper perſons, are *by judicial ſentence to decide the queſtions which do ariſe about matters of faith and Chriſtian religion* . . . finally that Kings may do whatſoever is incident unto the office of an Eccleſiaſtical Judge . . . we account abſurd."

The Biſhop of Oxford truly ſtated this matter to the Houſe of Lords, when he ſaid:—

[b] Hans. 3 S. vol. III, p. 666.

"No[b] man valued the Queen's Supremacy more than he, but he did not believe that it was a correct or conſtitutional interpretation of that Supremacy to ſay that the occupant of the throne ſhould ſettle, in his or her own individual capacity, articles of faith, or any other queſtions whatſoever. He was ſure that the exalted perſonage who at preſent occupied the throne would be herſelf the firſt to repudiate ſo unconſtitutional a doctrine. The Supremacy of the Crown meant nothing more or leſs than this, that the Crown had the ultimate appeal on all queſtions

Eccleſiaſtical and Civil, deciding ſuch queſtions not as of herſelf, but through her proper conſtitutional agents. How could it be ſaid to interfere with the Supremacy of the Crown to give additional means of information t othe Judges appointed under the Crown? How could it be ſaid to encroach on the royal prerogative to enact that for the future the law lords, when called upon to decide in matters of faith and ſpirituality, ſhould do ſo with the aſſiſtance and co-operation of the dignitaries of the Church?"

Royal Supremacy is not exerciſed by judgment perſonally given in the Courts, but only by inſiſting on juſtice being done in all and each, by authority properly conſtituted on the principles of the conſtitutional compact. For, when the Coronation Oath has been taken, "all[c] conſtitutional tranſactions between the Crown and ſubject are both eſſentially and formally legal covenants, King and people alike obeying the ſupremacy of the law," and the oath "is depoſited in the Chancery to be produced againſt the Sovereign ſhould the compact be infringed." In the Civil State

[c] Palgrave, Hiſtory of Normandy and England, p. 87.

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the axioms of our regal government are thus well expreſſed,—"*Lex*[d] *facit regem*"—"*Rex nihil poteſt niſi quod jure poteſt*"—"*The King's grant of any favour made contrary to the law is void.*" And ſuch principles are eloquently commended in thoſe pregnant words of Hooker, "Happier[e] that people whoſe law is their king in the greateſt things, than whoſe King is himſelf their law. When the King doth guide the State, and the law the King, that commonwealth is like an harp or melodious inſtrument, the ſtrings of which are tuned and handled all by one, following as laws the rules and canons of muſical ſcience."

[d] Hooker, Eccl. Pol. vol. iii. p. 308.

[e] Ibid.

And as in the Civil ſo in the Eccleſiaſtical State this harmony ſhould ever be maintained. The principles which govern the relations between the Crown and each of thoſe ſtates being analogous, ſo far as regards judicial ſentences, the ſpecial ſubject before us. "For[f] the received laws and liberties of the Church," ſays the

[f] Ibid. viii. 2. 17.

above-quoted judicious writer, "the King hath ſupreme authority, againſt them none," in accordance with thoſe words of S. Ambroſe, "*Imperator*[g] *bonus intra Eccleſiam non ſupra Eccleſiam eſt.*" And within what bounds, as regards deciſions on faith and doctrine, the Royal Supremacy is confined, we are aſſured by the ſtatutable words of the conſtitutional compact, which aſſerts of this realm of England, in words before quoted, "The[h] body ſpiritual, whereof, having power, when any cauſe of the law divine happened to come in queſtion, then it was declared, interpreted, and ſhowed by that part of the ſaid body politic called the ſpiritualty, now being uſually called the Engliſh Church."

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[g] Hooker, Eccl. Pol. vol. iii. p. 300.

[h] 24 Hen. VIII. 12. Preamble.

But not only are theſe limits aſſigned to the exerciſe of Royal Supremacy in reſpect of declaring doctrine, others alſo exiſt. For inſtance, the Crown never has been, and never can be ſuppoſed by any one of competent information to be

CHAP. V. charged with thoſe functions which all worthy precedent has combined to aſſign excluſively to the eccleſiaſtical order.

[i] Bp. Andrewes, Tortura Torti, p. 380.

"Neque[i] vero id agit rex, ne patitur quidem ut ſibi poteſtas ſit vel incenſum adolendi cum Oziâ, vel arcam attrectandi cum Ozâ. . . . *Docendi munus vel dubia legis explicandi* non aſſumit, non vel conciones habendi, vel rei ſacræ præeundæ, vel ſacramenta celebrandi; non vel perſonas ſacrandi, vel res; non vel clavium jus, vel cenſuræ. Verbo dicam, nihil ille ſibi, nihil nos illi fas putamus attingere, quæ ad ſacerdotale munus ſpectant, ſeu poteſtatem ordinis conſequuntur. Procul hæc habet Rex, procul à ſe abdicat."

Again, to the ſame purpoſe, Biſhop Bilſon writes:—

[k] Chriſtian Subjection, p. 297.

[l] Ibid. p. 327.

[m] Ibid. p. 332.

"That[k] princes may preſcribe what faith they liſt, what ſervice of God they pleaſe, what form of adminiſtering ſacraments they think beſt, is no part of our doctrine. . . . We[l] give princes no power to deviſe or invent new religions, to alter or change ſacraments, to decide or debate doubts of faith, to diſturb or infringe the Canons of the Church. . . . We[m] never ſaid that princes had any ſpiritual power, and the ſword which they beare we never called but

externall and temporall; for the true ſpirituall and eternal ſword is the Word of God." CHAP. V.

And though the fatal conſequences of any uſurped exceſs of authority on the part of the Crown may not always appear in the Church ſo viſible as they do in the State, "becauſe[n] many of them are of a ſpiritual nature, and ſuch as will only be known to their full extent when we come into the next world, yet as the Church is a ſociety no leſs orderly and regular in its conſtitution than any temporal kingdom whatever, ſo this uſurpation is equally inconſiſtent with the well-government and deſign of this ſpiritual, as it is with that of any civil ſociety."

[n] Potter, Ch. Gov. p. 218.

Indeed, if the legitimate authority of the Crown finds only a proper ſcope for its exerciſe in civil matters, within the bounds defined by the terms of the conſtitutional compact, ſo in ſpiritual matters and queſtions connected with the law

CHAP. V. divine, that authority ſhould be aſſerted at leaſt with equal if not with greater circumſpection. The neglect of ſuch caution is pregnant with many evils.

[o] Hor. Od. iii. 6. 5-8.

"Dîs[o] te minorem quod geris imperas;
Hinc omne principium, huc refer exitum.
Dî multa neglecti dederunt
Heſperiæ mala luctuoſæ."

"Thoſe[1] emperors," ſaid S. Auguſtine, "we call happy who govern juſtly, who are not elated by tongues that extol highly, or obſequiouſneſs that flatters humbly, but who remember that they are but men, and in promoting the worſhip of God ſubordinate their own authority to His Majeſty."

In order to meet ſome popular miſconceptions, it has ſeemed deſirable thus to clear the way by a few remarks pointing out that inner region within which the Royal Supremacy can exerciſe no legiti-

[1] "Sed felices eos dicimus, ſi juſte imperant, etc." *De Civ. Dei*, l. 5, c. 24.

mate authority. However, in real truth, this attribute of the Crown does only incidentally, and not abſolutely, touch our ſubject and the means hereafter to be propoſed for remedying the defects in the preſent ſyſtem of Eccleſiaſtical Appeals. For the Judicial Committee is *a Statute Law Court* founded on an Act[p] of Parliament, and does not, as the Star Chamber or Court of Review formerly did, derive its authority in any way from the ſource of Royal Supremacy. The real queſtion in our preſent argument lies not between the Church and the Crown, but between the Church and the State of England.

[p] 3 & 4 Will. IV. 41.

III. *Diſtinct Juriſdictions of Church and State.*

BUT if this really is a queſtion not between the Royal Supremacy and Church authority, but between the State and the Church, it will be right to conſider, before

CHAP. V. proceeding to ſuggeſt any remedy for the preſent grievance of Final Eccleſiaſtical Appeal, what is the broad diſtinction between the ſeparate juriſdictions of thoſe two bodies.

One of the diſadvantages of the eſtabliſhment of the National faith by law, overbalanced indeed by many ſignal and countervailing bleſſings, is, that the vulgar mind is wont to attribute the real ſanctions for that faith to an inadequate and a wrong ſource. In many quarters, where one would expect to find better information, the doctrines of the Chriſtian faith, as eſtabliſhed in this land, are ſuppoſed to have been originally defined by State authority, and thence to derive their real title for acceptance. Now it would be difficult to conceive any miſapprehenſion more groſs than this, more pregnant with evil, or productive of more miſchievous reſults. This is to attribute to the State that which by no means

belongs to it, but which by indefeaſible, and, indeed, by divine right, appertains to the Church. CHAP. V.

The diſtinct juriſdictions, offices, and duties of thoſe two very diſtinct organizations are eloquently deſcribed by the pen of S. Chryſoſtom, repreſenting the State in the perſon of the monarch:—

"Diſtinct,"[2] he ſays, "are the limits of the temporal kingdom from thoſe of the prieſthood, nobler is the power of the latter. . . . The king muſt not be judged of by the gems which ſtud his apparel, nor by the gold with which he is adorned. His province is to rule earthly things, but the authority of the prieſthood reaches to heavenly things; whatſoever ye ſhall bind on earth ſhall be bound in heaven. To the king are entruſted earthly things, to me heavenly things."

And in another place the ſame thoughts are enforced in this language:—

[2] ἄλλοι ὅροι βασιλείας, κ.τ.λ.—S. CHRYS. *Hom. in Verb. Is. Vidi Dom.* p. 757. Paris, 1636.

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"To[3] the king's authority are entruſted men's bodies, to the prieſt's their ſouls. The king remits their debts, the prieſt their ſins. The one compels, the other exhorts. The one acts by force, the other by perſuaſion. One wields ſenſible weapons, the other ſpiritual. He wars againſt barbarians, I againſt the evil angels; and the latter is the nobler exerciſe of power."

The ſame broad diſtinction between ſpiritual and civil juriſdictions is marked out by S. Jerome under the ſame figure:—

"The[4] king governs the ſubjects whether they will or not. The biſhop governs none but the willing. One keeps them in ſubjection by fear, while the other is in ſome ſort their ſervant. The one holds men's bodies in cuſtody for death, the other preſerves their ſouls for life."

Thus are the clear diſtinctions between the ſeveral juriſdictions of Church and State expreſſed in the forcible and glowing

[3] ὁ βασιλεὺς σώματα ἐμπεπίστευται, κ.τ.λ.—*Ibid.* p. 758. Paris, 1636.

[4] Ille (rex) enim nolentibus præeſt, hic volentibus, etc.—HIERON. *Epitaph. Nepotiani*, c. 7.

language of venerable antiquity. The conſcientious or inner and the civil or external forum are the ſeparate regions within which each finds a proper ſcope for its exerciſe. And their reſpective limits the firſt Chriſtian Emperor carefully diſtinguiſhed, of whoſe conduct we read in the words following: "*Ipſe*[p] *Conſtantinus curam Eccleſiæ dividebat in externam et internam. Hanc epiſcopis et conciliis relinquebat . . . externam ſibi ſumebat.*"

[p] Moſh. Ecc. Hiſt. p. 141; Helms.

And while theſe ſeparate juriſdictions of Church and State are thus diſtinguiſhed from each other, the offices and duties of each are ſufficiently definite within their proper ſpheres. No doubt much confuſion on this ſubject exiſts in ſome minds; but ſtill it ſeems, upon conſideration, that ſuch confuſion does not reſult from the neceſſities of the caſe, but from lack of adequate information or due thought.

Sphere of the Church's Juriſdiction.

CHAP. V. THE authority of the Church is rightly exerciſed in matters of faith and opinion, and over men's conduct reſpecting themſelves and others as depending on that faith. Her authority extends over that region wherein the human mind moves, and ſo is exerciſed with ſpiritual weapons and "*pro ſalute animæ.*" "Matters[q] ſpiritual," ſays Biſhop Taylor, "ſhould not be reſtrained by puniſhments corporal." "The[r] Church's arms," wrote Lord Chancellor King, "were ſpiritual, conſiſting of admonitions, excommunications, ſuſpenſions, and ſuch like, by the wielding of which ſhe governed her members and preſerved her own peace and unity. Now this is that which is called diſcipline, which is abſolutely neceſſary to the unity, peace, and being of the Church. For where there is no law or order that ſociety cannot poſſibly ſubſiſt, but muſt ſink in its

[q] Works, vol. viii. p. 143.

[r] Inquiry by an Impartial Hand, p. 109.

own ruins and confuſions." And it may be ſaid that in a Chriſtian nation the due exerciſe of Church authority, within its proper ſphere, is not only advantageous to thoſe of her own communion, but is of ſignal advantage to the whole commonwealth, for "unity[a] not kept in the Church is leſs kept in the State, and the ſchiſms and diviſions of the one are both mothers and nurſes of all diſobedience and disjointing in the other."

[a] Laud's Sermons, vi. p. 176.

Sphere of the State's Juriſdiction.

BUT while it is clear within what ſphere the authority of the Church in a Chriſtian country finds proper ſcope for its exerciſe, it is no leſs clear that, in reſpect of religion, the State has alſo its own proper functions, and thoſe, too, within certain bounds, which all antiquity and all reaſon aſſign. The State here adopts the faith of the Engliſh Church, and ſo its duties are to provide that that faith

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ſhould be taught, "to[t] preſerve inviolate the original ſtatus of doctrine and diſcipline agreed upon by the Church and State, and to keep all Eccleſiaſtical Judges to the terms of that ſettlement and within the limits of their lawful juriſdiction." Theſe duties are indeed ſanctioned[u] by the preſent Coronation Oath. The well-being of the whole community is involved in their proper diſcharge; for they are among the moſt neceſſary which appertain to civil authority. "Pure[v] and unſtained religion ought to be the higheſt of all cares appertaining to public regiment, as well in regard of the aid and protection which they who ſerve God confeſs that they receive at his merciful hands, as alſo for the force which religion hath to qualify all ſorts of men and to make them in public affairs the more ſerviceable; Governors the apter to rule with conſcience, Inferiors for conſcience' ſake the willinger to obey." Indeed, a ſtate can no more

[t] Biſhop of London; Hans. 3 S. vol. 111, p. 606.

[u] Blacks. i. 235.

[v] Hooker, Eccl. Pol. v. 1.

exiſt happily and well without religion than an individual. Thoſe are wiſe ſayings of S. Auguſtine, "*Non aliunde beata civitas aliunde homo*" . . . "*Male vivitur ubi non de Deo bene creditur.*" We ſhall vainly look for proſperity and bleſſing where, even in civil government, man's eternal intereſts are not conſidered as well as his temporal ones. "*Nunquam*[x] *res humanæ ſuccedunt ubi negliguntur divinæ.*" CHAP. V.

[x] See Coke, Litt. 95.

But while it is eminently the duty of the State, within its proper ſphere, to promote the faith which it adopts as true, it is equally its duty to abſtain from interfering with that faith beyond its proper province. The diſtinction between the conſcientious and civil forum, between authority in defining faith, and external co-active juriſdiction in promoting religion, is plain enough to any ordinary mind that will take pains to inform itſelf.

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y Dedicat. Exerc. Baron.

" Utinam," y ſays Caſaubon, " conſiderare principes vellent aliud eſſe ſacerdotem agere, ex ambone Scripturas interpretari, Sacramenta adminiſtrare, in nomine Chriſti ligare et ſolvere, aliud auctoritate ſuâ proſpicere, ut, quæ ſunt ſacerdotis, agat ſacerdos."

Theſe two functions are very different. Within one ſphere the Church is ſupreme, within the other the State. Any attempted uſurpation of State authority by the Church is fooliſh and miſchievous, any attempted uſurpation of Church authority by the State is irreligious and profane. The State has proper functions, which it cannot diſcard without abandoning its duty to the people committed to its charge. On the other hand the Church has proper functions, which ſhe cannot willingly ſurrender without abandoning her duty to God and religion, and in the words of S. Ambroſe, when required by the younger Valentinian to give up the churches to the Arians, ſhe may juſtly reply to all endeavours, come whence they may, to

rob her of that function which involves decision in questions of faith and doctrine,—"The[z] Church," said he, "is the house of God, and those things that are God's are not to be yielded up and disposed of at the Emperor's will and pleasure. His palaces he might grant to whomsoever he pleaseth, but God's own habitation not so." CHAP. V.

[z] Hooker, Eccl. Pol. iii. 358.

IV. *Crown acts through Courts.*

Now there must be a clear understanding, as the present Court of Final Appeal, the Judicial Committee of Privy Council, is a Statute Law Court, and founded on an Act[a] of Parliament, that the following suggestions for alteration in this system of judicature does not raise any new question between Church authority and the Royal Supremacy, because the remedies proposed, even if any of them were adopted, would leave that relation exactly as it stands at present. The sug-

[a] 3 & 4 Will. IV. 41.

CHAP. V. geſtions will merely have reſpect to the mode of proceeding in the Court itſelf, as now eſtabliſhed.

[b] Can. 36. The Crown, ſupreme "as[b] well in all ſpiritual or eccleſiaſtical things or cauſes, as temporal," acts by means of Courts ſpecially provided for each juriſdiction. "*Imperantis*[c] *eſt non imperata facere, ſed imperando facere ut fiant.*" And it is of the higheſt importance that the Courts appointed to wield the ſeveral juriſdictions ſhould be conſtituted in the manner beſt adapted to ſecure competent tribunals. "All[d] men are not for all things ſufficient, and therefore, public affairs being divided, ſuch perſons muſt be authorized judges in each kind as common reaſon may preſume to be moſt fit." How then can the beſt Court through which the Crown may act for the purpoſes in hand be beſt conſtituted? That is the queſtion before us.

[c] Grot. de Imp. circa Sac. 240.

[d] Hooker, Eccl. Pol. iii. 355.

V. *A mixed Court undeſirable.*

As a preliminary matter it may firſt be ſaid what ſuch a Court ſhould not be. 1. It ſhould not be, at leaſt if the principles above laid down are true, ſuch a Court as we have at preſent—a purely lay tribunal. 2. It[e] ſhould not be a mixed Court of eccleſiaſtics and laymen ſitting together in common as judges of fact, law, and faith. That would perhaps be worſe than the preſent ſtatutable ſyſtem. The aſſociation of eccleſiaſtical members with a Civil Court on the one hand, or the aſſociation of lay members with an Eccleſiaſtical Court on the other, are but clumſy and moſt unſatisfactory expedients, neither warranted by primitive practice nor ſupported by any worthy example, nor conſiſtent with eccleſiaſtical propriety, nor calculated to produce harmonious reſults. From ſuch connections there cannot but be generated a hybrid and ill-

[e] See Marq. Lanſdown's Speech; Hans. 3 S. vol. 111, p. 628.

CHAP. V. favoured progeny, which it muſt be ſaid the records of our paſt hiſtory do not commend at all hopefully for adoption. In ſuch a tribunal the legal and theological mind would conſort but ill together. Queſtions of law unfamiliar to the one, and of doctrine unfamiliar to the other, might lead to ſome very complicated perplexities touching the ſubject-matter on which both in common would be exerciſed and confuſed. Moreover, with all due regard to the mental powers and attainments of my own order, one is not quite ſure that the long practice in judicial inveſtigations, and the poliſhed acuteneſs and ſubtle perſpicacity of thoſe with whom eccleſiaſtics would be aſſociated in ſuch a Court might not ſecure an over-balance in the ſcale againſt them, and obtain undue preponderance in turning a final judgment. And it is alſo quite likely that thoſe divines to whom ſuch a ſcheme might commend itſelf would not

be the laſt to find themſelves hopelesſly proſtrate in the ſtronger graſp of their more powerful aſſociates. CHAP. V.

There is a ſtill graver objection, however, to ſuch a mixed Final Appeal Court. From the preſence of eccleſiaſtics it would have at leaſt the ſemblance of authority to define faith and doctrine. Now ſuch a function can never be permitted to belong to any Court whatſoever, by any man who underſtands and honours the original conſtitution of the Church, or of that branch of it now exiſting in theſe realms. Synods alone have the power of defining doctrine, and to grant even a ſemblance of ſuch a power to any other authority whatſoever would be a moſt unwarrantable and moſt miſchievous courſe.

VI. "*Cuique in ſuâ Arte credendum*" *a Principle of Engliſh Juriſprudence.*

BUT let us ſee if a remedy for the preſent diſorder might be found in cloſe analogy

CHAP. V. with all our conſtitutional proceedings in matters of judicature; whether a ſyſtem might be adopted by which the Judicial Committee, as at preſent conſtituted, might give judgment in the laſt reſort, and yet the due authority of the Church be preſerved inviolate in matters of faith and doctrine.

There is a legal maxim, "*Cuique in ſuâ arte credendum*," in purſuance of which, when any matter comes before a Court which is not competent, for want of knowledge, to decide, it refers for advice and guidance to thoſe who are. Lord Denman's words, delivered in the Court of Queen's Bench, illuſtrate this maxim. They are as follow:—

"There is a general rule that the opinions of perſons of ſcience muſt be received as to the facts of their ſcience. That rule applies to the evidence of legal men, and I think it *is not confined to unwritten law, but extends alſo to the written laws, which ſuch men are bound to know.* Properly ſpeaking, the nature of ſuch evidence is not to ſet forth the contents of the written law, *but its effects*,

and the ſtate of the law reſulting from it. The mere contents indeed might often miſlead perſons not familiar with the particular ſyſtem of law, the witneſs is called upon to ſtate what law does reſult from the inſtrument."

Now this wiſe ſtatement, that the mere contents of the written law, if unfamiliar, might without further elucidation miſlead the judicial mind, ſhould be carefully conſidered by thoſe who ſay that a civil Court is competent to decide a ſpiritual queſtion becauſe it has the written formularies before it which define the doctrine. Such a view is certainly not conſiſtent with the conviction of the learned judge above quoted.

Again, Lord Langdale delivered his judgment on the ſame ſubject as follows:—

"With foreign laws an Engliſh judge cannot be familiar; there are many of which he muſt be totally ignorant. There is in every caſe of foreign law an *abſence of all the accumulated knowledge and ready aſſociations which aſſiſt him in the conſideration of that which is the Engliſh law, and of the manner in*

CHAP. V. *which it ought to be applied in a given ſtate of circumſtances to which it is applicable.* . . . Difficulties are obvious enough, even in caſes in which he may have before him the very words of that which has been proved to have been the law applicable to the event in queſtion. . . . The rule of Engliſh law, that no knowledge of foreign law is to be imputed to an Engliſh Judge ſitting in a Court of only Engliſh juriſdiction, is undoubtedly well founded. And as caſes ariſe in which the rights of parties litigating in Engliſh Courts cannot be determined without aſcertaining, to ſome extent, what is the foreign law applicable in ſuch caſes, the foreign law and its application, like any other reſults of knowledge and experience in matters of which no knowledge is imputed to the judge, muſt be proved as facts are proved, by appropriate evidence, *i. e.* by *properly qualified witneſſes, or by witneſſes who can ſtate from their own knowledge and experience, gained by ſtudy and practice, not only what are the words in which the law is expreſſed, but alſo what is the proper interpretation of thoſe words, and the legal meaning and effect of them as applied to the caſe in queſtion.*"

The principles thus laid down are ſummed up in the following learned opinion:—

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"Our[f] Courts do not take judicial notice of any foreign laws, and when a queſtion of foreign law ariſes, either in Chancery or before the Common Law Courts, it is dealt with as a queſtion of ſcience to be proved, like matters of fact, by the teſtimony of witneſſes practically converſant with the ſubject. The principle and mode of proof is exactly the ſame, whether the queſtion be one of chemiſtry, or of mechanics, or of French law. . . . The evidence on which (our Courts) proceed is the ſworn opinion, orally delivered, of a perſon learned and experienced in the foreign law."

[f] From a learned opinion; Hans. 3 S. vol. 111, p. 614.

The very ſame principle,—"*cuique in ſuâ arte credendum*,"—is adopted in our juriſprudence, as regards the proceedings of our Courts, when dealing with the ſeveral branches of our domeſtic law:—

"When[g] a diſputed queſtion of Common Law ariſes in the courſe of a Chancery ſuit, and is neceſſary to be diſpoſed of before the ſuit can be finally diſpoſed of, it is the practice of the Court of Chancery either to direct the parties to try the queſtion in an action to be brought by one of them againſt the other for that purpoſe in a Common Law Court, or to order a ſpecial caſe to be ſtated and ſent to a Common Law Court for the purpoſe of obtaining the opinion of that Court on ſuch queſtion."

[g] Ibid.; ibid. p. 613.

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The ſame principle, again, guides the High Court of Admiralty, when queſtions come before it to be decided according to the rules of nautical ſcience, the Judge of that Court calls to his aſſiſtance ſome of the Elder Brethren of the Trinity Houſe ſkilled in naval affairs, by whoſe opinion his deciſion is governed.

And to come more directly to our own ſubject, when a queſtion of the law divine ariſes in a Common Law Court, that Court ſurceaſes from proceeding till the queſtion has been decided by an Eccleſiaſtical Judge.

[h] See Hans. 3 S. vol. III, p. 616.

An [h] analogous courſe is purſued in Scotland. The deciſion of ſpiritual queſtions is left to the Courts of the Kirk, which are preſumed to be alone competent to deal with them. In Sileſia and the Rheniſh provinces of Pruſſia, queſtions of falſe doctrine, wherever ariſing, are referred to the authorities of the Church. Such is the courſe even where

the Roman Catholic religion is not eſtabliſhed: of courſe, where it is, the principle contended for is adopted. CHAP. V.

VII. *This Principle applicable in the Caſe before us.*

Now it would ſeem, upon conſideration, that this principle,—"*cuique in ſuâ arte credendum*,"—univerſally followed in our national juriſprudence, excepting in the unfortunate caſe ſpecially before us, might wiſely be extended to that alſo, and might ſupply a cure for thoſe grievous diſorders of which complaint has above been made. Such[1] a courſe was eloquently commended to the Houſe of Lords by Lord Derby in 1850, and it received alſo the commendation of Lord Brougham in the following words:—

[1] Hans. 3 S. vol. 111, p. 652.

"How[j] can lay judges arrive at the ſoundeſt deciſions on doctrinal queſtions? Why, juſt as the judges arrived at ſound deciſions upon queſtions of rights of patent, of chemiſtry, of optics, of mechanics,

[j] Ibid. p. 632.

CHAP. V. or any other ſcience. They would form their own opinion upon the evidence of the moſt ſkilful and learned men upon theſe ſeveral ſubjects, and he contended it might be juſt the ſame with theological doctrine. The doctrines of the Church of England were preſcribed by the Act of Uniformity, by her Articles, her Liturgy, and her diſcipline. He would have queſtions upon theſe doctrines decided by the Judicial Committee, upon the evidence and the opinions of ſuch learned men as were brought before them."

If then the Judicial Committee, charged, as at preſent conſtituted, with the duty of giving judgment in the laſt reſort in cauſes eccleſiaſtical, was to ſend an iſſue to be tried by the Spiritualty, on any particular queſtion of faith and doctrine involved in the caſe before it, ſuch a courſe would be analogous to the whole ſyſtem of our national juriſprudence, would ſave the Church from that ignominious poſition in which ſhe is now placed, by having her doctrines and faith defined by a lay tribunal, and would put an end to

a ſolœciſm which diſcredits this nation in the face of Chriſtendom. CHAP. V.

It is very obſervable, at this point, that the principle now under view governs, with reference to civil matters, the enactments of the Judicial Committee Act[k] itſelf. And therefore the adoption, in ſpiritual matters, of the courſe above ſuggeſted would only be carrying out to its legitimate extent the expreſſed intention of its framers, when dealing with thoſe ſubjects to which, at leaſt in their minds, that Act was certainly confined. This principle is thus adopted in the ſtatute:—

[k] 3 & 4 Will. IV. 41.

"And[l] be it enacted that it ſhall be lawful for the ſaid Judicial Committee to direct one or more feigned iſſue or iſſues to be tried in any Court of Common Law, and either at bar, before a Judge of Aſſize, or at the ſittings for the trial of iſſues, in London or Middleſex, and either by a ſpecial or common jury, in like manner, and for the ſame purpoſe, as is now done by the High Court of Chancery. . . . And[m] be it enacted that it ſhall be lawful for the ſaid Judicial Committee to direct one or more

[l] Ibid. s. 10.

[m] Sec.

CHAP. V. new trial, or new trials, of any iſſue, either generally
[n] Sec. 15. or upon certain points only. . . . And[n] be it enacted that the coſts incurred in the proſecution of any appeal or matter referred to the ſaid Judicial Committee, and of ſuch iſſues as the ſame Committee ſhall under this Act direct, ſhall be paid by ſuch party or parties . . . and in ſuch manner as the ſaid Committee ſhall direct."

Here, then, is the principle above mentioned, which generally governs the juriſprudence of England, ſpecially adopted in this very Act which conſtituted the Judicial Committee. And if it was enacted that in civil matters the Court ſhould have ſtatutable means of informing itſelf by application to external ſources of inſtruction, ſurely in ſpiritual matters, with which it is even leſs familiar, the ſame courſe could not reaſonably be deemed improper or inconvenient.

VIII. *An Objection.*

AN objection, however, has been here raiſed, that if an iſſue on faith and doc-

trine was to be ſent for deciſion by the Spiritualty from the Court, it might fail to propound accurately the preciſe point in queſtion. Now this, it muſt be confeſſed, is the very oddeſt objection imaginable, at leaſt as coming from any man who would maintain the preſent ſtate of things. For if the Court was incapable of ſtating exactly the ſubject-matter in diſcuſſion, it could hardly be conſidered competent, without aſſiſtance, to give final judgment in the caſe. It muſt, however, be ſaid that every one of information muſt have far too high an opinion of the acuteneſs and perſpicacity of the Court to imagine that any ſuch objection is at all conſiderable. Thoſe moſt learned and accompliſhed perſons who adorn that tribunal would, doubtleſs, frame their queſtions with perfect clearneſs and accuracy, as well as with preciſe adaptation to the matter in hand. However, ſhould any difficulty be foreſeen on this head, it is

CHAP. V. obſervable that the firſt ſection of the Judicial Committee Act empowers[o] the Crown to nominate two extra members of the Court, being Privy Councillors. Theſe, for the occaſion, might be ſpiritual perſons, charged with the duty of framing the queſtions to be referred. One inclines, however, to the opinion that this would be entirely unneceſſary for the reaſons before ſpecified; and even further, would be undeſirable, as conſtituting a Court of that mixed character which above[oo] was repreſented as being on many accounts objectionable.

[o] 3 & 4 Will. IV. c. 41. s. 1.

[oo] p. 171-3.

IX. *A Second Objection.*

BUT a ſecond objection, and that of a far more reaſonable and more formidable character, has been raiſed to the plan of ſending iſſues from the Judicial Committee on matters of doctrine to the Spiritualty, whoſe anſwers ſhould ſerve to govern the judgment of the Court. And

this is an objection which was forcibly put before the House of Lords, in 1850, by the Marquis of Lansdowne:— CHAP. V.

"Every[p] Privy Councillor," said his lordship, "was required to take an oath that upon all questions that came before him he would speak his mind and act according to the decision of that mind, but how was he to do so if . . . a decision was sent to him which was to be binding and conclusive, and with regard to which he had no option except that of recording such decision as binding upon the Crown? The agency of a body which was assumed to possess some dignity—the Privy Council—was to be employed for the mere ministerial purpose of sending questions in the first instance . . . and receiving the decision . . . without being able to touch or alter the judgment, whatever the opinions of the Council might be upon the subject."

[p] Hans. 3 S. vol. 111, p. 623.

The[q] same objection was urged by Lord Brougham also with much earnestness. And if, under the circumstances supposed, the answer returned to the question proposed to the Spiritualty were to be absolutely binding on the

[q] Ibid. p. 630-635.

CHAP. V. Judicial Committee, this objection might appear to ſome perſons to be quite inſurmountable.

But if the ſame principle which governs the proceedings of the Court of Chancery, when ſending ſpecial caſes to Common Law Courts, were adopted in this inſtance, the whole force of the objection would be obviated. The Court of Chancery ſends for guidance and inſtruction only. It may diſregard the inſtruction given if ſo it pleaſes:—

[r] From a learned opinion; Hans. 3 S. vol. 111, p. 613.

"The[r] Lord Chancellor is not bound to act on the opinion certified by the judges in anſwer to a ſpecial caſe, but may, and often does, ſend a ſecond caſe, ſtating the ſame queſtion, to a ſecond Court of Law, and even a third caſe to a third Court."

Lord Eldon was wont to recount, with ſome ſatisfaction, that he once had a queſtion before him in Chancery, whether an eſtate was in fee, for life, or in tail; and he aſked for the opinions of the Common Law Courts on the ſubject.

One Court ſaid the eſtate was in fee; the ſecond Court ſaid it was for life; and the third Court ſaid it was in tail. "Whereupon," added his lordſhip, "I decided that there was no eſtate at all; and I had the unanimous concurrence of all Weſtminſter Hall." Whether in that concurrent unanimity were included the opinions of all thoſe learned judges, between whom and the Lord Chancellor there appears, at leaſt to the unprofeſſional mind, to have exiſted ſo conſiderable a diſcrepancy of conviction, may be a query. However, one may hence conclude that the Court of Chancery is not abſolutely tied down to decide in accordance with the advice and inſtructions tendered.

In like manner the anſwers of the Spiritualty and their advice on queſtions of faith might be returned to the Judicial Committee without being abſolutely binding on their ultimate judgment in the

CHAP. V. particular caſe. But as in theory a Judge in Chancery may refuſe to act upon the opinions returned to him, yet practically, ſave in the moſt iſolated exceptions, he makes them the foundations of his decree; as the Houſe of Lords may decline to be guided by the opinions of the majority of the judges, when called in to give counſel, yet practically, and as a general rule, they are adopted; ſo, in the caſe of any anſwer on a matter of faith returned by the Spiritualty to the Final Court of Appeal, one may ſhare in the firm conviction expreſſed by Lord Derby, that "in[s] ninety-nine caſes out of one hundred the Judicial Committee would be directed by the opinion . . . upon queſtions of doctrine in preciſely the ſame manner."

[s] Hans. 3 S. vol. III, p. 652.

However, even ſuppoſing that in any caſe, which is highly improbable, the Final Appeal Court felt itſelf conſcientiouſly conſtrained to diſcard the inſtructions

given by the Spiritualty, its judgment could then in no way, as is now unhappily the caſe, be ſuppoſed to affect the doctrine of the Church. That would then ſtand out perfectly clear from the facts and law of the caſe under hand, free from that confuſing admixture which is now painfully embarraſſing. The doctrine would then be ſtated diſtinct from the deciſion of the civil tribunal, the anſwer returned would be, at leaſt for the time, a repreſentative expreſſion of the national faith, irreſpective of the particular event of the contention under hand. And this would be a ſignal advantage. CHAP. V.

X. *Who are the Spiritualty?*

AND now we come to one of the moſt difficult queſtions connected with this ſubject. It will have been obſerved that hitherto the principle of ſubmitting doctrinal queſtions for ſolution to the Spiritualty has been commended generally,

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without any ſpecification of what that Spiritualty ſhould conſiſt. It will be of courſe admitted that the very higheſt attainable ſpiritual authority for ſuch a purpoſe as that before us ſhould be ſecured. "The Standards,"[t] ſaid Lord Harrowby, when ſpeaking on the ſubject of the doctrine of the Engliſh Church, "were conſtructed, after due deliberation, by all orders of the Church combined, and ultimately received the ſanction of the State as an important portion of the Church. Our buſineſs now is ſimply to interpret, not to conſtruct. Let us take care that under the guiſe of interpretation the work of conſtruction or legiſlation is not undertaken by inferior authority to that which originally eſtabliſhed." That this danger may be avoided it would be very deſirable to have for interpretation in Final Appeal, if not the original authority, at leaſt the repreſentation of the original authority, which was at the outſet charged with conſtruction.

[t] Hans. 3 S. vol. 111, p. 657.

For this reaſon, among many others of conſiderable weight, to refer queſtions of interpretation to the Bench of Biſhops would not be any way ſatisfactory. For that auguſt body have clearly no power whatever, according to the conſtitution of the Engliſh Church, of original conſtruction. Indeed, Lord Landſdowne pointed out to the Houſe of Lords the inconvenience of excluding the ſecond order[u] of the clergy from ſuch deliberations as thoſe under view. And Lord Harrowby reminded that Aſſembly that for ſuch purpoſes "other[x] orders than the Epiſcopal always took a conſiderable ſhare." Againſt the Biſhop of London's Bill, in 1850, which propoſed to refer theſe queſtions to the Epiſcopal Bench alone, the moſt reaſonable objections were urged on this very ground.

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[u] Hans. 3 S. vol. 111, p. 626.

[x] Ibid. p. 654.

But if a reference to the whole Epiſcopal Bench would be unſatisfactory, much leſs ſatisfactory would it be to refer

CHAP. V. ſuch queſtions to any ſtanding board of biſhops. If the firſt courſe would be a ſtrain on the conſtitution of the Engliſh Church, the laſt would be a greater ſtill. Lord Brougham ſpoke words which will meet with a hearty reſponſe in moſt minds when he ſaid, "He[y] ſhould be decidedly oppoſed . . . to any propoſition for giving the miniſter of the day a power to ſelect particular biſhops to adviſe the Committee of Privy Council."

[y] Hans. 3 S. vol. 111, p. 653.

And far worſe ſtill would it be if particular prelates ſhould be choſen for particular caſes. Nothing can be conceived more indefenſible, whether in Church or State, than a ſelection of perſons charged with judicial functions, *pro hâc vice*, in any Court whatſoever. That muſt ever lead to hardſhips and abuſes quite intolerable, as ſome paſſages in our country's hiſtory moſt unanſwerably teſtify. In words, to which every reaſonable man will cordially aſſent, Lord Derby

expreſſed his opinion on this ſubject, when he ſaid, "I[x] certainly ſhould object to refer to the diſcretion of any party, to the diſcretion of the Judicial Committee of the Privy Council, or the Miniſter of the day, that ſelection of the Archbiſhop or Biſhops for the guidance and direction of the whole Church." And then, as ſuggeſting a better alternative, his lordſhip ſaid, in words before quoted, "Of this I am quite ſure, that it would be a matter of ſatisfaction to the great body of Churchmen in this country if they knew that upon any queſtion raiſed they had an opportunity of obtaining, not the direction of the judges, not the direction of the legiſlature, but for their own guidance, as dutiful members and ſons of the Church, the authoritative declaration of the united heads of the Church in matters affecting doctrine."

[x] Hans. 3 S. vol. 111, p. 653.

XI. *United Convocations forming a National Synod.*

CHAP. V. Now this clearly, for the purpoſe before us, is the object to be obtained—the interpretation of documents, as before ſaid, by an authority not inferior to that charged with their original conſtruction, or at leaſt by a proper repreſentation of that authority. And how is this end to be ſecured? "I [y] know," ſaid the late Biſhop of London, in his moſt learned and exhauſtive addreſs to the Houſe of Lords on this ſubject, "what would be the conſtitutional mode of carrying theſe purpoſes into effect; namely, to permit the Church to deal ſynodically with queſtions of hereſy and falſe doctrine." And this would be a courſe to which, at leaſt conſtitutionally, no objection whatever could be made, that the Privy Council ſhould ſeek inſtruction on any point of doctrine ariſing before it from the united Synods of Can-

[y] Hans. 3 S. vol. III, p. 606.

terbury and York. They were originally charged with the power and duty of conſtruction; and they, united as a National Synod, certainly would be an unexceptionable authority for interpretation. And though they uſually ſit at different times and in different places, yet they have been and might be united as a National Synod for ſuch a purpoſe, in accordance with the following Canon of the Council of Windſor, A. D. 1072:— CHAP. V.

"Ita[z] ut ſi Cantuarenſis Archiepiſcopus Concilium cogere voluerit, ubicumque ei viſum fuerit, Eboracenſis Archiepiſcopus ſui præſentiam cum omnibus ſibi ſubjectis ad nutum ejus exhibeat, et ejus canonicis diſpoſitionibus obediens exiſtat."

[z] Conc. Mag. Brit. I. 324-5.

And it is obſervable that this Canon has not only the force of Eccleſiaſtical, but of Statute Law alſo. For by 25 Hen. VIII. 19, it was enacted that all Canons, Conſtitutions, Ordinances, Provincial and Synodal, made before the date of that Act (1534), "which[a] be not contrariant

[a] Sec. 5.

CHAP. V. nor repugnant to the laws, ſtatutes, and cuſtoms of this realm, nor to the damage or hurt of the king's prerogative royal," ſhould remain in force until ſuch time as the Eccleſiaſtical Law ſhould he otherwiſe ordered or determined. Such review has never been completed; this Canon does not fall within the proviſos firſt ſpecified, and therefore is at this moment not only a lawful Canon of the Church, but an integral part of the Statute Law of England.

For directing the proceedings when the two Convocations ſhould be united in a National Synod ſpecific regulations were laid down at the Council of London,[b] A.D. 1075, where the matter was diſcuſſed and decided in accordance with the tenor of ſome ancient Canons of Toledo, Milevis, and Bracara, and after conſultation with aged and experienced men who could then remember the former practice of the Anglo-Saxon Church. And

[b] Conc. Mag. Brit. I. 363.

theſe regulations were on ſubſequent occaſions adopted. On arriving at the church where the National Synod was convened, and where previous preparations were ſometimes made by providing ſeats, riſing in the form of ſteps[c] from the ground, the members took their places in preſcribed order. The Archbiſhop of Canterbury, as Preſident, occupied the chief ſeat. On his right was placed the Archbiſhop of York, on his left the Biſhop of London; next the Archbiſhop of York ſat the Biſhop of Wincheſter. But if the Archbiſhop of York was abſent then the Biſhop of London ſat on the right of the Archbiſhop of Canterbury, and the Biſhop of Wincheſter on his left. After theſe prelates had taken their places the other biſhops took theirs according to the dates of their reſpective ordinations[d] [? conſecrations]. As ſoon as all had been ſeated and ſilence obtained, the Goſpel "*I am the good Shep-*

[c] Conc. Mag. Brit. I. 648.

[d] Ibid. 363.

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herd"[e] was read, collects were offered up, and the hymn "*Veni Creator*"[f] ſung. Then followed a ſermon;[g] on its concluſion the Archbiſhop detailed the cauſes[h] for which the National Synod was convened, and the neceſſary forms of buſineſs were introduced by official perſons which was diſcuſſed[i] by the whole aſſembly.

[e] Conc. Mag. Brit. I. 648.
[f] Ibid. 649.
[g] Ibid.
[h] Ibid. 3. 851.
[i] Ibid.

Theſe details are here ſpecified with a view of ſhowing that the union of the two Convocations in a National Synod is no new imagination, but that it is contemplated in the early Conſtitution of the Engliſh Church. And indeed ſuch a courſe has been purſued on many occaſions of which we have records, amounting to about forty ſince the Conqueſt.

I am well aware it may here be objected, firſt, that to unite the two Synods of our country for ſuch a purpoſe as that before us would involve cumbrous machinery; and ſecondly, that it would interpoſe delay to a return of any opinion

required by the Court which might ſeek it. As regards the firſt objection, it may be anſwered that, as a final appeal on a matter of faith and doctrine, in which the whole Church of this realm and the nation itſelf is, or ſhould be, deeply concerned, involves the moſt grave and ſolemn queſtions which can be debated, ſo it ſhould be dealt with in the graveſt and moſt ſolemn manner which the conſtitution of this Church and realm is capable of ſecuring. As regards the ſecond objection, ſome delay would ſeem, upon conſideration, to be no evil at all, but rather an unmixed good. For it is moſt deſirable that queſtions involving final deciſion in matters of faith and doctrine ſhould not be hurried on in times of party heat and excitement, but that the ampleſt time and opportunity ſhould be allowed for calm and diſpaſſionate conſideration. CHAP. V.

XII. *Canterbury Provincial Synod, with York Repreſentatives added.*

CHAP. V. HOWEVER, if objections by ſuch as are beſt qualified to judge ſhould appear ſo formidable as to render the foregoing method at the preſent time impracticable, there is ſtill another plan by which the ſame end might be ſecured in accordance with conſtitutional principles and the practice of the Church. If the judgment of the united Synods—the authority for original conſtruction—could not be thus obtained for interpretation; yet at leaſt the repreſentation of that authority might be ſecured by a ſimple arrangement. The ſyſtem of acting by delegation has always been adopted to a much greater extent in eccleſiaſtical matters than in civil ones. To act "*per viam compromiſſi*" is a principle conſtantly recognized in the former. In one of the moſt important paſſages of our eccleſiaſtical hiſtory we find repre-

ſentatives of the Northern Synod charged with full power of acting for that aſſembly in the Southern. When our preſent Prayer-book was compiled, repreſentatives, duly authorized by the York province, appeared in the Canterbury Convocation, delegated by the Convocation which they repreſented to diſſent from the proceedings, or to aſſent to them. And this principle of delegation is ſo completely interwoven into the ſyſtem of the Church, that a Proctor, who is the repreſentative of dioceſan clergy,[k] though himſelf a delegate, may ſubſtitute another to vote in his place; for though in civil matters there is a general principle of common law, "*Delegatus delegatum ſubſtituere non poteſt*," yet in matters eccleſiaſtical[l] the contradictory propoſition is certainly true.

[k] Hody, p. 388.

[l] Atterb. Rights, &c. p. 58.

In accordance with this principle, then, repreſentatives from the province of York might be delegated to ſit in the Canter-

CHAP. V. bury Convocation, and to that aſſembly, thus fortified, doctrinal queſtions might be referred by the Judicial Committee.

XIII. *Joint Committee of Canterbury and York.*

OR yet, again, if a Synod thus conſtituted was conſidered too large a body for the purpoſe before us, it might, in accordance with the principle of repreſentation above mentioned, perhaps be thought a more eaſy plan that each of the two Provincial Synods ſhould appoint, at the aſſembling of every new Convocation, repreſentatives to form a united Committee, to which queſtions on interpretation of faith and doctrine might be ſubmitted by the Judicial Committee of Privy Council. It might perhaps by many perſons be conſidered that ſuch a body, as being of more manageable ſize than a Synod, would be better adapted to the deſired end, and that the duty

required would be thus more eaſily and expeditiouſly performed than in a larger aſſembly. And it may be added that this principle of an appointed eccleſiaſtical tribunal for the purpoſe before us, (though not appointed in this way,) received the commendation of Lord Brougham,[m] when he addreſſed the Houſe of Lords on this ſubject. How ſuch a Committee ſhould be conſtituted it hardly becomes an individual to expreſs an opinion, as that matter ſhould be dealt with by the united wiſdom of the two Convocations. However, a ſuggeſtion, but merely a ſuggeſtion, is thrown out in a note[4] for the conſideration of the reader.

[m] Hans. 3 S. vol. 111, pp. 632-3.

[4] If the two primates were *ex officio* members of ſuch Committee, and two biſhops were elected by the Upper Houſe of Canterbury, four preſbyters by the Lower, one biſhop by the Upper Houſe of York, and two preſbyters by the Lower, a body of eleven divines would thus be conſtituted, fairly repreſenting the two Provincial Synods, and to which the interpretation of the Church's documents might be ſafely

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XIV. *Objection I.*

IT may now be deſirable to glance at ſome objections which will occur here, for indeed they can never be avoided in any

entruſted. It will be obſerved that, according to the foregoing ſuppoſition, the elected repreſentatives of the clergy in each province, when compared with the biſhops, are as two to one. But this proportion is in imitation of primitive example. In the *tractoriæ* or letters of ſummons to the firſt Synod of Arles (314), Chreſtus, Biſhop of Syracuſe, was deſired to bring with him two of the ſecond* throne, *i.e.* two preſbyters. And, in accordance with ſuch venerable practice, it is the uſual habit in the Engliſh Church, when joint Committees of the two Houſes of Convocation are named, that for every one member of the Upper Houſe two members of the Lower Houſe ſhould be appointed. It is alſo obſervable, on this head, that when the repreſentatives of York ſigned the ratification of our preſent Prayer-book in the Canterbury Synod, the names of three prelates[n] and ſix clergy were ſubſcribed, numbers which accord with the proportion above ſpecified.

[n] Nichols, Pref. to Book of Common Prayer, p. 12.

* συζεύξας σεαυτῷ καὶ δύο γέ τινας τῶν ἐκ τοῦ δευτέρου θρόνου.—EUS. *Eccl. Hiſt.* l. x. c. v.

human managements whatſoever. "It is true," ſaid Lord Harrowby, on this ſubject, "that it is difficult to ſecure practically the ſeparation of theſe two functions, it is true that he who interprets is apt, in fact, to legiſlate." And ſo it may be objected that this Committee might by a deciſion trench too nearly on the confines of creating a new doctrine. But, to uſe the Biſhop of London's words, "it[o] is enough to ſay, in anſwer to this objection, that no power will be poſſeſſed by the new Court which is not poſſeſſed by the preſent. Suppoſing that it was in contemplation" [which it is not] "to inveſt any perſons with the power not ſimply of determining of any particular opinion, whether it be conſiſtent with the Church's doctrine, (which is all that the Court of Appeal will have to determine,) but of framing new doctrines, ſurely (ſuch a Court) would be more competent to exerciſe that power than the

[o] Hans. 3 S. vol 111, pp. 616-7.

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Court as at preſent conſtituted." Or the objection may be anſwered in Lord Derby's words, "He[p] ſhould much regret if either the one tribunal or the other had the power of eſtabliſhing new articles of faith; but if he were to chooſe which of the two ſhould have the power to bind the Church, of which he was a humble and unworthy member, he could not heſitate to take the power from a body who might not be members of the Church and confer it upon thoſe members of the Church who were authoritatively ſet forth as the ſpiritual guides and inſtructors of the Church." However, the objection is no way a valid one, becauſe the ſuppoſed Committee would not be charged with the duty of conſtruction, but only of interpretation; and ſhould the members tranſgreſs the limits of their appointment, they would be certainly amenable to that authority which while conferring had ſo reſtricted their functions.

[p] Hans. 3 S. vol. 111, p. 650.

Objection II.

ANOTHER objection which might occur is founded upon the poſſibility[q] of a difference of opinion among the members of the Committee. But this objection lies equally againſt the preſent Court, and indeed againſt all Courts whatſoever in which more than one member is charged with authority—in Lord Redeſdale's words on the ſubject, "Was[r] a probable difference of opinion any argument againſt the eſtabliſhment of a Court?" It is clear that if this objection were to prevail no Court could be permitted to exiſt, except ſuch as was preſided over by a ſingle judge, and that is an alternative which few perſons would be willing readily to accept.

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[q] See Marquis of Lanſdowne's Speech; Hans. 3 S. vol. 111, pp. 625-6.

[r] Ibid. 641.

Objection III.

THE laſt objection which may be raiſed, and to which I ſhall only advert in paſſing,

CHAP. V. is that the interpretation of legal inſtruments involving faith and doctrine would thus be entirely removed from the hands of the laity and placed in thoſe of the ſpiritualty. But, as the main object of theſe pages is to recommend that courſe, I cannot be expected to admit this as a valid objection, but I rather believe that ſuch an effect would be an unmitigated advantage, and now expreſs an anxious hope that, if any reader of theſe lines ſhould be found, he will have ſeen reaſon to join in that belief.

Some arrangement, as above propoſed, with ſuch modifications as more competent perſons than myſelf might ſuggeſt, would ſurely ſecure the rights and privileges both of Church and State, and would place a very important branch of our national judicature on a firm baſis, free from thoſe defects at the very foundation which weaken and endanger the whole ſuperſtructure. "It[a] retains," to

[a] Hans. 3 S. vol. 111, p. 617.

conclude in the words of the late Biſhop of London, "the laity in the exerciſe of their proper and legitimate functions. It will not diſplace the members of the Judicial Committee from their office as judges of fact, judges of the law and of the rules of juſtice, but they have to take their meaſure of true or falſe doctrine from thoſe who, I am bold to ſay, are more competent than themſelves to judge of ſuch queſtions. . . . By the fundamental principles of the Church of England all its different members, laity as well as clergy, have certain rights and certain duties, upon the faithful diſcharge of which the ſafety and efficiency of the Church itſelf depend. There are common duties to be performed by all, but there are alſo particular duties to be performed by particular members, and they are not to interfere with one another."

XV. *How the deſired Change could be conſtitutionally effected.*

CHAP. V. IT now remains only to inquire how this deſired change in our national juriſprudence could be conſtitutionally effected. And here as two diſtinct organizations are concerned—the Church and the State—it is neceſſary to conſider the meaſures required for ſecuring the end in view by the friendly co-operation of both. And firſt of the Church.

XVI. *As regards the Church.*

WHETHER it might be, upon due conſideration, deemed right that queſtions involving faith and doctrine ſhould be referred by the Judicial Committee to a National Synod; or to the Provincial Synod of Canterbury aſſiſted by repreſentatives from that of York; or to a Committee compoſed of repreſentatives from both Synods; in each of theſe caſes

there is a courſe perfectly familiar to the conſtitution by which the needful preliminary arrangements, as regards the Spiritualty, could be eaſily and ſatisfactorily carried out. CHAP. V.

By Royal Letters of Buſineſs.

ROYAL Letters of Buſineſs would be directed from the Crown, requeſting the two Convocations to take the neceſſary meaſures for the purpoſe propoſed. And here a word muſt be interpoſed on the inſtruments mentioned—Royal Letters of Buſineſs—becauſe the moſt ſtrange and unaccountable miſapprehenſions prevail in many minds on this and ſome cognate ſubjects connected with the relations between the Crown and the Synods of England. The matter, however, is ſo plain and ſo diſtinctly defined by the conſtitution that it cannot but be cauſe for ſome ſurpriſe that any miſtakes whatever ſhould have ariſen. There are four diſtinct and

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very different inſtruments by which the Crown enters into direct communication with the Church in her Synodical character: 1. a Royal[t] Writ, by which the Crown, whenever a Parliament is called, and at other times, if the Sovereign ſo pleaſes, directs each Metropolitan to ſummon his Provincial Synod; 2. a Royal[u] Licence, needful for one purpoſe and for one purpoſe only—"to attempt, alledge,[x] claim, or put in ure, or enact, promulge, or execute" Canons; 3. a Royal[y] Confirmation of Canons; 4. a Royal[z] Letter of Buſineſs.

[t] Rot. Vaſcon. 22 Ed. I. m. 4. d. 1; Parl. Writs, vol. 1, p. 25; Wake's App. 218; Pearce, Law Conv. p. 54.

[u] Att. Rights. Add. 642; Wake's State App. 237-9; Wake's Auth. Ch. P. p. 371.

[x] 25 Hen. VIII. 19.

[y] Gib. Cod. pp. 994-5.

[z] Wake's State App. 239; Pearce, Law Conv. p. 106; Card. Syn. pp. 776, 777; Ibid. pp. 818, 819.

It is this laſt inſtrument which would be required for the purpoſe under view. Such a document has been conſtantly iſſued, containing the expreſſion of the Sovereign's wiſhes that ſome particular buſineſs ſhould be tranſacted by the Synods. Modern examples of ſuch inſtruments may be found in the years 1661, 1710, 1714, 1715. And as they have

been ever dutifully attended to, ſo not only with reſpectful duty, but with becoming gratitude, it is certain that Royal Letters of Buſineſs on the ſubject before us would be received and obeyed. It is equally certain that the iſſue of ſuch documents by the Crown in this caſe would be in perfect harmony with conſtitutional precedent, and would graciouſly redeem this pledge given in the royal declaration prefixed to the Articles of Religion, that "if[a] any difference ariſe about the external policy, concerning the Injunctions, Canons, and other Conſtitutions whatſoever thereto" (the Church of England) "belonging, the clergy, in their Convocation, is to order and ſettle them." CHAP. V.

[a] Royal Dec. Art.

XVII. *As regards the State.*

THE next queſtion which ariſes reſpects the needful meaſures to be taken by the State for ſecuring the object in view.

By Act of Parliament.

CHAP. V. As was before ſaid, an endeavour was made to ſecure a ſomewhat like relief for the Church by a Bill introduced into Parliament in the year 1850. Her appeal was then refuſed. Would a ſimilar application at the preſent time meet with a more generous reſponſe? Is there room for hope that a kindlier welcome would be now accorded to any well-conſidered propoſition for this union of Spiritual and Civil judicature? Would the poet's language be realized in the legiſlative anſwer to the Church's requeſt:—

[b] Virg. Æn. xi. 321, 322.

. . . . "fœderis[b] æquas
Dicamus leges, ſocioſque in regna vocemus?"

Or, on the other hand, would it be rejected with ſcorn or treated with contempt? That is a grave queſtion, though one feels ſome confidence that the Britiſh legiſlature would never perſiſtently turn

a deaf ear to a real grievance if clearly proved and reſpectfully repreſented. CHAP. V.

By Order in Council.

IT is, however, by no means certain that an Act of Parliament is in any way neceſſary for this purpoſe. It may turn out, upon inquiry, that ample powers have been already granted by the legiſlature for ſecuring the ends in view, and that the ſtatutes of the realm, as they now ſtand, contain enactments ſufficient for the purpoſe.

In the ſtatute[c] which transferred Eccleſiaſtical Appeals, in 1832, from the Court of Delegates to the Privy Council, it is enacted that from that date ſuch appeals ſhall be made "*to*[d] *the King's Majeſty, his heirs, or ſucceſſors in Council . . . ſubject to ſuch rules, orders, and regulations for the due and more convenient proceeding . . . as his Majeſty, his heirs,*

[c] 2 & 3 Will. IV. 92.

[d] Sec. 3.

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and ſucceſſors ſhall, from time to time, by order in Council, direct." Now here power is given to the Crown, in diſtinct terms, to make rules, orders, and regulations *by Orders in Council* for the due and more convenient proceeding in ſuch appeals before the Privy Council. The queſtion then is, has this power been taken away by the ſubſequent Act[e] of 1833, which tranſferred theſe appeals from the Privy Council to the Judicial Committee? And it muſt be ſaid that there is no trace whatever in the later Act of any repeal of that power which the former granted to the Crown, of making rules, orders, and regulations by order in Council, for the due and more convenient proceeding. Thus upon the principle "*ut res magis valeat quam pereat, both acts being affirmative*," and the ſubſtance, "*ſuch*[f] *that both may ſtand together . . . they ſhall both have a concurrent efficacy.*" Therefore the above-mentioned proviſion of the firſt Act would

[e] 3 & 4 Will. IV. 41.

[f] Black. Com. 1. 89.

ſtill abide in force, even if the ſecond ſtatute did not in the preſent caſe ſpecially provide that "nothing[g] in this Act contained ſhall . . . any wiſe alter the conſtitution or duties of the ſaid Privy Council, except ſo far as the ſame are expreſsly altered by this Act." Conſequently, in accordance with the general principles of legal conſtruction, the power by an Order in Council of making orders and regulations for the more convenient proceeding in theſe appeals ſtill remains. And in the exerciſe of this power, poſitively conferred by ſtatute, an Order in Council might be publiſhed directing the Judicial Committee to refer queſtions connected with faith and doctrine to the Spiritualty for deciſion.

[g] 3 & 4 Will. IV. 41. s. 21.

And indeed, to proceed one ſtep further, not only does this power remain as conferred by the firſt of the two ſtatutes in queſtion, the ſecond contains an enactment which is directly to our purpoſe, and really ſeems, upon conſideration, ex-

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[h] 3 & 4 Will. 4 I. 17. "And[h] be it further enacted that it ſhall be lawful for the ſaid Committee to refer any matters to be examined and reported on . . . to ſuch . . . perſon or perſons as ſhall be appointed by his Majeſty in Council, or by the ſaid Judicial Committee, in the ſame manner and for the ſame purpoſes, as matters are referred by the Court of Chancery to a Maſter of the ſaid Court."

XVIII. *Concluſion.*

IN conſideration of the foregoing facts, it would ſeem that the deſired reform might be conſtitutionally obtained, ſo as to ſatisfy the due requirements of the conſtitutional compact, and to ſecure the reſpective rights both of the Church and State, by two courſes of proceeding, either 1. by a ſhort declaratory Act of Parliament, or 2. by an Order in Council, and in each caſe by Royal Letters of Buſineſs to the Convocations of Canterbury and York.

In theſe days of political excitement and party contention it is difficult to ſecure the attention of ſtateſmen to any ſubjects which do not excite ſtrong expreſſions of public feeling or elicit violent exploſions of clamorous outcry. But there are ſubjects no leſs important than thoſe to the well-being of this nation, lying at the very foundation of her moſt ſacred intereſts, and ſtirring to the very bottom the hearts of her moſt loving and moſt dutiful people. He would be a prudent ſtateſman and would earn no ſmall meed of worthy gratitude who ſhould, in the matter now before us, carry through any plan for ſatisfying at the ſame time the requirements of the State and the conſcience of the Church, conſigning in the laſt reſort the correction of offences to the civil power, and meanwhile providing for the due interpretation of the national faith by thoſe to whoſe [illegible] dianſhip it has been by God comm[illegible]

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Such a one would free the Church of this nation from galling fetters in which ſhe is now ignominiouſly bound, and would reſtore the ſupremacy of thoſe principles which alone can enſure an abiding union between a Chriſtian Church and a Chriſtian State. They are enforced by a divine command, "Render[i] therefore unto Cæſar the things which are Cæſar's, and unto God the things that are God's." They are touchingly commended in the words of King Edgar to Archbiſhop Dunſtan, "I[k] bear the ſword of Conſtantine, you the ſword of Peter; let us then join our right hands, ally ſword to ſword, that the lepers may be caſt out of the camp, the ſanctuary of the Lord cleanſed, and that the ſons of Levi may miniſter in the temple."

[i] S. Matt. xxii. 21.

[k] Conc. Mag. B. 1. 246.

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