# THE FUTURE OF THE ECCLESIASTICAL COURTS.

By William Marshall Freeman.

ONE of the most potent influences which brought about the rejection of the Prayer Book Measure by the House of Commons was the belief in the minds of many Members that, quite apart from its merits or demerits, the passing of the Measure would not restore discipline within the Church. They argued, not unnaturally, that if the Bishops could not maintain discipline under the existing Prayer Book, there was not much likelihood of their being able to do so within the wider bounds of the other—especially if, as they were given to understand, discipline was to be secured not by legal sanctions, but by moral suasion. Had the House of Commons been told that reform of the Ecclesiastical Courts was to follow, and that a Measure dealing with that subject had already been drafted, it is possible that a different view might have been taken and that rejection would at least have been accompanied by a hint that the scheme for reforming the Ecclesiastical Courts should be produced simultaneously. That, indeed, would have been wiser policy on the part of the promoters of the Deposited Book—more especially after its first rejection. Now it is inevitable that the question of the future of the Church's courts must be dealt with before any further measure of Prayer-Book revision will have the least chance of being considered by Parliament.

It is agreed, practically on all hands, that the Ecclesiastical Courts will have to be reformed and rehabilitated if the Church is to remain an Established Church. Should disestablishment come about, the Ecclesiastical Courts would not merely cease to function but would cease to exist, as in the case of the Church in Wales. The Church of England would then be in precisely the same legal position as are the Nonconformist Churches—possibly nothing more than a corporate body dependent for its legal rights upon trusteeships subject to the jurisdiction of the ordinary courts of the land. The view so often heard expressed that the present disorder in the Church is due to failure on the part of the Bishops to enforce obedience is not altogether a correct view. True, there have undoubtedly been instances when Bishops have refrained from taking proceedings when to do so might have been amply justified, but it is generally recognized that something more than spasmodic effort on the part of individual prelates has long been needed to restore harmony and discipline within the Church.

"The large variety in the presentation of its teaching and in the conduct of its public worship which has marked the course of the Church of England in the last century, and especially within recent years, has been mainly due to the widening of the thought and outlook of men, to the advance of science, to increased knowledge of the history and liturgies of the Church, to

inevitable changes in the social and educational life of the people, to the needs and demands of each new generation. In this respect it is a sign of health in the body and of the inward vitality which prompts a living organism to adapt itself to a changing environment. But there are many indications that this rightful liberty may degenerate into licence. It is not within our province to attempt to discriminate between types of teaching and modes of worship which have been introduced or restored, or to pronounce any opinion upon them. It is sufficient to record the fact that by general admission a position has been or is being reached in which the public sense of the authority inherent in the Church of England is being seriously weakened."

So the Ecclesiastical Courts Commission of the Church Assembly reported in April, 1926 (C.A. 200), and in support of that conclusion they refer to the Report of the Royal Commission on Ecclesiastical Discipline issued in 1906, which emphasized two main causes of the difficulty of maintaining and enforcing authority—one, the "impossibility of restricting the continuous life of the Church within the rigid limits of a uniformity prescribed three hundred years ago"; and the other, the allegation that, "as regards the constitution and character of the Final Court of Appeal in ecclesiastical causes, it does not command the general assent and confidence of the Church"—

"It is incongruous that the precise and uniform requirements which were in harmony with the Elizabethan ideas of the administration should still stand as the rule for the public worship of the Church under altered conditions, and amidst altered ways of thought. . . . The result has been a widespread disobedience to the letter of the law, which, though acquiesced in in quiet times, has made the enforcement of uniformity, when startling innovations rendered appeal to the law inevitable, difficult and invidious. It has proved impracticable to obtain complete obedience to the Acts of Uniformity in one particular direction, partly because it is not now, and never has been, demanded in other directions."

And again—

"Bishops and others have been naturally slow to appeal to a court, the jurisdiction of which was so widely challenged; clergymen have claimed the liberty, and even asserted the duty, of disobedience to the decisions of a tribunal the authority of which they repudiate; and judgments of the Judicial Committee, though at least the reasoned statements of very eminent Judges, are treated as valueless, because they are Privy Council judgments. A court dealing with matters of conscience and religion must, above all others, rest on moral authority, if its judgments are to be effective. As thousands of clergy, with strong lay support, refuse to recognize the jurisdiction of the Judicial Committee, its judgments cannot be practically enforced."

On this question of obedience, it is not without interest to observe that the Bishop of London, in his reply to the twenty-one clergymen in his diocese who recently addressed a letter to him giving reasons for declining obedience to his directions with regard to the use of the reserved Sacrament, made these significant observations:—

"The greatest fallacy of all is the belief that because things have been obtained by disobedience in the past, therefore they will be in the future. It may be urged that Bishops in the past ought not to have forbidden

some of the things which they did forbid, and that the Prayer Book of 1927 was an acknowledgment of the mistake; but it is a fallacy to argue that disobedience will have a similar result if it is directed against regulations which have received the approval of the Convocations representing the only living authority of the Church of England."

What the Bishop of London is dealing with here is the deliberately expressed intention of a section of his clergy to disobey his own episcopal admonition. That discloses precisely the same attitude of mind as is shown by those who object to the jurisdiction of the Privy Council in ecclesiastical appeals. The objection to the Privy Council has all along been based upon dislike of a lay judiciary and an obvious, though not by any means plainly expressed, desire to have ecclesiastics as judges in ecclesiastical causes.

"The principle upon which the objections to the present Court of Final Appeal are based is that the right of 'declaring, interpreting, and showing' the teaching and use of the Church belongs to the authorities of the Church, and not a tribunal which receives its jurisdiction exclusively from the State."

That is the authoritative statement of the basis of objection to the Privy Council as the Final Court of Appeal. In what way does that differ from the objection of the twenty-one clergymen in the diocese of London to obey their Bishop? Their objection was based upon the fact that Bishops are appointed by the Crown upon the recommendation of lay Ministers. Here again let us quote the Bishop of London:—

"Can it really be contended that the fact that the State has a voice in the appointment of Bishops, which it had (as you acknowledge) long before the Reformation, really frees us as priests from the obligation of our oath of canonical obedience? Remember, we knew all about this method of appointment when we were ordained, and still better when we were instituted to livings. In the service itself we promised canonical obedience to our Bishops, knowing that they were nominated by the State. Is it not too late now, when we are placed in important positions on this understanding, to turn round and say that we repudiate the obligations which we solemnly took with our eyes open? I feel sure that the conscience of the laity of the Church will not support you in that contention."

There can be no doubt that this attitude of hostility to lay jurisdiction has been adopted by two different clerical groups. One—happily, it may be believed, a very small group—desires to set up a new ecclesiastical hierarchy with power as absolute within its domain as is the power of the Pope of Rome. With this group there can be no compromise. The thing they aim at is preposterous and impossible. The other group—a very large group—conscientiously holds that there is a limit to State interference in matters of religion: that the Church should have exclusive power to decree her own rites and ceremonies, and full authority in controversies regarding her own faith: that the intervention of the State in the appointment of Bishops is wrong: that "spiritual" causes should be determined by "spiritual" judges: and that,

above all, the intervention of non-Churchmen (as in Parliament) is intolerable.

With the feelings of this latter group it is impossible not to sympathize up to a point. Indeed there is every reason why their views should be heard and considered with the utmost patience and care. Most of us would agree that the *choice* of her Bishops at least should rest with the Church: that their appointment by the Crown should be more in the nature of a necessary ministerial act following upon that choice. Nor would agreement on other points be difficult to reach. But on this "spiritual" jurisdiction there is surely need for clearer thinking. The word "spiritual" is capable of very varied meanings. There are not wanting those who would substitute it for "clerical" as opposed to "lay" in dealing with persons, in the same way as the Church of Rome places the word "religious" in apposition to "secular." So this word "spiritual" must be carefully analyzed. As commonly and loosely used in the present connection, so far as one can judge, the distinction between causes which are "spiritual" and those which are "non-spiritual" would appear to be something like this: an incumbent may conceive the idea of teaching some doctrine either forbidden or not allowed in the rubric. Upon being challenged for so doing, he wishes to be at liberty to say that with him it is a matter of conscience, and that it is not contrary to the doctrine of the Church. It is therefore a "spiritual" matter, and spiritual matters must only be determined by spiritual persons—the lawyer as layman not being a spiritual person. It is very difficult to understand this attitude of mind. It might just as well be contended that a man who has moved his neighbour's landmark should be tried by a "spiritual" court because his conscience makes him believe that there was an error in the original document of title. In each case the question raised is one of fact and legal interpretation. An incumbent is required upon institution to make a declaration of assent and a promise of loyal adherence to the Thirty-Nine Articles and the Book of Common Prayer. In virtue of that promise he is instituted into the temporalities of his living and is preserved therein by the power of the State, whose law he has promised to obey. Now that law, so far as the doctrine and ritual of the Church of England is concerned, has been made by the Church. It was never made by Parliament—it was *adopted* by Parliament as embodying what the Church had decreed and desired, just as much as the Measures recently passed and placed on the Statute Book have been adopted and placed there by and with the consent of Parliament as embodying what the Church desired in her elected Assemblies.

We must also keep clearly in mind in this matter the distinction between legislation and administration. No reasonable person would suggest that judges of Ecclesiastical Courts should be legislators. Like the judges of the civil and criminal courts, they are and should be interpreters and administrators of the law as ordained by the Church herself through her Convocations and

Assemblies. If it should happen that judicial decision should at any time place a construction upon some enactment different from what the Church intended, then the remedy is for the Church to correct it by amending legislation. That is exactly what happens in regard to the civil or criminal law. If a decision of the courts should fix the meaning of some section in an Act of Parliament as being different from what the nation by its legislature intended or does now intend, the remedy lies in fresh or amending legislation. The Church already has power to decree rites and ceremonies and authority in controversy of faith—that is fundamental and incontrovertible, and dates back to the time when its Divine Founder established His Church upon the rock of faith. But the Church must make her own arrangements for declaring what her faith is and shall be in any particular matter, and what are the permissible variations and extensions of that faith. She can only do that through her own legislature—to wit, her Convocations and Assemblies; but having done so, and having sought the acceptance and protection of the State for the upholding of her decrees, she must surely be content that her laws shall be interpreted and administered on the same lines and with the same absence of bias and partiality as are the other laws of the State.

But I shall be told that it is an intolerable affront and injustice that Parliament should decline to adopt and enforce any decree of the Church's Legislature—as, for example, the Deposited Prayer Book which that Legislature had adopted by large, if not overwhelming, majorities. But can we forget that we are dealing with an established Church? The Church of England is the heritage and possession of this nation in a sense far beyond the idea which limits her to her churches and congregations. Thousands, nay millions of the King's subjects rarely, if ever, enter a Church for habitual worship and make no pretence either of knowing her creeds or of being interested in her doctrines. Yet they love her cathedrals and churches, they respect her clergy, and seek their ministrations on occasion. To them the Church in her parochial organization is a living and effective reality—an emblem of stability and permanence. Who shall say that the House of Commons may not give effect to what it believes to be the prevalence of national feeling? That seeming prevalence may be misinterpreted. Let the Church remedy it by patiently correcting aught that is misunderstood. But let her not lose heart and temper, and fly to Disestablishment—changing her great heritage for the mess of pottage that freedom from the existing connection with the State might prove. Certain it is that if Parliament could see the Church's Courts administering the law ecclesiastical with independence and equity, and building up authoritative interpretation of that law, any likelihood of future conflict between Church and Parliament would disappear. True, the legislative power of the Church in Convocation and Assembly will need to be delineated and defined more clearly than at present if the rehabilitated Judiciary of the Church is to be in a position to do justice to that

ideal. That, however, is a collateral theme, into which we must not here allow ourselves to be drawn. The present quest is for the true basis of reform of the Church's Courts.

The first essential of any scheme for the reform of the Ecclesiastical Courts is that their sphere of action shall be clearly defined. One very necessary requirement to that end is consolidation of ecclesiastical statute law. The law of the Church is derived from various sources and is intermingled at many points with the law affecting other religious bodies and with other departments of the civil law. Disregarding all "hybrid" enactments and having regard only to the statute or written law affecting the Church of England alone, we shall have (*a*) the Canon Law; (*b*) the unrepealed Acts of Parliament on the statute-book of the realm prior to the setting up of the Church Assembly; and (*c*) the "Measures" added and being added to the statute-book since the Church Assembly began to function. There should be little difficulty in reducing the second group to more intelligible consolidated form, to be administered with the new "Measures" by the Ecclesiastical Courts. As to the Canon Law, that might present more difficulty: but a practical way could assuredly be found of eliminating what is obsolete and contrary to statute, and reducing the remainder to compact form. The Courts should then judicially administer (*a*) the Canon Law, (*b*) the Statute Law, and (*c*) the common and customary law affecting the Church of England. This last-named is outside both the two former. So much for the scope of their work.

How, then, should the Ecclesiastical Courts be rehabilitated, and what reforms are needed in order that they may command the general assent and confidence of the Church and nation which is the basis of all effective authority? As to the Courts themselves, could any system possibly be better than that which now exists? The Diocesan Court as the Court of first instance. Appeal from thence to the Provincial Court. Appeal from that Court direct to the Crown. That is the system upon which our civil judicial procedure is worked—and he would be a bold man who would assert that it does not command the general assent and confidence of the nation. It would seem that this system—as a system—meets with general approval. The Church Assembly Commission indeed treats it as such—following in this respect the Report of the Ecclesiastical Courts Commission of 1883 and that of the Royal Commission upon Ecclesiastical Discipline of 1906. So it is not a question of setting up new Courts at all, but a question of rehabilitating or revivifying the existing Courts, that the Church has now to face. It may be taken as agreed that the existing Courts are to be rehabilitated. But when we come to the changes—the reforms—necessary to ensure rehabilitation, we are met with the real difficulty of the situation.

Let us begin with a very elementary proposition. A Court of Justice which is to interpret law should be absolutely free and unfettered by control of any sort whatever. The appointment of the judge must therefore be so provided for that he will care

nothing for the favour or the frowns of any person however highly-placed. Apply this rule to the method at present obtaining in regard to the Diocesan Courts—the Courts of First Instance. The Chancellor is the nominee of the Bishop. True, the Diocesan Court is the Bishop's Court by tradition—the Court in which originally the Bishop himself sat as judge and, according to the Report of the Assembly Commission, ought still to sit as judge whenever he is so minded :—

> "We recommend that the Chancellor, as representing the Bishop, should be the judge of the Diocesan Court, but that the Bishop should be at liberty, when he sees fit, to sit in lieu of the Chancellor as judge of the Court. We also recommend that in every case involving discretion, whether as regards the observance of a rubric or the granting of a faculty, the Chancellor should be at liberty to refer any question, with his note of the evidence and of the arguments, to the Bishop, whose ruling shall be binding on the Chancellor."

But surely this violates the elementary proposition we are considering ? It is notorious that the very fact of the Diocesan Chancellor being "the Bishop's man" has done more than anything to bring his jurisdiction to the verge of public contempt. Let churchmen consider and reflect what a state of affairs we have arrived at in regard to the *personnel* on the Diocesan Courts. At the present time there are some forty-five dioceses in England, each with its own chancellor. Of the forty-five chancellorships no less than twenty-seven are at the present time held by five men. The remaining fifteen are distributed variously amongst eight or nine individuals. From these facts several very obvious deductions can be drawn. One is, that a separate chancellor is not required for every diocese. The fact that one of the five gentlemen named above, in addition to holding six chancellorships, also holds appointment as Official Referee of the High Court of Justice—a whole-time appointment of an onerous nature—would of itself seem to emphasize this deduction ; similar observations in regard to the other four would add further emphasis to the suggestion that the duties of these twenty-seven chancellorships would not overtax the time or the energies of two competent lawyers.

A second deduction to be drawn is that great financial saving might be derived from a drastic reduction of the number of chancellors. As to this, it is high time that an authoritative official return should be published showing the emoluments derived by the holders of these forty-five chancellorships, with an analysis of the sources from which they are derived. The Archbishops and Bishops of the Church owe that as a plain duty to the laity, who are continually being appealed to for funds for Church purposes. Moreover, the sources from which these fees are derived should be made clear. Year after year in many dioceses no Court is held—the faculties are so frequently issued without question or opposition that in the great majority of cases a common form suffices ; in numerous other administrative matters the Registrar of the diocese does the necessary work, and rarely is any intervention by

the chancellor called for; whilst in the matter of marriage licence fees it is generally understood that the chancellor's duty is limited to endorsing the quarterly cheque for his share of them. Put quite plainly, the whole system by which chancellors are remunerated, like almost everything else connected with their office, is medieval and obsolete.

Yet a third—and in some respects more serious—deduction is to be drawn from this system of "farming" chancellorships. It tends to a grouping of the chancellors into schools of thought correlating to similar groups of ecclesiastics—with the result that uniformity of practice has disappeared. The chancellors are in fact, almost without exception, men bearing distinct labels. Is it not most essential that there *should* be uniformity of practice in every diocese? It would seem that the Church Assembly Commission think otherwise, if we may judge from their recommendation that even the decisions of the Final Court of Appeal are not to be regarded as precedents—

"Theological thought is a living thing, and the interpretation of doctrinal formularies must needs be affected by the movement of the living mind of the Church . . . the statements and arguments of judges must be open to reconsideration in the future by their successors. Moreover, as the nature of the appeal is that it deals with a complaint of lack of justice in a particular case, it is reasonable that only the actual decree given in that particular case should be of binding authority, and that it should not form a precedent. The application of this rule will not always be easy, especially when a judge of a Provincial or Diocesan Court is invited to exclude from his mind a decision which he knows to have been given in the Court of Appeal to the Crown. But, on the other hand, that he should be bound by that decision or its reasons would be inconsistent with the function of the Crown Court."

It is difficult to believe that a Commission including in its membership several practising barristers could arrive at so strange a conclusion. All legal experience should condemn this proposition. The effect of adopting it would be to abolish law in the Church and to replace it by episcopal decisions varying with each change of episcopate, having no tradition built on precedents, with irregular administration varying in each separate diocese, and governed all through by the power (also advocated in the Report) of every Bishop to veto proceedings at will! The same unhappy idea, however, pervades the views expressed by the Commission in regard to the Provincial Courts: the two central courts to which appeal should lie from the Diocesan Courts—

"We recommend that, like the Bishop in the Diocesan Court, the Archbishop should have the right in all cases to decide whether he himself, or the official principal as his delegate, shall sit as judge of the Court of the Province."

This is followed by a suggestion that when the Official Principal sits as judge of the Principal Court he should have power to call for "theological assessors." These theological assessors

"should be selected by the Archbishop or the official principal, as the case may be, from a list consisting of (*a*) the Bishops of the Province, and (*b*) other

persons nominated to serve as assessors (when called upon to do so) by the Convocation of the Province."

The whole idea is wrong. The Provincial Court should be a Court presided over by three judges, in precisely the same way as the Court of Appeal is constituted at the Royal Courts of Justice. The judges should be appointed from the roll of chancellors just as the Lords Justices of the Court of Appeal are chosen for promotion from among the High Court Judges. They should, like the chancellors, be absolutely free from any suggestion or suspicion of partisanship or influence. Their duty should be to review the decisions in the Consistory Courts—not as theologians, but as lawyers charged with the duty of interpreting the Law of the Church as they find it—and from their decision appeal should again lie to the Privy Council as the final interpreting authority.

What is the true inwardness of the objections that have been raised to the jurisdiction of the Privy Council—the most august and dignified Court of Justice in the world—for these objections are said to lie at the root of all the trouble that has arisen in regard to the Ecclesiastical Courts? What say the Church Assembly Commissioners? Their attitude seems to be one of meek acceptance of the strange suggestion that the Judicial Committee of the Privy Council claims the right of "declaring, interpreting and showing the teaching and use of the Church," which, as the authors of the suggestion add, "belongs to the authorities of the Church, and not to a tribunal which receives its jurisdiction exclusively from the State."

The answer to this is, of course, that it is no part of the duty of the Privy Council to "declare or interpret the teaching and use of the Church." Its duty is wholly different. No such attitude has been or is likely to be adopted by the distinguished Judges who sit at the Privy Council Board. No clearer or more effective reply to the suggestion that this famous tribunal would go beyond its proper sphere of duty could be found than in the judgment delivered in 1850 in the case of Gorham *v.* Bishop of Exeter by Lord Langdale, Master of the Rolls, in favour of the appellant clergyman [1]:—

"These being the opinions of Mr. Gorham, the question which we have to decide is, not whether they are *theologically* sound or unsound—not whether upon some of the doctrines comprised in the opinions, other opinions opposite to them may or may not be held with equal or even greater reason by other learned and pious ministers of the Church—but whether these opinions now under our consideration are contrary or repugnant to the doctrines which the Church of England, by its Articles, Formularies, and Rubrics, requires to be held by its Ministers, so that upon the ground of those opinions the

[1] This really great judgment should be read in full by all Churchmen who feel any doubt on this point. The Court was composed of some of the greatest lawyers of the last century. In addition to Lord Langdale, there were present as members Lord Chancellor Campbell, Baron Parke, and Vice-Chancellor Knight-Bruce. The judgment was to the effect that the doctrines complained of—in respect of which the respondent Bishop of Exeter had refused to institute the appellant to a living—were "not contrary to or repugnant to the declared doctrine of the Church of England." The report is to be found verbatim in Vol. 7, *Notes of Privy Council Cases*, commencing at page 413.

appellant can lawfully be excluded from the benefice to which he has been presented. This question must be decided by the Articles and the Liturgy; and we must apply to the construction of those books the same rules which have been long established, and are by law applicable to the construction of written instruments. We must endeavour to obtain for ourselves the true meaning of the language employed, assisted only by the consideration of such external or historical facts as we may find necessary to enable us to understand the subject matter to which the instruments relate and the meaning of the words employed.

"In our endeavour to ascertain the true meaning and effect of the Articles, Formularies, and Rubrics, we must by no means intentionally swerve from the old-established rules of construction, or depart from the principles which have received the sanction and approbation of the most learned persons in times past as being on the whole the best calculated to determine the true meaning of the documents to be examined. If these principles were not adhered to, all the rights, both spiritual and temporal, of Her Majesty's subjects would be endangered. . . . This Court has no jurisdiction or authority to settle matters of faith, or to determine what ought in any particular to be the doctrine of the Church of England. Its duty extends only to the consideration of that which is by law established to be the doctrine of the Church of England, upon the true and legal construction of her Articles and Formularies."

In that pronouncement lies the keynote of impartial administration of the Law of the Church. Directly there is outside intervention by non-legal assessors—especially Bishops—the judicial becomes mingled with the legislative, and mischief enters. You get then the chaos against which the Church was warned by Lord Penzance in the separate Report he signed as a member of the Ecclesiastical Courts Commission of 1883, in protesting against the suggestion that judgments in ecclesiastical causes should not be regarded as precedents:—

"Such a system if adopted would result in this. . . . No legal principle would be asserted or established, no general interpretation of the terms and directions involved in the rubrics of the Prayer Book, or of the language in which the doctrine or the ceremonial of the Church has been expressed by lawful authority, could be arrived at or ascertained. . . . In a word, such a system, if acted upon for half a century, would destroy the ascertained law altogether; and had it been maintained in the temporal courts from early times, it is not too much to say that what is known as the common law of the land could have had no existence."

And so it is submitted that the true method of reforming and rehabilitating the Ecclesiastical Courts lies in reshaping them on the model of the Civil Courts of the Realm. Due regard must of course be had to the particular fitness of the men appointed to preside over those courts—the form of their appointment needs to be carefully reviewed: the methods of giving effect to their decisions should be simplified. These are side-issues, each with an importance of its own, but entirely subsidiary to the fundamental principle that the Law of the Church should be administered as it stands by Judges who are not Legislators, and whose only concern is to give effect to the law as they find it, leaving to the elected and accredited Convocations and Assemblies of the Church the duty of declaring her teachings and her usages, and of varying the same from age to age according to the wisdom derived from her own inherent spirituality.