THE REFORM OF THE ECCLESIASTICAL COURTS.

By H. F. Walker.

THE crisis in the Church of England arising out of the rejection of the Prayer Book Measure by the House of Commons has raised a fundamental issue. Precisely the same issue is involved in relation to the question of the reform of the Ecclesiastical Courts. In both cases it arises out of the conditions of the Establishment in England. Let us then be quite clear as to the meaning of Establishment in this country, for it is of the utmost importance that there should be no misunderstanding or misconception on this point when the subject of Ecclesiastical Courts is under consideration. "The Establishment of the Church by law consists essentially in the incorporation of the law of the Church into that of the realm, as a branch of the general law of the realm, though limited as to the causes to which, and the persons to whom it applies; in the public recognition of its Courts and Judges, as having proper legal jurisdiction; and in the enforcement of the sentences of those courts, when duly pronounced according to law, by the civil power." In the words just quoted the meaning of Establishment is plainly and concisely explained by a great authority, viz., Lord Selborne, in his well-known book entitled *A Defence of the Church of England against Disestablishment.*

The Prayer Book and Articles of the Church of England have by statute been incorporated into the law of the Realm. Now the law of the Realm has to be construed by Courts to which the necessary jurisdiction has been granted and cannot be altered otherwise than by the authority of Parliament. From this position flow two results of fundamental significance and importance in relation to the ecclesiastical law of the Realm. One is that that law must be finally determined by a Court appointed by the Crown and the other is that Church legislation must be finally approved by Parliament. In other words, the conditions of Establishment in England are such that the judicial and legislative system of the Church are subject to the final control of lay and secular authorities. Whether this ought to be so or not is entirely a matter of opinion. The point is that it is so, and that position was accepted by the Church from the time of the Reformation.

But during the latter half of the nineteenth century, as the "Catholic" movement began to grow and spread among the clergy, a revolt against these cardinal principles of Establishment began. The movement was directed first against the Judicial Committee of the Privy Council which was and is the Final Appellate Tribunal in ecclesiastical causes. The clerical rebels professed to

repudiate the jurisdiction of this Court, and claimed to act in disregard of its judgments in decided cases.

The same thing is happening in relation to the authority of Parliament now that the House of Commons has exercised its undoubted constitutional right to reject a Church Measure of the first importance. The authority of Parliament is challenged in the name of the (so-called) spiritual freedom of the Church. In both cases the Church is faced with the question whether or not it will continue to conform to the legal conditions of establishment or whether it will seek disestablishment. This is the fundamental issue which has now been raised.

With the question of the Church's position in relation to Parliament we are not further concerned in this article. But on the question of the Courts a Commission of the Church Assembly has proposed a scheme which is intended to operate within the Establishment in such a way as to satisfy the Church, and it is the main principles of this scheme which we are concerned here to examine.

Bearing in mind that the ecclesiastical law of the Realm is, as we have already seen, just a special branch of the general law which has to be construed and administered by properly constituted Courts, it is interesting to recall that in pre-Norman days there was no well-defined or separate system of ecclesiastical courts and that the civil and spiritual judges sat together in one court administering there civil and ecclesiastical justice. This system has been described by the great lawyer Blackstone as "moderate and rational," and it is most interesting to note that in 1898 Parliament, for a special purpose, in effect revived the system when it established the Court under the Benefices Act, 1898. In this court the judges are the Archbishop of the Province and a Judge of the Supreme Court nominated by the Lord Chancellor. The latter decides all questions of law and finds as to the facts alleged as grounds of unfitness in the presentee of the benefice, and such decision and findings are binding on the Archbishop. The Archbishop directs institution or admission if the Judge finds that no fact exists sufficient in law to be a reason of unfitness or disqualification or, if the Judge finds that any such fact exists, decides, if necessary, whether by reason thereof the presentee is unfit for the discharge of his duties and determines whether institution or admission ought in the circumstances to be refused; and in either case gives judgment accordingly, and that judgment is final.

The Anglo-Saxon system, however, in which Bishop and Sheriff had presided together over the Shire Court where both spiritual and secular causes came up for decision, was abolished by William the Conqueror, who directed that ecclesiastical causes should be heard and determined in exclusively ecclesiastical courts. There were three such courts, viz., the Court of the Archdeacon, the Court of the Bishop, otherwise called the Diocesan or Consistory Court, and the Court of the Archbishop, otherwise called the Provincial Court. Of these, the Court of the Archdeacon is, for judicial

purposes, dormant, though it has a legal existence and could be revived. Whether with a simple procedure it could be made to serve a useful purpose in disposing quickly of minor matters is perhaps worth consideration. The Diocesan and Provincial Courts are the two important ecclesiastical courts, and it is necessary to note carefully why these courts are recognized by the Church as "spiritual" courts properly so called. The reason is that they derive their authority from the Bishop and Archbishop respectively, and it matters not whether the Bishop or Archbishop sits as sole judge or whether his "Official" or Chancellor sits for him, inasmuch as, in either case, the Court is acknowledged as a spiritual court by reason of the Episcopal source of its authority.

It is not the purpose of this article to discuss questions of procedure. It may well be that there is much room for reform in the procedure of the Church Courts, and provided that any changes which may be made are not inconsistent with the general principles of English justice they should be welcomed.

Apart from questions of procedure there is not much difficulty or controversy about the two Courts now under consideration. As spiritual Courts they have always been acceptable to the Church and they have been recognized by the State. Opinion may differ as to whether the Bishop himself should sit as Judge having his "Official" or Chancellor with him as an Assessor to keep him right on questions of law and evidence or whether the "Official" or Chancellor should sit as Judge, having the Bishop with him as an Assessor in relation to theological and liturgical questions. These alternatives are discussed in the Report of the Church Assembly Commission (C.A. 200), pp. 10–15.

With regard to the Diocesan Court the Commission itself recommends that the Chancellor should be the Judge, but that the Bishop should be at liberty, when he sees fit, to sit in lieu of the Chancellor, in which case the latter should act as legal assessor, and there should also be a theological assessor. In the case of the Provincial Courts the Commission recommends that the Archbishop should have the right in all cases to decide whether he himself or the "Official Principal" shall sit as Judge. If he sits himself the "Official Principal" should be his legal assessor, and in either case each should have the right to request the attendance of theological assessors.

No important question of principle seems to arise out of these recommendations, which we therefore think may be generally accepted.

The next stage in the matter is the consideration of the appellate system in ecclesiastical causes, and here very serious questions of principle do arise. From the Diocesan Court an appeal lies to the Provincial Court and from that Court the appeal is to the Crown. This, of course, is the final appeal, and it is an appeal to the King in Council. This means that the appeal is heard by the Judicial Committee of the Privy Council, and technically their judgment is a report of advice to the King. This Court, as it may be conveniently

termed, is the highest Court of Appeal in the British Empire and is of equal standing with the House of Lords, from which it differs only in point of jurisdiction and in certain matters of procedure. The Law Lords are also members of the Judicial Committee, and in substance the two tribunals are one except that certain distinguished judges or ex-judges, both English and Dominion, who are not peers, are members of the Judicial Committee. No ecclesiastical test is imposed on the members of the Committee when they sit to hear ecclesiastical cases, but they are required to have with them certain Episcopal Assessors who, however, act in an advisory capacity only, take no part in the decision, and are not therefore responsible for it. The Court is as completely unfettered in ecclesiastical as in any other causes within its jurisdiction.

Under the present system, then, the Church has the right to have ecclesiastical appeals heard and determined by the greatest Law Court in the world. But the following objections are taken: it is said that this Court is not a spiritual Court, for it derives its authority from the Crown; that the right of declaring the teaching and use of the Church belongs to the authorities of the Church and not to a State Court; that as the decisions of the Final Court are binding upon the inferior Provincial and Diocesan Courts the decisions of the latter may be infected with a non-spiritual element; and that the members of the Judicial Committee of the Privy Council have not the requisite knowledge of ecclesiastical and theological matters to fit them to be judges in cases where these questions arise. The result is that the Anglo-Catholics on these, and possibly other grounds, repudiate the jurisdiction of this Court, which it is said, for this reason, does not possess the moral authority which a court should have if its judgments are to be effective. The Church Assembly Commission has committed itself to the view that the breakdown in the operation and enforcement of ecclesiastical law is due to the existence of the Judicial Committee of the Privy Council as the Final Court of Appeal and that the vindication of the law cannot be secured unless a change is made in the present constitution of the Final Court.

Before we consider the proposals which the Church Assembly Commission recommends to remedy the mischiefs which are alleged to exist in relation to the Final Court of Appeal it is desirable to bear in mind the following most important points, viz.: (1) While the Church remains Established and subject to the Royal Supremacy the final appeal must be to the Crown and therefore the Final Court of Appeal never can be a spiritual Court; (2) that spiritual authority cannot of itself confer legal competence; (3) that the principle that the decision of a superior Court is binding upon an inferior Court is fundamental to the English judicial system, for only so can uniformity, certainty and consistency in the law be obtained; (4) that in the English judicial system it is not required as a matter of principle, though it may be in some cases as a matter of convenience, that a judge shall be an expert in any one branch

of the law. The Judicial Committee of the Privy Council itself, for example, has to deal with many systems of law within the British Empire, but no rational person suggests that it is incompetent to adjudicate upon a case involving a different system of law, because that particular system is not one in which the Judges themselves have been trained; and (5) that the Judicial Committee of the Privy Council "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 other words, with regard to controverted opinions the question which the Court has 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 . . . 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." The passages just quoted are taken from the judgment of the Court itself in the case of Gorham *v.* The Bishop of Exeter,[1] and it is of the utmost importance that they should be carefully noted and clearly understood.

We turn now to the actual proposals of the Church Assembly Commission. They require careful examination because they present a plausible appearance to the uninstructed layman. The Commission admits that the final appeal must be to the Crown, and that the authority and jurisdiction of the Court must be derived from the Crown, with the result that the Court will be a non-spiritual Court. They further agree that the Judges must be appointed by the Crown, and they propose that they shall be selected from among existing Judges, whether judicial members of the House of Lords, the Judicial Committee of the Privy Council or the Supreme Court, and persons learned in ecclesiastical law. They propose that a new Court, so constituted, shall be established to be called the Court of Appeal to the Crown. So far there appears to be no difference in principle between the proposals of the Commission and the present system, and it is this that makes the scheme so plausible. But consider now the further proposals. The first departure from the pure standard of the English judicial system is in the imposition of an ecclesiastical test in a Crown Court. The Judges are to be required to declare themselves to be members of the Church of England as by law established. This in itself is sufficiently serious, for its only effect can be to narrow the area of choice of the judges. It might exclude some of the ablest among them. Obviously it cannot convert the Court into a "spiritual" Court. Even the Church Assembly Commission are constrained

[1] Brodrick and Fremantle's *Ecclesiastical Judgments of the Privy Council*, p. 64.

to admit that they " cannot consider that this is a matter of vital principle " ; but they think " that such a requirement is, in itself, fitting and would serve to disarm possible criticism, and to ensure the greater confidence of the Church." In our submission the imposition of this test is thoroughly unsound and ought to be rejected.

But far more serious is the next proposal, and this is the vital point of the whole scheme. We must quote the actual words of the Report of the Commission as follows: " We . . . . recommend that where in an appeal before the Final Court the question arises what the doctrine, discipline or use of the Church of England is, such question shall be referred to an assembly of the Archbishops and Bishops of both Provinces who shall be entitled to call in such advice as they may think fit ; and that the opinion of the majority of such assembly of the Archbishops and Bishops with regard to any question so submitted to them shall be binding on the Court as to what the doctrine, discipline or use of the Church of England is. The Court having taken such opinion into their consideration, together with any relevant Acts of Parliament, shall pronounce what in the particular case ought to be decided in order that justice may be done. For the purpose of this paragraph the expression ' Acts of Parliament ' does not include the Book of Common Prayer or the Thirty-nine Articles."

We can only regard this as an astounding recommendation, and we are completely at a loss to understand how the legal members of the Commission were induced to assent to it. Nor do we think that some of the other members of the Commission can have realized what they were doing. In our submission the proposal, in substance, amounts to nothing less than the setting-up of a " spiritual " Court as the Final Court of Appeal. The form of a Crown Court is retained, but the substance of the matter is that in all questions relating to the doctrine, discipline or use of the Church of England, including the construction of the Book of Common Prayer and Thirty-nine Articles, which are documents having statutory effect, the Court is completely subordinated to the Episcopate. This recommendation of the Commission is as astute as it is plausible. If there is to be any pretence of retaining the appearance of a Crown Court, then the Anglo-Catholics could ask for nothing more except that the Crown should be deprived of the right of appointing Bishops. That the construction of any branch of the general law of the Realm of which the Prayer Book and Articles form part should be withdrawn from the jurisdiction of the Crown Judges is a recommendation as intolerable as it is revolutionary, and we cannot think that such a departure from the English judicial system could ever receive the sanction of Parliament.

We must pass now to the consideration of a third recommendation of the Commission which is open to the most serious objection. The Commission has thrown over the great principle that the judgment of a superior Court must be binding on an inferior Court, for the Commission recommends with regard to the decisions

of the Crown Court " that the actual decree alone shall be of binding authority, and shall not form a precedent." We submit that this will reduce ecclesiastical law to chaos and absurdity. The objections to such a proposal were stated in measured language by a great lawyer (Lord Penzance) in his separate report as a member of the Ecclesiastical Courts Commission of 1883. He there said: " Such a system, if adopted, would result in this, that no case would become a precedent for the decision of cases arising after it, except those in which every circumstance was identical. No legal principle would be asserted or established, no general interpretation of the terms and directions involved in the Rubrics of the Prayer Book, or of the language in which the doctrine or the ceremonial of the Church has been expressed by lawful authority could be arrived at or ascertained. Every fresh point, though in reality falling under a general category with which the Court had previously dealt, would become necessarily the subject of a fresh suit to settle it, and until it was brought to adjudication no man would be able to tell what the law might be held to be. In a word, such a system, if acted upon for half a century, would destroy the ascertained law altogether; and had it been maintained in the temporal courts from early times, it is not too much to say that what is known as the common law of the land could have had no existence."

We may safely leave the proposal that the decision of the Court shall only be binding in the particular case to the condemnation of Lord St. Leonards and proceed to some concluding observations.

There are other matters of importance that might be referred to in connection with the subject of Ecclesiastical Courts. The historical aspect of the matter is very relevant to an understanding of the true constitutional position and there is the Bishops' veto on legal proceedings which should certainly be abolished. The purpose of this article, however, has been to select three of the proposals of the Church Assembly Commission which seem to raise fundamental questions of principle and on these points to challenge their recommendations.

We submit that there is really no half-way house for the Church between accepting frankly and fully the well-established principles of the English constitution and judicial system and disestablishment under which the Church can have any fancy system of " spiritual " courts which it cares to set up.

Apart from disestablishment, when the whole question of Ecclesiastical Courts would cease to concern the State, the only alternatives to the present system are, we suggest, as follows:

The total abolition of the Ecclesiastical Courts and the substitution therefor of:

(*a*) The system adopted for the Court under the Benefices Act, 1898, with an appeal from the Judge on questions of law to the Court of Appeal and House of Lords, or

(*b*) The Chancery Division of the High Court of Justice with

the usual right of appeal to the Court of Appeal and House of Lords.

In ecclesiastical appeals the House of Lords should have the right to consult the Bishops who are members of the House just as the House has the right to consult the Judges. But the judicial discretion of the House should be absolutely unfettered and the opinions of the Bishops should not be binding upon it. So far as the Final Court of Appeal is concerned there is obviously little to choose between the House of Lords with the Bishops as consultants and the Judicial Committee of the Privy Council with its Episcopal Assessors. But that one or other of these Tribunals should, so long as the Church remains established, be the Final Court of Appeal in ecclesiastical causes is, we are persuaded, a matter of vital importance to both Evangelical and Liberal Churchmen.

The Altar on the Hearth, by the Rev. George Townshend, Canon of Clonfert (The Talbot Press, Ltd., 2*s.* 6*d.* net), is a book of prayers and meditations which as Bishop Plunket says in his Introduction fills a gap because it "strives to uplift the everyday life of home and family towards a definitely spiritual plane." Canon Townshend emphasizes the truth that happiness is only to be attained through conscious communion with God, and he illuminates it and illustrates it by a collection of prayers dealing with the needs of life on many sides. They are full of spiritual insight and of deep sympathy with sorrow and suffering.

Messrs. Thynne and Jarvis have issued a verbatim report of the 101st Islington Clerical Conference under the title *Evangelicals in the Church of England* (1*s.* net). Those who heard these papers will be glad to have them in this permanent form, and those who did not have the privilege of being present at the Conference will be well advised to read this account of the past work, future prospects and aims of the Evangelical School. It ought to prove an inspiration to fresh effort in the service of Christ, and in consecration to the spread of the Gospel.