# ECCLESIASTICAL COURTS.

BY A K.C.

"FOR the first time the Church has undertaken to present a scheme for the reform of its Courts." So spake the Archbishop of York at the recent meeting of the Church Assembly. But the official report presented to the Assembly of the Ecclesiastical Courts Commission shows that the promoters of the scheme to which the Archbishop referred contemplate something much more than a mere reform of strictly Ecclesiastical Courts. It seeks to deprive one of the King's Courts—the Judicial Committee of the Privy Council—of its jurisdiction and powers in Ecclesiastical causes, and it is proposed to set up in its place a new tribunal to be known as the Court of Appeal to the Crown. The suggested reforms therefore are not merely of interest to Churchmen, lay and clerical, but to the whole nation, because in so far as the recommendations made relate to the supersession of the Privy Council in Ecclesiastical suits and causes, and purport to prescribe the constitution and the procedure of the proposed Court of Final Appeal, it is submitted that they touch a fundamental aspect of the English Constitution as by law established. These particular recommendations are, in short, of a revolutionary nature and would, if adopted, be a distinctly retrogade step.

The point which at the outset it is of the utmost importance to realize is that the Judicial Committee of the Privy Council is one of the tribunals of the realm. It is not a mere spiritual Court. It is not a mere Diocesan or Provincial Court which Bishops may perhaps regulate or control at discretion. It is a national Court, above and superior to any Ecclesiastical Court alike in its constitution and independence, and, as the Royal Commission on Ecclesiastical Discipline in 1906 said, it "seems to comprise the materials of a most perfect tribunal for deciding the appeals in question"—that is, appeals from the diocesan and provincial Courts. This tribunal, as such, succeeded the ancient Court of Delegates in accordance with the recommendation of a Commission in 1830–32. Such Commission, be it noted, which so recommended the Privy Council as the most perfect tribunal for the purposes in question, included the then Archbishop of Canterbury and several Bishops, as well as the most eminent Ecclesiastical Judges of the day. Their recommendations were accepted and have been acted upon for very many years.

Why is it now proposed to replace the Judicial Committee of the Privy Council by another tribunal? It would almost seem that the very independence of this eminently judicial body and its fearlessness in restoring and securing religious liberty when menaced by Ecclesiastical Courts are a grievance to those persons who would restore to the latter a not inconsiderable measure of their medieval power and importance. Such an idea is not, of course, admitted in plain language. But we nevertheless find in the report made to the

Church Assembly these extraordinary words: "though in theory it is conceivable that the Crown might make an Ecclesiastical Court the representative of its own supreme authority over all causes ecclesiastical and civil." Happily, the authors of the report recognize that such a plan would "be unacceptable to the nation as a whole." The nation would not listen for a moment to such a suggestion.

Still, the recommendations which are in fact made with regard to the proposed Final Court of Appeal do in at least one vital and material respect imply an attempted Ecclesiastical encroachment on a Crown Court in the exercise of its powers and duties, and this attempt ought to be fully realized and strenuously resisted, not only by Churchmen who value the freedom and the protection which the Judicial Committee of the Privy Council has ensured to them, but by all lovers of the Constitution who know the grave importance of preserving inviolate the full integrity and independence of the Crown Courts.

But before I deal in detail with this point, let us see what exactly are the proposals now made as to the constitution of the projected Final Court of Appeal. It is wisely recognized by the authors of the scheme that such tribunal must essentially be a Crown Court, and the implications and functions of such Crown Court are expressed in the following paragraph, which should be fully appreciated alike by Churchmen and the general community:—

> "First, it must be clearly recognized that in our recommendations the appeal is from the Ecclesiastical Courts to the Crown. It is an appeal to the Crown for remedy, based on the contention that justice in the Ecclesiastical Courts has not been done, or that these Courts have improperly exercised their authority. The right must be open in some way or other to members of any religious community within the nation who believe themselves to have been wronged by the action of the authorities of that community. In the case of the Church of England, the right has a special character owing to the place of the Royal Supremacy and the visitational authority of the Crown in the existing constitution of the Church and the Realm. The essence of the appeal therefore is that it lies from the Ecclesiastical Courts to the Crown. It follows that it is from the Crown that the jurisdiction of the Court is and must be derived."

This recognition being so made, the consequential recommendation follows:—

> "That the Court of Appeal to the Crown should be a permanent body of lay judges appointed by the Crown, consisting of past or present Lords of Appeal in Ordinary, members of the Judicial Committee of the Privy Council, or Judges of the Supreme Court of Judicature, and also of other persons learned in Ecclesiastical law, and that the number in each case should not be less than five, who should be summoned by the Lord Chancellor in rotation."

In the actual constitution of the proposed Court, as so stated, there would not seem to be any ground for objection. But what will the nation think of the recommendation which follows :—

> "We also recommend, with the report of 1883, that each member of the Court should, before entering on his office, sign a declaration that he is a member of the Church as by law established."

It is simply amazing that in this twentieth century—just a hundred years after Lord John Russell succeeded in getting the odious Test and Corporation Acts repealed—such a reactionary recommendation should be made, or even committed to writing. It is no wonder that Sir Edward Clarke, K.C., speaking to the Church Assembly with all the weight of his forensic eminence and experience, should have condemned the proposal as an affront to the Judges of the Judicial Committee. An affront it undoubtedly is, and of course the proposal will never be sanctioned by Parliament or by any body of persons which has the smallest conception of the age in which we live and the tolerant spirit of the nation. These are no Stuart days. These are no days for applying the arbitrary schemes and rigid tests of bigoted monarchs and complacent ecclesiastics of a bygone age. Indeed, the authors of the above recommendation appear themselves to have no great confidence in the proposal. "We cannot consider that this is a matter of vital principle," they concede, "but (they add) we 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." Assuredly this is a complete misconception. At any rate, the last thing which such a recommendation would do, if enacted, would be to ensure the approval of the nation, and certainly the very fact that even the idea of such an anachronism should now prevail shows the narrow and retrograde spirit which animates some of those persons who are, or would be, responsible for the policy of the English Church. It is difficult to believe that there are many such persons.

So much for the suggested constitution of the proposed Court of Appeal. It is when we pass to an examination of how its powers are to be exercised and applied that the attempted ecclesiastical encroachment on the rights and duties of a Crown Court become apparent. That encroachment is to take effect in this way :—

> "We therefore recommend that where in an appeal before a 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 italics are mine, and I have so set forth the latter words because of their transcendent importance and gravity, and their

imperative nature. Bluntly stated, what does this recommendation amount to? In practical effect it is this: it seeks and designs an incursion upon and a limitation of the rights and duties of a Crown Court—a supreme Court of the Realm—by a rigid, inexorable imposition on such Court of the opinions of a non-judicial body of Archbishops and Bishops. In a subtle and insidious way a sort of *imperium in imperio* is demanded, so to operate that the episcopal bench may dominate the judicial bench. Such a proposal is intolerable and objectionable in the last degree. It would not only strike at the very root of the supremacy and independence of the proposed tribunal, but it would be an invidious reflection on the capacity of the eminent men who would be the Judges of the Court. It is quite true that the opinions of the Bishops are only to prevail and bind the Court in such matters as the doctrine, discipline or use of the Church of England, and that there is not to be any such imposition of episcopal views when the Court has to deal with cases of clerical misconduct, such as sexual depravity or neglect of duty. It is also true that the recommendation further declares that "the Court having taken such opinion (i.e., of the Archbishops and Bishops in matters of doctrine, discipline or use) into 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." But if the opinions thus thrust upon the Court by the Archbishops and Bishops are to be binding on the Judges, as the report proposes, there would be little need for any consideration on the part of the Judges. In truth and in fact, if such an unconstitutional plan were legalized, and an Episcopal Bench found a clergyman perverse, the Court of Final Appeal would be expected to find him perverse, and the so-called judgment would be a mere registration of episcopal findings. The plan, therefore, is fundamentally erroneous, because it purports to, and would, if adopted, derogate from the full and proper status and dignity of a Crown Court.

But while the report in question acknowledges the Royal Supremacy, and therefore the supremacy of a Crown Court, the submission is added that "it does not follow, nor is it involved in a true construction of the principle of the Royal Supremacy, that in cases of heresy, ritual or ceremonial, the Crown Court should determine what is or is not the doctrine or use of the Church." A great deal of subtle purpose or desire seems to underlie those significant words. Then there is the implication that the findings of the Bishops should be so ascertained, imposed, and made binding on His Majesty's judges because the latter are less likely to be as well informed in the law Divine as the Bishops, or are less capable of ascertaining the law Divine. The suggestion is fallacious and, with respect, does not represent what the real and true functions of a final Court are or should be in relation to a State Church. The principles which guide the Judicial Committee of the Privy Council, and which, it is submitted, should govern any such final Court in dealing with matters ecclesiastical, were stated (*inter alia*) in the

judgment of the Court in the well-known Gorham case to be, in interpreting Articles, Formularies and Rubrics, as follows :—

> " 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 (i.e., of written instruments), 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."

And then these significant words are added, which, with respectful deference, I would emphasize :—

> " *If these principles were not adhered to, all the rights, both spiritual and temporal, of Her Majesty's subjects would be endangered.*" [Queen Victoria was then Sovereign.]

Herein is, indeed, implied a great truth, a great warning, a great lesson which runs through the whole course of the national evolution of Church and State in England.

Who is the more sufficient for these things? No opinion of Archbishops or Bishops can possibly be of any value if it is not founded on a knowledge and scientific interpretation of the Articles, Formularies and Rubrics of the Church. So far as knowledge is concerned, lay Judges have the same means of ascertaining the facts as the Bishops themselves, and by their training in the estimate and interpretation of the material evidence they are infinitely better qualified than any Archbishop or Bishop, as the many learned decisions they have given, rightly reversing the judgments of ecclesiastical courts, abundantly demonstrate. Even the report recognizes the exceptional capacity of the lay Judges in the application of rules of evidence.

Lastly, on this point, I would presume to say that, if the opinions of the Bishops are to be binding on His Majesty's Judges in the proposed Final Court of Appeal, we might as well say that the expert opinions of the Elder Brethren of Trinity House who sometimes sit in the Admiralty Court as Assessors should be necessarily binding on the President or other Judge of that Court—a proposition altogether untenable and unconstitutional.

I have purposely abstained from dealing with the proposed changes as regards the diocesan or provincial Courts, as the question of the Final Court of Appeal seems to me of overwhelming importance, not merely for the reasons above stated, but because also of the danger and the confusion which would inevitably result from the further recommendation that an " actual decree (of this Court) alone shall be of binding authority and shall not form a precedent." Thus there would be no finality or uniformity of authority, and probably much vexatious litigation, according to the shifting circumstances of each Diocese and its Diocesan. Surely this could not possibly be for the good or order of the Church.