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Spanish Church has, however, recently sprung into existence; and the compilers of a new Liturgy, to be used in the service of that Church, have taken the ancient Mozarabic Liturgy as the basis of their operations. Thus, like a phœnix rising from its ashes, the old "use," or at all events some portions of it, may be destined to live on in Spain, and in the great Spanish colony of North America, for some time longer.

F. R. McClintock.

Art. III.—CHURCH COURTS.[1]

THIS subject is emphatically *the* Church subject of the day. Round it all the forces which, now for many years, have been engaged in the great Ritual struggle are collected. Here is the main point of attack and defence at the present time. Much more than a matter of merely historical interest is involved. The union of Church and State, and even our conception of the nature of the Church of England, cannot but be affected most seriously by the settlement of what is the proper constitution of the Ecclesiastical Courts. The magnitude of the issues at stake is pleaded as at once the sole and the sufficient justification for the following pages.

I had no notion, when I prepared the paper which I read at the recent Church Congress, that Canon Trevor, who preceded me on the same subject, intended to occupy the audience with a review of my little book on Church Courts. Had I known this, I should probably have been tempted to take a different course; but, as it was, I thought I should best fulfil my task by trying to bring before the Congress one or two practical matters of common sense rather than controversy, and by repeating in public a suggestion which I had already made as a witness before the Royal Commission, with regard to the revival of the study of English Ecclesiastical Law (not merely Canon Law, as I have been supposed in some quarters to mean) at the Universities. But as it might be assumed that, because I did not reply to Canon Trevor's criticism, no reply was forthcoming, I am anxious, having regard to the importance of the matter, to avail myself of the earliest opportunity of saying what I have to say by way of rejoinder. Indeed, I am not sure that the subject is not more fitly treated in the columns of The Churchman than on a Church Congress platform. I

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[1] "Church Courts." A Paper read at the Derby Church Congress, by Canon Trevor, D.D.

confess to a shrewd suspicion that I should not have been allowed to say at Derby what I am going to write in my study-chair. Judging by the treatment accorded to subsequent speakers, I should probably have been howled down. Now, as I do not like being howled at, and do not find that it either stimulates my powers of memory or improves my reasoning faculties, I am not sorry to be amongst my books, where the howls, if there should be any, cannot penetrate, and where I can at least bestow upon the subject the attention it demands.

All who had the fortune to hear Canon Trevor deliver his paper must feel grateful to him for the good fun he was able to extract from a somewhat dry topic; and it is to be regretted that in the newspaper reports many spontaneous sallies, provoked by the enthusiastic applause of the audience, have not found a place. To a comic history of the Ecclesiastical Courts Canon Trevor's paper would form a valuable contribution; and, if he could be prevailed on to complete what he has so worthily begun, he might feel certain that his book would take a high place amongst literature of its class.

I have, however, to look at Canon Trevor's paper from quite a different point of view—to regard it as a serious contribution to the discussion of a serious subject.

Canon Trevor defines my theory thus: "It is for the Church to decree rites and ceremonies; the enforcing of the decree she leaves to the State. She keeps the doctrine in her own hands, and confides the discipline to the Crown." For the purpose of his paper, which only concerns itself with discipline, this is a sufficiently accurate statement of my view; but, to prevent mistake, I desire to point out, in passing, that as to doctrine, Canon Trevor has misunderstood me. The principle which throughout my book I have insisted on is that, while the discipline of the Church is in the keeping of the Crown or State, matters of substance and doctrine are under the *joint* control of Church and State. "The power of *altering* is vested in Church and State jointly; the duty of *maintaining* is vested in the State alone." Canon Trevor only deals with the latter half of this proposition. He denies that the Crown or the State is supreme over the discipline of the Church. Let us examine how he treats the question.

In the first place he does not attempt to deal directly with the evidence on which I ground the proposition in dispute. That evidence is entirely historical, and goes to show that from the Reformation till the present day the State has, in fact, exercised complete control over the discipline of the Church. I gather from Canon Trevor's paper that he does not admit the force of this evidence, but still he does not directly challenge it. I am not surprised, for his method of dealing with Statutes and

other documents and their construction is so novel and peculiar that he probably feels it would not meet with general acceptance. Certain parts of certain Acts of Parliament impress Canon Trevor as of first-rate importance. He forthwith introduces the rule of the Medes and Persians, and these particular enactments become in his eyes unchangeable. Subsequent statutes, no matter how plainly inconsistent with them, have no repealing effect; they are dismissed as "side-winds," and the obvious meaning of their plainest clauses is stigmatized as a "gloss." Of course the difficulty of such a mode of argument consists in selecting the particular laws which we thus dignify. Canon Trevor, as the inventor of this theory, possesses, perhaps, the best right to act as its high priest; and he does so. Thus, 24 Henry VIII., ch. 12, with its "famous preamble," belongs to the Median and Persian variety, while 25 Henry VIII., ch. 19, is only a "side-wind," and its ordinary construction a "gloss." His treatment of these two leading Reformation statutes is so good an illustration of his method that I am tempted into a little more detail. It will be remembered that these two Acts together dealt with appeals. Their short effect, so far as the Courts were concerned, was this (24 Henry VIII., ch. 12): "The Restraint of Appeals" provided that in matrimonial, testamentary, and tithe matters no appeal to Rome should be allowed. All such cases were to go from the Archdeacon to the Bishop, and from the Bishop to the Archbishop, "there to be definitively and finally ordered, decreed, and adjudged according to justice, without any other appellation or provocation to any other person or persons, court or courts." In any matter of the class named "touching the King," the appeal was to be to the Upper House of Convocation. This Act does not affect *spiritual* matters at all. 25 Henry VIII., ch. 19, "The Submission of the Clergy," abolished *all* appeals to Rome, and enacted that *all* matters (using the widest words) were to be dealt with according to the plan laid down in 24 Henry VIII., ch. 12, except that, "for lack of justice," an appeal was to lie from the Archbishop to the King in Chancery (the Court of Delegates). Nothing can be plainer than the combined effect of these provisions. The partial arrangement of 1533 is expanded in 1534, so as to embrace all ecclesiastical matters, and supplemented by the addition of a final appeal to the Crown. This is the common-sense construction of the words used, and this is the construction acted on at the time, and from that time to the present.

Canon Trevor, however, has quite a different view. 24 Henry VIII., ch. 12 (the limited scope of which, by an unfortunate oversight, he misses), defined for all time the course of ecclesiastical appeals and the finality of the Court of the Archbishop. "The right of appealing to the Pope is taken away."

Canon Trevor is so absorbed in that ravishing preamble that he does not notice that by this Act it is only taken away in matrimonial and testamentary and tithe cases. Then he comes to 25 Henry VIII., ch. 19. This statute, curiously enough, is made to have done nothing at all. It cannot undo the work of the former statute, because—I hardly know why—except, indeed, that it is a "side-wind." At any rate, it did "but restore the ancient law of the land as settled by the Constitutions of Clarendon in A.D. 1164." These were not originally Canon Trevor's words, but he has adopted them for a purpose for which they were not intended. It seems odd that the Parliament of Henry VIII. should busy itself, at a time of great change too, in passing Acts merely repeating and emphasizing the laws of Henry II. as to matters in which, according to Canon Trevor, Parliament had no legislative power. But let us recur to these Constitutions of Clarendon. I give the passage in Canon Trevor's words:—"If the Archbishop should be slack in doing justice, resort was "to be had to the King, by whose command the cause was to be "terminated in the Archbishop's Court and proceed no further." This reference by the King to the Archbishop means that "he "may require him to reconsider the case." If we are to read 25 Henry VIII., ch. 19, as equivalent to this, it must mean that the King in Chancery—*i.e.*, the Court of Delegates—could "reconsider the case." Accordingly, we are told, "the only change is "that instead of remitting the cause to the Archbishop's Court, "the King is to issue a separate Commission on each appeal to "persons of his own selection." Here Canon Trevor gets into a great difficulty, and pursues two lines of argument mutually destructive. First, he says, "for lack of justice," does not refer to a regular appeal, but to special cases of irregularity. He does not mention the words of the Act giving the Court "full power and authority to hear and definitely determine every such appeal, with the causes and all circumstances concerning the same." We are assured that nothing more was meant than the jurisdiction now exercised by prohibition and *mandamus.* But if that be so, how can 25 Henry VIII., ch. 19, be identical with the Constitutions of Clarendon? According to these Constitutions, when there is a "slackness of justice," the King can have the case determined in the Archbishop's Court, and it is admitted by Canon Trevor that this points to a re-hearing. I suppose to avoid this inconsistency we are presently invited to pursue a different line. The appeal is a real appeal, but the Commissioners, it is found, with the help of the *Reformatio Legum* (quaintly termed a contemporary *exposition*) mean "select Bishops or the Synod." By an amazing effort of historical intuition, Canon Trevor has ascertained that "this was the old practice of the Archbishop's Court." "The Archbishop sat

alone, or with three or four of his co-provincial suffragans; if the case was important enough, he summoned the whole Synod." In fact, the provision about the King in Chancery was a roundabout way of referring to the full Court of the Archbishop. But Canon Trevor has surely forgotten that we are considering an appeal from the Archbishop's Court. It is inconceivable that all this elaborate legislation should aim at nothing more than to enable a litigant to appeal from the Archbishop's Court to the same Court again, or, to put it as favourably as possible, to make an appeal to the full Court practicable. Of course, if Canon Trevor's theory of the Provincial Court is correct, no Statute was necessary to enable the full Court to be assembled.

If I have succeeded in making myself intelligible, the absurd contradiction in which Canon Trevor's singular selective method has involved him, ought to be plain. This is the most important example, and it must stand for the rest.

Now let us return to Canon Trevor's criticism of the proposition that the State is supreme over the discipline of the Church. It may, perhaps, strike the reader to inquire why so much trouble is expended in attempting to show that the Reformation Statutes accomplished nothing, but were nearly all "side-winds," merely affirming pre-existing laws. The answer is simple. Canon Trevor has not only to dispose of the Court of Delegates as the Court of Final Appeal, and the immediate ancestor of the Judicial Committee; he has to show that all these Statutes dealing with Courts were nullities, for otherwise, as they were mere Statutes without any ecclesiastical sanction, they would be instances of the very principle he is combating. It is for this purpose that I have relied on them in my book. The only sort of direct answer which Canon Trevor offers to my argument is to minimize the effect of these statutes. Hence his efforts to show that they merely re-stated principles already acknowledged. But even so, he cannot get rid of all of them. His favourite 24 Henry VIII., ch. 12, at any rate accomplished something, so according to one of his two theories of construction did the Act of the next year. It is really amusing to observe how impossible Canon Trevor finds it even in stating his theory not to contradict it. Thus he says, "The Act proceeds to enact that appeals," &c. "The Archbishop's Court is restored to its authority." "The Statute 25 Henry VIII., ch. 19, "did not restore," &c. All which phrases, if they mean anything, mean that by Acts of Parliament the State exercised a control over the Church Courts, and modified their constitution.

But although Canon Trevor fails, and if he will forgive my saying so, fails rather ignominiously over the direct historical evidence, he has another string to his bow. The argument on which he places his principal reliance is this:—He says my

theory of State control over Church discipline cannot be true, because it is inconsistent with the very conception of a Church Court. He adds that this inconsistency is "self-evident," but that is a mere rhetorical expletive, for he proceeds to argue his point with some elaboration. Now what does Canon Trevor mean by a Church Court? I do not think he knows very precisely, for his explanations have a curiously confused tone about them. We are first told.—"A Church Court has no jurisdiction over persons or property; it proceeds *pro salute animæ* by purely spiritual censures; its authority is exhausted in excommunications." If any temporal effect is to follow it must be by the law of the land administered by the "secular arm." Now it is, I should have thought, "self-evident" that such an institution as Canon Trevor describes is no Court at all. The prelate, or his official, may sit in what he pleases to call his Court, fulminating his excommunications against those whom he may suppose to deserve them; but for all practical purposes he is as powerless as John Bunyan's Pope, who sat grinding his teeth and biting the nails at the pilgrims, but was unable to move by reason of the rheumatism and old age. Unless there is some power in the Court to summon persons before it, and some means to compel their attendance, the judicial determination of any question between individuals is impossible. Accordingly Canon Trevor himself admits this a little further on. "The powers of such a Court are twofold—first and principally the spiritual authority of the prelate's office in the Church, and secondly, the legal jurisdiction accorded him by the State." Here we get on to well-known ground. Canon Trevor is only following many high authorities in saying that the Judge of a Church Court exercises two sets of powers, a jurisdiction in *foro conscientiæ,* which he derives from the Church, and a jurisdiction *in foro exteriori,* which he receives from the State. Thus Archbishop Bramhall ("Schism Guarded," chap. ix.) :—

> We must know that in Bishops there is a threefold power; the first, of *order;* the second, of *interior* jurisdiction; the third, of *exterior* jurisdiction. The first is referred to the consecrating and administering of the Sacraments; the second to the requirements of Christians in the interior court of conscience; the third to the requirements of Christian people in the exterior Court of the Church.

But let it be understood that a *Church Court* possesses both sets of powers. Canon Trevor would no doubt say that without the first there is no *Church* about it. I say that, without the second, there is no *Court.*

In fact, without the express sanction of the State no Court can exist lawfully. Canon Trevor quotes the Judgment of the Privy Council in the Colenso Case, and certainly it is very

relevant, though not quite in the way he supposes. It will perhaps be remembered, that Bishop Gray's condemnation of Bishop Colenso was declared to be ineffectual because the Letters Patent purporting to give Bishop Gray power to hold a Court were in this respect void.

No Metropolitan or Bishop in any colony having legislative institutions can by virtue of the Crown's Letters Patent alone (unless granted under an Act of Parliament or confirmed by a Colonial Statute), exercise any coercive jurisdiction, *or hold any Court or Tribunal for that purpose.*

The general principle is thus laid down in the same Judgment:—

It is a settled constitutional principle or rule of law, that although the Crown may by its prerogative establish Courts to proceed according to the Common Law, yet that it cannot create any new Court to administer any other law; and it is laid down by Lord Coke in the 4th Institute, that the erection of a new Court with a new jurisdiction cannot be without an Act of Parliament.

Archbishop Bramhall, in the work already quoted, asks, "Who can summon another man's subjects to appear when they please, and imprison or punish them for not appearing without his leave?"

We have arrived therefore at this:—Every Church Court exercises some power derived from the State, and no Church Court can exist except by permission of the State. The principle which I have advocated in my book is that the State possesses the right to mould and modify these Church Courts. Canon Trevor is shocked. He says, "This is what modern legislation has brought us to! When I was ordained there was not a single Court, and never had been one answering to any part of this theory." Now I do not forget that the issue between me and Canon Trevor at this moment is not as to facts, but as to whether the nature of a Church Court negatives my theory. I will therefore only observe in passing that to justify Canon Trevor's energetic denial we must leave out of view the Final Court of Appeal (both the Delegates and the Privy Council) and we must ignore the whole body of Acts dealing with Church Courts from the Reformation downwards. But to return. I think Canon Trevor is a little hasty in saying that the principle he disputes is so novel as to have been introduced "within his own recollection." I shall show, I hope clearly, not only that there is no novelty about this theory, but that it was preeminently *the* Reformation theory of ecclesiastical jurisdiction, and further, that it was held in more recent times by the High Church divines, to whose views those of Canon Trevor correspond.

First, as to the Reformation. Canon Trevor states very glibly, as though he were running over a series of undisputed propositions, the theory of *inner* and *outer* jurisdiction. But I suppose he knows very well that our Reformers did not hold this theory at all. I do not say that it had no supporters amongst the Reformers, but I do most positively affirm that it was not the principle acted on or professed in the Reformation settlement. A very much higher view was taken at that period of the duties and powers of the Crown than is now fashionable amongst High Churchmen. A Christian prince was considered to have the same authority in matters of religion as was exercised by the Jewish kings. He was the source of all rule and jurisdiction in the Church no less than in the State. His functions were distinguished from those of the spiritualty by no refinements about the court of conscience and the external court, but by the broad division of preaching the Word and administration of the Sacraments on the one hand, and all rule and authority on the other. Thus, the 37th Article states the principle in the clearest manner:—

> We give not to our princes the ministering either of God's Word or of the Sacraments, but . . . . that they should *rule* all states and degrees committed to their charge by God, whether they be ecclesiastical or temporal.

So anxious were the Reformers to leave no room for question as to their meaning that they took pains to use the very strongest terms to describe the plenitude of the Royal Supremacy. We find the illustration of a fountain continually made use of. All ecclesiastical jurisdiction and authority are said to flow from the Crown as from "one primæval fountain." Thus was it sought to emphasize in words the principle which was certainly adopted in practice. Now it follows, as a matter of course, that if all the powers exercised by the ecclesiastical judges came from the Crown, then the Crown is supreme over the Church Courts, and over the discipline administered by them. Accordingly we find this stated in the most unmistakable manner.

Thus, in 37 Henry VIII., ch. 17, (the Statute which enabled married laymen to be ecclesiastical judges) we find it recited that:—

> Albeit the said (Pontifical) decrees, ordinances, and constitutions . . . . be utterly . . . . abolished, ... yet, because the contrary thereunto is not used nor put in practice by the archbishops, bishops, archdeacons, and other ecclesiastical persons, *who have no manner of jurisdiction ecclesiastical, but by, under, and from your Royal Majesty, etc.*

And then the Statute goes on, without any synodical sanction be it remembered, to alter the status of the ecclesiastical judges.

Again, 1 Ed. VI., ch. 2, enacted that the writs and processes of the Ecclesiastical Courts were to run in the name of the King instead of that of the particular prelate. The preamble states (amongst other things):—

Seeing . . . . and that all courts ecclesiastical be kept by no other power or authority, either foreign or within the realm, but by the authority of his most excellent Majesty, etc.

I quote this Statute as quite conclusive on the view taken at the time it was passed. Like all the other Reformation Statutes, it was repealed by Queen Mary. When Queen Elizabeth came to the throne it was not revived, not because there was any change of opinion as to the extent of the supremacy, but because it was not considered advisible that the Ecclesiastical Courts should use the Queen's name. We see, therefore, that the theory of which Canon Trevor fancies he remembers the origin, is as old as the Reformation, and was then generally adopted. The ecclesiastical judges, whether prelates or their officials, were regarded as charged by the Crown, with a jurisdiction emanating wholly from the Crown. If we admit the Reformers' view of the source of the powers exercised in Church Courts, Canon Trevor's objection to the principle of State control, that it is contrary to the nature of a Church Court, falls to the ground.

But I do not wish to ignore the fact that although the Reformation theory of spiritual jurisdiction was what I have stated, that theory has not been agreed to by many of the leading Divines of the Church of England in later times. In many respects a great gulf separates the leading Churchmen of the sixteenth century from those of the seventeenth. It is not my business to discuss how this happened, I only know that so it was. I have recently seen this marked change referred to and discussed in a very ably-written and interesting work, entitled "Romanism, Protestanism, Anglicanism."[1] The theory of a Bishop's jurisdiction being of two kinds—the inner, from God, and the outer, from the King—which Canon Trevor makes the basis of his argument, was no doubt held by many of the great Divines of the Stuart period. But admitting this, I do not see how the case against me is much advanced. Canon Trevor seems to think that it is a necessary consequence of the existence of the "inner jurisdiction" that the State cannot have control over the Church Courts. But I think he is again jumping to conclusions too hastily. We have seen that it is admitted that a part of the powers exercised by the Ecclesiastical Court came from the State; and further, that no Court can sit but with

[1] "Romanism, Protestantism, Anglicanism." Kegan Paul & Co. By "Oxoniensis" (a layman).

the sanction of the State. Is it very unreasonable to expect that a tribunal so largely dependent on the State for its existence and its authority should allow the State to make laws and regulations binding upon it? I suppose Canon Trevor will say that it is perfectly unreasonable. He will probably add—he generally does—Erastian. But that is not the view of the very men from whose works he has learnt about the inner and outer jurisdiction. I will quote two.

First. Bishop Saunderson, in his celebrated book on "Episcopacy," p. 31 :—

That there can be no fear of any danger to arise to the prejudice of the Royal power from the opinion that Bishops are *jure divino*, unless that opinion should be stretched to one of those two constructions, viz., as if it were intended either, 1. That all the Power which bishops have legally exercised in Christian kingdoms did belong to them as of Divine right; or 2. *That Bishops living under Christian Kings might at least exercise so much of their power as is of Divine right after their own pleasure, without, or even against, the King's leave, or without respect to the laws and customs of the realm.* Neither of which is any part of our meaning.

Secondly. Bishop Stillingfleet ("Eccles. Cases," ii. 50) :—

In the ordinary jurisdiction of bishops, there are two things especially to be distinguished—

I. The original right belonging to their office, which they have from Christ, the Founder and Head of the Church, the Fountain of spiritual jurisdiction.

II. The authority to execute such a jurisdiction within the realm, and the rules and measures of exercising it—which are prescribed by the laws of the land—to transgress the bounds so prescribed is an offence against the Crown and royal dignity.

I think these extracts will be sufficient to satisfy the reader that even adopting Canon Trevor's own theory of episcopal jurisdiction, the inference which he draws from it is not just, at any rate in the opinion of the men whom Canon Trevor professes to follow. The result is that, whether the powers wielded by a Church Court came from one source or two, the State has entire control over its constitution and administration.

I have now answered, to the best of my ability, the main arguments of Canon Trevor's paper. There are many minor matters which I should have liked to notice if I had not already written more than I intended when I began. I can therefore only refer to a few points. Canon Trevor cites from Coke's 4th Institute a passage to the effect that—"certain it is that this kingdom hath been best governed and preserved," when the ecclesiastical and temporal jurisdictions were kept distinct—as though it tended to show the independence of Church Courts. The quotation is altogether irrelevant for this purpose. Coke is

speaking, not of principles, but of actual facts, and he says, what of course is obvious enough, that the two sets of Courts actually existing get on best when they do not meddle with one another. According to Coke's view both are equally the *King's* Courts.

Canon Trevor lays great stress on the supposed similarity of the Judicial Committee to the High Commission Court. But, except for the purpose of raising a cheer, there is nothing in the point. When he says that "the Crown set up a quasi-Papal tribunal in the Court of High Commission," Canon Trevor shows as slight acquaintance with the history of this tribunal as his previous remarks betray with reference to the Privy Council. What are the facts? The High Commission Court was a Parliamentary Court, created under 1 Eliz., ch. 1, sec. 18. It gradually superseded all the regular Ecclesiastical Courts, including the Court of Delegates, and dealt with all Church matters as a court of first instance, the decrees of which were final. The quarrel of the nation with it was not that it unduly exercised the Royal Supremacy. Its parliamentary origin would have been a sufficient answer to such a charge. Coke (4th Inst., 341) argues that the Crown could by virtue of the Supremacy have granted a "Commission of Review" to rehear a case decided by the High Commission. It was the excess of its Parliamentary powers that constituted the offence of the High Commission Court in the eyes of the lawyers, while the people detested its tyrannical procedure and cruel exactions. It will be seen, therefore, that the causes which led to its overthrow were quite distinct from any which may be supposed to apply to the Judicial Committee. It is simply absurd to say that the "precedents" of the latter "are drawn from the illegal and pernicious tyranny of the Tudors and Stuarts in the extinct Court of High Commission."

In the same category of platform garnish I include tall talk about the Inquisition, and maledictions on lawyers. In these latter Canon Trevor's paper is especially rich. "The lawyers not to lose a profitable trade," &c. "It floods the Church with litigation, to the profit of the lawyers and the scandal of religion." "To soothe the bigotry of the lawyers." "Carefully shutting out the lawyers." These are some of the expressions by which Canon Trevor evinces his disapprobation of a profession, the members of which are, I hope, not quite so mischievous and sordid as he thinks. He possesses a happy knack of using strong language effectively, and these illustrations of his wit were most warmly appreciated by his audience; but I do not think I need encumber the pages of THE CHURCHMAN by attempting to reply to, what I trust I may be forgiven for calling, mere sky-rockets.

LEWIS T. DIBDIN.