

**THE "LEGAL HISTORY" OF
CANON STUBBS: BEING THE
BASIS OF THE NEW SCHEME
OF ECCLESIASTICAL COURTS**

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The "Legal History" of Canon Stubbs: Being the Basis of the New Scheme of Ecclesiastical Courts
by J. T. Tomlinson & William Stubbs

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J. T. TOMLINSON & WILLIAM STUBBS

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OF
CANON STUBBS:
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ECCLESIASTICAL COURTS

PROPOSED BY

THE ROYAL COMMISSIONERS OF 1881-3.

REVIEWED BY

J. T. TOMLINSON

(Lay-Member of the Manchester Diocesan Conference).

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ANALYSIS
OF THE
REPORT OF THE ROYAL COMMISSION

APPOINTED TO

"INQUIRE INTO THE CONSTITUTION AND WORKING OF THE
ECCLESIASTICAL COURTS, AS CREATED OR MODIFIED
UNDER THE REFORMATION STATUTES OF THE 24 AND
25 HENRY VIII, AND ANY SUBSEQUENT STATUTES."

MAY 16, 1881.

N.B.—*The references throughout are to Vol. I. of the Report, except otherwise specified. The figures i. and ii. relate to the column of the page named. Figures in block type (e.g. 25) relate to pages of this Pamphlet.*

CHAPTER I.

INTRODUCTION.

ORIGIN OF THE ROYAL COMMISSION.

THE failure in 1850 of the attempt to overthrow the Gorham Judgment was due to a unanimous declaration by all the Judges of the Queen's Bench, of the Exchequer, and of the Common Pleas,* that no appeal in heresy lay from the Court of Arches to Convocation, and that 24 Hen. VIII, c. 12, s. 4, was "in effect repealed" by the "subsequent statute," 25 Hen. VIII, c. 19.† Many Churchmen

* These judgments are given at length in Dr. Stephens' "Notes, Legal and Historical, on the Book of Common Prayer," Vol. II., pp. 1382-1419.

† These two statutes are "The Reformation Statutes" named in the royal Commission; and the Judicial Committee of Privy Council succeeded the Court of Delegates created by 25 Hen. VIII, c. 19.

felt strongly upon the subject, amongst whom was Mr. Gladstone, the head of the present Government. His opinions, which may be fairly taken to represent those of a party in the Church, were published during the same year (1850) in a pamphlet on the "Royal Supremacy," in which he attacked the Judicial Committee of Privy Council. This pamphlet he has reprinted at various dates, in 1865, 1877, and 1879, thus showing the persistence of his hostility to the Judicial Committee.

From the published "Life of Bishop Wilberforce," it appears that in consultation with Sir R. Phillimore and the then Bishop of Oxford, Mr. Gladstone concerted several schemes for getting rid of the Judicial Committee. One such scheme, that of 1855, embraced the main features of the scheme of the Royal Commissioners, 1883. It proposed to "repeal the Act of Wm. IV" constituting the Judicial Committee; to give "a reference which need not be binding, to the Bishops of the province;" "letting the Lay Court, as a Lay Court, decide the individual cause, and trying to guard the precedent." In reporting this, Bishop Wilberforce adds:—

"Gladstone looks forward to clerical Chancellors, when the clergy are educated for it hereafter."—*Life of Bishop Wilberforce*, II.288.

The reproduction of these ideas in the Report of the Royal Commissioners may perhaps not be surprising when it is remembered that Mr. Gladstone was in a position to select the members of the Commission, and (as we learn from the minutes of the second meeting) gave a dispensation for non-attendance to a Commissioner (Mr. Freeman),² who was appointed on the sub-committee to draft the Report. Even the points which are omitted by the Commissioners were indicated for postponement years ago by Mr. Gladstone, who remarked as to the "discrepancies of the law" (which surely must affect the "working of the Ecclesiastical Courts"), that—

"This might be dealt with *at an after time*, the rule in our time being, "as to all Church matters, to put the cart before the horse."—*Life of Bishop Wilberforce*, III.105.

This may explain what is otherwise inexplicable: the total ignoring in the Report of the chaotic state of the so-called "law" now administered in Ecclesiastical Courts. It explains also the selection

of pronounced Ritualists, like the Marquis of Bath, the Earl of Devon, member of the English Church Union; Sir R. Phillimore (who in the Bennett Case pronounced an "extra-judicial opinion" in favour of "the adorable sacrifice of the Mass"*) ; Bishop Mackarness (ex-member of the English Church Union, who claimed† to have "vindicated the old historical independence of the Church Courts" by vetoing the Clewer Case) ; Dean Lake, Canon Stubbs, and Prebendary Ainslie (all signatories of the "Remonstrance" against the Purchas Judgment) ; Mr. Freeman (a well-known admirer "of S. Thomas of Canterbury" and apologist for mediæval institutions) ; Sir R. Cross, and Mr. Whitbread, both of whom voted against allowing any appeal from the Bishops' veto when the Public Worship Regulation Bill was before the Commons ; and Mr. Charles, the counsel of the English Church Union : these, from their known antecedents, seemed likely to secure the wished-for result which Mr. Gladstone had indicated ; while the Bishops of Winchester and Truro might be paired off against the two Archbishops—who, of course, were inevitable. There remain only to be enumerated—beside Lord Coleridge, Canon Westcott and Mr. Jeune—Lord Penzance, Rev. Chancellor Esplin, and Dr. Deane (whose professional existence is bound up with the "Spiritual Court" system) ; two clerically-minded laymen, Lord Blachford‡ and Sir W. James ; and last of all two (!) evangelicals, the Earl of Chichester and Dean Perowne, who not being specially conversant with the subject would be unlikely to issue a separate Report.

It is known that a methodized and systematic agitation had been kept up for years, stimulated by controversial writers who attacked each judgment of the Privy Council in turn, accusing Lords Selborne, Cairns, Hatherley, Chelmsford, Kingsdown, and their colleagues, of ignorance, incompetence, and dishonesty. Meetings had been held in various parts of the country, at which these incriminating statements were reiterated, until, being seldom contradicted, they came to be regarded in some quarters as beyond

* See p. 18 of "Is Lord Penzance fit to succeed Sir R. Phillimore?" (London: Marlborough, 51, Old Bailey. Price 1d.)

† Report, Vol. II., p. 196.

‡ Author of the Apophthegm, "Cranmer burnt well," preserved in Rev. T. Mozley's "Reminiscences," Vol. II., p. 230.