THE

CHURCHMAN

NOVEMBER, 1883.

ART. I.—THE REPORT OF THE ROYAL COMMISSION, AND THE EPISCOPAL VETO.

THE Commissioners for inquiring into the constitution and working of the Ecclesiastical Courts were appointed on the 16th May, 1881, and only made their report in August last. They held seventy-five meetings, they heard fifty-six witnesses orally; and though the actual Reports do not occupy more than sixty-three pages of blue-book, they have presented to her Majesty and the public two blue volumes, containing altogether more than 1,000 pages of closely printed quarto. To give within the limits of a paper in THE CHURCHMAN an adequate review of the results of the Commissioners' labours is obviously impossible. At the same time, it may be desirable to give some account of the more salient features of the actual signed Reports, in order that our readers may be the better able to appreciate the general tendency of their important parts. The writer of this paper would be the first to disclaim any idea that the short period which has elapsed since the publication of the Reports can possibly be enough to enable him to understand their full bearing; all he can pretend to do is to offer a few remarks, of the most obvious kind. It is to be hoped that every reader of THE CHURCHMAN will take the pains to investigate each point for himself, and not be content to take, at secondhand, impressions which at this early date must be considered as provisional.

The Reports are as follows: First, a long and (shall we say?) somewhat tedious general Report, signed by all the Commissioners except Lord Penzance—but as to many of the signatures, accompanied by reservations; this general Report is then followed by the reservations and dissents as to particular portions of it which the dissentients have found themselves on different grounds unable to agree with; and lastly comes Lord Penzance's separate Report.

I have spoken, perhaps, rather too disrespectfully of the general Report; but the fact is, that a very large portion of it is taken up with an historical disquisition on the Pre-Reformational Courts. Indeed, Pre-Reformational is an inadequate expression; the Commissioners go back to the times before the Conquest. Considering that their instructions were to deal with the Ecclesiastical Courts, "as created, or modified, under the Reformation Statutes of the 24th and 25th years of King Henry VIII., and any subsequent Acts," this antiquarian zeal shows that the Commissioners, at all events, took no narrow view of their duties. It cannot be said, however, that its result is completely satisfactory even to the historian. This part of the Report is confessedly and obviously based upon, and it may almost be said reproduced from, a draft Report by the illustrious Canon Stubbs. The Commissioners have printed Canon Stubbs's draft as an appendix to their own Report, so that the two may be compared with one another. The reader is strongly recommended to peruse the Canon's production first, and not to read the historical part of the Commissioners' Report till afterwards, if he wishes to obtain a correct view of the relation between the two. Now Canon Stubbs is a very eminent man; but there is no reason why, if the Commissioners thought proper to write a new history, they should have handed over their historical consciences to him, especially in matters of law and legal history. Canon Stubbs is no lawyer; if he had been, he would never have allowed himself to enumerate the Archbishop's Courts of Peculiars among his *Provincial* Courts. Yet this woful slip is adopted as it stands from Canon Stubbs's appendix into the Commissioners' Report.

To anyone who looks a little beyond the immediate future, there is really much satisfaction to be obtained from a perusal of this Report with its voluminous accompaniments. The Nonconforming party have had their fling, and a real good fling it has been. There stands their case, printed at length in the evidence, as extracted from the lips of their most representative men, the utmost they can do, the whole of their grievances and their demands. This fact alone ought to outweigh much that might otherwise appear unsatisfactory in the mere Report itself.

But even if we confine our attention to the Reports themselves, although we find, no doubt, that the necessity for making concessions to agitation has had great influence, there is not much (likely to pass through Parliament) that will do permanent harm. If, for instance, the Bishops are made to sit in their own Courts, whatever absurdities may be perpetrated at the outset will be more than counterbalanced in the future

by the leaven of common-sense and plain, sturdy, commercial morality which the study of law must inevitably produce in the clergy, especially if clergymen take to practising as advocates in the Ecclesiastical Courts. We are not of those who think that Bishops are at present sadly over-taxed; and consequently we see no objection to this proposal on the ground of the additional labour it will cast upon them. We trust it may be supplemented by a regular Clerical Bar. The benefit to the clergy will be incalculable. No doubt we shall get some curiosities at first starting in the judgments of our present revered prelates; but they must not mind being laughed at: and by-and-by, when they are succeeded by men who have received a legal training in courts of law, we shall hear no more of vetoes, or things of that kind, even if such things shall still continue a theoretical existence. On the other hand, there is much in the Report which is statesmanlike and thoroughly sound. The recommendation of suspension and deprivation instead of imprisonment, and other recommendations, will probably meet with general approval.

It appears to have been over and over again pressed upon the Commissioners that they should treat ecclesiastical suits as civil, and not as criminal, proceedings. No doubt it is for the advantage of clergy that these suits should remain criminal in character, so that the reverend defendants may have the benefit of all those technicalities which the principles of English Temporal Courts allow a prisoner to take advantage of. The Commissioners recommend that the pleading and procedure in all the Courts in contentious cases shall follow as near as may be the practice and procedure of the Supreme Court of Judicature in civil cases. If this recommendation is carried out, the effect will be that the element of fiction and unreality which has pervaded these ecclesiastical prosecutions —and is principally due to the circumstance of their being criminal in form—will be, to a great extent, eliminated. It was Mr. Valpy's suggestion; and the change will be as advantageous as the proposal itself is modest.

The most unsatisfactory part of the Report is that which relates to the Bishop's veto, by which the Bishop claims to protect clergymen from liability to the law. It is only dealt with in one short clause, which appears on the very same page as a magnificently sounding sentence, concerning the indefeasible right (of every subject of the Crown) "to approach the throne itself with a representation that justice has not been done him, and with a claim for the full investigation of his cause." No doubt this sentence was only meant to apply to appeals to the Crown against an adverse decision. But why every subject of the Crown should have an indefeasible

right to appeal against an adverse decision, but no right to appeal against a blank refusal of any decision—why he should have a right to appeal against a decision where he has been fully heard, but no right to complain where he has not been heard at all, it would not be easy to say. But as Romola says: "The human soul is hospitable, and will entertain conflicting sentiments and contradictory opinions with much impartiality." So will a blue-book, apparently. It is satisfactory to find that the Archbishop of York, Lord Chichester, the Dean of Peterborough, Mr. Jeune, Lord Coleridge, the Vicar-General of the Province of Canterbury, Chancellor Espin, and, lastly, Lord Penzance, have recorded their absolute dissent from this portion of the general Report; and that the late Archbishop, as we have learned from the Bishop of Winchester, would have been found joining in this dissent.

It could hardly be expected, when the constitution of the Commission is considered, that an explicit condemnation of this "Privilege of Clergy" should be found in the Report of the majority. The clerical element (by which we do not mean clergymen only) was far too strongly represented for that.

The fact is that while we should all like to see the Bishops taking the lead in matters of morality and true religion, and standing forth before the world as living proofs that the keenest intellect, the soundest common-sense, and the highest development of nineteenth-century morality are not only not inconsistent with, but, on the contrary, essential to the highest Christianity, and thereby wielding an authority and influence for good over the spirit of man which no secular enactments could either destroy or bestow; yet nobody can shut his eyes to the circumstance, that as things stand at present, the ideal is not universally realized. There can be no doubt that the Commissioners were perfectly aware that if the "spiritual authority" of the Bishops is to be preserved, it must be by dint of very careful nursing and swaddling. No one knows it better than the Bishops themselves. The Bishop of Oxford, for instance, must know full well that he can never wield any "spiritual" authority which is not given him by Act of Parliament. And the worst of it is that you cannot prevent the public from imputing the sins of individuals to the whole class. A profound consciousness of this would naturally induce many members of the Commission to cling to this veto as a drowning man clutches at a straw. But a voting majority is obtained by counting, not by weighing. The legal element among the Commissioners, including Chancellor Espin, and also the only episcopal member who has had much experience in the ecclesiastical appeals to the Privy Council (we allude to the Archbishop of York), is strongly against the veto.

So that the somewhat feminine character of the treatment of the subject by the numerical majority becomes less surprising.

The first thing that strikes one is the oddness of the phraseology. "Nothing has been brought to the notice of the Commission to lead them to recommend any alteration in the law which leaves it to the Bishop to give permission to the complainant to proceed." This disinclination to call a spade a spade is curiously characteristic. When the whole Church is eagerly discussing the power of veto, when several witnesses have raised the question distinctly and expressed the strongest opinions on the point, this numerical majority dares not even to call the thing in question by any other name than "the power of the Bishop to give permission to the complainant to proceed." Why, if you take the words by themselves, they are harmless enough. No one would object to the Bishop (provided he was not to be judge in the case) prejudging the case before hearing it, and using such spiritual influence, if any, as a person so acting may think he possesses, to conciliate popular favour and subscriptions for his candidate, and to dissuade and deter his rival. The lay justice of the Law Courts is, we will not say of a higher, but at all events of a very different character to episcopal justice, in some of its present developments, and would not be affected by the leave of the Bishop being granted or refused to the complainant. The substantial question is therefore not whether the Bishop shall or shall not have power to sanction the complainant's proceeding, but whether that sanction shall be made by statute a *sine quâ non* to the complainant's proceeding with his complaint in the legal method. It is a matter for serious complaint that the Report does not deal with this definite and most important point in more definite language. Such as it is, however, this phraseology finds such favour that it occurs twice in the body of the Report.[1] It cannot, therefore, be due to inadvertence. It might, indeed, be plausibly urged that the Report really means to leave open the question of principle, viz., whether justice should be free or fettered. If so, why in the world does it not say so? The sentence we have quoted does not end with a full stop. It is, in fact, in its entirety, as follows: "Nothing has been brought to the notice of the Commission to lead them to recommend any alteration in the law which leaves it to the Bishop to give permission to the complainant to proceed, and therefore they see no reason for restraining the general power of making a complaint in the first instance as provided in the Church Discipline Act." The ostensible point of the whole sentence is, of course, that there is no reason for limiting com-

[1] At pp. lii. and lvii.

plaints to three parishioners, or to residents for a certain period, or to officials, such as churchwardens, archdeacons, or the like. It is not stated, but only assumed, that there is a necessity for putting a padlock on the doors of the Temple of Justice. And yet, without knowing of this assumption, how is it possible to understand the *sequitur* implied in the word "therefore"? Nay, without knowing of the existence of this assumption, it would be impossible to guess that the words "power to give permission" mean "power to veto." The assumption, therefore, is of vital importance for the purpose of making intelligible not only the reasoning of the Commissioners, but also their very language; and this quite independently of the truth of the assumption. On the self-evident importance of its truth or falsity we need not enlarge. Under these circumstances the public had a right to expect a statement that it had been proved before the Commissioners that some limitation of the ordinary rights of her Majesty's subjects is necessary in ecclesiastical cases; or, at all events, a statement that the Commissioners have taken it for granted that some such limitation is necessary. But we look in vain for either the one or the other. And the reason is not far to seek. The objections to either course were too potent and crushing. A statement that the necessity for some limitation had been proved would have been in too glaring contradiction to the facts that no suit has been shown to have been instituted frivolously or vexatiously, while many suits which have been vetoed have been shown to have been neither frivolous nor vexatious. On the other hand, if the Commissioners had stated in so many words that they were proceeding on the assumption that some limitation was necessary, the public would have immediately cried, "Why, that is one of the most important things which you were told to inquire into!" And so, in order to steer between Scylla and Charybdis, they affect to consider that the only question is between the Bishops' veto and some other limitation, and that the *onus* of proof lies on those who would substitute some other limitation for the Bishops' veto.

It may be perfectly true, and we are not disposed to dispute, that *if* some limitation is necessary, the *onus* of proof is upon those who would substitute some different limitation for that which is now in existence. But on the prior and much more important question, whether there is any reason for making the Ecclesiastical Courts an exception to the rule of free justice which has prevailed in this country since Magna Charta[1]

[1] "Nulli negabimus justitiam vel rectum" (Magna Charta). "Neither the end, which is justice, nor the meane whereby we may attaine to the end, and that is the law" (Commentary of Lord Coke thereon).

downwards, the burden of proof is on those who support so gross an anomaly, so great a novelty.

Before saying a word further, it must be at once stated that this important question is not one which can be decided by discussing on which side the burden of proof lies. If, and so far as that portion of the Report which deals with this question is founded solely on any assumption as to the burden of proof, it is merely frivolous. In whichever way the burden of proof lies, the Commissioners ought to have fully considered the question, and to have given us the benefit of their reasoning. If they had done so, and had come to the conclusion that free justice was not desirable in the Ecclesiastical Courts, then, when they came to the second question, viz., what fetter should be imposed, there would not be much to complain of if they had decided it simply on the burden of proof; if, in fact, they had said there was no reason for change because no reason had been shown. It might be a matter of opinion whether any reason had or had not been shown; but, at any rate, the form of the Report on this point would not have been matter for censure. There were two separate questions with which the Commissioners had to deal, perfectly distinct from one another, differing widely in importance, and also in the treatment which they respectively demanded. Yet, in satisfaction of that demand, all we are offered in this voluminous and voluble Report of sixty pages of blue-book is an unreasoned and barely intelligible sentence in which both points are lumped together: "Nothing has been brought to the notice of the Commission to lead them to recommend any alteration in the law which leaves it to the Bishop to give permission to the complainant to proceed, and therefore they see no reason for restraining the general power of making a complaint in the first instance as provided in the Church Discipline Act." However you look at it, this is wholly inadequate; and, we must say, a clear shirking of the Commission's duty. We have pointed out considerations which must have weighed with many of the majority in favour of endeavouring by any decent means to support "spiritual" authority by the secular arm; we have shown that on this particular question they were without the assistance of the most experienced portion of their body; and we have indicated the dilemma which was staring them in the face. The stress of the logical situation is so evident, and the necessity for finding some way out of the dilemma is so palpable, as almost to lead to a presumption that the way which has been adopted will be found a little difficult to square with the facts.

In the first place it is a little startling, in contrast with th statement as to the utter absence of evidence, to read Lo

Coleridge's view of what was "brought to the notice of the Commission." He says (Report, p. lxii.), "The active interference of the Bishops to prevent the law of the land being enforced against those who have deliberately broken it seems to me to be fast becoming intolerable in practice;" that the right (of veto) "is one which, desiring to speak with true respect, I must think, in fact, has been abused." Either the Lord Chief Justice is reporting on what has not been brought to the notice of the Commission, or the majority of the Commissioners have been surprisingly blind and deaf. We cannot help thinking of an incident in the trial scene in "Pickwick," which suggests a possible explanation of the extraordinary contradiction.[1] "Do you see any evidence?" asks Lord Coleridge. "No," say the majority, gazing intently on their dilemma.

Even if, on the evidence taken before the Commission and printed with their Reports, there should be found no evidence against the veto, still, except on the principle that all is fair in love or war, it is rather unfair to ignore the published opinions of the Judges in the Bishop of Oxford's case merely because the presence of his lordship as a member of the Commission prevented the apparent discourtesy of reading these opinions to the Commissioners. When that Bishop interfered to veto the suit against Mr. Carter of Clewer, his technical right to do so was upheld by the Common Law Courts, but on purely technical grounds; while the opinion of the Judges on the merits of the case were clearly given. Lord Justice Bramwell said:

It is admitted that Mr. Carter has committed, and is wilfully and knowingly persisting in committing, six several breaches of the law of the land, acts for which he might be indicted and punished. By what means he has persuaded himself that he can receive the wages of the State to do a certain duty, and not do it, but do that which is opposed to it, I cannot conceive; and, with all submission, I feel a nearly equal difficulty in understanding how it can seem right to the Right Reverend Bishop not to bring him to justice. . . . . It does seem to me (I speak with sincere respect) that the discretion here has been most erroneously exercised.

Lord Justice Thesiger said:

I would guard myself against being supposed to differ in any way from the expressions upon this point which have fallen from Lord Justice Bramwell, and which were made use of in the Court below.

Lord Chief Justice Cockburn, after giving his reasons why the *mandamus* should be granted, said that it would have

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[1] "'Do you see him here now?' said the judge.
"'No, I don't, my lord,' replied Sam, staring right up into the lantern in the roof of the court."

been a very different thing if the Bishop had declined to grant a commission "on the ground *that the complaint was frivolous or vexatious,* or that it had been prompted by sinister or unworthy motives . . . . but nothing of the kind exists here." Mr. Justice Field and Mr. Justice Manisty concurred in this language.

However, as these opinions were not formally read before the Commission, their existence, however well-known, would not *per se* affect the literal truth of the statement that nothing *had been brought to the notice* of the Commission (against the veto). It is not said that there is no reason to recommend any alteration; but an affectation of judicial impartiality, and of deciding only on the evidence before them, is introduced, probably for the same reasons which caused the veto to be called a "permission to proceed." It should be noted also that the language is calculated at first sight to lead the reader to conclude that no evidence whatever has been adduced against the veto. Whether intended or not, that will undoubtedly be the effect of it. But when we turn to the evidence itself, what do we find? Mr. Valpy quoted to the Commissioners eight cases where the Bishop, exercising his veto, had stated his reasons for so doing. These so-called "reasons" are of the most ridiculous character; but the point of our present argument is that in *not a single one* is the frivolousness or vexatiousness of the suit given as the ground of the veto. Under these circumstances can anything be more frivolous and vexatious than to allege that the veto is required to stop frivolous and vexatious suits? Then look at the result of the veto in these eight cases. Mr. Valpy's evidence shows that in only one case have the illegalities been discontinued by the incriminated clergymen. This was the case of Mr. Chapman at Donhead St. Andrews. In one other case, the clergyman resigned, and the illegalities were discontinued by his successor. But in the other six it is in uncontradicted evidence that undoubtedly illegal practices, established by actual decisions to be illegal, are continued, and protected by the veto.

Or, to take a particular case, one of these eight, let anyone read the really touching story told by Mr. Howard, the railway clerk (7701-7703), of the building of the church for the railway men, of the three law-breakers appointed in succession by the Bishop, of the petition of 800 inhabitants for the appointment of a law-abiding clergyman replied to by that Bishop's appointment of Mr. Glover, of the various failures culminating only at the last in the veto, and then ask himself whether the somewhat unadorned language of this railway clerk is not intelligible, excusable, almost justifiable?

Now in the face of all this, is it possible to contend that there

is absolutely *no* evidence against the veto? We do not say no *sufficient* evidence, but no evidence at all. It is impossible to suppose that these sixteen Commissioners can have intended to commit themselves to the statement that there was no evidence at all, especially when to say that there was not sufficient evidence would equally well answer their purpose. Accordingly, when we examine the language with still more minuteness, we find that a loophole is carefully left to enable it to be said, if necessary, that the sentence does not really mean that no evidence against the veto was adduced, but only that no evidence was adduced sufficient to lead them to recommend alteration.

But if this is what is intended, the statement must be based not solely upon what was "brought to the notice of" the Commission *against* the veto, but on a consideration of the whole of the evidence taken together; on the evidence for the veto as well as the evidence against it. Now, how is the evidence against the veto met? What is the counter-evidence in its favour? Surely we expect to find the witnesses giving numerous instances of the necessity and beneficial working of the veto; of parishes pacified by its exercise, parishioners coming back to their parish churches, harmony regained, confidence restored. And, on the other hand, we should expect to hear of suits which ought to have been, but have not been, vetoed, dragging their weary length along to the ultimate consummation, which ought to have been their fate from their very beginning, of being dismissed with costs to be paid by the complainant.

How ludicrously the actual evidence offered meets such expectations, can only be appreciated by those who have read it. Suffice it here to say that no attempt whatever is made on the part of the ritualists either to show any instance of a "frivolous and vexatious" suit (indeed they could hardly do so in the face of the fact that in no instance has a veto been actually exercised on that ground), or to quote a single parish pacified by means of an exercise of the veto. In the case of Mr. Barrett of St. George, Barrow in Furness, the illegal practices are said to have been discontinued by his successor, Mr. Barrett himself having resigned; it is therefore clear that the immediate cause of the discontinuance was Mr. Barrett's resignation; and though his resignation may conceivably be in some way or other caused wholly by the veto, and not at all by the suit, it is reasonable to ask for some evidence of this before the case can be quoted as supporting the veto. But it is not in fact quoted by any of the ritualists as supporting the veto, nor is any other case. There is positively nothing but this question (in different forms, of course,) asked, "Are you

in favour of the veto?" And if the answer is affirmative, no grounds for such an answer are given or even asked for. No one asks why the witness thinks so, whether he is answering from his experience or his imagination; no one thinks it necessary (or perhaps safe?) to ask for instances. At one of the earlier sittings, an inexperienced Commissioner ventured to go a little further with Dr. Tristram, who had answered "Yes" to the question (3218), "Should you leave it in the discretion of anyone as to whether the case was to be heard or not?" But he had much better have left it alone; for it quickly appeared that Dr. Tristram's idea was that the power of vetoing should only exist where a man, *solely* influenced by spite and malignity, brings a *false* charge against a clergyman, and should be exercised by the *Chancellor*, with an appeal to the *Dean of Arches!* After this unfortunate result of indulging in an undue curiosity, the questions are regularly limited to mere approval or disapproval. Thus Mr. Shelly, Mr. Hubbard, Lord Alwyne Compton, and Mr. Bouverie, merely approve of the veto without giving any facts or instances derived from experience in support of their opinion. While the Rev. J. Oakley (since Dean of Carlisle), the Rev. Berdmore Compton, Mr. Wilbraham Egerton, the Rev. G. Body, the Dean of Manchester, the Rev. W. E. Heygate, Dr. Littledale, Canon Bright, Mr. Mackonochie, Mr. Beresford Hope, the Rev. Malcolm Maccoll, the Dean of St. Paul's, the Chancellor of Manchester, Canon Liddon, and Canon Trevor, are not asked, nor does any of them volunteer a word about it.

But now let us suppose that when this question comes before Parliament, timidity and partiality are found after all too strong for reason and justice, and that this bogey of frivolous and vexatious litigation has not been laid. Let us, in view of such a contingency, consider what may be conceded to clamour without the flagrant injustice of this secret veto. And here let it be observed, that there is nothing in the reports of the Commissioners to show that they have in any way whatever considered this point.

In the first place, there could be nothing objectionable in allowing clergymen who have been the defendants in frivolous and vexatious actions, to have the remedy provided for the ordinary layman who has been the object of a malicious prosecution. This was suggested to the Commission by Mr. Girdlestone. Let them have their remedy in an action for damages for a malicious suit in the Ecclesiastical Court. And if this is not enough, let it be extended, if necessary, to a case where the suit, though not malicious, has been frivolous and vexatious; or, if you will, where it has been either frivolous or vexatious. Care of course must be taken so to define the

vexatiousness as not to allow it to include that amount of vexatiousness which is a necessary incident to every suit. Every suit must be in one sense vexatious to the defendant. But the distinction between inevitable vexatiousness and the vexatiousness which goes beyond this necessary point, is not unknown to the law courts. The writer of this paper well remembers hearing a barrister make an application to the Court of Appeal for an order that a certain appellant should give security for costs, on the ground that the appeal in that case was vexatious. The late Sir George Jessel, who was presiding, at once said, "Why, every appeal is vexatious!" Of course it was necessary, and in all such cases is necessary, to show that the vexatiousness which gives a right to the other side to ask for security for costs is something beyond this ordinary vexatiousness.

Another alternative would be to allow the defendant to raise the frivolity and vexatiousness as a preliminary defence. It is the defendant's business alone. If the defendant does not object to the suit on the ground of its being frivolous and vexatious, why in the world should anyone else interfere? This is another objection to the proposed episcopal veto, that it may be wholly uncalled for. No doubt it may be presumed with a high degree of probability that these nonconforming clergy would desire to raise every possible defence; the probability is in marvellous proportion to the justice of the complaints against them; but then it may be also presumed that they are capable of expressing their wishes. They are clearly the proper persons, and if they do not wish to do so, no one else has any business to meddle. It is not a matter of course that every defendant should wish to raise the objection. Everybody knows that where there are *bonâ-fide* disputants, it continually happens that one says to the other: "You say I am wrong; I say I am right. Don't go on nagging, but if you think you have a complaint, the law courts are open: go and take your remedy. Either withdraw your accusations, or have it out in the proper way." Everybody can see the reasonableness of this, and every lawyer knows that it is the very best foundation for conducting litigation without acrimony. But this can only happen where the defendant *bonâ fide* believes he is right; and the case for the veto rests on the tacit assumption (which might just as well be confessed at once) that this happens so rarely as to be altogether unworthy of notice.

We may sum up our criticisms on the action of the majority of the Commission with regard to this question of the veto, by saying that their treatment of it appears grossly inadequate, and plainly contrary to the evidence.

A Layman.