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THE REFORM OF THE ECCLESIASTICAL COURTS IN NINETEENTH-
CENTURY ENGLAND

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THE REFORM OF THE ECCLESIASTICAL COURTS
IN NINETEENTH-CENTURY ENGLAND

by
J. Gordon Maule

A Dissertation
Presented to the Graduate Committee
of Lehigh University
in Candidacy for the Degree of
Doctor of Philosophy
in
History

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ABSTRACT

Although the ecclesiastical courts of early nineteenth-century England were in serious need of reform, all legislation failed to bring about necessary changes in the civil jurisdiction until the late 1850s. The delays were caused by various factors. The moderates of both parties were split on the approach to reform. Henry Brougham and Lord Cottenham proposed sweeping changes which went beyond the recommendations of the important Ecclesiastical Court Commission Report of 1832. Particularly troublesome in their bills was an attempt to transfer testamentary causes from church court jurisdiction. On the other hand, such moderates as Dr. Stephen Lushington and Lord Lyndhurst moved reforms in line with the 1832 commission report, including the abolition of the poorly-run Peculiar Courts. The split between the two moderate groups advocating reform was fatal because of the opposition of other factions in parliament.

This opposition came from four powerful splinter groups within the major political parties. The radicals did not support legislation which retained any civil jurisdiction, or which did not eliminate the diocesan courts.

The bishops, of course, opposed any efforts to tamper with the diocesan tribunals. The Country Party, an amorphous group of country gentry and provincial lawyers found in both parties, resisted changes in the Peculiars and in testamentary jurisdiction, and the ultra-conservatives refused to support any change. Neither political party was able to keep discipline over these splinter groups on the issue of church court reform.

Palmerston's ministry reformed ecclesiastical jurisdiction by presenting short, single-issue bills and by demanding discipline among the factions. Defamation, brawling, wills, marriage, and divorce were all transferred to civil courts within five years, and spoken testimony was introduced. Finally, the Doctors' Commons, the monopolistic college of lawyers, was disbanded.

The ecclesiastical jurisdiction was reformed by three statutes: the Pluralities Act, 1838; the Discipline of Clergy Act, 1840; and the Public Worship Regulation Act, 1874. The first two reorganized procedures and delineated the rights of the clergy and ordinaries. The final act stemmed the tide of the Ritualists. Ecclesiastical jurisdiction was also reformed by the work of four jurists from the Doctors' Commons: Lord Stowell, John Nicholl, Stephen Lushington, and Robert Phillimore.

INTRODUCTION

The ecclesiastical courts in early nineteenth-century England touched the lives of almost every citizen. Each will transferring personal property was probated in the courts of the established church. They handled cases involving defamation, nullity, divorce, incest, brawling, discipline of clergy, church rates, and many other causes and their income amounted to hundreds of thousands of pounds annually. The ecclesiastical courts formed an important part of the English legal system.

Discontent with the ecclesiastical courts was widespread throughout the eighteenth and nineteenth centuries. Their ancient procedures were costly and inefficient, and there was no spoken evidence or trial by jury. Most of the 380 courts in the system were staffed by incompetent judges, and the few able justices were drawn from the Doctors' Commons, a nepotistic organization which provided excellent legal training but was very much a closed society. The courts could order excommunication, huge fines, and even imprisonment and they could hold up probates and divorces for months. It was possible for people to be seriously injured by these courts.

Nevertheless, parliament took nearly fifty years (1812 to 1858) to transfer the civil jurisdiction of these courts

to the secular courts. The ecclesiastical jurisdiction was not adequately reformed until 1874. There was enormous resistance to reform, and even the leaders of the great political parties could not overcome it.

The purpose of this paper is to determine how reform took place and why it took so long. It traces the attempts to reform both the civil and ecclesiastical jurisdictions of the church's legal system by parliament and the courts themselves. The main focus will be the reforms from 1832 to 1874. In 1832, the Royal Commission on Ecclesiastical Courts issued its report, and in 1874, the Worship Regulation Act was passed, a statute which radically changed the constitution of the ecclesiastical courts. In addition, there is information from 1809 and 1812 directly relating to reform after 1832. Similarly, a short study of the Ecclesiastical Court Commission report of 1883 gives necessary follow-up data on the effects of the Public Worship Regulation Act of 1874. The topic is narrowed in scope by my dealing only with the problem of the ecclesiastical courts themselves and not with the jurisdictions over which they had control.

This dissertation studies the following historical problems. To what degree did the ecclesiastical courts need reform and how well did the public, the church, and parliament understand those needs or find them important? If there was a genuine need for reform, why did it take

from 1812 to 1858 to transfer civil causes to the secular legal system, and why did the ecclesiastical reform take from 1832 to 1874 to be accomplished? To what degree is present scholarship inadequate in explaining this delay? What effect did the Anglican Church and its bishops in parliament have on the progress of reform? What difficulty did the major parties have in dealing with ecclesiastical court reform and why did those difficulties stymie legislation? How did the reform of ecclesiastical jurisdiction differ from the problems facing reform in civil areas? And what effect did the important jurists have on reforming the system?

Because the procedures and personnel in the courts changed very little between 1810 and 1850, the parliamentary reports giving statistics throughout the entire period can be validly used concurrently and interchangeably. Most of the data for this study came from statistics gathered in 1828 for the first commission and from information ordered by various M.P.s during the Nicholl debates in 1843 and 1844.

There are three main sections in this study. The first part, chapters one, two, and three, gives a general overview of the environment in which the reform movement took place studying the condition of the church, the state of the courts, and the position of the major political

philosophies regarding the need for reform. The following chapters, four, five, six, and seven concern themselves with the reform of the civil jurisdiction. Here, after a short introduction on the attempts at reform before the Ecclesiastical Court Commission report of 1832, the state of party discipline and splinter groups is studied because the interplay among these various factions led to much of the delay. Chapters six and seven examine the reformers, the opponents to reform, and how the dissension among the groups prevented successful legislation. Finally, the tactics of Prime Minister Palmerston are studied to determine why he met with success. The third section, chapters nine and ten, follows changes in ecclesiastical jurisdiction. Here, the acts and the decisions based on those statutes are examined.

It is useful here to explain the differences between how the civil and the ecclesiastical jurisdictions were reformed. The civil jurisdictions are those which dealt with areas not under the exclusive control of the Church of England. Since most criminal jurisdiction had not been part of the ecclesiastical cognizance anyway (the church courts lacked the authority to punish criminal offences), most civil causes were contractual in nature like marriage, nullity, and wills. Some others involved civil behavior like brawling and defamation. Although the bishops tried to interpret these offences as ecclesiastical, the nine-

teenth century ministries insisted that they were not and presented legislation transferring these causes to civil courts. Reform of all the civil jurisdictions was done through the transfer of specific causes to the secular courts and was, therefore, exclusively parliamentary. For this reason, the examination of the parties and factions in parliament is very important to understand the difficulties involved in transferring certain authority away from the church courts to reform the British legal system.

The ecclesiastical jurisdiction concerned causes which involved purely theological issues. Reforming the ecclesiastical jurisdiction, however, was done very differently. Although parliament passed acts to reform both civil and ecclesiastical areas the nature of the bills was very different. In the three acts¹ which amended the legal authority that the Anglican Church exercised over its clergy, change did not occur by abolishing ecclesiastical authority; it came about by clarifying the role of the bishops, the rights of the clergy, and the procedures to be used by the diocesan and provincial courts. These reforming acts had the effect of giving court officials, especially the provincial chancellors, the ability to improve the courts from within and develop strategies to deal with

¹ Pluralities Act 1838, Discipline of Clergy Act 1840, and Public Worship Regulation Act 1874.

the legal problems which beset the ecclesiastical establishment during the middle and end of the nineteenth century.

Obviously, therefore, the civil and ecclesiastical jurisdictions have to be studied separately. The civil jurisdictions are covered first because their reform involved only one strategy -- transfer -- and only one arena -- parliament. Chronologically, these areas of cognizance were reformed earlier -- the late 1850s. The ecclesiastical jurisdictions are studied second because reforms here took longer and were more complex. Although the Pluralities Act and the Discipline of Clergy Act were passed before the civil jurisdictions had been abolished, their effects were not felt until later, especially after the Ritualists² were being prosecuted under those two acts. The Public Worship Regulation Act of 1874 was written as a direct result of the Ritualists and its administration led to the Ecclesiastical Court Commission of 1883. The 1874 act also ended the influence of the Doctors' Commons on the Court of Arches and thus closed an era in ecclesiastical court history.

Doing research in ecclesiastical courts, one encoun-

² Anglicans who wanted to revive many high church practices between 1860 and 1890.

ters several problems. There has been little investigation and there are only brief accounts outlining the reforms of the ecclesiastical judiciary. Parliamentary histories have studied the major reforms in great detail, but minor reform movements have not been covered so well. Most of the generalizations made about nineteenth-century reform, therefore, have been based on experience from the greater areas of parliamentary endeavor. The lesser reforms, however, indicate that some of the commonly held theories about party structure are inadequate to explain the experience of the ecclesiastical courts. Because of the dearth of previous studies, this research is based primarily on parliamentary and judicial records.

The only work which deals specifically with ecclesiastical court reform is an article by A. H. Manchester.³ This article focuses mainly on the necessity for reform. It does not study why the changes took place the way they did. The author also ignores the ecclesiastical cognizance and devotes his attention to the transfer of civil causes, so much so that he claims ". . . the emphasis was not so much on the reform of the courts as their virtual abolition

³ A. H. Manchester, "The Reform of the Ecclesiastical Courts," American Journal of Legal History, (vol. 10, 1966), pp. 51-94.

which took place in 1857."⁴ Clearly, as this dissertation points out, the problem of the Ritualists indicates that the church's courts were very active at least until 1883.

The climax of Manchester's article is the Nicholl debate of 1843 in the Commons. In it, he illustrates the difficulty of moderate reform. Unfortunately, he does not use the debates to show why the problems occurred. In this paper, the debates are treated in detail to illustrate one of the themes of this paper not dealt with by Manchester or most modern historians: the political parties before Palmerston were inadequate in the areas of party discipline⁵ when they dealt with religious issues. Finally, Manchester does not deal with the effect of the jurists from the Doctors' Commons on the courts: a very serious defect since that famous legal body provided all the chancellors and proctors for the ecclesiastical courts.

It is possible, however, to establish to some degree the general problem of law reform in nineteenth century England. The most common consensus is that law reform had

⁴ Ibid., p. 52.

⁵ Whips could only depend on full party support about 23% of the time in 1836 and only 69% in 1899. It was not until 1928 that 95% could be counted on and 98% in 1945; R. J. Jackson, Rebels and Whips: an Analysis of Dissention, Discipline and Cohesion in British Political Parties, (London, 1968), p. 23.

Benthamism as its impetus,⁶ but many of the features which characterized Benthamite reforms were not present with the ecclesiastical courts, and the origins of the acts which reformed the church courts were not from philosophical radicals.

There was, of course, the general Benthamite scheme to rationalize the English legal system, but Brougham, who initiated reform after 1832, was not at that time entirely in the Benthamite camp, although he was sympathetic to Benthamite thinking. At the time that Brougham was attempting his reform, the Westminster Review, a philosophical radical journal, published a very strong denunciation of his efforts in the legal field; he is cast as the very antithesis of Bentham.⁷

The relationship of Brougham and his party to the church was also ambiguous. "It was clear that at best the Whigs (Brougham's party) were no more than cool to the church."⁸ However, the Whigs wanted the church to remain a

⁶ Manchester, "The Reform of the Ecclesiastical Courts," p. 51; L. J. Hulme, "Jeremy Bentham and the Nineteenth Century Revolution in Government," Historical Journal, vol. 10 (1967), pp. 30-133; O. MacDonagh, "The Nineteenth Century Revolution in Government: A Re-Appraisal," Historical Journal, vol. 1 (1958), pp. 52-67; in all see footnotes for additional readings on the controversy.

⁷ "Bentham, Brougham and Law Reform," Westminster Review, vol. 9 (1828); C. New, The Life of Henry Brougham to 1830 (Oxford: Clarendon Press, 1961), p. 250.

⁸ P. T. Marsh, The Victorian Church in Decline (Pitts-

viable and visible force in English society, and, while Whigs were interested in the survival of the established Church, "conservative elements in the church" and "powerful local interests were determined that church court business should not be radically changed."⁹

It is the purpose of this dissertation to show how the differing jurisdictions were handled by parliament. It also demonstrates how the various factions which had to deal with ecclesiastical reform reacted to the problems involved. Each group came to the issue of reform with its own prejudices and priorities, and each behaved in ways which Manchester's article does not fully explain and which did not flow out of any philosophical scheme to change the British legal system.

Aside from the fact that the political parties did not have an overall plan in reforming the courts, another real problem in analyzing parliamentary activity was that M.P.s did not see legal reforms in clear-cut Benthamite terms and tended to confuse reforming the laws which the courts were to try with reforming the courts themselves. This, too, could explain why court reform occurred so rarely, for it seems that the individual M.P.s thought that they were

burgh: U. of Pitt. Press, 1969), p. 11.

⁹ Ibid.

reforming the courts when in reality they were not. Finally, because the legislators had no overall objectives in mind, they lacked persistence or loyalty to a cause so that opposition to any legal reform was fatal to the bills brought before a House. Consequently, the changes recommended by the various ministries were often dropped¹⁰ as happened so frequently in the ecclesiastical courts. The reforms, therefore, were pragmatic and piecemeal rather than being based on any overall scheme.

The Whigs, in particular, had greatly diminished their hopes of gaining any bipartisan support for legal reform by antagonizing the clergy through other church reform bills and the legal community through radical law reform legislation, those especially proposed by Brougham.¹¹ The attempts by Brougham to establish a system of local courts in England had failed prior to 1846 because of the active campaigning against them by the Tory Lord Chancellor Lyndhurst in the 1830s.¹² It should be pointed out, however, that on the issue of ecclesiastical court reform, Lyndhurst and Brougham agreed that the reform should take place and introduced similar bills when each was Lord Chancellor.

¹⁰ M. A. Crowther, The Church Embattled (Hamden: Archon Books, 1970), p. 224.

¹¹ O. Chadwick, The Victorian Church (New York: Oxford University Press, 1966), p. 17.

¹² Crowther, Church Embattled, p. 220.

Generally, however, law reform had a low priority for mid-century governments.

In the light of such relative lack of commitment to law reform on the part of the Lord Chancellors and of such relative lack of capacity on the part of governments, it is scarcely surprising that the cause of law reform failed to prosper.¹³

Thus, without a philosophical base, party objectives, or dedicated persistence, ecclesiastical court reform floundered and failed for five decades.

Modern historians have produced much research in nineteenth century parliamentary history, and there seem to be three general points of view germane to this dissertation. The first and most common maintains that shortly after the Reform Act 1832 and certainly by 1835, the Whigs and Tories had developed fairly well organized, well disciplined party structures which were generally able to dictate how the members were to vote.¹⁴ Some authors, however, look at the parties separately and, although they describe fairly cohesive elements, they do point out some inherent weaknesses

¹³ A. H. A. Manchester, "Law Reform in England and Wales 1840-1880," Act Jundica (1977), p. 198.

¹⁴ B. Kinzer, "J. S. Mill and the Problem of Party," Journal of British Studies, vol. 21 (1981), pp. 106-122; D. E. D. Beales, "Parliamentary Parties and the Independent Member, 1810-1860," Ideas and Institutions of Victorian Britain, ed. R. Robson (1967), p. 18; A. D. Kriegel, "The Politics of Whigs in Opposition 1834-1835," Journal of British Studies, vol. 7 (1968), pp. 65-91.

in the unity and the existence of uncooperative splinter groups.¹⁵ Professors Close and Aydelotte both present studies on voting behavior which indicate a third position that in certain situations party voting almost always split.¹⁶ Dr. Norman Gash, in particular, makes a general study of the period and he, too, discovers a lack of unity in certain places.¹⁷ Each of these historical points of view is now to be studied in turn with representative articles examined from each position. The remainder of this introduction is not meant as a study of the various political points of view common to 1830-1860. Rather, it is a study of how historians have interpreted the political activity of the nineteenth century. My own analysis of parliamentary behavior is found in chapters five, six, and seven.

¹⁵ D. Southgate, The Passing of the Whigs (1968); I. D. C. Newbould, "Sir Robert Peel and the Conservative Party 1832-1842: A Study in Failure?," English Historical Review, (1983), pp. 529-557; D. Roberts, "Tory Paternalism and Social Reform in Early Victorian England," American Historical Review, vol. 63 (1957), pp. 323-347.

¹⁶ D. Close, "The Formation of the Two Party Alignment in the House of Commons between 1832 and 1841," English Historical Review, vol. 84 (1969), pp. 257-77; W. O. Aydelotte, "House of Commons in the 1840s," History, vol 39 (Oct. 1954), pp. 249-262; "Parties and Issues in Early Victorian England," Journal of British Studies, vol. 5 (1966), pp. 95-114; "British Voting Patterns,"

¹⁷ N. Gash, Reaction and Reconstruction in English Politics, (New York: 1965); Politics in the Age of Peel (New York: 1953).

The first point of view presents parties after 1835 as strongly cohesive. It has been well established that independent M.P.s scarcely existed between 1835 and 1845. Even with the weakening of party loyalties after 1845, the independents remained rare, and there were only a few unaligned Peelites. By 1856 the parties had again solidified. The unity of the Whigs can be established from 1832, even before the Lichfield House Compact.¹⁸ There was a powerful clique of Whig aristocrats who saw their function in terms of preserving power for their class. "What separated O'Connell (the Irish wing of the Whig Party) from the Whigs was as much status as practical differences."¹⁹ This clique was presumably able to withstand occasional defections by the radicals and by the Irish wing of the party and still survive. The most damaging loss was that of the Derby Dilly, a group of moderate Whigs who bolted from their party, and that only amounted to a handful of votes.²⁰

The party was a "subsidiary of the Whig caste,"²¹ and

¹⁸ i.e., an alliance of Whigs, radicals, and O'Connellites organized to defeat Peel's first ministry -- 1835; Kriegel, "The Politics of the Whigs," p. 82.

¹⁹ Ibid., p. 69.

²⁰ Ibid.

²¹ N. Gash, Politics in the Age of Peel, p.34.

it was able to muster discipline around family interests when it came to matters of caste interest, patronage, and privilege even if the splinter groups of Radicals and O'Connellites were not in agreement. Grey, Melbourne, and Russell in particular were of the political old guard, and they believed that party ties were based on loyalty to one's aristocratic group and to a particular leader.²²

Members could be persuaded to accept policies and even sacrifice [personal] interest if it could be shown that a substantial gain in political influence with access to official patronage was likely as a result to accrue to the party and hence to the caste.²³

Thus, if the Whigs rallied around issues which concerned the well-being of the caste, the opposite was also most likely true. Although the radicals and Irish wanted to see the ecclesiastical courts reformed or abolished, the Whigs refused to push for changing those courts because they saw no advantage in squabbling with the established church. It is generally acknowledged, too, that the Whigs favored an established state-supported church as a public institution, which could control the people's behavior and act as a force of religious and moral stability in the community. It follows that it might have been difficult to muster an enthusiastic united support among all Whigs for

²² Ibid.

²³ Southgate, "Passing of the Whigs," p. 14.

ecclesiastical court reform, especially since the speakers against the reform bills threatened that reducing the jurisdiction of the ecclesiastical courts would eventually weaken the church itself. The Tories, who wanted to dissuade the various Whig governments from passing reforms concerning church courts, often presented this argument in debate. The oligarchy of Whigs would not have benefited from the abolition of the Peculiar Courts, however, because some of the family lawyers in the provinces would have lost a good deal of revenue if the ecclesiastical courts had lost their testamentary jurisdiction.

A similar situation existed on the other side of the aisle. There is significant evidence to counter the widely held theory that the Tories united around a sense of benevolent paternalism.²⁴ They, too, were a fairly strong vested interest of their own, and if they lacked the family unity enjoyed by the Whigs, "they possessed a unified agrarian and religious bigotry which brought them together when it was to their advantage to act collectively."²⁵ Peel, who was not from their tradition, was able to tap into this agrarian spirit on certain basic political issues, but he was not able to thwart their self interests especially when his party was trying to pass the Corn Law

²⁴ Newbould, "Sir Robert Peel," pp. 529 ff.

²⁵ Roberts, "Tory Paternalism," p. 333.

reforms.²⁶

Both parties were held together at least in part by the vested interest of an aristocratic majority in each party as well as by some philosophical foundation. It follows that if for some reason that vested interest could not be served by a particular legislative issue, the party itself would most likely not close ranks to support some unrelated legislative program. Thus party leaders found it difficult to unify their parties when the vested interests either were not served or were not threatened by a particular bill.

Although Whigs were in favor of protecting the established church as a moral force in the community, they could understand that the civil jurisdiction and the procedures of the ecclesiastical courts were separate from the established church as a bulwark of Christian morality. On the other hand, the Tories were inclined to see the church as the body of true believers so that Anglican Tories might view a change in the powers of any ecclesiastical body as a threat to the general authority of the church over the population.

While there is some evidence supporting the strong party thesis, there were also some exceptions to party

²⁶ Ibid.

discipline in the 1830s. The following paragraphs discuss the historical studies which show some lack of party unity. Whigs voted with Tories (Conservatives) in the following instances:

42 in 1835: Irish education grant
 39 in 1839: Irish municipal reform
 42 in 1840: Maynooth grant

Conservatives voted with Whigs in the following:

53 in 1837: suppressing Isle of Man bishopric
 81 in 1839: appointing Catholic prison chaplains²⁷

All of these bills involved some form of religious bias.

It was also true that many of the party-line members exhibited a fairly independent frame of mind and that there were many protests of party tyranny. Although strong party allegiance had become necessary for parties to survive in parliament, M.P.s did feel that they could vote against their party on specific bills.²⁸ Because the Whig leaders depended on an alliance of splinter groups of radicals and Irish O'Connellites to keep their majority, they could do little to enforce discipline without having groups bolt from the party.²⁹

As far as the Conservatives were concerned, Peel was philosophically opposed to party dictatorship and was un-

²⁷ Close, "Formation of the Two Party System," p. 268.

²⁸ Gash, Reaction and Reconstruction, p. 125.

²⁹ Gash, Politics in the Age of Peel, p. 439.

able to force such groups as the ultra-Tories to give up their positions for the sake of party unity.³⁰ The looseness in Tory party discipline in the 1830s probably provided "a necessary margin of tolerance in the new party machines built up so rapidly after the Reform Act,"³¹ so that disagreement among party members would not smash overall party unity. Peel's heavy-handed approach in the 1840s "put an excessive strain on a party system which was still gathering experience and evolving its own working rules."³² This concept of Peel's straining party discipline is evident in the factious result of the Corn Law debates on the Tory Party.³³ Those debates and ones on similar issues earlier in the decade "succeeded in splitting the landed aristocracy by separating the high farmers³⁴ from the traditionalists,"³⁵ thereby weakening the Country Party.³⁶ And although the Country Party did succeed in reorganizing,

³⁰ Gash, Reaction and Reconstruction, p. 124.

³¹ Gash, Politics in the Age of Peel, p. 52.

³² Ibid., p. 74.

³³ Ibid., p. 52.

³⁴ i.e., farmers who were willing to use new agricultural technology.

³⁵ i.e., farmers who continued to use the old methods of agriculture; D. C. Moore, "Corn Law and High Farming," p. 146.

³⁶ i.e., an amorphous group of country gentry that worked to preserve the traditional rural way of life.

it did not do so until the late fifties³⁷ well after Palmerston had passed the major ecclesiastical court bills.

It must be noted here that part of the problem in understanding voting patterns is the fact that some "moderate" Whigs are difficult to place because they did not always vote for Whig-sponsored bills. In matters which did not involve the survival of the party, the radicals were sometimes more agreeable than the "moderates," even to the extent that Peel was able to woo Stanley and other Whig moderates to his side. Voting patterns do emerge on both constitutional issues and on church-related bills but, unlike the patterns on constitutional legislation, the patterns on church reform do not follow party lines.³⁸

After 1835 some Whig members were apparently unreliable on religious matters. Anglican Whigs often voted with the Tories on ecclesiastical bills.³⁹ After 1837 the radicals voted more consistently with the Whigs on church matters because of their own desire to become more a part of the party.⁴⁰ After 1837, too, it is generally agreed that as many as half the Whig waverers were not reelected

³⁷ D. C. Moore, "Corn Law and High Farming," p. 146.

³⁸ Close, "Formation of Two Party Alignment," p. 265.

³⁹ Ibid., pp. 265-67.

⁴⁰ Ibid., pp. 271-274.

so that the Whig-radical alliance became more unified. Unfortunately for the Liberals (a name increasingly given to the Whig-radical alliance), their numbers also diminished in the Commons so that they were not able to exploit their new unity to put through their legislative program. This reduction did, however, unify them against the Conservatives when Peel came to power. The Tories, on the other hand, were more cohesive during the mid 1830s, centering much of their common action on anti-Catholic, anti-Nonconformist prejudice. During the 1840s, however, while their party had a majority in the commons their discipline deteriorated.

Statistical analysis⁴¹ of voting patterns establishes that voting on most major issues did follow party lines, but even where there was cross-party voting, there is a definable pattern.⁴² Normally, one party would remain united and one would split. This generalization is useful in explaining divisions concerning the major issues of the

⁴¹ Aydelotte gives the most exacting information on this subject to date. The purpose of his articles was to counter a consensus view of nineteenth century political parties in England. He wanted to show that voting patterns in parliament were definable and that voting was neither a matter of general concensus nor random behavior. It is necessary to remember Aydelotte's objective because he does not purport to explain all variations, only to show that patterns did exist.

⁴² Aydelotte, "House of Commons," pp. 73-76.

day.⁴³ Five distinct voting and philosophical groups can be found on the Liberal side and there was a "deeply divided" Conservative Party.⁴⁴ "It was possible to line up religious sentiment behind a political objective"⁴⁵ and that most probably these religious issues did not divide both parties at the same time. My own observation is that the majority party normally broke rank and that the minority party held firm most of the time. This was especially true of the two sets of divisions: church courts and wills during Peel's government.

Who defected and why is of interest to this paper. From the tables in "Parties and Issues"⁴⁶ one sees that religious questions did not fall into any one of the three categories of either straight party vote, liberals breaking rank, or conservatives breaking rank. Four such issues involved religious prejudice: the liberals broke on Russell's education proposals, conservatives broke on Catholic relief, and the parties remained united on university reform and a motion for a committee on temporalities of the church in Ireland.⁴⁷

⁴³ Ibid., p. 70.

⁴⁴ Aydelotte, "Parties and Issues," p. 95.

⁴⁵ Aydelotte, "British Voting Patterns," p. 147.

⁴⁶ Aydelotte, "Parties and Issues," p. 107.

⁴⁷ We are left to wonder, however, if the divisions

It is most likely that on a contentious issue like ecclesiastical court reform, which was overlaid with much religious prejudice, that socio-cultural and religious backgrounds could be expected to aggravate cross-party voting. Almost sixty per cent of the M.P.s went to a university, and of those eighty-five per cent went to either Oxford or Cambridge. Only fifteen per cent of the college graduates, therefore, went to non-Anglican institutions. Seventy-one per cent could be considered peerage, baronage, or landed gentry with over half that number tracing their nobility back before 1800. Thus, there was a strong agrarian, aristocratic majority in Parliament. Fifty-nine per cent of the M.P.s had no business background at all which means that almost three-fifths of parliament were landowners, lawyers, clergymen, or military men. All such groups tended to be very conservative and protective of the Church of England. Those who were businessmen were as

concerning the church and probate of will fit onto Aydelotte's scalograms because he first tells us that the two topics related to this paper (ecclesiastical courts and wills) fit the first scale and then proceeds to set up the scale using no religious or legal examples. In fact, he does not have either one of these issues on any of his scales even though he claims that religion had a strong and direct effect on voting patterns. We can only conclude that either the above-mentioned issues did not fit especially well into his paradigm or that it was not possible to compare the M.P.s religious bias to their general liberal or conservative voting patterns.

likely to be conservative as not.⁴⁸ Therefore, on religious issues, over half of parliament belonged to factions which might oppose party dictates on sacred matters.

In such a situation, the majorities of political parties tended to be very fragile even with non-religious issues. For example, the country gentry was as willing to vote with the liberal Ashley as with the ultra-Tories.⁴⁹ In fact the Country Party had voted with Ashley, a Whig, against Peel in a factory bill as revenge for Peel's stand on the Corn Law.⁵⁰ The backbenchers felt a certain freedom of choice except when they thought their government was going to go under. In one instance, however, they misjudged the importance of the sugar issue to the survival of the government and nearly brought about the collapse of Peel's ministry.⁵¹ Peel's problem with discipline was such that, although he technically had a majority in the Commons, he still needed support from at least two dozen moderate Whigs in order to succeed with various programs in 1835 in spite of the fact that Stanley and Graham had brought nineteen votes with them from the Whigs to the Tories. After the 1837 election the opposition party had

⁴⁸ Aydelotte, "House of Commons," pp. 110-113.

⁴⁹ Gash, "Politics in the Age of Peel," p. 439.

⁵⁰ Ibid., pp. 439-442.

⁵¹ Ibid., p. 451.

grown to 319 seats, and according to the Annual Register, only eighty of the majority were Peelite conservative with 139 listed as Tory and 100 listed as ultra-Tory.⁵² Although the single most important unifying issue seems to have been the Tory party's reputation as Defender of the Faith,⁵³ on the matter of ecclesiastical courts some Tories, particularly of the Country Party, were not willing to endorse all church court reform either.

The splinter groups within the Liberal coalition had already begun to act less independently as the thirties progressed and especially toward the end of the decade. The radicals and Irish had become emasculated as separate political forces and had started to fuse into a true Liberal party,⁵⁴ so that by 1839, Melbourne could look to a high level of party discipline and solidity.⁵⁵ The ultimate fall of the Whigs from power in 1841 was the result of more effective whipping in the Commons by the Conservatives -- evidence of their growing unity -- rather than a collapse of the Liberal Party. (No conservative was absent at

⁵² Newbould, "Sir Robert Peel," p. 543.

⁵³ Ibid., pp. 552-554; R. Blake, The Conservative Party from Peel to Churchill, (1970), p. 46.

⁵⁴ Gash, Reaction and Reconstruction, pp. 154-165.

⁵⁵ Ibid., p. 185.

the final vote.)⁵⁶ By the time the parties had reorganized after the fall of Aberdeen's coalition government, the Whig oligarchy had all but disappeared, and Palmerston took over as a politician/administrator of a more modern political party with a hierarchy instead of an oligarchy.⁵⁷ This, of course, left Palmerston with greater authority over the voting patterns of party members.

On the other hand, there is some disagreement as to Peel's success in forging a unified Tory Party.⁵⁸ The Peel needed to enlist the aid of the Whigs in order to outmaneuver the radicals, and he "had only limited success in controlling his party and influencing its principals."⁵⁹ Much of Tory unity had resulted from a definite pro-church bias, yet he had antagonized the ultra-Tories with his "great betrayal of 1829" in the Catholic Emancipation Act.⁶⁰ This lack of a unified spirit among Tories weighed heavily against the success of bills to reform the ecclesiastical courts.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ N. Gash, Mr. Secretary Peel; the Life of Sir Robert Peel to 1830 (Cambridge: Harvard Press, 1961); Newbould, "Sir Robert Peel."

⁵⁹ Newbould, "Sir Robert Peel," p. 541.

⁶⁰ C. S. Parker, "Sir Robert Peel from His Private Papers," vol. 2 (London: 1891), pp. 262-63.

It is somewhat inaccurate to characterize the ultra-Tories as totally obscurantist. It is probably more correct to think of them as acting with constitutional views "rooted in a bigoted form of landed Anglicanism deeply at odds with the industrial, pluralistic society which surrounded them -- the very society to which Peel had hoped to make conservatism attractive."⁶¹ The ultra-Tories detested Bishop Blomfield, and the Tory peers rallied to Lyndhurst who, in turn, disliked Peel.⁶² On the other hand, Lyndhurst was unpopular with moderate conservatives and much of the legal community because of his manner.⁶³ Given these prejudices, it is not difficult to imagine the fate of ecclesiastical court reform bills supported by Bishop Blomfield, Lord Chancellor Lyndhurst or Prime Minister Peel. No matter who supported the bill, some offended group was bound to oppose it.

Taken as a whole, the issue of ecclesiastical court reform does not fit the above-mentioned patterns enumerated by Aydelotte, Close, and Gash used to explain voting in the House of Commons. From 1832 to 1835 there was an uncontrolled block of independent votes. Further, loyal party

⁶¹ Newbould, "Sir Robert Peel," pp. 232-33.

⁶² Ibid., pp. 240-41.

⁶³ J. Campbell, Lives of Lord Lyndhurst and Lord Brougham, (London: 1896), pp. 115-116.

members shared a common attitude which condoned voting against one's own party on specific issues. The idea of independent voting continued until Palmerston took over in the early fifties. The two main parties were dominated by powerful aristocratic cliques, both of which were essentially agrarian in attitude, although the Tories were much more so. Both parties had a vested interest of country gentry in addition to smaller, somewhat undisciplined splinter groups: the Tories had the ultras and the bishops while the Whigs had the Radicals and the Irish. In 1837 the Derby Dilly defected to the Tory side of the House of Commons.

The Whigs during the period were particularly factious, with the radicals sometimes siding with the Tories. On other issues, especially church bills, the Whig oligarchy split, with the radicals and O'Connellites voting with the moderate Whigs. Tories, too, split on matters related to the church but to a lesser extent and generally over issues involving the degree of anti-Catholic bigotry of the individual Tories. They were more likely to cleave on matters of agriculture, a situation which eventually broke their strength when the high farmers separated from the traditionalists in the mid-1840s.

By the 1837 election, the Liberals had become somewhat more homogeneous. Many of the waverers among the Whigs either had not been reelected or, with the Derby Dilly, had

defected. The Radicals and Irish had become less independent and more willing to accept Melbourne's leadership than they had Grey's. Even so their numbers had decreased and they fell from power.

The Tories presented a different situation. During the thirties they had been more homogeneous than the Whigs and somewhat more inclined to act together. When they came to power, however, they were unable to maintain their unity and, even as early as 1839 before Peels's second ministry took over, the Quarterly Review complained about the lack of party unity among the conservatives.⁶⁴ Within the Tory Party, the moderate mercantile interests, ultra-Tories, high farmers, and agrarian traditionalists did not work well together, and Peel had a difficult time getting his program passed. He, like the Whig leaders before him, had managed to antagonize both the church and the legal community.

Two phenomena defied the generalizations about voting patterns in parliament between 1832 and 1856. First, there was the existence of a Country Party. They were probably somewhat less independent after 1832, but "there were more of them to be independent," and certain votes "showed the

⁶⁴"Conservatives in the Commons," Quarterly Review, vol. 112 (1839), p. 56.

existence of such a party on both sides of the House."⁶⁵ Second, Anglican M.P.s, especially high church members, also voted against their parties. Because these men saw the Church of England as more than a social institution supported by the state, they tended to vote against any change in the status quo of the church and ignored party directives when doing so.

The situation in parliament was not conducive for passing reform legislation for the ecclesiastical courts. There were factionalism, religious bigotry, and a party structure too inadequate to deal with so contentious an issue as church court reform. The leadership within the two parties was at best lukewarm to legal reform so that it is not difficult to see why prime ministers and lord chancellors were reluctant to push too hard for a piece of legislation which most likely would be defeated if presented.

⁶⁵ Ibid.

Chapter One

ORIGINS OF ECCLESIASTICAL COURT JURISDICTION

The ecclesiastical courts in the early and mid-nineteenth century seriously needed reform. There had been no real reorganization since William the Conqueror, and the courts operated under an unorganized jumble of statutes and procedures garnered from a variety of sources. In some cases, improvements used in English civil courts had not been introduced into the ecclesiastical legal system, and the charters of many of the church's courts had become obsolete. This chapter presents a brief account of how the ecclesiastical courts evolved and of some of the difficulties which arose from the confused state of their constitution. This study will show how the ecclesiastical courts evolved into the state the nineteenth-century reformers found them and the complexity of the problems involved in their reorganization.

During Saxon times there was no separation between civil¹ and ecclesiastical² jurisdiction. All causes, wheth-

¹ i.e., related to royal or civil authority; temporal, secular.

² i.e., pertaining to areas in which the church took

er spiritual or temporal, were heard before the "sheriff's toun," a county court where a bishop and an earl (or his sheriff) sat in judgment together. A sacred judge also sat with the lord of the hundred in the hundred court.³

William the Conqueror⁴ changed this organization in two important ways. First, he turned the large holdings of the Church into baronies, permitting bishops and abbots to set up separate courts under the control of the king, and second, he permitted papal legates to preside over these separate courts. After being permitted to hear spiritual causes, the legates introduced more courts run by clerics and initiated the use of canon law. The domestic ecclesiastical courts merged into the papal legatine system and became nearly independent of royal control, especially after King Stephen⁵ allowed appeals to be heard in the court of Rome and Henry II⁶ exempted clerks from being tried in civil courts. While Henry I⁷ and Henry III⁸ tried

an interest; sacred, spiritual.

³ Phillimore, Ecclesiastical Law, vol. 1, pp. 1112-15.

⁴ Reigned 1066-1087.

⁵ Reigned 1135-1154.

⁶ Reigned 1154-1189.

⁷ Reigned 1100-1135.

⁸ Reigned 1216-1272.

to keep the ecclesiastical courts under control by issuing writs of prohibition⁹ Archbishop Boniface in 1267 succeeded in passing the statute of Circumspecte agatis¹⁰ The Statute of the Writ of Consulation,¹¹ which was passed later, greatly limited the power of the civil courts to interfere with the actions of the church courts and the scope of permissible prohibitions even into the nineteenth century.¹²

Except for the few above-mentioned instances, it is difficult to trace precisely how and when the various civil jurisdictions came into ecclesiastical cognizance, because the English legal system evolved so slowly. The number and types of causes that the ecclesiastical courts were permitted to hear grew throughout the Middle Ages. Using the Justinian Code and papal canon law, the church courts gradually assumed authority over all matters which involved the Church, however remotely. Offenses like bigamy, witchcraft, and incest were within the jurisdiction of the

⁹ i.e., orders from royal courts forbidding certain actions by other courts; 31 Hen. I and 52 Hen. III.

¹⁰ i.e., "enclosing the servant" -- giving the church the authority to exclude the clergy from civil proceedings; 13 Edw. I.

¹¹ 18 Edw. I.

¹² Phillimore, loc. cit.

sacred courts until they were declared felonies¹³ at various times in the seventeenth century. Although testamentary causes involving real estate remained with the king, ecclesiastical courts probated wills that dealt with movable property. Marriage, nullity, and divorce mense et thoro¹⁴ also came under spiritual cognizance. The church did not recognize divorces a vinculo¹⁵ so that bishops and archbishops were not permitted to grant them.¹⁶ Of course, the ecclesiastical courts had jurisdiction over all matters relating to discipline of the clergy, worship, belief, morals, and church property. Even brawling on church property, especially during services, was within spiritual jurisdiction, and the ecclesiastical courts came to hear all brawling cases. By a similar logic, defamation of clerks had to be heard in the spiritual courts; hence, all defamation cases were tried there.¹⁷ By the time of the Reformation, all these causes were generally regarded as being within the jurisdiction of the ecclesiastical courts, so that, when the Canons of the Church of England were

¹³ "Ecclesiastical Courts," Contemporary Review, vol. 1 (1866), p. 9.

¹⁴ i.e., "bed and board" -- legal separation.

¹⁵ i.e., "from the bond" -- complete contractual divorce

¹⁶ Ibid., p. 12.

¹⁷ 24 Hen. VIII c.12.

promulgated under James I¹⁸ in 1603, all the above-mentioned causes had long been part of ecclesiastical court jurisdiction.

When Henry VIII¹⁹ broke away from the Roman church, he brought the ecclesiastical courts under royal control, ended all appellate jurisdiction from outside England,²⁰ and abolished the legality of Roman Canon law.²¹ He did not, however, abolish the ecclesiastical courts or materially diminish their jurisdiction either in civil or spiritual matters. Nor did he make an attempt to abolish the precedents which had been based on Canon Law; thus, while the Roman canons were no longer used, they continued to influence the courts' decisions through the precedents based on them.

In practical terms, Henry VIII's acts did little to alter either the workings of the courts or their relationship to the state. During the reign of his son Edward VI,²² an attempt was made to reform the courts completely through the "Reformatio Legum Ecclesiasticarum [sic.],"²³

¹⁸ Reigned 1603-1625.

¹⁹ Reigned 1509-1547.

²⁰ 25 Hen. VIII c.21.

²¹ 13 Eliz. c.12; and later by 13 & 14 Car. II c.14.

²² Reigned 1547-1553.

²³ i.e., Reform of Church Law.

but Edward died before it was adopted. This code later, however, became a basis of the Canons of 1603 which were passed by Convocation and approved by James I. It became a legitimate basis for decisions in spiritual matters and was used with ecclesiastical common law.²⁴ The use of common law was a typically English approach at adjudication; the use of a code of law was more typical of Roman and continental practice. By the actions of Elizabeth I²⁵ and later Charles II,²⁶ not only were the canons of the church made permissible for finding decisions in cases heard in ecclesiastical courts, but all the precedents from the Middle Ages could also be used.²⁷

Between the Restoration in 1660 and the reign of George IV,²⁸ there were statutory amendments involving the jurisdictions and organization of the church courts. One in 1691 abolished capital punishment for heresy but still permitted excommunication and other forms of church cen-

²⁴ i.e., the precedent setting cases used by judges in church courts to arrive at decisions.

²⁵ Reigned 1558-1603.

²⁶ Reigned 1660-1685.

²⁷ "Ecclesiastical Courts," Contemporary Review, p. 10.

²⁸ Reigned 1820-1830.

sure.²⁹ Execution, however, had not been used as a punishment in ecclesiastical courts since the sixteenth century. In 1812, prosecution for non-conformity in ecclesiastical courts was forbidden, but the church courts retained jurisdiction over religious worship and assemblies.³⁰ Two acts³¹ made minor changes in marriage and defamation causes. Very obviously, given the unimportance of these bills, the state of the English courts was of little interest before 1820.

The organization of the ecclesiastical courts had developed into a system no less haphazard and confused than its jurisdictions. By 1832, there were about 400 such courts with a wide variety of charters and responsibilities. The largest number of courts -- over 350 -- was called the Peculiars. The diocesan courts of various types and jurisdictions made up the bulk of the rest and were under the bishops. The highest courts of the ecclesiastical system were the provincial courts of appeal dominated by the Court of Arches.

The notorious Peculiars were the most often condemned of the ecclesiastical system. Dating back to before the Reformation, they had been related to the legatine system

²⁹ 2 & 3 Will. & Mar. c.4.

³⁰ 52 Geo. III c.155, s.3.

³¹ 26 Geo. II c.33; 27 Geo. II c.44.

during the Middle Ages. The vast majority had been incorporated by the popes and were independent of the bishops. Their jurisdiction varied from court to court. They were never defended from a legal point of view and justifiably so given their specific or peculiar jurisdictions: a court to handle testamentary causes in this town, a court to deal with brawling, wills, and marriage for that manor and so forth. The territorial jurisdictions of some Peculiars even crossed diocesan boundaries. Thirteen Peculiar courts of the Archbishop of Canterbury were found in London.³² Even in the nineteenth century, The Peculiars were not under the bishops, and yet, because of the Acts of Supremacy, they were not under legatine or papal control either. Because the Peculiars had been incorporated for specific manors or municipalities, the appointment of the judges or registrars and clerks fell to individuals among the landed gentry. Thus, they became a source of lucrative patronage and sinecures. The bulk of business brought before them consisted of testamentary causes, and the quality of jurisprudence was generally abysmal. Although roundly criticized by both churchmen and lawyers alike, they persisted well into the nineteenth century because of the solid backing they received from rural gentry and provincial

³² Phillimore, Ecclesiastical Law, p. 924.

lawyers who benefited from their easy revenues.

Above the Peculiars were the diocesan courts, which were typically small and poorly staffed, London's being a notable exception. Even so, they were not eliminated by nineteenth century reform bills and still exist today. Historically, they had grown out of the baronial-common law traditions of medieval legal practice. However, like the Peculiars, they operated under the precedents established by canon law and used procedures for gathering evidence and running trials more in keeping with continental practice than with the temporal English judicial system. The bishops were willing to have their courts consolidated and made more reliable as legal institutions, but they were unwilling to give them up entirely. They managed successfully to keep their court system intact.

Each diocese had a Consistorial Court which exercised original and appellate jurisdiction for diocesan tribunals under it. Most dioceses had one or more lesser courts with the jurisdiction prescribed by statutes or individual charters. In addition, there were archdeacons' courts which had original jurisdiction. Some of them were independent of the bishops' control until they were made subordinate to the diocesan courts with appeals to the consistorial courts in the early nineteenth century³³ (unless there was sede

³³ i.e., diocese lacking a bishop; "Ecclesiastical

vacante, in which case appeals went to the Court of Audience of the archbishop of Canterbury).³⁴ Each archbishop had a Court of Audience which was his own personal tribunal with original and appellate jurisdictions as well. In addition to this court, there were several archiepiscopal commissary courts with specialized functions and several provincial courts with specific jurisdictions. For example, the Vicar General confirmed bishops, and the Masters of the Faculties heard cases arising from disputes relating to ecclesiastical notaries public. Finally, each province had a supreme court of appeals; York's was the Chancery Court. Canterbury's famous and highly respected provincial court, the Court of Arches,³⁵ also functioned as the highest appellate court in the entire ecclesiastical judicial system.

Much of the well-deserved respect for the Court of Arches resulted from the four capable and eminent men who held the post of Dean of Arches during most of the nineteenth century: John Nicholl, Herbert Jenner-Fust, Stephen Lushington, and Robert Joseph Phillimore. Other court judges and officials, however, were not particularly compe-

Courts," Contemporary Review, p. 14.

³⁴ Phillimore, Ecclesiastical Law, p. 922.

³⁵ Ibid.

tent or qualified; therefore, the reputation of the lesser courts (especially the Peculiars) was low both within the legal community and with the general population.

The ecclesiastical courts employed many people. The chancellors, commissaries, assessors, and archdeacons or surrogate officials heard the cases. There was also a vast number of registrars and clerks. Their qualifications and terms of office were changed by various minor reform acts until they were regularized in 1846.³⁶

The lawyers who could plead cases in these appellate ecclesiastical courts were called advocates and were provided for in canons 96, 130, and 131. Until 1857,³⁷ all advocates had to be members of the Doctors' Commons, an incorporated college of doctors of law that had a monopoly on all contentious cases.³⁸ Members of the Doctors' Commons had to have graduated with a Doctor of Laws degree from an English university and had to serve a year's internship without pay. Although most of the members of the Doctors' Commons were highly competent, the organization came under harsh criticism because it was nepotistic. Des-

³⁶ 10 & 11 Vict. 98.

³⁷ 20 & 21 Vict. c77, ss. 116, 117.

³⁸ i.e., contested cases; cases in which a lawyer needed to prepare a case in the defense of a client who was being sued or charged with a crime. There was much business like contested wills or criminal cases where the defendant pleaded guilty when no defense was necessary.

pite opposition from all sides, the Doctors' Commons survived until it lost its monopoly in 1857, when the newly-formed civil probate and divorce courts permitted all solicitors to practice in them.³⁹

The practicing attorneys in the second classification, those not drawn from the Doctors' Commons, were called proctors. These lawyers were not necessarily doctors of law, but they had an extensive seven-year internship as clerks in the Court of Arches. They generally practiced in the lesser courts. Technically, "advocate" and "proctor" seem to have been somewhat synonymous until the terms were clarified in 1803,⁴⁰ but in practice, the differences were sharply drawn. After the Doctors' Commons was disbanded, the proctors were gradually absorbed into the general pool of solicitors. First, in 1845, solicitors were permitted to practice in all ecclesiastical courts except the provincial and the diocesan court of London.⁴¹ Then, seven years later, this prohibition was also removed, and all solicitors could practice as proctors in English ecclesiastical courts. Canons 123 and 134 required the presence of a registrar at proceedings in ecclesiastical courts because

³⁹ 23 Geo. III c.127, ss. 8, 9, 11.

⁴⁰ Ibid., ss. 116, 117.

⁴¹ 7 & 8 Vict. c.68, s.2.

all testimony had to be written. This meant that all 380 minor spiritual courts needed registrars. They not only kept custody of court records and archives but also sent citations and court decrees, handled licenses (including marriage licenses), and registered baptisms and burials. A predetermined statutory fee was paid for each act. In some areas their incomes became large, and registrars were eventually required to report their earnings to the Home Secretary.⁴² There was considerable criticism leveled at registrars for several reasons. Some of them appointed deputies to do the work and then collected the fees for themselves. Nothing prohibited a person from being a registrar for several courts or from being simultaneously a registrar and a beneficed clergyman.

The registrars were in effect notaries public, although they did not have to be so designated officially. They had to be appointed by the Archbishop of Canterbury and were absolutely necessary in the courts because they had the authority to verify "licenses, dispensations, compositions, faculties, grants, receipts, delegacies, instruments or other writings,"⁴³ and a fee accompanied each verification.

The bishops also appointed secretaries to keep records

⁴² Phillimore, Ecclesiastical Law, p. 940.

⁴³ 7 & 8 Vict. c.68, s.2.

and apparitors to execute orders and decrees that did not require official registration of documents. These officials, paid by fees, were not covered in the canons and their qualifications and duties were not regulated until 1792.⁴⁴ Their fees were not regulated until March, 1869. In addition there were seal keepers, clerks, and many other minor officials and employees, all of whom made jurisprudence in the ecclesiastical courts expensive.⁴⁵ The cumbersome procedures which marked the operations of the ecclesiastical courts necessitated a large personnel force. Although there were many acts passed during the nineteenth century removing most civil causes, the court procedures and the officials needed to maintain them remained untouched except in cases involving the discipline of clergy.

Several of the court practices were unusual to the English judicial system. Before 1854, only written testimony was admissable.⁴⁶ In addition, the first pleas could

⁴⁴ Phillimore, Ecclesiastical Law, p. 823.

⁴⁵ Ibid.

⁴⁶ There were unusual methods of gaining evidence from witnesses because of the lack of oral testimony. First, witnesses were called and their names were given to the opposing party. They were examined secretly with both sides being permitted to present questions. The examiner recorded the witnesses' depositions in a book kept by the registrar. After reviewing the depositions of the proctors for the defendant and plaintiff and the evidence of the witnesses, the judge could make a decision unless there were objections, in which case there was a complex series

be amended as the trial proceeded, and the suits could be broken down into separate parts, according to subject matter with the dates when each occurred recorded.⁴⁷ Similarly, the object of a suit could be changed during a trial.⁴⁸ One of the most unusual features of the ecclesiastical courts was that the introduction of interveners was permitted.⁴⁹ Unlike the procedure followed in civil courts, a

of procedures to permit rejoinders, counter-allegations and further pleadings. This procedure was dropped with the introduction of viva voce in 1854. It was also possible to admit hearsay evidence, and two witnesses were necessary to confirm an admissible point of evidence.

⁴⁷ Each accusation was then shown to the defendant who could object to its consideration on the grounds of irrelevance or the inability of the plaintiff to prove the allegation with admissible evidence. This had the effect of shortening the trials by eliminating points which were trivial or unprovable.

⁴⁸ In Best v. Best [4 Adm. & Ecc., p. 265], for example, the wife sued for restitution of conjugal rights, but her husband was able to prove that she had been guilty of adultery. Not only did the wife not win restitution of her conjugal rights, but she was ordered divorced from her husband. In Gardner v. Ellis [1 Add. p. 411], Gardner sued Ellis for having brought certain ornaments into his church without proper faculty to do so. He said that they were popish. During the trial, Ellis was able to prove that the ornaments were not prohibited by any rubrics. Consequently, the judge not only ordered Gardner to accept the new ornaments into his church, but also granted Ellis a faculty to confirm [Dalrymple v. Dalrymple, 2 Consist., p. 137].

⁴⁹ i.e., a third party who could also enter as a plaintiff against the defendant; such intervenings could occur any time during a marriage suit [Montague v. Montague, 2 Add., p. 372]. In cases of divorce [Clement v. Rhodes, 3 Add., p. 40] and wills [Bradford v. Fry, 4 P. D., p. 93], interveners could not hope to gain more than they

caveat could stop a spiritual court from issuing a license, dispensation, faculty, or institution.⁵⁰ Beyond the general differences in procedure between civil and spiritual courts, the different types of causes heard in ecclesiastical courts required specific procedures to deal with them. Phillimore adequately covers those procedural technicalities.⁵¹

There was one final source of confusion in the ecclesiastical courts. The spiritual courts often were called on to make legal judgment on rubrics in the Book of Common Prayer. Doing so created a great number of difficulties because the rubrics were written not by lawyers but by churchmen. They were adequate enough to provide directions for worship services and the like where clergymen only need general information, but their lack of technical legal language rendered some of them confusing and imprecise when they had to be used in place of parliamentary acts in

would have received if they had instituted the suit, nor could they claim more than the originators of the suit. Interveners had been upheld in appeal [Phillimore, Ecclesiastical Law, p. 981].

⁵⁰ Under canon law the court could not proceed if a caveat had been issued until it had been dealt with. In common law courts a caveat was treated only as a caution. The granting of a caveat in an ecclesiastical proceeding was done without the knowledge of the party against whom the caveat had been issued [Phillimore, Ecclesiastical Law, pp. 1000-01].

⁵¹ Phillimore, Ecclesiastical Law, pp. 912-1001.

courts of law. The Uniformity Act 1559 had given the rubrics statutory rank.⁵²

The difficulty of using rubrics as statutes was not really important until the controversy between the broad churchmen and the high churchmen needed to be settled in the courts during the 1850s. During the nineteenth century, there was a strong revival of interest in the organization and theology of the established church. This, of course, led to much heated debate on which direction the Church of England should take. On the one hand, there was the well-established conservative Calvinistic wing which had dominated the Anglican Church for the previous century. When the Great Awakening occurred in the eighteenth century not all the social-minded evangelicals left the Church to become Methodists or Congregationalists, so that by the nineteenth century there was a vocal evangelical group within the Church of England that tended toward an even lower church ideology than the ruling Calvinists. In reaction to the Broad church movement there arose the Tractarians and the Ritualists, who pushed for high church practice and theology.

Because these ideologies contended within the established church, the ecclesiastical courts often became the

⁵² ibid., p. 938.

battlefield for the two reforming parties. Convocation itself was divided, and the nineteenth-century archbishops of Canterbury for the most part took the view that the Anglican Church should be broadly based, embracing as wide a range of belief as was manageable. Most of the pressure came from the Ritualists, who wanted to make worship and church ornaments more elaborate. Many Anglicans had a phobia about what they considered to be "popish superstitions." The Ritualists, however, did not fear Roman practices and fought with an almost fanatical drive to revive many old forms and rites.

The church courts were called upon to referee the conflict, and they had to use the rubrics and past practice as the sources for their judgments. The first great confrontation of this sort occurred in Faulkner v. Litchfield (1844).⁵³ Vicar Faulkner opposed the move by Litchfield, a churchwarden, to have a stone altar and credence table installed at St. Sepulcher, Cambridge. The vicar lost and appealed to the Court of Arches. The judge's opinion (eighty pages) overturned the Consistory Court of Ely. The churchwarden claimed to be acting on a rubric of the Book of Common Prayer which had been given the force of statute by the Act of Uniformity and one of the 1603 canons. "The Court must proceed precisely in the same manner as it would

⁵³ 1 Rob. Ecc. R., p. 184.

construing other Acts of Parliament."⁵⁴

In 1855, the problem arose again in two churches in London. Adjudicating an appeal to the Court of Arches, Lushington ruled that an altar could remain because it was made of wood, but a cross, candlesticks, elaborate altar cloths, credence table, and a stone altar had to be removed.⁵⁵ Liddell, the plaintiff, objected that the decision did not go far enough and appealed to the Privy Council which had acquired ecclesiastical jurisdiction in 1835. The Judicial Committee reversed Lushington on the credence table and the altar cloths but upheld the rest.⁵⁶ A decision three years later, however, permitted a cross and candlesticks to remain because they were on a small ledge of wood.⁵⁷

The constant reversals occurred because the rubrics had not been written in legal terminology and could not be easily interpreted by the courts. For example, a difficulty arose concerning altar lights. The rubric in the

⁵⁴ Ibid.

⁵⁵ i.e., the prayer book did not specifically permit the use of stone altars, processional crosses, candles, and embroidered altar cloths; Liddle v. Westerton, 1 Moo. P. C., p. 187.

⁵⁶ Ibid., pp. 187-88.

⁵⁷ Beal v. St. Barnabas, 14 Moo. P. C. cited in "Ecclesiastical Courts," Contemporary Review, p. 8.

Prayer Book said ". . . such ornaments of the Church . . . shall be retained . . . as they were in this Church by the authority of Parliament in the second year of the reign of King Edward the Sixth." Edward VI's Prayer Book was not adopted formally until his third year. Since the first Prayer Book did not mention altar lights specifically, the Ritualists reverted to an act passed in 1544⁵⁸ which stated that canons and constitutions in authority then would be in effect until a commissioners report. Ten years earlier Henry VIII had confirmed a constitution of Archbishop Reynolds from 1322 which permitted use of altar lights during the service.⁵⁹ The first parliament of Elizabeth I confirmed that statute.⁶⁰ The Court of Arches often accepted the Ritualists' argument that the earlier rubrics could be considered when the Prayer Book made no specific reference to a point. The Judicial Committee of the Privy Council generally took the opposite view that what was not expressly permitted was forbidden. Sometimes, however, the Judicial Committee would take a pragmatic approach ignoring rubrics entirely; for example, they permitted the use of credence tables because they were useful and allowed commu-

⁵⁸ 25 Hen. VIII c.19.

⁵⁹ 35 Hen. VIII c.16 which confirmed 25 Hen. VIII c.19.

⁶⁰ 1 Eliz. c.1.

nion table candles if artificial light were needed.⁶¹

From the evidence given above it is obvious that the ecclesiastical law and the courts needed major reorganization. The jurisdictions of the church courts in England had developed over hundreds of years without any real plan on the part of either civil or episcopal authorities. Their authority developed into a confusing collection of causes often unrelated to the organization or ministry of the church, and the procedures became an odd mixture of Roman and English traditions. As a consequence, by the nineteenth century the courts were scenes of great corruption and mismanagement at the lower levels, and sources of annoyance and mischief at all levels. The quality of their justice was uneven, and their expense was great. The remainder of this paper will concern itself with the attempts by parliament and ecclesiastical jurists to modernize and rationalize the ecclesiastical courts.

⁶¹ "Ecclesiastical Courts," Contemporary Review, pp. 12-14.

Chapter Two

THE CONDITION OF THE CHURCH AND THE ECCLESIASTICAL COURTS

By the beginning of the nineteenth century, the ecclesiastical courts were in a chaotic state and needed to be reformed. The previous chapter has given an explanation of how this condition came about and the rest of the paper describes the efforts made by parliament and jurists to reorganize the courts and jurisdictions. In order to clarify the problems involved, the next two chapters will give background information on three aspects of the reform: the position of the church, the actual condition of the courts in the nineteenth century, and the prevailing political opinion.

Many scholars have written about the Anglican Church in the nineteenth century, and they give a varied view of the Anglicans. The established church pervaded almost every facet of English life, yet through the nineteenth century there was a steady decline of influence in area after area. The church was removed from authority in civil law and government. To some, the nineteenth century church was a failure, unable to meet the demands of a rapidly changing society. "Victorian England was religious," but

not as a result of the Church of England.¹ It had gone from a potent force in English life to, as some historians maintain, a sidelight.² The influence of the church in government, particularly in parliament, declined markedly during the nineteenth century.³ What effect this decline had on the church's tribunals has not, however, received much comment.⁴

From a secular point of view, the political and intellectual influence of the Victorian Church diminished. The Anglican Church had little to offer English society by the end of the nineteenth century. The newer theologies of the Tractarians and Cambridge evangelicals were no more capable of meeting society's needs than the older ones.

Much religious thinking in the nineteenth century has been characterized as putting new wine into old bottles, that is, putting new ideas into older forms, thereby altering the forms and reducing the impact of the ideas. Like most of the reforms made in the secular world as well,

¹ Chadwick, Victorian Church, p. 1.

² Brose, Church and Parliament, Chapters 1-3.

³ Ibid, Chapter 4.

⁴ Chadwick briefly lists the Acts which abolished the various civil jurisdictions of the courts and mentions only that the Gorham case started in the Court of Arches. He makes no attempt to discover why or how the transfers took place. Brose, even though she centered on the interaction between the church and parliament, does not even have a heading in the index for ecclesiastical courts.

changes were pragmatic and not systematic. This created a "great number of paradoxes." Certainly by the mid-forties the attempt to assert the church's national function had lost any connection with secular reality.⁵ Bishop Samuel Wilberforce, one of the chief scholar-bishops of the high churchmen, was opposed to keeping mandatory church rates because he wanted to see "who we are and who we are not," while Prime Minister Russell wanted to maintain the church rates in order to keep the church a strong force in domestic life.⁶ To some observers this view of the relative importance of church rates demonstrated that those outside the church had a better idea of the church's importance in English affairs than did the high church bishops.

Within the church there were three separate intellectual positions which established the sacred reality of the church and the relationship of that reality to the government and society. In examining these philosophical stances, none was able to accomplish much for society. First, the evangelicals were too uneducated to affect church scholars, and they lost their vigor and popular appeal when intellectuals tried to put evangelical Christianity on a sounder theological footing. The broad churchmen gave a

⁵ Marsh, Victorian Church in Decline, p. 11.

⁶ Crowther, Church Embattled, p. 224.

scholarly base to Christianity but gained no support from the intellectual community because they rejected the high-church practices, which were more popular with scholars. The high churchmen, who were eventually led by Maurice, moved to Christian socialism and ritualism. Both of these ideas flew in the face of traditional Anglicanism. As Crowther says,

It is impossible to say with certainty that if the Church had not been so concerned with conflicts over religious inquiry, it might have been a more powerful force with more central direction, common purpose and agreement among the clergy, the active energies which were so plentiful in the church at that time might have been harnessed for its good and not its division.⁷

Crowther never really explains what "for its good" means, but he implies later that having a larger role in the life of the state and a greater capability to fend off contentious theologies would have helped.

From another point of view, perhaps some of the church's activity during the nineteenth century can become more justifiable. In studying the Victorian church from its own intellectual and theological objectives, one needs to understand that the church, either established or non-conformist, did not exist primarily for the good of the state or for the physical well being of the population. Its first role was to promote Christian theology and belief

⁷ Ibid, p. 10.

and establish a society compatible with the teaching and philosophy of Jesus.⁸

Taken from this perspective, the Victorian church was not a failure, and losing much of its temporal power, including the civil jurisdictions of its ecclesiastical courts, did not mean that the church was in danger of collapse. It signified that the Church of England was better able to accomplish its primary Christian function and still continue to speak officially on behalf of the government on moral and social issues without being fettered to a constitution of extraneous temporal responsibilities. The church did not have adequate resources to manage the popular education necessary for an industrialized society. Nor did it have the secular objectivity needed to administer the contract law of divorce and marriage. Such things as probate of wills even in the ecclesiastical courts had always been handled by civilians, although technically the courts were controlled by the church. The church derived no financial benefit from running the courts for civil affairs because all the income collected by these tribunals was used in running the courts and paying their officials and employees.

This view of the church might explain why the bishops

⁸ D. Bowen, The Idea of the Victorian Church (Montreal: McGill U. Press, 1968), see especially the last chapter.

were in favor of reform and, except for the contentious old guard led by Henry Phillpotts, were willing to see most of the civil jurisdictions terminated. The debates give evidence that the conservative laymen and traditional Whigs were much less willing to let the church lose its secular influence than the majority of the bishops. Certainly, such influential bishops as Samuel Wilberforce, James Henry Monk, and later Charles Blomfield were pleased to let it go.

From a politician's point of view and perhaps to a political or an intellectual historian, the Victorian church was an abysmal failure. To a theologian of the nineteenth century, however, its condition in 1899 was much better than it had been in 1800.⁹ While much of the church's political power had disappeared, it was in a much better condition theologically and socially. At the end of the eighteenth century, the church was in a poor state. The bishops, for the most part, were lax and uninterested in the shepherding requirements of their position, and the Calvinists and Latitudinarians had reached a passive compromise to do nothing. The church was divided among contentious parties. Oxford, which had already spawned the evangelistic ideas of Wesley, had also produced the Trac-

⁹ Ibid.

tarians. By the 1800s evangelists from Cambridge and Tractarians were engaged in a bitter controversy. At the time that dissenters wanted disestablishment in the 1840s, Whigs, especially those in parliament, saw the Anglican establishment merely as a moral national watchdog.¹⁰ The Methodists had vividly displayed the weakness of the church in meeting the needs of the common folk of England.

Two personalities helped to change the direction of the church in the nineteenth century: Samuel Wilberforce and Charles J. Blomfield. Both were bishops, but each had his own direction. Wilberforce improved the relationship of the factions to each other, and Blomfield improved the church's relationship to the state. Yet, both had been in favor of ecclesiastical court reform. Blomfield, a broad churchman, was interested in reforming the position of the established church in the state. However, his enthusiasm for changing the structures of the church waned as the church became embroiled in several legal controversies like the Gorham trials. He felt partly responsible because he had defended the abolition of the ecclesiastical Court of Delegates in favor of the Privy Council, the secular court which tried Gorham.¹¹ Samuel Wilberforce was also inter-

¹⁰ "Marriage and Regulation Bill," Blackwood's Magazine, vol. 39 (1836), p. 606.

¹¹ Hansard, Parliamentary Debates, ser. 3, vol. 121 (1852), pp. 427-30.

ested in the the parliamentary responsibilities of a bishop. He was a high-church scholar and as such favored needed church reforms.¹² He was certainly not a high churchman in the mold of the cantankerous Phillpotts who successfully tied up the entire House of Lords simply to make a point.¹³ Phillpotts saw high church theology as an end in itself. Wilberforce used his belief to reform the position of the bishop and to improve the church's role in society. His work influenced many high churchmen to work in the slums and the depressed rural areas.¹⁴ Phillpotts had fomented the Gorham controversy; Wilberforce reintroduced the concept of the bishop as the shepherd of the sheep.

The time when Blomfield and Wilberforce reached their greatest prominence to some degree influenced reform in the ecclesiastical courts. Attempts at legislative reform flourished in the twenties, thirties, and forties when Blomfield was the most active; thus those amendments to the constitution of the church's courts to some extent bear his stamp. Internal reforms in the courts occurred during the fifties and sixties when Wilberforce was more

¹² Bowen, The Idea of the Victorian Church, pp. 28-29.

¹³ Hansard, P. D., ser. 3, vol. 69 (1843), p. 666.

¹⁴ Bowen, The Idea of the Victorian Church, pp. 29-36.

active.

The work of the moderate reforming bishops like Wilberforce and Blomfield was effective in moving the legislature to reform the aspects of their courts most important to the prelates. While parliament, especially Brougham, was interested in reforming the civil jurisdiction of the courts first after the 1832 commission report, the bishops were insistent on reforming ecclesiastical cognizance and succeeded in having passed the Pluralities Act in 1838 and the Discipline of Clergy Act of 1840.¹⁵ Both statutes affecting ecclesiastical jurisdiction were passed a decade and a half before the civil function of the courts was reformed. Certainly the success of the bishops in having legislation passed was helped by the widespread desire on the part of most Englishmen for the church to "get its house in order" and both acts had a profound effect on the workings of the ecclesiastical courts. These statutes more than any other legislation of the century reformed the courts to make them more workable. To the laity, however, the two bills represented legislation designed only to punish wrong doing and eliminate abuses of the "criminous clergy."¹⁶ To the church, however, the two acts were

¹⁵ Hansard, P. D., ser. 3, vol. 45 (1839), p. 755.

¹⁶ "Ecclesiastical Courts," Westminster Review, vol. 4

important because they gave the clergy, particularly the bishops, the legal machinery necessary to mobilize and purify the church so that it could better accomplish its primary objective of spreading Anglican Christianity. The specific sections of these acts and their effect on the church are examined in Chapter Ten.

It must not be forgotten that the bishops viewed the courts primarily as instruments of their authority over their clergy and not as a wing of the English legal system. Bishop Phillpotts, for example, did not mind seeing testamentary jurisdiction transferred because the Peculiars which handled most testamentary cases were "only of lay quality anyway."¹⁷ Their resistance to some of the reforms was due to their fear of the ultimate abolition of the consistory courts -- their own tribunals. When bishops were not allowed to pass judgment in their own courts, the legal machinery of the church and the discipline of the clergy declined. From the bishops' point of view, the church was eminently successful in ecclesiastical court reform at least until the Ritualists appeared. Those changes in civil jurisdiction which were so eagerly sought by such ardent legal reformers as Brougham, Cottenham, and

(April, 1831), p. 121.

¹⁷ Hansard, P. D., ser.3, vol. 137 (1855), p. 1373.

Lyndhurst were of little interest to the moderate bishops.

After the passage of the Worship Regulation Act in 1874, two important and disastrous changes for the prelates took place: first, the bishops lost the right to try clerics for ecclesiastical offenses and, second, they were given no control over which cases were to be heard in their courts. From a democratic viewpoint, these changes were very desirable, but within the framework of an authoritarian organization based on strict principles and discipline, the two innovations worked a great deal of mischief. The act of 1874 was passed when the phobic hysteria generated by the Ritualists created much desire among the laity for legislation to prevent the Romanizing of the English church and enforced a greater degree of conformity than most bishops wanted¹⁸ Most of the suits initiated under this act were instigated by laymen and not clergy.

Reforming the civil cognizance was much more complicated because of the many problems involved. Because of neglect by the church and parliament, courts were in a very poor state. The rest of this chapter explores the actual condition of the ecclesiastical courts taken from data presented in speeches before parliament, collected by var-

¹⁸ "Ecclesiastical Courts Commission," Quarterly Review, vol. 156 (Oct. 1883), pp. 533-34.

ious governmental agencies, and found in journal articles. This information reveals four main categories of problems facing the reformers: jurisdiction and enforcement; nepotism, pluralism, and qualifications; high costs and fees; and the difficulty of frequent appeals.

Between 1827 and 1829, a total of sixty-eight people were imprisoned by order of Chancery at the request of the ecclesiastical courts and the poor seem to have been the hardest hit. With the exception of one lawyer and one priest, all were working-class people and ten were unemployed. There were seven women, including three widows. The vast majority of the imprisoned were held in custody for from three to six months, although half a dozen were held for less than ten days and two served over a year in jail. Only one was being held as a result of discipline of clergy causes, a parish clerk who was held for five months for "an immoral and profligate life." The most common cause which had been brought against the prisoners was defamation, with twenty-one imprisoned for that offense. The reason for almost all the incarceration was non-payment of costs which ranged from £1-£123, although most were between £10 and £20.¹⁹

¹⁹ House of Commons Sessional Papers, Reports Made to His Majesty by the Commissioners Appointed to Inquire into the Practice and Jurisdiction of the Ecclesiastical Courts in England and Wales, 1832, vol. 24, pp. 168-171.

The law was then so structured that if a woman were assaulted by a man he would be called before a civil court and fined £5, but if she spoke in anger against that man she could be charged huge sums for costs and remain in jail until she could pay the debt because her case would be tried in an ecclesiastical court. There was no way for an ecclesiastical court to enforce its orders except by charging costs.²⁰ The injustices and inequities created by the ecclesiastical courts were at times very great.

In 1848, William Bouverie, a radical M.P., made a long speech complaining about the ecclesiastical courts. He complained that people were fined and imprisoned out of all proportion to the severity of their petty crimes. The registries were "insufficient, imperfect and objectionable."²¹ In 1844 the registrars had received £106,000 for probating wills and £60,000 for other duties. The registrar at Canterbury, for example, had received £7588 a year, in Chichester £7155 a year, and in York £2636 a year. The lists of court officials "seemed an index of family names of bishops."²²

The most serious charges of nepotism, however, were directed not against the courts directly but against the

²⁰ Hansard, P. D., ser. 3, vol. 99 (1848), pp. 103-23.

²¹ Hansard, P. D., ser. 3, vol. 99 (1848) p. 11.

²² Ibid., p. 123.

Doctors' Commons. The Morning Chronicle reported that

The Rt. Hon. John Nicholl has recommended to the government a list of proctors, all of whom are members of the family out of whom the fortunate one is to be chosen, but not one of whom . . . would have occurred to him, if experience in the profession were the only test.²³

The Times reported a similar incident between Jenner-Fust and Dr. Addams in the Court of Arches. Dr. Addams had framed a question in such a way as to throw doubt on Jenner-Fust's impartiality. His reason for doing so, according to the Times, was that one of his witnesses had sworn that "the plaintiff had notoriously boasted of his connection with the judge as a great element in his chances of success. All I can say is, that it is an unfortunate state of things, even if it occurred only once: but it is of perpetual occurrence; I see a phalanx against me which quite oppresses me. I have borne it a long time." Naturally the matter was raised in both parliament and the press.²⁴ After commenting on the monopoly allegedly enjoyed by the Jenner family. The Times continued that "a defendant may have one Jenner on the bench, another as advocate against you, and a third acting as the hostile

²³ "Doctors' Commons," Law Times, vol. 4 (1845), p. 162.

²⁴ Manchester, "Reform of Ecclesiastical Courts," p. 61; see also The Times, 5 Feb. 1848, p. 6 and 8 Feb. 1848, p. 3.

proctor."²⁵

Nepotism was a problem aggravated by a lack of adequate statutory qualifications for the more responsible positions like judges, proctors, and registrars. There is a great deal of information about this abuse in returns ordered by Chancery. In Winchester, for example, John Goldsmith had been made a registrar at age fourteen at the retirement of his father. His salary in 1852 was £288 derived from service on episcopal decrees, citations, the holding of the office seal, consecration fees for attending visitations and consecrations. He also earned £77 per annum as apparitor. As a point of reference, a middle class income in 1865 was £300. Brownlow North became the principal registrar of both the diocese of Winchester and the county of Surrey at the age of seven. He took office at the age of fifteen and in the meantime paid a surrogate £185 annually. His annual income at Winchester was £550 and for Surrey £300. He, too, had been given his positions in reversion from his father.²⁶ In the Rochester Consistory Court, sixteen year old Walker King was appointed deputy registrar with an income of £84. His fourteen year old brother James was deputy registrar in Essex and Herts,

²⁵ Ibid.

²⁶ "Returns on Ecclesiastical Business in Winchester," British Parliamentary Papers: Accounts and Papers, vol. 78 (1852-53 and 1843), pp. 227, 228.

earning nearly the same with an additional £11 for fees from a deanery at Dartford (he was in holy orders). William Strong and his son earned £110 as successive principal registrars of Northampton from the probate and the administration of wills. The Return from Winchester listed three men from Northampton whose combined salaries amounted to £506 as deputy registrars and then a page later reported that "No duties are performed by the deputy registrar at Northampton."²⁷

A report ordered by Elphinstone during the Nicholl Bill debates brings other instances of pluralism to light. A certain clerk was deputy registrar for four consistory courts in Bath and Wells. Several members of the Doctors' Commons who were practicing proctors also held positions as judges:

	Annual Salary (1828)
Beaumont -- Consistory Court	£ 93
Nicholl -- Vicar General	432
Dodson -- Court of Faculties	495
Jenner-Fust -- Dean of Arches	22
" Prerogative Court	3577
" Peculiar Court	26
Lushington -- Consistory Court	326
" Commissary Court	27 ²⁸

This meant that they were judges for each other and would

²⁷ "Returns on Ecclesiastical Business in Rochester," British Parliamentary Papers: Accounts and Papers, vol. 88 (1855), pp. 219-224 (2-6).

²⁸ "Abstract of Returns . . . 1843," B. P. P., vol. 40 (1843), pp. 179-193.

decide on cases pleaded by proctors with whom they might be collaborating or opposing in cases going on at the same time. A John Mott earned £266 as registrar in fourteen courts. William Castleman earned £123 as registrar in four Peculiar courts, and his son earned the same income as deputy registrar for the same four courts.²⁹ The man most successful at holding multiple positions seems to have been an Edward Parfitt, who was deputy registrar of four consistory courts in Bath and Wells with annual incomes of £1009, £367, £67, and £53 plus £3 for having custody of records. In addition, he was registrar for nine Peculiar courts and earned from £1-£8 per year from each position for a total annual income of £1561 for a minor ecclesiastical court official.³⁰

A comparison made by Chancery between the incomes of chancellors and registrars in various Consistory courts clearly illustrates the large incomes earned by those who were paid fees and the inequalities resulting from such a system.

	Chancellor	Registrar
St. Asaph	£ 184	£ 200
Bangor	217	728
Bath	213	400
Chester	1689	5607
Chichester	35	381

²⁹ Ibid.

³⁰ Ibid., p. 187.

Ely	105	103
Gloucester	325	1015 ³¹

There are several such returns from Peel's second administration which were ordered by various members of the Commons to defend their desire to transfer testamentary jurisdiction and to abolish the Peculiars. They repeatedly show highly paid registrars, many with the same surnames in the same diocese, large numbers of unmanned Peculiars, and plural holdings.

To some degree, holding more than one position was justifiable since the work load in some of the courts was quite low. In "An Inquiry into the Number of Times Jenner-Fust Sat in Court," the chancellor held court during two years only fifty-two times: thirty-seven as judge of the prerogative court and fifteen as Dean of Arches.³² The Court of Arches, in particular, seems to have had a very light case load -- only 119 cases between 1834 and 1836.³³

Stowell stated in his Bill for the Better Regulations of the Ecclesiastical Courts, 1812, that the "power of hearing and determining contested Causes of Ecclesiastical cognizance should be exercised only by courts under the

³¹ "Abstract . . . Probate of Wills," B. P. P., (330) vol. 28 (1852), p. 93; "Abstract of Appeals," (22), vol. 55 (1866), p. 51.

³² "An Inquiry into the Number of Times Jenner-Fust Sat," B. P. P., (400).

³³ Ibid.

bishops and not by the lower courts." (He had wanted to abolish all the courts up to the Consistorial level.³⁴ He claimed that there were too few cases, hence insufficient income to hold good judges. Neither were there adequate provisions for storing wills.³⁵ One registrar kept them in a box in his hay loft.³⁶

Parliamentary records in 1828 listed 372 Peculiar, manorial, and royal courts. Of that total, about 120 had had no business for three years prior. By 1869 when the Peculiar courts were abolished, almost twice that number had become defunct. The following dioceses had the largest number of Peculiar courts: Canterbury (51), York (58), Winchester (49), Lincoln (42), London (40), Lichfield (38), Bath and Wells (27), and Bristol (17).³⁷

The Peculiars which remained handled a fairly heavy testamentary business. The following is a list of the number of probates handled in three years (1827-29) in the Peculiar courts as compared to probates processed in all the other courts in each of the dioceses listed:

Chester	455-1209	Coventry	187-757
York	36- 608	Lincoln	461-313

³⁴ Report . . . Ecclesiastical Courts 1832, p. 22.

³⁵ Ibid.

³⁶ Ibid., p. 102.

³⁷ Ibid., p. 504.

Canterbury	103-6660	London	211-214
Bath and Wells	202- 116	Norwich	279-258
Bristol	42- 110	Peterboro	148- 7
Chichester	5- 123	Rochester	7- 18
Ely	1- 94	Sarum	185- 46
Exeter	591- 118	Winchester	103- 98
Gloucester	1- 182	Worcester	1-173 ³⁸
Hereford	22- 181		

Because of the large amount of business handled by the courts, the country lawyers would have been seriously hurt by eliminating the Peculiars. Quite obviously, too, a great number of people in both rural and urban areas depended on them.

Probates accounted for the greatest amount of business in all the ecclesiastical courts. The following chart shows the total number of contentious cases in all church courts in York and Canterbury from 1827-29:

	Canterbury	York
Testamentary	586	279
Matrimonial	83	17
Tithes	122	7
Church Rates	39	16
Civil Discipline	123	52
Clergy Discipline	17	4
Brawling	18	6
Defamation	157	106 ³⁹

During the debates on court reform, there were many complaints about the enormous costs of having cases tried and the exorbitant fines. Folkestone in 1812 charged that the fines in some church courts exceeded those levied in

³⁸ Ibid., p. 566.

³⁹ Ibid., p. 102.

the Court of Chancery and were set capriciously. Folkestone called the fines "extortion."⁴⁰ Non-appearance, for example, could cost from £11 to £26. In one case, a man and his wife were fined for contempt, the former for £27 and the latter for £24 although both were guilty of the same offense. A man was fined £10.5s for not doing penance; in another case, costs amounted to £56 for defamation. The most serious breach of justice, Folkestone related, was an instance where a man was excommunicated for not putting an answer in writing to a charge of libel and was then fined 6s. The man was a pauper and could neither write nor afford to have someone write for him. He was excommunicated for contumacy and non-payment of the fine and charged court cost of £13. He was imprisoned for three years until he was released under the Lords' Act. Similarly, a man was fined £35 and imprisoned for three years because his proctor had not appeared in court to plead his case. The proctor was also fined and imprisoned and both were excommunicated.⁴¹

Court costs would vary depending on the complexity of the case. In his law commentaries, Haggard listed the court costs levied in some of Scott's cases. In a few of the cases, they exceeded £100 and normally amounted to

⁴⁰ Hansard, P. D., ser. 1, vol. 21 (1812), p. 301.

⁴¹ Ibid., p. 300.

between £10 and £50.⁴² For a working man £10 amounted to a considerable sum.⁴³

The removal of testamentary jurisdiction would have been a serious loss of income for many people. Here is a short synopsis of costs in a 119 item fee chart. The money went to the registrars and the judges.

citation	5s	
allegation	1s 8d	
drawing answer	3s 4d	
copy same	1s	
appeal	6s 8d	
make a bill	4d	
enter caveat	5s	
engross a will	5s	
administer oath	6s	
per day in the country	£1	44

To register a will in Canterbury the fees were as follows. (The fees varied depending on the value of the personal property to be transmitted by the will. The first number in the pair represents the value of the property in the will. The second number gives the fee for registering the will valued at that amount.)

Under £5-4d, to £20-4s 6d, to £40-4s 10d, over £40-6s 8d.⁴⁵

⁴² 1 Hagg; 2 Hagg.

⁴³ In 1883 a poor working man earned about £25 per annum; in 1850 a "comfortable working class" income was £100 per annum, and in 1865-66 £300 was considered "substantial middle class." E. J. Hobsbawm, Industry and Empire (New York: Penguin Books, 1978), pp. 66, 161, 156.

⁴⁴ Report . . . Ecclesiastical Courts 1832, p. 118.

⁴⁵ Ibid.

To probate wills the fees were as follows:

	Canterbury		York	
	Registrar	Chancellor	Registrar	Judge
£ 5 will	3s 8d	2s 6d	6d	4d
£20 will	5s 2d	2s 6d	3s 6d	2s 10d
£40 will	5s 9d	2s 6d	3s 6d	2s 10d ⁴⁶

Of the money collected, the fees paid to the registrar were kept by him. Costs paid to the court were used to defray the salaries of the chancellor and other salaried employees of the court. This money was not a source of income for the church.

The individual fees were not high, but almost every act of a registrar, including making out the bill itself, was charged. Consequently the simplest activities became expensive. As a national enterprise the ecclesiastical courts cost a considerable amount of money. From 1827-29 the total income for judges was £14,271; for registrars £28,076; and for deputy registrars £15,851 for a total of £78,204. In that time they handled 923 causes, 18,678 probates, and 7756 administrations of wills.⁴⁷

Procedural costs also made litigation expensive. Those defending them claimed that the expense was so high because of the nature of the causes. Witnesses before the Ecclesiastical Courts Commission testified that marriage

⁴⁶ Ibid., p. 120.

⁴⁷ Ibid., p. 566.

suits and administrations of wills would be costly no matter who heard the cases.⁴⁸ Matrimonial suits involved hostile parties so that a great mass of evidence was needed to determine the truth. In testamentary cases there were also many witnesses if sanity, conflicting wills, intestacy, or non-standard form were issues. For example, in a £500,000 will of William Farquar there were 125 witnesses with a total of 908 folio pages of evidence. One witness before the Ecclesiastical Courts Commission proudly announced that one case took only twelve months.⁴⁹ Costs were aggravated by the stamp tax.⁵⁰ The probate of a particular will cost £290.2.3, but the stamp itself cost £270 of that. Thus the proctor's charge was only £20.2.3, out of which came all his costs.⁵¹ Certain procedures also led to delays. Two of the most often mentioned were the rules requiring two witnesses to determine any single point and the exclusive use of written testimony.⁵²

The greatest charge made against the ecclesiastical courts concerned the high costs resulting from the frequent delays caused by the poor quality of jurisprudence. The

⁴⁸ Ibid., pp. 69-85.

⁴⁹ Ibid., p. 107.

⁵⁰ Ibid., p. 102.

⁵¹ Ibid.

⁵² Ibid., pp. 60-61.

common litany was that the lack of qualified judges led to poor decisions and endless appeals. Indeed, the consistory court of Salisbury had hired a chancellor who had no training or experience in ecclesiastical law, with such an appointee allowed to choose his own surrogates.⁵³ In the case of Montgomery v. Clark,⁵⁴ an ecclesiastical court declared a will invalid although a jury had found it valid. Montgomery had been imprisoned for twenty years on a charge of contempt of court and had gone through several appeals because he had taken possession of some property even though a civil court jury had declared that he was entitled to do so.⁵⁵

But appeals do not seem to have been as common or as much the result of poor judgment as opponents of the courts claimed. The chancellor of Salisbury, for example, only had one of his decisions appealed in eleven years.⁵⁶ According to information from the Ecclesiastical Courts Commission Report, 1832, there were ninety-five appeals in 1828 from the ecclesiastical courts to the Court of Delegates from the Court of Arches, and only two of the deci-

⁵³ Ibid.

⁵⁴ 2 Atk. pp. 378 ff

⁵⁵ Ibid.

⁵⁶ Hansard, P. D., ser. 3, vol. 49 (1848), p. 103.

sions had been reversed. During the same year, Prerogative Court, which heard most of the testamentary cases, had fifty-four appeals with nine reversals. The provincial court of York heard ninety-five appeals from the lower courts; seventeen were appealed to the Court of Arches, and of those eight were reversed.⁵⁷

A later report shows that thirty-eight appeals had been heard at the Court of Arches between 1834-1850.⁵⁸ "A Return of All Appeals 1866" showed almost the same results. The report shows all the appeals heard before the Privy Council and Judicial Committee from 1832 to 1860. Of the 168 cases appealed from the church courts, they could be divided by the following causes:

testamentary	105	discipline of clergy	12
marriage	15	brawling	1
divorce	16	defamation	2
church rates	11	heresy	4
tithes	2		

All the cases came from the Court of Arches and Prerogative Court except for one from a Peculiar and nineteen from the Provincial Court of York. Four were withdrawn, twenty-three were dismissed, and twenty-eight were reversed.⁵⁹

⁵⁷ Report . . . Ecclesiastical Courts, 1832, p. 317.

⁵⁸ "Number of Times Jenner-Fust Sat," p. 446 (2), 1834-1840 -- 11 appeals; 1841-1845 -- 10 appeals; 1846-1850 -- 17 appeals.

⁵⁹ "Return of all Appeals," B. P. P., (22) vol. 55 (1866), p. 51.

The general prejudice against the ecclesiastical courts on the whole was justified, but some of the charges seem exaggerated. There was considerable nepotism, but that was not unknown in other areas of English life. There is much information illustrating the very strong tendency for ecclesiastical lawyers' and judges' sons to continue in the legal profession and replace their fathers. This was especially true in the Doctors' Commons. In fact, most lawyers' and judges' sons in nineteenth-century England followed in the law profession.⁶⁰ The courts were expensive and appeals were common, but much of the expense came from governmental taxes and the nature of the cases being tried. Appeals were often requested because of the hostility of the litigants -- given the emotional nature of the cases heard -- and not always as a result of poor decisions, since most of the appeals were not reversed. Certainly the complaint about a lack of good judges and inadequate qualifications was justified, but poor chancellors were not universal. The judges from the Doctors' Commons were very competent. The M.P.s spoke and voted on the basis of the common prejudices held about the ecclesiastical courts, and not always from data gathered in the above-mentioned reports.

⁶⁰ D. Denman, "A Social and Occupational Analysis of the English Judiciary 1770-1790 and 1855-1875," American Journal of Legal History, vol. 17 (1973), p. 353.

In the Ecclesiastical Courts Commission Report of 1883, the most frequently stated complaint concerning the inefficiency of the courts was the problem of prohibitions.⁶¹ According to the report, the main reason for persisting in the use of complicated rules was the fear of prohibition from the civil courts. These rules were very exacting and required that judges be extremely cautious about how trials were run, citations drawn up, and orders issued. The courts had developed through the centuries a regimen of rules, forms, and practices, which were designed to prevent defendants from seeking prohibition on some technicality. These protective devices, while seemingly necessary to the chancellors, required an increased amount of time and effort which meant higher costs.

The problem of prohibitions, along with the other short-comings of the ecclesiastical courts, demonstrated at least to some of the people in Victorian England that something needed to be done to reform them. The next chapter studies the work of authors in the major political journals and in the legal field on the topic of reforming the church courts.

⁶¹ Report . . . Ecclesiastical Courts, 1883, pp. 364-66.

Chapter Three
JOURNALISTIC COMMENT

Members of parliament may or may not have made themselves aware of the statistics presented in the previous chapter. In studying the debates on ecclesiastical court reform closely, it becomes obvious that many of them did not. It is likely, however, that the M.P.s did read the various political journals and newspapers published at the time of the debate. It is probable that many of the speakers brought with them the opinions expressed in the articles printed by their party's periodicals.

This chapter explores the opinion which existed in the major political journals concerning ecclesiastical court reform for the radicals, Whigs, Tories, and ultra-conservatives. The people of Victorian England were very conscious of religious matters. Hundreds of articles were written about the Church of England during the period. Of particular interest were controversies like the Tractarian and Ritualist disputes and issues which concerned church revenues. Such abuses as nepotism, simony, and plural benefices were common targets for editors, as were items like the Gorham case and the Thorogood affair. With all this, however, there seemed to have been very little interest in the

courts, which had to deal with all these problems.

The ecclesiastical courts do not seem to have been of great concern to the general public and parliament reflected the general national disinterest in the courts by passing almost no important legislation between the Restoration and the end of the Napoleonic Wars. Similarly, the press took little note of the church's tribunals.

The press was a very powerful force in bringing about reform in nineteenth-century England. As Aspinall says,

All the . . . great reforms of the period such as the abolition of slavery and the slave trade, the Reform Bill of 1832 and the repeal of the Corn Laws were preceded by long periods of agitation, of which the Newspaper Press was an indispensable instrument.¹

Indeed, Greville, Ellenborough, Grenville, and Wellington² all complained that the press had too much to do with what happened in parliament. Even Brougham, who had contributed 149 articles to the Edinburgh Review,³ forty-five of which were on political topics, complained that the press had become too powerful in influencing parliament to produce or

¹ A. Aspinall, Politics and the Press 1780-1850 (London: Home and Van Thal, 1949), p.4.

² Grevill Memoirs, Feb. 7, 1833; Ellenborough, Political Diary, vol. 2, p. 429; Hansard, P. D., ser. 2, vol. 25 (1817), p. 584; Greville Memoirs, Nov. 17, 1834, p. 59.

³ Aspinall, Politics and the Press, p. 3.

resist change.⁴

Manchester observes, however, that when it came to law reform, public opinion was "spasmodic."⁵ In the journals of the period, one finds almost no articles about ecclesiastical courts. Brougham, who spoke more than any other M.P. for the reform of the ecclesiastical courts, never wrote about them for the Edinburgh Review. In his article on "Parliament and the Courts,"⁶ the ecclesiastical courts are mentioned only in a passing statement that the Peculiars needed to be abolished.

The newspapers presented even less information. During the period covered in this paper there were few editorials about the state of ecclesiastical courts. Although there were many articles written about John Thorogood, Gorham, national divorce laws, and the discipline of clergy, there was very little on how the ecclesiastical courts handled those cases. Even Wade's Extraordinary Black Book, a notorious attack on almost every facet of the establishment, did not mention the ecclesiastical courts.⁷ There was interest in law reform but almost no interest at all in

⁴ Ibid., pp. 256-61.

⁵ A. H. Manchester, "Law Reform in England and Wales 1840-1880," Act Jundica (1977), pp. 189-90.

⁶ H. Brougham, "Parliament and the Courts," Edinburgh Review, vol. 165 (Jan. 1846), p. 1.

⁷ Wade's Extraordinary Blackbook (London: 1818).

reforming the ecclesiastical courts.⁸ For the most part, there was no group or political force outside parliament that pushed for the reform of the ecclesiastical courts. There was a great deal of public pressure to amend the law on such matters as tithes, discipline of clergy, pluralities, church rates, and divorce. But there was no similar interest in reforming the courts themselves. There were only a handful of articles concerned with the ecclesiastical courts. Even when John Stuart Mill, the arch-foe of the Anglican Church, wrote a forty-page article "On Ecclesiastical Establishments," he did not mention the ecclesiastical courts. He cited several court cases involving the church but none of them was tried in an ecclesiastical court.⁹ If it was true that great public pressure brought about parliamentary response, then it was also true that public apathy resulted in no change at all.

Because the court reforms involving both ecclesiastical and civil jurisdictions were initiated in parliament, it is necessary to make some comment about the opinions expressed in the most important political journals of the

⁸ A. H. Manchester, Modern Legal History of England and Wales 1750-1950 (London: Butterworth & Co., 1980), p. 120.

⁹ J. S. Mill, "On Ecclesiastical Establishments," Edinburgh Review, vol. 28 (Feb., 1823), pp. 145-168.

day: The Westminster Review, The Edinburgh Review, The Quarterly Review, and Blackwood's Magazine. While other periodicals like Frazier's and Contemporary Review published articles concerning ecclesiastical courts and some politically oriented newspapers ran occasional articles, it was the political journals which, as John Newman said, did much to "teach the multitude of men what to think and what to say."¹⁰

While it is impossible to prove that the M.P.s did, in fact, read the articles reviewed in this chapter, it is probable that some of them did so. In any case, some of the debates seem to mirror sentiments expressed in the major political journals. On that basis, the opinions of the major political journals are presented here before the actual debates are presented in order to give some idea as to the way at least some M.P.s were thinking when they entered the debates on ecclesiastical court reform.

The Whig's Edinburgh Review devoted only three major articles to the spiritual courts and these as part of a larger discussion about the results of Peel's second ministry. The Benthamite Westminster Review published five articles on the topic, although the first one in 1829 was a denunciation of Lord Brougham's non-Benthamite approach to

¹⁰ A. Biggs, The Age of Improvement (London: Longmans and Co., 1959), p. 428.

law reform¹¹ rather than an explanation of the state of the British courts. The ultra-conservatives were slightly more vocal. Blackwood's published six articles about church courts but only one dealt with them exclusively; the other five discussed issues within their jurisdiction and mentioned the ecclesiastical legal system only in passing. Although the Tory Quarterly Review had the most to say, it still only produced eight articles over a thirty-three year period, and just four concerned themselves solely with the church tribunals.

The best general coverage of the ecclesiastical courts is found in the Law Times. It not only published articles about the law courts, but it also ran a list of the cases being heard and a review of parliamentary debates. There is no particular political bias expressed, and the articles have a fairly objective, if slightly conservative, point of view. By comparing the bills in parliament with the articles about pending legislation, one sees, however, that the Law Times was much more interested in the civil jurisdiction than in ecclesiastical causes.

The articles from the Westminster Review were more concerned with the "feebleness" of the courts, the need for

¹¹ "Bentham, Brougham, and Law Reform," pp. 147-71.

codification, and the establishment of a ministry of justice to coordinate the British legal system. Generally speaking, the radical articles advocated the removal of any ecclesiastical control over non-Anglicans. There was also the similar reasoning that the established church should have no official functions which might require dissenters to pay fees to church officials for services rendered. For that reason, radicals were opposed to the monopoly of the Doctors' Commons. They saw no reason why a non-Anglican should be required to hire an Anglican lawyer to have a suit brought to court. The various schemes which were recommended by the articles and the M.P.s were different, but the objectives were essentially the same.

Similarly, the theories of Blackwood's Magazine and the ultra-Tories had the same foundations but varied forms. Blackwood's wanted reforms in the ecclesiastical system which would bolster the ultras' religious bias. They also called for a stronger position by the clergy in the affairs of the laity, and they wanted laws which would open up the church's patronage to the lesser gentry and conservative professionals who made up the bulk of their readership. The ultras in parliament, on the other hand, were interested in preserving the patronage system as it existed and saw no need to change the authority of the clergy over the laity. With both, however, there was the desire to have the established church recognized as the true religion and

to expand the resources of the church and then to keep them in the hands of the true believers.

The Edinburgh and Quarterly Review more closely represented the views of the moderate position of M.P.s. Tory articles and legislation wanted to preserve the church's courts as much as possible by recommending that only the civil jurisdictions be transferred and that the bishops retain as much authority as possible over their clergy by maintaining the diocesan courts. The Whigs and the Edinburgh Review generally agreed that the civil causes should be transferred and that the ecclesiastical jurisdictions could be handled in the provincial courts. They were not sympathetic to the legal needs of the bishops and viewed their courts as an unnecessary expense and a nuisance. Further, they pushed to have as much of the civil jurisdictions as possible consolidated into special London courts rather than to have probate and suits processed in the provinces.

The political journals concerned themselves with only a few issues. The articles can be grouped into five basic categories: the need for reform, the role of the government, court jurisdiction, procedures, and personnel.

The unreformed courts had created a problem for the people, and this was the most common theme of the left wing journals. The church's courts were characterized by the

radicals as a "grievous nuisance which ought to be instantly abated."¹² In particular, the Benthamite writer was struck by the haphazard attempts at reform and advocated a ministry of justice and a code of laws. The Edinburgh Review, somewhat more restrained, said that the unreformed courts had harmed many people and that the public and parliament had been "too indulgent."¹³ Even the more conservative Quarterly Review complained about "artificial hindrances," caused by a lack of needed reforms in some areas and by the irrational set of laws which already existed in others.¹⁴ The hodge-podge of unrelated statutes had dealt with specific problems rather than viewing the entire system as a whole. Unlike the other journals, however, the Tories were more interested in the harm done to the church than to the people. They were concerned that the disorganized state of ecclesiastical law could diminish the authority and status of the church in society.¹⁵

In this regard, there were several complaints resulting from the poorly written Public Worship Act of 1874.

¹² "Ecclesiastical Courts," Westminster Review, vol. 14 (1831), p. 326.

¹³ "Results of Tory Rule," Edinburgh Review, vol. 89 (1844), pp. 485-89.

¹⁴ "The State of the Church," Quarterly Review, vol. 173 (1874), pp. 246-82.

¹⁵ Ibid., p. 251.

Some objected that the act was too weak and easily ignored.¹⁶ It was pointed out, however, that as a result of the act, those who belonged to the established church were much more restricted than dissenters, Roman Catholics, and atheists because only an Anglican could be imprisoned for worshipping contrary to the rubrics of the Book of Common Prayer. According to the Quarterly Review, more people were likely to suffer injustice at the hands of the church courts after 1874 than was possible by the unreformed courts in the eighteenth century.¹⁷

Blackwood's Magazine claimed that the courts needed reforming, too, but from its ultra-conservative bias, it recommended that the courts strengthen, not weaken, the hand of the clergy to control public behavior. Permitting latitude in behavior and worship was an attack on the "Established Church, the pillar of the morals, the liberties, and the religion of the empire"¹⁸ ". . . leaving national recovery, like recovery from the grave, beyond all power but miracle."¹⁹ In very much the same vein, the left wing journals saw the state of the courts as dangerous to

¹⁶ Ibid.

¹⁷ Ibid., also "Marriage and Regulation Bills." Blackwood's Magazine, vol. 39 (1836), p. 606.

¹⁸ Ibid.

¹⁹ Ibid.

society. They, however, wanted to diminish the role of the Anglicans in society. The Whigs were in favor of consolidating the system by eliminating the Peculiars and diocesan courts;²⁰ the radicals would have been happiest if the entire system had been scrapped.²¹

There was an equally wide division among the journals as to the proper jurisdiction of church tribunals. Opinions ran from the "pillar of morals" to "grievous nuisance." Whigs wanted the abolition of all civil jurisdiction and a reduced ecclesiastical authority.²² The Tories were also in favor of eliminating the secular cognizance of the courts, but favored greater independence of action by the bishops.²³ There was also a need for better laws to protect the clergy from unjust treatment.²⁴

The articles focused on two particularly serious areas in need of reform, personnel and procedure. The Westminster Review chided the judges for their "feebleness" in dealing with offenders. They were either "helpless shad-

²⁰ "First Session . . . ," Edinburgh Review, p. 20; also "Ecclesiastical Courts Bill," Edinburgh Review, p. 586.

²¹ "Ecclesiastical Courts," Westminster Review, vol. 14 (1831), pp. 316-331.

²² "Ecclesiastical Courts Bill," Edinburgh Review, p. 586.

²³ "The State . . . Church," Quarterly Review, p. 251.

²⁴ Ibid., p. 278.

ows," chancellors who took on more than they could handle, or judges who were "interested in the increase of abuses."²⁵ The Edinburgh Review wanted stiffer qualifications.²⁶ The Quarterly Review saw the need for better judges in the lower courts,²⁷ but also deplored, along with the Law Times, the end of the Doctors' Commons and the dispersal of its library.²⁸ Only the Westminster Review faulted the Doctors' Commons for its incompetence.²⁹

Nepotism in the Doctors' Commons was a frequent complaint in most of the journals; virulent in the attack was the Law Times. In two articles published during the height of the Nicholl debates in 1843-1844, it complained that the Doctors' Commons had become a family affair. Apparently, according to the article, five names were recommended for the position of deputy Registrar of the Dean and Chapter of St. Paul's, London, having an annual stipend of £1100. The five were

²⁵ "Ecclesiastical Courts," Westminster Review, (1833), p. 326.

²⁶ "First Session . . . ," Edinburgh Review, p. 20.

²⁷ "The State . . . Church," Quarterly Review, p. 248.

²⁸ "Ecclesiastical Courts," Law Times, vol. 51 (26 Aug. 1877), p. 306; "The State . . . Church," Quarterly Review, p. 278.

²⁹ "Ecclesiastical Courts," Westminster Review, (1831), p. 329.

Mr. Nicholl -- cousin to Dr. John Nicholl
 Mr. Dyke -- son-in-law to Dr. Jenner-Fust, who
 was in turn a nephew of John Nicholl
 Mr. Fox -- son-in-law to Jenner-Fust
 Mr. Jenner -- son to Jenner-Fust
 Mr. Dyneley -- cousin to Jenner-Fust, nephew to
 Nicholl³⁰

Nepotism and patronage were two related problems. Blackwood's objected strenuously to Phillimore's bill regulating the sale of advowsons.³¹ Palmerston's government was admonished to end such sales and to prosecute all offenders of the patronage laws. Only two times from 1752 to 1855 had there been any convictions under the laws concerning simony.³² The journal did not complain about the existence of patronage but lamented that the patronage was not available to the middle class.³³

Blackwood's also pointed out that the problem of "criminous clerks" was vastly overstated. It said that parliament had provided for too many judges for the business at hand. Six chancellors were ordered to try clerks at £2000 per year. At the prevailing rate of criminal charges against clergy (1855), each judge would try one and

³⁰ "The Lawyer," Law Times, vol. 4 (30 Nov. 1844), p. 162; and "Sinecures in the Ecclesiastical Courts," Law Times, vol. 4 (4 Jan., 1845), p. 259.

³¹ i.e., the right of presenting a nominee to a vacant ecclesiastical benefice.

³² "Simony and Lay Patronage, Historically and Morally Considered," Blackwood's Magazine, vol. 79 (1855), p. 679.

³³ Ibid., p. 284.

a quarter clerks a year, costing the courts £1600 per offense.³⁴

Procedures needed as much reform as personnel. Even Blackwood's admitted to the need for simpler structure and procedure in the courts.³⁵ Only the Law Times issued a warning about adopting viva voce³⁶ and trial by jury. According to that magazine, both innovations had been introduced into the Courts of Chancery with only mixed success. The use of spoken testimony was somewhat unsuccessful because equity lawyers³⁷ --like lawyers from the Doctors' Commons -- were not trained at gathering evidence orally.³⁸ The problem was aggravated by the fact that the rules of evidence used in jury trials, even in the old assize courts,³⁹ were not particularly effective.⁴⁰ The government, of course, was blamed for the poor state of af-

³⁴ "The English Ecclesiastical Courts," Blackwood's Magazine, vol. 80 (1856), p. 724.

³⁵ Ibid.

³⁶ i.e., spoken testimony.

³⁷ i.e., lawyers of courts where evidence is gathered solely through deposition.

³⁸ "Ecclesiastical Courts," Law Times, vol. 33 (23 Apr. 1859), p. 62.

³⁹ i.e., itinerant criminal courts.

⁴⁰ "Ecclesiastical Courts," Law Times, vol. 49 (26 Aug. 1877), p. 306.

fairs,⁴¹ and only Lord Lyndhurst, termed "the reforming Lord Chancellor" by the Edinburgh Review, was cited as having tried to help change the courts.⁴²

Taken as a whole, the articles seem to reflect the common view that the ecclesiastical courts were in need of reform. Generally, they saw the need to consolidate the system and make it less susceptible to corruption. Procedures were antiquated, laws and regulations were chaotic, and the personnel was, in many cases, inadequate. There was, however, very little agreement as to how the weaknesses could best be remedied and the opinions of the journalists were not well documented.

Very little data can be gleaned from the political journals because the articles are too polemical. Even including the articles in the Law Times, there is very little real evidence that any of these articles specifically influenced the legislators or jurists.

The viewpoint of the journalists gives an idea of what people outside parliament were thinking. The articles, however, do not explain what happened inside parliament. Understanding the general state of politics, the church,

⁴¹ T. Falconer, "Probate Courts," Westminster Review, vol. 53, pp. 60-67.

⁴² "Ecclesiastical Courts," Westminster Review, (1831), p. 340.

the ecclesiastical courts, and political journalistic opinion helps to comprehend the difficulties faced by the major political parties in trying to reform the church's courts.

Chapter Four

EARLY ATTEMPTS AT REFORM IN PARLIAMENT

By the turn of the nineteenth century it was becoming apparent that the English legal system including the ecclesiastical courts was inadequate. The onset of the Industrial Revolution, the increased population, and shifting population patterns especially to urban areas put special pressures on the courts and necessitated new laws to deal with the new situations.¹ While he was introducing a bill in 1836, Lord Chancellor Cottenham complained that industrialization had made personal property a much more important part of testamentary causes than it had ever been before because "now the large estates need not consist of mostly real property." He mentioned the inability of the courts to deal with divorce and many of the criminal causes within ecclesiastical jurisdiction. Judges were wholly unable to enforce their rulings, and the condition of jurisprudence in the Peculiars was incredibly low because of a lack of qualified judges.²

¹ see Manchester, Modern Legal History of England and Wales, first two chapters.

² Hansard, P. D., ser.3, vol. 107 (1850), p. 90.

Even so, change was not automatic for several reasons. The French Revolution had left the British power structure very hesitant to initiate reform. Edmund Burke, for example, who had been outspoken in his speeches in favor of expanding the rights of the American colonists, was equally adamant against opening up British society or government in the aftermath of the French Revolution. In addition, conservative vested interests dominated Parliament. The aristocracy wanted no part of land reform and the industrialists were no more enthusiastic for any change that would diminish the control they had over their workers. Neither group wanted to see a change in the franchise.

The Church of England, as part of the conservative structure, became the beneficiary of the general attitude against reform before 1832. The French Revolution had raised the church and its bishops in the eyes of many Britons to heroic positions as defenders of order and the true religion because of the revolutionaries' program of trying to de-Christianize French society. The church hierarchy was itself a powerful vested interest, and it was no more eager for change than the agrarian aristocracy or the industrialists. Its representatives in Parliament were not more willing than their secular colleagues to initiate any change in the status quo.

In this very conservative period following the French

Revolution and the onset of the Industrial Revolution, reforming the ecclesiastical courts seemed unnecessary. Blackstone had praised the courts in his Commentaries.

They continue to decide many questions which are properly of temporal cognizance; yet justice is in general so ably and impartially administered in these tribunals (especially of the superior kind) and the boundaries of their power are not so well known and established that no material inconvenience and fraud arises from this jurisdiction . . . ³

While no acts of real substance had been passed since Charles II, attempts had been made to initiate genuine reform in the church courts as early as 1809 when the bishop of Exeter, William Eden, and Lords Auckland and Mulgrave moved for a parliamentary inquiry into their handling of the divorce law.⁴ The first legislative action to reform the constitution of the courts occurred in the House of Commons in January, 1812 when Lord Folkestone moved that the Commons grant relief to Mary Ann Dix. Miss Dix, a nineteen-year-old, had been excommunicated for slander and imprisoned indefinitely with little hope of being released because she had not been able to pay the court costs incurred after being convicted in an ecclesiastical court.

³ Blackstone, Commentaries III, pp. 98-99, as cited in Holdsworth, History of English Law, vol. 12 (London: Methuen and Co., Ltd., 1937), p. 678.

⁴ Hansard, P. D., ser. 1, vol. 11 (1808), p. 414.

Folkestone was obviously upset and presented a detailed account of how one could be caught in the courts' antiquated procedures. The only avenues open to the court for enforcing the sentences it was legally bound to hand down resulted in what was obviously too harsh a punishment for the offense committed by Miss Dix.⁵ Two weeks later Folkestone presented a new bill to abolish the courts' right to excommunicate and to set up stricter qualifications for judges sitting in Peculiars and inferior diocesan courts. He withdrew his bill only after the attorney-general promised that the government would produce a bill to remedy the situation.⁶

After six months of prodding by Folkestone, the government produced "A Bill to Regulate Ecclesiastical Courts," authored by William Scott, brother of the famous jurist Lord Eldon. Scott, who shortly thereafter became Lord Stowell, was a highly respected jurist in his own right and a member of the Doctors' Commons. As chancellor of the consistory court of London, his decisions often set precedents and were frequently cited by later judges.

His bill, to some degree similar to Folkestone's, provided for the following: judges would issue de contumaci

⁵ Hansard, P. D., ser.1, vol. 21 (1812), p. 95.

⁶ Ibid.

capiendo,⁷ a stern censure, (instead of excommunication which carried several civil penalties as well) and this could be applied only "in cases of great enormity," but not in civil causes except incest; a number of minor courts were to be abolished; certain causes would be removed from lower ecclesiastical courts to the consistory courts; there would be stricter qualifications for judges; and slander, tithes, and church rates would be removed from ecclesiastical jurisdiction.⁸ During the second reading, the archbishop of York and bishops of Exeter and Chester prevailed upon the government to withdraw the causes dealing with excommunication and slander, much against objections of Whig speakers.⁹

The House of Lords remanded the bill to a committee dominated by the conservative bishop of Chester. The resulting bill passed by both houses provided that excommunication be reduced to de contumaci capiendo for civil causes. It also required that a greater number of admiralty and ecclesiastical courts' proctors become members of the Doctors' Commons in order to practice law in the eccle-

⁷ i.e., removing from the unrepentant (the good graces of the church).

⁸ Hansard, P. D., ser.1, vol. 23 (1813), p. 806.

⁹ Hansard, P. D., ser.1, vol. 24 (1813), pp. 705-07.

siastical courts.¹⁰ Interestingly, one of the supporters of the bill in the Commons was John Nicholl, a future Dean of Arches, who authored and presented a comprehensive bill for Peel's government in the 1840s. As will be shown in chapter five below, it was modeled after Scott's bill.

Prime Minister Liverpool and Lord Chancellor Eldon were not enthusiastic about legal reform so there was little legislation presented in that area. Lord Chancellor Lyndhurst (1827-1830, 1834-1835, 1841-1846), Lord Eldon's successor, however, had shown interest in legal reform, and it is likely that he had convinced Wellington, who succeeded Liverpool, to request the formation of a royal commission to study the Ecclesiastical Courts.

By the late twenties the idea of reform in many areas of British political life was beginning to take hold outside parliament. In such areas as extension of franchise, working conditions and property rights, the government was beginning to take a new look at needed reforms. Under the leadership of Lyndhurst, royal commissions, rather than select committees of parliament, were used to gather much needed information in helping the members of parliament put together effective reform legislation. Not surprisingly,

¹⁰ 23 Geo. III c.127. Very often qualification requirements for ecclesiastical court personnel affected the admiralty courts as well because both courts were staffed by the Doctors' Commons.

several areas of legal reform were investigated, most notably common law, real property, and ecclesiastical law. Thus, in 1828, Lyndhurst moved on behalf of Wellington's government that a royal commission be formed to "Inquire into the Practices and Jurisdiction of the Ecclesiastical Courts in England and Wales." The commission report was published three years later and officially accepted by Parliament in 1832.¹¹

The Ecclesiastical Courts Commission Report was the work of some of the most distinguished and respected British churchmen and legal minds of the time. The chairman was the archbishop of Canterbury. Other clergymen were the bishops of London, Exeter, Lincoln, Durham, and St. Asaph. The legal profession was represented by the Chief Justice of Kings Bench, Lord Wynford, William Alexander, William Codrington, Edward Carington, R. Cutlar Fergusson, and Charles K. Murray. Undoubtedly, the three most influential members were John Nicholl, the Dean of Arches, Herbert Jenner-Fust and Stephen Lushington, all of whom were members of the Doctors' Commons and at one time or another the Dean of Arches, the chief justice of the ecclesiastical court system.

Lushington, obviously supportive of the ecclesiastical courts, is thought to have written much of the report him-

¹¹ Reports . . . Ecclesiastical Courts 1832, p. 1.

self.¹² The commission heard only thirty-four witnesses, mostly churchmen, and from their testimony concluded that most of the charges leveled at the church courts were groundless. In view of the recommendations, the effect of the report was remarkable. Parliamentary debaters both for and against existing ecclesiastical jurisprudence treated it with respect and almost with awe. As Lushington, Jenner-Fust, and Blomfield, the bishop of London, became more eminent and more highly esteemed during the 1840s and 1850s, the report took on almost scriptural significance. Only Robert Phillimore, with deepest reverence, dared to challenge some of its findings.

Given the makeup of the commission, it is not surprising that the report was sympathetic to the jurisdiction of ecclesiastical courts but not to its organization. It recommended a strengthening of their position and a rationalization of their structure. The commission first suggested that the highly inefficient Courts of Delegates be replaced as final appeal by the Privy Council since that body contained both spiritual and temporal lords. It then recommended that the Peculiar courts be abolished and their jurisdiction be absorbed by the archidiaconal courts, that stricter qualifications be established for all the courts'

¹² Manchester, "Reform of the Ecclesiastical Courts," p. 54.

officers, and that all testamentary jurisdiction and right of probate and administration be exercised by the archiepiscopal courts. The Prerogative Courts of Canterbury were to merge with the Court of Arches, and all the provincial courts of York were also to be consolidated because the commission felt that there was not a heavy enough case load to justify more than two provincial courts in England. All matters concerning benefices were to come under church control.¹³

The report enumerated and justified the following classes of civil jurisdictions for the ecclesiastical courts: "questions of a civil and lay nature" including testamentary causes and matrimonial matters for separation and nullity; causes of tithes, church rates, seats, and facilities; and finally, cases pertaining to church discipline including such causes as laymen brawling or showing irreverent conduct in church or churchyards, contumacy, incest, and defamation and recommended that no changes be made in the authority of the courts.¹⁴ It stated that the ecclesiastical judges should possess the power to impose monetary penance, excommunication, suspension ab ingressu

¹³ Reports . . . Ecclesiastical Courts 1832, pp. 22-64.

¹⁴ i.e., suspension of permission to enter a church.

Ecclesiae,¹⁵ suspension from office, and deprivation.¹⁶

The section on the testamentary jurisdiction of the ecclesiastical courts was the largest in the report and the topic that also generated the most debate after the report was published. A serious problem had arisen in England because of a division of probate between real property, which was under the jurisdiction of the civil courts, and personal property, which was the domain of the ecclesiastical courts. This arrangement required that all wills be acted upon by two courts. The Industrial Revolution had made personal property such as factory machinery a much more important part of wills.

The report further charged that the real estate laws were poorly written and not well administered by the civil courts. It claimed that, as the ecclesiastical courts had dealt with probate and administration of wills better than the civil courts, the ecclesiastical courts should take over all testamentary jurisdiction. If, however, the church courts were to receive expanded jurisdiction recommended by the report, oral examination would have to be introduced so that the ecclesiastical courts could handle the new case load more efficiently.¹⁷

¹⁵ Ibid., pp. 13-15.

¹⁶ Ibid.

¹⁷ Ibid., p. 64-47.

It is understandable that a commission dominated by churchmen and members of the Doctors' Commons wanted church courts to handle all wills. The testamentary business meant a considerable income, and it was generally non-contentious. During the next twenty-five years, the question of who should control this lucrative service would be one of the main points of discussion. On the one hand, Whig reformers moved to create a registry of wills in London to accommodate a national, civil probate court. The London lawyers favored the same system, but only because they wanted a virtual monopoly of provincial testamentary business. On the other hand, the conservatives, acting in favor of the commission report, recommended that all wills should be kept in diocesan registries for the sake of provincial convenience and to save their source of patronage. The bishops were ambivalent on the issue of probate but wanted diocesan courts left intact.

The commission also made recommendations concerning the other jurisdictions of the church courts. The report stated that their jurisdiction over suits concerning restitution of conjugal rights, nullity, and "separation from bed and board by reason of adultery and cruelty" was necessary for a well-ordered society.¹⁸ It proposed that all

¹⁸ Ibid., p. 43.

criminal jurisdiction be transferred to the civil courts, but in return the ecclesiastical courts were to gain civil suits concerning pews and seats which for reasons unknown had been tried in the criminal courts. The report also recommended that parliament establish a fund to pay for much of the court cost, that wills be written in a common form, and that the church courts be given the power to sequester in order to enforce contempt citations.¹⁹

There were many factors which seemed to favor easy acceptance of the commission's recommendations. The Archbishop of Canterbury and five other bishops had served on the commission to draw up the proposals. The legal community also helped to write the report. Influential members of the Doctors' Commons had participated, and one of them had written most of the original drafts. Even the London lawyers who had disagreed with one proposal of the commission could gain much by reform if it moved in their direction. There was documented evidence such as the Dix case that the courts in their unreformed state could do a great deal of mischief to a citizen. In the preceding twenty years, both Whig and Tory M.P.s had voiced concerns about the church's courts. Even Wellington's conservative ministry, which had already succeeded in bringing about the

¹⁹ Ibid., p. 63.

controversial Catholic Emancipation, had moved to request the commission to investigate the ecclesiastical courts. Certainly, with the passing of the Reform Act of 1832, parliament had demonstrated its willingness to legislate reforms concerning issues of graver concern than the church courts. However, most of the ecclesiastical court reforms did not occur until the mid and late 1850s.

In spite of the fact that party leaders, clergymen, and some lawyers were in favor of reforming the courts and even though there was a respectable starting point from which a reform program could be initiated, there were, unfortunately, certain conditions in parliament which stymied reform.

Chapter Five

MODERATE ATTEMPTS AT REFORM

The proceedings in one year after another have taken a form so nearly identical that one can almost stereotype the speeches delivered there. Some hon. Gentleman, gets up in the early part of the Session and declares that the Ecclesiastical Courts are no better than an Augean stable, and, in answer to him, either the Leader of the House or one of the Law Officers of the Crown rises and, amidst the most enthusiastic cheers, says that it is time the Augean stable was swept But when the Bills come to be discussed, the Gentlemen who are so fond of introducing them, immediately fall foul of one another arguing . . . Chancery jurisdiction . . . Common Law jurisdiction . . . County Court jurisdiction . . . or a separate Court of Probate.

Gladstone -- 1856¹

After the Ecclesiastical Court Commission had published its report in 1832, every ministry until 1846 presented bills designed to reform one or more of the jurisdictions of the church's courts, and they all failed miserably. As has been noted in Chapter Four, the major political parties were well enough organized and disciplined to deal with major, well-publicized issues, but historians have not yet studied their ability to handle minor but necessary legal reforms. This and the following three chap-

¹ Hansard, P. D., ser.3, vol. 143 (1856), p.455.

ters examine the attempts to change the ecclesiastical courts following the Reform Act of 1832.

It is generally agreed that the Whigs and Tories quickly reestablished themselves in the reformed parliament after 1832 with little break in continuity and that by 1835 two major political coalitions had formed around them and dominated British politics until the fall of Peel's second ministry.² As a result, almost all major efforts to reform the ecclesiastical courts came by way of the two major parties. Resistance to change, on the other hand, came from three blocs of M.P.s made up of men who did not vote according to party dictates or along party lines.

The vehicle for reform was a series of bills -- over twenty in all -- mostly from the two major parties, with each advocating reform in somewhat different directions; although, on some occasions the same bill was offered by both parties but at different times. To make matters worse there were actually about ten areas of reform being debated, and, depending on which combination of those topics was covered by a particular bill, individual M.P.s would side with any one of the five conflicting groups or in some cases a voting bloc would completely split and disappear

² Close, "Formation of the Two Party Alignment;" Beales, "Parliamentary Parties and the Independent;" Aydelotte, "British Voting Patterns," "Parties and Issues."

for a while during debates.

Before Palmerston's ministry, such vacillating by M.P.s is understandable in light of the nature of the bills presented for reforming the civil jurisdiction of the ecclesiastical courts. It was most common for the ministries to present huge, multifaceted bills for reform, each covering many or all of the areas for which change was being sought. The longest was John Nicholl's bill of 1844 with 141 clauses.³ Although other bills were not quite as far reaching, they were generally cumbersome pieces of legislation with many areas to be discussed at a time. Such omnibus bills were presented in 1834, 1835, 1836, 1839, 1843, 1844, 1845, 1853, and 1854. Only in 1838, 1840, 1846, and 1847 were there bills that dealt with reform in one area; these, however, were not sponsored by the ministry then in power. (Until Palmerston became prime minister, the most common reform bill was multifaceted.) Within these pieces of legislation were clauses dealing with civil jurisdiction, ecclesiastical jurisdiction, procedures, and various schemes to consolidate the system.

Because the issue involved the greatest amount of revenues, the most hotly debated item was the probate of wills. The topic came up over twenty times between 1833

³ ". . . Modifications . . . of the Recommendations contained . . . Commission [1832], "B. P. P., 1843 (7), vol. 2 (315).

and 1857, when the last of the reform acts was passed. Several issues were at stake. Was there to be a national registry for wills? Was there to be a national probate court in London or would local courts handle testamentary affairs? Were wills concerning personal property to be handled by ecclesiastical courts? Finally, were wills involving small amounts to be handled differently from those of larger estates? Very often, however, many of the bills had only the testamentary portions debated, and these were defeated because both parties seemed unable to get a majority to agree on how the probate should be dealt with.

Defamation, the next most frequently debated item was one of the first considered. (Folkestone had presented motions concerning it as early as 1812.)⁴ There were two main concerns: how severe sentences should be⁵ and whether the issue was secular or ecclesiastical.⁶ The actual transfer of defamation to the secular courts did not take place until 1855 because of resistance from conservative bishops who insisted that the moral behavior of British subjects should be within the province of the Church's courts.

⁴ Hansard, P. D., ser.1, vol. 23 (1812), p. 396.

⁵ Ibid., p. 806.

⁶ Hansard, P. D., ser.1, vol. 25 (1813), p. 761-62.

Several of the other civil jurisdictions controlled by the church courts were also discussed, and ecclesiastical jurisdiction over marriage and nullity was the next most frequently debated subject, occurring nine times between 1833 and 1856. It had already been on the agenda several times between 1808 and 1812 and became especially important during the mid-1840s. Adultery and divorce were never discussed after 1832 although many of the reform bills contained clauses dealing with them; they were removed from ecclesiastical jurisdiction in separate bills in 1856. Contempt was dealt with thoroughly by legislation resulting from the Thorogood Affair, and attempts to make brawling a civil cause generated animated debate, especially in the fifties.

The problem over tithes and rates came up only five times in the discussions of church court reform between 1813 and 1849. Bills concerning them were generally separate, and the issue was whether tithes and church rates should exist rather than the competence of the ecclesiastical courts to hear such cases. What did gain a great deal of attention was the indefinite sentence passed on John Thorogood to be discussed later in greater detail. Thorogood's action was meant to be a test case, and his activity succeeded in forcing parliament to pass legislation con-

trolling indefinite sentencing.⁷ His imprisonment, however, did not lead to any resolution of the difficulty concerning the competence of ecclesiastical courts to hear cases dealing with church rates. What was actually debated was the problem of how ecclesiastical courts were to deal with contempt and how defendants like Dix and Thorogood, who were found guilty of improper conduct, were to make restitution for civil losses. The problem of church rates itself was obviated in 1849 when they were abolished.

In addition to the civil jurisdictions, the reformers attempted to improve the methods which had been used to discipline the clergy and correct the defects in the courts' administration and procedure. The discipline of clergy was debated at length during the late thirties when attempts were made to reform this area of law and the procedures used by the ecclesiastical courts to deal with such causes. In 1836, the bishops succeeded in getting a moratorium on bills concerning church court reform by refusing to cooperate on any bills dealing with ecclesiastical courts until the problem of the discipline of clergy was resolved. Apparently, they felt that no reform of the church courts would be complete without a reform in the provisions dealing with discipline. This explains why

⁷ Hansard, P. D., ser.3, vol. 55 (1840), pp. 1395-98; 4 & 5 Vict. c.36.

almost no church court reform bills were presented by the government between 1836 and 1840. An attempt was made to push the Ecclesiastical Courts Consolidation Bill in 1837, but the prelates objected, linking it to their concern with the discipline of clergy, and it failed. Russell used it as an excuse for not presenting reform bills⁸ and Lushington, in particular, was bitter about the postponement.⁹ In a speech delivered on April 25, 1839, two years after the previous attempt at reform, he proposed his own bill in which parliament was to transfer inferior court jurisdiction to consistory courts and that it remove the authority of the courts to arrest.

He gave several reasons for immediately reforming the court, and they were often later quoted in debates. He wanted reform "first, for the sake of justice, secondly, for the sake of their [the M.P.s'] own character, and lastly, for the sake of that which every well-regulated Government should desire, and for the appeasement of that religious dissension, which day after day disgraced and debased the discussions of Parliament." The conduct of the ecclesiastical courts was, he said, "most injurious to the welfare of the Established Church . . . setting up a bar to all improvement in its constitution and thus laying it bare

⁸ Hansard, P. D., ser.3, vol. 41 (1838), p. 1112.

⁹ Hansard, P. D., ser.3, vol. 45 (1839), p. 755.

to the obloquy of the public."¹⁰ The ban on legislation must have been very powerful because his bill was not even read for a first time.¹¹

The administrative defects of the ecclesiastical courts were the poor quality of jurisprudence in the Peculiar courts and the conduct of judges and court officials. With the exception of the Peculiar courts, administration was rarely discussed. While radical speakers complained about the quality of the ecclesiastical courts in general when they pressed for the abolition of the diocesan courts or for the abolition of the entire ecclesiastical court system, they made no specific allegations.

There were two main proposals for reforming procedure. First, from the Middle Ages ecclesiastical courts had used no spoken testimony. Every omnibus bill from 1833 to 1854 contained a provision to establish viva voce, and no one ever opposed the use of it, although Jenner-Fust had testified to a royal commission that written testimony provided better evidence.¹² As each of the omnibus bills was killed, so the section containing the viva voce reform died as well. Therefore, it was not until 1854 that a separate

¹⁰ Hansard, P. D., ser.3, vol. 47 (1839), pp. 535-38.

¹¹ Ibid., p. 539.

¹² Manchester, "Reform of the Ecclesiastical Courts," p. 68.

act introduced the procedure to the church courts.¹³ Second, excommunication as a prerogative of the courts was dealt with comprehensively in 1813. The problem as to whether lay judges could excommunicate as a punishment came up several times, and the difficulty was not resolved by statute until the seventies, even though the non-clerical judges had tacitly agreed not to excommunicate even before then.¹⁴

Beyond trying to adjust the jurisdictions and procedures in the ecclesiastical legal system, there was a final classification of clauses in the omnibus bills dealing with the whole area of consolidation. As mentioned above, the Ecclesiastical Court Commission had recommended the abolition of the Court of Delegates, an ad hoc court of final appeal which was convened as a royal court of appeal if someone challenged a ruling of the Court of Arches. Because it was a temporary court convened only on special occasions and presided over by random judges who were not always well-versed in ecclesiastical law and because the make-up of the court was different each time it heard a case, the quality of justice it rendered was uneven.¹⁵ The

¹³ 17 & 18 Vict. c.47.

¹⁴ Manchester, "Reform of the Ecclesiastical Courts," p. 51.

¹⁵ Ibid., p. 56.

fate of this court will be discussed later in this chapter.

The commission had also recommended the dissolution of all the Peculiar courts, and the omnibus bills typically contained provisions to abolish them. In practical terms, these courts were not important because individually most of them handled very little business. They were poorly run and from an appellate point of view a terrible nuisance. Nonetheless, to people in the provinces, especially in more remote areas, it was easier to use the Peculiars than to travel to some far-off city to transact the probate of a little will or determine some niggling point about church rates, pews, etc. For the local gentry, the Peculiars represented a small bit of private patronage and some easy income. To local attorneys, they were an easy source of non-contentious fees without the need for rigorous preparation. Although few parliamentary speakers defended them -- least of all the prelates -- they survived until 1856 because their abolition was contingent upon passing the omnibus bills which contained clauses concerning wills. All attempts to abolish other ecclesiastical courts failed except for the abolition of the Peculiar courts and the Court of Delegates mentioned above. In 1835, 1844, 1848, and 1853, unsuccessful motions were made to abolish all ecclesiastical courts. In 1839, 1842, 1844, and 1852, bills designed to terminate their criminal jurisdiction

failed because they did not order other courts to absorb what was to be removed from the ecclesiastical responsibility. In the 1840s, the Whigs seemed intent upon abolishing all the diocesan courts leaving only provincial tribunals.

The second and more important reason for the legislature's slowness to reform the ecclesiastical courts lies in the peculiar impact that the issue had in parliament. The Whigs were the more persistent in attempting reform. However, despite the Lichfield House Compact of 1834, they were unable to generate support from the philosophical radicals who not only voted against Whig bills but actively spoke against them. In addition, there were uncooperative Whig lawyers and gentry who rarely debated but consistently voted against their party's bills. In a similar way the Tory party was split when ecclesiastical court reform bills were presented. It contained, on the one hand, a group of legal reformers led by the Peelites and, on the other, hard-core conservatives who refused to vote for any change in the church's legal establishment. As in the Whig Party, there were also provincial lawyers and lesser gentry among the Tories who persistently voted against any reforms of the ecclesiastical courts. Finally, in the House of Lords there was an easily fractured bloc of prelates voting more or less as a group.

This and the following chapters examine the views and voting of five of these groups: the party-line Whigs, the

party-line Tories, the radicals, the clergy, and the Country Party -- a group of provincial lawyers and gentry found in both parties who voted as an independent group on this issue.

Because the Whigs were in power in 1832, they had the first opportunity to act on the Ecclesiastical Court Commission's recommendations. However, the form that their response took was unclear because there were two contrasting approaches among the party's leaders.

The more radical position came from Brougham and Cottenham who wanted simply to secularize the civil jurisdiction and reorganize the courts on a more rational basis. A more moderate course was plotted by Stephen Lushington who, because of his close association with the ecclesiastical courts, tried to reform them without materially changing their constitution. Brougham derived many of his theories on law reform from Bentham. Because of his speech on the English legal system in 1828, however, Bentham and the radicals viewed him as an outcast.¹⁶ As a practical politician, Brougham realized that some of Bentham's ideas were too idealistic. As a consequence, he and Cottenham presented essentially the same bills when each was lord chan-

¹⁶ New, Brougham, p. 250.

cellor.

Although Brougham presented more bills and spoke more persistently for ecclesiastical reform than anyone else in parliament, reforming the ecclesiastical courts for their own sake does not seem to have been important to him. He never mentioned the ecclesiastical courts in his autobiography, never wrote about them in his many articles for the Edinburgh Review, almost wholly ignored them in his famous House of Commons Speech on law reform and never spoke in favor of ecclesiastical court reform after the county court system had been adopted. Further, because all his bills on church court reform called for the abolition of the Peculiars, it is most probable that he regarded them as an impediment to the establishment of his county courts.

Brougham endorsed the recommendations of the Real Property Commission Report which called for the transfer of all testamentary jurisdiction to the civil courts. The Peculiars had handled most of the probate business in the provinces. Brougham viewed them as a system of local courts, which could have offered competition to his county courts since they possessed sufficient income through their testamentary business to survive. As lord chancellor, he alluded to the relationship between the two when he presented his ecclesiastical courts bill in 1833. He said that he realized the timing was poor because his local courts bill had just been defeated, indicating that parlia-

ment did not seem enthusiastic about drastically changing the English court system. He, nonetheless, wished to pursue the issue because he saw no reason to keep the Peculiars in operation, and he then virtually ignored the rest of his bill.¹⁷

Brougham's bill of 1833 also provided that all criminal jurisdiction be removed from the ecclesiastical courts and that the bishops gain greater control over the proceedings in diocesan courts against clerks suspected of misconduct. Very important to Brougham, or at least the point which he explained in greatest detail, was a provision which would have standardized the forms of wills and provided a central repository for all the wills of England.¹⁸ The rest of his bill was in harmony with the Ecclesiastical Court Commission report of 1832, as were most of the Tory bills which were to follow.

In 1835, the Whigs returned to power and Brougham reintroduced his 1833 bill. This time the bill should have enjoyed greater success because he had gained the support of Lushington, Nicholl, and Jenner-Fust, two of whom were Tories and all of whom had presented smaller bills of their own during the previous session. Lushington himself had

¹⁷ Hansard, P. D., ser.3, vol. 5 (1833), pp. 612-13.

¹⁸ Ibid.

drawn up six, and Nicholl and Jenner-Fust had written two others at the behest of the bishops.¹⁹ Despite their support from both the Tories and the bishops, Brougham's bill failed because of resistance from the radicals, the Irish, and the Country Party.²⁰

The second, more moderate Whig approach was made by Lushington who presented the government's bills in the Commons, but he was no more successful than Brougham had been in the House of Lords, even with the support of moderate Tories like Nicholl who had opposed his own party's bill a year earlier.²¹ Lushington's bill differed from Brougham's bill because instead of abolishing Peculiars outright, it sought to bring them under the bishops' control. It then transferred the Peculiar's testamentary jurisdiction to the consistory courts instead of moving them to the civil courts.²²

His bill also differed in several important respects from those introduced by Scott, mentioned earlier, and Brougham. Lushington's bill was more a reorganizational piece of legislation than Brougham's. It had a specific objective, the formation of a Probate Court, but its seven-

¹⁹ Hansard, P. D., ser.3, vol. 26 (1835), p. 934-35.

²⁰ Ibid.

²¹ Ibid., pp. 908-36.

²² Ibid.

ty-three sections succeeded in touching all the items in Brougham's general consolidation bill including the transfer of testamentary causes. It also called for trial by jury but not spoken testimony. The Doctors' Commons was not to have a monopoly because all probate including real estate was to be heard in the same court.²³

It was obvious that Lushington had respect for the ecclesiastical courts and did not view all their differences from civil courts as undesirable. He, in particular, wanted to preserve the rules of evidence used by the ecclesiastical courts. Unfortunately, his bill met with resistance from both ultra-conservatives and radicals and died after the second reading.²⁴

Although they were defeated in the 1830s, the bills of Brougham and Lushington became the bases for most of ecclesiastical court reform legislation proposed in the following quarter-century. A third, lesser influence, was Scott's bill of 1813. Generally speaking, the purpose of Scott's bill was to bring the organization and enforcement procedures more in line with common law and reduce the cognizance of the Peculiars and lower episcopal courts.

²³ House of Commons Sessional Papers, "Bill to Consolidate the Jurisdiction of the . . . Ecclesiastical Courts . . . (4), 1836, I, 5.

²⁴ Hansard, P. D., ser.3, vol. 26 (1835), pp. 908-36.

Brougham's bill moved to abolish the Peculiars and transfer several of the jurisdictions of the ecclesiastical courts, particularly testamentary causes, to the county courts and would have introduced many procedural features which were common in the civil courts like spoken testimony and trial by jury. Of the three bills, Brougham's was the most destructive to the ecclesiastical court system. Lushington's was most sympathetic to the tradition and forms of the ecclesiastical courts, but even it moved to abolish the Peculiars and establish a Probate Court and control registry for wills.

Unfortunately, the existence of three such different approaches damaged the prospect for reform because M.P.s of both parties tended to split. Unfortunately, both Lushington and Brougham had adherents within the Whigs whenever the legislation came up. The Tories were split with the ultra-conservatives, but even among moderate Tories, there was a split between those who supported one bill or the other. As a result, the existence of two Whig bills greatly impeded the efforts of both parties to bring about change because in each party there was a faction which voted against both reform schemes. This was particularly disastrous, however, for the Whigs.

The main issue was whether probate should be a civil or ecclesiastical matter. Brougham and Lushington both agreed that all wills should not be probated in two courts,

but they disagreed on which court should handle all testamentary business. Brougham had been trained as a civil lawyer and had served prominently on the Real Estate Commission, which had recommended that testamentary causes be handled in Common Law courts (that he had hoped would be expanded to include his county court scheme). Typically, the Whigs supported the Real Estate Commission report and, as will be seen later, Whig bills tended to advocate a diminution in the number of church court jurisdictions. Lushington was a member of the Doctors' Commons and eventually became the Dean of Arches. He had served on the Ecclesiastical Court Commission which had recommended that all probates be heard in reformed ecclesiastical courts. The Tories, on the other hand, backed the Ecclesiastical Court Commission's contention that the sacred courts should be reformed in an effort to strengthen their jurisdiction.

The split hurt the Whigs who lost Lushington, Phillimore (another highly respected member of the Doctors' Commons), their supporters in the Commons, and the Whig bishops in the House of Lords. Nor could the Whigs depend on the support of Lyndhurst, Pollock, and other Tories who were generally in favor of church court reform but opposed the transfer of testamentary jurisdiction to the civil courts. The disagreement was especially damaging because almost all the debates eventually turned to the question of

probates. Even when Brougham tried to stress other issues and ignore wills in his presentations, probate became the primary point of discussion.²⁵

As a result of the split and out of fear of weakening the church, there was little enthusiasm or energy on the part of the Whig leadership to effect reform, especially after the difficulties resulting from attempts to tamper with the Anglican Church in Ireland. Grey never spoke to the issue and Melbourne promised only that his party would "look into abuses if they existed," but that he would not "impair the solidity of the fabric [of the church] itself."²⁶ Later Whig ministries after Melbourne advocated reform but did not press the issue until Palmerston became prime minister.

Thus when Lord Cottenham, lord chancellor under Melbourne (1835-1841), presented a government-sponsored bill when he entered office, he did not dominate the discussion, although he did speak in favor of the legislation both times it was debated. The bill itself was not in any way original; it was mostly Lyndhurst's work which had been drawn from Brougham's and Scott's measures with the inclusion of a civil probate court. The Tories spoke both for

²⁵ Hansard, P. D., ser.3, vol. 25 (1834), p. 1057.

²⁶ Hansard, P. D., ser.3, vol. 31 (1836), pp. 324-30.

and against the bill.²⁷ Cottenham's chief interest seemed to be the establishment of the central civil court in London, and thereafter that idea became a major plank in the Whig party's reform platform.

In 1844, the Whigs presented a new concept during the debates over John Nicholl's bill but did not follow through in later legislation of their own. During that debate, both Cottenham and Campbell, Melbourne's former attorney general, attacked the Tories' position by bitterly denouncing Nicholl's attempt to keep the diocesan courts at all.²⁸ (Cottenham's bill of 1836 had moved to weaken but not destroy those courts.) The debate was altogether more partisan than previous ones, and the issue of the episcopal courts was probably just an excuse for the Whigs to defeat a Tory bill, because Campbell reversed himself when, on behalf of the Aberdeen government, he presented legislation which was more like the 1835 Cottenham bill which had not disbanded the diocesan courts.²⁹

Although the Whigs' omnibus bills failed, the party did manage to pass three pieces of legislation. The first was the work of Brougham who, following the recommendations of the Ecclesiastical Court Commission, abolished the

²⁷ Ibid.

²⁸ Hansard, P. D., ser.3, vol. 73 (1844), p. 1684.

²⁹ Hansard, P. D., ser.3, vol. 78 (1845), pp. 260-263.

Court of Delegates and replaced it with the Privy Council. Had it ended at that point, later problems could have been avoided because the Privy Council had both temporal and spiritual lords. Brougham, however, several years later recommended and had passed a measure which moved final appeals from the Privy Council to the Judicial Committee of Privy Council.³⁰ Outwardly, this was a logical move; however, since there were no clergy on the Judicial Committee, it meant that it was possible for a wholly theological question to be adjudicated by an entirely secular board. This, in fact, did happen in the Gorham Case to be examined later in this chapter. In this case, the Whigs' desire for secularization had gone awry.

The other two acts were more successful. The Wills Act of 1837 was the only surviving remnant of Cottenham's bill of 1836. Following its second reading in the House of Lords, the lord chancellor's bill had been referred to a committee which, after ten weeks, recommended so many amendments that the bill was dropped.³¹ During the following year, however, Cottenham revived one of the suggestions of the committee in the form of a bill which provided a standard form for wills but did not make any changes in the

³⁰ 3 & 4 Will. IV c.41.

³¹ Hansard, P. D., ser.3, vol. 31 (1836), pp. 324-30.

probate or administration of those wills.³² The last act was the result of the Thorogood Affair in 1840. The issue came to involve the ecclesiastical courts because Thorogood had refused to pay not only his tithe of £5, but also the £125 costs assessed by an ecclesiastical court. He was sentenced for contempt and imprisoned indefinitely until costs were paid. (The situation was similar to the Dix case.) Nicholl, who was concerned about indefinite sentencing, moved a private bill to have him released. Melbourne's cabinet took over the project, however, and Lord Russell, then secretary of war, presented his own bill. The commons defeated Nicholl's bill, adopted Russell's, and sent it to the House of Lords.³³ Because of some retaliatory action taken by the Clemsford vestry, which had originally sued Thorogood, there was added to the government bill a provision that not only limited the maximum incarceration period to twelve months, but provided that the plaintiff would have to pay court costs. The Tories bitterly objected and succeeded in having the former provision reduced to six months and the latter one dropped. This was the last bill passed by parliament giving church courts competence in civil causes.³⁴ Six months later a bill by

³² Holdsworth, English Law, Vol. I, p. 667.

³³ Hansard, P. D., ser.3, vol. 45 (1840), pp. 1160-62.

³⁴ Ibid., pp. 1189-90.

Lushington was passed in 1841 concerning sentencing for non-payment of costs in all other cases. Ecclesiastical judges were given the latitude to impose a sentence of up to six months.³⁵

The topic of ecclesiastical court reform was not revived until Aberdeen's ministry. Although the government did not present a bill, a motion was made in March, 1853 by Robert Collier, a Quaker judge, that the ecclesiastical courts be abolished and that their jurisdiction be assumed by the newly formed county courts. After giving a history of unsuccessful reform measures and complaining of the incompetence and expense of the remaining 372 courts, Collier pointed to the ridiculous situation that while Dr. Jenner-Fust was earning £3904 as Dean of Arches, Rev. Robert Moore, registrar of his court received £8265 for delegating his responsibility to someone else. It was inconceivable to him that the church courts should still be hearing cases concerning fornication and solicitation, and that they could have the power to pass a sentence of excommunication but not be permitted to use it. The Irish and radical speakers continued to condemn the ecclesiastical courts.³⁶

³⁵ Ibid., p. 1220.

³⁶ Hansard, P. D., ser.3, vol. 66 (1843), pp. 856-58.

Phillimore responded that in 1836 parliament had passed a bill, containing a clause which had abolished the Peculiars.³⁷ That clause had been annulled by act of parliament like so many other annual bills which were mindlessly passed. He also mentioned that the Ecclesiastical Court Commission of 1832 had not recommended that all testamentary jurisdiction be transferred from the ecclesiastical courts, as the radicals and O'Connellites had erroneously stated. In fact, that report had recommended that testamentary causes concerning real property be transferred from Westminster Hall to the Court of Arches. Lord Lyndhurst's bill of 1844 in the debate, had preserved the basis of the ecclesiastical court system. If the ecclesiastical courts were expensive, the common law courts were even more so. Phillimore then informed the House that he had prepared a bill for the government's approval that provided for four reforms -- the abolition of all sinecures, the abolition of more than 300 courts, regulations for the appointment of court officials, and the introduction of viva voce evidence -- but the bill had never been presented.³⁸ Collier then dropped his motion. It was obvious that Aberdeen's government intended to sidestep the issue completely, and it never presented any additional

³⁷ 6 & 7 Will. IV c.77.

³⁸ Hansard, P. D., ser.3, vol. 74 (1853), p. 853-75.

legislation on ecclesiastical courts. The Aberdeen coalition collapsed shortly thereafter and with it died the old Whig Party.

It evolved, however, into the Liberal Party which won a majority in 1855, but the thinking which had motivated the Whigs from 1832 to 1855 remained intact when Palmerston took office. His ministry was ultimately successful and, therefore, so was the Whig philosophy of Brougham and Cottenham as it related to ecclesiastical court reform, but the campaign of the Liberals under Palmerston will be discussed in chapter seven.

While it is true that the Whigs dominated moderate attempts to reform the ecclesiastical courts, it would be misleading to give the impression that the Tories only parroted Whig ideas and operated under the same philosophy. To the contrary, the two parties built on each other's theories and behaved according to their own peculiar outlook on reforming the courts. The moderate Tories moved in a different direction from either Brougham or Lushington especially during Peel's second ministry.

The Tory role in reforming the ecclesiastical courts was more like that of a moderator than an innovator. Had the most logical extreme of the Whig program been adopted, the ecclesiastical courts would not have been reformed;

they would have been abolished. Such a move would have left an established church without a government-backed judiciary, and that would probably have led to the eventual disestablishment of the Anglican Church. While that might not have been a bad idea (many outside and inside the church were in favor of such a move), it would have been opposed to the Whig belief in an official watchdog for public morality.

The Tory theory concerning church court reform was more straight-forward and as a consequence simpler to legislate: there was to be an established church because God had ordained it, and it was the responsibility of the government to keep God's truth before the people. The Tories, however, were not united as to how this might be done. Ultra-conservative Tories maintained that the Anglican Church and its establishments were without flaw and thereby needed no change. On the other hand, more Conservatives felt that although the theology and ministry of the church were valid, its organizations and administration should be aided and improved by the state. Obviously, the two positions were antithetical, and the Tory position was hindered by the resulting disunity.

The Tories who favored reform, most notably Lyndhurst, Pollock, and Dr. John Nicholl, a member of the Doctors' Commons and a former Dean of Arches, made their greatest effort during Peel's second cabinet (1841-1846). Bills

before that time were in harmony with the Ecclesiastical Court Commission report of 1832. Up to 1838 both parties were in general agreement as to how the courts should be reformed. In 1834 the new lord chancellor, Lyndhurst, who had served as secretary for the commission, introduced a rare single item bill to establish a national repository of wills,³⁹ and in March, 1835, Sir Frederick Pollock, Peel's attorney general, moved a bill very much like Brougham's. But, in order to circumvent Tory objections to Brougham's bill, which would have removed all civil jurisdictions from the church's courts, Pollock's legislation transferred adultery, incest, and other immoralities to the Common Law courts retaining defamation, brawling, and nullity of marriage in the ecclesiastical courts. The bill also tried to make divorce a matter for the ecclesiastical courts instead of a function of parliament and required that trial by jury be instituted in ecclesiastical courts.⁴⁰

Peel did not seem especially enthusiastic about trying to deal with so contentious a subject as ecclesiastical reform since it had severely split the party previously in 1834.⁴¹ The issue, while mentioned in the Queen's address

³⁹ Hansard, P. D., ser.3, vol. 23 (1834), p. 1103.

⁴⁰ Hansard, P. D., ser.3, vol. 24 (1835), pp. 908-36.

⁴¹ Ibid.

to parliament in 1842, was ignored by the government until Campbell questioned Lord Chancellor Lyndhurst who told him that Secretary of State Graham was going to present a bill.⁴² When Campbell asked two months later in May why the government still had not presented a bill, he was told that the failure of the Local Courts Bill had obviated any hope of passing the government's Ecclesiastical Courts Consolidation Bill.⁴³

This was probably an accurate appraisal of the situation. The last time the Tories had presented a bill for eliminating the Peculiars, members of both parties had objected to legislation which would eliminate courts in the outlying regions of the kingdom, and the same ones who had opposed that bill had also earlier voted down the government's local courts bill. Campbell soon thereafter presented three bills of his own, which were aimed at ecclesiastical court civil jurisdiction, one of which would have sent all church court appeals to the civil courts. They were dropped after the first reading.⁴⁴

It was not until the next year that Nicholl presented the bill on behalf of the government, and it was generally in keeping with Conservative thinking. He presented sta-

⁴² Hansard, P. D., ser.3, vol. 61 (1842), p. 120.

⁴³ Hansard, P. D., ser.3, vol. 63 (1842), p. 2.

⁴⁴ Ibid.

tistics showing that there were many fewer appeals in the London ecclesiastical courts than in those of the provinces, intimating that metropolitan courts were superior, and he used this as evidence to demonstrate why his bill confined most testamentary business to London and why it provided for a national registry of wills to be housed there. His bill provided that the spiritual and temporal jurisdictions be separated and that temporal causes not be heard any lower than the provincial court level (except for wills of under £300 which were to be probated in diocesan courts). It also provided for spoken testimony, for new regulations concerning the discharge of persons from prison, and for a much restricted role for surrogate judges. In defense of his abolition of diocesan jurisdiction in temporal matters, he pointed to the ecclesiastical court commission report, a convocation report, and the report of the committee which had been set up to discuss Cottenham's bill of 1836. All these reports, he said, backed his bill. What he failed to point out was that all of these were basically Tory documents. The only reason the bill had not been enacted in 1836, he claimed, was the desire to proceed first with the Church Discipline Bill. Now, he said, four years later, it was necessary to deal with the problem of the civil jurisdiction of the ecclesiastical

courts.⁴⁵

For the next two years the government tried unsuccessfully to push reforms through parliament. Since these debates were most important and involved all the parliamentary forces working against each other, they will not be examined fully until the other interest groups are discussed.

By the time Palmerston became prime minister both parties had been unsuccessful in materially reforming the civil jurisdiction of the ecclesiastical courts. Their tactics had been generally defective. The great omnibus bills were too unwieldy and gave the opposition too many opportunities to kill efforts at reform. Both parties also seemed unable to maintain the necessary discipline to keep uncooperative M.P.s under control in voting on controversial but needed minor reforms. Nevertheless the two major parties would have been able to pass more fundamental reform bills if the opposition had not been so effective. The nature of that opposition is the subject of the next chapter.

⁴⁵ Hansard, P. D., ser.3, vol. 64 (1843), p. 312.

Chapter Six

THE OPPOSITION TO REFORM

While the groups which opposed the reform bills were highly successful in blocking the efforts of the two major parties, it is incorrect to consider their efforts in any way coordinated. Each of the opposition groups, the ultra-conservatives, radicals, prelates, and Country Party acted on its own, and none of them displayed much more discipline than the major parties. There is little evidence of caucusing among these groups, except during the Nicholl debates.

The ultra-conservatives and radicals differed substantially from the other opposition groups. First, they were officially associated with a major party. Normally they would cooperate and vote with their party when it was opposing a church court reform bill but act independently when their ministry had presented a bill. Second, they acted more for general philosophical reasons than the bishops and country partyites who were obviously vested interests.

This chapter examines the motives and activities of the opposition groups in the order presented above and demonstrates how these groups acted in the important Nicholl debates. Finally, the strategy of the Palmerston min-

istry is studied in order to discover how it was able to neutralize the effects of these groups and to pass legislation that fundamentally changed the constitution of the ecclesiastical courts.

The ultra-Tories were the least complex of the opposition groups. Their position was not represented on either of Prime Minister Peel's cabinets, and their single aim was that there should be little or no change in the ecclesiastical courts. "The courts have lasted for 700 years, and after all that time, it seems that abolition or change is uncalled for," argued Lord Abinger, one of the more persistent ultra-conservatives in the House of Lords.¹ The foremost proponent of the ultra's position, however, was Colonel Sibthorpe, a doughty, opinionated representative from Lincoln. He spoke more frequently in ecclesiastical court reform debates than anyone else including Brougham, and he once told the Commons, "This measure [Ecclesiastical Court Consolidation Bill, 1843] is a measure that is called 'reform' -- a thing I detest as I detest the devil. It is an innovation and all innovation is dangerous."² A year later he told them, "I object to all changes except the

¹ Hansard, P. D., ser.3, vol. 81 (1845), p. 124.

² Hansard, P. D., ser.3, vol. 66 (1843), p. 335.

late change of the ministry." He wanted to vote for the reading of Nicholl's bill of 1844 only to speak against "that which would cause the spoliation of the Church."³ It was he who complained about the similarity of bills in the mid-1830s. Although to twentieth-century readers he seems to have provided comic relief during the debates and was not taken too seriously by his contemporaries, he was very determined to defend his position. For example, he engineered 166 petitions with 10,257 signatures to oppose Pollock's bill in 1835,⁴ and, in order to vote against Nicholl's bill and the Voter Registration Bill, took a train, which he greatly disliked doing "at the risk of his neck" all the way from Lincoln.⁵

Sibthorpe's most consistent political ally was Sir Robert Inglis whose political credits include opposition to such measures as the Poor Relief Bill, the repeal of the Test Act, the reduction of bishops' salaries, public education (he termed it "godless education"), and the abolition to slavery. He composed and published a Book of Family Prayers in response to the Ecclesiastical Courts Bill of 1843. Dodsworth said of him that he was "a man of many

³ Hansard, P. D., ser.3, vol. 74 (1844), p. 167.

⁴ Hansard, P. D., ser.3, vol. 29 (1835), p. 105.

⁵ Hansard, P. D., ser.3, vol. 67 (1843), p. 708.

prejudices and no great ability."⁶ He, too, encouraged petitions against Nicholl's bill and claimed credit for eighty-two of them and possibly had a hand in forty more.

The main concern of Inglis, Sibthorpe, and the other ultra-conservatives like Col. Henry Lowther, a Tory leader; Cutlar Fergusson, who had served on the Ecclesiastical Court Commission; and Lords Cumberland and Ellenbough in the House of Peers, was to keep the local ecclesiastical courts operational. They did not see the diocesan courts as particularly damaging either. Inglis, for example, pointed out that the diocesan court of Exeter, which serviced his area, had only three decisions reversed in the twenty-five years from 1819 to 1844.⁷ Although they spoke in favor of keeping local courts for local justice -- a policy consistent with ultra-conservative philosophy -- they were not generally enthusiastic about Brougham's scheme for county courts. In this case, it seems likely that their reactionary philosophy was reinforced by pressure from the Country Party, to which many of the ultra-conservatives belonged, than by philosophy.

The hard-core ultra-conservatives were not a very large group. Aydelotte intimates that there were about

⁶ "Robert Inglis," Who's Who of British Members of Parliament, vol. 2 (Sussex: Harvester Press, 1979), p. 311.

⁷ Hansard, P. D., ser.3, vol. 74 (1844), p. 164.

thirty, although he never calculates this number exactly because he lists the Peelites and other conservatives together. By using Dod's Parliamentary Companion and comparing the names with those who appeared most consistently on the church court reform divisions, it is possible to determine that there were about fifteen ultras who were interested in this reform. While fifteen to thirty votes might not have been a considerable bloc in a parliament of 658 seats, they constituted an important force in the ecclesiastical court reform bills because most divisions listed fewer than 100 names and only the 1844 debate registered more than 200. The persistence and fervor demonstrated by these conscientious conservatives made them much more potent than their small numbers might indicate, as had also been the case with regard to Catholic Emancipation in Liverpool's time.

While some historians have demonstrated that there were few independents in parliament after the Reform Act of 1832, even Aydelotte with his elaborate Guttman scales had to admit that "Not all issues will fit together in a cumulative scale of this kind."⁸ "Votes on a number of . . . subjects do not fit this scale and, further show no statis-

⁸ Aydelotte, "British Voting Patterns," p. 138.

tical relation to party affiliation."⁹ Ecclesiastical court reform in general seems to have been one of those subjects. When Sibthorpe voted against Nicholl's bill, he did so out of an abiding confidence that he was being the true Tory ultimately upholding party traditions. At the other extreme, when a radical like Hume voted against a Whig bill, he was also voting according to his convictions and to some degree against Whig political philosophy.

The radicals did have a political philosophy -- Benthamism. Research seems to indicate, however, that they did not act out of a unified plan of attack; Benthamism was very difficult to define precisely, much less couch in a specific legislative program.¹⁰ The radicals were never able to present their own platform of reform in a systematic and coherent fashion because they had become part of the Whig alliance. Nor could they depend on the Whigs to back the radical program. Rather, they could only react to bills presented by the two major parties. Many of the radicals did try to present their own pieces of legislation, but their bills rarely made it to the second reading.

Most of their influence in the ecclesiastical court reforms was in the form of negative debate and votes

⁹ Aydelotte, "Parties and Issues," p. 110.

¹⁰ W. Thomas, "The Philosophical Radicals," Pressure from Without, ed. P. Holles (London: Edward Arnold, 1974), pp. 52-80.

against proposals which did not agree with their concepts of legal reform. There are only a few examples of radicals actually speaking in favor of reform bills, and in only one instance did they seem to be acting in concert with the Whig party.

During the debates of the early 1830s, the radicals seemed unable to act on their own effectively. In 1834, the radical William Duncombe presented a petition from Richmond, in Yorkshire, to have consideration of Campbell's reform bill postponed. (Sibthorpe had collected 166 such petitions.) John Wilkes, a well-known dissenter and radical, succeeded in having the bill tabled with the help of the arch-foe of disestablishment, Henry Lowther, and the equally conservative John Scarlett.¹¹

Radical pressure for reform was resumed in a more typical maneuver in 1840 when Sir Benjamin Hawes requested that Lord Russell revive Brougham's bill of 1835. He also moved a resolution that ". . . in conformity with the recommendations of the Committee on Ecclesiastical Courts . . . , this house is of the opinion that the jurisdiction of the inferior ecclesiastical courts should be abolished without delay." The motion was passed without the last two

¹¹ Manchester, "Law Reform in England and Wales," p. 201.

words¹² but never referred to again. Hawes again asked for a government bill in February, 1841, and was put off with a promise that Cottenham would do so shortly but no new legislation was presented.¹³

Radicals were, however, very active during the Nicholl debates. After the fall of Peel's ministry, they continued to agitate unsuccessfully for the government to present legislation. Later in the decade, radicals presented several of their own bills. William Bouverie and Joseph Hume strongly opposed bills from both parties and insisted that the entire ecclesiastical legal system be dismantled. Bouverie even presented his own bill in 1848, but it never got past the first reading.¹⁴ Thereafter, he never again spoke of ecclesiastical courts. Joseph Hume, on the other hand, persisted in trying to have the ecclesiastical courts abolished in England, as had been done much earlier in his native Scotland. He joined George Hadfield, Robert Collier, and Thomas Kelley in the early 50s to present bills for abolishing church courts.¹⁵ Of these radicals, Hadfield was the most vocal, requesting the ministries from 1853 to

¹² Hansard, P. D., ser.3, vol. 52 (1840), pp. 1080-81.

¹³ Hansard, P. D., ser.3, vol. 54 (1841), p. 92.

¹⁴ Hansard, P. D., ser.3, vol. 99 (1848), p. 143.

¹⁵ Hansard, P. D., ser.3, vol. 124 (1853), p. 857; vol. 128 (1853), p. 1231; vol. 136 (1855), p. 1973; vol. 140 (1856), p. 384.

1857 to produce bills which they had promised for abolishing various ecclesiastical courts.

The radicals acted as a body in a predictable if non-partisan way only on a few occasions. Whig leaders were sometimes able to work with this splinter group within the party. There were, however, some radicals who were neither as predictable nor as manageable by party leaders because they were even more independent in their ideas on how to deal with the church courts.

Radical reformers like George Faithful and William Gillon, favored the complete disestablishment of the Church of England partly because of the courts which enforced religious laws on non-believers.¹⁶ Other uncooperative liberals like John Bright, Thomas Duncombe, the Marquis Normby, Henry Yorke, and J. S. Mill's friend William Christie did not suggest disestablishment but rather wanted the entire ecclesiastical court system abolished.¹⁷ Finally, Charles Cowan, Thomas Denman, Benjamin Hall, Benjamin Hawes, Edward Horseman, and Dr. George Stock, all of whom were normally loyal to the Whigs, defied their party and advocated specific legal reforms but did not want either

¹⁶ Hansard, P. D., ser.3, vol. 22 (1833), p. 178; vol. 21 (1834), p. 1192; vol. 26 (1835), p. 922.

¹⁷ Hansard, P. D., ser.3, vol. 124 (1853), p. 24; vol. 74 (1844), p. 87; vol. 73 (1844), p. 1593; vol. 66 (1843), p. 334.

disestablishment or abolition.¹⁸

The ineffectiveness of the overt actions taken by the radicals belies the real effect they had on ecclesiastical reform. Aydelotte suggests that there were between twenty-four and thirty¹⁹ radicals during the 1840s, but as with the ultra-conservatives, they were more often present at the debates than the average back bencher. Since, like the ultras, their vote was generally negative, the two groups were capable of tipping the balance in favor of the opposition.

The prelates, while obviously acting out of an overarching philosophy, must in the case of the ecclesiastical courts be considered something of a vested interest. Yet they by no means presented a united front for or against ecclesiastical court reform. There were three basic positions held by the bishops, although they showed a wide variety of stances on many of the issues brought before the House of Lords. The Whig prelates, headed by Charles Blomfield of London, were in favor of wide reforms within the courts. It was generally their position that the church's responsibility was to promote the kingdom of God

¹⁸ Hansard, P. D., ser.3, vol. 111 (1856), p. 384; vol. 124 (1853), p. 872.

¹⁹ Aydelotte, "Parties and Issues," p. 103.

and that even the established church had only a limited governmental role. They were theologically Latitudinarian; that is, they favored as wide a base of religious thought as possible. They tended to emphasize social ministry and good works, and they were interested in having the Anglican Church highly visible in national affairs as a force for good. Many, like Blomfield were anti-Tractarians.

Contrasted with the low church Latitudinarians were two groups of high church bishops. The larger and more vocal were the high church conservatives led in parliament by the irascible Henry Phillpotts, bishop of Exeter, and the gentler, more scholarly Samuel Wilberforce, bishop of Oxford and later Winchester. They were devoted to maintaining the Anglican Church in as pure and powerful a form as possible. Preventing heresy was as important as a social ministry to them, and of the three groups they were the most concerned with maintaining the prerogatives of the church and keeping the power of the bishops undiminished. They were intolerant of innovation within the church either from the Latitudinarians, the Calvinists, or from the Anglo-Catholic ritualists. Some like Phillpotts even opposed the Tractarians, although most of them were sympathetic to the Oxford Movement. They were especially interested in maintaining some sort of authority over the actions of citizens whether or not they belonged to the Church of

England. Phillpotts said in a speech before the House of Lords that the Church was not to forego its duty to censure the laity and to tell the laity what its responsibility was. There should not be a civil punishment, he argued; rather, the Church should be permitted to excommunicate without the civil government adding more penalty. It was the duty of the Church to tell sinners that they were sinners and that they needed to repent. And the Church neither needed nor wanted the state's assistance.²⁰

The ultra-High churchmen were the smallest of the three groups. Led by James Henry Monk, bishop of Gloucester, they could see no advantage in being part of the governmental establishment, much less in maintaining a court system with civil jurisdiction. They feared government interference in church matters, and their fears were realized when secular lords in the Privy Council were called upon to make a judgment concerning the theological significance of baptism in the famous Gorham case. They were the only ones in the episcopacy who were sympathetic with the Ritualists. Of the three groups, they were the most interested in improving the conditions of the poor and the least interested in preserving the ancient prerogatives of the church.

Although the prelates did not behave as a unit, they

²⁰ Hansard, P. D., ser.3, vol. 158(1860), pp. 1074-80.

did not act in concert with the two major political parties either. Even though Blomfield worked with the Whigs on many civil reforms, he did not subscribe to the Whiggish notion that the place of the established church was to act primarily as a moral watchdog. Even the liberal bishop of London was not going to submerge his Christian faith for civil expediency. On the other hand, the high churchmen could not be numbered among the Tories in many matters of the church. Phillpotts, for one, was not inclined to permit the church to drift aimlessly as it had in the eighteenth century. He spoke for reform in many areas of church organization and administration, although he wanted to increase not decrease its authority over the laity. Tories were more inclined to let the church remain unchanged.

Most bishops seemed inclined to support reform legislation based on recommendations from the Ecclesiastical Court Commission. In fact, in a show of good faith, the archbishops of Canterbury and York and the bishops of Gloucester, Lincoln, and London -- all members of that commission -- voluntarily gave up their patronage positions which amounted to about £60,000 a year until the law was settled.²¹ They did not offer any opposition either to

²¹ Hansard, P. D., ser.3, vol. 26 (1835), pp. 908-36.

Brougham's bills of 1833 and 1835²² or to Lyndhurst's bill of 1834.²³

Resistance to reform began when Cottenham introduced his bill in 1836. Blomfield spoke in favor of the bill, especially the feature providing a national registry of wills in London²⁴ which certainly would have been very lucrative for his consistory court. Otherwise, the bishops opposed the bill, but not for the same reasons as the Tories. It was of little concern to the bishops whether the loss of the local courts in the provinces would cause great inconvenience. They were more concerned with preserving their own tribunals. It is easy to detect a frustration on the part of the prelates about what was lacking in the bill rather than what it contained.

The prelates seemed very uninterested in the fate of the Peculiars and of testamentary causes because of their concern to obtain a bill to deal with the discipline of clergy. The bishop of Lincoln sneeringly called the Peculiars of "lay quality" and claimed that they would not be missed.²⁵ In order to force the issue, the bishops claimed that they would resist all attempts to reform the civil

²² Ibid., pp. 933-35.

²³ Hansard, P. D., ser.3, vol. 23 (1834), p. 1103.

²⁴ Hansard, P. D., ser.3, vol. 31 (1836), pp. 324-30.

²⁵ Hansard, P. D., ser.3, vol. 81 (1845), pp. 1309-14.

causes until the government succeeded in passing legislation dealing with the entire area of ecclesiastical jurisdiction. Their campaign must have been effective because Lushington was very upset by it. The bishops were so successful, in fact, that two statutes, the Pluralities Act of 1838 and the Discipline of Clergy Act of 1840,²⁶ were passed to reform ecclesiastical jurisdiction a full fifteen years before any ministry was able to push civil jurisdiction reforms through parliament. It no doubt helped that at the time there were many newspaper articles generated by the Tractarians about the church, and there was much pressure from the press for parliament to deal with the abuses of benefices and unchastened "criminous clerks."²⁷

As a result of both public outrage and the Tractarian controversy which began in 1833, the Anglican bishops tended to unite and become more conservative. They were remarkably quiet during the Thorogood debates, although the issues involved were important to the church. The conservative trend, however, was made most evident in the views of Blomfield, the prelate who spoke most frequently in the debates. Even before serving on the Ecclesiastical Court Commission, he had been an ardent and sometimes impatient

²⁶ 1 & 2 Vict. c.43; 3 & 4 Vict. c.86.

²⁷ See Theories of Aspinall and Manchester above in Chapter Three.

supporter of reform, but in the 1840s the anti-Tractarian bishop was noticeably more conservative, especially during the Nicholl debates. He generally opposed the government's bill in 1843, although it called for the retention of the diocesan courts. During those debates, Lord Campbell, with whom he had frequently worked earlier, pointed out that that he had very much changed his opinion on church court reform, and he admitted that he had "modified" his opinion during the preceding thirteen years.²⁸

Because Blomfield had changed his position, Bishop Phillpotts became the most outspoken prelate, and he made the high church position more evident. During the debates in the mid-1840s, he objected to any reduction in the authority of the diocesan courts because he claimed that they were necessary to maintain episcopal authority.²⁹ He was equally adamant about keeping such jurisdictions as brawling and defamation of character within ecclesiastical court jurisdiction because of his belief that it was the responsibility of the church to monitor and control lay behavior.

John Kaye, Bishop of Lincoln, had repeated Phillpott's theme when he objected to a provision in Cottenham's bill

²⁸ Hansard, P. D., ser.3, vol. 124(1843), pp. 1309-14.

²⁹ Hansard, P. D., ser.3, vol. 69 (1843), p. 666-68.

of 1844 to make divorce a civil matter,³⁰ and he was joined by Blomfield when the bill came up for a second reading.³¹ It is very possible that the objections of the bishops helped to kill the bill because it was dropped soon thereafter, even though it had passed a third reading in the House of Lords.³² In 1852, Phillpotts along with Blomfield, Wilberforce, and Edward Denison, bishop of Salisbury, successfully blocked a non-government measure, An Ecclesiastical Court Jurisdiction Bill, which had passed through the Commons without debate.³³ The debate centered around the definition of brawling, which Blomfield said meant disturbances during worship and was, therefore, an ecclesiastical concern. The government, however, claimed that it was a civil matter and should be transferred out of the church's jurisdiction. Other bishops raised a technical point that parliament was revising a part of the Book of Common Prayer without consulting Convocation. Phillpotts, however, dismissed all the debate by saying that it was the responsibility of the established church to enforce the proper behavior of the laity both inside and outside the Church, and for that reason needed to be kept within

³⁰ Hansard, P. D., ser.3, vol. 80 (1845), p. 835-47.

³¹ Hansard, P. D., ser.3, vol. 81 (1845), p. 1309-14.

³² Ibid., pp. 124, 1309-14.

³³ Hansard, P. D., ser.3, vol. 88 (1846), pp. 708-11.

ecclesiastical court jurisdiction.³⁴

It is interesting to note here that the ultra-high prelate, James Henry Monk, voted against the motion because he favored the complete dissolution of church-state ties, and if he could not have all legal authority swept away, he was content at least to have brawling and defamation disappear from ecclesiastical jurisdiction.³⁵

In 1843, Brougham stated that a group of provincial lawyers and gentry had voted against every bill to reform the ecclesiastical courts. Peel complained about the same group several months later.³⁶ The problem here is to determine who these M.P.s were and whether they were actually powerful enough to prevent the passage of a government-sponsored bill. Twentieth-century scholars have done little research on this group, dubbed the Country Party.³⁷ Fortunately, it has not been wholly ignored.

Apparently, the earliest manifestation of a Country Party came in the early 1820s when it was noticed that a group of provincials voted together against a series of

³⁴ Hansard, P. D., ser.3, vol. 122 (1852), pp. 319-23.

³⁵ Ibid.

³⁶ Hansard, P. D., ser.3, vol. 74 (1845), p. 186.

³⁷ D. C. Moore, "The Other Face of Reform," Victorian Studies, vol. 5 (1961), pp. 7-8.

currency reform bills.³⁸ These M.P.s opposed deflation of currency and resisted all attempts at modernizing farm techniques.³⁹ They seemed responsive to the Anti-League, the Central Agricultural Protection Association, which eschewed the use of chemicals and crop rotation schemes suggested by the "high" or technological farmers.⁴⁰ The Country Partyites came mostly from the gentry who inherited their lands, and since about two thirds of all land was owned through testamentary settlements, the base for a Country Party could have been considerable.⁴¹

Moore says that the core of the Country Party was the ultra-Tories. Many of them, however, disagreed with the Tories because they were very interested in the passage of the Reform Act of 1832. The lesser gentry stood to gain parliamentary strength with the elimination of pocket boroughs held by the great landholding families. At that time, they were anti-Wellington because he opposed reforming parliament and he supported Catholic emancipation. The Country Party was also very bigoted in favor of the Anglican Church.

³⁸ D. C. Moore, The Politics of Deference, (New York: 1976), p. 197.

³⁹ Moore, "Corn Laws and High Farming," pp. 546, 549.

⁴⁰ Ibid., p. 549.

⁴¹ Ibid., p. 551.

Gash observes that after the redistribution of seats resulting from the Reform Act of 1832, there was a growing number of conservative gentry being elected from the rural counties, and by 1841 there were about sixty-nine such new M.P.s.⁴² However, in a letter to Russell in 1840 concerning projected election results, F. R. Parks claimed that there were as many as 323 county borough seats and that most of these were determined by rural not national issues.⁴³ Aydelotte calculates that provincial lawyers and gentry made up seventy-one percent of the Commons in the 1840s.⁴⁴ It is not likely that all lawyers and landowners from the counties voted in the Country Party, but such figures do indicate that the conservative provincials could be drawn from a very large group of M.P.s.

Although the Country Party remained throughout its history, as Moore puts it, "an attitude rather than an organization," it was visible enough for the Times and the Morning Herald to acknowledge it as a group within parliament.⁴⁵ If the Times analyzed the situation correctly, parliament was "town versus countryside and middle class

⁴² Gash, Reaction and Reconstruction, p. 135.

⁴³ Ibid., p. 208.

⁴⁴ Aydelotte, "Parties and Issues," pp. 101-02.

⁴⁵ Moore, "Other Face of Reform," p. 20.

versus aristocracy," with the Country Party representing the countryside. After the Reform Act of 1832, it became more powerful.⁴⁶

By the time the ecclesiastical court reforms began, therefore, there was a sizeable, if indistinct, bloc of votes which was protective of provincial interest, very pro-Anglican Church, and predisposed to be anti-ministerial when it suited. Because they were primarily Tories, the moderates from that party were unable to enact legislation.

The gentry was joined by other county members. The Edinburgh Review describes the following outside vested interest as being part of the constituency supporting the Country Party.

Bills were introduced [concerning ecclesiastical courts] . . . to which three successive Chancellors, and all the lay Peers, without exception, were pledged We are well aware of the power exercised by country proctors and attorneys. When their columns advance, or their lines deploy, we know well how powerful is their charge on even a thoroughly disciplined parliamentary phalanx The agency of country attorneys in influencing members of the House of Commons, through their constituents, is admitted to be all powerful.⁴⁷

In both parties, especially among Whigs, M.P.s were "manifestly divided on constitutional and religious is-

⁴⁶ Ibid.

⁴⁷ "Ecclesiastical Courts Bill," Edinburgh Review, vol. 80 (1843), pp. 486-87.

sues,"⁴⁸ the same two which were involved in the ecclesiastical court reform. Not only did the Country Party enjoy a large base of support, it was also motivated by an outside pressure group in the Anti-League. The Country Party seemed to have all the ingredients necessary to provide a strong presence in parliament: philosophical unity, a base of support, and support from outside pressure groups.

The historical background of the Country Party helps in identifying its members and following its activities during the period that the reforms took place. Since the party was "an attitude rather than an organization," it is somewhat difficult to determine the membership precisely. Certainly, Sibthorpe with his two benefices and large Lincolnshire estates qualified for membership, as did Lord Abinger, the Earl of Beauchamp, Lord Cumberland, Lord Ellenbough, Benjamin Escott, Cutlar Fergusson, Henry Goulburn, Robert Inglis, Richard Jenkind, Henry Knight, Richard Malin, Charles Newdegate, Sir Francis Powell, the Earl of St. Germain, Robert Scarlett, Charles Western, and Edmond Wodehouse, all of whom were gentry and all opposed church court reform.

The conservative lawyers are more difficult to find. The radical reformer Sir John Jervis often opposed eccle-

⁴⁸ Close, "Formation of the Two Party Alignment," p. 240.

siastical court reform in a way inconsistent with his general political stances, yet he was a lawyer from Chester.⁴⁹ Other radicals and liberal Whigs also took an anti-reform posture in relation to these reform debates. George Grenville, the Marquis Westmeath, was a staunch Whig who opposed reform because he had been able to defy the ecclesiastical courts as a result of his rank.⁵⁰ Sir George Strickland was an advocate for Dissenters, but he was a Yorkshire lawyer and a patron of seven livings. The Quaker -- Joseph Pease, John Wilkes, and George Pryme⁵¹ were all dissenters and energetic reformers, yet they too resisted reform, specifically the proposed establishment of a central probate court in London. They were also all country lawyers. Thomas Duncombe even presented petitions from Yorkshire opposing reform⁵² in much the same way as Lord Abinger⁵³ and Sibthorpe had done.

All of the above liberal lawyers, while philosophicaly in favor of reform, acted in a way opposite to their typical behavior when their own vested interests were

⁴⁹ Hansard, P. D., ser.3, vol. 64 (1843), pp. 312-13.

⁵⁰ Hansard, P. D., ser.3, vol. 25 (1834), p. 1057.

⁵¹ Hansard, P. D., ser.3, vol. 23 (1834), p. 1103.

⁵² Hansard, P. D., ser.3, vol. 31 (1836), pp. 324-30.

⁵³ Hansard, P. D., ser.3, vol. 29 (1835), p. 1105.

threatened. They all resisted any attempt to abolish the Peculiars and other lesser ecclesiastical courts because they stood to lose an enormous amount of non-contentious business if probate were moved to a London court. The gentry was equally opposed to reform because it would have lost a large source of patronage. This would have been especially critical for the lesser gentry who could possibly lose their only source of patronage.

Unlike the other interest groups in Parliament, the Country Party was not motivated by a philosophy; it was in the truest sense of the word a vested interest. It never suggested any reform or improvement of the ecclesiastical courts and, of course, never presented any legislation. The Country Party was entirely a negative force in the debates and in the voting. As a result, any bill presented by Whigs, Tories, radicals, or bishops had a considerable bloc of negative votes, no matter what was proposed.

Chapter Seven

WORKING OUT THE REFORM

A reader of the debates encounters a confusing combination of speakers for and against any bill. Almost every group was divided on each proposal. Nowhere was this more evident than in the debates over John Nicholl's bills in 1843 and 1844.

In this paper, the debates are analyzed to show how the conflicting groups acted against each other at every point of the discussion. These debates are not materially different from those which occurred before and after Nicholl's bills. They are given here as an example of how the debates ran throughout the thirty-year reform movement. Much of the detail of the discussions has been omitted in order to emphasize the characters who participated and the general reasoning for their support or opposition to the bills that Nicholl had presented.

There were two somewhat unusual features, however. First, Nicholl introduced a new idea in trying to expand the power and original jurisdiction of the diocesan courts. Second, there was more cooperation between the party-line Whigs and the radicals than was usual.

In February, 1843, Dr. Nicholl read a bill, "Modifications on the Recommendations of the Ecclesiastical Court Commission of 1832" on behalf of the government to reform the ecclesiastical courts. His bill generally followed the outline of Lushington's legislation of 1836 with several exceptions: spiritual and temporal jurisdictions were to be separated, and the latter would be heard no lower than the provincial court level (except for wills of under £300 which were to be heard in diocesan courts), and surrogate judges were to have a more restricted role. In addition, not only were Peculiar courts to be removed but simony, schism, heresy, blasphemy, perjury, incest, adultery, fornication, drunkenness, brawling, and defamation were all to be non-punishable and could result only in a censure by the court. (Such a bill would have indirectly removed brawling and defamation to the civil courts.)¹

The radical reformer Sir John Jervis and the very conservative Henry Goulburn then jointly proposed five amendments: that all criminal jurisdiction be abolished, that all Peculiar jurisdiction be abolished, that all wills under £300 be probated in London since they were generally the most poorly drafted, that provincial attorneys plead cases in London so that they would not be ruined, and that only copies of wills be sent to the registry in London.

¹ Hansard, P. D., ser.3, vol. 66 (1843), pp. 312-131.

They all were defeated.²

The bill was opposed by various groups. The Tories, Inglis and Goulburn, were joined by the radical Jervis in denouncing the abolition of the diocesan jurisdiction. The radicals Joseph Hume and William Christie with several other dissenters wanted the London court to be secular and expected to see a delineation of fees. The Whigs, Lord Russell, Joseph Stock, Dr. Elphinstone, and George Pechell generally agreed with Nicholl's version, although another Whig, Edward Protheroe, condemned the diocesan courts. (Colonel Sibthorpe provided comic relief and ended the debate with a rousing condemnation of the bill because it represented change.) Even with denunciations from all political factions the bill was read a first time.³

Liberals and conservatives worked against the second reading as well. Beckham Escott, a Tory, and Charles Buller, a Utilitarian radical, objected to the second reading because the circuit lawyers were out, and it appeared that the government was trying to have the bill passed in their absence (as well it might have been since lawyers on circuit were probably provincial attorneys who belonged to the Country Party). Nicholl was defended in his second

² Ibid.

³ Ibid., pp. 317-18.

reading of the bill by Henry G. R. Yorke, who sat on the other side of the House. Yorke retorted to Buller that the ideas contained in the bill had been around since 1812 and no more time was needed to "look them over," but the second reading was put off until March 19.⁴

On Saturday, March 11, an angry group of M.P.s had returned to London to vote against the bill. Sir James Graham, William Ferrand, Jervis, Buller, Escott, and Yorke all spoke against a second reading. Colonel Sibthorpe had returned "at great inconvenience" to oppose this and the Registration of Voters Bill." The government postponed the reading of the bill to April 10.⁵

In the meantime, petitions against the bill came in. By April 10, Inglis could boast eighty-two petitions against it. In the supercharged atmosphere of a House, which had just debated and passed the Voter Registration Bill, Nicholl rose for the second reading. He never read it. Inglis charged that the bill was not a reform but a wholesale destruction of the inferior courts. All the legal fees would be funneled into London. Meanwhile the poor might have to travel up to three hundred miles to probate wills since personal property was rarely under £300 (a gross exaggeration). The bill flew in the face of the

⁴ Hansard, P. D., ser.3, vol. 67 (1843), pp. 67, 351.

⁵ Ibid, pp. 707-08.

government's vow for "justice to be brought to everyman's front door." Jervis was less rhetorical in complaining that much non-contentious business was to be removed from local areas into London, and Colonel Sibthorpe, in his typically reserved manner, claimed "the bill was of so obnoxious a character as to spell ruin to thousands" and warned, "Don't move the courts to that greedy Doctors' Commons,"⁶ Actually, while lacking eloquence, his attack on the Doctors' Commons displayed a fairly common bias. Rev. Brotherton, part-time dissenting minister, agreed with Sibthorpe and moved to close debate. Grey asked the House's pleasure. Peel moved adjournment. A division found the group opposed to the bill voting against adjournment, but the government position won 136 to 51.⁷

When the House met again on April 28 to discuss the measure, both the government and opposition were much better organized. Liberals and reformers, Grosvenor, Graham, Edward Sugden and Collett, who was a well-known supporter of church reform, joined moderates Fitzroy, Strickland, and Elphinstone and conservatives Captain Gladstone, Escott, and Newdegate, who "had never voted against her majesty's government before," to speak against the bill. Only Peel

⁶ Ibid., p. 708.

⁷ Ibid.

spoke for the bill, simply pointing out that those who had opposed the bill were doing so for contrary reasons. However, the final vote was 186 to 104 in favor of the bill.⁸ Because of the heated debate, the bill was sent to a select committee where it was modified but never returned to the House that session.⁹

The debates of April 28 were more structured than those concerning previous legislation on ecclesiastical courts. The speakers were bipartisan and so was the voting. The fact that 290 M.P.s were present suggests that some whipping had taken place. Such partisan organization was not typical for this issue, and it demonstrates that the parties were beginning to take the votes on minor reform more seriously and that they were in an organizational position to do so.

Meanwhile, the Bishop of Exeter had decided to oppose the bill in the House of Lords, although it had not been formally presented. Ostensibly for the purpose of presenting a petition to prevent any debate on a bill concerning ecclesiastical matters until a majority of bishops were present in the House, Phillpotts began a denunciation of a Nicholl's bill. The Lord Chancellor and the Earl of Radnor tried to stop his speech, but Phillpotts, who was skilled

⁸ Ibid., 1031-47.

⁹ Hansard, P. D., ser.3, vol. 73 (1844), p. 1314.

at parliamentary gymnastics, succeeded in keeping the floor until he had made all his points. He finally withdrew his petition. No other bishops concurred with his position at the time.¹⁰ As it was, the bill never made it to the House of Lords anyway, because Peel had dropped it after the second reading even though he had been able to gain a majority vote.

In March, 1844, Lord Chancellor Lyndhurst introduced to the Lords what was essentially Nicholl's bill as modified the previous year by the select committee. The new items proposed to move all probate to the Court of Arches, eliminate the power of excommunication and de contumace capiendo, and remove effective jurisdiction over the laity by reducing the possible sentence to censure in the following cases: simony, schism, heresy, blasphemy, perjury, incest, adultery, fornication, drunkenness, brawling, lying, non-attendance, and defamation. Although most of these offenses had already been absorbed by the civil courts, the removal of brawling and defamation would have been an important change in the civil jurisdiction of the ecclesiastical courts.

At the second reading, when the debate really began, Lord Campbell asked several sarcastic questions about why

¹⁰ Hansard, P. D., ser.3, vol. 69 (1843), p. 666-68.

the government had tried to hide the fact that diocesan courts would still have broad jurisdictions. Lyndhurst replied only that it was necessary to keep diocesan courts for the bill to pass the other house.¹¹ Brougham stated that he had presented those reforms as one bill, then two bills, then six bills, then two again and finally as one in the General Registry Bill. He very pointedly reminded the House that each time his bills had been defeated by the same coalition of the practitioners of the courts and the landed gentry. Lyndhurst also spoke for the bill but bitterly attacked Cottenham for speaking against a similar bill which he had presented in 1836 and denounced Cottenham for playing party politics to the detriment of a much needed reform. Actually Cottenham had only spoken against the national registry of wills.

As the debates continued, the parties again split. Campbell and Cottenham opposed Brougham and Lyndhurst. The bishops split as well, with Blomfield supporting Campbell and Archbishop Tait taking the position of Brougham and Lyndhurst. The bill itself was little discussed. As was typical with discussions on church court bills, debates were often sidetracked to other issues. This time the diversion was whether the Peculiar and diocesan courts

¹¹ Hansard, P. D., ser.3, vol. 73 (1844), p. 1539.

should exist.¹²

Here we can see Whig and Tory support for a moderate reform bill. The types of arguments for and against the government bill were typical of what had been heard between 1832 and 1844. These arguments did not materially change until Palmerston became prime minister.

In the committee meeting of March 26, serious objections were raised because the government bill did not deal with the patronage of the courts and whether the the Doctors' Commons would enjoy a monopoly in the new central probate court to be established. The committee inserted a clause permitting suiters to plead on their own behalf as was permitted in civil courts. Lawyers who did not belong to the Doctors' Commons, however, were still not to plead in the provincial Prerogative Courts.¹³ On March 28, the report was presented and it was agreed to but not without some partisan debate. Brougham succeeded in having passed an amendment that set forth stiffer requirements for judges.

On April 1, Lyndhurst moved the third reading. The debate this time was centered around four Whigs. Cottenham and Blomfield were opposed by Brougham and Denman, again on the issue of the Peculiars. The bill passed the third

¹² Hansard, P. D., ser.3, vol. 72 (1844), p. 1312-59.

¹³ Ibid., pp. 1538-43.

reading and was sent to the Commons.¹⁴

Nicholl presented his bill with several new provisions: that the Peculiar courts be abolished, that diocesan courts be reformed, that stricter qualifications be provided for judges, that new diocesan courts be established at Ripon and Manchester, that archbishops' courts be retained as courts of appeal, and that trial by jury be introduced. A table of fees was set up and all sinecures were to be abolished. It was to be immediately criticized by the Whigs Grey, Russell, Grosvenor, Dencombe, and Watson and by the Tories Inglis and Graham. All objected to the diocesan courts.¹⁵

Peel then entered the debate saying that he preferred the bill presented the previous year but that he felt the present one had a better chance of passing. He then noted that Grey had ably spoken against the bill in both forms for precisely the opposite reasons. He continued by saying that although Grey had just defended the former bill in favor of the one currently on the floor, he doubted that he could count on any more votes for the measure from that side of the House, even if the government were to revive

¹⁴ Ibid., pp. 1684-85.

¹⁵ Hansard, P. D., ser.3, vol. 74 (1844), pp. 152-55.

the bill so eloquently supported by Grey that very night.¹⁶

Peel had hit upon three of the most serious problems during his speech. First, the Country Party, while saying nothing, had voted against the bill and every useful amendment. Second, the two major parties had split, but there had been more defections from his party than from the Whigs, and third, there was a bloc of partisan politicians who had opposed the bill only because it was Tory. After Peel had finished speaking, the bill was read a second time on a division of 158 to 89 and sent to committee.¹⁷

The committee met May 31. This time its opponents were better organized. Nicholl decided that it was useless to persist and said that he would not continue with the bill, although the government had succeeded in five divisions. The committee adjourned and was never reconvened.¹⁸

Nicholl's bills had failed, as had all the omnibus bills. Under the strain of religious prejudice and vested interests, all those weaknesses which have been explained earlier appeared: the party presenting the bill split and the opposition party held fast, the bishops split, the radicals sided with whichever party opposed the lower courts, and the Country Party voted against any measures

¹⁶ Ibid., pp. 187-88.

¹⁷ Ibid., pp. 184-92.

¹⁸ Hansard, P. D., ser.3, vol. 75 (1844), pp. 113-32.

which threatened their patronage and testamentary business.

In February, 1845, Grey asked if the government were going to present a bill for the regulation of the ecclesiastical courts. Graham, Secretary of State for Home Affairs, rather tartly replied that he did not think any reform bill concerning the ecclesiastical courts would be acceptable or satisfactory, but that Mr. Grey might do so if he chose.¹⁹ In March, Lord Campbell asked a similar question of the Lord Chancellor. He, too, was invited to write his own bill if he wished.²⁰ Neither chose to do so.

Nicholl's bills are presented here because they demonstrate the idea that party unity and organization were insufficient to keep debates along wholly partisan lines. It is obvious from the debates that the splinter groups and vested interests refused to cooperate with the major parties to which they had been aligned. Only in the case of the radicals did a splinter group act with its party, and this pattern of cooperation had become increasingly true after 1840.

In March, 1855, Palmerston became prime minister and he ended the undisciplined party behavior that was typical

¹⁹ Ibid., pp. 77, 169.

²⁰ Hansard, P. D., ser.3, vol. 78 (1845), pp. 260-63.

of the ecclesiastical court reform movement from the 1830s to the mid 1850s and was demonstrated by the Nicholl debates. When his government took office, it successfully presented and passed a bill abolishing ecclesiastical court jurisdiction in cases of defamation and slander. After rejecting Hadfield's demand for comprehensive legislation in February, the government determined on piecemeal reform. Except for minor objections from Phillpotts,²¹ "An Act for Abolishing the Jurisdiction of the Ecclesiastical Courts of England and Wales in Suits for Defamation," moved through both houses without debate and was passed.²² While Palmerston had been the Home Secretary in the former ministry, he had become so interested in law reform that it is not surprising that he began his legislative program with such a bill.²³

Beginning in 1856, the radicals Hadfield and Collier presented a bill moving testamentary jurisdiction to the Superior Courts of Common Law and the county courts.²⁴ Collier, however, dropped his bill in favor of the government's Wills and Administration Bill which was read only

²¹ Hansard, P. D., ser.3, vol. 137 (1855), p. 1373.

²² 18 & 19 Vict. c.41.

²³ Ridley, Lord Palmerston (New York: 1971), pp. 506-07.

²⁴ Hansard, P. D., ser.3, vol. 140 (1856), pp. 384-98.

once.²⁵ Later, Hadfield asked the government why it had not brought the Wills and Administration Bill and the Divorce and Matrimonial Causes Bill from the House of Lords. George Grey, who engineered much of the strategy for Palmerston in the Commons, replied that the government had decided to withdraw the bills because they could not be properly dealt with that session.²⁶ It is more likely that the government could not muster enough support to counter Gladstone and the other high churchmen at that time.

Palmerston's government continued to present bills abolishing the various civil jurisdictions of the ecclesiastical courts in 1857. It had adopted a new tactic concerning the reform of the church's tribunals. Rather than trying to reform the administration of church court jurisdiction, the government's bills merely transferred their civil causes to civil courts. Instead of dealing with the ecclesiastical courts directly, George Grey reformed each individual jurisdiction separately and then assigned it to a secular court without even mentioning ecclesiastical jurisdiction.

Marriage had already become part of contract law, and civil courts had been handling testamentary causes in real property for some time. The jurisdiction of the ecclesias-

²⁵ Hansard, P. D., ser.3, vol. 141 (1856), pp. 1227.

²⁶ Hansard, P. D., ser.3, vol. 143 (1856), pp. 679-81.

tical courts over marriage was virtually abolished by the Matrimonial Causes Act 1857.²⁷ This act provided that "all Jurisdiction now exercisable . . . in respect of Divorces as mensa et thoro, Suits of Restitution of Conjugal Rights, and in all Causes, Suits, and Matters Matrimonial shall cease . . . except so far as relates to granting Marriage Licenses which may be granted."²⁸ It also provided for a secular Court for Divorce and Matrimonial Causes (later merged with the Probate and Admiralty Courts in the Judicature Act of 1873.)²⁹

In the actual debates on the divorce bill, little mention was made of the status of the ecclesiastical courts. The "liberalization of divorce" was the main source of objection by the church and high churchmen. Since the bill itself is not germane to the topic of the paper, the debates will not be discussed here. It is important to note, however, that the government had made a compromise in favor of the church's position placating the prelates who were afraid that the secular courts would ignore the precedents established by the church courts: Section 22 of the act states that "the court shall proceed

²⁷ 20 & 21 Vict. c.85.

²⁸ Ibid., s.2.

²⁹ 36 & 37 Vict. c.66.

and act and give relief on principles and rules which in the opinion of the said court shall be nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief."³⁰

The government's Probates and Letters of Administration Act was a masterpiece of compromise and tact. Surprisingly, the bishops put up relatively little resistance to losing so large a source of revenue. Since most of that revenue never made it into diocesan coffers, perhaps it was enough that the bill provided that officers of the courts affected by the act would be compensated. The lord chancellor introduced the bill to the House of Lords, and debate began at the second reading in May, 1857. His bill was a composite of the more than seventeen bills which had been presented on the subject. It provided that the judge of the Prerogative Court be first judge of the new Probate Court, that viva voce evidence be used, that trial by jury be permitted unless the parties decided otherwise, that the Peculiar and Royal Peculiar courts be abolished (they were all but deferred by this time), that wills of less than £3500 be handled by County Court judges, that districts be established irrespective of diocesan boundaries, that registrars under the Court of Probate handle non-contentious wills of less than £1500, that a central registry in London

³⁰ Holdsworth, English Law, Vol. XII, p. 686.

keep copies of all wills while the originals remain in district registries, and that only one probate be necessary for a will.³¹

Archibald Tait and the bishop of London requested only that remuneration be provided for those court officers who were still employed by the church-registrars, etc. Campbell warned Bethell, who had earlier objected to diminishing the jurisdiction of the diocesan courts, that the government could have put the entire ecclesiastical court system under the court of Chancery if they chose.³² That boast of Campbell's seems to indicate that the ministry was sure of support in both Houses for this bill. Resistance in the Commons was bipartisan but weak and came from the Liberals Collier and Henley, and Conservatives Richard Malin, Lord Stanhope, and Philip Henry Mahon.³³ It was apparent that two things had occurred. First, Palmerston had succeeded in disciplining his party so that it was obvious to the opposition that the government would succeed in the bill, and second, the old vested interests were no longer capable of defying party unity. On August 25, 1857, royal assent to "an Act to amend the Law relating to Pro-

³¹ Hansard, P. D., ser.3, vol. 145 (1857), pp. 386-94.

³² Ibid., p. 95.

³³ Hansard, P. D., ser.3, vol. 146 (1857), pp. 454-57.

bates and Letters of Administration in England,"³⁴ resolved the most controversial issue in the reform of the civil jurisdiction of the ecclesiastical courts. As a consequence of the passage of this and the Marriage Act of 1857 in the same month, the Doctors' Commons was abolished.³⁵

In 1858, the remaining competency left to the ecclesiastical courts relating to marriage was similarly abolished. Without debate a bill was passed that provided for a secular court of divorce and matrimonial causes which would be competent in questions of "legitimacy, validity of marriage and the right to be deemed a natural born citizen."³⁶ Interestingly, the ecclesiastical courts were not mentioned and their authority was not technically abolished.³⁷

The last important civil jurisdiction left to the ecclesiastical courts was brawling. The government's bill of 1858 had been written by Dr. Phillimore and was first debated only after it had passed three readings in the Commons and one reading in the House of Lords. Lord Chancellor Cranworth moved the reading of the bill, and

³⁴ 20 & 21 Vict. c.77.

³⁵ 20 & 21 Vict. c.85.

³⁶ 20 & 25 Vict. c.93.

³⁷ F. Makower, The Constitutional History and Constitution of the Church of England (New York: Burt Franklin, 1972), p. 452.

Brougham seconded it. Henry Phillpotts bitterly opposed it. Lord Chancellor Cranworth, sensing perhaps, that he was no polemical match for Phillpotts, quickly moved that the House consider the bill as a committee of the whole.³⁸ Cranworth assured the prelates that the bill adequately provided for punishment of any "indecent behavior during Divine Service,"³⁹ and the bill was passed unamended.⁴⁰

The strategy of Palmerston and George Grey had been remarkably successful given the enormous difficulties experienced by all ministries from 1832. Multifaceted bills had been replaced by single item ones, private bills on ecclesiastical courts were strongly discouraged, and party discipline was maintained.

Lord Penzance in 1876 killed all hope of reviving any civil jurisdiction in the ecclesiastical courts. In Philimore v. Machon⁴¹ he ruled as follows: "It cannot, I think, be doubted that a recurrence to the punishment of the laity for the good of their souls by ecclesiastical courts, would not be in harmony with modern ideas, or the position which ecclesiastical authority now occupies in the

³⁸ Hansard, P. D., ser.3, vol. 158 (1860), p. 1074-80.

³⁹ Hansard, P. D., ser.3, vol. 179 (1865), p. 275.

⁴⁰ 23 & 24 Vict. c.32.

⁴¹ I. P. D., pp. 481-85.

country."⁴² "Where there is a temporal remedy for whatever crime -- unless the statute specifically established ecclesiastical jurisdiction, it must be assumed that the temporal courts have jurisdiction."⁴³ In Bowman v. Secular Society (1917), however, it was ruled that ecclesiastical law did not make up a legitimate body of English common law.⁴⁴

By the end of the nineteenth century (1895), as Robert Phillimore's son William said, the only civil jurisdiction of the ecclesiastical courts over laity related to "fabric and ornaments of the church, the churchyard and church wardens."⁴⁵ Technically, perjury could have been an ecclesiastical offense, but it was always taken as a secular matter because of the Phillimore v. Machon decision.⁴⁶

The 1883 Ecclesiastical Courts Commission Report describes a vastly different system from the one delineated in the report of 1832. First, those who served on the commission were not nearly as well known, and the findings of the commission were not so revered. Second, unlike the 1832 report, the 1883 commissioners were not unanimous in

⁴² Ibid., p. 485.

⁴³ Ibid., p. 481.

⁴⁴ 1917 A. C., p. 406.

⁴⁵ Phillimore, Ecclesiastical Law, p. 1085.

⁴⁶ House of Commons Sessional Papers, Report . . . to Inquire into the Constitution and Workings of the Ecclesiastical Courts, 1883 (vol. 24), p. lx.

their approval of the report's recommendation. Of the twenty-three commissioners, fourteen filed reservations to the report.⁴⁷ Third, by the time of the report there was no civil jurisdiction left to the ecclesiastical courts. Fourth, there was no attempt to explain away the criticisms of the courts. Instead many of the faults were freely admitted, and recommendations were made accordingly. Evidence was much more voluminous, but the scope of the witnesses' backgrounds was very narrow. Most of the witnesses were churchmen although a few were lawyers and M.P.s. Since, however, the ecclesiastical courts only heard cases concerning church policy, the narrowness of perspective is understandable.

The report gave what it considered was an exhaustive list of acts which affected the civil jurisdiction of the ecclesiastical courts, arranging them by topic. According to the report, "From the date of the Restoration to the year 1834 no statute was passed which in any important point affected the character of the ecclesiastical courts," except the bill of 1813, which substituted the writ de contumaci capiendo for the writ de excommunicato capiendo for non-appearance or contempt.⁴⁸ The report also stipu-

⁴⁷ Ibid., pp. i-xxxii.

⁴⁸ 53 Geo. III c.127.

lated that excommunication was to have no other penalty except a six month prison sentence. After 1834 there had been many bills of substance, reported the committee. In the matter of discipline, the Church Discipline Act of 1840⁴⁹ and the Public Worship Regulation Act of 1874⁵⁰ were discussed in great detail since in 1883 these two acts and the legal decisions which had flowed from them made up the body of the courts' cognizance. The appellate jurisdiction had been altered by an act which abolished the High Court of Delegates and transferred appeal to Privy Council.⁵¹ Another act had transferred that appeal to the Judicial Committee of the Privy Council.⁵² Four bills had changed procedure somewhat, but not until the Judicature Act of 1873 had any substantial procedural change been made. This act had been effectively repealed by the Appellate Jurisdiction Act of 1876.⁵³ Other acts affecting procedure permitted oral testimony,⁵⁴ gave the courts the power of

⁴⁹ Reports . . . Ecclesiastical Courts, 1883, pp. 364-66.

⁵⁰ Ibid., pp. 366-70.

⁵¹ 2 & 3 Will. IV c.92.

⁵² 3 & 4 Will. IV c.41.

⁵³ 6 & 7 Vict. c.38.

⁵⁴ 17 & 18 Vict. c.47.

sequestration,⁵⁵ gave judges the power to discharge a person in custody for contempt,⁵⁶ and gave the right to all solicitors to practice in the ecclesiastical courts.⁵⁷ The report alluded to three unidentified acts which standardized the rights of bishops in their own courts. Civil causes had been transferred to the civil courts in eight acts.⁵⁸

⁵⁵ 2 & 3 Will. IV c.93.

⁵⁶ 9 & 10 Vict. c.93.

⁵⁷ 39 & 40 Vict. c.66

⁵⁸ Reports . . . Ecclesiastical Courts, 1883, p. 511
ff.

Chapter Eight

REFORM OF THE ECCLESIASTICAL JURISDICTION

The Liberals had reformed the civil jurisdiction of the ecclesiastical courts through abolition. By the time Palmerston had resigned a second time, virtually all the authority which the sacred tribunals had over the laity had been transferred to secular courts. Ecclesiastical jurisdiction, which was of much greater interest to the prelates, had to be reformed in a different way. It was necessary to have legislation which amended the procedures of the courts and the law concerning the rights and responsibilities of the clergy. Once such legislation was passed, the judges who handed down the decisions based on the new statutes began building up a catalogue of precedents which adjusted the actual jurisdiction of the courts and functioning of the acts.

The final two chapters take a look at how the reform of the ecclesiastical jurisdiction of the church's courts took place. First, there is a brief examination of how the acts were passed and what they said. Then, in the following chapter, there is a sampling of cases heard before the five most important jurists in the ecclesiastical legal

system during the nineteenth century.

Three major bills were passed materially affecting the jurisdiction and procedure in the courts: the Pluralities Act of 1838, the Church Discipline Act of 1840, and the Public Worship Regulation Act of 1870. The first two were passed because of pressure put on parliament from the inside by the bishops and from the outside by increased publicity concerning misuse of church funds brought about by such publications as the Extraordinary Black Book of 1831 and by resistance to church rates. (The Whigs had presented an unsuccessful bill in 1834 to abolish them.) The third act was passed as a result of public demanding that the Ritualists be controlled.

The first attempt to pass a Pluralities Bill took place in 1836. The Home Secretary, Lord John Russell, introduced the bill to the Commons¹ after Brougham had easily pushed it through the House of Lords.² The bill, much shorter than the omnibus bills mentioned earlier, provided that bishops should have the right to relocate the boundaries of parishes without a vestry's consent in the event that population changes warranted it. It permitted plural holdings of benefices for clergy if the benefices provided less than £50 annual income. It also allowed

¹ Hansard, P. D., ser.3, vol. 31 (1836), p. 908.

² Hansard, P. D., ser.3, vol. 28 (1835), p. 1055.

bishops to combine certain benefices for more efficient administration. The bill included qualifications, especially an education requirement, for holders of benefices with cure of souls. It also established a jury system whereby clergymen were to sit in judgment in certain discipline cases. Finally, it gave some mechanisms whereby the bishops could enforce such offenses as non-residence and neglect of duty. It was dubbed a "bishop's bill" by the radicals³ because the bishops were given a great deal of discretion in handling abuses. Russell emphasized that there was some popular public pressure and that he fully expected the bill to pass. Opposition arose not from the Tories but from the radical wing of his own party.

For the three times that it was presented, the radical opposition remained consistent. Warburton in 1836 objected to clauses which permitted bishops to change boundaries of parishes. He felt that the vestries should control the makeup of their parishes. Moreover, it still permitted pluralities and non-residence, and he could see no reason for perpetuating an old abuse with a new statute. Joseph Hume repeated the complaint when the bill was reintroduced in 1837.⁴ With the votes of sympathetic Tories, Russell

³ Hansard, P. D., ser.3, vol. 35 (1836), pp. 1048-51.

⁴ Hansard, P. D., ser.3, vol. 36 (1837), pp. 48-52.

was successful in having the bill pass the second reading both times, but the Radical opposition led Melbourne's government to drop it,⁵ probably because at that time Melbourne could not afford to antagonize a bloc of votes he desperately needed to maintain a majority.

The third attempt in 1838 was managed differently. Russell, in presenting the same bill for the first reading, made a long presentation pointing out that the bill could save £120,000 a year and that many benefices, especially in Wales and Yorkshire, were too small to support a person adequately. "If one wants a clergyman with a university degree one cannot expect him to live on £10 a year, and it is very much to our advantage . . . to have an educated clergy."⁶ The bill was then sent to a Parliamentary committee⁷ and reappeared in the House of Lords little changed. There, several of the bishops moved some compromise amendments which were not debated and quickly passed.⁸ The bill was reintroduced into the House of Commons where Warburton commented that the bishops had made a great number of useful improvements, especially ones eliminating

⁵ Ibid; Hansard, P. D., ser.3, vol. 35 (1836), pp. 1048-51.

⁶ Hansard, P. D., ser.3, vol. 40 (1838), p. 722.

⁷ Hansard, P. D., ser.3, vol. 43 (1838), p. 597.

⁸ Hansard, P. D., ser.3, vol. 44 (1838), p. 10.

non-residence and establishing a more judicial approach to enforce the provisions of the act. The amendments spelled out in greater detail the offenses which merited specific punishments by the consistory courts. The bishops also removed the jury of clergymen. Hume, however, continued his lengthy denunciations of pluralities.⁹ At the second reading, the Commons quickly agreed to the changes made by the House of Lords and the bill was finally passed.¹⁰

The Pluralities Act of 1838 survived well, and parliament amended it only twice in the nineteenth century. The Discipline of Clergy Act of 1864 dealt more specifically with certain classifications of clerks, and the Pluralities Act Amendment Act, 1885,¹¹ changed some regulations concerning curates.¹² In matters of procedure, the act established specific, well-defined regulations for suspensions, monitions,¹³ and sequestrations.¹⁴ If a clerk were determined by his bishop to be guilty of non-residence, he was to be cited to appear before his chancellor for a hearing.

⁹ Ibid., p. 845.

¹⁰ Ibid., p. 1015.

¹¹ 48 & 49 Vict. c.59 s.31.

¹² Phillimore, Ecclesiastical Law, p. 1003.

¹³ i.e., written orders from the bishop to the defendant to desist.

¹⁴ i.e., complete removal of benefices.

If convicted, the clerk could be suspended for a year; if convicted for a second time, the judge could suspend the clerk for any given period of time. If the guilty party failed to obey his ordinary in either offense, the bishops could sequester all profits from the clerk's benefices. The third offense caused deprivation¹⁵ and probable sequestration. The Act was very specific as to how the monitions of sequestrations and the actual sequestrations were to be handled.¹⁶ There was an elaborate due process and appeal procedure to prevent capricious judgments by the prelates. Rules were laid down as to how incumbents were to reinstate themselves¹⁷ and what legal procedures to be followed by the bishop if the incumbent left within a year of his return. In every case monitions needed to be issued, and cited clerks were given from several weeks to six months to respond before disciplinary action could be taken. The archbishop had to report most disciplinary acts to the privy council.¹⁸

The Discipline of Clergy Act of 1840 was designed to deal with the clergy in broader terms than the Pluralities

¹⁵ i.e., an order to leave a benefice for a specified time; 48 & 49 Vict. c.59, s.31.

¹⁶ Ibid., ss.5, 54.

¹⁷ Ibid., s.55.

¹⁸ Ibid., s.56.

Act of 1838. It was the first act since 1485¹⁹ to deal with discipline of clergy in matters of morality.²⁰ The act also touches doctrinal cases, simony, breaches of official duty, and ritual.²¹ The bill was first introduced in July, 1838, and it provided that all cases of discipline of clergy be tried in the Court of Arches, that clergymen be permitted to speak on their own behalf, that spoken evidence be permitted, and that the inferior ecclesiastical courts up to the provincial level be abolished. It stated that all the civil jurisdictions of the ecclesiastical courts were to be absorbed by the civil courts.²²

The bishop of Exeter was violently opposed to the measure, claiming that the bill put an end to the authority of bishops by removing the jurisdiction of discipline of clergy from all ecclesiastical courts except the Court of Arches. The bill was, he claimed, opposed to the Bible and English common law, especially since it prohibited bishops from pronouncing sentence and because it required that the bishop of the cited clergyman appear as a witness to testify in the suit as an unknowing third party. It was, he

¹⁹ 1 Hen. VII c.4.

²⁰ Phillimore, Ecclesiastical Law, p. 1012.

²¹ 3 & 4 Vict. c.3, s.86.

²² Bill "More Effectually . . . Enforcing . . . Church Discipline," Sessional Papers (248) 1838 II. 373.

said, worse than the 1836 bill which had required clergymen to participate in juries at the Consistory Court.

Brougham defended the bill which Cottenham had introduced because it limited or abolished many ecclesiastical courts and provided for oral testimony; Brougham pointed out that John Nicholl and Herbert Jenner-Fust had been on an 1836 commission which had recommended many provisions of the bill. (Nicholl and Jenner-Fust had endorsed the commission report, although Nicholl later wrote a bill opposing the views expressed in the commission report. Since Lushington had written the report, Nicholl inadvertantly found himself opposing Lushington.)

It might be considered odd that Brougham supported the 1838 bill because it opposed his pet project of providing local justice -- a point indirectly raised by the bishop of Exeter. It is necessary to remember, however, that ever since the Real Property Commission Report was published, Brougham absolutely opposed the existence of lower ecclesiastical courts, especially the Peculiars, because of their jurisdiction in testamentary causes. It is apparent that he preferred to have inconvenienced the clergy and sent them to London than to have continued the existence of the Peculiars. The bishop of London, Blomfield, not surprisingly supported it. So did the archbishop of Canterbury. Several speakers suggested that the bill be tabled ,

and it was.²³

In 1839, the bill -- very little modified -- was reintroduced by the lord chancellor into the House of Lords. The debates are illustrative of the problems which beset the bills that revised the ecclesiastical jurisdiction. The Lord Chancellor presented an elaborate explanation as to why the passage of the bill was so important to the government: first, because it repealed a statute of Henry VIII which forbade the clergy from entering into their own defense and, second, because it was too difficult for litigants to know where to begin suits since 300 of the lower ecclesiastical courts had such varying jurisdictions. Brougham presented complaints that the government viewed Consistory Courts as too inefficient and that a suit could go on for five years and cost over £1500. He also argued that most cases were appealed to the Court of Arches anyway; actually this was very much an overstatement. Cottenham and Archbishop Howley both said that the introduction of viva voce was essential to reasonable court procedure.²⁴ The bill passed and was sent to committee. The committee so heavily amended the bill by further limiting the role of the bishops in cases involving discipline of

²³ Hansard, P. D., ser.3, vol. 43 (1838), pp. 103-109.

²⁴ Hansard, P. D., ser.3, vol. 47 (1838), pp. 1029, 1306-10.

clergy and by reintroducing the Peculiars that there was considerable debate at the third reading, especially from conservative churchmen like Henry Phillpotts. Lord Chancellor Cottenham disclaimed any responsibility for the bill. It passed the third reading with only thirty-three lords present to vote.²⁵ The bill did not get past the first reading in the Commons. Even Russell, who stood in favor of adoption, complained about the great number of amendments.²⁶

Several things were occurring at the same time during the debate. First, the government desperately wanted this bill to pass because of continuing pressure from the outside. Second, moderate prelates like Howley and Blomfield also saw the need for the passage of such a bill for their own reasons -- a desire to amend antequated procedures and better regulations for controlling their clergy. Third, the bill was obviously a compromise position by the government. When the vested interests of conservative clergy and Country Party were permitted to work on the bill, the moderate point of view was lost. Fourth, the government, represented by Russell and Cottenham, was unwilling to pass any bill except the one it presented. All this shows that

²⁵ Hansard, P. D., ser.3, vol. 49 (1839) pp. 465-69.

²⁶ Hansard, P. D., ser.3, vol. 50 (1839), p. 262.

the ecclesiastical jurisdiction bills suffered from the the same problems which the civil bills had: the power of vested interests in supporting the Peculiars and the lack of party unity. It also demonstrates the lack of unity found among the prelates before the Gorham trials.

Melbourne's government made one last effort to pass a discipline of clergy bill in 1840. It obviously meant to have a statute passed dealing with the discipline of clergy because it introduced and had passed without discussion or amendment the "Act for Better Enforcing Church Discipline."²⁷ The 1840 act dealt with the criminal ecclesiastical causes for which clerks could be tried in ecclesiastical courts,²⁸ thereby eliminating old statutes and ending attempts to extend ecclesiastical jurisdiction by the Dean of Arches. It did not deny the bishop's power over his clergy in any way.²⁹ In fact, the act increased episcopal authority by bringing the Peculiar Courts within the jurisdiction of the bishops in whose dioceses they were found.³⁰ The independence of the Peculiars had been a sore spot with the bishops for centuries. In addition, suits were to be handled with the same procedure common to the

²⁷ 3 & 4 Vict. c.86.

²⁸ Ibid., s.23.

²⁹ Ibid., s.25.

³⁰ Ibid., s.22.

civil courts³¹ so that the form of those trials tended to be more highly structured than that of earlier ones. Two poorly worded sections caused some difficulty, however. Section two inadvertantly included some laymen by bringing offenses concerning the administration of the sacraments under the act. This oversight was not remedied until 1868.³² Section twenty, concerning time limitations after which certain offenses could not be tried, took six court decisions in appeal to the Judicial Committee of the Privy Council to clarify. In many respects, the act made many demands on the personal life of clerks. Prima facie evidence of wrong doing presented to a bishop immediately required that the prelate form a commission of inquiry.³³ Causing a "scandal or evil report" was an offense in the case of a clerk, and the machinery of the act was to begin moving "for the sake of purging the church from such a scandal." Conviction could incur the penalties permitted for contumacy and contempt of court³⁴ (excommunication, sequestration, and suspension from position). Suspension from pension was added by the Incumbents' Resignation Act,

³¹ Ibid., s.19.

³² 31 & 32 Vict. c.109; Holdsworth, English Law, Vol. XII, p. 691.

³³ Ibid.

³⁴ Phillimore, Ecclesiastical Law, p. 1022.

1871.³⁵ The Church Discipline Act, however, lacked one proposed reform which existed in the 1838 bill: the right of clerics to be examined in court in their own defense. Robert Phillimore, however, permitted the clerics to speak on their own behalf.³⁶ Later, the Judicial Committee of the Privy Council permitted an accused clerk to be examined in the well-known Martin v. Mackonochie case.³⁷

The section on time limits does not seem to have been worked out especially well because many early court decisions were overturned. Phillimore claimed that it gave rise to "much costly litigation and toil to interpret" because of certain ambiguous sections of the act on time limits but was "pretty well construed and expounded by judicial decision." He went on to say, however, that it "had been worked by the ecclesiastical officials as a fairly satisfactory and efficient piece of machinery."³⁸

The provisions of the Church Discipline Act were not materially changed by statute until the passage of the Public Worship Regulation Act of 1874. There were, however, many Parliamentary attempts to amend the procedures and

³⁵ 33 & 36 Vict. c.44; and Ibid., p. 1024.

³⁶ Bishop of Norwich v. Pearse, L. R., 2 Adm. & Ecc., 281 overturned Burder v. O'Neill, 9 Jur. N. S., 1109.

³⁷ L. R. 3 P. C., 52.

³⁸ Phillimore, Ecclesiastical Law, p. 1012.

ecclesiastical jurisdiction of the spiritual courts in other ways during the intervening time.

The first came in 1860 when Lord Ebury tried to stem what he considered a large number (sixteen) of appeals resulting from the Church Discipline Act of 1840.³⁹ He claimed that the appeals were the result of incompetent judges, and he presented a bill to improve the qualifications of judges required by the 1840 legislation.⁴⁰ This bill was dropped. Palmerston's government seemed to lack the interest in legal reform that his first ministry had shown. For the next five years, M.P.s H. Seymore and F. S. Powell and the Marquis of Salisbury repeatedly asked about government-sponsored bills for the reform of the ecclesiastical courts, especially the poor judges in the lower courts and the badly run registries. Each time George Grey gave the same answer: next session.⁴¹ Ebury had also badgered for a revision of the Prayer Book, and in 1865, the "Clerical Subscription Act" was passed. The amendments, however, did not include revisions in the rubrics which had been

³⁹ Crowther, Church Embattled, p. 20.

⁴⁰ Hansard, P. D., vol. 160 (1860), p. 52; vol. 58 (1860), p. 846.

⁴¹ Hansard, P. D., vol. 165 (1862), p. 374, 430; vol. 169 (1863), p. 1066; vol. 174 (1863), p. 1299; vol. 173 (1864), p. 1784.

causing legal difficulties.⁴²

Because neither Derby, Disraeli, nor Gladstone seemed interested in reforming the ecclesiastical courts at this time, it is not surprising that the Earl of Shaftesbury, a well-known church reformer, tried to effect changes on his own. Shaftesbury's first bill in 1867 was written with some help or at least encouragement from Lushington.⁴³ It proposed more rigid requirements for judges and revised salary scales for court officials. Lushington himself was displeased with the Church Discipline Act and claimed that the "confusions created" by it "have no limit."⁴⁴ Archbishop Tait also presented a reform bill in the same year. It failed because it called for increasing the number of bishops and reactivating some deaneries along with amendments to the 1840 act.⁴⁵ In 1868 and 1869, both Shaftesbury and Tait presented their bills and again both failed.

In 1869, Shaftesbury tried once more with an entirely new bill based on suggestions from Blomfield instead of using Lushington's ideas. Although this bill did not try to abolish any courts, it made the following proposals: that procedures be streamlined especially in the examina-

⁴² Crowther, Church Embattled, p. 146.

⁴³ Hansard, P. D., vol. 189 (1867), p. 155.

⁴⁴ Ibid.

⁴⁵ Crowther, Church Embattled, p. 164.

tion of witnesses by using direct and cross examination, that there be one supreme judge for the two provincial courts, that rules be stricter for appointing diocesan judges, that juries be used in certain causes, that all solicitors be allowed to act as proctors, that the clergy retain all their civil legal rights in ecclesiastical proceedings, and that there be better kept registries.⁴⁶ The House of Lords did not act on either bill at that time, but sent both to a Select Committee on which sat the archbishops of Canterbury and York, the bishops of Oxford, Ripon, Gloucester, and the lords Shaftesbury, Portsmouth, Carnarvon, Beauchamp, and Halifax. The report was worked into a bill presented in 1870, but the committee members did not want to present it because their chairman, Archbishop Tait, was ill. By the time he was well enough to make the presentation, it was too late in the session to be acted upon.⁴⁷

In 1871, Shaftesbury again read his bill, but the government had presented its own bill, the Ecclesiastical Procedure and Registry Bill. The two bills were again remanded to a committee,⁴⁸ and neither was brought before

⁴⁶ Hansard, P. D., vol. 195 (1869), p. 803.

⁴⁷ Ibid., p. 810.

⁴⁸ Hansard, P. D., vol. 209 (1871), pp. 188-213.

Parliament again. In 1872, the government's bill of 1871 easily passed the House of Lords with some modified provisions about registries, presumably because of support from the bishops and Sir William Page, the Lord Chancellor, but lost in the Commons because of an unusual alliance. The bill should have won the Liberal government's support because much of it was from the Liberals' own bill of 1871. However, both Gladstone and Goldney spoke strongly against it and a coalition of High churchmen from both sides of the aisle joined with radical liberals to defeat the measure. The high churchmen opposed the bill because they felt that it weakened the authority of the bishops in their own courts by making the Court of Arches a court of first instance. The radicals felt that it enhanced the powers of the ecclesiastical courts to the disadvantage of the county courts.⁴⁹

Ironically, Shaftesbury was unable to obtain ecclesiastical legal reform while the Liberal party was in power, but, when the Conservatives gained control, a reform bill -- not Shaftesbury's -- was passed in four months. There were probably several reasons. First, Shaftesbury's bills were not government-sponsored bills. Second, Shaftesbury was an evangelical, a theological position which offended many Anglicans on both sides of the aisle. Third, the new

⁴⁹ Ibid., p. 188-233.

bill dealt specifically with the Ritualist controversy. In April, 1874, a select committee was set up to examine the problems of patronage, simony, and exchange of benefices in the Church of England. Bishop Peterfore, who made the motion requesting that the committee be established, delivered a long speech which never mentioned the controversy raging about the Ritualists.⁵⁰ The Select Committee Report, which drew heavily upon a report of the Lower House of Convocation, 1868, concerned itself almost entirely with the problem of the Ritualists. Shaftesbury, a low churchman, heartily endorsed the three major tenets of those reports: that all novelties of ornament require a faculty from the bishop, that all details of public worship be overseen by the courts "to prevent alterations as a result of public clamour or a bishop's whim," and that Convocation be permitted to treat ritual matters (as had been encouraged by Gladstone's ministry).⁵¹ Several conservative bishops complained bitterly about the fact that the bill too easily allowed appeals to be made from bishops' courts to the Judicial Committee. They also objected to provisions not allowing convocation to have authority over practices of worship. Finally, they thought that it was intol-

⁵⁰ Hansard, P. D., vol. 218 (1874), p. 1201.

⁵¹ Hansard, P. D., vol. 219 (1874), pp. 919-925, 940-952; vol. 220 (1874), p. 392.

erable that bishops should not be allowed to preside as judges in cases involving worship. The Lord Chancellor, however, had informed the House that the government was determined to have the bill passed, and it was.⁵²

Generally, the bishops approved of the bill except for the above-mentioned sections. They were genuinely afraid of a schism and feared direct parliamentary intervention in the controversy, and many high church prelates supported the Ritualists to some degree. The Public Worship Regulation Bill seemed ideal from their point of view. Professionally-trained judges instead of bishops were to make the decisions, a definite advantage for the bishops who had difficulty in dealing with the intricate court battles caused by the Ritualists. The bill did not provide any changes in the worship law per se but only the machinery by which existing laws were to be reformed: there were to be fewer appeal courts, the provincial courts were to be combined, and procedures of the Church Discipline Act, 1840, were not to be abolished. Thus, the bishops retained their authority in dealing with problems other than the Ritualist crisis.⁵³

Debate in the Commons was bitter. Gladstone presented

⁵² Hansard, P. D., vol. 219 (1874), pp. 931-44.

⁵³ Chadwick, The Victorian Church, pp. 524-25.

the two Ritualist objections to the bill which had been published throughout England: "liberty for the congregations of the Church of England" and "obedience not uniformity."⁵⁴ The Ritualists maintained that it was possible for the members of the Anglican Church to be obedient to the theology of the church without having to adhere to all the non-canonical forms. It should be possible, they contended, for one church to have flowers on the altar and another to place them on a small stand beside it and still have the members of both churches agree on the significance of the Eucharist and be willing to submit to the bishop on matters of faith and polity.

The debates consumed four entire days and addressed several points. The bishops were displeased because the bill did not specifically regard convocation as the main source of interpreting what was to be proper worship. The bill, rather, left such interpretations up to secular judges. In this regard, evangelicals like Shaftesbury and the Lord Chancellor agreed with the high church bishops except that the two men wanted lower convocation (representing about 20,000 clergy) to have some guaranteed authority.⁵⁵

The Liberals wanted appeals from the bishops' courts to move immediately to the secular courts, without having

⁵⁴ Hansard, P. D., vol. 220 (1874), pp. 1379-83.

⁵⁵ Hansard, P. D., vol. 219(1874), pp. 919-31, 940-52.

to go through the Court of Arches first. The bishops countered with objections to having secular judges involved at all.⁵⁶ Debates often became sidetracked into discussions of what offenses were to be tried under the new acts and the Lord Chancellor had to remind everyone that the bill only dealt with the procedures for the trials and not the offenses.⁵⁷

When the bill was debated in the Commons on July 9, 1874, most of the speakers concerned themselves with the differences between conformity and uniformity. By the end of that session, there were many conflicting amendments.⁵⁸ On July 13, 1874, Gladstone again dominated the floor, but Disraeli moved into the debates later and made many cutting remarks about Gladstone's position.⁵⁹ July 15 saw continued debates. There were seventeen speakers who debated along party lines for and against bishops' authority in matters concerning worship practices, and the expenses involved in running the courts. Gladstone said nothing.⁶⁰ Debates continued in much the same way on July 16 until

⁵⁶ Ibid., pp. 940-52.

⁵⁷ Hansard, P. D., vol. 220 (1874), p. 392.

⁵⁸ Ibid., pp. 1355-88.

⁵⁹ Ibid., pp. 1389-1421.

⁶⁰ Hansard, P. D., vol. 221 (1874), p. 3-89.

Disraeli said that his government would deal with the matter. By that time, there were over one hundred amendments to be considered on the bill.⁶¹ Two days later, it was brought back to the floor of the House and was passed without debate.⁶²

The bill was not well-written, and neither Holdsworth⁶³ nor Phillimore seemed to think much of it. Phillimore called it "panic legislation"⁶⁴ because the bill left the ecclesiastical courts with two sets of machinery under which to operate. The preamble stated that the act was for "further regulations . . . of the administration of laws pertaining to the performance of divine service." This limited the scope of cases triable under the statute to exclude other forms of the discipline of clergy. It also included, however, offenses relating to fabrics and ornaments used in worship. It was further limited by the requirement that three parishioners were needed to initiate a suit, but an archdeacon or churchwarden could do so on his own. This eliminated the many complaints initiated by a single parishioner.⁶⁵ It also tended to limit the the

⁶¹ Ibid., p. 91-118.

⁶² Ibid., p. 140.

⁶³ Holdsworth, English Law, Vol. I, p. 613.

⁶⁴ Phillimore, Ecclesiastical Law, p. 1013.

⁶⁵ 37 & 38 Vict. c.85 s.8.

number of countersuits by Ritualists who were normally parishioners and not benefice holders or churchwardens. In the act, the most anti-Ritualist section stipulated that suits could be initiated only if there had been an alteration or addition to the canons or if there had been some addition or deletion in the observation of the rubrics in the presently used Book of Common Prayer. A bishop had the authority to rule on a case if both parties agreed and his decision in that case could not be appealed. A bishop could also prevent a suit from being sent to a court if he gave written reasons.⁶⁶

The appeal process was fairly complex. The new court could enforce its inhibition and monition, using any of those enforcements open to bishops except excommunication: suspension, sequestration, deprivation, and degradation (not used since the Reformation). As a result of Hudson v. Tooth,⁶⁷ imprisonment was also an allowable option for a sentence.

Although Phillimore and Holdsworth had some technical objections, the act seems to have accomplished the goals of its sponsors to stem the legal confusion generated by the Ritualists. In the first twenty years, the provisions of

⁶⁶ Ibid., s.9.

⁶⁷ 2 P. D., p. 45; Phillimore, Ecclesiastical Law, p. 1033; also Green v. Lord Penzance, 6 App. Ca., 65.

the act were invoked only nine times. Several more cases had been settled by the bishops of the dioceses in which problems involving the act had occurred. Of the nine cases which reached the courts, two involved the same defendant and three did not come to the hearing stage and were presumably settled out of court.⁶⁸

Because the act ordered that Arches and Chancery Court be combined, Sir Robert Phillimore, the Dean of Arches, and Granville Vernon, Auditor of the Chancery Court of York, resigned their positions. James P. Penzance was then appointed judge by the archbishops of Canterbury and York in compliance with Section Seven of the act. Another act passed shortly thereafter⁶⁹ permitted Phillimore and Vernon to keep the positions that they had held in their provincial courts in addition to that of official principal. To allay the fears of the judges as much as possible and to prevent another Gorham Case, whereby a dissenter could make judgments on doctrinal matters, it required that the judge (Penzance) be a member of the Church of England.

The three acts examined in this chapter did a great deal to reform ecclesiastical jurisdiction and procedure. They gave the courts a stronger hand in dealing with such

⁶⁸ Phillimore, Ecclesiastical Law, p. 1036.

⁶⁹ 38 & 39 Vict. c.76, c.77

problems as pluralities, improper activities of the clergy, and controversies centering on worship practices. Moreover, they established a common procedure for the ecclesiastical court system. Certain citations, monitions, decrees, and hearings had to occur within specified time spans, defendants were guaranteed a certain measure of due process, and when the Church Discipline Act, 1840, brought all courts under the control of the bishops, it also indirectly required that their procedures conform to the reforms made in diocesan courts. Because certain causes like some dilapidation suits and civil acts of clerics did not come under these acts, they were automatically removed to the civil courts. The courts were made more efficient, fairer, and the procedures more regular as a result of the Pluralities Act, 1838, the Church Discipline Act, 1840, and the Public Worship Regulation Act, 1874, and the host of minor acts which amended and added to them. The increased and more regularized system of recording decisions gave the ecclesiastical courts a stronger common law basis. The use of more secular-trained judges and a broader base of common law attorneys also brought ecclesiastical courts into the mainstream of nineteenth century English legal procedure and jurisprudence.

Six years after the Public Worship Act had been passed, parliament organized a second Ecclesiastical Court Commission. Obviously, the commission had been given the

responsibility to examine the effect that the act of 1874 had on the church's courts, but the commission report, published in 1883, provides other useful insights into the status of the ecclesiastical legal system.

The witnesses before the commission, most of whom were lawyers and clergymen, centered their concerns on two main themes: the fact that the Discipline of Clergy Act, 1840, and the Public Worship Regulation Act, 1874, made justice in the church courts more costly and less effective, and the more general question of how the Judicial Committee of the Privy Council was handling the 1874 Worship Regulation Act.

The first page of the Report states:

The Judicial Committee of the Privy Council have been dictated by policy; . . . they have been rigid in the enforcement of a particular standard of ritual conformity; lax in reproofing heresy; and opposed to clear principles of theological interpretation; . . . it entrusts the interpretation of the formularies, the exposition of traditions, and the inflictions of spiritual censures of the Church to persons of no theological education Such appeals not only . . . [abrogate] civil rights . . . but also those decisions were taken as authoritative standards of belief and practice.⁷⁰

Further objections developed this theme. The two acts put the bishops in an untenable position because it gave them the responsibility to enforce conformity in worship but did

⁷⁰ Report . . . Ecclesiastical Courts, 1883, pp. 364-66.

not give them the authority to deal with infractions of the law. They did not permit bishops to appoint the judges who would try cases in their own courts, but they required the bishops to sit in judgment. Since they also permitted the ordinary to prevent any case that did not meet with his approval from being tried, there was much dissension in some consistory courts. Often, bishops would not permit discipline cases to come before courts over which the clergy had only limited control. The report stated:

The disciplinary matters which come before the ecclesiastical courts relate either to ritual, doctrine, or morals. It seemed . . . undesirable that moral offenses should be of the same character as . . . cases of ritual or doctrine.⁷¹

Heresy was also mentioned as a cause which could not be handled well by the ecclesiastical courts as a result of the 1874 act⁷² and the report also said that it disapproved of disciplining clerks through imprisonment but "regarded it as inevitable if disobedience were persistent."⁷³

The second most common complaint of the witnesses before the commission concerned the excessive costs and delays which were also blamed on the two acts. The Discipline Act required that each complaint presented to the

⁷¹ Ibid, p. vi.

⁷² Ibid.

⁷³ Ibid., p. 611.

bishop be examined by a five member Commission of Inquiry. The Worship Regulation Act did not permit many offenses to be tried by the bishop. This meant that almost all cases were being tried in London. The costs involved in having the Commissions of Inquiry, moving the trials to London, and the red tape involved in trying to prevent prohibitions made the cases very expensive, especially for the bishop who was expected to pay for most of the court costs himself. The costs and the legal entanglements led bishops not to prosecute immorality or infractions of doctrine except in extreme cases.⁷⁴ The imprecise language concerning time limits was another reason for excessive costs. The appeals, mentioned above, added a great deal of expense and delay but were not the fault of the courts. They were caused by flaws in the language of the law and were finally dealt with by the various decisions handed down interpreting the law.

In all recommendations and testimony there was no real desire to eliminate the ecclesiastical courts or to change radically their structure and rules, with the exception of redefining the role of bishops in the consistory courts and in initiating suits on discipline. For the most part, the witnesses approved of the quality of judges and jurisprudence found in the church courts and stated that they

⁷⁴ Ibid.

wished that the Judicial Committee were as sympathetic to the main objectives of religious courts. They were divided as to whether the Crown should have final authority in all matters. As might be expected, the clergy favored either limiting or eliminating any appeals to the Judicial Committee. The lawyers, on the other hand, wanted more civil control.⁷⁵ There was a consensus, however, that the ecclesiastical courts were providing a necessary service and, given the weaknesses of the Discipline and Worship Acts, were doing as well as the secular courts in proving a creditable jurisprudence.

The ecclesiastical courts succeeded because of a long tradition of sound precedent-setting cases handed down by the competent chancellors of the upper courts. Even when the civil jurisdictions of the church courts were transferred, there was no attempt to eliminate the practice and precedents set by the older ecclesiastical courts.

⁷⁵ Ibid., pp. 417-527.

Chapter Nine

IMPORTANT JURISTS

While it is true that legislation effected reform in the ecclesiastical courts, not all change came by way of parliament. Many reforms came through the courts themselves. Because cases were decided by precedent, interpretation in procedures were changed or adapted by judges of the courts. Since the Court of Arches and Prerogative Court of Canterbury had excellent judges coming from the Doctors' Commons, the modifications its judges created in the decisions they handed down were very sound.

The ecclesiastical courts functioned as well as they did because of the quality of the judges in the upper courts. Much of the success of the church court system could also be credited to the Doctors' Commons. Although formed during the reign of Elizabeth I, it did not receive a royal monopoly until 1768, so that its legal right as a monopoly was less than fifty years old by the turn of the nineteenth century. At that time, it became necessary for a member to have a doctor of laws degree from either Oxford or Cambridge. Shortly thereafter, it was agreed that ordination would bar entrance into the Doctors' Commons.

Membership lasted until death or retirement from a law practice. The president of the society was always the Dean of Arches, a judgeship which carried great prestige. The vice president was chancellor of the Court of Admiralty and the King's Advocate and was second after the Dean. The members of the society had the exclusive right to act as advocates and judges in the upper admiralty courts and the appellate courts of the Archbishop of Canterbury. They were also usually the judges and advocates in the Consistory courts of London and Canterbury.¹ Since their numbers never rose to twenty-five and usually remained at twenty, their range of courts was sufficient to supply them with adequate business.²

As early as July 5, 1853, there were official moves to break the society's monopolistic hold on testamentary business. The radical, George Hadfield, brought before the Commons a bill to transfer testamentary jurisdiction to the common law and country courts.³ The society apparently believed that the bill would pass because it began to make plans to disband.⁴ Such a move was not necessary, however,

¹ G. D. Squibb, Doctors' Commons, (Oxford: Clarendon Press, 1977), pp. 35-55.

² Ibid., p. 14.

³ Hansard, P. D., vol. 128 (1853), p. 124.

⁴ Squibb, Doctors' Commons, pp. 102-05.

until royal assent to the Matrimonial Causes Act of 1857, which provided that all barristers at law could practice in the new Divorce and Matrimonial Court. The monopoly in the Court of Arches and High Court of Admiralty was ended in August, 1859, with the passage of "An Act to Enable Serjeants, Barrister-at-Law, Attorneys and Solicitors to Practise in the High Court of Admiralty."⁵ The advocates' monopoly in the ecclesiastical courts was never legislated away. The ruling in Mouncey v. Robinson (1867),⁶ however, allowed a common law attorney to sign articles in the Court of Arches required by the Church Discipline Act, 1840. Technically, the Doctors' Commons existed until March, 1912, when its sole surviving member died. Manchester says of the passing of the society:

Doctors' Commons, and its magnificent library, disappeared. Yet the new court was to follow the principles which had been established in the Ecclesiastical courts, if modern authority were lacking. To that extent the work of the distinguished jurists of the Doctors' Commons lives on.⁷

Most important to the courts were the four who served before 1874 when appeals were less commonly sent to the Judicial Committee of the Privy Council. They were Sir

⁵ 23 & 24 Vict. c.6.

⁶ 37 L. J. Ecc. 8 as cited in Squibb, Doctors' Commons, p. 105.

⁷ Manchester, Modern Legal History, pp. 144-45.

John Nicholl, Sir Herbert Jenner-Fust, Dr. Stephen Lushington, and Sir Robert Phillimore. In addition to these four doctors of law, Lord Stowell, the former William Scott, who had written the Ecclesiastical Court Consolidation Bill in 1812, must be mentioned. Stowell, who never sat as the Dean of Arches, became famous for his decisions in the Admiralty and the London Commissary Courts. He served as chancellor of the Consistory Court of London for over twenty years, during which time he handed down many important decisions for the ecclesiastical common law.

Lord Stowell's decisions tended to be long and rambling. In looking through some of the court case collections which contain decisions by several judges,⁸ one can easily spot Stowell's simply by their length. While his decisions are heavily documented, he was more inclined to moralize than the other four judges. This was especially true of his matrimony and divorce cases. In Evans v. Evans (1790),⁹ he denied a suit for divorce, but before giving his summation he included a short counseling section of several paragraphs which advised the couple to be more understanding toward each other. The wife was told to be less critical and disagreeable and to permit her husband to

⁸ For example, see Volume II of Joseph Phillimore's Ecclesiastical Cases.

⁹ 1 Hagg. Con. 35. as cited in Phillimore, p. 682.

control the household. Mr. Evans, on the other hand, was advised not to bully or be unkind; he was to be more patient and less inclined to give orders. Both were to try to make the marriage more successful.¹⁰ Stowell could be compassionate as in Williams v. Bott (1790)¹¹ when he suggested that Bott could declare himself a pauper, but apparently the man refused.

In two of his most celebrated cases, Stowell established a definition for marriage. In the first he said that marriage was a natural contract, neither civil nor religious but "antecedent to both." Intercourse did not make a marriage by itself but it needed to be accompanied by a promise of cohabitation in order for it to be constituted "a contract extended to a more permanent nature." The procreation of children in any case constituted a contract of "extended nature." Such a contract could, therefore, be broken only by a mutual consent, and cohabitation by itself was a contract which could be broken if there were no consummation.¹²

In the second case he ruled,

The Ecclesiastical Courts, therefore, which had the cognizance of matrimonial causes, enforced

¹⁰ Ibid., pp. 35-147.

¹¹ Ibid., pp. 1-20.

¹² Lindo v. Belisario (1796), 1 Consist. 230.

these rules [the rules of canon law which had their foundation not in the sacrament or in any religious view on the subject, but in the natural and civil contract of marriage] . . . that . . . an irregular marriage per verba de praesenti could not be followed by any consummation shown valid to the full extent of avoiding a subsequent regular marriage contracted with another person.¹³

In neither case did he rely on precedent, and in the second, he made only vague references to several canons. Stowell viewed law from a pragmatic point of view and for the most part that pragmatism pervaded the Court of Arches. In Hutchins v. Denziloe (1792),¹⁴ Rev. Hutchins sued a church warden Denziloe for obstructing the singing of the parish children's choir because Hutchins had made so many derogatory comments about the choir and its conduct during the service. Stowell lectured the pastor not to antagonize his congregation even if he were technically correct, and then explained that the pastor could not accomplish his first responsibility -- to save souls -- if he drove his congregation from church by his pettiness. In another case, he ruled that a marriage performed by an unregistered clergyman was valid because the vows, not the priest's certificate, created the marriage contract.¹⁵ He once ordered a vestry to purchase an organ because one was

¹³ Dalrymple v. Dalrymple (1811), 2 Consist. 46.

¹⁴ 1 Hagg. Con. 170.

¹⁵ Hawk v. Corri (1820), 2 Consist. 280.

obviously needed. Although there were errors in the presentment, he maintained that the merits of the case had not been flawed. Because it was possible in ecclesiastical courts to broaden the scope of a suit while it was in progress, he added to his order not only that the churchwardens should buy the needed organ but that they were to keep it in repair and pay for an organist or be held in contempt.¹⁶ Similarly, he upheld a divorce on the grounds of adultery although there had been valid objections concerning how the evidence was obtained.¹⁷

In Nash v. Nash (1790),¹⁸ Stowell expanded ecclesiastical jurisdiction by ruling that bigamy, a felonious act, was within his court's constitution. He was upheld on appeal. He also expanded the scope of authority in Lindo v. Belisario (1796)¹⁹ by relying on evidence from a rabbi on Jewish marriage law in a case involving a non-English marriage. The evidence was used as a precedential source for his decision.

John Nicholl was not quite as free wheeling as Lord Stowell. His decisions were shorter and more to the point,

¹⁶ 1 Hagg. Cons. 198.

¹⁷ Elwis v. Elwis (1796), 1 Hagg. Con. 269-293.

¹⁸ 1 Hagg. Con. 140.

¹⁹ 1 Hagg. Con. 216.

and he was more inclined to depend on precedents. While he did not moralize, he was nonetheless willing to spend a moment on legal theory. He enjoyed invoking the ancient Roman laws and medieval canons. Thorold v. Thorold (1809)²⁰ contains whole paragraphs of legal theory in Latin and Greek.

He was obviously a scholar and proud of that fact. He was also very particular that all regulations be followed exactly.

Irregularities exist in many of the inferior courts," but they are conspicuous in the Court from which the appeal is brought. There the proceedings are not carried out upon the same principles [of exactness and scholarship] which guide us in the Doctors' Commons.²¹

He once refused to probate a will which contained a codicil written in pencil on wrapping paper on the grounds that, although it had been witnessed, the document was of an improper form. The codicil, which also dealt with real estate, had already been approved of in a civil court.²²

His contempt for the lower courts, especially the archidiaconal ones, was evident in his decisions. In Purham v. Templar (1821),²³ he claimed that the archidiaconal

²⁰ 1 Phil. Ecc. 89.

²¹ Morgan v. Hopkins (1818), 1 Phil. Ecc. 583.

²² Rymes v. Clarkson (1809), 1 Phil. Ecc. 586.

²³ 3 Phil. Ecc. 515.

courts were inferior to the courts of deans and chapters and in Prankard v. Deacle (1828)²⁴ that the archdeacon had only those jurisdictions which an ordinary was willing to give him. This included the running of the archdeacon's court. The decision contradicted an earlier one by Judge Ayleffe but was upheld on appeal.

In several other instances, he upheld the autocratic power of the bishop. He ordered that bishops must give permission before chapels could be used for worship²⁵ and that new chapels could not be built or endowed without the permission of a ordinary.²⁶ Further he ruled that tradition and past practice could not justify any rights assumed by a chapel. "Chapels possess no parochial rights unless acquired by composition with the patron, incumbent, and ordinary."²⁷ In Rich v. Bushnell (1828),²⁸ Nicholl ruled that the ordinary and not the vicar had the right to approve or veto the placement of a memorial tablet in a chancel by a lay rector. He not only added that the bishop's permission was necessary, but he went on to rule that

²⁴ 1 Hagg. Ecc. 189.

²⁵ Carr v. Marsh (1814), 2 Phil. 198; Morsey v. Hillcent (1828), 2 Hagg. Ecc. 530.

²⁶ Bliss v. Woods (1831), 3 Hagg. Ecc. 509.

²⁷ Moysey v. Hillcent (1828), 2 Hagg. Ecc. 551.

²⁸ 4 Hagg. Ecc., 164.

it was not necessary to obtain the vicar's permission.

Nicholl made several rulings in which he established the rights of the ecclesiastical courts. "All persons ought to understand that the sacred edifice is under the protection of the ecclesiastical laws," he wrote in Jarratt v. Steele (1819),²⁹ a situation apparently unclear to Steele who had renovated his pew without faculty. The pew and chancel were ordered to be returned to their original condition within three months. In Chase v. Yonge (1822),³⁰ he forbade a commissary judge to deny the jurisdiction of the Court of Arches in a case of first instance. Finally, he ruled that the ecclesiastical courts had criminal jurisdiction in cases of contracts which invoked simony. In Chase v. Yonge, a Rev. Hesse, who had attempted to obtain an appeal, charged that the ecclesiastical courts could not order any deprivation because the case, he said, should have been heard in a civil court since it involved a felony -- contract fraud. Hesse was refused, and Nicholl was not appealed.³¹

Herbert Jenner-Fust was much more aggressive than Nicholl in trying to expand the jurisdiction of the church courts. His most spectacular success in this regard was in

²⁹ 3 Phil. Ecc. 527.

³⁰ 1 Add. 336.

³¹ 3 Hagg. Ecc. 659.

Re Smith (1835).³² In ruling on this routine probate, he was able to extend several acts regarding wills to the colonies to ecclesiastical jurisdiction.³³ In Ray v. Sherwood (1836),³⁴ Jenner-Fust asserted the right of the ecclesiastical courts to hear cases involving incest (marriage with deceased wife's sister) under "An Act to render certain Marriages valid, etc.," because the offense had taken place before the passing of the act. He also ruled that "this is a contract which is prohibited by the laws of both God and man," and therefore within the jurisdiction of his court.

That this court would and ought to lend its aid and assistance towards the accomplishment of so desirable an object [the elimination of incest] cannot be doubted; and I have myself no hesitation in saying that I should feel great regret if I were to find myself placed in such a situation as to be obliged to accept this libel [to call the incestuous marriage a lawful marriage], and thereby in effect to pronounce that the validity of this marriage could not be questioned

The legislature may exempt the parties from punishment . . . but it cannot change the character of the act [incest] itself, which remains as it was, and must always so remain [i.e. evil], whatever be the effect of the act of parlia-

³² (1850) II Rob. Ecc. 332 as cited in Phillimore, Ecclesiastical Law, p. 685.

³³ 13 & 14 Car. II. c.3; 1 Geo. IV c.19; 6 & 7 Will. IV c.93.

³⁴ 5 & 6 Will. IV c.54.

ment.³⁵

The problem for Jenner-Fust, however, was a clause in the act which prohibited ex post facto use of this law. He then maintained that he was permitted to order a divorce between Sherwood and his wife because the prohibition of ex post facto in that statute was referring to the right of the court to declare the marriage null and void. The act did not, he claimed, prohibit the church courts from punishing the incest. Sherwood appealed the decision of Jenner-Fust, but the Dean of Arches was upheld.³⁶

Jenner-Fust was also able to preserve a jurisdiction for the ecclesiastical courts in the case of Wynn v. Davies (1817).³⁷ The Marriage Act of 1824³⁸ stipulated that a clergyman found guilty of marrying couples without proper publication of banns or without proper license was to be transported for fourteen years as a felon. Since ecclesiastical courts could not pass such a sentence, there was a question whether the jurisdiction passed from the ecclesiastical courts. Jenner-Fust relied on an old precedent in which a prohibition had been ignored for a similar offense.

³⁵ 1 Curt. 197 as cited in Phillimore, Ecclesiastical Courts, pp. 576-77.

³⁶ 1 Moo. PC. C. as cited in Phillimore, loc. cit.

³⁷ 1 Phil. Ecc. 602-05 (in appeal).

³⁸ 3 & 4 Geo. IV c.78.

He concluded, therefore, that because the prohibition was once permitted to be ignored, it was not valid. The act did not specify that the jurisdiction was to be moved or changed, and since the discipline of clergy had always been permitted by the canons of the church, he concluded that Wynn was liable to be punished canonically for improper publication of banns. The case was not appealed.³⁹

Jenner-Fust's decisions are full of subtle manipulations and fine detailing. His insistence on detail often led to great inconvenience. It is easy to see why the radicals, in particular, tried so hard to embarrass Jenner-Fust during the 1843-1844 debates with requests for data about how often he held court and his family connections. His decisions portray a man of arrogance and interest in petty detail. One sees it in the tone of the Ray v. Sherwood decision mentioned earlier. In another instance, he disallowed a will because A had not made her mark, although B had placed A's name on the document and three other witnesses testified that A had witnessed the signing of the will. The resultant intestacy case absorbed almost all of the value of the small estate.⁴⁰ In Brenchley v. Still (1850),⁴¹ he wrote, " I have no doubt about the case, not

³⁹ 1 Phil. Ecc. 602-05.

⁴⁰ Cope in Re (1850) 2 Rob. Ecc. 335.

⁴¹ 2 Rob. Ecc. 165.

the least in the world." His arrogance and lack of compassion and common sense were radically different from Stowell who preceded him and Dr. Lushington who followed him.

Stephen Lushington was the only non-cousin of the four Deans of Arches. He was also the most liberal. His decisions are remarkably brief and simply written. The authoritative clarity of his work in the 1832 royal commission report also characterized the decisions he handed down. Some of his decisions have already been discussed in connection with the Ritualist cases. Pragmatism and a desire to permit the law to stretch when necessary marked his treatment of the Ritualists. He does not seem to have been as aggressive as Jenner-Fust or even Nicholl in enhancing the position of the courts. Even more than Stowell, he saw most offenses in terms of broken contracts, and he generally tried to preserve the authority of the bishop in his diocese.

In Williams v. Brown (1855),⁴² for example, he did not permit a parish to use the north transept of Chichester Cathedral for services although it had been doing so since the twelfth century. Lushington ruled that there was no contract involved, that the use of the cathedral transept was a gift, and that the bishop should have final say

⁴² 8 Jur. N. S. 1186.

pertaining to worship in his own cathedral. In Poole v. Bishop of London (1861),⁴³ he ruled that the last section of the Discipline of Clergy Act of 1840 gave the bishop almost unlimited right to proceed in the correction of a clergyman in offenses not specifically listed in the statute itself and in offenses not normally handled by the ecclesiastical courts. Because the act does not specify a particular mode of action, Lushington ruled that the bishop was to act according to his own discretion.

Lushington's most important case was Gorham v. Bishop of Exeter (1851).⁴⁴ He was one of the Lords of the Privy Council who heard the case. Phillpotts, a high churchman, had accused Gorham, a Calvinist rector in his diocese, of preaching errors concerning baptism. When Phillpotts refused to grant Gorham a new position, Gorham sued his ordinary in the Court of Arches where Jenner-Fust found in favor of Phillpotts. Gorham then appealed to the Judicial Committee of the Privy Council.

The significance of the case to the ecclesiastical court was the method used by the Lords of the Privy Council to arrive at its decision. The only sources they used were the rubrics and formularies from the Book of Common Prayer and the Thirty-nine Articles. They claimed that using

⁴³ 5 Jur. N. S. 522.

⁴⁴ 15 Q. B. 52, Moore's Special Report 472.

works of theologians as guides was invalid since the law had not established them as proper legal sources. Using just the three sources mentioned, they concluded that the doctrine concerning baptism was "capable of being honestly understood in different senses."⁴⁵

Lushington explained the methodology of the Judicial Committee in greater detail in Burder v. Heath (1860).⁴⁶ The first step was an attempt to discover the meaning of the rubric or article in a plain grammatical sense without "any violation of the ordinary rules of construction." Then, if some controversy arose because of the grammatical construction, the judge had the responsibility to offer as broad a range of interpretation as made sense. If there were no difficulty with the grammar, then its clarity demanded a greater degree of conformity. The court attempted to reconcile the opinions in question with the Articles or rubrics.

This was a practical solution to a thorny problem. Lay judges were not theologians; therefore, they were unable to deal with doctrine on a theological basis. They were lawyers whose expertise was in determining the legal significance of words and sentences. The high church party

⁴⁵ Ibid.

⁴⁶ 5 Moo. PC. C. 45.

protested the decision. Pusey and Keble, two of the most important Tractarians, tried to persuade the House of Lords to recognize the upper house of Convocation as a special court of appeals for doctrinal matters, but they were refused. Manning, another well-known Tractarian, was so upset that he became a Roman Catholic. Others followed him.

The later courts set up by the 1874 Worship Regulation Act did not take so liberal a strategy. They were more inclined to say that, if the Articles did not specifically name a practice, it was contrary to the law. Since doctrinal issues did not come under the 1874 act, most cases were determined in diocesan courts or dropped because, under the Clergy Discipline Act of 1838, bishops had the authority to prevent suits from even being heard in court. Worship practice, however, did come under the 1874 act so that the Judicial Committee did have to deal with matters of ritual. Therefore, after 1874 theological opinions became more varied, and worship became more uniform. Maurice, for example, developed the theory of Christian Socialism without much fear of being called into court. The bishops did not like to have purely doctrinal controversies heard in the courts, so theological points were rarely litigated. On the other hand, worship practices became more regularized because laymen could institute suits against their clergy in courts set up by the Public Worship

Act. Consequently, many high church clergymen left the established church and joined the Anglo-Catholic church because they wanted to use certain practices in their worship which were forbidden by the Book of Common Prayer. It was a denomination which, although it did not give its allegiance to the papacy, adopted many Roman practices and doctrines.

Robert Phillimore was called upon to make decisions concerning both ritual and doctrine more frequently than any other dean of Arches in the nineteenth century because he served in that post during the Ritualist hysteria of the 1860s and 1870s. For the most part, he adhered to the legal principles developed by his colleagues in the Doctors' Commons and expanded upon them. He kept up a running battle with the Judicial Committee of the Privy Council for over two decades until the Worship Regulation Act forced him to resign as the dean of Arches in 1874.

Phillimore, of course, heard cases dealing with causes other than doctrine and ritual, but his rulings on ritual formed a basis of reasoning which was used in the new court under Lord Penzance. With the help of the archbishop of Canterbury, the Judicial Committee was made a more moderate interpreter of ritual and doctrine, and the low church influence of Cairns was somewhat diluted. Archbishop Tait, a broad churchman himself and one who had condemned the

Tractarians in the 1830s, proved to be a moderating statesman and, as will be demonstrated later, supported Phillimore's rulings when requested by the Judicial Committee to offer opinions on various cases involving doctrine.

Phillimore used Lushington's grammatical interpretation in Sheppard v. Bennett (1870).⁴⁷ He refused to admit evidence charging that Bennett was a heretic for preaching the receptionist doctrine.

Much of Mr. Bennett's language would fall into these categories upon the ordinary principles of [grammatical] construction by which alone in this criminal suit I must be guided. . . . I must see whether it [the language] exceeds the liberty which . . . I must hold to be accorded to all clergymen⁴⁸

Phillimore acquitted Bennett, and his decision was upheld twice by the Privy Council.⁴⁹ It was the first time that the civil liberties of the clergy had been considered in such proceedings.

Phillimore went even further in trying to break the rigidity of the rubrics in the case of Wilson v. M'Math (1871).⁵⁰ He used a decision by Nicholl in which common law, lex non scripta, was declared to be sufficient in deciding a case if there was no statute, canon, or judgment

⁴⁷ 3 Adm. and Ecc. 167.

⁴⁸ Ibid., p. 168.

⁴⁹ L. R. 4 P. C. 350.

⁵⁰ 3 Phill. 67.

on a particular issue. Nicholl had ruled that "There is . . . a common law of the church which runs by the side of statute law." Phillimore maintained that in order to read a rubric one must put oneself in the place of the author of the rubric. Since many of the rubrics were imprecise concerning details, they had to be interpreted within their historical context. Phillimore further expanded this thesis in Escott v. Mastin (1842).⁵¹ Here he ruled that in the case of statutes dealing with practices in the church, unless the acts specifically abrogated some item, such a practice would remain in effect. "This principle, which is plainly founded in reason and common sense, has been largely sanctioned by authority."

He put his theories to the test in Westerton v. Liddell (1846),⁵² which involved ornaments. In this case, he noted that the rubrics referred back to Edward VI's Prayer Book which was very specific about what ornaments were permitted and indicated that "such ornaments (vestments, books, cloths, chalices, patens and other items) of the church . . . shall be retained and be in use." He then went down the list of offenses charged to Liddell and concluded that, since the defendant's use [of ornaments]

⁵¹ 4 Moo. PC. C. 104.

⁵² Moore's Special Report, pp. 147-158. The case as it appeared before Privy Council was Liddell v. Westerton.

was not prohibited, they were permitted. He was upheld in his judgment but not his thesis by the Judicial Committee, which added

In the performance of the services rites and ceremonies ordered by the Prayer Book, the directions contained in it must be strictly observed; no omission and no addition can be permitted.

In Martin v. Mackonochie (1869),⁵³ he pushed his theories too far and the Judicial Committee reversed his decision. Mackonochie was an inveterate high church priest who used incense, genuflected, elevated the host and participated in many Roman practices. Phillimore suggested that, if Mackonochie had done anything improper in regard to the practices he had instituted, they could not be considered criminal offenses because they were not specifically prohibited. They were a "category of cases which should be referred to the bishop." The Judicial Committee reversed Phillimore, interestingly enough, using an argument based on grammar and construction.⁵⁴

Phillimore persisted in his manner of interpreting rubrics, however. In a subsequent case, he attempted to liberalize the rulings of the courts. His high-church bias was becoming obvious. He referred to the use of incense as

⁵³ L. R. 2 Adm. and Eccl. 116.

⁵⁴ Ibid.

"an ancient, innocent and pleasing custom"⁵⁵ and the mingling of water with wine "an innocent custom and one which has been sanctioned by eminent authorities in our church."⁵⁶ Nevertheless, he ruled against them both.

In Elphinstone v. Purchas (1870),⁵⁷ Phillimore was most resoundingly reversed. Elphinstone had objected to a long list of Ritualist practices performed by Rev. Purchas. Four sources were appealed to by the plaintiff: the Injunctions of 1559, the Advertisements of 1564-65, the Canons of 1603-04, and the Canons of 1640. Phillimore ruled that the Advertisements and Canons of 1640 existed only on royal authority; therefore, they could be ignored. This left the Book of Common Prayer, the Injunctions, the Canons of 1603-04, all of which had been approved by statute, and whatever acts still remained as valid sources for judgments. He then ruled that most of the charges leveled against Purchas be dropped. The Privy Council reversed Phillimore's judgment on every count where he permitted a practice not specified by a rubric.

Archbishop Tait found it necessary to intervene. William Phillimore claimed that the reason the Judicial Committee reversed itself on several important issues was that

⁵⁵ Liddell v. Westerton, Moore's Special Report, p.58.

⁵⁶ Ibid., p. 59.

⁵⁷ 7 Moo. N. S. 17.

Tait had offered counsel to the committee.⁵⁸ In Read v. The Bishop of London (1871),⁵⁹ the Privy Council permitted mixing water with wine, singing the Agnus Dei, washing the chalice and paten, and using candles in the sanctuary, thereby reversing itself and upholding Phillimore. In Ridsdale v. Clifton (1871),⁶⁰ it did the same for using wafers and standing in front of the altar while preparing the elements. In Sumner v. Wix (1872),⁶¹ it made even more liberal provisions for the use of candles.

There are several other procedural matters which stemmed from cases involving Phillimore as dean of Arches. In the case of Ditcher v. Denison (1857),⁶² Lord Justice Bruce reversed a decision by Phillimore and carefully delineated and reduced the power of the bishop. In doing so, he reversed the trend of Nicholl and Jenner-Fust, which was to increase episcopal authority. In this case, which flowed from the Discipline Act, 1840, Denison was charged with preaching heresy. His bishop ordered that a commission of inquiry be established but did not order a monition

⁵⁸ Phillimore, Ecclesiastical Law, p. 716.

⁵⁹ 6 App. cited in Phillimore, Ecclesiastical Law, p. 719.

⁶⁰ 2 P. D. 276.

⁶¹ L. R., 3 Adm. & Eccl. 116.

⁶² 11 Moo. PC. C. 324.

within two years of the time he delivered the sermon; he also suspended Denison, who pleaded timeliness and was upheld by Bruce. The lord justice also ruled that the bishop had no power to restrain a pastor except through the courts, and ordered Denison restored.

Two other cases stemmed from preaching heresy. Both cases developed around Rev. William Early Bennett, who was accused of preaching and publishing heresy. In the first suit to reach the Judicial Committee, Sheppard v. Phillimore and Bennett (1871),⁶³ Phillimore as dean of Arches had chosen not to accept the letters of the bishop of Bath and Wells. Phillimore was ordered by Lord Hathesley to accept the letters because he maintained that accepting letters from the bishop was not optional although the letters did not specify a remedy for the offense. Hathesley, in this case, ruled that it was up to the judge and not the bishop to establish a remedy. Sheppard reinstated the suit against Bennett on behalf of the bishop of Bath and Wells to restrain Bennett from preaching heresy. This time, Phillimore refused to hear the suit because he said that it was not timely. The suit was again appealed, and the Judiciary Committee ruled that ordering a commission to investigate did not institute a suit. He said that it was

⁶³ Sheppard v. Phillimore and Bennett (1870), 9 Moo. N. S. 120, L. R. 2 Adm. & Ecc. 335.

not necessary for the commission to complete its report before the bishop could apply to the courts. It was only necessary for the charges to be made generically. Therefore, the bishop could not be excused from issuing a citation in the prescribed amount of time, and the case was dropped.⁶⁴

The cases mentioned above were determined by the precedent setting case of R. v. Chichester (1859),⁶⁵ one of the first Ritualist cases not initiated by a bishop. In this case, there was an important twist which altered the scope of objections. Rev. Golightly of the Oxford diocese had objected to sermons delivered by Rev. Bovill in the Chichester diocese. The bishop of Chichester refused to act on a commission of inquiry report. In a suit instigated by Golightly, the bishop was upheld by the Judicial Committee because, according to the Church Discipline Act, it was the bishop and no one else who was to determine whether a suit was to be initiated. The ruling was used in Martin v. Mackonochie (1874),⁶⁶ Sheppard v. Bennett, Elphinstone v. Purchas and established a reason for the non-Ritualists to demand that parliament pass an act which allowed laymen and

⁶⁴ Ibid.

⁶⁵ 2 E1. & E1. 209.

⁶⁶ 6 & 7 Vict. c.38 s.5.

lower clergyman the right to initiate suits over the objection of bishops. In 1874, the Worship Regulation Act legislation established that right.

The Judicial Committee also made an important decision on purely doctrinal issues in 1871 when it heard and ruled on a suit and countersuit issued by Thomas Nobel and Rev. Charles Voysey. Present at the trial were Lord Chancellor Hatherly, Robert Phillimore as dean of Arches, and the archbishop of Canterbury. The case involved several sermons published by Voysey dealing with the doctrines of reconciliation, the Trinity, and the authority of scriptures. The court declared itself competent to hear such a case although the issues involved were theological in nature because the older Court of Delegates had done so.⁶⁷ It ruled against Voysey.

In doing so, the Judicial Committee established several precedents. First, it ruled that wholly theological tracts could be held in evidence. This, to some degree, negated the rules of evidence established by Lushington in the Gorham case. However, the Judicial Committee also ruled that it was possible for a pastor to explain how his work was not heretical even if the published work indicated a heresy on the surface. Further, it ruled that it could

⁶⁷ Voysey v. Nobel (1871) 7 Moo. N. S. 167; Nobel v. Voysey (1870) L. R. 3 PC. 365.

not deal with "commonly received doctrines" but that all charges of heresy must specify which Article, rubric, or part of holy scriptures was being preached against.⁶⁸ Its obvious importance was that it established some of the ground rules for cases to be heard under the Worship Regulation Act.

After the resignation of Phillimore, the new appellate court for the ecclesiastical courts radically changed character. The influence of the Doctors' Commons faded, and the new court took on the aspect of the English civil courts. The Judicial Committee did not wish to eliminate the effect of the ecclesiastical courts, and it established the relationship between the courts of church and state in its decision of Mackonochie v. Penzance. Lord Blackburn ruled that, although the temporal courts could not be bound by the ecclesiastical courts in matters of prohibition, suspension and other punishments provided for in laws governing ecclesiastical matters were not matters for secular prohibitions. Nor could the civil courts hold appellate jurisdiction over the ecclesiastical courts. Lord Blackburn also ruled that it was possible for a suit to contain items cognizable by a civil court in an ecclesiastical matter and vice versa. In cases where that occurred, he ordered that those offenses that dealt with ecclesiastical

⁶⁸ (L) L. J. Q. B. 611.

law must be handled by the church courts and that secular matters must be heard in the civil courts as independent matters.

Most importantly, he established the validity of ecclesiastical law:

The ecclesiastical law of England is not a foreign law. It is a part of the general law of England, of the common law -- in that wider sense which embraces all the ancient and unproved customs of England which form law . . . consisting of such canons and constitutions ecclesiastical as have been allowed by common consent and custom within the Realm . . . it is not as ascertained by calling witnesses to prove it . . . but by taking judicial notice of what the law is . . . ascertained by argument and founded on legal principles and authorities.⁶⁹

69 Ibid.

CONCLUSION

The English ecclesiastical courts were dramatically reformed during the nineteenth century. All civil causes were transferred to secular courts. The ecclesiastical jurisdiction was completely overhauled in both procedure and organization by statutes and court decisions. The Doctors' Commons was legislated away, but its influence is still felt. Some of the decisions handed down by the members of the Doctors' Commons still serve as precedents for cases heard today.

In parliament, the debates were protracted and bitter resulting in years of unsuccessful legislation. Then, suddenly, reforming acts came without debate. The ecclesiastical jurisdiction was reformed more quickly than the civil by the legislature but resulted in the loss of civil liberties for clergymen and aggravated a serious controversy between high and broad churchmen.

At the beginning of the nineteenth century, the English ecclesiastical legal system was, for the most part, in deplorable condition. Parliament had ignored the church courts and had not passed any important legislation to reform them since the Restoration. The hierarchy of the

church was interested in maintaining only the episcopal tribunals and had neglected the rest of the system. Especially in the lower courts, there was nepotism, unnecessary delay, and generally poor jurisprudence. Even at the highest levels, there were gross injustices resulting from inadequate laws regarding enforcement.

Even so, there were reasons why the courts persisted as long as they did. There is evidence that although there were many appeals and costly delays, the complaints about these problems was to some degree exaggerated. There are statistics to show, as well, that the courts, while often poorly staffed, were frequently used in some areas of England and did provide a useful service which was not covered by any civil courts.

The main reason for their survival, however, was the backing they received from provincial lawyers who enjoyed a considerable income from the non-contentious probate business, minor gentry who used the Peculiars as patronage posts, and ultra-conservative Anglicans who saw any attack on the courts as an attack on the church itself. For the prelates, however, their only interest was in the preservation of the higher diocesan courts, but to keep them they often had to defend the existence of the entire system because of the nature of the omnibus bills. At the highest level, the Court of Arches and the Consistory Court in London, the chancellors justified the existence of the

courts by the excellence of the jurisprudence practiced there. The public, for the most part, ignored the courts. Journal and newspaper articles were rare on the issue of ecclesiastical courts, especially the secular jurisdiction.

Reforming the civil authority of the courts was the responsibility of parliament. The legislature was unsuccessful until Palmerston's ministry for three reasons. First, there were five more or less distinct factions in parliament when bills involving religion were debated. The moderate reformers in both parties split between two positions, the more radical ones were led by Brougham and Cottenham, and the more conservative M.P.s followed Lushington and Lyndhurst. Opposing church court reform were the Benthamite radicals who were aligned to the Whigs but not supportive of moderate church court reform. The bishops were in favor of amending the courts but refused to allow episcopal authority to be diminished. The Country Party resisted change because it represented a recalcitrant constituency of gentry and provincial lawyers who stood to lose patronage and income if testamentary jurisdiction were to be removed from the Peculiar courts. The ultra-conservatives wanted no changes at all.

When reform legislation was brought before either house, the moderates split. The radicals generally opposed any bills that kept diocesan courts intact, but the bishops

refused to support any legislation that weakened the episcopal courts. The Country Party voted against all efforts to quash the local ecclesiastical courts, and the ultras supported no bill which called for change. In general, the parties lacked sufficient discipline to keep M.P.s in line on religious and vested issues.

Second, the bills were not properly drawn up to deal with the contentious factions. Until the time of Palmerston, almost all proposed reform legislation was comprehensive and multifaceted. Bills with such a large scope always offended at least one of the groups. The issues of moving testamentary business and the fate of the diocesan courts, in particular, caused protracted debate and negative voting. For the moderates who saw a strong need for reform, the difficulty was compounded because the Whig party did not have a basic policy regarding reform. Hence that party produced two antagonistic approaches, each with its own adherents. Had the Whigs planned better there would not have been this dichotomy in the party.

Third, parliament was sensitive to pressure from periodicals and the general constituency, yet there was little outside agitation to change the church's courts. There was great interest in having such areas as divorce, pluralities, and probate reformed, but the same was not true of the procedures and personnel in the courts. Consequently, the parties did not feel compelled to take a stand on

church court reform, especially since the issue was so volatile a one.

After the many unsuccessful attempts to pass bills reforming the civil jurisdiction, climaxing in the Nicholl debates, Palmerston introduced two innovations. The first was the use of single issue bills instead of multifaceted legislation. The simpler bills reduced the likelihood of opposition. The second was to insist upon tighter discipline. As the debates of 1856 and 1857 show, his government was very little interested in modifications of its bills. His well-known campaign slogan of 1855, "Either be for me or against me," obviously carried over into his handling of the backbenchers because for most of the reform bills there was no debate, and, as was noticed, his lord chancellor threatened to abolish the entire ecclesiastical legal system when the Bishop of Bangor objected to a government-sponsored bill.

The pattern of reform legislation continued through the 1860s, and other reformers like Ebery and more especially Shaftsbury were unsuccessful even in having their proposals seriously considered. The Public Worship Regulation Act of 1874 was put through parliament with great efficiency.

Reform of ecclesiastical jurisdiction benefitted from outside public outcry not only against Ritualists but from

complaints about pluralities and the misconduct of clerks as well. Both, of course, were brought to the fore by the publicity from the Tractarians. The bishops also had put pressure on the government to amend the sacred functions of the courts in the 1830s. As a result, two acts, the Pluralities Act of 1838 and the Discipline of Clergy Act of 1840 were passed earlier than bills changing the civil jurisdiction. Along with the Public Worship Regulation Act of 1874, which also resulted from outside influence, the three acts drastically changed the constitution of the ecclesiastical courts as was noted earlier. In particular, the authority of the bishops and the rights of the clerks were better defined.

Legislation had not created all the modifications in the system. The precedent-setting decisions from the Court of Arches covered weaknesses in statutes by redefining ambiguous sections -- especially those dealing with time limits and those working out strategies to deal with the rubrics in courts of law.

While contemporary research views outside pressure as important for reforms, there has been little work on the effect of more or less independent factions in parliament. In particular, little is known about the Country Party which many scholars attribute wholly to the agrarian interests. The attorneys are rarely included, although there

were several references made to provincial lawyers in connection with the Country Party. Research here has shown that the provincial lawyers and gentry worked together.

This paper has set out to establish that the reform of the ecclesiastical courts was hampered by problems in the legislative process in nineteenth-century England and that it was aided by remarkable jurists who sat on the highest courts. It has demonstrated that in this area research up to this time has been inadequate to explain why there was so much difficulty in reforming the ecclesiastical courts. It has listed several weaknesses and discovered the existence of powerful yet often ill-defined factions and vested interests. Further, it has explained the legislative strategies used by the major parties before and after the rise of Palmerston and from this information it is concluded that George Grey and Palmerston's innovative writing and handling of reform bills was successful. Finally, this paper has determined that, while each of the five great jurists of the period who sat in the London Consistory Court and the Court of Arches had an individual style and view of law, each one provided enlightened leadership to the ecclesiastical courts of nineteenth-century England.

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