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LORD TENTERDEN'S 1832 PRESCRIPTION ACT: WHY WAS IT PASSED, AND WAS IT A FAILURE?

I A statute without friends

Few English statutes have attracted the levels of opprobrium that have been bestowed upon the 1832 Prescription Act. The contemporary commentator Charles Gale introduced his 1839 *Treatise on the Law of Easements* with the claim that the Act 'introduced greater doubt and confusion than existed before its enactment'.[1] Indeed, Gale's treatise can be seen as an attempt to correct the difficulties introduced by the 1832 Act. In his view the statute had signally failed to reform the historical morass of English law by due analysis of the key doctrines, and Gale's response was to propose fresh prescription principles drawn from American and French servitude law.[2] Later jurists affirmed Gale's criticism that the Act lacked any clear policy and had failed in its limited objectives of clarifying which easements or other incorporeal rights could be claimed by acquisitive prescription, and how the prescriptive period of enjoyment should be measured. T.A. Herbert in his Yorke Prize Essay of 1890 wrote: 'the Act is … so carelessly drawn that some provisions are inconsistent with others, and … there is the greatest difficulty in discovering what the real intention of the legislature was'.[3] J.L. Goddard wrote of the Act and its judicial exegesis in 1904 in these terms: 'There have been several important opinions and decisions more or less directly relating to the meaning of the legislature … but the result is only indecision and uncertainty'.[4] Indeed in the very first major judicial interpretation of the Act, a highly respected common-law judge essayed an interpretation that in effect wrecked the Act from the outset. In 1834 in the case of *Bright* v. *Walker*[5] Baron Parke found that the statutory recognition of an inchoate right of enjoyment after twenty or thirty years, which would then harden into an indefeasible right after forty or sixty years, created the legal absurdity of a qualified or

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1 *C.J. Gale* and *T.D. Whatley*, A Treatise on the Law of Easements, London 1839, p. vi. Whatley's name was removed from later editions, and Gale seems to have been the dominant author.

2 *Ibid*, p. vi-vii and *passim*. Compare the contemporary work of *D. Gibbons*, Lex Temporis: A Treatise on the Law of Limitation and Prescription, London 1835, a far less cultivated performance than Gale's, which is dedicated to Sir John Campbell and praises 'the excellent laws enacted at his suggestion', *inter alia* defending the worth of the 1832 Prescription Act.

3 *T.A. Herbert*, The History of the Law of Prescription in England, Cambridge 1891 & 2013, p. 25.

4 *J.L. Goddard,* A Treatise on the Law of Easements, London 1904[6], p. 201.

5 *Bright* v. *Walker* (1834) 1 Crompton Meeson & Roscoe 211, at 216-223 (Ex.); and see *J.L. Goddard*, A Treatise on the Law of Easements, London 1871, p. 101.

relativistic prescriptive right; to avoid this Parke B read the Act as supplying fixed periods of enjoyment displacing the flexible common-law evidential approach, such that the Act actually extended and rigidified the prescriptive period necessary to be applied under the common law doctrine of lost modern grant – a reading which has puzzled courts ever since.[6] In 1903 Lord Macnaghten stated: 'the Act was "an Act for shortening the time of prescription in certain cases".[7] And really it did nothing more'.[8] Perhaps he was trying to minimize the impact of the Act in order to curb the potential for harm that it could do to the law.

The overall goal of the Act was to state shortened prescription periods for various incorporeal rights and make those claims immune to proof of some origin later than the conventional time immemorial dates of the common law, and so to obviate the need to instruct juries to make a factual presumption of a 'lost modern grant' or even an imaginary past statute when it was tolerably clear that there was no such grant or statute. Under the provisions of the Act a 'common or other profits à prendre' could be established after thirty years' enjoyment as of right without interruption even if commencement of user could be shown at some earlier date; and after sixty years enjoyment as of right, the prescriptive claim would become indefeasible unless the enjoyment was based on consent or agreement (section 1). The same technique was applied to rights of way, water courses, 'or other easement', with twenty and forty years as the relevant periods (section 2). Enjoyment of light for twenty years without interruption (and without any requirement that the enjoyment be asserted as of right) made the claim indefeasible (section 3). Section 4 was the crucial section redefining how the relevant prescriptive periods of user, and a relevant interruption of that user, were each to be measured. It is difficult to paraphrase, so here it is in full:

> Each of the respective periods of years herein-before mentioned shall be deemed and taken to be *the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question* and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made (emphasis added).

The reason in this section for making the relevant prescription period immediately precede the suit, as was the case with limitation periods, rather than for time to run from after the moment that the enjoyment had commenced, as with common law prescription, was not entirely clear. Perhaps the policy goal was to give the servient owner a chance to

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[6] See *A. Dowling*, The Doctrine of Lost Modern Grant, Irish Jurist 38 (2003), p. 225–262.

[7] This reproduces the Short Title of the Act.

[8] *Gardner* v. *Hodgson's Kingston Brewery Co Ltd* [1903] A.C. 229, at 236 (H.L.).

challenge or interrupt the preceding enjoyment, and not merely discover on acquiring a title that some prior prescriptive period of enjoyment had saddled his estate unawares with a claim based on a now-discontinued or dormant or non-apparent user. Certainly there is evidence that lawyers of the time were influenced by civilian doctrines requiring apparent and non-interrupted user as a foundation of prescriptive right.[9] But not every interruption or lapse of a prescriptive use was to prove fatal to the claim, lest the prescription mechanism fail to protect long and settled enjoyments simply through some transient interruption being recorded. The Act sought to balance the interests of the prescribing user and the servient owner by stipulating that any legally causative interruption to a prescriptive enjoyment had to be made seriously for a year's period of time with notice to the user, such that it was clear that the interruption was a challenge to the ripening prescriptive right.[10]

The sternest critic of the complicated 1832 Act was W.S. Holdsworth, writing in the 1920s, who seems to put aside his usual Olympian detachment when confronting this particular attempt at statutory reform of the common law.[11] The 'carelessness of its drafting', he claimed, led to major defects, chief of which was the decision to model the period of prescription on a stated period akin to limitation immediately preceding some litigation putting the existence of the claimed prescriptive right into question.[12] This was designed to replace the complicated and contentious notion that some period of user might give rise to a rebuttable presumption of a lost modern grant, which in turn had been developed to sidestep the problem that an immemorial use presumed from long enjoyment could be rebutted by any proof of an origin of the enjoyment or an interruption to that enjoyment within the time of legal memory. But limitation was the appropriate approach for the ranking of relative titles to possession at common law based on an ordering of trespassory actions, argued Holdsworth, and was not meet for the prescriptive acquisition of incorporeal hereditaments through long user. What was really called for was a conclusive legislative title to an incorporeity to be recognised wherever a stated period of prescriptive user could effectively be proved, and this simple solution the Act failed to provide. The old common law would undo a prescriptive claim if any challenge to user could be proved *prior* to the claimed prescriptive user period, but still within the time of legal memory. The Act allowed cancellation of a statutory claim for any challenge to user coming *after* a prescribed period of user but before litigation had been mounted to assert the right. This would simply allow a race to court, with the challenger of a prescriptive claim being allowed to defeat the claim if he interrupted the enjoyment before the claimant could

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9 *A.W.B. Simpson*, The Rule in Wheeldon v. Burrows and the Code Civil, Law Quarterly Review 83 (1967), p. 240–247.

10 Such reasoning is suggested in the First Report of the Real Property Commissioners of 1829, preparatory to the drafting of the 1832 Act, discussed in Part III below.

11 *W.S. Holdsworth*, A History of English Law, (first ed. 1925) London 1937[2], vol. VII, p. 343- 352; *W.S. Holdsworth*, An Historical Introduction to the Land Law, Oxford 1927, p. 279–288.

12 *Holdsworth* (1937), p. 350-351.

cross the court door.[13] In other words, the drafters commingled the concepts of limitation and prescription, and ineptly used limitation concepts in their attempt to clarify the law. They achieved the opposite, 'making the law still more confused than it was before';[14] and the reaction of the judges to the confused reform was to maintain the alternative common law systems of prescription based on immemorial user and lost modern grant alongside the new statutory system – a disastrous triple system that no-one could comprehend in action.

The second raft of defects described by Holdsworth was a failure to decide which incorporeal rights fell within the operation of the Act.[15] The drafter invented the neologism of a 'convenient' watercourse, which might have meant a reasonable one or one appurtenant to a riparian estate, only no-one could tell what the drafter meant, with the courts feeling their way pragmatically to admit rights to enjoy or discharge water as utility demanded.[16] Common-law difficulties in framing the easement of light were addressed clearly enough; but it took a lengthy case half a century later to decide that the easement of support fell within section 2 of the Act;[17] and no amount of judicial probing could resolve the position of easements in gross, which were left in a state of limbo.

The definitive judicial interpretation of the 1832 Act and the entire area of prescription for incorporeal claims came in 1881 with the great case of *Dalton* v. *Angus*. Eighteen common-law judges ended up giving opinions in that great litigation, with a trial at assizes, then split decisions by the Queen's Bench Division and the Court of Appeal, then advisory opinions of seven eminent common law judges at the bar of the House of Lords, and finally an appellate opinion from the Judicial Committee of the Lords itself. In the end, after eighteen judges had offered their views on the 1832 Act in that case, it was decided that the Act was so riven with problems that the old common law modes of prescription had to be preserved in order to prevent major disruption to settled rights. Lord Blackburn's leading speech in the Lords suggested that the impact of the 1832 Act had been largely nugatory:

> It [the Act] did not abolish the old doctrine; if it had, old rights even from time immemorial would have been put an end to by unity of occupation for the space of a year. But this was not done*: see Aynsley v. Glover*[18]. I think the law, as far as regards this subject, is the same as it was before that Act was passed.[19]

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[13] Curiously a grant of consent to user given *after* a period of twenty years' enjoyment may act retrospectively to characterize the prior user as permissive and not prescriptive under the Act: see *Llewellyn (Deceased)* v. *Lorey* [2011] EWCA Civ 37 (C.A.).

[14] *Holdsworth* (1927), p. 284.

[15] *Holdsworth* (1937), p. 352.

[16] See for example *Simpson* v. *Mayor of Godmanchester* [1897] A.C. 696 (H.L.), admitting the right to discharge lock waters as an easement capable of acquisition under the 1832 Act, notwithstanding that the benefit of the easement was not exclusive to the dominant owner.

[17] *Dalton* v. *Angus* (1881) 6 A.C. 740, at 798-800 per Lord Selborne C. (H.L); *Union Lighterage Company* v. *London Graving Dock Company* [1902] 2 Ch. 557 (C.A.).

[18] (1874) L.R. 10 Ch. App. 283.

Holdsworth concluded that as a result of the Act,

> there is no branch of English law which is in a more unsatisfactory state….no mere restatement can clear up the muddle which the courts and the Legislature have combined to make of the law of prescription. What is required is a total repeal of the existing common and statute law, and the substitution of an entirely new set of rules, based upon an understanding of the meaning of the doctrine of prescription, and of the results at which it should aim.[20]

Legislation that could make the cautious Holdsworth call for root-and-branch reform of a major area of law must have been provocatively awful.

Lawyers since Holdsworth have been even more negative, if that were possible. 'The Act is a classic example of an incompetent attempt to reform the law', concluded A.W.B. Simpson in his 1961 *History of the Land Law*.[21] Perhaps the sharpest put-down came in 1966 from the Law Reform Committee, an attack repeated with some malicious glee in textbooks and law reform reports ever since: 'the Prescription Act has no friends. It has long been criticised as one of the worst drafted Acts on the Statute Book'.[22] The Law Commission in 2011 followed a long line of commentators in condemning the unduly complex and uncertain tripartite system of prescription for easements and other incorporeal use rights in England and Wales, which to this day allows concurrent or alternative claims based on: (i) user from time immemorial; (ii) user for twenty years raising a presumption of lost modern grant; and (iii) user triggering a claim under the 1832 Act. A particular problem was the determination of requisite levels of knowledge indicating acquiescence in the prescribed right by the servient owner, with differing ideas emerging from each of the three modes of prescription.[23] The only possible way out from this mess, argued the Law Commission, was to make a fresh start, consigning the failed 1832 Act, and the old common law prescription methods it glossed so badly, to the dustbin of legal history, and replacing all with an entirely new statutory code.[24] Thus for modern lawyers the legislators who brought in the 1832 Act simply failed to create a cogent and workable code for prescription, misunderstanding the nature of the problems their reforms had set out to

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19 *Dalton* v. *Angus* (1881) 6 A.C. 740, at 814 (H.L.). Lord Blackburn's admired speech in *Dalton* at least gave a clear affirmative answer to the controversial question whether an easement of support could be asserted under the Act, but this titanic litigation ultimately gave no clear guidance as to how the Act coalesced with the extant common law: see *S. Anderson*, Easement and Prescription – Changing Perspectives in Classification, Modern Law Review 38 (1975), p. 641–659 at p. 655-659.

20 *Holdsworth* (1937), p. 352.

21 *A.W.B. Simpson*, A History of the Land Law, (first ed. 1961); Oxford 1986[2], p. 269.

22 *Law Reform Committee*, Acquisition of Easements and Profits by Prescription, Fourteenth Report London 1966, Cmnd 3100, para 40.

23 *B. Bogusz*, The Doctrine of Lost Modern Grant: Back to the Future or Time to Move On?, Conveyancer (2013), p. 198-210.

24 *Law Commission*, Making Land Work: Easements, Covenants and Profits à Prendre, London 2011, Law Com No 237, p. 41-64, 175-177, and Draft Bill, Part 2, at p. 194-200.

solve, and failing to foresee the difficulties that would emerge in applying the Act alongside the ancient common law rules.

Against this hostile consensus, I will take on a challenging brief and try to befriend and defend the much reviled 1832 Prescription Act, and moreover to rehabilitate the promoters of the legislation and shield them from this enormous condescension of posterity. I will argue that the 1832 legislation was not simply an ill-conceived patchwork attempt to correct problems in the common law doctrines of prescription that ended up making a confused area of law worse, but was rather part of a wider reformist plan that largely succeeded. One has to see the purpose of the Act through the eyes of the protagonists at the time, and not apply modern preconceptions to the work of jurists and politicians legislating nearly two hundred years ago. The prize they sought was not just to reshape the immemorial right and modern grant models of acquisitive prescription, but to make a modern *actio negatoria*,[25] a system of negative prescription allowing destruction of existing servitudes through non-use or desuetude, in order to clear a path to ready exemption of estates from tithe payments to the Anglican clergy (often absentees) or to lay impropriators or lessees who farmed the tithes as a species of rent. The existence of tithes as a rateable impost on agriculture, inconveniently and oppressively collected in kind, was one of the most controversial issues in politics at the time of the Great Reform Bill, and it was this controversy that drove the parliamentary debate over prescription. Tithe reform had originally been a part of the provisions of the Prescription Act, but in the end was hived off into a separate Tithe Act passed in the same Parliament three months ahead of the Prescription Act proper. The attempts in the latter legislation to clean up problematic doctrinal areas such as the measurement of the period of prescriptive enjoyment, the means to claim easements of light or support, the nature of interruptions to enjoyment, and the status of the doctrine of lost modern grant, were really subsidiary to the main drive, expressed ultimately in the earlier statute of the session, namely to deal with the problems of tithe commutation and exemption. The English reformers of 1832 never purported to offer a general rationalization or systemization of the land law on the models offered by James Humphreys, Jeremy Bentham or the New York codifiers of the day.[26] Viewed backwards from a modern perspective of creating a tidy and effective system of readily noticed, well-defined and easily provable and (where relevant) transferrable real property rights, the legislation of the 1830s indeed fell short, but this may be applying an ahistorical lens to the terrain.

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[25] A Roman action by which an owner could establish the *non*-existence of a servitude in a neighbour's estate, so freeing the owner to use his land more freely without fear of a positive action from the neighbour enforcing some use rights: see further *A. Rodger*, Owners and Neighbours in Roman Law, Oxford 1972, p. 90-124.

[26] Cf *B. Rudden*, A Code Too Soon: The 1826 Property Code of James Humphreys, English rejection, American reception, English acceptance, in: P. Wallington and R.M. Merkin (eds.), Essays in Memory of Professor F.H. Lawson, London 1986, p. 101–116.

The argument in defence of the Act will be made, first, by reviewing briefly the law of prescription before 1832; then outlining the reform strategies leading to the 1832 Act in the political context of the time of its passing. The long and convoluted history of interpretation of the Act in court – nearly five hundred decisions to date – will hardly be broached, as this topic has been covered exhaustively in specialist texts since Gale first wrote. The focus of attention here will be the moment of legislation itself – what did the reformers *think* they were achieving? The objectives of the law reformers, as we shall see, shifted radically between 1829 and 1832 in response to the disruptive passage of the Great Reform Bill, and this fractured politics is the best explanation for how the two 1832 Acts came to be passed in the forms they finally took. One cannot properly assess the success or failure of legislation without recovering a sense of the times in which it was passed and the motives and goals of the actors; this was not simply technical law reform imperfectly executed, but a major distributional shift in the landed economy engineered by law. Once this dimension is grasped, a kindlier assessment of the legislation becomes possible.

II The law before 1832

We may be brief here and not reproduce an existing and intricate scholarship.[27] English law allowed for positive prescriptive acquisition of incorporeal property as claims appendant to or appurtenant to land used beyond living memory; but the causal theory underpinning positive prescription was always murky. It was left unclear in the jurisprudence of Bracton's time whether enjoyment of an immemorial incorporeal right betokened some presumed grant, or rather whether immemorial use acted to bar or extinguish any rival claims on a theory of laches or acquiescence. Bracton's free borrowings from the Roman system of *usucapio,* whereby long use was itself a direct form of original acquisition, only further clouded the picture. In English law long use of a corporeal right in the manner of an owner was not a prerequisite to establishing a durable absolute title. At common law possession or seisin, that is legally recognized control, would instantly constitute a title with all the qualities of a durable estate,[28] but that title was relative and would be trumped by a prior or better title. User operated within the relativistic system of titles based on seisin by upping the ranking of a possessory title through the effluxion of time terminating rival claims. Limitation of actions (using

[27] For brief summary of the relevant history see *J.S. Getzler*, Roman and English Prescription for Incorporeal Property, in: J.S. Getzler (ed.), Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn, London 2003, p. 281–323 at p. 303-323. Analysis of the later 18th and 19th century developments is offered by *S. Anderson*, Servitudes and Allied Rights Over Land, in: W. Cornish *et al.* (eds.), The Oxford History of the Laws of England, Vol. XII 1820-1914: Private Law*,* Oxford 2010, p. 159–178, building on *Anderson* (1975); and *Dowling* (2003). An elegant treatment of the modern operation of the Act is in *E.H. Burn* and *J. Cartwright*, Cheshire and Burn's Modern Law of Real Property, Oxford 2011[18], p. 666-686.

[28] *Asher* v. *Whitlock* (1865) L.R. 1 Q.B. 1.

various dates for the different proprietary writs or remedies) buttressed adverse possession by barring even superior titles after a stated period of time, so that after the limitation period had passed the titular holder was left in the virtual position of an absolute or superior owner.

Prescription for incorporeal claims perforce worked by a different theory, since there could be no physical possession of the claimed right, only a use that was more or less apparent to those title holders against whom the claim was made. The necessary period of prescription for incorporeal rights through long and apparent user, and the limitation periods governing corporeal titles by adverse possession, were not identical, but they shared concepts and the two bodies of law borrowed from each other quite promiscuously. The early common law fixed limitation periods by the time of legal memory beyond which a title could not be challenged. The ultimate cut-off for time immemorial was set first to the Conquest, and then for differing real writs to the time of Henry II in 1154 or Richard I in 1189. But for the summary petty assizes the limiting time of memory was the actual span of memory of persons with reason to know, a much vaguer local theory of knowledge. These variant theories of limitation were blended by presumptions holding that an event outside living memory could be presumed to stretch back to the 12th century – unless the rival claimant could affirmatively disprove that the right could have existed any time in the span back across the centuries.

These limitation periods in turn fed back into prescription periods for incorporeities. In 1294 ten years' enjoyment of a profit was held to be good enough evidence that the profit had likely existed earlier beyond living memory, and so could be protected under the assizes.[29] There was no strict period that could launch a claim that a long-held user might win legal protection; all depended on judge and jury's assessment of the local evidence, a kind of negative hear-say test whereby no-one in the vicinity had heard any evidence contradicting the long existence of the right. When limitation periods amounting to a term of years rather than a fixed date were introduced in the 1540 Limitation Act, with sixty years preceding an action being the mandated limitation period for the higher writ of right, courts began to assimilate the fixed statutory limitation period as presumptive evidence of a much longer immemorial use for the purposes of prescription, in place of the hearsay-flavoured rules of the earlier centuries. Judges were prepared to instruct juries to find rebuttable immemorial rights whenever a relevant limitation period had been exceeded, thus adding further protection to the user. But even in the post-1540 world, hearsay concepts of immemoriality, whereby a user to which no man knew the contrary would allow a presumption that the user stretched back to the earliest legal times, continued to play a role.[30]

The hybridization of hearsay rules, statutory fixed-date and moving limitation periods, and presumptive concepts of time immemorial, meant

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[29] YB 21 & 22 Edw. 1 c. 422 (1294).

[30] *J.W. Salmond*, The History of the Law of Prescription, in: J.W. Salmond (ed.), Essays in Jurisprudence and Legal History, London 1891, p. 73–120.

that it was very difficult to maintain a pure version of the dual theory of acquisition of rights through time – namely, prescription for servitudes, limitation for possessory titles. It was also possible in the case of prescription for incorporeities that presumptive proof of the immemoriality of a right through long user could be rebutted by any positive evidence that the right could not have existed all the way back to 1189, eg because there had been at some earlier date an interruption, or an impossibility of user, or because at some early date there had been a unity of dominant and servient estates that must have extinguished any right benefitting one estate through control of the other. Another source of instability was the vague notion inherited from Bracton that the true ground of prescriptive acquisition was some consensual grant of right by a servient owner of an estate before the time of legal memory. If an incorporeal right was perceived to be 'rank' or unreasonable, this implied that no grant could ever have been granted by reasonably minded people at any time in the past. Thus a legal test founded on a policy of restricting unreasonable user could be used to exclude rights by factual presumption.

Between the sixteenth and eighteenth centuries lawyers made much of the rankness test to shear away many prescriptive rights (based on individual specialties) and customary rights (based on local or manorial practice) during peak periods of enclosure and individuation of property rights in land. But if the consensual theory of prescription could be used to diminish rights, it could also be used to augment. In the eighteenth century the ancient grant theory of prescriptive right was re-worked by the courts to yield a sibling doctrine – the factual presumption that a long user might evidence a 'lost modern grant', hypothesised by the court as a likely if unprovable event, and allowing the judge to instruct the jury to find such a right in the absence of contrary evidence.[31] The beauty of the theory, which hovered somewhere between useful fiction and vague evidential presumption assimilating acquiescence to grant, was that prescriptions were immunized from ancient evidence controverting immemorial usage, so that for example some long past unity of estate in the middle ages would not affect the hypothesized lost modern grant. By the early nineteenth century, the twenty year limitation period for the action of ejectment was used by analogy to provide a presumptive period of user justifying a finding of lost modern grant, that was immune to disproof by contrary evidence from before the twenty-year period. However the twenty-year user had to be capable of grant by the owner of the servient fee, and had to be enjoyed continuously without force, secrecy or licence, added tests that allowed judges to control the finding of such presumptive rights. Alongside all this the older common law presumptions of immemoriality continued to be used for customary claims that did not lie in grant as common law claims. In the 1823 case of *R* v. *Joliffe* the Court of King's Bench approved a jury instruction that 'slight

[31] Eg in *Lewis* v. *Price* (1761) 2 William Saunders 175a; *Read* v. *Ann Brookman* (1789) 3 Term Reports 151 (K.B.); *Dowling* (2003), p. 233-239.

evidence [of custom enjoyed for more than twenty years], if uncontradicted, becomes cogent proof of immemorial usage'.[32] Abbott C.J. explained the grounds for such jury instruction as follows:

> A regular usage for 20 years, not explained or contradicted, is that upon which many private and public rights are held, there being nothing in the usage to contravene the public policy...or any known rule or principle of law.[33]

So if a usage was proved to have continuously existed for twenty years past and was not rank as obnoxious to law or public welfare, it could be described either as a prescriptive claim founded on a lost modern grant, or as an indication of 'immemorial custom' without more.

It was said that Abbott C.J. particularly resented the complicated fictions that judges had to feed to juries to make the lost modern grant theory work; he was not the only judge who decried the difficulties of telling juries to presume a fact that, whilst not irrebuttable, was still obviously a ruling of policy where no-one believed that a grant had actually taken place. Some judges described such instructions as an affront to the conscience of both judges sworn to uphold the law and juries who had taken oaths to decide truthfully; it was certainly well-understood that the presumptions, though formally factual findings of the jury, were not believed to be forensically true nor even rebuttably presumed to be true.[34] When Abbott was ennobled as Lord Tenterden he introduced the 1832 Prescription Act in order to deal with the fictive nature of modern prescriptive claims based on a presumption of lost modern grant; and the Act has borne his name ever since. But it was not simply Lord Tenterden's desire for intellectual tidiness that drove the reforms. Rather it was the problem of proof of the 'negative' urban servitudes of light and support, of increasing importance in an age of urbanization, together with the problem of proving extinctive prescriptions getting rid of servitudes and easements including oppressive and vague tithe charges that urgently demanded legislative reform. The problem of proof of negative servitudes arose because an owner who claimed an unbroken period of enjoyment of window light or of support from an adjoining estate would be hard put to show some act of acquiescence by a neighbour who could not interrupt or challenge the supposed right without going to the expense of blocking the neighbour's window with some structure, or digging to undermine his support. The latter problem arose particularly in the case of extinction of tithe obligations following a long prescriptive period of non-payment of tithes, and it is the tithe dimension that seems to have preoccupied the reformers, led by the barrister John Campbell. It turns out that Abbott C.J. with his dislike of the convoluted presumptions that riddled prescription

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[32] (1823) 2 Barnewall & Cresswell 54 at 55 (K.B.).

[33] (1823) 2 Barnewall & Cresswell 54 at 59-60 per Abbott C.J. (K.B.).

[34] See eg *Eldridge* v. *Knott* (1774) 1 Cowper 214 at 215 per Lord Mansfield C.J. (K.B.); *Hillary* v. *Waller* (1806) 12 Vesey Junior 240 at 265 per Lord Eldon C. (Ch.).

law, the Lord Tenterden who introduced and lent his name to the reforming legislation, was a relatively minor player in the story. The 1832 Act should really have been named after Campbell.

What, then, was the special problem with prescription regarding tithes? It was long held impossible to negatively prescribe so as to be freed entirely of the obligation to pay an ecclesiast his tithes, known as prescription *in modo non decimando*, in order to prevent the undermining of religion by cutting off support for churchmen. The same rule was then held to apply to protect the interest of a lay impropriator to whom a living or benefice with tithing rights had been transferred or sold. So no matter how long a state of non-payment had existed, no immemorial right of non-payment could be found nor a lost modern grant presumed – though it was not impossible for a person entitled to tithe actually to grant a release. The policy made a certain amount of sense, as to have allowed extinctive prescription as a result of non-payment would encourage holdouts by landowners attempting to free their lands of obligations to support the church. Exceptions did exist allowing a presumption of full release to be derived from a long period of non-payment, known as a prescriptive *modus non decimando*. Where lands could be shown to have been in the hands of a monastery exempt from tithes prior to the Dissolutions, the Henrician legislation saving the privileges of the monasteries' tenures for lay successors was held to extend the privilege of non-payment to later takers of the monastic property.[35] By extension, where a parson's close and the titheable land could be shown to have been united at any time in the past, so ending the obligation to pay tithe, it was held that the termination of the payment obligation was not suspensory but permanent; in such a case the splitting of the estate did not revive the tithe obligation, though this was an implication of the common law rather than an extension of a statutory privilege.[36] The practical difficulty lay in the law's hostility to *presuming* an event such as a grant or a unity of possession by a monastery or a parson, instead requiring some level of positive proof of such an historical exemption in order to harden a lengthy period of non-payment into a perpetual release.

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[35] See eg *Lamprey* v. Rooke (1755) Ambler 291 per Lord Hardwicke C. (Ch.). The lengthy historical controversies over this form of release are explored in *K. Loncar*, John Selden's 'History of Tithes': A Charter for the Landlord?, Journal of Legal History 11:2 (1990), p. 218–238.

[36] The *locus classicus* is *Slade* v. *Drake* (1617) Hobart 295; the relevant modern law was developed *inter alia* in *Lady Charlton* v. *Charlton* (1732) Bunbury 325 per Reynolds L.C.B. (Ex.); *Fanshaw* v. *Rotheram* (1759) 1 Eden 276 per Henley L.K. (Ch.); *Nagle* v. *Edwards* (1796) 3 Anstruther 702 (Ex.); *Lord Petre* v. *Blencoe* (1797) 3 Anstruther 945 (ex.); *Meade* v. *Norbury* (1816) 2 Price 338; 4 Price 322 (Ex.); *Norbury* v. *Meade* (1821) 3 Bligh 211, 261 (H.L.); *Andrews* v. *Drever* (1835) 3 Clark & Finnelly 314 (H.L.). The full authorities up to the end of the Regency are collected in *S. Toller*, A Treatise on the Law of Tithes, (first ed. 1808), London 1822[3], p. 164-228. Earlier authority is analysed on *W. Bohun*, The Law of Tithes: Shewing their nature, kinds, properties and incidents, London 1730, corrected ed. 1731, p. 205-437; A practical guide to tithe incidents, clearly aimed at farmers rather than lawyers, was offered by the same writer in *W. Bohun*, A Tithing Table: Shewing (by way of analysis) of what things tithes are or are not due, either by common law, custom, or prescription, (first ed. 1732), London 1735. For the social and economic history see *E.J. Evans*, The Contentious Tithe: The Tithe Problem and English Agriculture, 1750-1850, London, 1976.

One could not presume from centuries of non-payment that some undocumented monastic holding lay at the back of a justified tithe exemption. But it would often be impossible to find documentary proof of a grant or unity of estate sufficient to overcome the presumption in favour of maintenance of tithes against desuetude through prescription.

The position was different when it came to *modus decimando*, or the commutation of tithe to a fixed money rent charge rather than for example a tenth share in kind of the produce of the land. A lengthy period of money rent payment in lieu of tithe could raise a presumption of immemoriality for the commutation of the tithe, that is a presumption that the change in the tenor of the obligation dated back to 1189; but it was also possible for the parson or lay impropriator to argue for the rankness of the commutation on the basis that any supposed agreed commutation must have been reasonable at twelfth century prices. A run of cases suggested that improved modern land with a low commuted payment would suggest that when the land was unimproved in centuries past and when money was dearer there ought to have been a much higher level of commutation, thus quashing the claimed *modus*.[37] The proper determination of such claims had long been a matter of controversy, for example over whether power to decide lay with the ecclesiastical courts or with the common law courts with jurors possibly hostile to ecclesiastical claims; Sir Edward Coke's report of constitutional debates in the court of James I such as *Prohibitions del Roy* in 1607[38] and *The Case de Modo Decimandi, and of Prohibitions* in 1609[39] evidence the high importance of these jurisdictional and fiscal issues from an early period.

The practical result of these doctrines concerning tithes was that tenants could never be sure that even the lengthiest periods of non-payment or commuted payment would insulate their estate from disruptive demands to reinstate tithe should the tithe holder choose to assert his rights and deny any release. Prescription law was not equipped to create a shield against revival of tithes by making a presumptive and long-followed commutation or extinction permanent. It was this uncertainty that drove the reformers, and to see how the issue came to the boil in 1831-1832 we must now learn more of the prime actors in the drama, and understand the political stage on which the drama unfolded.

III John Campbell Q.C. and the Real Property Commissioners

Parliamentary reform of the land law was kicked into life by Lord Henry Brougham's marathon speech in Parliament in 1828,[40] but it was not Benthamites or radical Whigs who ended up leading the reforms. It was the Tory administration of Sir Robert Peel who appointed the Real

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37 *Benson* v. *Watkins* (1716) Bunbury 10 (Ex.).

38 12 Coke's Reports (Co. Rep.) 64.

39 13 Co. Rep. 37.

40 *M. Lobban*, Henry Brougham and Law Reform, English Historical Review 115 (2000) , p. 1184–1215.

Property Commissioners, taking a cue from Lord Eldon's Chancery Commission, which in 1826 had reported that the delays in Chancery could be alleviated by reform of the complex and inefficient system of land titles. The Real Property Commissioners were appointed to do this job three years later, and so pre-empted the calls from Brougham and the Benthamites for more radical reform.[41] Lord Chancellor Lyndhurst put at the head of the Commission a moderate Whig, the barrister John Campbell, when the expert conveyancer Edward Sugden from the Tory side declined the appointment. Born in Scotland in 1779 and living until 1861, Campbell went on to serve for ten years as Chief Justice of the Queen's Bench and then briefly as Lord Chancellor.[42] He was also a notable author and biographer with the famous (or notorious) *Lives of the Lord Chancellors* flowing from his ready pen.[43] His lengthy autobiography, edited from his diaries and papers by his daughter Mary, gives direct insight into the motivations driving his earlier career in law and politics.[44]

Campbell was the son of a minister of the Church of Scotland, a national church with Presbyterian principles of theology and governance and a looser connection to the state than its Anglican counterpart. Campbell would therefore have been familiar with the Scottish church settlement whereby tithes had been converted from the early 17th century into a type of fixed rent charge, by legislation asserting public control of church revenues and aiming to relieve farmers of an oppressive burden.[45] After studies at St Andrew's, Campbell entered Lincoln's Inn at the age of twenty-one and joined the bar six years later, supporting himself in his early years as a journalist and law reporter. By 1829 he was a politically ambitious Queen's Counsel seeking a seat in Parliament when was tipped to head the Real Property Commission. Campbell believed he had been chosen as a sound legal technician, who though identified with the Whigs was safely outside Parliamentary politics, and moreover as an established commercial lawyer was outside the charmed circle of Lincoln's Inn property specialists. He embraced the necessary research into real property with glee, claiming that his hitherto lack of acculturation in the mysteries of tenures and estates allowed him to take a fresh and objective view. Campbell wrote an encomium celebrating the perfection of English land law as a system of substantive rules defining estates and interests, and he argued that it was only the adjectival law of proof and transfer that was archaic and unsuitable and needful of surgery. His mollifying conservatism as he presented it may have concealed more radical instincts. Campbell's modus operandi was to take elaborate soundings

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41 *S. Anderson*, 'The World of the Real Property Commission', in: Cornish (2010), p. 49-78.

42 *G.H. Jones* and *V. Jones*, Campbell, John, first Baron Campbell of St Andrews (1779–1861), in: Oxford Dictionary of National Biography (ODNB), online ed., accessed 8 March 2015.

43 *J. Campbell*, Lives of the Lord Chancellors and Keepers of the Great Seal of England from the Earliest Times till the Reign of King George IV, London 1845-1847, 7 vols.

44 *M. Scarlett Hardcastle*, Life of John, Lord Campbell, Lord High Chancellor of Great Britain: Consisting of a Selection from his Autobiography, Diary, and Letters, London 1881, 2 vols.

45 See eg [*A. Rutherford*], The History and Settlement of Tithes in Scotland, Edinburgh Review 75 (1823), p. 1–26.

form the profession in order to frame problems and solutions, and then to recruit eminent counsel to the Commission and allocate to each a topic within the law of real property to study for reform.

> I had the important subject of 'Prescription and Statutes of Limitation.' The statute 3 and 4 Wm. IV. c. 27 is the result of my labour. I read every case to be found connected with the subject in our Reports, from the Year Books downwards, and I inquired how it had been treated in the Roman Civil Law, by the modern continental nations, and by the different States forming the American Union. Our own law of prescription I found the most barbarous and anomalous that ever existed in the world, – a man with a bad title being, under certain circumstances, being able to defraud the true owner by adverse possession of five years, and, under other circumstances, there being no security in a *bona fide* possession of centuries….I proposed the general rule that a possession as owner for twenty years shall be conclusive evidence of ownership, which was established by the enactment that every claimant must pursue his remedy within twenty years from the time when his title or right of entry accrued.[46]

Campbell and the Commissioners worked rapidly, publishing their first report on fines, recoveries, prescription and limitations, on 20 May 1829. The report circulated widely in legal London, with the material reprinting in the *Law Magazine and Quarterly Review of Jurisprudence* early in the next year.[47] Three further reports followed, preparing the way for a wave of property reform legislation.

Campbell began by observing how difficult it was to establish evidence to quiet a contested title where evidence had faded after lapse of time. A balance then had to be struck between the claims of a long possessor and those of the prior title holder who had failed to end the current possessor's long enjoyment. Campbell's main reform concern was to ensure that "there should…be for each kind of property, one uniform period of limitation, depending upon the length of adverse enjoyment, and not upon the form of the remedy selected by the claimant, or upon any act of the party in possession for the purpose of abridging it.[48] He acknowledged that different classes of property, such as 'Land and Advowsons', might have to be treated differently, tracking the distinction between adverse possession of land and prescription of incorporeities. Thus for titles founded on adverse possession, limitation of twenty years on the model of the ejectment remedy should provide a bar to all adverse claims whatsoever; and ejectment should then be left as the sole mode of recovery for landed property. For titles by prescription Campbell recommended getting rid of the presumed grant theory in all of its forms

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46 *Scarlett Hardcastle*, Vol. I, p. 458-459.

47 First Report of the Real Property Commissioners (1829), reprinted in: Law Magazine & Quarterly Review of Jurisprudence 3 (1830), p. 1–71.

48 *Ibid.,* p. 47-48.

and replacing it with a rule that at the outer limit sixty years' enjoyment prior to an action ('*ante litem motam*') should vest a conclusive title, and that twenty years' enjoyment should vest a presumptive title subject to defeasibility if for example consent to the enjoyment beyond the twentieth year could be shown on the part of the servient owner. After addressing possible objections to this simplification, Campbell then turned attention to his main concern in this entire enterprise:[49]

> On the still more important subject of Tithes, we propose at present to consider of a limitation for them in the hands of the laity only. We hope to suggest some improvements in the law, by which tithes in the hands of ecclesiastics may remain equally valuable to them, and be rendered less productive of vexation to the laity. We are deeply impressed with the conviction that the property of the church should be held sacred, and that the clergy should be protected in the enjoyment of their possessions and rights, but we conceive that the clergy might derive benefit from regulations that might lessen the litigation to which the claim to tithes now too frequently gives rise, and might rescue this species of property from the odium which on this account is sometimes *unjustly* cast upon it.

Realizing that he was moving into controversial territory, Campbell assured that all questions 'respecting tithes and other ecclesiastical property' would be decided only after consultation with 'the Right Reverend the Bishops': 'We feel reluctance to propose any new rule affecting the property of the church without their previous sanction'. Three principles of reform were then enunciated.

First, 'the right to impropriate tithes in the hands of the laity, ought to be regulated by the same principles as the right to any other species of lay property'. As with common of pasture, estovers, and rent-charges, impropriated tithes 'are in commerce', and so 'ought to be subject to the same rules of limitation and prescription, by which other property is governed'. Crucially, the common-law rule for prescription *in modo non decimando* was to be reversed for impropriated tithe at least, such that

> non-payment as of right for twenty years shall be sufficient as against any person from whom the tithes are withholden, and those claiming under him, to establish the exception of the land from payment of tithes,—the onus to be on the lay rector to prove payment within twenty years, or to account for the non-payment.

Secondly, the rule for commutation by *modus decimando* was to follow a similar rule; a seeming composition acted on for twenty years would perpetually bind the lay rector and his heirs. These reforms would only

[49] *Ibid.*, p. 66-69.

admit one defence, namely where the lay rector was under some disability that prevented him objecting to the prescriptive usage.

The third and most radical proposal was that a simple agreement between a lay impropriator and the owner of a burdened estate enshrined in a deed should be effective to merge tithes into the host land once and for all, thus freeing the servient land of tithe perpetually. In the unreformed law a release could only bind persons party to the deed and did not run with the estates, such that tithes would revive upon division or subdivision of the burdened estate, binding one-tenth of the produce of every portion of that subdivided estate in the future, despite a complete lack of notice to later takers of the burdened land. This reform went far beyond the proposal to facilitate commutation of tithes into a special type of rent charge; here a once-only payment to the lay impropriator would cancel a tithe by purchase, by merging the tithe into the burdened land perpetually. Campbell gave this sweeping justification for the reform:

> It may be hoped that this regulation will encourage the purchase of tithes by the owner of the land from the lay impropriator, and that in course of time, with perfect respect to the sacredness of property, lay tithes may be entirely extinguished. Even some risk of inconvenience might be run to further so desirable an object. Every subdivision of interest in the same property is attended with various inconveniences, a separate right to one-tenth of the produce of the soil against the cultivator, is calculated to raise disputes and to retard improvement, *and where there is no collateral benefit sought by its continuance, it is an unmixed evil.*

Campbell was well aware that these various proposals would be seen as a radical attack on vested interests, and so added some emollient words, in effect trying to split the opposition:

> No apprehension on the part of the clergy need be felt, from the proposal that lay tithes shall be governed by the same rules as other lay property. It is obvious that those rules cannot, without important modifications, be justly or reasonably applied to ecclesiastical tithes, which are not in commerce, and which are enjoyed by a succession of tenants for life, who from various motives may compromise the rights of their livings, so far as their individual acts are allowed to do so, and permit usages to spring up, tending to strip the church of that patrimony, which laws as binding as those which secure private property, *and resting besides on clear grounds of public policy,* require she should enjoy unimpaired.

Perhaps predictably, upon consultation the Bishops gave a resounding no to the proposed reforms. But the politics of the country were shifting, and the prescription reforms were now to explode into controversy.

IV Prescription, tithes of the clergy, and the Great Reform Bill 1830-1832

In the summer of 1830, the Captain Swing Riots convulsed southern England. This was a popular rebellion against farmers extracting high rents and curates extracting tithes from an immiserated labouring class, in conditions of high prices and food shortages after two bad harvests.[50] The political nation was shocked at the vehemence and unanimity of the rural protestors, and there was pressure for political and economic reform, fiercely resisted by Arthur Wellesley, the Duke of Wellington, Prime Minister since early 1828. Wellesley lost the confidence of Parliament over his blocking strategy in November 1830, and a new Whig administration led by Earl Charles Grey took power, pledged to reform the franchise and composition of Parliament, renovate the constitution, and bring relief to the poor. On 1 March Lord John Russell introduced a franchise Reform Bill of far-reaching extent for a first reading in the Commons. But rumblings over the rent and tithe riots continued to echo in Parliament. Lord Peter King, seventh in succession to the Lord Chancellor King of the 1720s, led the radical Whig attack on the landed interest, calling for reform or even abolition of the Corn Laws and tithing system, using all the arguments of philosophical radicalism and political economy. King brought to the Lords a torrent of tithe petitions signed by many thousands of people, and with fiery oratory and carefully prepared argument forced the political nation to attend to the mounting grievances felt by the population over the burden of tithes, especially when collected by absentee ministers or lay impropriators as a dead-weight impost. On 7th February 1831 King made a great speech to open his campaign, incorporating subtle philosophical arguments about the basis of property and its relation to State power, natural law, and the welfare of the population. This is the key passage:

> They [the tithe petitioners] stated that they were in great distress; that the farmers could get no profit, and the labourers no employment, on account of the tithe. They stated that tithes, in their origin, were intended to answer very different purposes from that to which they were applied at present; that originally the tithes were divided into three portions—one went to the clergyman, another to repair the church, and the third to maintain the poor. But these petitioners stated, that they had now to maintain all the poor, and keep the church in repair, and that the whole of the tithes went to the minister. The mode in which the tithes were collected, they described as a barrier against improvement, and he must say, that there was great truth in the sentiments of the petition. He knew that it was said that tithes were property; and so they were, but very different from individual property. It was said that tithes were the property of the Church, and it was asked, if it were not as sacred as other property? But the property

[50] *E. Hobsbawm and G. Rudé*, Captain Swing, London 1969; *P. Jones*, The Swing Riots and Rural Parish Relations: The 'Moral Economy' of the English Poor in Early Nineteenth-Century England, London 2015.

> of the Church stood upon a different footing from individual property. The Church Establishment was the creature of the State; it was paid for, and in such a manner, as the State pleased. In that respect, then, it was perfectly different from individual property. A reverend Prelate had stated, on a former evening, that Church property was more ancient than other property; it might be more ancient than some other property, but it was at all times the creature of the State, and public property: it was conferred by the State, and it was held as public property, intended for the benefit of the State. It was different from private property, which was necessary for the good of society. Without private property, we should have nothing but the spontaneous produce of the earth; but without tithes we should have a great deal more valuable produce of art and skill than at present. Tithes, then, and private property, operated in different ways. The institution of private property increased the produce; the institution of tithes lessened it. They were a tax on production; they hindered capital from being applied to the land; and, but for them, more capital would be applied, and more produce obtained. It was now necessary to pay tithe on the gross produce of the land, and of capital, and labour united, which prevented the application of capital to land, and prevented the employment of labour. Nothing was more prejudicial than a tax on the gross produce of the land; and it was one which any prudent rulers of the Church would now try to have commuted. He said commuted; because the time for composition was gone by. There must be a commutation measured in a fixed corn-rent, not liable to alteration, and which would not give a greater than a fixed share of the produce to the tithe-owner, not increasing with the capital employed. He believed that, a few years ago, when the Church proposed composition, it might have done; but now nothing short of commutation would do. The right reverend Prelates would now find it prudent to come to some moderate commutation. His Lordship concluded by presenting a petition from Somersetshire, praying for a Commutation of Tithes.[51]

The Bishop of Lincoln and the Archbishop of Canterbury answered King with the suggestion that tithe right should be composed as either a proportionate money rent or a fixed grant of land to end the problem; and also that the vices of non-residency and pluralities protested by King were mainly caused by the avarice of lay impropriators rather than the greed and idleness of churchmen. King hit back, arguing that lay impropriation had been the considered policy of the Henrician reformers in order to end the separatist powers of the Catholic Church, and that he would support legislation to curb lay as well as clerical pluralism, but that the State property of the Church could not be left unreformed with the rural economy in such disruption and uproar.

[51] House of Lords Debates (HL Deb.) third series, vol. 2, 7 February 1831, col. 196-197.

On 10 February King returned to the attack with a second major speech expatiating on the ills of the Church and the nature of property in the modern State.[52] He began by 'presenting some more Tithe Petitions', and suggested that the Prelates in the House should 'act prudently', in light of 'the excited state of public feeling', and offer the country their own plan 'to allay the irritation of the people. He 'would argue the question solely as a simple political economist'. First came the question of pluralities and non-residence. King noted how some 'about twenty-five years ago, an attorney excited a great sensation by the number of qui tam actions he brought to recover the penalties of a great number of clergymen, for non-residence.' This was 'an attack on the Church in the tenderest part', and learned churchmen and their lawyers had 'smote their foreheads to find out how they might relieve the Church from the terror of these proceedings'. Little had improved since those actions, and the Church continued to evade its responsibilities, arguing that lay impropriation was the sole cause of non-residence. King urged therefore that the extent and nature of pluralities be surveyed –

> distinguishing whether they were held under lay or ecclesiastical patronage, including ecclesiastical Corporations. Such a return would show whether more pluralities were held under lay or under ecclesiastical patronage, and their Lordships would see which class was most deserving of the accusation of causing non-residence.

King then brusquely dismissed the defence that non-residents and pluralists paid to have curates in residence to acquit their ecclesiastical duties.

> But what lesson did that teach the public? It was admitted, that the duty was as well done by the Curates for one quarter of the salary. The public would be apt to apply to ecclesiastical offices the principle that was now acted on in civil offices, where it was found that the deputy did all the duty; namely, to abolish the principal office, and retain only the deputy. It was a dangerous lesson to teach the public, that the Curates did the duties of the Church better than the incumbents, at one-fourth of the salary.

King concluded by objecting to the very principle of tithes as a mode of paying the clergy, as bad for public finances and social morale.

> They were instituted in a barbarous age, when the state of society was different from its present state, and though tithes might be suitable then, they were unsuitable now. They might suit such a country as Poland, where the land was ploughed, and then left to the care of nature to restore to it what the agriculturist had taken from it. Tithes

[52] HL Deb. third series, vol. 2, 10 February 1831, col. 350-353.

impeded agriculture—they prevented the application of capital to land; and there was no property more prejudicial than a tax on gross produce. No jury of twelve men would say, that any greater benefit could be conferred on the country than a commutation of tithes. He would read to their Lordships an opinion of a gentleman —a very sensible man—as to property; he was a Republican, and therefore his opinion on some subjects would not be much valued by their Lordships; but Republicans liked property as well as other men. That author observed, "that if there be one natural right recognised by all, it is the right of each succeeding generation to the earth and all its produce, and it is only inherited by private persons under the laws for the good of society." That was Jefferson's opinion, who had placed property on a true foundation. For himself he objected to tithes, that they diminished produce, and diminished the beneficial effects of the right of property.

On hearing this angry and powerful speech, George Finch-Hatton, Earl of Winchilsea rose to reply. He was an ardent Protestant of impeccably reactionary views, who had duelled with the Duke of Wellington two years earlier after accusing him of trying to introduce Popery into government by his measures to alleviate the disabilities of Catholics. Finch argued that Church property was not at the disposal of the State; that the clergy supported by tithe were an essential estate of the realm who helped lead and influence the populace; and that the Anglican clergy gave a better example to the common people than any other element of the upper classes.[53] A more reasoned and forensic defence came from Lord Wynford, formerly the Chief Justice William Best who had presided over the Court of Common Pleas and now an active and ardent Tory peer. In his reply to King, Best urged that the State could not simply abolish property without unintended consequences:

The noble Baron spoke of [tithes] as a tax on productive industry; a mode of talking which could have no other effect than that of creating a most improper excitement among the peasantry of the country. Tithes were no more a tax on productive industry than the noble Baron's rents were; and the same spirit which would destroy this species of property in one week, would destroy all real property in the next. The noble Baron spoke of the President Jefferson, and his opinion of the nature of property. He himself knew nothing about the opinions of President Jefferson, as he never had much inclination to have anything to do with a Republican, in whose views he could not, in many respects, concur. But it appeared to him, that Jefferson's words, as quoted by the noble Baron, afforded a good answer to his own argument. The scope of the noble Baron's argument was, that the tenth of property might be taken on a principle which would also justify

[53] *Ibid*., col. 353-54.

taking the other nine parts. But Jefferson said, that all property was the creature of law, supported by usage or prescription [Lord King: No]. He should be sorry to misrepresent, but so he understood the noble Baron's quotation. But if all property was the creature of law, supported by usage or prescription, which was the oldest property, the temporal or the spiritual? The property of the Church in the tithes was certainly the oldest property, and that which was supported by the longest usage. It was the prior right, and if that property was to be destroyed, on what principle could the other be maintained? The argument of the noble Baron was calculated to spread among the peasantry the notion that the abolition of tithes would afford them relief; a notion than which none could be more fallacious. In this House, such arguments would be estimated as they deserved, and the subject would be considered with views founded on wisdom and justice.... But, notwithstanding the arguments of the noble Baron, he believed that the tenants knew very well that they would not be better off by the abolition of the tithes. By public property, he understood property that had belonged to the public, and which the public might therefore deal with, and dispose of. But tithes did not belong to the public, for they never came from the public, and therefore could not belong to it. If the tithes were to be taken from the Church, they would not be given to the tenant, but to the landowner; for, although tithes were abolished, the tenant would not get one farthing more, but he would have to pay a higher rent. Suppose the noble Baron had two pieces of land, one on each side of a hedge; and the land on one side of the hedge was subject to tithe, and the other free from it. For the one piece of land the noble Baron might get 20s. per acre, while 5s. went for tithe; and for the Other he might get 25s.But the profit made by the tenant would be the same for both; and if the land for which the tenant paid 20s. to the noble Baron were freed from tithe, the only difference to the tenant would be that he would have his 5s. per acre to pay to the noble Baron instead of to the Church. It could have no good effect to endeavour to make, tenants expect relief in a way in which it could not be given without the destruction of all property. Property was the creature of law, supported by usage or prescription, and he would not give a quarter of a year's purchase for the noble Baron's property after the tithes were taken away. He did not wish to prolong this incidental discussion, but he was anxious to show to the Prelates and the clergy of the Church that there were lay Peers in the House who did not share in the feelings which some appeared to entertain towards them.[54]

Lord King then replied with statistics showing that four out of ten church incumbencies were non-resident. He arraigned Lord Wynford for his 'narrow, confined, and professional, view of property, which he

[54] *Ibid*., col. 358-359.

appeared to contemplate with respect, only as being the creature of the law', which was a view –

> much less philosophical than the sentiment of Jefferson, who viewed property as being for the benefit and support of the inhabitants of a country, and as being only possessed by private men for the good of society. He fully coincided in this, and thought that any mode of property which was not for the good of society ought to be, and he trusted would be, altered.[55]

More petitions against tithes were laid on the Table of the House of Commons a week later, on 16 February 1830. In debate Mr. D. W. Harvey stated:

> [He] was surprised that any man who was a friend to the Church should contend for tithes. He had a petition to present from a parish of Essex, signed by twenty-four persons, who used, either as owners or tenants, 1,200 acres. The average rack-rent was 20s.per acre, and they had to pay 8s. an acre to an absent Rector. A Curate attended three parishes, and performed divine service in their parish once in three weeks; was not that enough to disgust these people with the Church of England? That Church took tithes to the amount of 3,000,000l. a year at least, though he believed they might be estimated at 5,000,000l. When it was said that these were a sacred species of property, he must reply, that they were given for the payment of religious services, and when not appropriated to that, they ought to cease. On these principles, what claim could the Rector he had before alluded to have on the tithes of a parish he never visited. The present method of paying the clergy was not at all calculated to promote harmony between them and their flocks, and the well-being of the Church itself required that some reformation should speedily take place.[56]

It was only two weeks later, on March 15, in the midst of a gathering political storm over both tithes and the franchise, that Lord Tenterden introduced his Prescription Bill in the Lords. Lord Tenterden, a long-serving Chief Justice of King's Bench, was regarded as a highly competent lawyer and a colourless politician mainly interested in technical law reform. There is little evidence that he had much hand in the design of the Bill or its precise wording. One may suspect that in the new political climate, John Campbell had a strong hand in the drafting; he was elected in 1830 to the Commons as a Whig member and could now turn his hand to legislation from within Parliament. Notably the Bill went far beyond what Campbell had diplomatically recommended in his 1829 Report regarding prescript-ion against tithes. The clauses dealing with prescriptive acquisition of

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[55] *Ibid.*, col. 364.

[56] House of Commons Debates (HC Deb.) third series, vol. 2, 16 February 1831, col. 605-606.

easements, commons and profits followed the lines of the Report, but in addition there were clauses for the prescriptive commutation of tithes into rent-charges, or even complete discharge, to be proved by stated periods of non-payment, and independent of any agreement evidenced by deeds. Most significantly, such releases were to apply to ecclesiasts as well as lay impropriators. The objections of the Churchmen to the gentler 1829 scheme were now met by a still more aggressive reform.

Lord Tenterden himself was politically conservative in temper. The next year saw him protest vociferously against the Whig government's Great Reform Act, and in a state of rage he refused to ever enter the Parliament precincts again, to show his dismay at the disfranchisement of ancient corporations, a move he regarded as unconstitutional. For this behaviour John Campbell thought his once-ally 'very absurd', especially when compared to the great orators of the day, Macaulay, Stanley, and Russell.[57] But in the 1831 debates over prescription and tithes Tenterden was effective. The initial Lords debate is instructive.[58]

> *Lord Tenterden* …introduced his Bill for shortening the period of Prescription in respect of claims for tithes, and certain other cases…. His Lordship observed that their Lordships were aware that the time of legal memory or prescription extended so far back as the reign of Richard the 1st, but it was often impossible to trace a right or a title so far back and the Judges were often obliged to tell Juries that they might presume that it existed as early as that period, because there was proof of its extending so far back as to afford some ground for the presumption. But this was an uncertain method, liable to mistakes and abuses, for different opinions might prevail among the Judges, as to what were good grounds for the presumption.

The presumption, his Lordship noted, could be defeated by some contrary fact, or by the judge's legal opinion about the forensic implications of supporting fact. Doubt riddled the entire area and litigation was radically uncertain. It was therefore 'much better to fix by law a much more limited period, to the extent of which distinct proof must be given. This would be more reasonable and less uncertain.' The Bill divided into distinct parts, the first relating to 'claims of profits arising out of land, such as rights of common'. Such rights 'should not be defeated where uninterrupted enjoyment for sixty years could be proved, even where the right could be established only for thirty years, and its commencement could be shewn'. Only an illegal commencement should be potent to displace the prescriptive presumption. The second part dealt with easements, 'by usage enjoyed by one over the lands of another'. '[T]hese…should not be effectually challenged where an uninterrupted enjoyment for forty years could be proved.' Thirdly, ancient lights should

[57] *Scarlett Hardcastle*, vol. I, p. 526.
[58] HL Deb. third series, vol. 3, 15 March 1831, col. 442-446.

be proven by twenty years' uninterrupted enjoyment, and then 'be secure from challenge unless originally enjoyed by contract or agreement.'

Lord Tenterden then turned to '[t]he fourth…and…perhaps…the most important part,…that which related to tithes.'. He expounded the problem and then his solutions.

> At present, under the maxim of nullum tempus occurrit ecclesiœ, moduses in lieu of tithes could be challenged and set aside, unless they could be proved to have existed or presumed to have existed so far back as the time of legal memory.

But this brought in all the vagaries of proving presumptions in the teeth of contrary evidence before a jury. '[I]t was much better that some reasonable time should be fixed, up to which positive proof of the existence of the modus should be required, and at which, if the proof was given, the modus should be unchallengeable.' The solution was to 'make evidence of the enjoyment of land for thirty-years without the payment of tithes sufficient to establish the right to exemption, or to pay a modus as the case might be, unless a contrary practice could be distinctly proved at some antecedent time'. As an outer limit, where enjoyment could be proved over a sixty-year period, that should suffice 'to make the right absolute and indefeasible unless contract or agreement…could be established.' He urged his reform upon the Bishops, stating that –

> He was himself most sincerely attached to the Clergy of the Church of England, and should be very ungrateful if he were not; but it was better for them as well as for others, that some reasonable time should be fixed by law as to these matters….He had availed himself of the suggestions of the late Law Commissioners, where he thought them suitable to his purpose.[59]

Lord Brougham, serving as Lord Chancellor, rose to compliment Lord Tenterden on the Bill, and stating that under these reforms the clergy had nothing to fear for their due incomes, thereby cleverly characterizing potential opposition as motivated by material interests. The responses of the Church leaders in the House suggest that they understood that complete resistance to the reform was useless. Instead they acted tactically, seeking to buy time so as to protect an opportunity for churchmen to assert all possible tithe claims in advance of the operation of the new prescription system, and so prevent the new legislation acting as another abrupt nationalization of church property. The Bishop of Bristol, Robert Gray, a notorious pluralist who had been promoted in the hierarchy by Shute Barrington, the lordly Bishop of Durham,[60] took the lead in the defence, and was quite open about the church's tactics.

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[59] HL Deb. third series, vol. 3, 15 March 1831, col. 442-444.

[60] *B.H. Blacker*, Gray, Robert (1762–1834), rev. M.E. Clayton, in: ODNB, online ed. accessed 14 March 2015; *W.B. Maynard*, Pluralism and Non-Residence in the Archdeaconry of Durham,

> [He] was anxious that the contest about moduses should be put an end to, but it was of the last consequence that full notice should be given to parochial incumbents as to the time in which the prescription began to run, and that ample time should also be afforded them to assert their claims. The clerical incumbent stood in a different situation in this respect from the lay impropriator, for the former was often negligent in the prosecution of his claims, from a desire to avoid differences with his parishioners, and especially with those to whose patronage he might have been indebted for his living.[61]

The Archbishop of Canterbury, William Howley, was a High Churchman, who managed simultaneously to be a sacramentalist and a Freemason, but also proved to be aware of the political need for the Church to give way and adapt its property and powers for the modern age.[62] He asked Lord Tenterden not to act through animus against the Church, and to ensure 'that he would take care to avoid any violation of their property'. Agreeing with Gray, he said 'that it was desirable that the clerical incumbent should have ample notice and time to prosecute his rights', and proposed 'a more summary mode of proceeding...in regard to the claims for tithes',[63] by which he seemed to mean a quick method for Churchman to assert their claims as of right and so prevent non-payment turning into a prescriptive modus under the Act.

On 13 July 1831 the tithes question was debated in the Commons. Evidence was produced that the Church had indeed begun litigating to re-establish neglected tithe rights in anticipation of reform. The scale of the Church's claims was remarkable. John Campbell, now sitting in the House of Commons as a member of parliament,

> presented a Petition from the Owners and Occupiers of land, in Dellicar and Docker, and in Kirkby-in-Kendal, for some amendment in the present system of levying tithes. They stated, that lately a demand, for the first time had been made upon them for tithe in kind; and 220 notices had been served of the intention of the interested parties to enforce its collection. The prayer of the petition was, that the House would fix some reasonable time, beyond which, if tithe in kind be not demanded, its collection would not be enforced.[64]

More evidence of Church activism in the courts then emerged. Member of Parliament J. Wood rose to support the petition, and presented his own, 'which stated, that 222 Suits in Chancery had been commenced for tithes in one parish, which tithes had not been demanded

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1774–1856: The Bishop and Chapter as Patrons, Northern History 26 (1990), p. 103–130.

61 HL Deb. third series, vol. 3, 15 March 1831, col. 444.

62 *J.R. Garrard*, Howley, William (1766–1848), in: ONDB, online ed. accessed 14 March 2015.

63 HL Deb. third series, vol. 3, 15 March 1831, col. 444.

64 HC Deb. third series, vol. 4, 13 July 1831, col. 1990.

for a long time.'. Wood feared that these two parishes were only the beginnings of a massive Church campaign to claw back neglected tithes; and it was very difficult for parishioners who claimed to rely on a long agreed modus to show its origin going back to earliest time of memory. His petition 'concluded by praying, that there might be some reasonable period fixed by law, beyond which no claim for tithe in kind could be made.'

> If some law of this nature were not soon passed, there would be not only 200, but 200,000 suits instituted, which would have the effect of doing away with those modusses which had been of great public advantage, by making land easy of transfer. Public sales had been advertised, and many purchases of land made, as being tithe free, on the security of those modusses; and if some measure were not speedily taken to prevent the revival of these antiquated claims, it would lead to endless disputes, and tend materially to bring religion itself into disrepute.[65]

The leading property lawyer and Tory member Sir Edward Sugden (later Lord St Leonard's) agreed with Wood that 'there ought to be some legal measure introduced to limit these claims', but warned that Parliament could not act to intervene in cases that were as yet sub judice, some of which he was involved in as counsel. This was in effect a conservative lawyer's plea to do nothing to impede the exercise of vested rights.

Fellow barrister Campbell acknowledged the point, adding that Sugden's speech –

> strongly illustrated the necessity of some legal measure to compel the lessees of tithes, as well as the proprietors, to conduct themselves with fairness and liberality. He must also observe, that although this defect in the law respecting modusses was the only subject before the House, yet this was not the only part of the system that required a remedy.[66]

The interest of these skirmishes in the Commons lay in the scale of Church litigation evidenced in the petitions. A fire was being stoked.

At the second reading of the Tenterden Prescription Bill on 16 September 1831 Bishop Gray of Bristol (one of the wealthiest pluralists) made the Church's aggressive litigation strategy still clearer. Gray –

> approved of the provisions of the Bill, in as far as they related to rights of way, and other common rights. But there was one clause in the Bill which related to a subject of the utmost importance, and of that clause he could not approve in its present state, and he hoped that the noble

[65] HC Deb. third series, vol. 4, 13 July 1831, col. 1990-1991.
[66] HL Deb. third series, vol. 4, 13 July 1831, col. 1992.

> and learned Lord would consent to introduce some modification of it in the Committee. The clause to which he referred was that which appointed the period of prescription in cases of moduses, or customary payment for tithes. It was well known, that as the law at present stood, in order to establish a modus, or customary payment in lieu of tithes, it was necessary for those claiming that modus as against the clergyman, to give such evidence as to lay a good foundation for the inference that the modus existed as early as the time of Richard 1st. He admitted, that very serious inconvenience arose from that circumstance, and that some more limited period of prescription should be established. These moduses were at first merely agreements with temporary incumbents, which were entered into out of favour to the parishioners, or some other motive, and then continued through the negligence of succeeding incumbents, by which means the Church was deprived of a great deal of property, which of right belonged to it. All that he wished on the present occasion was, that the clause should appoint a period of prescription extending much further back than a period of six years, which was the time limited as the clause stood. He should propose twenty years, or at least that of a new incumbency taking place subsequent to the passing of this Bill, as several of the existing incumbents were, for various reasons, extremely indisposed to contest the validity of these moduses, although they had good grounds to do so.[67]

The Church's practical defence was becoming clear: to defend of tithe income against the menace of statutory prescription by creating the means of litigation that could interrupt any possible claim of prescriptive desuetude.

Lord Tenterden spoke briefly to decline Bishop Gray's invitation to give the clergy more time to establish their tithing rights, but five days later, on 22 September 1831, the Bishop moved again, proposing that at least sixty years and three incumbencies should elapse before any prescription against a tithe duty should be allowed – a restriction that would as good as end prescriptive extinction of tithes. Gray tried to justify the Church's defensive stance by going on the attack. He began by characterizing Lord Tenterden's Act as aiming to put a limitation upon 'the period which had been hitherto allowed for invalidating fictitious claims to prescriptive payments in lieu of tithes.' This exactly inverted the intention of the legislation, which was to provide a definitive prescription period to *establish* (not invalidate) claims to commutation. Gray professed himself anxious to see limitations on prescriptive actions, and avowed that 'He should be one of the last persons in that House, as well from consideration of the clergy themselves, as from regard to the interest of the landholders, to encourage precarious litigation for the setting aside of any modus'. Moreover 'the clergy were not eager to come forward in such contests' regarding law impropriators, lest their own position be called into

[67] HL Deb. third series, vol. 7, 16 September 1831, col. 85-86.

controversy. He gave the example of a lord who had entered a 'number of suits which had been instituted with a view to subvert unfounded [modus] claims', and in the absence of necessary proofs ; and as the result of the inconclusive litigations could now presume that maybe all these modus claims were 'vexatious or frivolous'. Gray's major point was that even a generous rule of 60 years' limitation, binding an estate only if non-payment or commutation could be shown through three incumbencies, nonetheless required daunting forensic inquiries, and that many suspensions of full tithe would have been made over the years as a grace and favour by the incumbent or a gratuitous alleviation by the lord, without any intention of permanently sacrificing ecclesiastical or landlord rights. Gray therefore recommended 'prospective arrangements' only, proposing 'that no prescription should be deemed valid and indefeasible, in lieu of tithes, where the sixty years should have expired, till after three years of a third incumbency, in the appointment of some person, to take place *after* the passing of this Act.'[68]

Lord Eldon, formerly the barrister John Scott and now an octogenarian retired Lord Chancellor, spoke in favour of Gray's amendment urging strong prospectivity for prescriptions retiring tithes. This elder legal statesman's intervention must have impressed the House of Lords, for his speech was cited often in the debates that followed. A further argument for the Church was added by Charles Blomfield, the Bishop of London, who was counted one of the ablest ecclesiastical politicians of his age.[69] Blomfield argued that ecclesiastic incumbents should be allowed to resist prescription to a far greater degree, and for a longer time period, than lay impropriators, because of their pastoral position:

> [I]n framing the Bill, it seemed to have been forgotten that the clergy were in a very different situation from the lay holder of tithes, whose property was in fee simple, and descendible to his heirs, and who therefore would take care not to let any modus or collusive payment be established; whereas the clergy, having only a life interest, and depending upon the nullum tempus principle, which made it practicable for any of their successors to assert their rights, had suffered many of these rights to fall into disuse – some from inattention, some from poverty, some from a love of peace, and some from a fraudulent agreement with their patrons. The effect of the Bill, with respect to the clergy, would be to extinguish almost all doubtful claims; for no person would think of setting up a modus, which could not be proved to have been paid for more than sixty years; and it was not probable that one half of the clergy, who were prepared to prove the invalidity of moduses, would undertake to institute suits within three years from the passing of the Bill, after which time all claims would be foreclosed. The effect of limiting the institution of suits to so short a period would

[68] HL Deb. third series, vol. 7, 22 *September 1831*, col. 480-481 (emphasis added).

[69] *A. Burns*, Blomfield, Charles James (1786–1857), in: ONDB online ed. accessed 14 March 2015.

be peculiarly hard on the clergy. It would compel them to bring a vast number of causes into the Exchequer, at a time of all others most unfavourable to the assertion of their rights, and would load them with an obloquy which the lay impropriator might fearlessly defy, or they must be content to see their just claims for ever extinguished. For these reasons, satisfied as he was that putting an end to the nullum tempus principle would be not less advantageous to the interests of the Church, than due to the just rights of landed proprietors, he thought that a longer period than three years, after the passing of the Bill, ought to be allowed to the clergy for the institution of suits.[70]

The House then agreed the Prelates' prospectivity and notice amendments and sent the Bill to committee for rewriting.

V Breakdown and recovery – the 1831 riots and their aftermath

Meanwhile the Great Reform Bill was making its tortuous way through Parliament. A first Bill had been gutted in debates in March 1831, but following the landslide Whig election victory in June 1831 on a franchise reform platform, a stronger second Bill was introduced and passed by the Commons in September by a majority of over one hundred votes. When the Bill went up to the Lord, many Tory peers took the view that with the electoral and Commons votes, it would be wrong for the Peers to deny the Bill as it stood as the will of the people. But an irredentist Tory element argued that the Bill was unconstitutional, in that Parliament did not have the self-embracing power to change its own composition so abruptly. The Bill was voted down in the Lords by forty-one votes on 8 October 1831. The Lords Spiritual were the most vehement opponents of the Bill, and their unrestrained conduct in the parliamentary proceedings instantly attracted wide opprobrium. Led in the Lords by Bishop Gray, twenty-one of the twenty-two bishops voted against the Bill, ensuring its defeat, and the political nation saw this as an assertion of a veto power by an unelected, elitist, and sponging clerical class who presumed to thwart the clear will of the people. The vote triggered angry protests across the nation, with rioting aimed in particular against the property and persons of the clergy. According to Cole and Postgate, 'never since 1688 had Great Britain been so near actual revolution as in 1831; never in all the troubles of the next two decades was she to come so near to it again'.[71] Rudé tells of the climax of the convulsion:

But by far the biggest outbreak came at Bristol on 29 October. Rioters held the streets for three days and did almost as much damage as the Gordon rioters in London fifty years before. They demolished the Mansion House, Lawford's Gate, the Bishop's Palace, Canons' Marsh, the Customs House, the Excise Office, and toll-houses all over the city; they broke into

[70] HL Deb. third series, vol. 7, 22 September 1831, col. 481-482.
[71] *G.D.H. Cole* and *R. Postgate*, The Common People 1746-1938, London 1945, p. 248.

the Bridewell, the Gloucester County Prison and New Gaol and released prisoners; and destroyed forty-two offices, warehouses and dwellings. A dozen rioters were killed, nearly 100 were wounded, and 180 persons were committed to prison, fifty on capital charges. It was the last great urban riot in English history.[72]

The political battle over franchise reform continued until June 1832 when the Third Reform Bill was passed, after Earl Grey's successful threat to have William IV swamp the Lords with newly created Whig peers in order to overwhelm Tory opposition. The whole tableaux was repeated within a century with the fight over the Liberal "People's Budget" in 1909-10, this time over land tax and the funding of redistributivist welfare, rather than the undoing of the political representation of the landed interest. But our concern returns now to the impact of the political dramas of the autumn of 1831 on the progress of the Prescription Bill, which understandably had been put to one side as Parliament debated greater issues.

Bishop Gray, who had been of the leaders of opposition to franchise reform in the Lords, had shown personal courage in the Bristol riots, refusing to flee the city as his episcopal palace and possessions were targeted by the rioters, presumably to punish him for his lead role in the defeat of the Reform Bill. But it soon emerged that Gray and the other bishops had helped stoke popular anger through their irredentism on tithe and prescription issues as well as on the major issue of the franchise. Three days after the vote against the Second Reform Bill, on 11 October 1831, some startling accusations were made in the House of Lords by Lord King, returning to the attack. He presented fresh evidence that the clergy had since the summer brought further campaigns of litigations against parishioners across the land aiming to enforce neglected tithe payments and thereby to re-establish the viability of tithe rights, thus to blunt the impact of any changes to the prescription rules that might allow a new statutory defence against stale tithe claims. A mighty debate in the Lords ensued, drawing in the leaders of both Whigs and Tories.

King began by tabling petitions supporting the Prescription Bill, 'which was likely to be strangled in this Session as it had been in the last'. He cited the needs of numerous petitioners, for example 'owners and occupiers of lands to the extent of 5,000 acres in the county of Suffolk' who 'prayed that the Bill might speedily pass, as otherwise they would be continually harassed with suits for tithes, as they had recently been, after an exemption for centuries.'. In Suffolk tithe payments had been unenforced since the Reformation had merged priory and abbey and into lay cathedral estates, but now a blizzard of tithe suits had been 'commenced against them by the Dean and Chapter of Ely, who were lords of the manor', vesting leasehold estates in a steward and charging him to enforce every possible tithe claim on the subtenants, however ancient. Initial legal skirmishing had cost the petitioners already some £5000 in legal fees. As if

[72] *G. Rudé*, English Rural and Urban Disturbances on the Eve of the First Reform Bill, 1830–1831, Past and Present 37 (1967), p. 87–102. Rudé would have had to adjust his assessment following events in London, Birmingham, Bristol, Manchester and Salford, 6-11 August 2011.

to show contempt for the parishioners and tenants, the Dean and Chapter had imposed hefty fines on fresh lease renewals and appointed non-resident vicars in livings to save on expenditure. King concluded:

> This disturbance of the ancient order of things, then, came from the clergy, who professed to be averse to all changes, and to be desirous that everything should remain unchanged, but who, when their own interests were concerned, became arch-disturbers of the peace.[73]

This language drew the ire of Lord Ellenborough, who rose to oppose King:

> [T]he more he saw of the conduct of the clergy, the more he was convinced there was the grossest injustice in making such a charge against them. Even they themselves had lately come forward with measures of improvement and amendment. He knew the abilities and kindness and excellent disposition of his noble friend, but really these constant attacks on the clergy had a tendency to detract from the position which his noble friend ought to hold in that House, and very much disparaged him.

King affirmed that the evidence he had provided supported his charges and angry criticism. 'The petitioners complained that the property they held had been for centuries exempted from tithe, but that the Dean and Chapter of Ely had introduced a claim, and subjected them to great and unnecessary litigation.' The Church had thus contradicted itself, being 'unwilling…to disturb settled institutions, or to agree to such a change as the late great [reform] measure would have effected', and at the same time 'are very ready to disturb the settled order of things when it is their interest to do so.' King ended with a stark warning:

> [I]f the [Prescription] Bill of the noble and learned Lord [Tenterden] does not pass this Session, and if the clergy persevere in their obnoxious claim; I believe they will not be able to resist the odium which in a short time will be raised generally against tithes.[74]

King then laid further anti-tithe petitions on the Table of the House, piling up evidence that the Church had launched further waves of litigation to preserve and enlarge their rights to tithe. It was an incendiary moment; King had waited for his clerical adversaries to push too hard and then pounced on their mistake to undermine their position. His harsh arguments won over supporters immediately, notably the Liberal politician and anti-slavery activist Edward Harbord, now the third Lord Suffield.[75] Harbord avowed that he had been a critic of King's anti-clerical campaign-

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[73] HL Deb. third series, vol. 8, 11 October 1831, col. 468-469.

[74] *Ibid.*, col. 468-469.

[75] *H.C.G. Matthew*, Harbord, Edward, third Baron Suffield (1781–1835) in: ONDB online ed. accessed 14 March 2015.

ing in the recent past, but having witnessed the behaviour of the Bishops in the House of Lords he was forced to reconsider and would change his allegiances. He then made this wounding observation:

> My Lords, I have always looked at the existence of that body in the House as liable to one objection—I always considered that the right reverend bench were at all times ready to throw their weight into the scale in favour of the existing Government. I saw them on all occasions acting along with the Government. I saw them ready and willing to support every Administration until now; but the late events have led me to remark what sort of a Government it is, that the right reverend bench of Prelates are willing to be attached to. So long as the government of the country was arbitrary and oppressive, so long do I find the right reverend Prelates giving it their support; but, as soon as a liberal Government produces a measure for the benefit of the people at large, and for the extension and security of the liberties of the country, so soon do I find the right reverend bench deserting that Administration, and throwing all its power into action against it.[76]

Henry Herbert, the Earl of Carnarvon, then spoke against Harbord, hotly protesting that the motives of peers in how they vote should not be impugned by fellow peers in the House. Lord Brougham, the Lord Chancellor and hence Speaker of the Lords, then ruled in favour of Harbord, using perhaps element of irony to dig the ground beneath the Bishops' feet. Harbord, like Herbert, could be counted 'a warm friend of the Establishment, none of your Lordships more so'. Members of the House would have to accept that their conduct as legislators could be observed and commented upon, and they could not wish for any impunity from criticism. Nor could they wish 'to evade the discussion of the consequences of their conduct on a great occasion.' He continued:

> The right reverend Prelates have acted with the greatest disinterestedness. Good God! my Lords, the idea of imputing self interest to the right reverend Prelates is impossible! Good God, my Lords, it is the last charge which I thought any one would have brought against them. They had a right to pursue the course they did. Who can deny it? They had a right to vote against the Government; and if they thought they had the opportunity of tripping up the Government, my Lords, they had a right to do so. It could not be imputed to them that they were actuated by selfish motives when they acted against the present Government, and attempted to trip it up, and probably thought that they had tripped it up.[77]

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[76] HL Deb. third series, vol. 8, 11 October 1831, col. 469-470.
[77] *Ibid*., col. 470-471.

Earl Charles Grey, the Prime Minister and leader of the Whigs, then rose to try and calm the debate. He spoke chiding Harbord for his comments, and thus asserting his authority over his own team. But Grey could constrain neither Harbord, nor the Bishops whom he baited. Harbord offered this calculated provocation:

> I did not mean to question the motives of the right reverend Prelates in the vote which they gave the other night; but…I only stated that which is naturally a matter of fact…that the votes of the right reverend Prelates were in favour of Government so long as it adopted severe measures against the people; and that they began to be opposed to Government only when a more liberal policy was avowed. So long as the existing Administration held the reigns of power with a tightened hand, so long was it assured of the support of the right reverend Prelates; but the moment the system was to be relaxed, and the people of England were to receive the full measure of freedom which they were entitled to by the Constitution, then, for the first time, were their votes recorded against the Government. This, my Lords, I meant to state as the fact, without imputing motives to any member of your Lordships' House…. I will sit down, assuring you that I did not mean to say any thing which could be considered as offensive to any member of the House.[78]

The Bishop of London then criticized the Lord Chancellor for suggesting that the Bishops had voted to 'trip up the Government', affirming that they were for the Administration but on this occasion had voted independently with a pure motive, for the public good. The Bishop of Landaff stated that he had voted down the Reform Bill due to conscience, expressed his contempt for critics of the Lords Spiritual whether in the House or in the streets: 'I care little for what may be said by the noble Lords; and their censures pass me as idle words, or as the echo of those sounds with which we are assailed in our way to the House'. But it was the Bishop of Exeter who made the most inflammatory comments:

> [H]e was wholly astonished at the remarks which had been made on the motives of the reverend Bench, from the highest quarters. Noble Lords assumed the right to censure the body of Bishops for the vote they had recently given. This censure came from those, too, who, from their office and station, were bound to sustain the institutions of the country. He defied any noble Lord to state a single instance in the history of the country when any Members of that House had been so vilified and insulted as the Bishops had been within the last week, by a person of the highest station in the realm. They had been accused of voting against the Reform Bill because it was the measure of a liberal Administration. Was this charge an instance of liberality; and did the

[78] *Ibid.*, col. 472.

> members of his Majesty's Government by these remarks intend to incite and encourage violence? He did not apologize for his warmth; for he should be ashamed of himself if he could be cool upon such a subject. Had the attack upon the Bench of Bishops been made at a moment of excitement, to that excitement he would have submitted; but upon the mere presentation of a petition, and that a petition of no consequence, one noble Lord had abused the Church as the great arch-disturber of all order, and another noble Lord had charged the Bishops with being bound together in a conspiracy against the liberties of the country, and against all that could constitute the welfare and happiness of the people. These were the notions that were propagated everywhere against the Bench of Bishops, and noble Lords had, moreover, spoken against them in that House, in a tone of sarcasm, if not of direct and positive censure, as a body actuated by self-interest, at variance with the public good. Under these circumstances he had thought it his duty to address their Lordships.[79]

This was too much for the Prime Minister. Grey leapt up and said:

> [H]e should be guilty of injustice to himself and other noble Lords, if he permitted this most unprovoked attack to pass without notice. What the right reverend Prelate had uttered was the most intemperate, and the most unfounded insinuation that he had ever heard from any Member of that House…. The right reverend Prelate had said, that every man who had spoken from that side of the House had spoken in a tone of sarcasm or reprobation of the recent conduct of the Bishops….The right reverend Prelate was not content with this want of truth, but he had uttered it with all the appearance of a spirit that but little became the garment that he wore. It was the grossest injustice he had ever heard. But the right reverend Prelate had even gone much further. He had said, that those who ought to be charged with the care of the public peace, and were bound to support the institutions of the country, had actually been the instigators of a mob to insult the Bench of Bishops. He could not conceal the contempt, the indignation, with which he heard the charge. He dared the right reverend Prelate to state, if he could, one single syllable of truth to support the falsest and most calumnious accusation which ever had been heard…. He rejected the charge as one totally unfounded in truth, and as having no one colour of foundation. He…now repelled, with scorn and indignation, the aspersions which the right reverend Prelate had endeavoured to cast upon his character, and he called upon him to support what he said by proofs.[80]

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[79] *Ibid.*, col. 474-475.
[80] *Ibid.*, col. 475-476.

The Bishop of Exeter descended still further into accusation, stating that in the Reform Bill debate Grey had as good as threatened the Churchmen with 'schemes of confiscation' and that they could not expect protection from the 'multitude' if they blocked reform – all pressures to subvert the Bishops' independence in the most important vote since the 1688 Revolution. Grey then expressed astonishment that 'The right reverend Prelate charged his Majesty's Ministers with having purposely done all in their power to encourage tumult and excite the mob to acts of popular violence'. The Bishop of Exeter tried to retract: 'Most solemnly do I declare that I do not think I have used any such words. Upon my honour and conscience I did not use those words. I am quite sure that I never accused his Majesty's Government of exciting the people to outrage'. But Grey would not allow the Bishop to resile form his own words, and completed his condemnation:

> The right reverend Prelate had uttered a foul and calumnious aspersion, totally unfounded in truth, nor had he in the least benefitted himself by the explanations he had entered into. The right reverend Prelate charged the Government with encouraging acts of violence against himself and his brethren, and for that charge there was not the smallest foundation.[81]

Wellesley, the Duke of Wellington, leader of the Tory party, tried to defuse the angry controversy, stating that all were exaggerating and point scoring on what was really a subsidiary issue about petitions concerning tithes, hardly worth the attention of the House; and he then cleverly directed the peers to an anxious debate as to whether the Government had done enough to protect peers, landowners and clerics from the violence of the mob. The peers then gratefully exchanged stories of the personal attacks each had suffered in the streets or in their homes, and Edward Law, the second Lord Ellenborough, recently returned from governorship of India, then helpfully recommended muzzling of the metropolitan press as the key measure in defense of the realm.

VI Church Bills for Composition and Commutation of Tithes

Let us wind back the narrative some fourteen weeks, to an episode preceding these dramatic parliamentary scenes of October. On 24 June 1831, a few weeks into the life of the popularly elected Whig Administration of Grey, the Archbishop of Canterbury, William Howley, had brought his own Bill for the Composition of Tithes (preserving them as a proportionate and proprietary charge on capital), together with two other Bills to augment the incomes and property of resident clergy, thus attempting to outflank Lord Tenterden's Bill. The Whig Thomas Brand, the Lord Dacre, had immediately proposed a Commutation Bill modelled on

[81] *Ibid*., col. 478-479.

compulsory enclosure acts, and Grey spoke at length recommending that both Bills be debated and considered, but that his government had other business to attend.[82] On 18 July the Archbishop moved a second reading of his Bill, stating that he was backed in this by all the bishops. His argument against permanent commutation was that this would immiserate the clergy and make for impossible complexities in the definition, collection and distribution of payments. A rolling programme of temporary compositions for terms of years was the better pragmatic approach, and would best balance the interests of the classes, the Anglican leader suggested. There then ensured a most fascinating political crossover. Lord Brougham spoke in favour of the Archbishop's bill for temporary compositions as more likely to evolve into a workable system, and less likely to create unjust confiscations of property. He rejected the model of enclosure whereby a two-thirds majority by weight of landholders could coerce the holdout minority to submit to a compulsory valuation by commission. Then the aged Lord Eldon spoke, stating that tithe entitlements were little understood and would be extremely difficult to negotiate consensually, so that the Archbishop' system would be productive of continued misery. He seemed to favour the once-and-for-all solution of legislatively mandated composition.

On 21 July the Composition Bill promoted by the Churchmen was again debated. Lord Wynford, the former Chief Justice Best, successfully had the Bill removed to committee, making the point that prescription of release upon non-payment of tithe was conspicuously absent from the Bill, and that eminent lawyers had warned that the forensic difficulties involved in negotiating compositions would make the policy insufferable:

> The Earl of Eldon did not think, that the Bill was one which could pass in its present shape. There was no provision made in it for determining, in cases of moduses, whether there was a modus or not; or whether the modus, if one had existed, was or was not a legal modus. It sometimes happened, that very delicate questions arose, as to whether certain lands were or were not titheable; and sometimes, persons who had not paid tithe for their lands, were not able to tell the reason why they had paid none; and yet they might have good right of exemption.[83]

How, then, did the great debate over prescription against tithes conclude? The best answer is that the debate was partly won by the Church, who managed to install protection of church incumbents and so contrived that only the lay impropriators should be subject to the modernized prescriptive regime extinguishing their claims. Hence it was that the Church and Tories allowed Lord Tenterden's Tithe Act to pass quietly though Commons and Lords between March and July 1832 without attracting any fresh Parliamentary debate or opposition; and that Act was

[82] HL Deb. third series, vol. 4, 24 June 1831, col. 292-295.
[83] HL Deb. third series, vol. 5, 21 July 1831, col. 133.

duly put into force on 9 August. In short, the Act provided that non-payment or compromised payment of a tithe lasting for thirty years would be good against a person demanding, and would become indefeasible after sixty years, following the pattern laid out by the Real Property Commissioners for general easements; but that any tithe claim made for an ecclesiastic person should not be subject to prescription unless the non-payment had occurred through two incumbencies and then a further three years of a third incumbency. Shorn of the contentious tithe issues, the Prescription Act first conceived by John Campbell in 1829 also reached the statute book, with effect from 1 December 1832. Indeed Campbell had adumbrated this result with his original proposal that impropriated tithes should be treated as secular profits, but that ecclesiastically-held tithes be given better protection.[84] Parliamentary time was of course dominated in these months by the passing of the Third Reform Bill, and when Parliament did debate tithe reform it was chiefly concerned with curbing lay impropriation and pluralism in the Church of Ireland, an issue absorbed far more legislative time than English tithes. One may also suspect that the language of the 1832 Tithe Act was so extraordinarily rebarbative that very few Parliamentarians understood what they had passed.

One can only admire the canniness of the Bishops in this great debate. But as the old constitution died around them, the Bishops showed better sense than to triumph over their Whig adversaries, who after all were in the ascendant. Charles Blomfield, the Bishop of London who had so brilliantly finessed the liberal attack on tithes led by Peter King, partly changed sides, re-aligning himself with Charles Grey and the triumphant Whigs to found the Ecclesiastical Commission and begin a long overhaul of Church property, dragging the institution away from its taint of Old Corruption and beginning a process of socialization and modernization that stretched across the nineteenth century and that continues, with fits and bumps, to this day. One may suspect that Grey, in the midst of his great combat with the Tories over the franchise, had flung the Lords Spiritual a symbolic bone to bring them to heel over constitutional reform. And as it turned out in the new era of democracy, there was no end of legislative tithe reform, with eight further Parliamentary Acts in the next fifteen years alone, and many more statutes to follow, whittling away the tithing rights of the Churchmen to nearly nothing, partly by conversion to simple rent charges, partly through a process of voluntary amalgamation and sale, partly by compulsory acquisition or cancellation wrought by bureaucracy. Perhaps the real answer to the problem of tithing lay in the deeper economy – as agriculture lessened in importance and the urban-industrial economy grew, the Church could make its income handsomely from the capital and rents of its lands, without taking a portion of the produce of the land and irritating the society around them through the enforcement of archaic and stale rights.[85] It was not Lord Tenterden's

[84] Above, Section III.

[85] But now see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council* v. *Wallbank* [2004] 1 A.C. 546 (H.L.).

difficult system of prescription that ended tithe, but time itself. Yet Tenterden's legislation helped breach a mental wall and rendered the property of the Church more plastic and more amenable to the needs of a changing society;[86] indeed I have suggested that debates over tithe in the agonized politics of those years changed the minds of the Churchmen themselves. In this sense, I will vote the 1832 Prescription Act and its sibling Tithe Act a success.

[86] See for example the amelioration of pluralism and non-residence effected by the Bishops in partnership with Parliament after 1832, a process charted by the secretary to the new Bishop of Gloucester and Bristol: *Thomas Holt*, The Act for the Abridging of the Holding of Benefices in Plurality and for Making Better Provision for the Residence of the Clergy: With an Analysis of the Act, Some Practical Notes, and a Copious Index, London 1839.