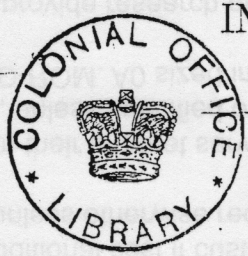
THE

POSITION OF THE CHURCH OF ENGLAND

IN SOUTH AFRICA.



REPORT

OF THE

PROCEEDINGS AT A SPECIAL VESTRY MEETING OF TRINITY CHURCH, CAPETOWN,

HELD AUGUST 10TH, 1882,

CONVENED TO CONSIDER THE PROPER COURSE TO BE TAKEN BY MEMBERS OF THE CHURCH OF ENGLAND CONSEQUENT UPON THE RECENT JUDGMENT OF HER MAJESTY'S PRIVY COUNCIL IN THE CASE OF

MERRIMAN (*Bishop of Grahamstown*) VS. WILLIAMS (*Dean of Grahamstown*).

TO WHICH IS ADDED

THE TEXT OF THE JUDGMENT,

WITH BRIEF NOTES THEREON.

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ERRATA.—On page 15, line 14 from the bottom, for "Bishop of South Africa," *read*, "Bishop of the Church of the Province of South Africa."

INTRODUCTORY REMARKS.

A FEW words of explanation are due with reference to the publication of this pamphlet.

Looking at the deep importance to all concerned of the matters of which it treats, the Church Committee felt it would be desirable to offer to all members of Trinity Church a full statement of what took place at the special Vestry Meeting on Thursday, August 10th, to which it would be useful to add the text of the recent Judgment. The importance of an intelligent acquaintance with questions so vitally affecting our Church life and prospects cannot be overrated. It is further felt that it is the duty of all at this time to contribute what they can to the elucidation of the questions at issue, as only by a clear understanding of these are we likely to arrive at peaceful and united conclusions. In the hope, then, that the matters here referred to, and the Resolutions proposed, may, in some degree promote the concord and union so much to be desired, the Committee offer to their fellow-churchmen as well as to the members of the Church of the Province of South Africa, this small contribution, earnestly desiring that, in the gracious providence of God, the forthcoming Provincial Synod of that Church, may, by His Holy Spirit be guided into the adoption of such wise measures of conciliation and peace as may satisfy all reasonable scruples, re-unite all Churchmen under the protecting shadow of our dear mother Church of England, and secure lasting union and mutual goodwill.

H. WHITE, } Churchwardens of
J. D. CARTWRIGHT, } Trinity Church.

Cape Town, August, 1882.

THE CHURCH OF ENGLAND IN SOUTH AFRICA.

TRINITY CHURCH VESTRY MEETING.

On Thursday evening, the 10th August, 1882, a vestry meeting was held in the Chancel of Holy Trinity Church, Cape-town, under the presidency of the incumbent, the Rev. Charles Hole, LL.D., to deliberate upon the best course to pursue towards bringing about unity and concord, consequent on the recent judgment of the Judicial Committee of the Privy Council. A large number of members attended, including several visitors, former members of the congregation, and some of the ladies of the congregation seated in the body of the church, who appeared to manifest the keenest interest in the proceedings.

The rev. Chairman, having offered up prayer for guidance in their deliberations, addressed the meeting as follows:—In opening this meeting, I wish to say that it seemed to me right to give the congregation this opportunity of expressing its opinion as to the proper course to be pursued for promoting the peace and welfare of the Church of England in this colony, and the union of all who receive its doctrines and formularies, into one homogenous body, resting on a common basis, and governed by the same laws in all essential matters of doctrine, faith, and discipline. I need hardly say that the recent judgment of Her Majesty's Privy Council in the appeal in the suit of Merriman (Bishop of Graham's Town) *vs.* Williams (Dean of Graham's Town), is the cause of my convening this special meeting. You have always, as a congregation, maintained your position as part of the Church of England in this colony; and, with a persistence which, I confess, has sometimes seemed to me to run into over-scrupulousness, have refused to commit

this congregation to a connection with the Church of the Province of South Africa, on the ground that that body was not identical with the mother church. The recent judgment has fully vindicated the accuracy of your contention, and the soundness of the advice under which you have acted. It, therefore, seemed to me a duty to call you together, that the opportunity might be afforded you of declaring what steps you propose to take with a view to rendering your aid and counsel as churchmen, at this juncture, in promoting union and concord among all members of the Church, on the lines, of course, of the Church of England. I frankly confess that the relative position of the Church of the Province of South Africa and that of the Church of England, with the consequences involved as regards the ministers of those churches respectively, which the judgment has laid down, has startled me. The judgment asserts, as clearly and distinctly as language can express, that the identity or connection between the two churches which had been previously supposed to exist by persons high in authority here, as well as by myself, is without legal standing. My belief in this matter will explain my action at the late Diocesan Synod. That action, though unsuccessful, had for its object the removal of, as I then thought, all just grounds of exception on the part of those who refused their adhesion to the Church of the Province of South Africa. It has now been unmistakably decided that this refusal was based upon an accurate conception of the real consequences resulting from the constitution of the Church of the Province of South Africa,—namely, that the latter had distinctly separated itself from the Church of England, and that, therefore, members of the latter body could not join it and retain the same guarantees of freedom as they possess in the mother church. No doubt this is correct, and specially applies to the clergyman of the church, unless he happens to be of one particular school of thought. Under these circumstances, I am sure you will sympathise with me in the feeling that it now becomes the duty of all churchmen, in a spirit of loyal submission to the decision of the highest legal tribunal of our church, to recognise the gravity of the situation, and to do all in their power to aid in applying the obvious remedy,—namely, so to amend the constitution of the Church of the Province of South Africa as to render its connection with the Church of England as by law established impregnable and unassailable. This emendation is not in our hands, but we can

do our part in strengthening the hands of those who have the power, by showing our sincere and earnest desire for concord and peace, and our willingness to do everything to forward the end in view, short of giving up or placing in jeopardy those cherished principles which we regard as our inalienable birthright. Our recent special prayer-meeting was convened that we might supplicate grace for ourselves to act with calmness, wisdom, and charity, and for those in authority that they may bring out of this crisis measures of lasting benefit and blessing to the church.

If you will kindly allow me, I would conclude what I have to say on this occasion by a few words as to the personal bearing of this matter upon my own position. This, as due to you, as well as to myself. The judgment clearly states, or implies, two consequences that seriously affect the prospects of a clergyman who may be at once a member of the Church of the Province of South Africa and minister of a congregation of the Church of England. 1. Such a clergyman, holding and teaching doctrinal views perfectly within the lines of the Church of England, may, in the Church of the Province of South Africa, be accused and condemned for heresy on account of those views, and thus one whom the decisions of Her Majesty in Council would protect in England, may be silenced and excluded by the Church of the Province of South Africa. 2. Such a clergyman might be required to conduct his ministrations under the possible rules, orders, or canons of the Church of the Province of South Africa, in a way that would be illegal in the Church of England, and thus be liable to prosecution whichever way he acted. In such circumstances he would be a striking example of our Lord's statement: "No man can serve two masters."

I have felt it right thus briefly to state the position in which we find ourselves. It is a serious one, and demands grave and careful treatment. I will not further enlarge upon the questions here referred to, but will now place myself at the disposal of the meeting, earnestly praying that the Holy Spirit may guide your deliberations, and may graciously order that these may promote the peace of the church, and the spread of the kingdom of Christ.

The Hon. Dr. WHITE, senior churchwarden, followed by saying:—In considering the important question now before us, it was felt advisable that all the aid that could be obtained from

the knowledge and experience of others should be secured to help in guiding our decisions. There is one gentleman that all would agree was specially qualified to advise us. He alluded to Mr. Willmot. He was not only an office-bearer in St. Peter's, Mowbray, at the present time, but had been for many years connected in the same way with that church and its minister, the Rev. W. Long, who, as the meeting is aware, had never joined the Church of the Province of South Africa. He need not allude to the celebrated litigation instituted by the late Bishop of Cape Town against Mr. Long, which issued in the full recognition of the latter's position as a clergyman of the Church of England independent of the Church of the Province of South Africa, further than to say that Mr. Willmot had been intimately acquainted with all the legal bearings of that case, as well as those of other cases since argued and decided upon in connection with the peculiar position and claims of the Church of the Province of South Africa. The churchwardens of Trinity Church felt that, as the question before this meeting was one affecting the whole body of the Church of England in South Africa, they would be sure to have a favourable response from Mr. Willmot when they asked him to attend this meeting, especially as his former connection with Trinity Church gave him a personal interest in its concerns. They, therefore, believing this course would be acceptable to this meeting, invited Mr. Willmot's presence. He kindly and readily accepted this invitation, and he begged to move that Mr. Willmot be asked to favour this meeting with a brief statement of his views upon the recent judgment as it affected the interests of the Church of England in this colony.

Mr. J. D. Cartwright, the junior churchwarden, briefly gave his reasons for seconding this proposition, which was unanimously carried.

Mr. P. G. H. Willmot then rose and spoke. [Mr. Willmot has since added other matter to his address, and, therefore, to preserve the continuity of his remarks we give them *in extenso* on page 10.]

At the conclusion of this excellent address, the audience showed their approval by hearty cheers.

Mr. J. D. Cartwright said he never felt greater pleasure than he did on this occasion, in proposing that the best thanks of this meeting be accorded to Mr. Willmot for the plain and lucid statement of the question which he had just given to the meet-

ing; but should there be any portion of that address not quite clear to anyone present, he felt confident that Mr. Willmot would willingly answer any questions that might be put to him.

The CHAIRMAN then thanked Mr. Willmot on behalf of the congregation for the kindness he had shown in so readily responding to the wishes of the churchwardens to be present that evening in their midst, and assured him that they highly appreciated the admirable address he had delivered, which every one would know had not been executed without much time and consideration.

MR. T. J. C. INGLESBY in rising to propose the following resolution, said from the first he had opposed the idea of sending a delegate from this congregation to represent them at the Provincial Synod, and he was thankful to say that mainly through his instrumentality no such delegate had ever been elected, although he was fully cognizant of the fact that his opposition had caused offence to some well-meaning persons who thought differently to himself on this matter, but time had proved that the step they had taken was the wisest under the circumstances, and he thought they had lost nothing by thus resolutely holding to their principles. He was also glad to find that their pastor was fully in accord with them, although he could not help saying that there was a time when he had some doubt upon this point. He had, therefore, great pleasure in moving the resolution which he held in his hand, and which he would read to the meeting, viz. :—"That the Privy Council having ruled in the recent case of Merriman *vs.* Williams that the Church of the Province of South Africa is an independent and separate church, unconnected with the Church of England, and, therefore, not entitled legally to the possession of the properties and endowments of the Church of England in this colony, this meeting desires to record its thankfulness to the great Head of the Church that the doubts previously shared by the congregation as to the alleged connection have preserved this church from being compromised by any contract with the Church of the Province of South Africa, and have kept it from being bound by any laws other than those of the Church of England."

MR. A. SIMKINS having seconded, the resolution was unanimously carried.

Mr. E. J. EARP then moved the following resolution:—"That, as the church was, some time after its erection, transferred by the parties who held it in trust for the congregation into the trusteeship of the first Bishop of Capetown and his successors in the

see, to be held by him in trust solely for Church of England purposes, the churchwardens be instructed to cause inquiry to be made whether the building is still registered as the property of the Church of England, and, if not, to take legal steps for the restoration of the property and trusts to their original object." He said he considered the resolution a very proper one, that inquiry should be made as to the legal position of the church. It had been stated that Trinity Church with several other properties held in trust for the Church of England, had been transferred by Bishop Gray to the trustees of the Church of the Province of South Africa. At the time of Bishop Gray's death, eleven years ago, there was an old balance due on mortgage on the building, that no doubt formed a legal barrier, even if there were no other to transfer, but even if there had been no mortgage there could be no question of the illegality of the transfer; under this view the lawyers say that all properties vested in the trusteeship of the first Bishop of Capetown will have to come back again to the Church of England, and any transfers from the first Bishop of Capetown to the trustees of the Church of the Province of South Africa could not for one moment stand the test of the law, and are consequently illegal. The result therefore was that the greater part, if not nine-tenths of the church property, comprising the older established church buildings about Capetown and its suburbs, so far as these Dioceses are concerned, belong to the Church of England and not to the Church of the Province of South Africa, and will have to revert to the Church of England. He said no one under contract to the Church of South Africa can legally claim to minister in Trinity Church unless he abandoned his connection with that church. At all events, the contract of a minister of the Church of England ministering in a church vested in the Church of England legally disabled him from making contract with another church; and in law, the church from which his stipend is derived, and to which the members belong, relieved him, and made it *ultra vires* for him to enter into contract with any other church but that to the members of which he is ministering, and to which the buildings belong. It was clear from the recent decision of the Privy Council, that if the object of those who formed the Church of the Province of South Africa was to have a church in connection with the Church of England that they had failed in their object, but he believed if that Church was desirous of rectifying past legal errors this congregation would heartily co-operate with

them in the maintenance of the Church of England in this colony. He quoted from Lord Romilly's judgment in the case of "The Bishop of Natal *vs.* the Trustees of the Colonial Bishoprics Fund," to the effect that when English churchmen in the colonies understood that a separate and independent church had been formed in the colony there would be a rapid and large secession from the church which was only in union and full communion with the Church of England to the Church of England itself. The following is an extract from the judgment: "If each church is to consider itself a separate and independent church, though in union and full communion with the Church of England, and if each church claims to possess full powers to make rules and ordinances for its guidance in each separate colony . . . . it requires but little foresight to predict that in the course of a very short time, humanly considered, the colonial churches, though calling themselves in union and full communion with the Church of England, would, in forms and ordinances, and in matters of Church government, differ widely from each other and from their parent Church. Nor is it too much to say that some alteration of doctrine would probably in many cases follow upon the alteration in the discipline and government of the Church. Another consequence may also, I think, be reasonably predicted to arise from such a state of things, by any one who has carefully observed the disposition of the English people in such matters. If he has done so, he cannot fail to have noticed how deep rooted an attachment to the Church of England exists in the people generally, even amongst those portions which are not sedulous in attendance at places of public worship; and this consequence is that, as soon as this matter shall have become clearly understood by the English resident in the colony, there will be a rapid and large secession from the Church which was only in union, and in full communion with the Church of England, to the Church of England itself, which even in those distant colonies would receive and foster her brethren as part and parcel of her own peculiar flock."

Mr. Kearns said he readily seconded this resolution, because he felt it was desirable, owing to the existing uncertainty of the tenure of their church property, that an investigation should be made by the churchwardens to ascertain their exact position, and that steps be taken by them to have the property re-transferred to the present Bishop, who, he thought was the legal successor to

Bishop Gray, although he could not help thinking there was some doubt as to his legal standing, owing to his having joined himself to the Church of the Province of South Africa, which had been declared by the highest tribunal of the realm as not legally entitled to the property vested for the sole and exclusive use of the Church of England in South Africa.

This resolution, on being put to the meeting, was also unanimously adopted.

The Hon. Dr. WHITE then moved:—"That now that there can be no further question that the Church of England in this colony can by voluntary compact continue its identity and connection with the Church of England as by the law established in England, this congregation, in the interest of peace, order, and good government, desires respectfully to tender its co-operation, by rendering its aid to the Bishop of the diocese, the clergy and their fellow-laymen, without respect of parties, for the rectification of past legal mistakes, and desires further to express its conviction that, in the light of past and recent judicial decisions, all that is necessary to remedy past errors of constitution will be the proper and legal restoration of the properties and endowments of the see and diocese to their original object, as also a simple deed of association, under the title of Church of England in South Africa, as the compact between members of the Church of England of all orders in this land, and simple contracts between bishops, clergy, and laity, embracing the conditions that the laws and standards of the Church of England, as well as the judicial interpretation of those standards in her legally constituted Courts of Appeal, shall govern all in their respective relations to each other. Such contracts need form no bar to periodical synodical meetings for the framing of rules of order, so long as nothing shall be of force antagonistic to the standards of faith, doctrine and discipline of the Church of England as by law established." Dr. White said he might enlarge upon this resolution, but its points were so clear that it scarcely needed any remarks to be made upon it, but he might just say this much that he hoped the very serious differences in point of authority and government would soon be finally set at rest.

Mr. J. D. CARTWRIGHT, in seconding this resolution, said he considered it absolutely requisite that the vestry should place on record its opinion of the present aspect of the case, and as reasonable men they should not rest satisfied till the church property reverted to the donors' original intention.

Mr. T. J. C. INGLESBY agreed with the purpose of this resolution, providing no intention of representing this congregation at any Synod of the Church of the Province of South Africa, so as to compromise the position of the congregation as belonging to the Church of England, were intended. With this reservation he was in full accord with the resolution.

The CHAIRMAN explained that these matters could only be settled by the Provincial Synod, which consisted of *ex officio* members, and elected delegates from the Diocesan Synods. The latter had all elected their delegates; and, therefore, even if it was desired, which it was not, to represent this church at the forthcoming Provincial Synod, in January, it could not be done.

Mr. INGLESBY intimated his satisfaction with this explanation.

Several questions having been put to Mr. Willmot respecting the legal aspect of the matter, which that gentleman very clearly answered, the resolution was subsequently put to the meeting and unanimously agreed to.

After some discussion on the ordinances governing various properties belonging to the Church of England in South Africa, in which Messrs. Kearns, Twycross, Cartwright, Willmot and the Chairman took part, Dr. Hole announced that he would, as president of the meeting, bring the resolutions passed that evening to the notice of the Bishop of Capetown, through whom the Provincial Synod, at its next meeting in January, would probably be made acquainted with them.

The proceedings were then brought to a close by prayer and the pronouncing of the benediction.

Just as the meeting was about to separate, information reached Dr. Hole of a serious accident having befallen Bishop Merriman, the announcement of which to those assembled called forth expressions of sincere condolence and sympathy.

MR. WILLMOT'S ADDRESS.

Were I to consult my own feelings, Mr. Chairman, I would rather have been a silent listener and spectator to-night than to have taken any part in your deliberations, and as I have plenty of work and care at present outside of church cares and anxieties, I confess to an instinctive shrinking just now from invitations to come forward publicly with my opinions and views on church politics. As others have, however, pressed the subject upon me, it seems like shirking the cross to decline to assist, however feeble one's influence, especially as my official connection with a parish from which some twenty years ago there was an appeal to the Privy Council has given me some little experience in such matters, and of necessity the legal responsibilities and position of our Colonial Church became to me a matter of interest and study. At the onset, however, let me ask for myself if in the course of these remarks anything should fall from me inconsistent with the spirit of Christian charity, or at variance with that credit for conscientiousness which I have learnt the older I get to accord to all good men among our different schools of thought allowable in the Church, I hope it will be attributed to the permissibilities of argument, and not ascribed to any real unchristian feeling.

PREVIOUS LITIGATION.

The several dioceses, sir, of South Africa have now been no less than five times before the higher Courts of England. Four on occasions of appeal to the Privy Council, and once before the Master of the Rolls, who is also a member of the Judicial Committee of Her Majesty's Privy Council; and I think most persons will agree with me that if we, of the Colonial Church, whether bishops, clergy or laity, are not yet sufficiently enlightened as to our legal duty and position, after having had the benefit of five elaborate and masterly judicial elucidations of that position, the Church of the Cape will be liable to be adjudged hereafter as either hopelessly obtuse, or wilfully disobedient to the laws of the country. To my humble

apprehension, sir, as a layman, these judgments have been clear and unmistakably consistent throughout; and as far back as Mr. Long's case, which was the first of Privy Council decisions in the order of time, I maintained that it was then proved as an incontestable legal fact that the Church of England can and does exist in the colony, though on the basis of a voluntary association; that the title of the association can legally be no other than "the Church of England in South Africa," that the articles of association, and the contracts under them, must simply be neither more nor less than (to use the language of Lord Kingsdown) "the laws of the Church of England, so far as they are applicable (or can be suited and made applicable) to the circumstances of the colony." But if there was any room for doubt before, there can be none now after the last judgment, that unless and until the several bishops of our South African dioceses, founded and endowed as these have been judicially declared to be, for no other than Church of England purposes and uses, and the salaries of the bishops, vested in trustees, who will as a consequence be legally debarred from paying the moneys for the purposes of any other trusts or church, unless and until, the bishops abandon and cancel the contracts now declared to be illegal, and make fresh and simple contracts with clergymen similar to those made between the late Dr. Gray as the first Bishop of Capetown and his respective clergy, previous to the legal error under which the bishops assumed that they could contract away their rights and responsibilities to a separate body under the title of the Church of the Province of South Africa, I cannot conceive how they will, either to their own consciences as honourable men (which I believe them to be), or to the judgment of the world, escape the charge, after the last Privy Council decision, of accepting the pay and property of one church, and appropriating the same to the purposes of another.

THE LEGAL CONTRACT.

I have said that as far back as 1861 the Privy Council ruled that the late Bishop of Capetown and the Rev. Mr. Long had contracted with each other that "the laws of the Church of England should govern both, in their respective relations to each other," and that Dr. Gray was declared to have the power to suspend Mr. Long for any offence in doctrine or discipline for which a clergyman could be punished by a bishop in

England. The like contracts, sir, will have to be made with every clergyman in the diocese, as was done by Dr. Gray when he landed on these shores, under commission from the Church and Crown of England; and if these contracts are not so made and required by the successors to Dr. Gray in these dioceses, but if in their stead both bishop and clergy contract themselves in another voluntary association, under the title, and laws, of the Church of the Province of South Africa, it requires no great legal perception to see that the bishops are not either in law or equity entitled to Church of England pay, and can have no jurisdiction over Church of England buildings from their cathedrals downwards to all the old-established buildings; and that anarchy, confusion, and dissension will be perpetuated in time to come in our midst to the hindrance both of religion and the progress of the Gospel of Christ. We will all, however, as Christian men, be ready to admit that the bishops, and those by whom they are influenced in the settlement of matters of church organisation, may have thought that the endowments and trusts under which they claim to be the successors of Dr. Gray in their respective dioceses did not require of them in order, under a voluntary association, to make the connection with the Church of England complete, the same acceptance or acquiescence in the decisions of Her Majesty in Council, as regards interpretations of the doctrines and faith of the Church of England, which the Church of England in England is bound to, and in their anxiety to avoid that which they considered a yoke and a burden, from their view, in the Church of England, as well as in their desire to get rid effectually of that yoke, they bound themselves together in a voluntary association, under a separate and distinct title, which should be very like the Church of England, but should in law be independent of the Church of England, and of the tribunals which judicially interpret her laws and standards of doctrine.

AN INDEPENDENT CHURCH.

It has now, however, been decided, that while it is perfectly competent for the bishops to form and join a church which should be so independent, that church will not be in law the Church of England in South Africa, and cannot either morally or legally claim the salaries, endowments, and properties belonging to the Church of England. I have myself that high opinion of Bishop Jones, as I think churchmen of all

schools have in their personal intercourse with him, formed of him as a conscientious man, that I do not think after the law has now, in the case of Merriman *vs.* Williams, been so clearly and unmistakably set forth, that he will hesitate to declare himself emphatically on one side or the other, and as nine-tenths of the buildings and churches of the diocese were all originally built and vested for Church of England purposes, and as his own stipend is similarly confined to the Church of England, he will no doubt either accept the new position and enforce the new contracts as a condition of the trusts under which his Bishoprick is endowed (and in this we will all aid him), or if he has any conscientious scruples hindering the faithful enforcements of those trusts, he will resign his post to others who can do so conscientiously. If, however, the Bishop should be induced to endeavour the hopeless and illegal task of trying to serve two masters at the same time, we shall in the future be a diocese of storms and lawsuits in the colony and Cape of storms. In order to shew that this must, in such an eventuality, be the result, let me give you

A FEW EXTRACTS FROM THE JUDGMENT

published for our benefit, and some of the effects which flow from them if the bishops do not abandon connection with the Church of South Africa, and establish the Church of England on its own legal voluntary organisation. I particularly refer to the bishops, for it is with them that the whole responsibility of restoration, and the sad and terrible consequences and confusion of non-restoration, will rest. It is no use telling us that they have bound themselves to Provincial Synods of the Church of South Africa, for unless the Provincial Synods which include the Free State, Zululand, &c., are in a position to give the bishops of our British colony and dioceses the moneys to build fresh churches *de novo* in the Eastern and Western Provinces, and also to pay their salaries, our bishops have no alternative but to abandon contracts which they cannot legally or consistently with justice and equity to their own individual trusts carry out, and they must just say to those other dioceses, "you will have to make contracts with us that we can legally enter into, and which will not embarrass our position;" but the past ones destroy our very legal existence, and were *ultra vires* for us to enter into. Reverting, however, to the extracts from

THE LAST JUDGMENT AND ITS EFFECTS,

the Privy Council tells us:—1. "That the divergence between the Church of the Province of South Africa and the Church of England was not merely potential, but real and actual." 2. "That the Church of South Africa, so far from having done all in its power to maintain the connection with the Church of England, had taken occasion to declare emphatically that (on the point of English and judicial interpretations of the standards of faith and doctrines in the Church) the connection was not maintained." 3. "That having chosen to take up its own independent position with reference to the tribunals of the Church of England, they could not claim as of right the benefit of endowments settled to uses in connection with the Church of England." 4. "That the Church of South Africa and the Church of England had different standards on important points." 5. "That in the Church of England the standard was the formularies of the Church as judicially interpreted; in South Africa it was the formularies as they may be construed without the interpretations." 6. That "this reservation on the part of the Church of South Africa must tend to silence and exclude those (instancing the Gorham case) whom the decisions of H.M. in Council would protect in the Church of England." 7. That if a bishop "belongs to a religious body which cannot claim to be in connection with the Church of England as by law established, no contract with anyone can give him a right to use property which is settled to uses in connection with the Church of England." 8. That no person, whether bishop, priest, or layman, "can contract away the rights of others." 9. That one "who is occupying an office in which he owes duties to the church members cannot by contract give to any extraneous person or body rights which may interfere with those duties." These, sir, and other like extracts, are strong and unmistakable, and their consequences are many and voluminous. Let me give you

A FEW OF THE EFFECTS.

If Dr. Williams, as Rector of St. George's, which has a local Church Ordinance, cannot give Bishop Merriman, because the latter belongs to the Church of South Africa, the use of St. George's Church, and if Dr. Williams, as minister of St. George's, cannot contract with Bishop Merriman, because Bishop Merriman belongs to the Church of South Africa, and not to the Church of England in South Africa (and

such the Privy Council say he cannot do), there are no less than nine Churches in the colony with local ordinances more or less similar to St. George's, the ministers of all which are thus equally debarred in law from contracting with the Bishops of the Church of South Africa, and over these the said Bishops have no jurisdiction, nor have they any legal right in the buildings.

THE FOLLOWING CLERGYMEN

therefore, are practically without any bishop, and are legally, equally with Dean Williams, debarred from contracting with their hitherto supposed diocesans:—The Dean of Capetown, as minister of St. George's; Archdeacon Badnall, of St. Paul's, Rondebosch; the Rev. Mr. Swift, of St. John's, Wynberg; the Rev. Dr. H. Wirgman, of St. Mary's, Port Elizabeth; the minister of Bathurst; the minister of Sidbury; the minister of Fort Beaufort; and the minister of Graaff-Reinet. There is yourself also, Mr. Chairman, and other Churches such as this. This Church was vested in the first Bishop of Capetown in the following words: "To the Right Rev. Father in God Robert by Divine permission Lord Bishop of Capetown and his successors in the said see in perpetuity for ecclesiastical uses in connection with the Church of England in this colony." As minister of this Church, sir, ministering to members of the Church of England, you can only simply be a member of the Church of England in a Church of England building, and you are legally debarred, I take it, equally with the rest from contracting with a Bishop of South Africa, and the Dean and yourself are equally without a legal Bishop until Bishop Jones abandons the Church of South Africa. I think it will be found also that there are a vast number of churches forming

THE OLDEST AND LARGEST CONGREGATIONS

in the diocese whose original deeds of transfer—mark the expression, original deeds of transfer—were vested in the late Dr. Gray in the same language as the original deed of transfer of Trinity Church, and vesting the property in him as "Lord Bishop of Capetown, &c., for ecclesiastical uses in connection with the Church of England." And as no subsequent illegal transfer to the Church of South Africa can stand good in law, and any member of the Church of England can, I think, move

the Court to cancel any transfer illegally allowed to pass, by the late or present Registrar of Deeds, it will follow that nearly

NINE-TENTHS OF THE PROPERTIES

in the two dioceses will be out of the jurisdiction of the Church of South Africa, and their ministers practically in law without a bishop. A complete, honest, and loyal return to the Church of England in our local organisation is therefore inevitable and absolutely necessary, if order and good government, and not disorder and confusion, are to be the rule of our diocese, and I hope sincerely that on the bishop's return he will see it in that light. One point more and I have done, though I must leave out half of what I wished to bring before you. As regards the position in the present organisation of the Church of South Africa:—If you, sir, were

PRESENTED FOR HERESY

on the same ground as the late Mr. Gorham was, what would be the result? The bishops of these dioceses are, it so happens, all of the anti-Gorham school; they believe Mr. Gorham to have been in error. As conscientious men, they would have to condemn you. But it may be said, it is not likely that with so peaceful a bishop as Bishop Jones, such a case would occur. But, sir, the power is still there, though it may likely not be exercised, and it is a power, which if exercised, would, as the Privy Council say, "silence and exclude from the colonial church men whom the Church of England would protect." Again, supposing there was no such likelihood of its exercise now, who can answer for the future, or who can answer for Bishop Jones' successors? By the laws of the Church of South Africa, Canon 21, it is competent for

"ANY PRIEST IN THE PROVINCE"

to present a clergyman for heresy on that or any other doctrine, or for one or both churchwardens, or for any three communicants; and if the bishop refuse to try the accused, the presenter can apply to the metropolitan; or if the metropolitan be the bishop who refuses, the presenter may do so through the other bishops of the province through the senior bishop; so that, under the canons of the South African Church,

or even Maritzburg or Pretoria, may present you for heresy, and if he got other bishops of the province to approve, Bishop Jones would be powerless to stop the trial. Such a state of things should not be allowed to exist; and if the colonial church is not to be sufficiently broad to admit men into her ranks who would be permissible and considered loyal churchmen in England, she will become the church of a party, and lose her catholic and constitutional character. Providence, however, brings good out of evil; and the necessity for a change in the constitution of the colonial body has forced itself upon men of all schools. and, as loyal churchmen, you would all no doubt give them aid in placing matters for the future on a legal basis. There are other points which I should have liked to refer to, but they must be left for another occasion.

PART II.

Their Lordships of the Privy Council state that, in "conducting their examination of the Acts of the Synods which are set forth in the record before the Court, they deem it unnecessary to enter into the discussions whether or no the Church of the Province of South Africa is a *branch* of, or *identical* with, the Church of England as by law established." *

Their reasons for deeming this labour unnecessary, appear to me transparent. The case before them rested on the settlement of a *minor* question, whether the Church known as the Church of the Province of South Africa could claim to be either in law or equity in proper and legal "*connection*," *by contract* "with the Church of England as by law established."

"IDENTICAL" THE TWO CHURCHES COULD NOT BE.

And why? They had (1) separate and non-identical titles, and under such non-identical titles they had (2) separate and distinct

* The reference to the words "branch and identical," is thus explained:—Their Lordships had stated that the "ground principally relied on by the Chief Justice (in his very able judgment, which, they add, was of the greatest assistance to them) was that St. George's had been devoted to ecclesiastical purposes in connection with the Church of England, and that the C. P. S. A. was not (so far as circumstances would permit) a part (or branch) of the C. E." If the C. P. S. A. is, therefore, not "in connection with the C. E.," it was unnecessary, in their view, to spend words to shew that it could not be "a branch, or indentical with, the C. E."

existences, and under such separate existences there were embodied (3) non-identical Constitutions. The Church of the Province of South Africa having chosen a name of its own and registered it among its articles of Constitution in the Deeds Office of the colony, different from that by which the Church of England is recognised in the eye of the law, the two Churches could not be "identical," and under the former's separate Constitution there was no guarantee even for *permanency of connection* beween them. It was in this view no doubt that the Privy Council say that "it was competent for the Church of the Province of South Africa to establish any system of law it thought fit." If the *minor* position of *permanency of connection* with the Church of England cannot, therefore, by virtue of its separate title and constitution (even if there were no other reasons) be established for the Church of the Province of South Africa (which is different from the Church of England in South Africa), it clearly was unnecessary to enter into the discussion of the *major* question, whether the Church of the Province of South Africa was "identical" with, or "a branch of the Church of England as by law established." "The trusts and grant of St. George's, Graham's Town, are declared in favour of persons belonging to the United Church of England and Ireland as by law established." "What the charters of the endowments," (of St. George's) they further say, "require,

IS CONNECTION WITH THE 'CHURCH OF ENGLAND

as by law established,' and such *connection* on the part of the Church of the Province of South Africa the plaintiff" (who is a bishop, consecrated in that Church and under contract to its Constitution) "cannot show."

Their Lordships then go on to prove *how* "the plaintiff (the Bishop) and the Church of the Province of South Africa are *disconnected* from the Church of England."

It thus follows, that

NO TEMPORARY PATCHING UP

of the old Constitution of the Church of the Province of South Africa as the Constitution of a distinct Church, so long as it retains its independent title and Constitution, will be legally sufficient to guarantee to that body *permanency of "connection* with the Church

of England." This will further appear from the following extracts from the judgment:—

"The Church of the Province of South Africa might have declared that the decisions of the tribunals established by law for the Church of England, whether past or future, should be binding on its own tribunals. That would PROBABLY keep the two Churches in *connection* for the longest period of time. The obvious course for a church which desired to be in connection with the Church of England to all intents and purposes would be at least to say at starting that its faith, doctrine, and discipline should be those which then prevailed in the Church of England. Such a church would, UNTIL SOME FRESH DEPARTURE OCCURRED, be in connection with the Church of England."

In these extracts we have it, as a ruling of the Privy Council, by which the Law Courts will have to abide, that so long as the Church of the Province of South Africa retains

ITS PRESENT TITLE AND CONSTITUTION

implying non-"identity" and separate existence, that even the deletion of the adverse "proviso" which has been the subject of so much comment, and the insertion in its stead of a declaration by a separate Church that the decisions of the tribunals established by law for the Church of England will be binding on its tribunals, will not give that Church *permanency* of connection with the Church of England, but will, as the law now stands, be only an expedient for *temporary connection* "*until some fresh departure occurs*" when the endowments will be again jeopardised and the contracts between bishops and clergy again rendered *ultra vires*. Seeing, then, that fresh "divergences as actual and real" as any of those so fully pointed out by the Privy Council, may, in the opinion of that High Court of Appeal, spring up at any time hereafter, even

AFTER THE ABOLITION OF THE "PROVISO"

and the reception of past and future English decisions of interpretation, surely there can be no question as to the *one plain course* before the bishops, as clothed with the responsibility, and entrusted, under the endowments of their respective sees, with the distinct and special mission of carrying out the system of the Church of England in this colony.

That plain course (if the contingency of being condemned for

the fifth or sixth time by the Privy Council is to be effectually provided against, and if for the future the coercive decrees of that Court for the enforcement of proper discipline and obedience to lawful authority is to be ensured), appears to me to be nothing short of the abandonment, as a first measure of legal necessity, however distasteful to some amongst us, of the title "Church of the Province of South Africa," for one embodying as far as possible "identity" of title and inseparability of connection with the Home Church, and the re-establishment of the Church of England in South Africa under a "voluntary association" on the lines laid down in the decision of the case of *Long* vs. *Bishop of Capetown*.

THESE LINES EMBRACING:—

(1) That the Church of England in South Africa as a branch of the Church of England as by law established in England, shall be committed in her voluntary compact, or articles of association, to the standards of faith and doctrine as well as to the laws, *constitution*, and discipline of the Church of England as by law established.

(2) That the bishops shall, in virtue of the conditions of their emoluments, maintain their rule, conduct, and teaching, by these standards and laws.

(3) That the voluntary contracts between bishops and clergy, to be enforced by the bishops, shall be similar to those in use in England, so that the laws of the Church of England shall (as far as applicable to the circumstances of a colony), in legal language, "govern all orders in their respective relations to each other;" and,

(4) That no declarations of subscription or contracts shall be required of the clergy but such as may by law be required or enforced in England.

If we all consent,

AS LOYAL CHURCHMEN,

to throw aside our sectional and party differences, and so associate ourselves, as the law of England and of her church and constitution (embodying as these do the growth and experience of ages) point out to us, and as the endowed trusts of these bishoprics, in legal and honest good faith to the founders, conscientiously demand of the bishops, we shall then have proper security for

order and discipline, and a sure provision for the punishment of lawlessness and opposition to constituted authority in church and state, as well as protection against arbitrary or unjust rule.

To shew, however, the injustice to our colonial church, and to all orders in it, of

HALF MEASURES OR TEMPORARY EXPEDIENTS,

as special remedies after each fresh case of defeat, in the increasing list of painful lawsuits, as well as the unwisdom of *putting off* the full abandonment of an untenable and impracticable independent position, at variance with the purposes for which the See of Capetown was first founded in 1847, by the joint action of the Church and Crown of England, it will be necessary, at the risk of lengthening these remarks, to quote again from the judgment, and as pointing further to the same conclusions, that, so long as the two churches continue separate in name and constitution, legal permanence of "connection" will never be secured; and, so long as the properties and endowments belong to the Church of England, immunity from condemnation by the Law Courts for illegalities and non-fulfilment of trusts, as well as for contracts rendered *ultra vires*, will *never* be realised.

"*The existence of separate systems of* (1) *appointing bishops and separate* (2) *ecclesiastical tribunals*," say the Privy Council, "*is likely enough, in course of time, to lead to divergence*, though the mere fact of their establishment does not produce such an effect." We may be sure that

THESE CAREFULLY CONSIDERED WORDS

were intended both for warning and counsel. It becomes our duty therefore (1) as regards the appointment of bishops at each vacancy of a see to heed the warning, and endeavour to obtain such concurrent action on the part of the Crown as it can or is willing to render us, by *submitting* our elected candidates, getting them committed to the system of the Church of England (so as not to jeopardize their stipends), as well as having them always consecrated through the Crown's mandate in England, especially when we are told in the judgment before us that "by the Bishops' successors were meant persons named and appointed by the Crown and consecrated by the Archbishop of Canterbury."

That this concurrency of action on the part of the Crown, or

as much as the law enables the Crown to give, can always be obtained, it is only necessary to quote an

OFFICIAL REPLY BY LORD KIMBERLEY

to the Bishop of Sydney, wherein his Lordship as Secretary of State, says, that "Her Majesty will be advised on the application of the Archbishop of Canterbury to issue from time to time such mandate as is required by law to authorise the consecration of a Bishop—though no Diocese or sphere of action can be assigned in such mandate." This despatch is in strict harmony with the law as expounded in a previous Privy Council judgment, which set forth, that "the Crown as legal Head of the Church has a right to command the consecration of a Bishop, but it has no power to assign any Diocese or give him any sphere of action within the United Kingdom without the consent of the Legislature." The colony is in the same position as the United Kingdom when it received a Legislature for its own purposes. The "sphere of action" involving territorial coercive jurisdiction, which as a "want," that the Crown is in law now no longer able to grant, the members and clergy of the Church in the colony can, as the Privy Council states, "supply" by "voluntary understanding" with the Bishop, consecrated in England under the Crown's mandate.

AS RESPECTS THE (2) WARNING

"that the existence of separate ecclesiastical tribunals is likely, in course of time, to lead to divergence" between the two churches, there is no doubt that it is in the possible and probable future "*working*" of those of the Church of the Province of South Africa, and in the *nature and form of the subscriptions* regarding them, now unlawfully demanded by the Church of the Province of South Africa of clergymen at the Cape, and wherein such clergy pledge themselves to receive and accept the decisions and ruling of these "tribunals" as tribunals of FINAL ARBITRATION in all questions of dispute, that the "divergence is likely to arise," and *disconnection* on the part of the Church of the Province of South Africa again proclaimed by the Law Courts, and future litigation in store for us.

THESE ANTI-ENGLISH SUBSCRIPTIONS,

which have no warrant from the Church of England, or counterpart in her laws, run thus:—

"I, A. B., do declare that I consent to be bound by all the laws of the Church of the Province of South Africa, and by the rules and regulations which have heretofore been made, or which may from time to time be made by the Diocesan and the Provincial Synods of the Church of the Province of South Africa; and I hereby undertake to accept and immediately submit to any sentence depriving me of any or all the rights and emoluments appertaining to the office of ——, or which may at any time be passed upon me, after due examination had, by any tribunal acknowledged by the Provincial Synod of the said Province for the trial of clergymen, saving all rights of *appeal allowed by the said Provincial Synod.*"

(How different these declarations of subscription, unknown in England, are to those subscribed by the Rev. W. Long, after the English form, before Bishop Gray, and under which it was ruled that Bishop Gray could, on Church of England grounds, suspend or deprive that incumbent for lawful cause, I need not pause again to point out, but I might ask, in passing, *why, in the name of all that is loyal to the English Church, the English subscriptions are not sufficient for all other clergymen in the colony?*)

I have, however, stated that the warning given us as to these "separate tribunals leading to divergences" is manifestly founded on the fact that the bishops and clergy of the Church of the Province of South Africa have, by the character and form of the declarations of subscription, which I have quoted, mutually contracted that the tribunals of the Church of the Province of South Africa shall be their Courts of Arbitration for the FINAL settlement of all cases of discipline or of interpretation.

That these subscriptions do so render the decisions of the tribunals final, is plain from a quotation in the Judgment, that "the Courts established by law will *give effect* to the decisions of such tribunals, when they have acted within the scope of their authority, and have observed such forms as their rules require, as they give effect to *the decisions of arbitrators* whose jurisdiction rests upon the agreement of the parties."

"The ecclesiastical decisions of Her Majesty in her Judicial Committee of Council, form part of the constitution of the Church of England," but "*not*," as will thus be seen, "of the constitution of the Church of the Province of South

Africa." These *final* tribunals of the latter may *at any time* as is so clearly put in the Judgment, give decisions differing from those of the former on the same questions. It will be asked: If, however, the Church of the Province of South Africa

DROP THE "PROVISO"

under which it may repudiate English judicial interpretations, and if it also agree to receive the English decisions, without at the same time changing its *title or altering its declarations of subscription and its constitution*, will divergence be impossible and permanency of connection between the two Churches ensured? The answer to this question is given in the negative by the Privy Council in the extracts which I have quoted in the early part of these remarks. Such action say the court will "PROBABLY keep the two Churches in connection for the longest period of time," or "UNTIL SOME FRESH DEPARTURE OCCURRED." The question will, I can imagine, again be asked,

"HOW CAN THESE OCCUR?"

It might be sufficient answer to say again that the last words I have quoted, and the legal fact contained in them, are plain, and were no doubt well weighed by the five judicial councillors whose expression they are, and, as such, constitute judicial warning for all of us to take note of. Before I revert to them and offer opinions as to their solution, let me say that the Judgment itself points out several ways and avenues in which "fresh departures" may "occur," and it will be manifest to careful and unbiassed readers of that document, that though the Privy Council have referred to the first Article of Constitution of the Church of the Province of South Africa, *as well* as to the third proviso therein, as Acts which have practically *severed* the connection between the two distinct Churches, it also draws attention to several other acts of the Synod, which the judges say they "*do not now discuss in detail*," but which are inferentially hinted at, as having a tendency in their future "*working*" to cause "fresh departures," and fresh "divergences," and so bring about fresh *disconnection* and litigation hereafter, though the mere fact of their enactment before pro-

bable results are developed in "period of time" did not itself constitute "disconnection."

"AMONG THE ACTS OF THE SYNOD OF 1870,"

they say, "are several provisions which in the Supreme Court and here have been relied on to show disconnection between the Church of the Province of South Africa and the Church of England, and which they will not now discuss *in detail*. Such are the provisions of the 27th canon (that the interpretations of the laws and canons of the Church of the Province of South Africa shall be governed by the *general principles of canon law*) the declarations which refer to a possible alteration of the creeds, and to a possible alteration of formularies by a general assembly, the provision of the 3rd canon for the election of bishops without the consent of the Crown and the constitution of separate ecclesiastical Courts. Their Lordships are not prepared to say that the *effect* of these provisions is to disconnect the Church of the Province of South Africa from the Church of England." They are *not prepared to say* what the hereafter effect of the "*working*" of these provisions may develope.

"NOT PREPARED TO SAY,"

is very guarded and significant language. Their Lordships confine their judgment to such deeds as constitute actual *present disconnection*, but they plainly hint that the provisions referred to are capable of developing fresh departures in course of time. They add, that "the most important in this respect are the two last mentioned provisions (the election of bishops without the consent of the Crown and the constitution of separate ecclesiastical Courts)." "If they WORKED a disconnection" (plainly insinuating that by injudicious rulers and tribunals they were capable of *working* a disconnection), "there would be an absolute impossibility of connection between the two Churches." They then add immediately afterwards the words which I have already quoted, that "separate systems of ecclesiastical tribunals *are likely enough* in the course of time to lead to divergences."

There are, however,

MANY OTHER REASONS IN PROOF

of the position that, under the present Constitution of the Church of the Province of South Africa, *permanency of con-*

nection cannot be ensured, and through which "departures" may at any time recur, even under the conditions to which I have in a previous part of these remarks referred.

1. One probably is that, as the declarations of subscription enjoined on the clergy of the Church of the Province of South Africa refer all questions of interpretation or of breach of laws and canons to the arbitration of the tribunals of the Church of the Province of South Africa, the special one of agreement or non-agreement, in particular cases, with English Church interpretations, would have likewise to be decided by the same arbitrators, whose verdict, in terms of agreement, would be *final*.

2. If, however, the Church of the Province of South Africa so altered its constitution as to agree to make this latter point of English agreement exceptional, there is a second answer, and that is, that questions of discipline and interpretation may be brought before the tribunals of the Church of the Province of South Africa for *final* arbitration which have not heretofore been adjudicated upon by the Privy Council (and of which there are a great many) in the Church of England, but which, if at any time hereafter brought before the Judicial Committee, may receive different decisions to that which the Church of the Province of South Africa had come to, years before, in similar cases. It will thus be seen that, under the present title and constitution of the Church of the Province of South Africa, uniformity of *interpretation* with the Church of England can *never* be permanently ensured.

3. A third reason is, no doubt, that the laws of the two Churches, as well as the rules for their respective tribunals of arbitration (as, for instance, that the interpretation of the laws of the Church of the Province of South Africa shall be governed only by the general principles of canon law) are in many respects not identical, and the Church of the Province of South Africa, not being limited nor confined to the laws and constitution of the Church of England, but claiming also the right to be its own "legislative body" (*vide* article 2 of constitution) for its own members, additional "divergences" may occur as time rolls on.

4. And lastly, as

THE MOST IMPORTANT OF ALL REASONS,

the Constitution of the two Churches are different, *in one*

very essential feature, and a refusal or disinclination on the part of the Church of the Province of South Africa to embody this feature, as an article of its local Constitution, must, I fear, prove fatal to all chances for the establishment of that permanency of connection, which the Privy Council say is necessary before it can in law or equity entertain or put forth any "claim to the benefits of endowments" and properties "settled to uses in connection with the Church of England." The Church of the Province of South Africa by the nature and plain grammatical rendering of the declarations of subscription which she enjoins and which cover the contract between herself, her bishops and her clergy, and by which these bishops and clergy are obliged, under that contract, to confine all questions to the arbitration of her own tribunals or of such tribunals only as her provincial synod may permit, has practically ignored or vitiated that element or article in the Constitution of the Church of England under which, in virtue of the Crown's supremacy in all causes ecclesiastical, the clergy in connection with the Church of England have a right (which the clergy of the Church of the Province of South Africa have, by their colonial contracts surrendered) of referring all questions regarding interpretations of doctrinal standards and discipline for appellatory review and final arbitration to the Judicial Committee of Her Majesty's Privy Council. I am aware that some of the clergy object on conscientious grounds to this feature in the Constitutional Articles of the Church of England as the law has interpreted it. They should, however, remember that there are others, whom they cannot ignore, equally conscientious, who consider it essential to the Church's national character and comprehensiveness, and who see in it the chief safeguard under God to her not being split up into a number of free, or disestablished

EPISCOPAL SECTS AND SCHISMS,

acting in rivalry. If there are men in the National Church, no matter to what party they belong, who will obey neither their Diocesan bishop nor Metropolitan, nor the Privy Council, or any of those "set over them in the Lord," whether in Church or State, they will be no better off in a Disestablished Church, which will equally have to call in the "help of the secular arm" (as the Church of the Province of South Africa

has done) to eject them, on the ground of *lawlessness*, or insubmission to lawful authority. The law does not require the violation of conscientious conviction from any of us, but it demands *consistency of action*. It practically says that our action cannot be defended, on either moral or legal grounds, when we use, or claim the use of, endowments and buildings vested, either by ordinances or property deeds of transfer, or other trusts, to purposes in connection with the Church of England, and do not at the same time conform to her constitution.

I trust I have said enough in proof of the wrong that will be done if steps are not taken so to amend the constitution of the colonial organisation as to

PROVIDE AGAINST THE CONTINGENCY

of future disconnection and of having the whole framework when some fresh departure recurs again pronounced a nullity and the endowments all afresh jeopardised. The foundations of future peace and order cannot be substantially laid without such provision. That course of action which only provides for "peace in our time," leaving the future to care for itself, is not one which God can bless. It allows the seeds of strife to remain latent in the colonial constitution as legacies, pregnant with litigation, to spring up at a future day and embitter the lives of our children after us.

NO MERE SIMPLE DROPPING OF THE "PROVISO"

will, in my humble opinion, be legally sufficient. If nothing more than this is done, the question of the Privy Council will again apply—"Have the two Churches the same standard?" and the answer will be supplied from the same judicial source:—"In England the standard is, the formularies of the Church as judicially interpreted, while in South Africa it will be the formularies as they may be construed *without* the interpretation."

If, therefore, the Church of the Province of South Africa does not make it *very clear* in an amended constitution, that it *conforms to the English standard*, permanency of connection and the right to endowments cannot be established.

As to

THE NECESSITY OF COLONIAL TRIBUNALS,

no one denies it. They are, as the Judgment states, "the

necessary result of the legal and political situation." That situation does not by statute provide for Diocesan and Arches Courts, with lay chancellors, and appeal to the Privy Council. It is quite right, therefore, to organise Diocesan and Metropolitan tribunals, on "the footing of contract;" but that contract should also provide for "the English standard of interpretation" through the appeal to the Privy Council; and if the law does not allow that appeal to go through any other source than the Supreme Court of the Colony, there is no help for us for the present but to conform to it.

The local tribunals need not therefore imply, as the Privy Council points out, a "separatist intention." It is, as I have stated, the particular element of their constitution (to which clergymen are required to subscribe), making them final Courts of Arbitration, and in such finality excluding the operation of the "English standards of judicial interpretation," which renders them stumbling-blocks in the way of the connection which the law requires between the two Churches.

If this feature in these tribunals be not remedied, then it will follow, as I remarked in my first paper, that the church buildings having ordinances, as well as those vested by the wording of original title deeds, "for purposes in connection with the Church of England," will be subject to

NO EPISCOPAL CONTROL,

their incumbents being declared in law without a Church of England bishop, while at the same time the contracts of such ministers with the Bishop of the Church of the Province of South Africa are rendered by the same law a *nullity*. "For," say the Privy Council, "if the Bishop belongs to a religious body which cannot claim to be in connection with the Church of England as by law established, no contract with the defendant, *or with anyone else*, can give him a right to use property which is settled to uses in connection with that Church;" and further, if the Bishop belong to such an independent body, "he cannot also claim as of right the benefit of endowments" (as, for instance, those of the Sees of Capetown and Grahamstown) "settled to uses in connection with the Church of England."

IT IS, THEREFORE, ONLY AN ACT OF JUSTICE

to Bishop Jones, as well as to the future Bishop of Grahamstown, no less than to the trustees of the Colonial Bishoprics

Fund, that the Church of the Province of South Africa should so alter its compact as to relieve them of the responsibility of taking or paying moneys which may be some day ruled to have been illegally received or paid.

In the foregoing remarks I have endeavoured studiously to abstain from all appeal to polemical and party prejudices, and in pursuing the discussion have striven to give credit for conscientiousness to all permissible schools of thought in the Church, and as my contention has been that the foundations of the professed branch in this colony should be on the broad basis of the legal comprehensiveness of the Church of England, "narrow party victory" cannot possibly be the result of it. Against the "existing body," I am likewise conscious of no "vital hostility," nor of a desire to "rival it." If, as the judgment declares, the constitution of the existing body is capable of "excluding those whom Her Majesty in Council would protect in England" (and among these are not wanting saintly and self-sacrificing men, both at home and in the mission field), I look upon the contest as involving something more than a mere "technical idea," and I contend that upon the lines of the English Church, those of the clergy of the same school as myself, should have their position dependent not on the uncertainty of "sympathetic treatment from ecclesiastical authorities in this colony," subject to change with the course of time, circumstances, and men, but on the sounder and safer basis of a proper and unchallengeable legal standing, which it should not be in the power of the "existing body" by any process or peculiarity of its independent constitution or tribunals to exclude. I desire no monopoly of position for these whose cause I am pleading, but am not prepared to accept the lower standing of *toleration* as long as it may be the pleasure of successive "ecclesiastical authorities" to extend it. As an English churchman, whose "rights cannot be contracted away," I respectfully but firmly, though in no spirit of "menace," demand the recognition in an amended constitution, of the higher standing, as a right which the "existing body" cannot on either moral or legal grounds honourably withhold *so long as she uses the churches and endowments settled*, not to her own uses, *but "to purposes in connection with the Church of England as by law established."*

Persistence in the non-recognition of the legal rights of any

sections in the Church, simultaneously with the retention of the endowments founded for the purposes of the general body without respect of parties, cannot be proper in the sight of Him "by whom actions are weighed," and without whose blessing no Church can prosper.

Finally let me conclude with the humble and earnest prayer that God would so dispose the hearts of all that the causes of dissension in the Canons and Articles of Association may be displaced by "the things that make for peace," so that we may be enabled all to pursue our work without uncertainty, and to the glory of our Blessed Lord and Master.

THE CHURCH QUESTION.

The following letter appeared in the *Cape Times*. We publish it, believing that it may help in clearing away misconceptions on one or two points, and tend to promote the large spirit of true churchmanship by which alone, under God, the present crisis can be satisfactorily dealt with.

August 17th, 1882.

To the Editor of the Cape Times:

SIR,—The importance of the question to all churchmen will be my excuse for troubling you with a few words suggested by your leader of this date, upon the present position of the Church of England in South Africa.

My object in doing so is to aid in giving the public a clear view of the points involved, for I am sure that if any attempt is now made to half-settle this question by insufficient remedies, and to induce acquiescence by a statement of the case that tends to obscure its true bearings and merits, a great opportunity for securing union will be lost, and past divisions will be intensified.

You rightly say, sir, that as churchmen in this colony, the controversies that are now unhappily raging in England, or have formerly disturbed the Church, are nothing to us in themselves; but surely the great principles which have, by their instrumentality, been evoked, or which have received emphatic endorsement, are something to us.

With the personal element to which you refer as being the real cause of the late litigation, churchmen have no concern, except to deplore the fact that it should ever have existed; but in the serious issues which the Judgment brings before us, they are deeply interested.

You repeat a statement, which has often been urged before in opposition to those who have unfavourably criticised the constitution of the Church of South Africa, to the effect, that "of his right of access to the Civil Courts no man can divest himself by contract." That is a simple truism, but in no way touches the point at issue.

The Church of South Africa is a voluntary body, and under its constitution an incriminated clerk cannot get access to the Civil Courts except by disobeying the decisions of the tribunals

of arbitration, in connection with the body, to which he had voluntarily undertaken to submit himself, and "the decision of such tribunals," as Lord Kingsdown says, "will be binding when they have acted within the scope of their authority, and have observed such forms as their rules require." Beyond this limit the Civil Courts will not interfere with this body.

The Church of England in South Africa is also judicially declared to be a "voluntary association," but under laws and restrictions of subscription not identical with those of the Church of South Africa; and by virtue of "the supremacy of the Crown in causes ecclesiastical" being a distinctive feature in the Articles of Constitution of the Church of England, an incriminated clergyman is secured and gets left open for review and final adjudication by the Crown's Courts, questions of interpretation as respects the grammatical and plain English meaning of the Church's standards, which by the constitution of the Church of South Africa are, on the contrary, limited to its outside ecclesiastical tribunals.

In this distinction, as regards the constitution of the two Churches, the whole question at issue rests, and "clerks' rights of access to the Civil Courts" under each body, are to that extent respectively and importantly different.

You say again, sir, that by the decisions of their respective cases, "Mr. Gorham and Dr. Rowland Williams were secured in their benefices, but the clergy and laity of the Church of England were not, therefore, bound to believe that the sacrament of baptism is not the instrument of regeneration or the Bible not the word of God." Did ever any one suppose that they were so bound? I think not. But this is made plain, that a clergyman who holds the views Mr. Gorham held on the sacrament of baptism cannot be condemned in the Church of England for heresy, while in the Church of South Africa, as indicated in the recent judgment, he can be so condemned. As to Dr. Rowland Williams, I can only repeat that no one is bound to his views, and it will be sufficient to quote a short extract from the judgment on his case to show that the charge laid against him of "holding the Bible not to be the Word of God" was, in the opinion of the Judges, declared to be "*not proven*." "We are satisfied," say the Judicial Committee, "that, whatever may be the meaning of the passages included in this Article against Dr. Williams, they do not, taken collectively,

warrant the charge which has been made that he has maintained the Bible not to be the Word of God nor the Rule of Faith."

Of course, no one contends that the present system in England is perfect. What human system is there that is? But what most laymen contend is, that, as members of the Church of England, they are entitled to the same privileges and rights here as in England; above all, that they shall have the guarantee for justice which the laws of the Church of England, in matters ecclesiastical, give, and which they would have in England. These they do not possess at present in the Church of South Africa, for this interpretation of the formularies is the crucial point. I would ask any impartial man to answer this question—In which case would it be likely that a fair and impartial conclusion as to the interpretations of formularies would be arrived at? By their being subjected to the calm decision of trained lawyers, of judicial minds, accustomed to weigh evidence and dispassionately consider the meaning of the language of documents compared with one another, or by two or three, "grave priests," of whom it is but implying that they are partakers of human nature, to say that they must be more likely than not influenced by theological bias, — especially when you consider that they must have been interested spectators of, if not actual partakers in, the controversy that has led up to the need for the judicial decision? I am convinced but one answer will be given.

It seems a pity to endeavour to justify a party church by raising party jealousies which, without, I am sure, intending it, your inquiry as to what the Evangelical would say to the Rowland Williams case, as you have represented it, has a tendency to do. The whole question wants to be regarded from a wider point of vision. It is clear that the Church of South Africa, in its present Constitution, can only be a church of one party; and what is contended for by churchmen amongst the laity is, that, as English churchmen, they ought not to be forced into a party, or else into nonconformity, but that they should have, in all essential points, the same liberty, the same privileges, and the same laws, as they have as churchmen in England.

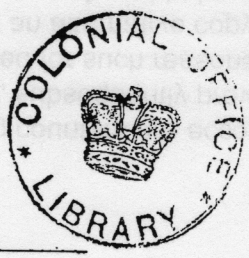
This is a simple, reasonable contention; and it is to be earnestly desired, in the interests of peace, that the South African Church will show its wisdom, by so amending its title

and re-modelling its constitution, as to satisfy it—not by half measures, but by a candid and effectual recognition, thus satisfying the reasonable demands, and meeting the conscientious scruples, of loyal churchmen. Such a settlement, I am convinced, will have the approval of a large body of the clergy too. Clergy and laity should remember that the recent judgment establishes three points:—

1. That the Church of the Province of South Africa is not the Church of England.
2. That the Church of England can exist in South Africa as a voluntary association.
3. That endowments granted by the Crown, as well as endowments and properties placed in trust for the Church of England, belong exclusively to the latter Church, and cannot be legally enjoyed by the former Church.

Yours, &c.,

ENGLISH CHURCHMAN.



JUDGMENT

Of the Lords of the Judicial Committee of the Privy Council on the Appeal of Merriman (Bishop of Grahamstown) vs. Williams (Dean of Grahamstown) from the Supreme Court of the Colony of the Cape of Good Hope, delivered 28th June, 1882.

Present:

SIR BARNES PEACOCK.
SIR ROBERT COLLIER.
SIR JAMES HANNEN.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

In this case the Plaintiff in the Court below and the Appellant here is the Bishop of Grahamstown, one of the dioceses of the province of the Church of South Africa. The Defendant in the Court below and the Respondent here bears the title of Dean of Grahamstown; he is also the Colonial Chaplain appointed by the Crown for Grahamstown, and he is *de facto* the officiating minister, sometimes called the Rector, of the church of St. George in Grahamstown. The controversy between the parties has raised a very important question, but its earlier phases are comparatively unimportant, and may be briefly stated.

In the year 1878 a difference of opinion arose respecting the right to preach in the church of St. George. The Plaintiff claimed it as his Cathedral, in which he had a right to preach whenever he thought fit. The Defendant was willing to allow the Plaintiff to preach whenever he thought fit as a matter of courtesy; but as to the matter of right, he held that he as Dean had control over the arrangements. The Plaintiff would not consent to preach except as a matter of right.

On the 17th April, 1879, the Plaintiff attended the church with the object of preaching, having previously admonished the Defendant in a formal way not to hinder him, but the Defendant anticipated the usual time for the delivery of the sermon, and began to preach himself, whereupon the Plaintiff protested and left the church.

For this conduct the Defendant was presented in the Diocesan

Court of Grahamstown, and was there found guilty of contumacious disobedience, and of conduct giving just cause of offence or scandal to the Church; and he was suspended from his ministerial functions for one calendar month, and further until he should engage not to repeat the offence of preventing the Bishop from preaching or ministering in the church of St. George. As the Defendant refused to obey that sentence, he was excommunicated by a subsequent decree of the same Court.

The present suit was instituted to enforce the sentences of the Diocesan Court. By his declaration, filed on the 21st of April, 1880, after showing that he and the Defendant are officers of the Church of the Province of South Africa, the Plaintiff prays relief in the following terms:—

"Wherefore the Plaintiff says that an action has accrued to him, and he prays that this Honourable Court will by its judgment declare,—

"That the Defendant is one of the clergy of the said Church within the true intent and meaning of Article XXIV. of the Constitution thereof, and is bound by the laws of the said Church, and by the rules and regulations made by the said Diocesan Synod of Grahamstown, and by the said Provincial Synod, or either of them.

"That the Defendant is bound to accept and immediately submit to any sentence depriving him of any or all of the rights and emoluments appertaining to the office of Dean and Rector of the cathedral church of Saint George, or to any other office or benefice held or enjoyed by him as dignitary or priest of the said Church within the diocese of Grahamstown, such sentence having been passed upon him after due examination had by the Diocesan Court of Grahamstown, being a tribunal acknowledged by the Provincial Synod for the trial of a clergyman, saving all rights of appeal allowed by the said Provincial Synod.

"That under and by virtue of the sentences passed upon the Defendant by the Diocesan Court of Grahamstown, on the 5th of August and 13th of November, 1879 respectively as aforesaid, the Defendant is lawfully suspended from his office of priest and other spiritual promotion and dignity, with total loss of all emoluments derived from any benefice or attached to any office or offices heretofore held by him as dignitary or priest of the said Church within the diocese of Grahamstown.

"That the Plaintiff in his episcopal capacity has the right of officiating and performing all ecclesiastical functions within the said cathedral church.

"That the Plaintiff, in his said capacity, shall have free and uninterrupted access to the land and premises comprised in the transfer bearing date the 17th of June 1871 to the Trustees under the Diocesan Trust Board of the Diocese of Grahamstown, of the site of the said cathedral church of St. George, and to the said church or cathedral or other buildings erected thereon, for the purpose of enjoying and exercising all rights, privileges, and immunities which have heretofore been enjoyed and exercised, or ought to be enjoyed

and exercised by the Bishop of Grahamstown as such Bishop or otherwise, in reference to or within the cathedral thereon and its appurtenances, and that the Defendant and his agents shall be restrained from in any manner interfering with such access, enjoyment, or exercise.

"And the Plaintiff further prays that this Honourable Court will grant a perpetual interdict restraining the Defendant from hindering the Plaintiff in his lawful ministrations within the Diocese of Grahamstown, and further restraining the Defendant from officiating or performing any ecclesiastical functions whatsoever, and from receiving any emoluments in respect of the performance of any ecclesiastical functions whatsoever within the limits of the diocese of Grahamstown, as a dignitary or priest of the said Church."

By his pleas the Defendant claims to be Rector of the church of St. George, and to perform ecclesiastical functions in that church as a priest of the Church of England as by Law established. He says that the Church of the Province of South Africa is a religious association entirely independent of the Church of England as by Law established; that he himself is not a member of that Church, nor bound by its constitutions or canons; that the Church of St. George is held in trust for ecclesiastical purposes in connection with the Church of England as by Law established; and that the Plaintiff and the Church of South Africa have no authority or jurisdiction over it.

On the 26th of August, 1880, the Supreme Court pronounced a decree absolving the Defendant from the instance with costs against the Plaintiff. The ground principally relied on by the Chief Justice, Sir Henry De Villiers, was that the Church of St. George had been devoted to ecclesiastical purposes in connection with the Church of England, and that the Church of South Africa was not, so far as the circumstances of the colony would permit, a part of the Church of England. Mr. Justice Dwyer concurred, but he also thought, contrary to the opinion of the Chief Justice, that the Defendant had not so acted as to give the Plaintiff the episcopal jurisdiction claimed by him. Mr. Justice Smith expressed no opinion on the main question decided by the Chief Justice, doubting whether it could be properly raised in this suit; but he concurred in the decree on the ground that the necessary parties for discussing that question were not before the Court.

Their Lordships have now to consider whether this decree is right. Before entering on the discussion they wish to say that in the careful and elaborate judgment of the Chief Justice, the case is treated with a gravity befitting its importance, and every

topic in turn is handled with a fulness and clearness which are of the greatest assistance to those who have to review it.

They also wish to state their sense of the judicial method and impartiality which marks the proceedings of the diocesan Court. An objection has been raised to those proceedings on the ground that the Court was improperly constituted, and Mr. Justice Dwyer was of that opinion; but in the view which their Lordships take of the case it is not necessary to express any opinion on that point.

Turning now to the Plaintiff's prayer, it is clear, and it has not been disputed by his Counsel at the bar, that the greater part of it asks relief which is beyond the competence of the Civil Court to grant in this suit.

The Defendant is not receiving any emolument except as Colonial Chaplain, nor does he hold any benefice in the Church of South Africa, unless it may be the incumbency of the church of St. George. It is clear, therefore, that there is no question before the Civil Court except that which relates to the use of the church of St. George, and that the relief prayed must be confined to such an execution as, under the circumstances, may be proper of the trusts upon which the church of St. George is held.

* Case rests upon the nature of the trusts upon which the Church property is held.

In order to entitle himself to that amount of relief the Plaintiff must show, first, that he is a proper object of the trusts, and secondly, that both as between himself and the Defendant, and as between himself and other objects of the trusts, he is entitled to have the Defendant restrained from and himself admitted to the use of the church in question. The first thing then to be ascertained is the precise position of the property in dispute.

It is clear that the site had at some time been vested in the Crown. It does not appear by whom the church was built, but prior to the year 1839 its affairs were regulated by a committee called the Church Committee. It seems to have been the practice for the Colonial Chaplain appointed by the Crown to become the Officiating Minister of the church. It is not possible upon the materials in this Record, and perhaps is not important, to ascertain more precisely the state of things prior to 1839.

On the 23rd January, 1839, an Ordinance was passed by the Governor of the Colony of the Cape of Good Hope, with the

* The above and subsequent marginal notes are inserted so as to render the different points judicially decided readily accessible for reference.

advice and consent of the Legislative Council and House of Assembly of that Colony. It recites as follows :—

"Whereas it is expedient that the inhabitants of Grahamstown and the parochial limits thereof, being members of and holding communion with the United Church of England and Ireland as by law established, should be invested with the right and privilege of choosing and appointing, under certain regulations, a Vestry and Churchwardens for the better and more effectual administration and management of all matters connected with the church of Grahamstown, commonly called St. George's church, and that the said Vestry and Churchwardens after having been duly appointed should possess certain powers and perform certain duties as the same are usually possessed and exercised by such officers according to the customs and usages of the said United Church of England and Ireland. And whereas on the appointment of the said Vestry and Churchwardens it is expedient that the office of Church Committee as at present constituted should cease and determine."

Provisions are then made for the election of a Vestry and Churchwardens by the male inhabitants of Grahamstown and of the parochial limits thereof, being members of and holding communion with the United Church of England and Ireland as by Law established.

The Officiating Minister is to be chairman of the Vestry, when present, and, by Sect. 8, the Vestry are to make rules for their own guidance, "and for more effectually executing the provisions "of this Ordinance, and also to take such order for the manage- "ment of the said Church as to them shall seem expedient. "Provided that the rules contain nothing repugnant to law or "to the tenor of this ordinance, or to the customs and usages of "the United Church of England and Ireland as by Law "established."

By Sect. 10 the Vestry are to have the same powers, rights, and duties as were then possessed by the Church Committee.

Sect. 12 empowers the Vestry to maintain suits in performance of the trusts reposed in them.

Sect. 14 provides for the keeping of accounts, which are to be audited and to be laid before the Church Members at a general annual meeting.

Sect. 15 provides for the election of Churchwardens, to exercise the usual functions of English Churchwardens so far as applicable to the colony.

Sect. 19 enacts that there shall be set apart in the church pews and seats for the civil and military authorities, the Minister, the officers of the garrison, and for troops and poor people.

Their Lordships consider the meaning and effect of this Ordinance to be reasonably clear. Whatever may have been the exact rights of the Crown and the inhabitants as between one another, the church was, at the date of the Ordinance, property used for religious purposes. It was desired to place the arrangements on a more public and permanent basis, and to have a Governing Body more responsible and efficient than the Church Committee. For that purpose the machinery of election is put in motion. The persons so elected are called a Vestry and Churchwardens in analogy to the English parochial system, but they are elected by the Church Members, not by the parishioners at large. The Churchwardens receive powers analogous to those of English Churchwardens. But over and above that, the Vestry are clothed with duties and trusts, and made subject to liabilities, for the benefit partly of the Church Members and partly of the Government, such as appertain only to the trustees and managers of what we should in this country call a charitable endowment. It would be exceedingly difficult for the Crown to contend that the Ordinance did not effect a permanent dedication of the site to charitable uses. But that point need not be discussed because such a dedication was undoubtedly effected by the next transaction.

On the 7th of June, 1849, the Governor of the Colony, in the name and on behalf of Her Majesty, granted the site to Dr. Gray, the Bishop of Capetown, and his successors in the see, "on condition that the land hereby granted shall for-"ever hereafter be used for ecclesiastical pur-"poses in connection with the Church of "England, and to and for no other purpose "whatsoever. . . . Subject however to all such "duties and regulations as are either already "or shall in future be established with regard to such lands." The site is described as a piece of land on which the St. George's church has been erected.

Buildings to be used for ecclesiastical purposes in connection with the Church of England and no other.

It does not appear that any duties or regulations had been established except those which were established by the Ordinance of 1839, nor would there seem to be any mode of establishing any future duties or regulations except by some legislative or judicial authority.

With reference to the expression "ecclesiastical purposes in "connection with the Church of England," it is to be observed that the Bishopric of Capetown was founded in the year 1847,

at which time, as is stated in the judgment in Long *vs.* The Bishop of Capetown, the legislative authority over the colony was vested in the Crown. Bishop Gray was appointed by Her Majesty, and ordained and consecrated by the Archbishop of Canterbury, having first taken the oath of allegiance, the oath affirming the Queen's supremacy, and the oath of obedience to the Archbishop as Metropolitan.

When the grant of 1849 was made the see of Capetown included Grahamstown. But in 1853 Dr. Gray resigned his Bishopric in order that his diocese might be contracted in extent, and that two new dioceses, those of Grahamstown and Natal, might be erected.

On the 8th of December, 1853, the Crown issued letters patent assigning to Bishop Gray the new diocese of Capetown, and appointing him to be Metropolitan Bishop in the Colony of the Cape of Good Hope and its dependencies, and the Island of St. Helena.

On the 20th of December, 1853, the Crown issued Letters Patent erecting the Bishopric of Grahamstown, and ordering the consecration of Dr. Armstrong as first Bishop of that diocese. The Bishop and his successors were made a body corporate. Grahamstown was erected into a city and the see of the Bishop. And it was declared "that the church called St. George in the said "city of Grahamstown, shall henceforth be the Cathedral church "and see of the said John Armstrong and his successors Bishops "of Grahamstown." But the Bishop was left at liberty to constitute any other church at Grahamstown to be his Cathedral and See. The Bishop had power granted to him to found dignities in his Cathedral and Archdeaconries in his diocese. By the Bishop's successors were meant persons named and appointed by the Crown, and ordained and consecrated by the Archbishop of Canterbury.

What constitutes a legal successor to the Bishop of Grahamstown.

Some time previously to the issuing of these Letters Patent the Crown had granted a constitution to the colony, and a representative Colonial Legislature had been established.

On the 20th November, 1857, the Crown issued Letters Patent appointing the Rev. Henry Cotterill to be Bishop of Grahamstown in the place of Bishop Armstrong, who was then dead, and directing the Archbishop of Canterbury to consecrate him. The provisions of this instrument which relate to the church of St. George, to the power of the Bishop to constitute dignitaries, and

to the nature of the Bishop's successors, are precisely to the same effect with the corresponding provisions in Bishop Armstrong's Patent.

On the 17th of July, 1860, an Act of the Colonial Legislature was passed, enabling the Bishop of Capetown to transfer to the Bishop of Grahamstown for the time being and his successors all immoveable property vested in the Bishop of Capetown but situate in the diocese of Grahamstown, "provided that every "such property so transferred shall be subject to the same trusts "in all respects after such transfer as it was subject to at the "time of such transfer."

By a deed dated the 4th of March, 1863, the Bishop of Capetown conveyed to Bishop Cotterill and his successors the land conveyed by the grant of the 7th June, 1849, subject to the conditions in that grant mentioned and referred to.

By a deed dated the 17th of June, 1871, Bishop Cotterill conveyed the same property to himself and three other persons, being apparently the trustees of the Diocesan Trust Board of Grahamstown, to hold upon the trusts upon which the Bishop himself held.

There has been some controversy as to the regularity of this conveyance of 1871, but their Lordships hold the question to be immaterial. The interest which was passed first to Bishop Gray, then to Bishop Cotterill, and then to the grantees of 1871, is an interest clothed with no active duties, and subject to the trusts, duties and regulations created by the Ordinance of 1839, and the conveyance of the 7th of June, 1849. It was not contended at the bar that the position of such a bare interest as this could affect the questions in this case.

Such being the legal position of the property in dispute, it is now necessary to show the position of the disputants, both with reference to one another and with reference to the property.

In the month of February, 1863, Lord Kingsdown delivered the opinion of this Board in a case which threw a new light on the position of the Church of England in South Africa, and showed that the advisers of the Crown had purported to do what was beyond its power. In the controversy between Bishop Gray of Capetown and Mr. Long, the Colonial Court held that the Letters Patent of 1853, being issued after a constitutional government had been established, were ineffectual to create any jurisdiction, ecclesiastical or civil, within the colony. On appeal to Her Majesty in Council that opinion was upheld. Lord

Kingsdown then proceeds to discuss the question whether the want of coercive jurisdiction in the Bishop had been supplied by the voluntary submission of Mr. Long. He states the position of English churchmen as follows:—

The Church of England can exist out of England, upon the principle of voluntary contract; the fact of her not being the established church of the colony being no hindrance. The want of coercive jurisdiction in the Bishop can be supplied by the voluntary submission of clergy under Church of England declarations of obedience, as in Mr. Long's case.

"The Church of England, in places where there is no Church established by law, is in the same situation with any other religious body—in no better, but in no worse position; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body, which will be binding on those who expressly or by implication have assented to them.

"It may be further laid down that, where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation, the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice.

"In such cases the tribunals so constituted are not in any sense Courts. They derive no authority from the Crown, they have no power of their own to enforce their sentences, they must apply for that purpose to the Courts established by law, and such Courts will give effect to their decision, as they give effect to the decisions of arbitrators, whose jurisdiction rests entirely upon the agreement of the parties.

"These are the principles upon which the Courts in this country have always acted in the disputes which have arisen between members of the same religious body, not being members of the Church of England."—Vol. 1, Moore's reports, N.S., p. 461.

In the course of the next year a controversy turning upon the same principles arose between the Bishop of Natal, and Bishop Gray claiming to act as his Metropolitan under the Patents of 1853. The opinion of this Board was delivered by Lord Westbury in December, 1864. As to the power of the Crown the law is thus laid down:—

"We apprehend it to be clear upon principle that after the establishment of an independent Legislature in the Settlements of the Cape of Good Hope and Natal, there was no power in the Crown by virtue of its prerogative (for these letters patent were not granted under the provisions of any statute) to establish a metropolitan see or province, or to create an ecclesiastical corporation whose status rights and authority the colony could be required to recognize."—Vol. 3, Moore's Reports, N.S., p. 148.

And after giving reasons for this opinion, his Lordship continues,—

"The same reasoning is of course decisive of the question whether any jurisdiction was conferred by the letters patent. . . . It is quite clear that the crown had no power to confer any jurisdiction or coercive authority upon the Metropolitan over the Suffragan Bishops, or over any other person."

The question then arose whether the Bishop of Natal had by contract given the jurisdiction claimed by Bishop Gray. On this point Lord Westbury says:—

"Even if the parties intended to enter into any such agreement (of which, however, we find no trace), it was not legally competent to the Bishop of Natal to give, or to the Bishop of Capetown to accept or exercise, any such jurisdiction."—Vol. 3, Moore's Reports, N.S., p. 155.

One effect of these expositions of the law was that the Crown ceased to grant Letters Patent for Bishops in colonies possessing independent Legislatures. It has been supposed in this case that the Crown might still take such action as to give to Grahamstown a Bishop who should be a successor to Bishops Armstrong and Cotterill within the terms of the Patent creating the Bishopric. But though the Crown has not in any formal or public way decided not to resume the practice prevailing prior to 1863 their Lordships are clear that this case must be decided on the footing that the practice no longer exists.

Another effect of the decisions was that English Churchmen in the colonies took steps to organize themselves, like other independent religious societies, on the footing of contract. This was done in South Africa by the action of Synods, the effects of which will be presently discussed.

In the year 1865 the Defendant, who was then the Vicar of Ashton-under-Lyne, agreed with Bishop Cotterill, who was in England, that he should accept the office of Colonial Chaplain at Grahamstown, and should also be appointed Dean of Grahamstown. He was accordingly appointed to be Colonial Chaplain by letter from the Secretary of State, and he went to the colony in November, 1865. He had before leaving England signed declarations of obedience to the Bishop of Grahamstown and his successors, and of submission to the rules and regulations of the Synod of the diocese of Grahamstown, in all things not contrary to the laws of the United Church of England and Ireland. And he also subscribed to the three articles required to be subscribed by the 36th of the Canons of 1603.

On his arrival in the colony he found that the Vestry were in possession of the church of St. George, as according to the Ordinance of 1839 they ought to have been. They appear to have accepted the Colonial Chaplain to be their Officiating Minister as a matter of course, according to the usual practice, and they put the Defendant into possession of the church by handing him the keys, which are the symbols of possession. This, he says, was done under the Ordinance of 1839, by the provisions of which St. George's church has always been governed. With a natural fondness for terms which bring the familiar system of the mother country before the mind, he calls this proceeding an induction of himself as Rector.

Two or three months afterwards Bishop Cotterill returned to the colony, and he then appointed the Defendant to be Dean of Grahamstown, and installed him in the church as such. So far as the dignity goes, the Bishop may have had power under his patent to create it, but he could not confer any authority with it except such as might flow from contracts between the Defendant and others. In this case there were no special statutes for the Cathedral, nor have any been made till after the present dispute began.

It is important not to be misled by the false analogies of English ecclesiastical titles. The Defendant is a titular Dean, and may be called a Rector. But in point of law, and for the present purpose, he must be taken as the Officiating Minister of a Church governed by the Ordinance of 1839 and the grant of 1849, and appointed thereto either by the Vestry, or by the Crown, or by the joint action of the two. Neither the Vestry nor the Crown have been made parties to this suit. If it were necessary to determine the precise origin of the Defendant's title, their Lordships would have to deal with the difficulty as to the frame of suit which has been indicated by the Chief Justice, and on which Mr. Justice Smith bases his judgment.

In the years 1867 and 1869 Synods were held for the diocese of Grahamstown. In the year 1870 was held the first Provincial Synod of the Church of South Africa. By these Synods much was done to establish that Church on a voluntary basis. It is sufficient for the present to say of them that the Defendant took an active and leading part in the proceedings.

In the year 1871 Bishop Cotterill resigned his office, and, as no appointment of a successor by letters patent could be looked for, Bishop Gray as Metropolitan issued a mandate addressed to

the Defendant commanding an election of a new Bishop. The result was the election of the Plaintiff, and in that election the Defendant took the leading part.

Some time afterwards the Defendant became dissatisfied with the proceedings of the Synod, but he did not withdraw from his position in the Church of South Africa. When the present dispute began the Defendant did not contend that the Plaintiff had not the ecclesiastical character which he claimed to have. On the contrary, the Defendant insisted on his own rights as Dean, which, as he asserted quite erroneously, would, according to English ecclesiastical law, give him the right of excluding the Bishop from ministrations in the Cathedral. It is only during this litigation that the Defendant has contended either that he himself is not a member of the Church of South Africa, or that the Plaintiff is not the successor of Bishop Cotterill, or that the Plaintiff and his Church are disconnected with the Church of England.

Their Lordships consider that the Defendant's present contention is wholly inconsistent with his past conduct. The Chief Justice says on this point:—

"It is idle for the Defendant to deny that he joined the Church of South Africa and became personally subject to its constitutions and canons, in the face of the part which he took in the discussions of the Provincial Synod of 1870, and in the absence of any protest against the separatist canons adopted by that Synod. It is still more idle for him to deny that he has subjected himself personally to the episcopal jurisdiction of the Plaintiff according to the laws of the Church of South Africa, in the face of the documentary proof which exists of his active participation in the election of the Plaintiff."

Of the same opinion was Mr. Justice Smith, and with it their Lordships entirely agree.

So far then as this dispute turns on the question whether the Defendant has come under personal contracts or equities the Plaintiff has proved his case. But the Defendant cannot contract away the rights of other people. If he is occupying an office in which he owes duties to the Government, to the Vestry, or to the Church Members, he cannot by his contract give to any extraneous person or body rights which may interfere with those duties. If again the Plaintiff belongs to a religious body which cannot claim to be in connection with the Church of England, as by Law established, no contract with the Defendant

Incumbents ministering in buildings held in trust for purposes in connection with the Church of England cannot contract away the rights of the laity nor make personal contracts placing themselves, the laity, or the buildings, under the jurisdiction of Bishops belonging to a Church which

cannot in law claim to be in connection with the Church of England.

or with any one else can give him a right to use property which is settled to uses in connection with that Church. Their Lordships will address themselves to this latter question, which they think must govern the case. For that purpose they have to examine the Acts of the Synods which are set forth in this Record.

In conducting this examination their Lordships do not enter into the discussions whether or no the Church of South Africa is a branch of or identical with the Church of England. What the charters of the endowment now in question require is connection with the Church of England as by law established; and on this part of the case it is sufficient for the Plaintiff if he can show such a connection on the part of the Church of South Africa.

If the Church of South Africa cannot be shown to be a Church in connection with the Church of England, it is not necessary to discuss whether she is a Branch of the Church of England.

One thing which their Lordships conceive to be necessary for establishing such a connection between the Church of England and another Church is a substantial identity in their standards of faith and doctrine. Where the other Church is that of a colony possessing an independent Legislature, there must be differences, as for instance in the appointment of bishops and in the erection of courts, such as necessarily result from the difference of political circumstances in which the Church of England and the other Church find themselves placed. There may probably be other differences, which yet might be too slight to work a disconnection, and which need not now be considered.

There may be certain differences, to suit peculiar circumstances, but substantial identity in standards of faith and doctrine there must be between two churches to establish a connection between them.

Among the Acts of the Synod of 1870 there are several provisions which in the Supreme Court and here have been relied on to show a disconnection between the Church of South Africa and the Church of England, and which their Lordships will not now discuss in detail. Such are the provisions of the 27th Canon, the declarations which refer to a possible alteration of the creeds, and to a possible alteration of formularies by a general assembly, the provision in the 3rd Canon for the election of bishops without the consent of the Crown, and the constitution of separate Courts. Their Lord-

Their Lordships do not deem it necessary to discuss now IN DETAIL the many Acts of the Church of the Province of South Africa which are capable of working a disconnection from the Church of England, and of "leading to divergencies in

course of time," but refer to the 1st Article of Constitution as well as its 3rd proviso as having already actually severed all connection between the two Churches.

ships are not prepared to say that the effect of these provisions is to disconnect the Church of South Africa from the Church of England. The most important in this respect are the two last mentioned provisions. But they are the necessary results of the legal and political situation as laid down by Her Majesty in Council, not the expression of any separatist intention. If they worked a disconnection, there would be an absolute impossibility of connection between two Churches so situated. And it appears to their Lordships that though the existence of separate systems of appointing bishops and of ecclesiastical tribunals is likely enough in the course of time to lead to divergencies, the mere fact of their establishment does not produce any such effect.

It is the first article of the Constitution, and *especially the 3rd proviso* attached to it, which, in their Lordships' opinion, creates the great difficulty in the way of holding that the Church of South Africa is in connection with the Church of England. That article is as follows :—

"Articles of the Constitution.

"1. The Church of the Province of South Africa receives the doctrine, sacraments, and discipline of Christ as the same are contained and commanded in Holy Scripture according as the Church of England has received and set forth the same in its standards of faith and doctrine, and it receives the Book of Common Prayer, and of ordering of Bishops Priests and deacons, to be used according to the form therein prescribed in public prayer and administration of the sacrament and other holy offices, and it accepts the English version of the Holy Scriptures as appointed to be read in churches, and further it disclaims for itself the right of altering any of the aforesaid standards of faith and doctrine.

"Provided that nothing herein contained shall prevent the Church of this Province from accepting, if it shall so determine, any alterations in the formularies of the Church (other than the creeds) which may be adopted by the Church of England, or allowed by any General Synod, Council, Congress, or other Assembly of the Churches of the Anglican Communion, or from making at any time such adaptations and abridgments of and additions to the services of the Church as may be required by the circumstances of this province.

"Provided that all changes in and additions to the services of the Church made by the Church of this Province shall be liable to revision by any Synod of the Anglican Communion to which this province shall be invited to send representatives.

"*Provided also, that in the interpretation of the aforesaid standards and formularies the Church of this Province be not held to be bound by decisions in questions of faith and doctrine or in questions of discipline relating to faith and doctrine other than those of its ecclesiastical tribunals, or of such other tribunal as may be accepted by the Provincial Synod as a tribunal of appeal.*".

There are in this Article and in other parts of the Synodical proceedings general expressions affirming in the strongest way the connection of the Church of South Africa with the Church of England, and its adherence to the faith and doctrine of the Church of England. But all these general expressions are unavailing for the present purpose, if on coming to particulars we find that the Constitution substantially excludes portions of the faith and doctrine of the Church of England. The trusts of the property in dispute are declared by the Ordinance of 1839, and the grant of June, 1849, in favour of persons belonging to the United Church of England and Ireland as by Law established. But the standards of faith and doctrine adopted by that Church are not to be found only in the texts. They are to be found also in the interpretation which those texts have from time to time received at the hands of the tribunals by Law appointed to declare and administer the Law of the Church.

The standards of faith and doctrine are to be found not only in the texts, but in the interpretations of those texts by the Judicial Decisions of the English Courts.

It has been argued that the Church of South Africa has here done all that existing political circumstances permitted it to do for continued connection with the Church of England; and again that the proviso is a mere statement of the facts of the case, and means no more than this: that as the Church of South Africa must have tribunals of its own, it hereby places on record that their decisions should be binding.

The Church of the Province of South Africa has not only failed to do all within its power legally to maintain the connection, but by its own action has plainly disconnected itself.

The necessity of separate tribunals and its probable consequences has been above dealt with. But their Lordships consider that the proviso under consideration is very much more than a recognition of the facts of the case; and that the Church of South Africa, so far from having done all in its power to maintain the connection, has taken occasion to declare emphatically that at this point the connection is not maintained.

It was competent to the Church of South Africa to establish

for itself any system of law which it thought fit. The facts of the case did not compel it to say that its tribunals shall not take English decisions as authoritative. It might have declared that the decisions of the tribunals established by Law for the Church of England, whether past or future, should be binding on the tribunals of the Church of South Africa. That would probably keep the two Churches in connection for the longest period of time, though it would not be necessary to go so far in order to maintain the connection at the outset.

The Church of the Province of South Africa might have maintained a connection with the Church of England by binding itself to be bound by the latter's decisions, past and future, though PERMANENCY of connection, under its present separate constitution, could not be ensured. The connection would "probably" last for some time, but would be subject to the contingency of fresh departures occurring hereafter.

But the obvious course for a Church which desired to be in connection with the Church of England, to all intents and purposes, would be at least to say at starting that its faith, doctrine, and discipline should be those which then prevailed in the Church of England. Such a Church would, until some fresh departure occurred, be in connection with the Church of England.

What is necessary (at the very least) in the opinion of the Council, to establish connection with the Church of England.

Their Lordships were strongly invited by the Respondent's Counsel to connect the proviso under consideration with the course of some well-known controversies. There is no judicial ground for saying that it was aimed at any special practice or doctrine. But its practical effect may well be illustrated by reference to some important decisions of Her Majesty in Council. For instance, the decisions in the cases of Gorham *v.* the Bishop of Exeter, and Williams *v.* the Bishop of Salisbury, both delivered prior to the Synod of 1870, affirm and secure the right of a clergyman of the Church of England to preach freely the doctrines which were there in question; but in the Church of South Africa a clergyman preaching the same doctrines may find himself presented for, and found guilty of, heresy. Such a reservation on the part of the Church of South Africa must tend to silence and to exclude those whom the decisions of Her Majesty in Council would protect in the Church of England.

The Canons of the Church of the Province of South Africa are so framed that clergymen not of one particular school may be condemned for heresy, although by the Church of England laws they would be protected and maintained in their positions.

The decisions referred to form part of the constitution of the

The Church of the Province of South Africa and the Church of England having essentially different constitutions and different standards of and for interpretation, uniformity of faith and doctrine cannot be relied on as between the two churches.

Church of England as by Law established, and the Church and the tribunals which administer its laws are bound by them. That is not the case as regards the Church of South Africa. The decisions are no part of the constitution of that Church, but are expressly excluded from it. There is not the identity in standards of faith and doctrine which appears to their Lordships necessary to establish the connection required by the trusts on which the Church of St. George is settled. There are different standards on important points. In England the standard is the formularies of the Church as judicially interpreted. In South Africa it is the formularies as they may be construed without the interpretation.

This separation is not merely possible in the future, but is actual in the present.

It is argued that the divergence made by the Church of South Africa is only potential and not actual, and that we have no right to speculate on its effect until the tribunals of South Africa have shown whether they will agree or disagree with those of England. Their Lordships think that the divergence is present and actual. It is the agreement of the two Churches which is potential. The ecclesiastical tribunals of South Africa may possibly decide in all important points as Her Majesty in Council has done. But the question is whether they have the same standard; and, as has been shown, they have a different standard.

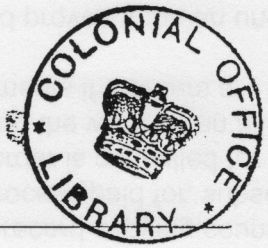
Therefore the endowments settled for the use of the Church of England cannot be claimed by the Church of the Province of South Africa, and the result may be that the endowments of the See and other properties of the Diocese are jeopardised.

Of course it was perfectly competent to the Church of South Africa to take up its own independent position with reference to the decisions of the tribunals of the Church of England. But, having chosen that independence, they cannot also claim as of right the benefits of endowments settled to uses in connection with the Church of England as by Law established.

Such being their Lordships' view of the Synodical proceedings in 1870, it is not necessary to consider further whether the defendant's position is such as to enable him by his conduct to give to the Plaintiff the rights he claims, or whether the suit is so constituted as to enable the Plaintiff to obtain any decree for the enjoyment of property situated as this is. It will have been seen by the foregoing observations that there is difficulty on both these points.

Their Lordships wish to add their opinion that courts of law cannot settle in any satisfactory way questions affecting permanent endowments after a total change of circumstances has occurred, and their concurrence with the Chief Justice in thinking that the Legislature alone can properly deal with such cases.

The result is that their Lordships will humbly advise Her Majesty to dismiss this appeal. The costs must follow the result.



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