REMARKS

ON THE

Status of Colonial Bishops,

AND THE

LAW CONCERNING BISHOPS IN VICTORIA.

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LAW RESPECTING BISHOPS IN VICTORIA.

I HAVE been asked by many persons to state the grounds on which I moved the following resolution in the Church Assembly, in February, 1868, and accordingly I have prepared a statement of some of the arguments upon the question. Of course, in printing a statement it is advisable to quote more largely from decisions of the Courts than was requisite in speaking on the question in the Church Assembly. Also I address this paper to a larger number than the audience to whom I spoke.

Members of the Church Assembly are aware that, though the resolution was carried by the votes of the clergy as well as by those of the laity, I refrained from proceeding further, in the late session, out of deference for the large minority opposed to the resolution: but the Committee, having been appointed, can, if they desire to do so, report to the next meeting of the Church Assembly.

The resolution was—"That a committee be appointed to prepare a bill for the consideration of the Assembly, with a view that such bill may be brought before Parliament, in order that as well with regard to Bishops as with regard to clergymen and other members of the Church of whatever order or degree, the United Church of England and Ireland in Victoria may be permitted to exercise the same rights of self government as are enjoyed by other religious communities."

In this resolution the words "in order that they may be permitted to exercise the same rights of self-government as are enjoyed by other religious communities," are taken from the preamble of the Act of the Canadian Legislature, by which the Church in Canada is enabled to govern itself.

The local legislature has, by an Act (18 Vic. No. 45) to enable the Bishops, clergy, and laity, of the United Church of England and Ireland in Victoria to provide for the regulations of the affairs of the said Church, made it lawful for the members of that Church to meet together for the regulation and management of their affairs conformably to the provisions of that Act.

But the provisions of that Act, while enabling the Assembly to deal with whatever might "concern the position, rights, duties, and liabilities of any minister or member of the said United Church or any person in communion therewith, in regard to his ministry, membership, or communion, or may concern the advowson or right of patronage in or management of the property of the said Church," did not enable the Assembly to deal with questions affecting the appointment or removal of Bishops. On the contrary, though the third clause of the Act enables the Church Assembly to establish a commission for the trial of ecclesiastical offences, it is at the same time provided that such commission shall report to the Bishop of the diocese "their opinion of the matters referred

to them and the penalty which they would recommend to be imposed, which penalty the Bishop shall not have the power to exceed." The provisions of this clause, together with other portions of the Act, tend to show that no power was given to the Church to deal with matters concerning the office of Bishop, or appointment to or removal from it, whatever might be the exigency of a case.

In 1866 I moved for a committee on the status of Colonial Bishops, and amongst other questions remitted to England at the instigation of that committee was one as to the power of the Church Assembly, with the consent of the Bishop, to frame rules concerning the office of Bishop; and the answer obtained was, as might have been expected, and certainly was expected by myself, that no such power is conferred by the Act.

There is no reason to suppose that the local Legislature was unwilling to give the Church full power to manage its own affairs, just as other religious communities manage their affairs. On the contrary, the local Legislature passed the Act 18 Vic. 45 at the request of the Church itself: and on all occasions the Australian Parliaments have displayed a readiness to accord full rights of self-government to all denominations of Christians.

Why, then, it may be asked, was not complete power of self-government sought for by the Church in the colony? Various motives may, of course, have actuated various men; but at least one motive is apparent throughout the Act 18 Vic. No. 45.

It was believed that Her Majesty the Queen had, by her royal prerogative, the right to nominate and appoint any Metropolitan or Bishop of the said United Church in Victoria, and had "other rights and prerogatives" in the matter; for such are the expressions in the 18th clause of the Act.

It was also believed that although there was no established Church in the colony, the members of the United Church in the colony were so bound by the ecclesiastical law of the Church in England, and by the Common and Statute Law relating to the Church, that it was necessary to provide that "no regulation of any such (Church) Assembly which shall affect any right of appeal to Her Majesty in Council, or to the Archbishop of Canterbury, or to the Metropolitan of the Province, or the subordination of the said Bishops, clergy, and laity, to the Metropolitan, or to the said Archbishop, shall be valid unless the consent of the said Archbishop or of the said Metropolitan thereto be previously or thereafter signified by him under his hand and seal, nor unless such regulation be confirmed by an order of the Archbishop of Canterbury."

By the 15th clause of the Act it was also provided that copies of all regulations passed, and of all rules framed (for any commission) at the Assembly called under the Act, should be sent by the Bishop "to the Archbishop of Canterbury, and also to the Metropolitan; and the said Archbishop may, within six months of his receipt thereof, submit the same, with such observations thereon as he may see fit to make for the consideration of Her Majesty in Council; and Her Majesty, by and with the advice of her Privy Council, may allow or disallow the same as to Her Majesty shall see fit," &c.

The 16th clause enacts that any regulation or rule disallowed by Her Majesty "shall cease to be in force" after notification to the Bishop of its disallowance.

These numerous provisions as to the Royal prerogative, and as to the supervision of the Colonial Church by the Archbishop of Canterbury, plainly show that there were matters in which the members of the Church in the colony felt, or supposed, that they were bound by the ecclesiastical law and by the government of the Church in the mother country.

The local Legislature abstained from permitting the Church in the colony to govern itself freely, because it was not asked to permit it to do so. It was not asked to do so, because the members of the Church in the colony supposed that they carried with them to the colony a subordination to the Archbishop

of Canterbury, and a legal relation to the Queen within the Church, superadded to that relation to which all Her Majesty's subjects—whatever their religious faith—are liable, and by which they are bound.

Nor was this belief as to the position of members of the Colonial Church confined to the colonies.

It existed as fully in England as in Australia. Lord Westbury, and others, prepared for Her Majesty's signature many letters patent, in which that position was taken for granted.

Certainly events had occurred which might have led cautious persons to doubt the truth of the received opinions; notably those which led to a special enactment about marriages in the East Indies, (58 Geo. III., cap. 84,) but nothing transpired for some time to break the quiet sleep which brooded over the subject.

But, in 1863, the case of Long v. the Bishop of Cape Town, carried, on appeal, to the Privy Council from the Supreme Court at the Cape of Good Hope, was destined to bring about a complete revolution in public opinion as to the existing state of the law.

It is unnecessary to detail the case at length in this paper, and, therefore, only so much of the facts will be detailed as will serve to show the grounds for the decision arrived at on such points as are interesting to the members of the Church in Victoria.

The Bishopric of Cape Town was founded in 1847, the legislative authority in the colony being then vested in the Crown. On the 25th September, 1847, letters patent were issued by the Crown, erecting the colony of the Cape of Good Hope and its dependencies, and St. Helena, into a bishop's see and diocese, appointing Dr. Gray to be Bishop, and ordering his consecration by the Archbishop of Canterbury.

The letters patent purported to empower the Bishop to perform all the functions appropriate to the office of a bishop within the diocese of Cape Town, and, especially, to give institution to benefices; to grant licenses to officiate to all rectors, curates, ministers, and chaplains, in all churches, chapels, and places where Divine Service should be celebrated according to the rites and liturgy of the Church of England; to visit all rectors, curates, ministers, and chaplains, and priests and deacons in holy orders, of the United Church of England and Ireland, and to cite them before him, or before the officers whom he was authorised to appoint; and to enquire concerning their morals, as well as their behaviour in their several stations and offices.

Power was given to the Bishop to appoint archdeacons, a vicar-general, official principal, chancellor, commissaries, and other officers; and it was provided that an appeal should be made from sentences of the subordinate officers so to be appointed to the Bishop, and from sentences of the Bishop to the Archbishop of Canterbury.

No Ecclesiastical Court was expressly constituted by the Letters Patent, nor was power given to the Bishop to establish one, and it was declared that they should not extend to repeal, vary, or alter the provisions of any charter whereby ecclesiastical jurisdiction had been given to any Court of Jurisdiction within the limits of the said diocese.

The letters made the Bishop of Cape Town subject to the Metropolitan See of Canterbury. Dr. Gray, accordingly, was duly consecrated, and officiated at the Cape until 1853, when it was thought advisable to subdivide his diocese, and create the dioceses of Cape Town, Graham's Town, and Natal.

On the 23rd November, 1853, he resigned his bishopric into the hands of the Archbishop of Canterbury (conformably to an enabling clause in the original Letters Patent appointing him); and on the 8th December, 1853, new Letters Patent were issued, by which Dr. Gray was made Bishop of Cape Town, and Metropolitan Bishop in the colony and it dependencies, and St. Helena.

But, previously to the issue of these new Letters, the Crown had granted a

Constitution to the colony of the Cape. Representative institutions had been founded, and a Colonial Legislature established.

Mr. Long was at the Cape before any bishop was appointed there. He was admitted to Deacon's Orders by the Bishop of London in 1844, and appointed in 1845, by the then Governor of the Colony, to be Minister of the English Episcopal Church at Graaff Reinet, his salary being partly paid by the Governor, partly by the Society for the Propagation of the Gospel, and partly by his congregation.

Soon after the arrival of the Bishop of Cape Town, in 1848, Mr. Long was ordained priest by the Bishop, and, on ordination, took the usual oaths, including that of canonical obedience to the Bishop. The Bishop then granted, and Mr. Long accepted, a license to officiate and have cure of souls at Graaff Reinet, the Bishop reserving to himself and his successors full power to revoke the license whensoever he or they should see just cause to do so.

Mr. Long was subsequently licensed in June, 1854, to another church at Mowbray, built and endowed by a clergyman named Hoets, a similar power of revocation being reserved, and a similar oath of canonical obedience being taken.

In 1856 the Bishop determined to convene a Synod, which was appointed to be held on 21st January, 1857. Mr. Long and his parishioners being opposed to the holding of the Synod, he did not attend it in compliance with a summons, but protested against it on the ground of its illegality, as being unsanctioned by the Crown and unauthorised by the Legislature.

The Synod, however, passed various resolutions, termed "Acts and Constitutions of the First Synod, held at Cape Town, January 21, 1857." Amongst other matters, a Consistorial Court was appointed for the trial of all offences against the ecclesiastical laws of the diocese, and various provisions were made as to the mode of trial.

In 1860 the Bishop convened a second Synod for the 17th January, 1861, and cited Mr. Long to attend it. Mr. Long objected. Correspondence ensued. Mr. Long was formally cited by the Registrar of the Diocese to appear before the Bishop on the 4th Feb., 1861, to answer for having neglected and refused to obey the commands and directions of his Bishop to give notice of a meeting to be held in terms of the letter forwarded by the Bishop.

Mr. Long protested against the power of the Bishop to try or sentence him. The Assessors delivered their opinions to the Bishop:—the Bishop pronounced sentence, suspending Mr. Long from the cure of souls, and exercise of ministerial functions, for three months; and thenceforward till he should express his willingness to render obedience, but not depriving him of any portion of his ecclesiastical income. Mr. Long, however, treated the sentence as a nullity; was again cited to appear on the 6th March, declined to attend, and was then, by further sentence of the Bishop, deprived of his charge and cure, and of all emoluments belonging thereto.

Another clergyman, Mr. Hughes, was appointed to officiate. Mr. Long and the Churchwardens applied to the Supreme Court of the colony for an interdict to restrain the Bishop and Mr. Hughes from interfering; a proceeding took place, in the forms of the Roman-Dutch Law, and the result was a decision in all material points in favour of the Bishop.

Against that decision Mr. Long was admitted to appeal to Her Majesty. The Judges at the Cape were, however, unanimously of opinion that all jurisdiction given to the Bishop by the Letters Patent of 1847 ceased by surrender of the bishopric in 1853, and the issue of new Letters Patent; and that the Letters Patent of 1853, being issued after a Constitutional Government had been established in the Cape of Good Hope, were ineffectual to create any jurisdiction, ecclesiastical or civil, within the colony, even if it were the intention f the Letters Patent to create such jurisdiction.

With these conclusions the Judicial Committee of the Privy Council agreed. The members present were Lord Kingsdown, Dr. Lushington, Sir Edward Ryan, and Sir John T. Coleridge.

A majority of the Judges at the Cape had held, however, that the defect of coercive jurisdiction under the Letters Patent had been supplied by the voluntary submission of Mr. Long, and that on that principle he was bound by the decision of the Bishop.

With this conclusion the Judicial Committee did not agree; and they expressed themselves thus:—

"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, then 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 case 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."

The Court proceeded to say that, applying these principles, they found that Mr. Long had voluntarily submitted himself to the authority of his Bishop to such an extent as to enable the Bishop to deprive him of his benefice for such cause as (having regard to differences arising from circumstances in the colony) would authorise the deprivation of a clergyman by his Bishop in England; but, looking at the steps which Mr. Long was required to take with regard to a Synod, they did not find that Mr. Long was shewn to have been guilty of any offence which, by the laws of the Church of England, would have warranted his suspension and subsequent deprivation.

They, therefore, humbly advised Her Majesty to reverse the sentence against Mr. Long, and to declare that he was not lawfully removed, but remained a minister of the Church at Mowbray, and entitled to the emoluments belonging to it.

The judgment concluded in these words:—"But it is not beyond our province to observe that the Lord Bishop has been involved in the difficulties by which he has been embarrassed, in a great measure, by the doubtful state of the law, and by the circumstance that he, not without some reason, considered the Letters Patent, under which he acted, to confer on him an authority which, at the time when he acted under them, Her Majesty had no authority to grant, and that either in this or in some other suit it was important to the interests of the colony generally, and especially of the members of the Church of England within it, that the many questions which have arisen in this case should, as far as possible, be set at rest."

A subsequent judgment, delivered by the Judicial Committee of the Privy Council, on the 20th March, 1865, in the matter of the Petition of the Bishop of Natal, contains the following passages:—"In this state of things three

principal questions arise, and have been argued before us. First—Were the Letters Patent, of the 8th December, 1853, by which Dr. Gray was appointed Metropolitan, and a Metropolitan See, or Province, was expressed to be created, valid and good in law? Secondly—Supposing the ecclesiastical relation of Metropolitan and Suffragan to have been created, was the grant of coercive authority and jurisdiction expressed by the letters patent to be thereby made to the Metropolitan valid and good in law? Thirdly—Can the oath of canonical obedience, taken by the appellant to the Bishop of Cape Town, and his consent to accept his See as part of the metropolitan province of Cape Town, confer any jurisdiction or authority on the Bishop of Cape Town, by which this sentence of deprivation of the Bishopric of Natal can be supported? With respect to the first question, 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 recognise. After a colony or settlement has received legislative institutions, the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to that colony, or settlement, as it does to the United Kingdom. It may be true 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 him any diocese, or give him any sphere of action, within the United Kingdom. The United Church of England and Ireland is not a part of the Constitution in any colonial settlement, nor can its authorities, or those who bear office in it, claim to be recognised by the law of the colony, otherwise than as the members of a voluntary association. . . . . We, therefore, arrive at the conclusion that, although in a Crown colony, properly so called, or in cases where the Letters Patent are made in pursuance of the authority of an Act of Parliament (such, for example, as the Act 6th and 7th Victoria, cap. 13), a Bishopric may be constituted, and ecclesiastical jurisdiction conferred, by the sole authority of the Crown; yet, that the Letters Patent of the Crown will not have any such effect or operation in a colony, or settlement, which is possessed of an independent Legislature. The subject was considered by the Judicial Committee in the case of *Long* v. *The Bishop of Cape Town*, and we adhere to the principles which are there laid down. The same reasoning is, of course, decisive of the second question, whether any jurisdiction was conferred by the Letters Patent. Let it be granted, or assumed, that the Letters Patent are sufficient in law to confer on Dr. Gray the ecclesiastical *status* of Metropolitan, and to create between him and the Bishops of Natal and Graham's Town the personal relation of Metropolitan and Suffragan as ecclesiastics; yet it is clear that the Crown had no power to confer any jurisdiction or coercive legal authority upon the Metropolitan over the Suffragan Bishops, or over any other person. It is a settled Constitutional principle, or rule of law, that, although the Crown may, by its prerogative, establish Courts to proceed according to the common law, yet that it cannot create any new Court to administer any other law; and it is laid down, by Lord Coke, in the 4th Institute, that the erection of a new Court, with a new jurisdiction, cannot be without an Act of Parliament. It cannot be said that any ecclesiastical tribunal or jurisdiction is required in any colony or settlement where there is no established Church, and, in the case of a settled colony, *the ecclesiastical law of England cannot*, for the same reason, *be treated as part of the law which the settlers carried with them from the mother country*. . . There is, therefore, no power in the Crown to create any new or additional ecclesiastical tribunal or jurisdiction, and the clauses which purport to do so, contained in the Letters Patent to the appellant and respondent, are simply void in law. No Metropolitan or Bishop in any colony, having legislative

institutions, can, by virtue of the Crown's Letter Patent alone (unless granted under an Act of Parliament, or confirmed by a Colonial Statute), exercise any coercive jurisdiction, or hold any Court or tribunal for that purpose. Pastoral or spiritual authority may be incidental to the office of Bishop, but all jurisdiction in the Church, where it can be lawfully conferred, must proceed from the Crown, and be exercised as the law directs; and suspension or privation of office is matter of coercive legal jurisdiction, and not of mere spiritual authority. Thirdly—If, then, the Bishop of Cape Town had no jurisdiction by law, did he obtain any by contract or submission on the part of the Bishop of Natal? There is nothing on which such an argument can be attempted to be put, unless it be the oath of canonical obedience taken by the Bishop of Natal to Dr. Gray, as Metropolitan. The argument must be, that, both parties being aware that the Bishop of Cape Town had no jurisdiction, or legal authority, as Metropolitan, the appellant agreed to give it to him by voluntary submission. But, 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 Cape Town to accept or exercise, any such jurisdiction. . . . . The attempt to give appellate jurisdiction to the Archbishop of Canterbury is equally invalid."

Another case, involving considerations as to the status of Colonial Bishops, was tried before the Master of the Rolls and the Vice-chancellors in 1866 (*Bishop of Natal* v. *Gladstone.)* The Treasurers of the "Colonial Bishoprics Fund" (*after* the decision of the Judicial Committee above cited, *in re Bishop of Natal*, 20th March, 1865) declined to pay over any more salary to Bishop Colenso, on the ground that that decision had shewn that he had no power to exercise the functions of Bishop in Natal, or, at all events, had no jurisdiction, and that, therefore, the fund was inapplicable for his payment, according to the objects for which it had been established, and that they were not justified in continuing to pay him.

It was contended for the Bishop of Natal that, to whatever extent the letters patent had not been invalidated, they were so far good until shown to be otherwise; that those letters had not been repealed; that he was a "corporation sole" under the title of the Bishop of Natal, and that the defendants had recognised him as such for thirteen years, and ought to continue to pay him. "At any rate," it was argued, "the defendants must be taken to have known what the letters patent were, and that by the law the letters patent could not confer the exercise of coercive jurisdiction; so that, assuming the invalidity of the letters patent, they would not be absolved from their contract, nor can they avail themselves of the decision of the Synod of the Church of South Africa, or of the refusal of some of the clergy to obey the plaintiff."

To this Sir Roundell Palmer replied, "It was said that all parties had accepted the letters patent, and that it was not open to the trustees to question the title of their *cestui que trust.* The answer is, that no trust on the footing of the letters patent was ever executed."

In giving judgment, the Master of the Rolls said, "First of all, I have not to consider whether the plaintiff, by false and erroneous teaching, or doctrine, or in other manner, has misconducted himself as a bishop. I have nothing to do with the question whether his works have or have not an heretical tendency. That question might have been raised, and might have had an important bearing on the question whether the plaintiff is, or is not, entitled to be paid the salary in question; but that question not only is not raised, but it seems to have been on both sides carefully excluded from the pleadings. I must, therefore, in dealing with the question in this case, proceed on the assumption that, neither in respect of morals, nor in respect of doctrine, is there anything to disqualify the plaintiff from acting as the Bishop of Natal. In the second place, I have not to consider whether the letters patent, creating the diocese of Natal, and appointing the plaintiff the bishop thereof, are or not wholly null

and void. That question may be tried before some other tribunal, or in some other cause, in which their validity may be challenged, but it cannot be tried in this suit as at present constituted. What I have now to consider is the force and effect of these letters patent as between the trustees who obtained the grant, the plaintiff to whom it was made, and the members of the Church of England in the colony of Natal, who have accepted or submitted to it; and, in doing so, I have to consider whether, with reference to the law of England on this subject, as expounded by the Judicial Committee of the Privy Council, those letters patent do not attempt to confer powers which the Crown has no legal power or authority to confer. . . . . The letters patent creating the see or diocese of Natal, and appointing the plaintiff the bishop thereof, may validly make him a bishop, and confer upon him certain powers which he may legally exercise, and yet, at the same time, may also purport to give him other powers which he cannot legally exercise. If, however, this should turn out to be the fact, the circumstance that such excess of power is attempted to be conferred in and by the Letters Patent does not render them wholly invalid, or vitiate that portion of them which confers powers which may be legally exercised."

Lord Romilly then proceeded to class the powers and authority of a Bishop under three heads. 1. *Ordo.* 2. *Jurisdictio.* 3. *Administratio rei familiaris*, of which the letters patent profess to give the first and second, but not the third.

Under the first, a bishop may transmit the spiritual power to others; can ordain deacons and priests; can consecrate and dedicate churches; can administer confirmation. "These powers," he said, "are not confined to this or that spot, but are universal. They extend over the whole world."

The limitation of these powers territorially had become customary, he said, because it was found convenient to limit them to a district which could be practically superintended.

The Privy Council judgment, in Lord Romilly's opinion, "does not in the slightest degree affect the status and position (of a colonial bishop) as bishop of the Church of England generally—not being the bishop of any territorial see or diocese—it does not, therefore, in the slightest degree affect the first class of his powers, namely, that of orders; he can as lawfully and as conclusively ordain, confirm, and consecrate, as if the coercive jurisdiction could have been exercised by him."

As to the jurisdiction, Lord Romilly says, "The law, as declared by the Privy Council's Judicial Committee, leaves all these functions to the bishop exactly as by the law of the Church of England they belong to that office. He may, as bishop, visit; he may, as bishop, call before him the ministers within his diocese; and he may enquire respecting their morals and behaviour, and the doctrines that they preach; but the power which the letters patent seem to intimate an intention of conferring upon the bishop—namely, the power of enforcing obedience to his orders in the performance of these duties, and the power of removing any obstruction which may be interposed to prevent his performing any of the functions of a bishop—this power is not given to him personally, or to any officers of his, or dependent upon him. Is he, therefore, left powerless, and can any one with impunity resist his authority? This is not so; but to enforce obedience to his orders, or to remove obstructions interposed to prevent his performing his functions, he must have recourse to the civil tribunals which administer the laws of the colony, before which tribunals the person who resists the acts of the bishop may contest the validity or legality of the acts intended to be done by the bishop, or of the orders given him." . . . . "The letters patent, therefore, are inoperative in that respect; they are also inoperative in this further matter, that they purport to give an appeal to the Bishop of Cape Town, and they also purport to give an appeal from the Bishop of Cape Town to the Archbishop of Canterbury, to whom no such appeal by law can lie, so as to enable the Bishop of Cape Town or the Archbishop of Canterbury to enforce the coercive jurisdiction in these

matters, which the Bishop of Natal was unable to exercise. It is not that there is no appeal in such matters, but the appeal, such as it is, the extent of which I shall presently point out, lies to the civil tribunal, and from the civil tribunal in the colony to the Sovereign herself in Council, who, with the assistance of her Councillors, will determine the question between the parties.

The *administratio rei familiaris*, a colonial Bishop, in Lord Romilly's opinion, "does not possess at all; it was not even proposed to be given to him; it belongs to a different officer, and to a different tribunal."

In one part of his judgment Lord Romilly says—"In order satisfactorily to explain my meaning in this matter, it is necessary to point out what I consider to be the real position of the Church of England in these colonies. It is declared in the judgment of the Judicial Committee that the Church of England in the colonies which have an established Legislature, and no church established by law, is to be regarded in the light of a voluntary association '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.' These expressions have created some alarm, which has, as it appears to me, arisen from an imperfect apprehension of what is meant by them. They do not mean, as some persons seem to have supposed, that because the members of such a church constitute a voluntary association, they may adopt any doctrines and ordinances they please, and still belong to the Church of England. All that is really meant by these words is, that where there is no State religion established by the Legislature in any colony, and in such a colony is found a number of persons who are members of the Church of England, and who establish a church there with any doctrines, rites, and ordinances, of the Church of England, it is a part of the Church of England, and the members of it are, by implied agreement, bound by all its laws. In other words, the association is bound by the doctrines, rites, rules, and ordinances, of the Church of England, except so far as any statutes may exist which (though relating to this subject) are confined in their operation to the limits of the United Kingdom of England and Ireland. Accordingly, upon reference to the civil tribunal, in the event of any resistance to the order of the Bishop in any such colony, the Court would have to inquire, not what were the peculiar opinions of the persons associated together in the colony as members of the Church of England, but what were the doctrines and discipline of the Church of England itself, obedience to which doctrines and discipline the Court would have to enforce."

The reporters sum up the case thus. "*Held* that the plaintiff retained his legal *status* as Bishop of Natal, notwithstanding the judgment *in re* Bishop of Natal; that though the Letters Patent had failed to confer upon him any effective coercive jurisdiction over his clergy, he could still enforce obedience by having recourse to the Civil Courts; and that, as no allegation was raised in the pleadings against the plaintiff's character or doctrine, he was entitled to the income of the endowment. *Semble*, if the defendants had raised a case of false or erroneous teaching against the plaintiff, the Court would either have suspended its judgment until after the result of proceedings by *scire facias* to repeal the Letters Patent, or by petition to the Sovereign in Council, or else have itself decided the question in the present suit."

It is palpable that the Colonial Act 18 Vic. No. 45 was framed under a belief that the law was otherwise than as laid down in the judgments cited above. That belief, however, existed in England as well as in the colonies. On the 13th July, 1866, Lord St. Leonards said in Parliament, when alluding to the *status* of colonial Bishops—"To say that Miss Burdett Coutts had made a mistake was hardly just, for no one could have supposed at that time that

these Bishoprics were not established on the firmest basis. Every one, then, agreed that such Bishops had ecclesiastical jurisdiction over the churches in the colonies, and that they were in close connection with the Mother Church; but this opinion had turned out to be unfounded. Every one now knew how the law really stood, and he thought therefore that for a committee of their lordships to inquire into that point would be a mere waste of time. The law was that where Colonial Legislatures existed the Crown could not grant Letters Patent giving Bishops jurisdiction over the Church. The Church in such colonies was a voluntary association, and was on the same footing as the Wesleyans or any other denomination." In the same debate the Duke of Argyle said—"Religious bodies, therefore, occupied in the colonies the position simply of voluntary associations. They were in a state, in fact, of absolute helplessness, and any government or discipline which they might realize must be secured by their own individual action." The Earl of Carnarvon also said that the "judgment involved a complete revolution in all ecclesiastical matters relating to the Church in the colonies."

These statements were made indeed before the delivery of the above quoted judgment of Lord Romilly, but Lord Romilly nowhere says that he does not coincide with the previous decisions of the Privy Council.

All the judgments must therefore be read together, and they are clear upon the points that "the ecclesiastical law of England cannot be treated as part of the law which the settlers carried with them from the mother country;" that the Crown can now create no ecclesiastical jurisdiction in Victoria; that no Letters Patent from the Crown purporting to give ecclesiastical jurisdiction are of any effect; and that the appellate jurisdiction thought to be preserved for the Archbishop of Canterbury, by our Act 18 Vic. No. 45, has not been preserved, and cannot exist.

As I have remarked in the commencement of this paper, the Act of the Colonial Legislature (apparently in deference to the presumed prerogatives of the Crown and the appellate jurisdiction of the Archbishop of Canterbury) made no provisions under which members of the Church could take any steps to secure succession of Bishops, or, in case of need, exercise any self-governing powers, subject to their peculiar laws and constitutions, for the removal from office of a Bishop whose removal might be necessary for the well-being of the Church.

We have no reason whatever for supposing that the Colonial Legislature would be disinclined to permit us to exercise full powers of self-government, and the question for the Church to consider is, "Whether such permission shall be asked for in a time of quiet, or whether we shall wait until a vacancy in the office of Bishop, or an exigency requiring immediate action, imperatively casts the task upon us?"

I know not why the members of our Church should be urged to delay doing that which practical men, in all positions, are careful to do in secular affairs.

In government, the succession to a throne is always deemed of vital importance, and men do not rest until they have provided for it.

In business, the terms of a partnership are so seriously weighed that, as to the incoming of partners, or their outgoing, much thought is always bestowed and the utmost precision aimed at. When there is a failure to bestow proper thought or secure proper precision, such events as occurred to the new proprietary in the firm of Overend, Gurney & Co., are sad but salutary warnings to those who have been neglectful.

If there were no provision by which a partner in a firm could be restrained from wasting its possessions, what results might sometimes ensue?

Shall a Bishop, the keystone of our arch, be the only person amongst us for whom we shall arrange for no successor—the only person who, at any time, now or hereafter, may, without check or control, waste the goods of the

Church, or shame it by clinging to office after so disgracing himself as to be unworthy to hold it?

To state such questions is almost to answer them. There can be but one answer in the minds of all well-wishers of the Church.

In England there is a regular mode of obtaining succession of Bishops. The Crown, in accordance with the distinct law of the land, appoints a Bishop and gives to him all needful jurisdiction in his See.

In England also there is a method of removing an offending Bishop. The Church in England has never been without the power of removing Bishops; and in ancient times our Saxon ancestors sturdily resisted the intrusions of the Pope in the affairs of their English Church, which had a national existence, not only before the Reformation, but before the time of John, of Stephen, or of William the Norman.

The mode of appointing to a vacant See in England I need not dwell upon. The mode of trying one I will show by one instance.

In 1695 Dr. Watson, Bishop of St. David's, an appointee of James II., was proceeded against in the Archbishops' Court for simony, extortion, and other alleged offences.

In October, 1695, Dr. Watson appeared at the Court at Lambeth Palace, under protest.

In March, 1696, Dr. Watson waived his privilege as member of the House of Lords.

In April, 1696, Lucy (the promoter) brought in the Articles.

After many delays on the part of Watson, he, on the 20th February, 1699, protested against the Archbishop's jurisdiction, and appealed to the Court of Delegates.

In March, 1699, a Commission issued, naming delegates to hear the appeal. While the appeal was pending, Watson (apprehensive of the result) moved in the Court of King's Bench for a Prohibition. The Prohibition was refused on all substantial points (Holt, C. J.) One of Watson's objections was that taking excessive fees was punishable as extortion, and, being cognizable in the Temporal Courts, could not be tried by the Archbishop; but the whole Court held that taking excessive fees was by the Canon Law simony, and therefore cognizable in a Spiritual Court; and further that any of these offences, if committed by a Bishop, were offences against his office, and "as to that which relates to the office of Bishop, the Spiritual Court may proceed against him, to deprive him, but not punish him, as for a temporal offence."

The appeal to the delegates proceeded.

On the 8th June, 1699, the Court of Delegates pronounced against the Appeal, remitted the cause to the court below (the Archbishop's), and condemned Bishop Watson in costs.

The suit was then resumed in the Archbishop's Court, and was heard by himself and five Bishops (London, Rochester, Worcester, Salisbury, and Oxford), whom he called in as assessors.

On August 3rd, the Archbishop pronounced sentence of deprivation. Against this sentence Dr. Watson appealed to the Court of Delegates.

On the 19th August, a second Commission of Appeal was issued; but when they met it was contended on the part of Lucy that no appeal lay from the sentence of deprivation. The Delegates held that there was an appeal, and subsequently decreed that Dr. Watson should be suspended, *pendente lite.*

Meantime Watson had claimed to resume his Parliamentary privilege, which he had formerly waived. The House of Lords ordered that he and the Archbishop, if he should think fit, should be heard by counsel at the bar of the House. Counsel were heard on both sides, as was also the Attorney-General on behalf of the Crown, "apprehending that something might arise tending to the diminution of the King's prerogative in ecclesiastical affairs." After hearing arguments, and the opinion of the Judges, the House resolved that the Bishop's of St. David's should not be allowed his privilege.

In 1700, Watson again moved in the King's Bench for a prohibition and mandamus, which were refused.

Meantime the Appeal to the Delegates still went on, and on the 22nd February, 1700, they confirmed the sentence of deprivation pronounced by the Archbishop, remitted the cause to the Court below, and condemned the appellant, Dr. Watson, in the costs.

Dr. Watson failed to pay costs, was excommunicated, confined in Newgate, brought up in 1702 by Habeas Corpus before the Court of Queen's Bench, and pleaded that no *capias* would lie against him, a Bishop and a peer: the Court refused to allow his plea, but quashed the writ for informality. He then endeavoured to retain his palace in Wales. Information of Intrusion was exhibited against him in the Queen's name in the Court of Exchequer. Judgment was given against him. He appealed again to the Exchequer Chamber, and the judgment against him was confirmed. He brought the suit by Writ of Error before the House of Lords, but had then apparently exhausted his devices, though not his money, and the writ was dismissed (1704-5) "for laches of the plaintiff in Error." (The Court of Delegates appointed under 25 Henry VIII., c. 19, has been succeeded by the Judicial Committee of the Privy Council appointed under 2 and 3 William IV., c. 92; 3 and 4 William IV., c. 41.)

Now does any man assert that, even if the Privy Council Judgments had not shown that the Court of the Archbishop of Canterbury cannot be resorted to from Victoria, the procedure above referred to would be suitable for the Church in this colony? Who would live to see the end of any such suit instituted in any Australian colony? What evils might not the Church suffer from impossibility of justice, if it were instituted, and from denial of it, if it were not?

Would it not have been bitter irony to say to colonists, "You shall not manage your own Church affairs. You may have recourse to the same courts and procedure as are available for members of the Church in England?"

But English law says nothing of this kind to us. Shall we then say it to ourselves, adding that, if we are not content with the condition, we shall be outlaws?

To say that we need not provide for a due succession to the office of Bishop would be unwise indeed, when we reflect upon the numerous claims which might hereafter arise as to the administration of Trusts for the Church, if there should be any disputes between rival claimants for a diocese; not to mention, now, the scandal to the Church which would be caused by the issue of licenses by rival Bishops.

To say that we need not provide against offences committed by Bishops would indeed be to make sinners of our memories; for in what religious community have there not been frightful instances of depravity, even amongst those who were high in office?

It is no part of the doctrine of the Church of England that a Bishop is infallible, or exempt even from the great offence; and nothing less than such a received doctrine would justify hesitation in providing against the faults of fallible men.

Nor is it the practice for clergymen or Bishops to preach as if they could assume that they are superior to the frailties of humanity; and they themselves may be thought to be in honour bound to assist in guarding the Church from the possible consequences of those frailties.

As yet, no difficulties stand in the way. But difficulties may, for aught we know, arise hereafter, unless we guard against them by timely legislation.

The legislation sanctioned in Canada would meet our wants. On the 28th May, 1857, an Act of the Canadian Parliament accorded full powers of self-government to the members of the United Church of England and Ireland in

Canada. (This Act was supplemented in 1858 by a further Act, to explain and remove doubts as to the mode of representation of the laity; but this was almost a technical matter, not affecting the principle of the original Act, and I need not dwell upon it.) The preamble and first clause of the first Act contain all the words which it would be needful for us to ask for in this colony; our own Church Act (18 Vict., No. 45) being sufficient as far as it goes, and there being, therefore, no need to meddle with it, nor with any of our own peculiar legislation under it.

The preamble and first clause are—

"Whereas doubts exist whether the members of the United Church of England and Ireland in this province have the power of regulating the affairs of their Church in matters relating to discipline and necessary to order and good government, *and it is just that such doubts should be removed, in order that they may be permitted to exercise the same rights of self-government that are enjoyed by other religious communities.* Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:—1. The Bishops, Clergy, and Laity, members of the United Church of England and Ireland in this province, may meet in their several dioceses, which are now, or may be hereafter, constituted in this province, and in such manner and by such proceedings as they shall adopt, frame constitutions and make regulations for enforcing discipline in the Church; *for the appointment, deposition, deprivation, or removal of any person bearing office therein, of whatever order or degree,* any rights of the Crown to the contrary notwithstanding; and for the convenient and orderly management of the property, affairs, and interests of the Church in matters relating to and affecting only the said Church and the officers and members thereof, and not in any manner interfering with the rights, privileges, or interests of other religious communities, or of any person or persons not being a member or members of the said United Church of England and Ireland, provided always that such constitutions and regulations shall apply only to the diocese or dioceses adopting the same."

I have *italicised*, in the above citation, the passages which explain why we should ask for further permission, and to what extent we have need to ask it.

Other persons are permitted, as a matter of justice, to govern themselves, and we ask for similar permission.

There is no limitation as to the functionaries over whom control, according to law, may be exercised in Canada, and no reason for any such limitation can be alleged in Victoria. In the early part of this paper I have shewn that the limitations which now restrain us were based upon erroneous assumptions in England as to the powers of the Crown and appellate rights in the Church.

One clause, shorter even than the one above cited, would be all that we need ask for.

To those who would allege at random that we ought not to ask for power to control Bishops, because such power might be abused too readily, a reply is very easy.

Supposing that we obtain permission from the Legislature to manage our own affairs, let us observe in what way the power must be exercised. As to the appointment of a Bishop, arrangements could, of course, be made so as to keep up as close a connection with the parent Church as is kept up by any other religious body in the community. As to trial of a Bishop, we should have, first of all, to constitute a Court for the purpose.

This would require an Act passed by our Church Assembly. On each important stage of that Act in the shape of a Bill, the votes of the clergy would have to be separately taken; and an adverse vote in either order (clergy or laity) would be fatal to the Bill for the session.

Supposing the Bill to emerge from this ordeal scatheless, there would then be the Bishop's opportunity to pronounce finally upon its fate. He can veto the Bill.

Subsequently, another Bill would have to be brought in, to declare the various grounds on which it should be lawful to arraign a Bishop before the duly constituted Court.

This Bill would have to be dealt with like the former: the Bishop having his veto at the last moment, if he should think himself or his successors unduly compromised by the terms of the Bill.

What danger can accrue to the Church from a procedure so guarded? From what quarter can danger be suspected? If from the laity, the clergy have their separate vote in their own order. If from the clergy, the laity have their separate vote. If from clergy and laity together, the Bishop has his final veto.

The particular mode in which the Court should be constituted I need not now deal with. No such subject is without difficulties; but there is no reason to apprehend insuperable difficulties in this case. I take it for granted that trial by his peers would be secured for a Bishop, in conformity with the customs of the Church and the spirit of English law.

In Canada, the first canon of the Canadian Church provides for the appointment of the Bishop of Montreal and Metropolitan: the fourth canon for the Trial of a Bishop; the fifth for the Court of Appeal of the Metropolitan.

I may add, that, as it is quite clear that several years must elapse before we can organise the requisite machinery for bringing a Bishop to trial, and not less than one or two before we can arrange for the mode of appointment of a successor to the present Bishop, there is no time to be lost. A body like the Assembly of the Church ought not to be idly confident. Time will not bridge over our difficulties for us, but may see us in despair before them.

> Rusticus expectat dum defluat amnis, at ille,
> Labitur, et labetur, in omne volubilis ævum.

Shall the Church in Victoria play the part of the Roman boor?

I believe there are some, though not, I trust, many persons who say that we need not attempt to legislate until we absolutely encounter a difficulty, or have to deal with an offending Bishop.

This assertion almost contains its own refutation. We can pass no measure without the consent of the Bishop, and an offending Bishop would not consent to a measure enabling the Church to deal with his offences.

The confidence with which it was assumed that the appointment and succession of Bishops in Victoria was completely in the hands of the Church in England, when our local Act (18 Victoria, No. 45) was passed, has brought about one singular consequence which it may be well to point out.

So plain did it seem that there never could be in Victoria *any Bishop* who had not been appointed to his diocese by the Queen, that the Act enables *any Bishop* of the Church to convene an Assembly of the licensed clergy and the laity of such Church in his diocese.

Therefore, if from Canada, or from New Zealand, or elsewhere, a Bishop deposed (according to the local Church law) for any offence, should migrate to Victoria, he might set himself up as a Bishop, and, whatever the ultimate result of his claim, might cause great scandal to the Church by making it, and insisting upon it, under the terms of the first clause of the Act which enacts that, "It shall be lawful for any Bishop of the United Church of England and Ireland, in Victoria, to convene an Assembly of the licensed clergy and the laity of such Church in his diocese, and the Bishop, or, in his absence, a commissary appointed in writing by him, shall preside in such Assembly."

What words more vividly than these can awaken apprehensions as to the scenes of disorder and confusion which may arise hereafter in the Church, if those who have it in their power now do not take order for its good government?

> Ut jugulent homines, surgunt de nocte latrones;
> Ut teipsum serves, non expergisceris? atqui
> Si noles sanus, curres hydropicus.

March, 1868.

W. H. Williams, Printer, 63 Elizabeth street.