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OBSERVATIONS  
ON THE  
JUDGMENT OF THE JUDICIAL COMMITTEE  
OF  
THE PRIVY COUNCIL,  
IN THE CASE OF  
BISHOP COLENZO *v.* THE BISHOP OF CAPETOWN.

BY  
CHARLES H. TODD, LL. D.,  
BARRISTER-AT-LAW;  
VICAR-GENERAL OF THE DIOCESES OF DERRY AND RAPHOE.

RIVINGTONS,  
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# OBSERVATIONS,

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THE Judgment of the Judicial Committee of the Privy Council, in the case of Bishop Colenso against the Bishop of Capetown, has raised a question of the most vital importance, affecting not only the Royal Supremacy in ecclesiastical affairs in the Colonies and Dependencies of the Crown, but also the Missionary exertions of the Church, and its power of extending itself amongst our Colonies and foreign possessions. Had the Privy Council decided that a Bishop of the English Church might with impunity preach that the Holy Bible was not inspired, and that the historical Books of the Old Testament contained as little truth as the ancient Mythology of the Pagans, or that the miracles of our Lord were mere displays of mesmeric influence, however it might scandalize Churchmen, and shake the allegiance of many, it would have made a decision scarcely more important in its consequences. Notwithstanding such a decision, the teaching of the Church of England would remain unaltered, how-

ever limited might be her power to compel all her Bishops and pastors to conform to that teaching. But if it be a necessary consequence of the recent decision of the Privy Council that the Bishops who have been sent to the Colonies have no jurisdiction, no power to restrain the erroneous teaching or immoral lives of the Clergy over whom they have been appointed ; if they have no powers except to perform the spiritual functions incident to their order ; if it be the fact that, instead of extending the Church, we have been sending into the Colonies a set of unattached Bishops and Clergy, free from all control, and at liberty to teach and practise what they please under the apparent sanction of the Church of England ; if, in endeavouring to plant Christianity in our Colonies according to the form and principles of the Reformed Church in England, we have been "for all practical purposes acting a mediæval farce,"\* it is impossible to exaggerate the importance of this decision, or the necessity for devising some means of correcting the abuses and mischiefs which may possibly flow from it.

Can we give to our Colonies and Dependencies the blessing of the Reformed religion as we have it established among us ? Can we plant that Church, with its priesthood, its episcopacy, and its form of sound words, among them, as an institution to grow with their growth, its officers and ministers to

\* "Times" Newspaper, March 21, 1865.

be supplied by the colonists themselves? Or must the Christian population in those Colonies and Dependencies become Roman Catholics, Presbyterians, or Protestants of some of the sects into which Protestantism is divided, or be dependent on the ministration of Bishops and pastors sent from England, free to teach and practise any form of religion they please?

It may seem presumptuous in me to question the correctness of a decision come to by such learned and eminent men as Lord Westbury, Lord Cranworth, Lord Kingsdown, the Master of the Rolls, and Sir S. Lushington, and that in a case which was argued by the ablest men the English Bar could produce; but, however anxious and willing I am to submit my judgment to their authority, I confess I find no small difficulty in reconciling their decision with the constitution of the Church itself, the nature of the office of a Bishop, and with that supremacy in ecclesiastical matters, which, as well as in civil, is by the law and constitution of this country vested in the Crown.

The Church, regarded as an institution, is no more than a voluntary society, body politic, or, as the 19th Article has it, "congregation" of men bound together by the profession of certain tenets or opinions, a common faith; and, as every society of men has inherent in it the power of admitting members, of prescribing the terms and conditions of membership, and of expelling those who will not



conform to its rules and regulations, so the Church must necessarily have inherent in it, as a part of its constitution, similar powers. The Apostles, the first missionaries of the Church, gathered together men into societies, or Churches, by persuading them of the truth of their teaching and of their own divine authority. These societies were perfectly independent of the State, and often existed in a country despite of persecution and the efforts of the civil power to destroy them; they were held together by the voluntary adhesion of their members, and governed by their voluntary submission to their rulers. In these societies certain rulers—the Bishops—were placed, with power to govern, and to constitute or ordain teachers and ministers, priests and deacons, to teach and minister therein. Thus we find in the Bible instructions given to the Bishops how they were to rule the Church; and we also read of Churches expelling, either wholly or for a season, persons who, by immoral lives or heresy, violated the laws of the Church, or impugned its teaching. But all this power and authority were merely *voluntary*, and incapable of affecting the *civil status* of those who submitted to it. We have examples of Churches similarly constituted at the present day—for instance, the Episcopal Church in Scotland, the Roman Catholic Church in the three portions of the United Kingdom, the Protestant Dissenting communities—in all of which the power and authority of the rulers depend altogether on the voluntary submission of their members.

When, however, kings became Christians—when the civil rulers in a country adopted the Christian faith—they believed that a religious duty was imposed upon them to abolish Heathenism and Idolatry, to destroy the temples of the Idols, to abolish the Heathen priesthood, and to substitute in their places the Christian Church and the Christian ministry; their subjects were compelled to adopt Christianity; their adhesion to the Church was no longer merely voluntary; the laws and canons of the Church were enforced by civil pains and penalties, and heresy was made a crime punishable by the temporal power: kings were the nursing fathers of the Church, and queens its nursing mothers. The powers and jurisdiction of the Bishops became defined; they held courts for the trial of offenders against the laws of the Church, and their decrees and sentences were enforced by civil penalties. The union of the regal and episcopal powers in the Pope of Rome greatly increased the powers of the Church; and, inducing appeals by ecclesiastics to him for his kind offices against the oppression and tyranny of other temporal rulers, led to the usurped claim of that See to a supremacy over the whole Christian Church—a supremacy which, to some extent, was acknowledged by most of the countries of Europe. During this period of the Church the powers and jurisdiction of Bishops became defined, and the exercise of them was confined and limited to certain districts, or dioceses, corresponding with the secular

magistracies of the State. Bishops were divided into Archbishops and Bishops, according to the extent of their jurisdiction. An Archbishop had not only a diocese, but a province, embracing several dioceses, presided over by the respective Bishops, who were styled his suffragans. In his diocese his spiritual jurisdiction was over the clergy and laity, while in his province his jurisdiction was only over the Bishops, and not over the laity or clergy; but an appeal lay to him from any decree or sentence of the Bishop. In each province and diocese were synods, or councils, convened with power to make rules or canons for their own government; while the discipline and doctrine of the general Church was regulated by General Councils of the whole Church. Such is the present constitution of that society, or congregation of faithful men, known as the Church. Her Bishops are, by virtue of their office, its rulers and judges in ecclesiastical causes; they have, as incident to their office, all the general powers and jurisdiction given to them by the General Councils of the Church. In countries in which the Church is recognised as a national institution, that power and jurisdiction may be curtailed, limited, or enlarged, by the Statute Law, or by the canons and rules of the National Church itself, sanctioned by the Crown, and the decrees and sentences of the Bishops may be enforced by the civil power; but in countries where the Church is not so recognised, the jurisdiction and power of the Bishops depend on

those General Councils, and the canons or rules of the General Church which are not repugnant to the civil law of the country, or the character of the particular Church ; and, that jurisdiction being wholly dependent on the voluntary submission of the members of the Church, their decrees and sentences can only be enforced by ecclesiastical censures and punishments, and cannot affect in any way the civil *status* of its members. Such is the condition of the Church in Scotland, and the Churches in communion with the See of Rome founded in the three portions of the United Kingdom ; and such would appear to be also the condition of the Church in those Colonies and Dependencies of the Crown in which it is not adopted as a portion of their national constitution. In all of these the Church has no legal *status*, i. e., no *status* recognised by the civil law of those countries, and the powers and jurisdiction of its Bishops are wholly dependent on the voluntary submission of its members, and their decrees and sentences can only be enforced by such ecclesiastical censures and punishments as do not infringe on civil liberty ; but, though a merely voluntary society, it necessarily must have the power of regulating the conduct of its members and officers, and of expelling or censuring those who violate its laws or impugn its teaching.

In the early ages of the world, religion—whether it were Heathen, Jewish, or Christian—formed an essential part of the constitution of every country, so

intimately interwoven with the civil constitution of the State as to be inseparable from it. In the early periods of the Christian Church, the heads of the Christian Church, the Bishops, were also the chief counsellors of State and advisers of their sovereigns ; the laws, by which the country was ruled, were made and administered by ecclesiastics ; those laws were framed to enforce religious as well as civil duties and obligations, and punished disloyalty to the Church as severely as treason to the Crown. The same tribunals administered the ecclesiastical and the civil laws. Hence the appointment of Bishops in a country always required the sanction of the prince, whose principal officers of state and counsellors and advisers they were. In this sanction and assent to the election of the Bishops, and the enactment of laws for the regulation of ecclesiastical affairs, and enforcing obedience to those laws by temporal punishment, consisted the supremacy of the Crown in ecclesiastical matters. The claim of the See of Rome to spiritual authority in all Churches frequently brought the Pope in collision with princes ; and it is not to be wondered at if, in such contests, the spiritual power prevailed, when we bear in mind that the Bishops were also great temporal lords, having a great number of vassals, who owed their primary allegiance to them, and that they could bring into the field large armies, frequently as large as the prince himself, who had often need of their aid to quell the turbulence and

ambition of the nobles. Nay, Popes themselves have frequently taken the field at the head of large armies, and claimed the right to depose sovereigns and dispose of kingdoms—a right asserted to belong to them, as the Vicars of Christ, by virtue of the same Divine authority on which their present claim to the spiritual supremacy of the Church rests. In England matters continued in some such state, the Bishops enjoying more or less power and authority, until the Reformation, when all interference of the Pope in ecclesiastical as well as civil affairs in England was completely put an end to. The relation, however, between religion and the State was not by this event in any way altered: the Crown enjoyed an undivided ecclesiastical as well as civil supremacy. The laws of the Church were enforced by the civil power, and temporal penalties were annexed to dissent from her teaching, or contempt of her authority. A separation had taken place between the civil and ecclesiastical tribunals for the administration of justice; each confining itself to a peculiar class of causes, as exclusively within its cognizance. The election of Bishops was confirmed by the Crown alone, and they exercised their jurisdiction and authority by the royal license. This Royal Supremacy was not confined to England, Scotland, and Ireland, but extended to all dominions of the Crown; it was not the creation of an Act of Parliament, but was declared to be a part of that prerogative of right inherent in the Crown by the Divine law, and which had been usurped by the Popes. No

variety of sects was tolerated, nor any religious ministers but those of the National Church, the *Ecclesia Anglicana*, as it is styled in the 26 Hen. 8, c. 1. No Bishop could presume to exercise his office without the permission and sanction of the Crown.

The ascendancy of Puritanism during the Commonwealth, and the toleration of the various religious communities to which the Reformation in the North of Europe gave birth, in no degree affected the Royal Supremacy in England. By the principles of toleration at present established in this country, a man may profess any religion he pleases—Christian or Jewish; that is to say, no man is now compellable by civil pains and penalties to profess adherence to the Church; nor is any one now punishable by the civil courts for professing, or publicly teaching, religious opinions at variance with its doctrine or teaching. The power of the Church in England, however, still remains, to exclude from her communion those who reject her teaching and her discipline. She can still impose ecclesiastical censures; yet these censures entail no civil disability. An excommunicated heretic enjoys the same civil rights and liberties as the most orthodox member of the Church. From the decrees and sentences of the ecclesiastical courts an appeal lies to the Crown, as the supreme source of all jurisdiction—ecclesiastical as well as civil.

When an English Colony is planted in a foreign land, it continues subject to the Crown of England, and carries with it the principles of the British

Constitution, and the fundamental maxims of the Common Law. The law of the mother country prevails, so far as it is applicable to the condition of the Colony. The artificial refinements and distinctions incident to the property of a great and commercial people—the laws of police and revenue—the mode of maintenance for the established clergy—the jurisdiction of spiritual courts, &c., are not in force. They do not bring with them English Acts of Parliament, or that portion of the law of the mother country which is merely local—only such portions as are of general applicability, and suited to their condition.\* The Royal Supremacy in ecclesiastical as well as civil matters is a part of the inherent prerogative of the Crown, and forms part of the British Constitution, and of that law of the mother country which prevails in every Colony. I presume it would not, even at the present day, be competent for a British Colony to assert the Supremacy of the Pope, or for the judicial tribunals of a Colony to enforce the observance of Papal decrees by civil pains and penalties. But the fullest toleration in matters of religion is also a part of the constitution of every Colony. This necessarily follows from the principles above stated; because by the general law of England, apart from all penal Acts, all denominations of Christians are equally tolerated. What are called the Toleration Acts are only Acts repealing Statutes by which the Legislature com-

\* 1 Bl. Com. 107; *Hall v. Campbell*, Cowp. 204; *Atty.-Gen. v. Stewart*, 2 Meriv. 143.



pelled conformity to the Church, which Statutes are of merely local obligation, and would not form any portion of that general law which colonists take with them to their new country.

The Church of England is a branch of the Catholic Church—a Reformed branch. It is governed by the general law of the Catholic Church, so far as that law is applicable to its condition—so far as it is not contrary to the principles of the Reformation and the Civil Law of England. It is this Reformed Catholic Church that is planted in a Colony; and it takes with it the same general law of the Catholic Church, so far as it is applicable to its position, and stripped of all that is of merely local obligation. But, to adopt the language of the Privy Council :\*—

“The Church of England, in places where there is no Church established by law, is in the same situation as 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 when 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 any 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

\* *Long v. The Bishop of Capetown*, 1 Moo. P. C. N. S. p. 461.

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 decision of arbitrators, whose jurisdiction rests entirely on the agreement of the parties.”

This passage must, however, be taken with some limitations. The ordinary civil tribunals of a country will not enforce or examine the decision of a merely voluntary tribunal, unless some *civil* right is brought in question. For instance—suppose the minister of any religious denomination in England, except the Established Church, to be deprived of his office, or suspended from the exercise of his functions, by the decision of the proper authority, although he might thus be deprived of his benefice and his means of support, no appeal would lie to the courts established by law; but if, by such sentence, he was deprived of any endowment created by will or deed, such a decision might come under the review of a civil court in determining whether such minister was properly entitled to the benefit of such endowment; and this was, in fact, the case of *Mr. Long v. The Bishop of Capetown*.

Mr. Long was the Incumbent of a Church which had been built and endowed by a pious layman; the Church and its endowment were vested in the Bishop and his successors, as trustee; thus there existed between the Bishop and Mr. Long the *civil* relation of *trustee* and *cestuique trust*, as well as the ecclesiastical one of Bishop and priest. Mr.

Long had been ordained a priest by the Bishop, and licensed by him to officiate in the said Church, and had taken the oath of canonical obedience to him. In the license the Bishop reserved a power of revocation whenever he should see just cause so to do. The Bishop was desirous of forming a Synod composed of Clergy and laymen, and had directed Mr. Long to convene his parishioners for the purpose of electing a lay representative to take part in the proceedings of the Synod. Mr. Long objected to the Synod, as did his parishioners, and refused to convene them, or to attend or take part in the Synod ; and for this he was cited before the Bishop on a charge of contumacy and disobedience, and was suspended. He then took proceedings in the civil court of the colony against the Bishop as his trustee, to recover his income, in which proceedings the legality of the Bishop's suspension was brought in question, in order to determine whether Mr. Long was still the Incumbent of the Church ; and the colonial jurisdiction decided in favour of the Bishop.

The colonial judges were unanimously of opinion\* that the Letters Patent granted to the Bishop of Capetown, and which were subsequent to the establishment of a colonial legislature, were void so far as they purported to confer a *coercive jurisdiction*, or to empower the Bishop to constitute a court for the trial of alleged ecclesiastical offences ; but the

\* 1 Moo. P. C. N. S. 433.

majority of the judges were of opinion that the Bishop, by virtue of his *general inherent episcopal authority*, submitted and assented to by Mr. Long, had power to suspend and deprive Mr. Long, and that the power had been lawfully exercised according to the laws of the Church. From this decision Mr. Long appealed to the Queen in Council; and the Council entertained the appeal, expressly on the ground, that the suit in which it was brought respected a *temporal* right, in which the appellant alleged that he had been injured; that the suit called for a decision as to the *right of property*, and involved the question whether Mr. Long had ceased by law to be what in England is termed *cestuique* trust of funds of which the Bishop was *trustee*; that Mr. Long had not precluded himself from exercising the power, which under similar circumstances he would have possessed in England, of resorting to a civil court for the restitution of civil rights, and of thereby giving to such courts jurisdiction to determine questions of an ecclesiastical character essential to their decision.\* It was solely for the purpose of deciding a temporal right, and as incident to its determination, that the Privy Council in that case entertained the ecclesiastical question.

The Privy Council reversed the decision of the colonial Court. The grounds of the reversal, and the principles upon which it was rested, are of the most

\* 1 Moo. P. C. N. S. p. 466.

vital importance. The Privy Council agreed in opinion with the colonial court that the Letters Patent were void, so far as they purported to give coercive jurisdiction, having been granted after the establishment of a colonial legislature ; but it held, that the acts of Mr. Long were to be construed with reference to the position in which he stood, as a *Clergyman of the Church of England*, towards a lawfully appointed Bishop of *that Church*, and to the *authority known to belong to that office in England* ; it was of opinion that, by taking the *oath of canonical obedience* to the *Bishop*, and accepting from him a license to officiate, and by accepting the appointment of the living of Mowbray under a deed which expressly contemplated as one means of avoidance the removal of the incumbent for any lawful cause ; Mr. Long did voluntarily submit himself to the authority of the Bishop to such an extent, as to enable the Bishop to deprive him of his benefice for any lawful cause, that is, for such cause as (having regard to any differences which may arise from the circumstances of the Colony) would authorize the deprivation of a Clergyman by his Bishop in England. From this language it would seem that the Privy Council regarded the Church in Africa, rather as an extension of the Church of England, than as a separate and distinct Church ; and Mr. Long, as a Clergyman of the Church of England, and Dr. Gray, as “ a lawfully appointed Bishop of that Church,” and pos-

sessed of "the authority known to belong to that office in England:" in other words, that the Church of England, when it is planted in a Colony, takes with it the general law of the Church, divested of those statutes or customs which are merely local; and that her Clergy and Bishops are possessed of that authority and power which belong to them by the general law of the Catholic Church, so far as it is received in England; that it, nevertheless, is a merely voluntary society, possessed of no peculiar privileges, and incapable of enforcing its discipline except by the same means as any other voluntary association; that it cannot establish courts in the strict sense of the word, though it may establish tribunals for the decision of questions arising within it—which tribunals are devoid, however, of all legal sanction, and are of the nature of arbitration courts, whose decisions will not be reviewed or questioned by the civil courts of the Colony, unless it should become necessary to do so in order to determine some temporal right. If this be the true view, a Clergyman of the Church of England in a Colony, taking the oath of canonical obedience to a Bishop of the English Church in the Colony, is subject to his jurisdiction, the exercise of which jurisdiction cannot be questioned in the temporal courts of the Colony, except incidentally to determine a temporal right; and then the question will be, whether a Bishop in England would, under similar circumstances, be justified in so acting by the general law

of the Church of England, divested of everything of a merely local character.

The Privy Council, while it held that Dr. Gray was a lawfully appointed Bishop of the Church of England, and possessed of the authority known to belong to that office in England, and bound to proceed in the exercise of that authority according to the general law of the Church of England, nevertheless held that the Letters Patent by which he was constituted such Bishop, and vested with such authority, were void, so far as they purported to confer *coercive* jurisdiction, having been granted after the establishment of a legislative council. And to the principles so laid down the Lords of the Judicial Committee in Dr. Colenso's case adhered. They lay it down "as 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, to establish a metropolitan see or province, or to create an ecclesiastical corporation whose *status*, right, and authority *the Colony should be required to recognise*. After a Colony or settlement has received legislative institutions, the Crown 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 a 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." Assuming this last proposition to be true, that the United Church in a Colony is only a voluntary association, it is nevertheless an association of a known and defined character, consisting of officers and members bearing to each other a known relation and subordination ; and although the law of the Colony takes no notice of such relation or subordination, yet the law of the *association* does ; and if any civil rights in the Colony depended upon the law of the association, the law of the Colony would recognise and act on the law of the association, in the same way as the law of England recognises and acts on the laws regulating the voluntary associations composed of dissenters from the Established Church. The offence of Dr. Colenso was one against the law of that voluntary association, and the sentence pronounced on him was pronounced by an officer of that association, to which by *its* laws he was subordinate. The law of the Colony would take no cognizance of that sentence unless Dr. Colenso's civil rights were affected thereby ; and, in fact, no appeal was made to the law of the Colony in his case. The appeal of Dr. Colenso was to the Crown, as the head of that very voluntary association, as the source from whence the Bishop's power



and authority were derived. It is difficult, indeed, to understand in what other capacity the appeal could have been entertained by the Privy Council.

It is not necessary to quarrel with the exposition of the law given by the Privy Council in the case of *Mr. Long v. The Bishop of Capetown*, even though it may not be quite accurate ; but while the Judicial Committee in Dr. Colenso's case professes to adhere to these principles, I think it will be seen that it has carried the doctrine much further, and in fact denied the validity of the Letters Patent, not merely so far as they purported to give *coercive* jurisdiction, but *any* jurisdiction whatever. The doctrine laid down in Mr. Long's case is based upon broad principles of jurisprudence ; namely, that no jurisdiction can be exercised in a country without the consent of the whole governing body, which in England consists of the Crown and Parliament, and in the Colonies, of the Crown and those legislative assemblies which are substituted for the Imperial Parliament ; neither is it necessary to quarrel with the statement of the Privy Council in the principal case :—

“That after the establishment of an independent legislature there was no power in the Crown, by virtue of its prerogative, to establish a metropolitan see or province, or to create an ecclesiastical corporation whose *status*, right, and authority *the Colony* should be required to recognise.”

For the question was not, whether *the Colony* could be required to recognise the rights and authority of the Bishop of Capetown, or whether he had a juris-

diction capable of being exercised generally in the Colony, *in invitos*; but whether the members and clergy of the *United Church of England and Ireland* in the Colony could be required to recognise his rights and authority, or whether he had any authority by virtue of his appointment over them. It is admitted in the Judgment that in a Crown Colony, properly so called—by which, I suppose, is meant a colony not possessed of an independent legislature—a bishopric may be constituted, and ecclesiastical jurisdiction conferred, by the sole authority of the Crown. The power of legislating for such a Colony, however, is vested in the Imperial Parliament; and I confess it is difficult to see why, if the consent of the Imperial Parliament be not requisite in the case of a Crown Colony, that of the colonial legislature should be required in the other case. Prior to the establishment of a legislative council in a Colony, the power of legislating for it is vested in the Imperial Parliament; the Colony, however, not being bound by any Acts unless specially named therein. If the consent of the legislative council of the Colony is requisite to make the Letters Patent valid, it would seem that prior to the establishment of a council the consent of the Imperial Parliament would be equally necessary; and if the consent of the latter be not necessary, there seems no reason for the consent of the former being required.

In support, however, of the proposition as laid down by the Privy Council in the Judgment deli-

vered by Lord Westbury, "the course of legislation" on the subject is referred to as a strong proof of its correctness. The first instance taken is the establishment of a Bishopric in the East Indies in the year 1813.

India is one of those dependencies of the Crown obtained by conquest. The inhabitants have retained their own laws and their own religion; although the English residents in India are governed by English law. The power of legislating for India is vested in the Imperial Parliament. At the time of passing of the 53 Geo. 3, c. 155, all the English possessions in India had been vested by charter in a trading corporation, to whom were granted all the powers of government, including the right of making war and peace with all nations not Christian, and the power to arrest and send out of the country all persons not licensed to reside there. No person could live in any portion of the British dominions in India without the Company's license; and, consequently, in order to secure the admission of missionaries into India, the 33rd section of the 53 Geo. 3, c. 155, reciting "that it is the duty of this country to promote the interest and happiness of the native inhabitants of the British dominions in India, and that such measures ought to be adopted as may tend to the introduction among them of useful knowledge and of religious and moral improvement," provides that the Board of Commissioners for the affairs of India may give licenses to missionaries, if

the Court of Directors should refuse. The 49th section of the same Act, after reciting "that no sufficient provision hath hitherto been made for the maintenance and support of a *Church Establishment* in the British territories in the East Indies, and other parts within the limits of the said Company's charter," enacts, "That, if it shall please His Majesty, by his royal Letters Patent, &c., to erect, found, and constitute one Bishopric for the whole of the British territories and parts aforesaid, &c., and from time to time to nominate and appoint a Bishop, &c., to such Bishopric," the Court of Directors shall be required to pay such Bishop a fixed salary. This section evidently recognises the right of the Crown by Letters Patent to found a *Bishopric*, that is, a Bishop's See, and appoint a Bishop thereto. The Act does not authorize the Crown to do so, or ratify the act of the Crown when done. Its provisions are contingent upon the Crown exercising a right, which the Act expressly recognises as belonging to the Crown *only*.

The 51st section is negative, providing "That such Bishop shall *not* have or use any jurisdiction, or exercise any episcopal functions in the East Indies, or *elsewhere*, but only such as shall be limited to him by the Letters Patent;" but the 52nd section enacts, "That it shall be lawful for His Majesty, from time to time, if he shall think fit, by Letters Patent to grant to such Bishop so to be appointed such ecclesiastical jurisdiction, and the exercise of such ecclesiastical functions, within the

East Indies and parts aforesaid, as His Majesty shall think necessary, &c., *any law, charter, or other matter or thing to the contrary notwithstanding.*" These sections would seem to have been introduced partly by way of precaution, lest there might be something in the Company's charter which would conflict with the right of the Crown to confer ecclesiastical jurisdiction; but also, it may be, to limit the jurisdiction to be conferred to such as should be necessary for administering holy ceremonies, and the superintendence and good government of the ministers of the *Church Establishment* within the East Indies and parts aforesaid. The term "ecclesiastical jurisdiction" would, at the time of the passing of the Act, have included jurisdiction in testamentary and matrimonial causes; and a question might have been raised whether such jurisdiction was not necessarily possessed by the Bishop *virtute officii*, which it was not desired the Bishop should have. The Act does not enable the Crown to constitute a Bishopric and to appoint a Bishop; but, assuming this right to be vested in the Crown, it enables the Crown, notwithstanding anything contained in the Company's charter, to confer upon the Bishop ecclesiastical jurisdiction, and limits the nature of that jurisdiction.

The Act of 3 & 4 Will. 4, c. 85, has similar provisions as to the Bishoprics of Madras and Bombay, which were formed out of the Bishopric of Calcutta. The 93rd section provides that it shall be lawful for His Majesty, from time to time, by Letters Patent, "to assign limits to the diocese of

the Bishopric of Calcutta, and to the diocese of the said Bishoprics of Madras and Bombay, respectively, and from time to time to alter and vary the said limits ;” “ and to grant to such Bishops, respectively, within the limits of their respective dioceses, the exercise of episcopal functions, and of such ecclesiastical jurisdiction,” &c. ; following the language of the 53 Geo. 3, c. 155, s. 52, omitting the words, “ any law, charter, or other matter or thing notwithstanding.” The omission of these words from this Act would seem to strengthen the view I have taken of the former Act. Great changes had been made in the powers and privileges of the India Company. The Company, by the Act of Will. 4, was obliged to give up its commercial business ; and by the 81st section, any of His Majesty’s subjects might reside without license in certain parts of India in the Act specified, and which included the dioceses in question. By the 96th section, the Bishop of Calcutta was made Metropolitan Bishop in India ; and it was enacted that he should have, enjoy, and exercise such jurisdiction as His Majesty by Letters Patent should direct. If we consider the peculiar condition of India, and that the Act of Geo. 3 purported to make provision for a *Church Establishment* in that country, it would, I submit, be too much to infer from the introduction into an Act regulating the ecclesiastical as well as civil establishments of India, of clauses recognising or confirming the jurisdiction given to the Bishops by the Letters Patent, that it was incompetent for the

Crown, without the sanction of an Act of Parliament, to create Bishoprics in India, or to confer on them ecclesiastical jurisdiction.

The next instance referred to by Lord Westbury is Jamaica. Jamaica was also acquired by conquest, although subsequently colonized; it is governed by the English Common Law. By an Act of the Jamaica legislature, 1 Geo. 2, c. 1, s. 22, all laws and statutes of England which had been received and accepted as laws were declared to be and continue the law of His Majesty's island of Jamaica.\* The statute 6 Geo. 4, c. 88, entitled "An Act to make *Provision for the Salaries* of certain Bishops, &c., in the Diocese of Jamaica, and in the diocese of Barbadoes and the Leeward Islands, &c.," reciting:—

"Whereas His Majesty, by his several Letters Patent, has been graciously pleased to direct and appoint that the island of Jamaica, the Bahama Islands, and the Settlements in the Bay of Honduras and their respective Dependencies, should be and become a Bishopric, and the diocese and see of a Bishop of the *United Church of England and Ireland, as established by law*, to be called 'The Bishopric of Jamaica;' and that there should be one Bishop of the said diocese, &c.; and in like manner that the Island of Barbadoes, &c. &c., should be and become a Bishopric, and the diocese and see of a Bishop, to be called the Bishopric of Barbadoes and the Leeward Islands; and that there should be one Bishop of the said last-mentioned diocese," &c.—

proceeds to provide salaries, which are made payable out of the Consolidated Fund, with a pro-

\* Burg., Col. Law, Prel. Treat. xxxiv.

vision that they shall be a charge on the four-and-a-half per cent. duties payable to His Majesty in the West Indies, whenever, after payment of the prior charges, they shall afford the means of paying them. This Act assumes the power to create a Bishopric and nominate a Bishop to be in the Crown, and that that power had been already duly exercised. It contains no provisions as to jurisdiction similar to those in the Acts relating to the East Indies. It is said, however, that it was thought necessary that the legal *status* and authority of the Bishop should be confirmed and established by an Act of the colonial legislature ; that the consent of the Crown was given to this colonial Act, which would have been an injury to the Crown's prerogative, unless the law advisers of the Crown had been satisfied that the colonial statute was necessary.

Previously to the conquest of Jamaica, the Spaniards had introduced Christianity ; and three bishoprics had been created by Pope Alexander VI., and the Crown of Spain. Upon the conquest of the island by Cromwell, Protestant clergy were introduced ; the Spaniards had all left the country, which was colonized by the English. At the Restoration, the Church of England became the established religion ; and by a local Act, 33 Car. 2, c. 15, s. 2, gifts, grants, or devises for the maintenance of any ministers or teachers other than such as are lawfully admitted and allowed by the Church of England, were declared illegal. The rectors of the several parishes are paid salaries in lieu of tithes by the



churchwardens, from the amount of the taxes levied by the vestries, of which they are *ex-officio* members, on the inhabitants generally. Each parish builds and repairs a parsonage house, or allows the rector £50 *per annum* in lieu of one.\* Several Acts of the local legislature had been passed affecting the ecclesiastical establishment, and providing for the maintenance of the clergy, and the performance of their duties. By the 21 Geo. 2, c. 6 (a local Act passed, in 1748), the Bishop of London had been invested with all powers not interfering with the Governor as ordinary, so far as regarded the *clergy* only. The Governor by his commission, as is the case in very many Colonies, had been invested with the *powers* of the *ordinary*; to collate to all vacant benefices, to grant probate and administration, marriage licenses, &c.; to suspend the clergy for just cause, and to be sole judge in all matters relating to the consistorial or ecclesiastical law†—a coercive jurisdiction, it may be remarked, granted to a layman by Letters Patent from the Crown. The Bishops of London, however, never, in fact, exercised any jurisdiction; and in 1799 an address was presented by the legislature to the King in Council, praying that this ecclesiastical jurisdiction should be exercised by some one resident in the island. The opinion of Sir W. Scott was taken upon this proposed measure of delegating the ecclesiastical authority of the Crown. He recommended His Ma-

\* Bryan Edwards' "Hist. of West Indies," vol. i., p. 264.

† Ibid., vol. ii., p. 389.

jesty, as supreme head of the Church, to nominate three or more respectable clergymen of the island to be his commissaries, for the purpose of exercising jointly and synodically discipline over the clergy only—such commissaries to have the power of censuring, suspending, or removing any offending clergyman.\* He added:—

“It will be necessary, I presume, for the legislature of the island to repeal that Act by which they transferred *this part of the royal supremacy* to the Bishop of London, and revest it in His Majesty; and likewise to make some further provision for *aiding the process* and executing the sentence of His Majesty’s commissaries.”

In accordance with this opinion, the rectors of St. Andrew’s Kingston, St Elizabeth, St. James, and St. Catherine, were appointed His Majesty’s commissaries; and the local legislature confirmed their powers by a law recognising the authority of these commissaries to give institution to benefices, grant licenses to curates, and exercise all the powers and coercion which might be requisite, or according to the constitutions and canons ecclesiastical of the Church of England. This opinion of a civilian of the eminence of Lord Stowell is of the greatest value; it shows that in his judgment the Crown could confer the power “to censure, suspend, or remove offending clergymen,” that is, *coercive jurisdiction* — that it was part of the royal supremacy;

\* Bridges, “Annals of Jamaica,” vol. i., App. p. 553, note.

and if he thought a local Act might be necessary, it was not to confirm the powers of, or confer legal *status* on the commissaries of the Crown, but to repeal a former act, by which these powers had been vested in the Bishop of London, and to vest them, not in the Commissaries, but in the Crown, and to aid *the process* and *execute* the sentence of the commissaries. The Church of England being the *established* religion of the Colony, the clergy having civil rights incident to their offices as rectors of the several parishes, which rights might be interfered with by the exercise of this ecclesiastical jurisdiction, an Act of the local legislature may have been expedient. Lord Stowell, in the same opinion, further observed, that he considered it would be—

“A novelty to vest the government of the clergy in the modes of ecclesiastical discipline in the single person of a lay governor; and to subject the clergy to such regulations as might be provided *by the legislature of Jamaica*, would be to expose the body of the clergy to the hazard of considerable alterations in their functions, and subjecting them to a system of rules unknown to the general law, by which their duties and rights are ascertained in that parent Church of which they are ministers, *wherever it is established in any part of His Majesty's dominions.*”

He, therefore, was manifestly of opinion that the clergy in Jamaica were clergy of the *Church of England*, and bound by the general law of the parent Church, and ought not to be subjected to the legislature of Jamaica. It would appear that Jamaica is less in point even than the East Indies, be-

cause in Jamaica the Church is the established religion, and ecclesiastical jurisdiction had been for years exercised there by the Governor, or the Commissaries of the Crown, or both. There were existing many Acts of the local legislature relating to ecclesiastical affairs, and therefore an Act of the legislature may have been necessary upon the appointment of the Bishop, to regulate his powers, or to remove any difficulties that might arise in the exercise of them from previous legislation. An abstract of the Act is to be found in the Appendix to Bridges' "Annals of Jamaica;" there does not appear to be any provision in it enabling the Bishop, or authorizing him to exercise the powers and jurisdiction conferred by the Letters Patent.

By a recent statute of the Imperial Parliament, 5 Vict. sess. 2, c. 4, Her Majesty is empowered from time to time by Letters Patent, under the great seal of the United Kingdom, to establish within the territorial limits of the existing dioceses of Jamaica and Barbadoes three or more dioceses, with such or so many archdeaconries within each diocese as to Her Majesty shall seem meet, and for that purpose to revoke the Letters Patent under the great seal aforesaid, under which the existing dioceses of Barbadoes and Jamaica, and the existing archdeaconries within the same, respectively, have been established; "provided no such Letters Patent, if issued during the life and incumbency of any such Bishop, shall take effect until by a notarial act he

shall have declared *his consent* thereto." This Act contains no reference to the local legislature of Jamaica, which is strange if the Crown cannot without its consent create a bishopric. Why was not this power conferred upon the Crown by an Act of the local legislature of Jamaica, instead of the Imperial Parliament?—These are the only instances of colonial bishoprics referred to in the Judgment; and it would be difficult to deduce from these instances the proposition that the Crown cannot in a Colony or dependency of the Crown create a bishopric of the Church of England without the sanction of the local legislature.

The Privy Council next refer to the creation of new bishoprics in England, and in the first place to the constitution of four new bishoprics by Henry VIII. It is said that even that absolute monarch thought it necessary to have recourse to the authority of Parliament, and reference is made to the 31 Hen. 8, c. 9, which is to be found only among the "Statutes of the Realm." Now, it must be borne in mind, not only that Henry VIII. was about to exercise a new ecclesiastical prerogative, one which had never been exercised in England before by the Crown alone, but also that at this time the whole of England had been apportioned to different bishoprics; and what the Crown was empowered to do was not to create or found a bishopric where none had previously existed, but to form new bishoprics out of the existing ones without requiring the consent of the existing Bishops, and to endow

them with the property of the suppressed religious houses ; by so doing, the Crown was divesting existing Bishops of rights and jurisdictions long enjoyed, and recognised and acknowledged by the law, and therefore an Act of Parliament might have been required to prevent a conflict of jurisdictions. The recent constitution of the new Bishoprics of Manchester and Ripon is next referred to, and it is said that they were constituted, and the new Bishops received ecclesiastical jurisdiction, under the authority of an Act of Parliament. The Act of Parliament referred to is the 6 & 7 Will. 4, c. 77 ; it recites four Reports of the Ecclesiastical Commissioners for England, and their recommendation that Parliamentary Commissioners should be appointed for the purpose of laying before His Majesty in Council schemes for carrying into effect certain recommendations set forth in the Act, altering the boundaries and extent of the existing Bishoprics in England, and recommending the formation of two new Sees in the province of York. The Act proceeds to appoint commissioners, who are empowered to prepare such schemes, and to lay them before His Majesty in Council ; and it then enacts (s. 12):—

“ That when any such scheme shall be approved by His Majesty in Council, it shall be lawful for His Majesty in Council to issue an order ratifying the same, and specifying when such scheme shall take effect, and to direct that every such order shall be registered by the registrar of each of the dioceses *the Bishops whereof may in any respect be affected thereby,*” and also published in the Gazette ;

and by section 14, such order, when registered and gazetted, is to have the effect of the Act of Parliament, any law, statute, canon, Letters Patent, grant, usage, or custom to the contrary notwithstanding ; so that not only were the new Sees of Manchester and Ripon carved out of existing dioceses—not only were existing rights and jurisdictions, including testamentary and matrimonial jurisdiction, affected ; but all this was done by an order in Council. It would be rather too much to argue from these instances of Imperial legislation that the Crown could not by Letters Patent create a bishopric in any part of its dominions in which there was no bishopric subsisting. All the bishoprics in England and Wales are of the King's foundation ; they were all created by the Pope and the Crown.\* It cannot be pretended that Parliament had anything to do with them ; the Pope's power was usurped, and an encroachment on the Royal Prerogative, and on its abolition the power to constitute a bishopric remained solely in the Crown. It is, then, respectfully submitted, that neither the cases of the Bishoprics in the East Indies and in Jamaica, nor the English bishoprics founded by Henry VIII., nor the bishoprics of Manchester and Ripon, establish the proposition contended for, viz., that the Crown cannot constitute a bishopric by Letters Patent in a Colony having a legislative council without the assent of that body ;

\* Co. Lit. 134 a ; 344 a.

these are, however, the only instances referred to in the Judgment of the Privy Council.

It will be desirable to take a more extended view of the foundation of the colonial bishoprics, and the course of legislation on the subject, than has been taken by the Judicial Committee.

The first colonial bishopric founded by England was Nova Scotia ; it was founded in 1787, by Letters Patent, long before the East Indian bishoprics. Nova Scotia received a constitution in 1758. I have not been able to find that there was any legislation at home or in the colony on the subject.

Canada was finally conquered by England in the year 1759. By the articles of capitulation, the Roman Catholic Church was secured in the possession of certain of its rights and properties. By the Act 14 Geo. 3, c. 87, passed in 1774, it was provided that the clergy of the Church of Rome in the province of Quebec should receive and enjoy their accustomed dues and rights, with respect to such persons only as should profess the said religion ; and that His Majesty might make provision out of the rest of the said dues and rights for the encouragement of the Protestant religion, and the maintenance and support of a Protestant clergy. These, together with the rents and profits of the lands reserved or allotted for a Protestant clergy under the 31 Geo. 3, c. 31, are what constitute the clergy reserves, and which are now divisible in certain fixed proportions between the clergy of the Church of England and the minis-



ters of the Scotch Presbyterian Church in that country. The 38th section of the 31 Geo. 3, c. 31, known as the Constitutional Act of the Canadas, authorized the Governor, with the consent of the Executive Council, to constitute and erect parsonages and rectories according to the "*Establishment of the Church of England*," and to endow the same. And the 39th section enacted, that it should be lawful for His Majesty to authorize the Governor to present to each such rectory "an incumbent or *minister* of the *Church of England*," who should hold the same upon the same terms and conditions, and liable to the performance of the same duties, as the incumbent of a parsonage or rectory in England. And by the 40th section it is enacted, that every such presentation, and the enjoyment of any such rectory, &c., shall be subject and liable to

"All rights of institution, and all other spiritual and ecclesiastical jurisdiction and authority, which have been lawfully granted by His Majesty's Letters Patent to the Bishop of Nova Scotia, or which may hereafter by His Majesty's royal authority be lawfully granted or appointed to be administered and executed within the said provinces, or either of them, respectively, by the said Bishop of Nova Scotia, or by any other person or persons, according to the laws and canons of the *Church of England* which are lawfully made and received in England."

These provisions placed the Canadian clergy under the spiritual jurisdiction of the Bishop of Nova Scotia; and his jurisdiction, so far as related to them, was created by Act of Parliament; but

Canada was no part of his original diocese. The first Parliament was held in Canada in 1796 ; in 1793 a Bishop was consecrated for the two Canadas, under the title of Bishop of Quebec ; in 1850 the Bishopric of Montreal was created ; and in 1839 Upper Canada was created into a separate diocese under the Bishop of Toronto. Subsequently the bishoprics of Huron, Ontario, and Rupert's Land have been founded. There does not appear to have been any Imperial legislation on the foundation and creation of any of these bishoprics. By the Act of the Imperial Parliament, 6 Geo. 4, c. 59, the Bishop of Quebec was empowered, on behalf of the Protestant clergy of Canada, by deed to surrender to His Majesty certain portions of the lands allotted for the maintenance of a Protestant clergy. After the establishment of the Bishopric of Montreal, it became necessary to give similar powers to him ; accordingly, the 15 & 16 Vict. c. 53, reciting the 6 Geo. 4, and reciting that—

“Her Majesty did, by Letters Patent of the 8th day of July, 1850, erect certain portions of the ancient diocese of Quebec, therein described, to be a Bishop's See or diocese, and did declare and ordain that the same should be styled the bishopric of Montreal,”

gave to the Bishop of Montreal the same powers as had by the 6 Geo. 4 been given to the Bishop of Quebec ; and the 2nd section enacts :—

“If Her Majesty, at any time hereafter, in *pursuance of the authority to her appertaining in this behalf*, shall annex to the

diocese of Montreal any further portion of the districts comprised within the said diocese of Quebec, or shall otherwise alter the limits of the said respective dioceses, or shall *erect any new diocese* out of the districts now comprised in the dioceses of Quebec and Montreal, or in either of them," &c.

Now, this is a plain legislative declaration that the power of altering the limits of dioceses, and of erecting new dioceses in a Colony then having an independent legislature, appertained to the Crown. It is observable, also, that notwithstanding the existence of an independent legislature in Canada, the Imperial Parliament takes upon itself to regulate the powers of the Bishops there, and to deal with the property of the clergy there. The only other Imperial Act affecting colonial bishoprics that I can find is the 15 & 16 Vict. c. 88, relating to the bishopric of New Zealand. It was considered desirable to divide this diocese ; and the statute, reciting that Her Majesty, by Letters Patent bearing date the 14th day of October, 1841, did make, ordain, and constitute the Colony of New Zealand into a Bishop's See or diocese, by the name or style of the bishopric of New Zealand, and the appointment of Bishop Selwyn, and his resignation of a portion of his see, and that doubts were entertained as to the validity of this resignation, enacted that the said deed of resignation should be deemed valid and effectual in law, "for the purpose of enabling Her Majesty to *erect and constitute* the surrendered portion of the said diocese of New Zealand into a

distinct see or diocese." This appears another strong legislative declaration that this power was vested in the Crown ; the only difficulty in the exercise of it being the doubt whether Bishop Selwyn could surrender a portion of the territory included in his Letters Patent, so as to enable Her Majesty to exercise the power : this was in 1852. New Zealand had been up to the year 1840 a dependency of New South Wales ; in the year 1860 it was, under the provisions of 3 & 4 Vict. c. 62, made by Letters Patent an independent Colony, and given a legislative council. The bishopric of New Zealand was erected in 1841, after the establishment of a legislative council there. A legislative assembly was not constituted there until 1846, by the 9 & 10 Vict. c. 103. Its government is now regulated by 15 & 16 Vict. c. 72. Van Dieman's Land had a legislative council in 1829. It has since been divided into several independent Colonies, with legislative assemblies, in most of which bishoprics have been founded by Letters Patent from the Crown.

It might be a question whether these legislative councils or assemblies in the Colonies have any power to legislate for the United Church of England and Ireland in the Colonies. The power usually granted to them by their Patents, or by Acts of the Imperial Parliament, is to make laws for the peace, welfare, and good government of the Colony. Now, unless the United Church be one of the established

institutions of a Colony, recognised by its laws, it would seem that the legislative council could not make laws affecting it or its officers. In the opinion of Lord Stowell, to which I have already referred, he seems to have been of opinion that the legislature of Jamaica could not make regulations to bind the clergy of the Church of England in matters of discipline, although in Jamaica it was the established religion.

From this review of the course of legislation on this subject, it would appear that the power to constitute bishoprics in the Colonies, and to appoint Bishops to them, has been by the Imperial Parliament frequently declared to belong to the Crown ; and that what the Imperial Parliament and the Crown intended or endeavoured to do was, not to found separate and independent Churches in the Colonies—not to found a Church of South Africa, or of Canada, or of New Zealand, &c.—but, regarding the Colonies as an extension of the territory subject to the spiritual supremacy of the Crown, to extend into them the United Church of England and Ireland, and to found and establish bishoprics of *that* Church in those countries. Thus the jurisdiction given to the East Indian Bishops is, by the 3 & 4 Will. 4, c. 85, s. 93, said to be “for the superintendence and good government of the ministers of the *United Church of England and Ireland* therein.” Again, the 6 Geo. 4, c. 88, s. 1, recites, that His Majesty had by Letters Patent directed and appointed that the

island of Jamaica, &c., should be and become “a bishopric, and the diocese and see of a *Bishop of the United Church of England and Ireland.*” \* So in Canada parsonages and rectories are to be created “according to the establishment of the Church of England—“Ministers of the Church of England” are to be appointed, who are to be subject to the Bishop of Nova Scotia, “according to the laws and *canons of the Church of England*, which are lawfully made and received in *England* ;” † and the legislature of Canada is prohibited from passing any Act, except under certain conditions, which shall in any manner relate to, or affect the establishment or discipline of the *Church of England* among the *ministers and members thereof* within the said provinces.” And among the “King’s Instructions,” sent to the Governor of the Canadas in 1818 ; section 41, “remembering it is toleration of the free exercise of the religion of the Church of Rome only to which they are entitled, but not to the powers and privileges of it as an Established Church, that being a preference which belongs only to the Protestant *Church of England.*”

It is manifest, therefore, that the object and intention were to extend the United Church of England and Ireland into the Colonies ; or, to speak more accurately, to send into the Colonies Bishops and Clergy of the United Church of England and

\* 31 Geo. 3, c. 31, s. 38.

† Section 39.

Ireland, to minister to those in the Colonies who are members of that Church, or voluntarily accept their ministrations; which Bishops and Clergy should be bound and governed by the laws, canons, and constitutions of that Church so far as applicable—the clergy being invested with the same powers, and the Bishops having the same authority and jurisdiction as the Clergy and Bishops at home have by the general ecclesiastical law of England, all being subordinate to the See of Canterbury. It is plain this is a very different thing from founding independent colonial Churches. And the real matter for discussion is, whether this is practicable; whether there is anything in the law or in the principles of the constitution to prevent this being done; and, if not, whether the proper steps have been taken to effect the object. The only objection to the mode that has been adopted, and so often recognised by the legislature, arises, according to the view of the Privy Council, from the want of the assent of the legislative council in those Colonies which have an independent legislature.

“Let it be granted or assumed,” says Lord Westbury, “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 Grahamstown the personal relation of Metropolitan and Suffragans 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 any other person.”

In this passage the Noble Lord uses the phrase “co-

*ercive legal authority*" as synonymous with jurisdiction; but it is manifest that all jurisdiction is not *coercive legal authority*; for there is what may be called voluntary jurisdiction, and it is as contradistinguished from such jurisdiction that the Privy Council in the case of *Long v. The Bishop of Capetown* has used the phrase *coercive jurisdiction*. The phrase "*coercive jurisdiction*" is ambiguous; it may mean, either that jurisdiction and authority which the law enforces, to which it compels obedience, or the power and authority to coerce, correct, or punish, and which may belong to the rulers of a voluntary society. The fallacy in the Judgment consists in predicating of it in the latter sense that which is true of it only in the former. If the Letters Patent be valid to create the relation of Metropolitan and Suffragan between Dr. Gray and the Bishop of Natal, as *ecclesiastics*, they must be sufficient to confer on Dr. Gray that voluntary jurisdiction over his suffragan which is by the general law of the Church of England vested in a Metropolitan, because it is in that jurisdiction the relation consists.

It is important not to confound *voluntary* with *coercive* jurisdiction. By *coercive* jurisdiction is meant that jurisdiction which the law of the country enforces, to which it subjects its people or any portion of them; but *voluntary* jurisdiction is that which belongs to the heads or rulers of any society or body of men, which can be enforced only by such penalties as the society have agreed to, or by ex-



pulsion from the society—a jurisdiction quite independent of the State or the laws of the State in which the society happens to exist. The Church, as distinguished from the State, is a purely voluntary society; the jurisdiction of its rulers is purely voluntary; it can be enforced solely by ecclesiastical censures, or expulsion from its communion. A State may or may not adopt the Church as a part of its constitution, enforce its laws, and aid the jurisdiction of its officers by civil penalties. But the power of the Church is limited to the members of the Church only, and, unaided by the State, can be enforced by ecclesiastical censures only. If the Letters Patent create the relation of Metropolitan and Suffragan between two Bishops as ecclesiastics, they must necessarily subject the suffragan to that jurisdiction which a Metropolitan has over his Suffragan by the general law of the Church. The Letters Patent in the case of *Long v. The Bishop of Capetown* were declared by the Privy Council to be void, so far as they purported to confer *coercive* jurisdiction; and yet it held that Mr. Long, by taking a benefice in the Bishop's diocese, and taking the oath of canonical obedience to him—by, in fact, bringing himself into the Bishop's diocese—subjected himself to that *voluntary* jurisdiction which *virtute officii* belongs to a Bishop over the Clergy of his diocese, but the exercise of which was to be regulated by the general laws of that voluntary society to which they both belonged, viz. the Church of

England. And so, although the Letters Patent of Dr. Gray may be void so far as they purport to grant *coercive* jurisdiction, yet if they constitute him Metropolitan, and if Dr. Colenso is by his Letters Patent made one of his Suffragans, Dr. Colenso thereby becomes subject to that jurisdiction which *virtute officii* belongs to a Metropolitan by the general law of the Church of England, which jurisdiction is not *coercive*, but *voluntary*. It is not necessary for the exercise of this jurisdiction, that there should be an actual voluntary submission or *contract*. It is essential to the existence of every society or corporation of men, that it should have laws, and should have the power of enforcing obedience to those laws; and every one who joins or becomes a member of such society or corporation, thereby submits himself to the laws of that society, and to the jurisdiction and authority of those whose province it is to enforce obedience to those laws, to the governing body of the society; and that not only as it existed at the time he joined the society, but as it may be altered and changed in accordance with the laws and regulations of the society. The Patent granted to Dr. Colenso, and under which he took possession of the See of Natal, expressly recited the former Patent, which had created the original diocese of Capetown; and also that Dr. Gray had resigned the office of Bishop of Capetown; that it was expedient to divide the See into three dioceses—Capetown, Grahamstown, and

Natal ; and that the Bishops of Grahamstown and Natal *were to be subject and subordinate to the See of Capetown, and the Bishop thereof and his successors,* in the same manner as any Bishop of any See within the province of Canterbury was under the authority of the Archiepiscopal See of that province, and the Archbishop of the same ;” and after appointing Dr. Colenso Bishop of Natal, they proceed to declare that the Bishop of Natal shall be subject and subordinate to *the See of Capetown, and to the Bishop thereof* and his successors, in the same manner as any Bishop of any See within the province of Canterbury is under the authority of the Archiepiscopal See of that province, and of the Archbishop of the same ; and in pursuance of the Letters Patent, Dr. Colenso did take an oath of canonical obedience “ to the Metropolitan Bishop of Capetown and his successors, and to the *Metropolitan Church of St. George, Capetown.*” Surely it made no difference that at that time the Letters Patent constituting the Metropolitan See of Capetown were not actually *sealed* ; they were so subsequently ; and Dr. Colenso was as much bound to obedience to the Metropolitan Church of Capetown when so constituted, as if the words “ when erected and constituted ” had been inserted in the oath ; but his subordination does not depend on his oath, but on the relation of Metropolitan and Suffragan having been created by the Letters Patent, and to that extent they are assumed valid. The Privy

Council have declared them invalid only so far as they purport to confer *coercive* jurisdiction ; but the jurisdiction, power, and authority which they give are only over ecclesiastics—persons who must be members of that voluntary society, the United Church of England and Ireland, in the Colony ; it is not *coercive*, but what I have called voluntary jurisdiction—i. e., confined to the members of a voluntary society, and capable of being enforced only by *its* laws. It is said in the Judgment that suspension or deprivation of office is matter of coercive legal jurisdiction ; this must depend upon the nature of the office : if it be a public office—an office recognised and acknowledged by the laws of the State—it may be so ; but if it be an office in a *voluntary* society, possessed of no legal *status*, the suspension or deprivation of such an office is matter of *voluntary*, not of *coercive legal* jurisdiction. For instance, suppose a Roman Catholic Archbishop were to deprive a Roman Catholic Bishop in England or Ireland of his office, would that be a matter of voluntary, or of coercive jurisdiction ? Could the law take notice of the exercise of this jurisdiction ? Clearly not ; because it is an office in a voluntary society, and not one founded by the law, or having any legal existence—that is, derived from the law. So a bishopric of the United Church of England and Ireland in the Colonies. In them that Church is a voluntary society, not established by the law, having no legal existence ; its Bishops are only officers

in that voluntary society, and therefore their suspension or deprivation is matter, not of coercive, but of voluntary jurisdiction. It makes no difference that the office be created, or the appointment made by the Crown—the nature of the society is not thereby changed ; it is still a voluntary society, though the right to nominate the rulers of that society be vested in the Crown.

It is essential to bear in mind the right and power of the Church in a Christian State. The Church, regarded separately, and distinct from the State, is purely a *voluntary* society. It possesses no right or power to compel or force men to belong to its communion by temporal pains or penalties ; its commission is to “ teach all nations ; ” to preach the Gospel, not to persecute ;\* it is nowhere commanded to Christians to put to death idolaters, or to abolish idolatry by force ; as a *society* or corporation, it has inherent in itself the power to make laws, rules, or canons to bind its members, and it has the power to enforce obedience to them ; but those laws can only bind its own members, and its authority can be enforced only by ecclesiastical censure, or expulsion from its communion ; it has no power to enforce its authority by temporal pains and penalties ; to it is given the power of the keys, not of the sword ; it can bind or loose, open or shut—it can admit persons into it, or expel them from it. The State may

\* Hooker's “ Eccl. Pol.,” Book VIII., Ch. iii. 4.

either tolerate the Church and all other religious societies equally ; in which case it, as well as the others, is a mere voluntary society, and its rulers and heads are possessed of a merely voluntary jurisdiction ; or it may adopt a particular form of religion as the religion of the State, and this may be in two ways—either by giving to it peculiar temporal privileges, or imposing on those who exercise or profess any other form of religion temporal penalties. In England, at the present day, the Church of England, as the national Church, enjoys certain temporal privileges ; no penalties are now attached to the exercise of any other religion ; but in the Colonies it receives only the same amount of toleration as other religious bodies ; it enjoys no privileges, and other religious communities are subject to no penalties ; it is, therefore, a mere voluntary society.

Adopting, then, the principles laid down by the Privy Council in *Long v. The Bishop of Capetown*, and approved of by the same court in the principal case, and assuming that the Letters Patent are valid and effectual to create the office, it is difficult to understand how they can be ineffectual and void to confer that power and authority which are necessarily incident to the office ; and if the sentence or Judgment pronounced by Dr. Gray be within the limits of that power and authority—if in pronouncing it he did not exercise any coercive legal jurisdiction—it is difficult to understand how that sentence can be null and void in law.

Dr. Colenso, it appears, has commenced proceedings in the Court of Chancery ; and it is to be hoped that in these proceedings this question will be raised in such a shape as to obtain the opinion of the Twelve Judges of England, and of the House of Lords.

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## APPENDIX.

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BEFORE THE JUDICIAL COMMITTEE OF THE PRIVY  
COUNCIL.

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THE RIGHT REV. J. W. COLENZO, D. D., LORD BISHOP OF NATAL,  
*Appellant*;

AND

THE RIGHT REV. R. GRAY, D. D., LORD BISHOP OF CAPETOWN,  
*Respondent*.

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### JUDGMENT.

THE LORD CHANCELLOR.—The Bishop of Natal and the Bishop of Capetown, who are the parties to this proceeding, are ecclesiastical persons, who have been created Bishops by the Queen, in the exercise of her authority as Sovereign of this Realm, and Head of the Established Church. These Bishops were consecrated, under mandate from the Queen, by the Archbishop of Canterbury, in the manner prescribed by the law of England. They received and hold their dioceses under grants made by the Crown. Their *status*, therefore, both ecclesiastical and temporal, must be ascertained and defined by the law of England; and it is plain that their legal existence depends on acts which have no validity or effect except on the basis of the Supremacy of the Crown. Further, their respective relative rights and liabilities must be determined by the principles of English law applied to the construction of the grants to them contained in the Letters Patent; for they are the creatures of English law, and dependent on that law for their existence, rights, and attributes. We must treat the parties before us as standing on this foundation, and on no other. The Letters Patent by which Dr. Gray was appointed Bishop of Capetown, and also



Metropolitan, passed the Great Seal on the 8th of December, 1853. These Letters Patent recited, among other things, that it had

“ Been represented to Her Majesty by the Archbishop of Canterbury, that the then existing See or diocese of Capetown was of inconvenient extent; and that for the due spiritual care and superintendence of the religious interests of the inhabitants thereof, and for the maintenance of the doctrine and discipline of the United Church of England and Ireland within the Colony of the Cape of Good Hope and its dependencies, and the island of St. Helena, it was desirable and expedient that the same should be divided into three (or more) distinct and separate Sees or dioceses, to be styled the Bishopric of Capetown, the Bishopric of Grahamstown, and the Bishopric of Natal. The Bishops of the said several Sees of Grahamstown and Natal, and their successors, to be subject and subordinate to the See of Capetown, and to the Bishop thereof and his successors, in the same manner as any Bishop of any See within the province of Canterbury was under the authority of the Archbishop of that province and the Archbishop of the same.”

And the Letters Patent contained the following passages:—

“ And We do further will and ordain that the said Right Rev. Father in God, Robert Gray, Bishop of the said See of Capetown, and his successors, the Bishops thereof for the time being, shall be, and be deemed and taken to be, the Metropolitan Bishop in our Colony of the Cape of Good Hope and its dependencies, and our island of St. Helena, subject nevertheless to the general superintendence and revision of the Archbishop of Canterbury for the time being, and subordinate to the Archbishop of that province; and We will and ordain, that the said Bishops of Grahamstown and Natal, respectively, shall be suffragan Bishops to the said Bishop of Capetown and his successors. And We will and grant to the said Bishop of Capetown and his successors full power and authority, as Metropolitan of the Cape of Good Hope and of the island of St. Helena, to perform all functions peculiar and appropriate to the office of Metropolitan within the limits of the said Sees of Grahamstown and Natal, and to exercise Metropolitan jurisdiction over the Bishops of the said Sees and their successors, and over all archdeacons, dignitaries, and all other chaplains, ministers, priests, and deacons in Holy Orders of the United Church of England and Ireland, within the limits of the said dioceses. And We do by these presents give and grant unto the said Bishop of Capetown and his successors full power and authority to visit once in five years, or oftener if occasion shall require, as well the said Bishops and their successors, as all dignitaries and other chaplains, ministers, priests, and deacons in Holy Orders of the United Church of England and Ireland, resident in the said dioceses, for correcting and supplying the defects of the said Bishops and their successors, with all and all manner of visitatorial jurisdiction, power, and coercion. And we do hereby authorize and empower the said Bishop of Capetown and his successors to inhibit, during any such visitation of the said dioceses, the exercise of all, or of such part or parts, of the ordinary jurisdiction of the said Bishops or their successors, as to him, the said Bishop of Capetown or his suc-

cessors, shall seem expedient ; and during the time of such visitation to exercise by himself, or themselves, or his or their commissaries, such powers, functions, and jurisdictions in and over the said dioceses, as the Bishops thereof might have exercised, if they had not been inhibited from exercising the same. And We do further ordain and declare, that if any person against whom a judgment or decree shall be pronounced by the said Bishops, or their successors, or their commissary or their commissaries, shall conceive himself to be aggrieved by such sentence, it shall be lawful for such person to appeal to the said Bishop of Capetown or his successors, provided such appeal be entered within fifteen days after such sentence shall have been pronounced. And We do give and grant to the said Bishop of Capetown and his successors full power and authority finally to determine the said appeals. And We do further will and ordain that, in case any proceeding shall be instituted against any of the said Bishops of Grahamstown and Natal, when placed under the said Metropolitan See of Capetown, such proceeding shall originate and be carried on before the said Bishop of Capetown, whom we hereby authorize and direct to take cognizance of the same. . . . And if any party shall conceive himself aggrieved by any judgment, decree, or sentence, pronounced by the said Bishop of Capetown or his successors, either in case of such review, or in any cause originally instituted before the said Bishop or his successors, it shall be lawful for the said party to appeal to the said Archbishop of Canterbury or his successors, who shall finally decide and determine the said appeal."

The Letters Patent which constituted the See of Natal, and appointed the Appellant to that See, were sealed and bear date on the 23rd of November, 1853, fifteen days before the grant of the Letters Patent to the Bishop of Capetown. The Letters Patent creating the See of Natal recited the patent of September, 1847, which created the original diocese of Capetown, and appointed Dr. Gray the Bishop thereof; and that he had since resigned the office of Bishop of Capetown, whereby the said See had become and was then vacant. The Patent also recited that it was expedient and desirable that the said diocese should be divided into three or more distinct and separate dioceses, to be styled the Bishoprics of Capetown, Grahamstown, and Natal; the Bishops of the several Sees of Grahamstown and Natal to be subject and subordinate to the See of Capetown, and the Bishop thereof and his successors, in the same manner as any Bishop of any See within the province of Canterbury was under the authority of the Archiepiscopal See of that province and the Archbishop of the same; and the Letters Patent proceeded to erect, found, make, ordain, and constitute the district of Natal to be a distinct and separate Bishop's See and diocese, to be called the

Bishopric of Natal. And, after appointing Dr. Colenso to be Bishop of the said See, and granting that the said Bishop of Natal and his successors should be a body corporate, the Letters Patent contained the following passage:—

“ And we do further ordain and declare that the said Bishop of Natal and his successors shall be subject and subordinate to the See of Capetown, and to the Bishop thereof, and his successors, in the same manner as any Bishop of any See within the province of Canterbury in our kingdom of England is under the authority of the Archiepiscopal See of that province and of the Archbishop of the same; and We do hereby further will and ordain that the said John William Colenso, and every Bishop of Natal, shall, within six months after the date of their respective Letters Patent, take an oath of due obedience to the Bishop of Capetown for the time being, as his Metropolitan, which oath shall and may be ministered unto him by the said Archbishop, or by any person by him duly appointed or authorized for that purpose.”

The Letters Patent then proceeded to confer on the Bishop of Natal and his successors episcopal jurisdiction and authority over all rectors, curates, ministers, chaplains, priests, and deacons within the diocese; and directed that, if any party should conceive himself aggrieved by any judgment, decree, or sentence pronounced by the Bishop of Natal or his successors, he should have an appeal to the Bishop of Capetown, who should finally decide and determine the appeal. Under these Letters Patent the Appellant was consecrated on the 30th of November, 1853, and he took an oath of canonical obedience to the Metropolitan Bishop of Capetown, which oath was administered to him by the Archbishop of Canterbury, and was in these words:—

“ I, John William Colenso, Doctor in Divinity, appointed Bishop of the See and Diocese of Natal, do profess and promise all due reverence and obedience to the Metropolitan Bishop of Capetown and to his successors, and to the Metropolitan Church of St. George, Capetown.”

At this time there was not in reality any Metropolitan See at Capetown, or any Bishop thereof in existence. These several Letters Patent were not granted in pursuance of any orders or order made by Her Majesty in Council, nor were they made by virtue of any statute of the Imperial Parliament, nor were they confirmed by any Act of the Legislature of the Cape of Good Hope, or of the Legislative Council of Natal. Previous to these Letters Patent being granted the district of Natal had been erected

into a distinct and separate government; and by Letters Patent granted by the Crown in 1847, it was ordained that it should have a Legislative Council, which should have power to make such laws and ordinances as might be required for the peace, order, and good government of the district. With respect to the Cape of Good Hope, by Letters Patent, dated the 23rd of May, 1850, it was declared and ordained by Her Majesty that there should be within the settlement of the Cape of Good Hope a Parliament, which should be holden by the Governor, and should consist of the Governor, a Legislative Council, and a House of Assembly; and that such Parliament should have authority to make laws for the peace, welfare, and good government of the settlement. In the year 1863 certain charges of heresy and false doctrine were preferred against the Appellant before the Bishop of Capetown as Metropolitan; and upon these charges the Bishop of Capetown, claiming to exercise jurisdiction as Metropolitan, did on the 16th day of December, 1863, sentence, adjudge, and decree the Appellant, the Bishop of Natal, to be deposed from his office as such Bishop, and to be further prohibited from the exercise of any divine office within any part of the Metropolitan province of Capetown. In pronouncing this decree the Bishop of Capetown claimed to exercise jurisdiction as Metropolitan, by virtue of his Letters Patent, and of the office thereby conferred on him, and as having thereby acquired legal authority to try and condemn the Appellant, and the Appellant protested against such assumption of jurisdiction. This sentence and decree of Dr. Gray, as Metropolitan, has been published and promulgated in the diocese of Natal, and the clergy of that diocese have been thereby prohibited from yielding obedience to the Appellant as Bishop of Natal.

In this state of things three principal questions arise, and have been argued before us:—First, Were the Letters Patent of the 8th of 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

Capetown, and his consent to accept his See as part of the Metropolitan province of Capetown, confer any jurisdiction or authority on the Bishop of Capetown, by which this sentence of deprivation of the Bishop 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 settlement 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 members of a voluntary association. The course which legislation has taken on this subject is a strong proof of the correctness of these conclusions. In the year 1813 it was deemed expedient to establish a Bishopric in the East Indies (then under the government of the East India Company); and although the Bishop was appointed and consecrated under the authority of the Crown, yet it was thought necessary to obtain the sanction of the legislature, and that an Act of Parliament should be passed to give the Bishop legal *status* and authority. Accordingly, by Stat. 53 Geo. 3, c. 155, 3, 49, it was enacted, that in case it should please His Majesty, by his Royal Letters Patent, to erect and constitute one Bishopric for the whole of the British territories in the East Indies, and parts therein mentioned, a certain salary should be paid to the Bishop by the East India Company; and by the 51st and 52nd sections it was enacted that such Bishop should not have or use any jurisdiction, or exercise any episcopal functions whatsoever, but such as should be limited to him by Letters Patent; and that it should be lawful for His Majesty by

Letters Patent to grant to such Bishop such ecclesiastical jurisdiction, and the exercise of such episcopal functions, within the East Indies and parts aforesaid, as His Majesty should think necessary for administering holy ceremonies, and for the superintendence and good government of the ministers of the Church Establishment within the East Indies and parts aforesaid. Subsequently, in the year 1833, it was deemed right to found two additional Bishoprics—one at Madras, and the other at Bombay; and again an Act of Parliament (3 & 4 Will. 4, c. 85) was passed, by the 93rd section of which it was enacted in like manner that the Crown should have power to grant to such Bishops within their dioceses ecclesiastical jurisdiction; and it was also enacted and declared that the Bishop of Calcutta should be Metropolitan in India, and should have, as such, such jurisdiction as the Crown should by Letters Patent direct, subject nevertheless to the general superintendence and revision of the Archbishop of Canterbury; and it was provided that the Bishops of Madras and Bombay should be subject to the Bishop of Calcutta as Metropolitan, and should take an oath of canonical obedience to him. So, again, when in 1824 a Bishop was appointed in Jamaica by Letters Patent containing clauses similar to those which are found in the Letters Patent to the present Appellant, it was thought necessary that the legal *status* and authority of the Bishop should be confirmed and established by an Act of the Colonial Legislature. The consent of the Crown was given to this Colonial Act, which would have been an improper thing, as an injury to the Crown's prerogative, unless the law advisers of the Government had been satisfied that the colonial statute was necessary to give full effect to the establishment of the Bishopric. The conclusion is further confirmed by observing the course of Imperial legislation on the same subject—namely, the creation of new Bishoprics in England. When four new Bishoprics were constituted by Henry VIII., it appears to have been thought necessary even by that absolute monarch to have recourse to the authority of Parliament; and the Act that was passed (*viz.*, the 31 Henry 8, c. 9, which is not found in the ordinary edition), is of a singular character. After referring to the slothful and ungodly life which had been used among all those which bore the name of religious folk, and reciting that it was thought therefore unto the King's Highness most expedient and necessary that more

Bishoprics, collegiate and cathedral churches should be established, it was enacted that His Highness should have full power and authority from time to time to declare and nominate by his Letters Patent, or other writing to be made under his great seal, such number of Bishops, such number of cities Sees for Bishops, cathedral churches, and dioceses, by metes and bounds, for the exercise and ministration of their episcopal offices and administration as shall appertain, and to endow them with such possessions, after such manner, form, and condition as to his most excellent wisdom shall be thought necessary and convenient. This statute, which was repealed by the 1 & 2 Philip and Mary, c. 8, s. 18, does not appear to have been revived. It is remarkable as giving power to nominate and appoint new Bishops, as well as to create new Sees and dioceses. So also in recent times the two new Sees of Manchester and Ripon were constituted, and the new Bishops received ecclesiastical jurisdiction, under the authority of an Act of Parliament. It is true that it has been the practice for many years to insert in Letters Patent creating colonial Bishoprics clauses which purport to confer ecclesiastical jurisdiction; but the forms of such Letters Patent were probably taken by the official persons who prepared them from the original forms used in the Letters Patent appointing the East Indian Bishops, without adverting to the fact, that such last-mentioned Letters Patent were granted under the provisions of an Act of Parliament. We therefore arrive at the conclusion, that though 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 of the 6 & 7 Vict. c. 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 which is possessed of an independent legislature. This subject was considered by the Judicial Committee in the case of *Long v. The Bishop of Capetown*, and we adhere to the principles that are there laid down.

The same reasoning is, of course, decisive as to 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 Grahamstown 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. So much of the Letters Patent now in question as attempts to confer any coercive legal jurisdiction is also in violation of the law, as declared and established by that part of the Act of the 16 Charles 1, c. 11, which remains unrepealed by the 13 Charles 2, st. 2, c. 12. It may be useful to state this in detail. By the 16th and 17th sections of the 1st Eliz. c. 1, entitled "An Act for restoring to the Crown the ancient Jurisdiction over the State ecclesiastical and spiritual, and abolishing all foreign Power repugnant to the same," it was enacted that all usurped and foreign power and authority spiritual and temporal should for ever be extinguished within the realm; and that such jurisdictions, privileges, superiorities, and pre-eminences spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority had heretofore been, or might lawfully be, exercised or used for the visitation of the ecclesiastical state and persons, and for reformation, order, and correction of the same, and of all manner of heresies, schisms, abuses, offences, contempts, and enormities, should for ever be united and annexed to the Imperial Crown of this realm. And by the 13th section, the Queen was empowered by Letters Patent to appoint persons to exercise, occupy, use, and execute all manner of spiritual or ecclesiastical jurisdiction within the realms of England and Ireland, or in any other the dominions and countries of the Crown. Under this statute the High Commission Court was erected, which was abolished by the 16 Charles 1, c. 10. By the Act 16 Charles 1, c. 11, the 18th



section of the 1st Eliz. was wholly repealed; and by the 4th section of the same statute all spiritual and ecclesiastical persons or judges were forbidden, under severe penalties, to exercise any jurisdiction or coercive legal authority—an enactment which closed all the regular established ecclesiastical tribunals; but by the 18th Charles 2, c. 12, the ordinary ecclesiastical jurisdiction and authority, as it existed before the year 1639, was, with certain savings, restored to the Archbishops and Bishops; and the Act of 16 Charles I., excepting what concerned the High Commission Court, or the erection of any like court by commission, was repealed, but with a proviso that nothing should extend or be construed to revive or give force to the enactments contained in the 18th section of the 1 Eliz. c. 1, which should remain and stand repealed. 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 Letters 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 deprivation of office is matter of coercive legal authority, and not of mere spiritual authority.

Thirdly. If, then, the Bishop of Capetown 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 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 Capetown 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 Capetown to accept or exercise, any such jurisdiction. There remains one point to be considered. It was

contended before us, that, if the Bishop of Capetown had no jurisdiction, his Judgment was a nullity, and that no appeal could lie from a nullity to Her Majesty in Council. But that is by no means the consequence of holding that the Respondent had no jurisdiction. The Bishop of Capetown, acting under the authority which the Queen's Letters Patent purported to give, asserts that he has held a court of justice, and that with certain legal forms he has pronounced a judicial sentence; and that by such sentence he has deposed the Bishop of Natal from his office of Bishop, and deprived him of his See. He also asserts that, the sentence having been published in the diocese of Natal, the clergy and inhabitants of that diocese are thereby deprived of all episcopal superintendence. Whether these proceedings have the effect which is attributed to them by the Bishop of Capetown is a question of the greatest importance, and one which we feel bound to decide. We have already shown that there was no power to confer any jurisdiction on the Respondent as Metropolitan. The attempt to give appellate jurisdiction to the Archbishop of Canterbury is equally invalid. This important question can be decided only by the Sovereign as Head of the Established Church, and depositary of the ultimate appellate jurisdiction. Before the Reformation, in a dispute of this nature between two independent prelates, an appeal would have lain to the Pope; but all appellate authority of the Pope over members of the Established Church is by statute vested in the Crown. It is the settled prerogative of the Crown to receive appeals in all colonial causes; and by the 25th of Henry 8, c. 19 (by which the mode of appeal to the Crown in ecclesiastical causes is directed), it is by the 4th section enacted, that for lack of justice at or in any of the courts of the Archbishops of this realm, or in any of the King's dominions, it shall be lawful for the parties grieved to appeal to the King's Majesty in the Court of Chancery—an enactment which gave rise to the Commission of Delegates, for which this tribunal is now substituted. Unless a controversy such as that which is presented by this appeal and petition falls to be determined by the ultimate jurisdiction of the Crown, it is plain that there would be a denial of justice, and no remedy for great public inconvenience and mischief. It is right to add, although unnecessary, that by the Act 3 & 4 Will 4, c. 47, which constituted this tribunal, Her Majesty has power to refer to the Judicial Com-

mittee for hearing or consideration any such other matters whatsoever as Her Majesty shall think fit; and this Committee is thereupon to hear or consider the same, and to advise Her Majesty thereon; and that on the 18th of June, 1864, it was ordered by Her Majesty in Council that the petition and the supplemental petition of the Appellant should be, and the same were thereby referred to the Committee, to hear the same, and report their opinion thereupon to Her Majesty. Their Lordships, therefore, will humbly report to Her Majesty their Judgment and opinion that the proceedings taken by the Bishop of Capetown, and the Judgment or sentence pronounced by him against the Bishop of Natal, are null and void in law.

THE END.

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