

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Rev. William Long v. the Right Rev. Robert Gray, D.D., Bishop of Cape Town, from the Supreme Court of the Cape of Good Hope ; delivered June 24, 1863.*

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Present :

LORD KINGSDOWN.

THE DEAN OF THE ARCHES.

SIR EDWARD RYAN.

SIR JOHN T. COLERIDGE.

THIS is an Appeal from a decision of the Supreme Court of the Cape of Good Hope in a suit between the Appellant, the Rev. Mr. Long, claiming to be the Incumbent of the parish of Mowbray, in that Colony, and the Respondent, the Lord Bishop of Cape Town. Mr. Long being in possession of the church of the parish of Mowbray, and in receipt of the income attached to the benefice, refused to obey certain orders which the Bishop, in what he considered the due exercise of his episcopal authority, thought fit to issue, and for such disobedience the Bishop issued against Mr. Long sentences, first of suspension, and afterwards of deprivation. The validity of these sentences, and especially of the last, was the question to be decided by the Court below, which, by a majority of two Judges to one, has held them to be valid.

In the argument at our Bar many questions of great novelty and importance were raised and discussed with remarkable ability. Some of them were considered, and very justly, by the Counsel as seriously affecting the well-being of members of the Church of England in the Colonies and other dependencies of the Crown. We propose to deal with these questions only so far as may be necessary for the purposes of the present decision, and to

abstain as far as possible from saying anything which may prejudice cases that may hereafter arise.

It is advisable, in order to make the reasons of our Judgment intelligible, to state in some detail the facts as they appear upon the record.

The Bishopric of Cape Town was founded in the year 1847. At this time the legislative authority in the Colony of the Cape of Good Hope was vested in the Crown. There was no State Church; all denominations of Christians stood on an equal footing; there were no Ecclesiastical Courts as distinct from Civil Courts. The Supreme Court, under the Charter of Justice granted in 1832, had supreme jurisdiction in all causes—civil, criminal, and mixed—arising within the Colony, with jurisdiction over all subjects of the Crown, and other persons within the Colony.

In this state of things Letters Patent were issued by the Crown dated the 25th September, 1847, erecting the Colony or Settlement of the Cape of Good Hope and its dependencies, and the Island of St. Helena, into a Bishop's See and Diocese, appointing the Respondent, Dr. Gray, to be ordained and consecrated Bishop of the See, and commanding his Grace the Archbishop of Canterbury to ordain and consecrate him accordingly. The Letters Patent purported to empower the Bishop to perform all the functions appropriate to the office of a Bishop within the diocese of Cape Town, and especially to give institution to benefices; to grant licences to officiate to all rectors, curates, ministers, and chaplains, in all churches, chapels, and places where divine service should be celebrated according to the rites and liturgy of the Church of England; to visit all rectors, curates, ministers, and chaplains, and priests and deacons in holy orders, of the United Church of England and Ireland, and to cite them before him, or before the officers whom he was authorized to appoint, and to inquire concerning their morals, as well as their behaviour in their several stations and offices. Power was given to the Bishop to appoint Archdeacons, a Vicar-General, Official Principal, Chancellor, Commissaries, and other officers; and it was provided that an appeal should be made from sentences of the subordinate officers so to be appointed, to the Bishop, and from sentences of the

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

The Letters Patent provided that the Bishop of Cape Town should be subject to the Metropolitan See of Canterbury, in the same manner as a Bishop of any See within the province of Canterbury, and should take an oath of due obedience to him as Metropolitan; and they contained a clause that the Bishop might, by an instrument in writing under his hand and seal, addressed to the Archbishop of Canterbury, resign his office; and after acceptance of such resignation by the Archbishop, the Bishop was to cease to be Bishop of Cape Town to all intents and purposes. Dr. Gray having been duly consecrated by the Archbishop of Canterbury, and taken the oath prescribed, went out to the Cape to assume the duties of his office, and continued to discharge them till the latter end of the year 1853.

At that time it was considered by the Queen's Government that the then Diocese of Cape Town was too extensive for one Bishop, and that it would be advisable to divide it and make it into three Dioceses, to be called Cape Town, Graham's Town, and Natal. With a view to this arrangement Dr. Gray, on the 23rd November, 1853, resigned his Bishopric into the hands of the Archbishop of Canterbury, by whom the resignation was accepted, and Dr. Gray ceased to be Bishop of Cape Town.

On the 8th December, 1853, new Letters Patent were issued, by which certain specified parts of the original Diocese of Cape Town were erected into a distinct and separate Bishop's see and diocese, to be called thenceforth the Bishopric of Cape Town, and to this newly-constituted Bishopric Dr. Gray was appointed, and he was also appointed Metropolitan Bishop in the Colony of the Cape of Good Hope and its dependencies, and the Island of St. Helena. The new Letters Patent seem to have been in other respects in the same form with the old.

But previously to the issuing of these Letters, the Crown had granted a Constitution to the Colony of the Cape. Representative institutions had been founded, and a Colonial Legislature established.

Mr. Long was officiating in the Colony as a Minister of the Church of England before any Bishop was appointed there. He had been admitted into Deacon's orders for the Colonies by the Bishop of London in 1844. In the year 1845 he went to Cape Town, and was appointed by the then Governor of the Colony to be Minister of the English Episcopal Church of Graaff-Reinet, his salary being paid partly by the Governor, partly by the Society for the Propagation of the Gospel, and partly by his congregation. There seems to have been no endowment of any kind attached to this church. He had at this time no other authority for discharging the duties of a Minister in that Church than the Holy Orders which he had received from the Bishop of London and the appointment of the Governor of the Colony.

Soon after the arrival of the Bishop of Cape Town in the Colony in 1848, and while the first Letters-Patent were in force, Mr. Long was ordained priest by the Bishop according to the form and manner of ordaining priests as contained in the Book of Common Prayer; and, on being so ordained, he took the usual oaths prescribed by the laws and usages in force in England, and amongst others the oath of canonical obedience to the Bishop, by which he engaged to pay to him true and canonical obedience in all things lawful and honest.

On this occasion the Bishop granted, and Mr. Long accepted, a license from the Bishop to officiate and have the cure of souls over the parish and district of Graaff-Reinet, the Bishop reserving to himself and his successors full power to revoke the license whensoever he or they should see just cause so to do.

In the year 1854 a clergyman of the English Church, named Hoets, built and proposed to endow an Episcopal Church in the parish of Mowbray, in the Colony of Cape Town, and to convey the church to the Bishop, upon certain terms agreed upon between them, and by a Notarial Act in the Dutch form, dated the 2nd June, 1854, Mr. Hoets transferred in full and free property to the Bishop and

his successors in perpetuity, for ecclesiastical purposes, a piece of land therein described, "with the church which the Appearer had lately erected thereon at his own cost and charge for the worship of Almighty God according to the Liturgy and Ritual of the Church of England, situate in the parish of Mowbray."

By a Notarial instrument of the same date, to which the Bishop and Mr. Hoets were both parties, the conditions on which the grant was made are stated.

The first is that the church shall with all convenient speed be consecrated, and shall be at all times used and enjoyed by the parishioners of the parish of Mowbray free from any charge.

Mr. Hoets covenants with the Bishop to pay a certain salary to the clergyman or incumbent to be appointed and instituted to the spiritual charge of the said church and parish in manner after mentioned during the incumbency of the two first incumbents thereof, as and for a provision or endowment towards the stipend of such two first incumbents, and a mortgage is made by Hoets to the Bishop of certain bonds in order to secure the due payment of the stipend.

The Bishop, in consideration of the premises, covenants with Hoets, that he, the Bishop, and his successors will admit, institute, and appoint unto the said endowment, and unto the spiritual charge and care of the said church and parish a Clerk to be presented and nominated by Hoets (such person, being a priest in holy orders of the United Church of England and Ireland, or of any of the Colonial Churches in communion with the said United Church, and not subject to any spiritual or ecclesiastical censure or other impediment), as the first incumbent of the said church and parish. And so in like manner upon the death, resignation, or removal for any lawful cause of the first incumbent, upon the like presentment of Hoets, to admit, institute, and appoint a second incumbent.

There can be no doubt that by these deeds a trust was created between Mr. Hoets and the Bishop, and that the Bishop became trustee of the church and of the funds provided for its support, and held them in that character.

On the 3rd of June, 1854, Mr. Long and several of the parishioners of Mowbray presented a petition to the Respondent, as Bishop and Ordinary of the diocese, praying him to consecrate the church, and on the 6th of June his Lordship consecrated it accordingly, and signed an instrument under his episcopal seal declaring such consecration, and reserving to himself and his successors, Bishops of Cape Town, all ordinary and episcopal jurisdiction, rights, and privileges. On the same day his Lordship preached in the parish church, and referred to the Appellant as being henceforth the parish priest.

There were, or were supposed to be, some impediments to the institution and induction of the new incumbent in the English form, and no such ceremonies took place, but Mr. Long entered into possession of the benefice, and discharged his parochial duties, receiving from the Bishop a license to officiate and have the cure of souls within the parish and district of Mowbray. In this, as in his former license, the Bishop reserved power to revoke it if he should see just cause, and Mr. Long on these occasions renewed his oath of canonical obedience to the Bishop.

We will here observe, in order that we may not have occasion again to refer to the point, that we consider the good faith of the arrangements between Mr. Hoets and the Bishop to have required that the nominee of Mr. Hoets, when admitted by the Bishop to this church, should hold and retain it on the same terms as a clergyman in England regularly instituted and inducted, and that the Bishop, by means of this license, obtained no right to suspend or deprive Mr. Long by the mere exercise of his discretion, or otherwise than for such cause as would have justified a sentence of suspension or deprivation in the case of a Clerk in full and lawful possession of his benefice. Indeed, it is due to the Bishop to say that we did not understand his Lordship to contend for more than this by his Counsel at our Bar.

In the year 1856 the Bishop was of opinion that, for the purpose of settling some scheme of Church government which should be binding upon the religious community of which he was the head, it would be desirable to convene a Synod, consisting

partly of clergy and partly of laymen, members of the Church within his Diocese. The measure had been in contemplation, and, indeed, under discussion, for several years before, and different opinions had been entertained both by clergymen and laymen as to its legality and its expediency.

On the 15th November, 1856, the Bishop issued a pastoral letter, in which, after stating the reasons which induced him to believe that such a measure was expedient, if not indeed necessary, for the well-being of the Church in the Colony, and explaining the objects which might, in his opinion, be effected by means of a Synod, his Lordship proceeded to declare of what persons the Synod should be composed. These were to be, first, lay delegates, to be elected in the different parishes by adults, being, or at the time of the election declaring themselves to be, members of the Church of England, and of no other religious denomination. Secondly, duly licensed clergy, being in Priests' orders. Deacons were to be authorized to attend and speak, but not to vote.

Some of the subjects to be brought under the consideration of the Synod were then enumerated, including matters not exclusively of ecclesiastical cognizance; as for instance, the tenure and management of Church property; questions relating to the formation and constitution of parishes; difficulties which had presented themselves with regard to marriages, divorces, and sponsors; and, finally, the desirableness, or otherwise, of seeking to obtain the assistance of the Legislature to carry out the objects of the Synod.

Mr. Long was summoned by the Bishop to attend the Synod, which was appointed to be held at the Cathedral Church in Cape Town on the 21st January, 1857, and he was requested to affix a notice of the intended meeting on his church door and to take the necessary steps for holding the election of a delegate for his parish.

Mr. Long and his parishioners were opposed to this measure. The parishioners held a meeting on the 22nd December, 1856, at which they resolved that no delegate should be elected, and Mr. Long neither attended the Synod himself, nor took any steps to forward the election of a delegate.

No attempt appears to have been made at

this time by the Bishop to enforce obedience to his summons, but the Synod was held, and was attended, as it appears, by many of the clergy and laity, and various resolutions were passed by them, which were termed "Acts and Constitutions of the First Synod, held at Cape Town, January 21, 1857."

These regulations provided that a Synod of the clergy should be convened by the Bishop once in three years. They provided for the mode of electing delegates from the different parishes, and required that on some Sunday, or other convenient day, during Divine Service, each Minister should give notice of the day and place of meeting for such election in his parish or district, and should cause notice of the same to be fastened to the door of the church or chapel of the parish or district.

The clergy and laity were ordinarily to sit and deliberate together, the Bishop presiding, and to vote as one body; but any member of the Synod might demand a vote by orders, in which case no Resolution should be regarded as adopted by the Synod unless carried by a majority of both orders and assented to by the Bishop.

Various rules were made with respect to the formation of parishes, and the institution and induction of clergy; and all Presbyters and Deacons before institution or induction, or before receiving a license from the Bishop, and as a condition of receiving such institution, induction, or license, were to sign a declaration that they would subscribe to all the Rules and Constitutions enacted by the Synod of the Diocese of Cape Town.

A Consistorial Court was appointed for the trial of all offences against the ecclesiastical laws of the Diocese, and various provisions were introduced with respect to the mode in which the trial should be conducted.

The Synod had been convened without any express sanction of the Crown, and no attempt was made to obtain the assistance of the Legislature to carry into effect its objects. It was stated at the Bar that the Synod resolved that it would not be desirable to make any attempt for the purpose, but we do not find any Resolution to this effect amongst the printed papers.

In 1860 the Bishop convened a second Synod,



to be held on the 17th of January, 1861; and on the 1st of October, 1860, his Lordship addressed a letter to Mr. Long, inclosing a copy of a pastoral letter which he had issued, and also a copy of the printed Regulations adopted by the Synod for the election of Deputies. The pastoral letter referred to the Acts and Constitutions of the last Synod, and mentioned as one of the subjects to which his Lordship would have to call attention, the Constitution of the Ecclesiastical Court.

Mr. Long was of opinion that the convening of this Synod without the authority either of the Crown or the local Legislature was an unlawful act on the part of the Bishop; that the Synod itself was illegal, and its acts of no validity; and he declined therefore to take any steps himself for calling a meeting for the election of Delegates in his parish, but he handed over the papers to the churchwardens and sidesmen that they might act as they should think proper, informing them at the same time of his own views upon the subject.

After some angry correspondence, in which, as usually happens, there are passages in the letters on both sides which the writers perhaps now regret, the result was that Mr. Long refused to give the notice required of the intended election.

On the 27th November, 1860, he was served with a citation signed by the Registrar of the diocese, by which he was cited to appear before the Bishop on Monday, the 4th February, 1861, to answer for having neglected and refused to obey the commands and directions of his Bishop to give notice of a meeting to be held "in terms of a certain letter addressed and forwarded to you, and dated the 1st October, 1860, with the pastoral issued on the same day and therein inclosed."

Certain clergymen, five in number, were named by the Bishop to be his Assessors, but his Lordship offered if Mr. Long had any personal objection to any of them, to change their names for those of other clergymen who might be resident in the neighbourhood.

On the 4th February, 1861, Mr. Long attended before the Bishop and his Assessors, and delivered in a letter signed by himself stating, in respectful terms, the grounds on which he objected to give the required notice, and adding that if obedience

were still required to the Bishop's command in that respect, it was impossible for him to pay it.

Mr. Long's Counsel at the same time handed in a protest signed by them that no Judgment or sentence pronounced by the Bishop as the Judgment or sentence of any alleged Court was in any degree binding on Mr. Long, because no lawful authority was vested in the Bishop to hold, by himself or others, any Court or Courts competent to hear or determine any causes of what kind soever.

The Court adjourned, as it seems, without hearing evidence; there was no question of fact in issue. The Assessors afterwards delivered their opinions in writing to the Bishop, and on the 8th February, 1861, the Bishop pronounced a sentence suspending Mr. Long from the cure of souls, and the exercise of all ministerial functions and offices for a period of three months, and thenceforward until he should have expressed regret for his past disobedience, and his willingness to render obedience for the future.

His Lordship added, from motives which do credit to his feelings, the following note to his Judgment:—

“I have only to add that as you have a wife and children, I should be sorry to deprive you of any portion of your ecclesiastical income. You will be allowed to receive this, therefore, as heretofore for the present.”

This sentence was intimated to the churchwardens of the parish, and they were requested to provide a clergyman to perform duty in the church during Mr. Long's suspension. Mr. Long, however, considered the sentence to be a nullity, and he continued to officiate as usual, apparently with the concurrence of the churchwardens.

On the 19th February, 1861, he was served with a citation by order of the Bishop to appear before his Lordship on Wednesday the 6th March, to answer for having failed to render due and canonical obedience to the Bishop, and for acting in defiance of the laws of the church and the authority of the Bishop. The citation recited the Bishop's order and Mr. Long's disregard of it, and required him to appear and answer for his contempt, and to hear and receive such Judgment as the Bishop might see right to pronounce, and as the exigency of the case might require or authorize.

Mr. Long declined to attend this summons, and on the 6th March a sentence was pronounced by the Bishop, which, after reciting the various offences against his authority of which he considered Mr. Long to have been guilty, concluded in these terms:—

“I, therefore, Robert, by Divine permission, Bishop of Cape Town, do, for these repeated acts of disobedience and contempt, withdraw the license of the Rev. William Long, and do deprive him of his charge, and cure of souls in the parish or parochial district of Mowbray, and of all emoluments belonging to the same. And I do, moreover, hereby admonish the said William Long not to officiate again in the said church or parish, and warn him that if he should do so after this his deprivation he will render himself still further liable to the censures of the Church.

“ R. CAPE TOWN.

“ Cathedral Vestry, March 6, 1861.”

Notice was given of the sentence on the same day to Mr. Long and to the churchwardens of Mowbray, who were required to conform to it; and a gentleman of the name of Hughes was appointed by the Bishop to officiate in the church till a new Minister was appointed, and to receive one-half of the income.

On the 7th March Mr. Long and the churchwardens applied to the Supreme Court of the Colony of the Cape of Good Hope for an interdict to restrain the Bishop and Mr. Hughes from interfering with him in the performance of his lawful duties as Incumbent of the parish of Mowbray, and from disturbing him in the enjoyment of his lawful emoluments as such Incumbent.

Some further proceedings took place in this matter, but the Plaintiffs were required to file a declaration in regular form for the purpose of trying the important questions in difference.

The present suit was accordingly instituted.

It was a proceeding, of course, in the forms of the Roman-Dutch Law; a claim in convention by the original Plaintiff, and a defence and claim in reconvention by the Defendant, so that, in fact, both parties were Plaintiffs and both Defendants.

The claim of Mr. Long, after stating those several matters of fact on which he relied, insisted that he was aggrieved by the proceedings of the Bishop, and prayed the protection of the Court, and also a declaration of the law by the Court in conformity with his views on the several points in dispute; and lastly,

that he was entitled of right, and without any license other than his before-mentioned Letters of Order, and the presentation he had already received from Mr. Hoets, and the approval of such presentation publicly made known by the Defendant in June 1854, to exercise all the lawful functions of Minister and Incumbent of St. Peter's Church, Mowbray.

The Bishop filed an answer and plea in reconvention, by which, as Defendant, he pleaded the Letters-Patent of 1847 and 1853, the license granted by him, and accepted by Mr. Long, as officiating Minister, both of Graff-Reinet and Mowbray; he alleged that until authorized so to do by the Synod and until the formation of rectories by the same authority as after mentioned, and until certain rules on that behalf had been framed, he could not give, nor had he in any previous instance given, institution to cure of souls, or induction to benefices, in any other way than by licenses similar to that granted to the Plaintiff. He insisted that he cited the Plaintiff in accordance with the rules of the Synod, and in exercise of the authority belonging to him as Bishop, conveyed to him by the Letters-Patent; that the sentences were Judgments or sentences ecclesiastical or spiritual so issued under the power and authority conveyed to him by the Letters-Patent, or otherwise of right belonging to him as Bishop of the Church of which the Plaintiff was a Priest; and that the Plaintiff was, in consequence thereof, removed for lawful cause from the Church of Mowbray; and he maintained, in conclusion that the Court was not entitled to examine the sentence, but that if it were examined it ought to be affirmed.

This was his defence. In reconvention he prayed, by his second plea, that it might be adjudged that the Letters Patent of the 25th September, 1847, and of the 8th December, 1853, are valid in law, and that they confer the rights and powers claimed thereunder, and that ecclesiastical jurisdiction may thereby be lawfully exercised by him.

By his last plea he prayed that the said Plaintiff in convention and Defendant in reconvention might be restrained by interdict, so long as the sentence of deprivation should continue and remain in force, from occupying or attempting to occupy the Church

of St. Peter's, Mowbray, or otherwise interfering with the duties of the Minister of the said church.

On the 15th February, 1862, the Court gave judgment against the Plaintiff in convention and for the Plaintiff in reconvention, except as to his second plea in reconvention, to which we have already referred, and adjudged each party to pay his own costs.

This was in effect a decision in all material points in favour of the Bishop, and Mr. Long has been admitted to appeal to Her Majesty. The case seems to have been very well argued in the Court below, and though there was some difference of opinion amongst the three Judges who decided it, no one who reads their opinions can fail to admire the great learning and ability which they have brought to bear upon the questions submitted to them, and the judicial temper and moderation which they have shown in a case calculated to produce great excitement in the Colony.

The first question which we have to consider is, what authority did the Bishop possess under and by virtue of his Letters-Patent at the time when these sentences were pronounced? The Judges below have been unanimous in their opinion: 1st, that all jurisdiction given to the Bishop by the Letters-Patent of 1847 ceased by the surrender of the Bishopric in 1853, and the issue of the new Letters-Patent; and 2ndly, that the Letters-Patent of 1853 being issued after a Constitutional Government had been established in the Cape of Good Hope, were ineffectual to create any jurisdiction, ecclesiastical or civil, within the Colony, even if it were the intention of the Letters-Patent to create such jurisdiction, which they think doubtful. In these conclusions we agree.

Dr. Gray had been duly appointed and consecrated a Bishop of the Anglican Church in 1847, and such he remained after the resignation of his See; but by such resignation he surrendered all territorial jurisdiction and power of proceeding judicially *in invitos*, so far as such authority depended upon the Letters-Patent of 1847. These points have not only been decided by the Court below, but have been embodied in their Judgment, by which they

have expressly rejected the second claim above stated of the Lord Bishop.

But a majority of Judges below has held that the defect of coercive jurisdiction under the Letters Patent has been supplied by the voluntary submission of Mr. Long, and that he is on that principle bound by the decision of the Bishop. This point we have next to consider.

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

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

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

These are the principles upon which the Courts in this country have always acted in the disputes which have arisen between members of the same religious body not being members of the Church of England. They were laid down most distinctly, and acted upon, by Vice-Chancellor Shadwell and Lord Lyndhurst in the case of Dr. Warren, so much relied on at the Bar, and the report of which in Mr. Grindwood's book seems to bear every mark of accuracy.

To these principles, which are founded in good sense and justice, and established by the highest authority, we desire strictly to adhere, and we proceed to consider how far the facts of this case bring Mr. Long within their operation.

To what extent, then, did Mr. Long, by the acts to which we have referred, subject himself to the authority of the Bishop in temporal matters? With the Bishop's authority in spiritual affairs, or Mr. Long's obligations *in foro conscientiæ*, we have not to deal.

We think that the acts of Mr. Long must 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; and we are of opinion that by taking the oath of canonical obedience to his Lordship, and accepting from him a license to officiate, and have the cure of souls within the parish of Mowbray, subject to revocation for just cause, and by accepting the appointment to 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. We adopt the language of Mr. Justice Watermeyer, p. 81, that “for the purpose of the contract between the Plaintiff and Defendant, we are to take them as having contracted that the laws of the Church of England shall, though only as far as applicable here, govern both.”

Is, then, Mr. Long shown to have been guilty of any offences which, by the laws of the Church of England, would have warranted his suspension and subsequent deprivation? This depends mainly on the point whether Mr. Long was justified in refusing to take the steps which the Bishop required him to take, in order to procure the election of a delegate for the parish of Mowbray to the Synod convened for the 17th January, 1861.

In what manner and by what acts did he contract

this obligation? The Letters-Patent may be laid out of the case, for if the Bishop's whole contention in respect of them be conceded, they conferred on him no power of convening a meeting of clergy and laity to be elected in a certain manner prescribed by him for the purpose of making laws binding upon Churchmen.

A very elaborate argument was entered into at our Bar in order to show that Diocesan Synods may be lawfully held in England without the license of the Crown, and that the Statute with respect to Provincial Synods does not extend to the Colonies.

It is not necessary to enter into the learning on this subject. It is admitted that Diocesan Synods, whether lawful or not, unless with the license of the Crown, have not been in use in England for above two centuries; and Mr. Long, in recognizing the authority of the Bishop, cannot be held to have acknowledged a right on his part to convene one, and to require his clergy to attend it. But it is a mistake to treat the Assembly convened by the Bishop as a Synod at all. It was a meeting of certain persons, both clergy and laity, either selected by the Bishop, or to be elected by such persons and in such manner as he had prescribed, and it was a meeting convened, not for the purpose of taking counsel and advising together what might be best for the general good of the society, but for the purpose of agreeing upon certain rules, and establishing in fact certain laws, by which all members of the Church of England in the Colony, whether they assented to them or not, should be bound.

Accordingly, the Synod, which actually did meet, passed various acts and constitutions purporting, without the consent either of the Crown or of the Colonial Legislature, to bind persons not in any manner subject to its control, and to establish Courts of Justice for some temporal as well as spiritual matters, and in fact the Synod assumed powers which only the Legislature could possess. There can be no doubt that such acts were illegal.

Now Mr. Long was required to give effect, as far as he could, to the constitution of this body, and to take steps ordered by that body for convening one of a similar nature. He was furnished with a copy of the Acts and Constitution of the last Synod, and



he was requested to attend carefully to the inclosed printed regulations with regard to the election of Delegates.

He clearly, therefore, was required to do more than give notice of a meeting, and he could not give the notice at all without himself fixing the time and place at which the meeting was to be held. He was required to do various acts of a formal character for the purpose of calling into existence a body which he had always refused to recognize, and which he was not bound by any law or duty to acknowledge.

The oath of canonical obedience does not mean that the clergyman will obey all the commands of the Bishop against which there is no law, but that he will obey all such commands as the Bishop by law is authorized to impose; and even if the meaning of the rubric referred to by the Bishop in his case were such as he contends for,—which we think that it is not,—it would not apply to the present case, in which more was required from Mr. Long than merely to publish a notice.

We are therefore of opinion that the order of suspension issued by the Bishop was one which was not justified by the conduct of Mr. Long, and that the subsequent sentence of deprivation founded upon his disobedience to the order of suspension must fall with it.

It was strongly pressed, both before us and in the Court below, that supposing these sentences to be erroneous, Mr. Long had no remedy against them except by Appeal to the Archbishop of Canterbury under the provisions of the Letters-Patent. What authority his Grace might possess under the Letters-Patent, or otherwise, to entertain such an Appeal if it had been presented, it is unnecessary, and we think it is inexpedient, to discuss. It is sufficient to say no such Appeal has been presented, and that the suit in which this Appeal is brought respects a temporal right, in which the Appellant alleges that he has been injured. It calls for a decision as to the right of property, and involves the question whether Mr. Long has ceased by law to be what in England is termed *cestui que* trust of funds of which the Bishop is trustee. Whatever else Mr. Long may by his conduct have done, we cannot hold that he has 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. Indeed, in this case the Appellant and Respondent have alike found it necessary to call upon the Civil Court to determine the right of possession of the Church of Mowbray.

We think that even if Mr. Long might have appealed to the Archbishop, he was not bound to do so; that he was at liberty to resort to the Supreme Court; and that the Judges of that Court were justified in examining, and, indeed, under the obligation of examining, the whole matter submitted to them. We, of course, are in the same situation; and after the most anxious consideration we have come to the conclusion that the sentence complained of cannot be supported, and therefore we must humbly advise Her Majesty to reverse it, and to declare that Mr. Long has not been lawfully removed from the Church of Mowbray, but remains Minister of such church, and entitled to the emoluments belonging to it.

Being of this opinion, we are relieved from the necessity of considering, as a ground of our decision, whether the course adopted by the Right Reverend Respondent in the proceedings against Mr. Long was in all respects proper, and whether the proceedings themselves, if the Bishop be regarded as acting and entitled to act with the authority of a Visitor sitting *in foro domestico*, were conducted with that attention to the rules of substantial justice and that strict impartiality which are necessary to be observed by all tribunals, however little fettered by forms. Much argument was addressed to us at the Bar in this part of the case, and it would not be proper to pass it altogether without notice; and first with respect to the suspension, and the constitution of the tribunal for the trial of Mr. Long on the first charge against him.

It cannot be held that all the provisions which would have been applicable to such a case under the Church Discipline Act in England were necessary to be observed in the Colony. This was impossible, but care should have been taken to secure, as far as possible, the impartiality and knowledge

of a judicial tribunal. Here the Bishop was not merely in form but substantially the prosecutor, and a prosecutor whose feelings, from motives of public duty as well as from the heat necessarily generated in the purest minds by a long and eager controversy, were deeply interested in the question. It was, perhaps, necessary that he should preside as the Judge before whom the cause was heard, and by whom the sentence was pronounced; but he should have procured, as a Bishop in England under such circumstances would have done, the advice and assistance, as Assessors, of men of legal knowledge and habits, unconnected with the matter in dispute, and have left it to them to frame the decision which he would afterwards pronounce. But instead of adopting this course, he selected as assistants three gentlemen, all Clergymen sharing his own opinions on the subject of controversy, and all themselves members of that Synod which Mr. Long was accused of treating as illegal.

Mr. Long was cited for refusing to give the required notice, but the sentence was not grounded entirely on this charge. The protest which he had given in by his Counsel against the proceedings was treated as a very grave offence. The Bishop, in speaking of it, says—

“To put in such a document is virtually to reject Episcopacy and the Church, and to stop on the very confines of schism, if not to have overstepped the line.”

Mr. Long's conduct at a private meeting with the Bishop is discussed, as to which there is great doubt what really took place, and no regular evidence appears to have been produced, or was in fact admissible, for it was not to the point in question; and from the language of the Bishop in delivering his Judgment it may be inferred that the sentence against Mr. Long was not founded entirely on the only charge which he had been summoned to meet.

The proceedings which led to the subsequent deprivation are open to no less objection than those which resulted in the suspension.

The Bishop had declared before the first Synod that there were no rules or proceedings for trying ecclesiastical offences, and one of the objects of the Synod was to supply the deficiency. The Synod

had established a Consistorial Court and certain regulations by which the trials of clergymen and of laymen before such Court should be guided.

These regulations had amongst other things provided that no sentence of deprivation should be pronounced by any person whatever, but only by the Bishop with the assistance of the Chancellor of the diocese, or, in case there be no such officer, some legal adviser whom he may see fit to appoint. The Bishop insisted that Mr. Long was bound by the rules established by this Synod, and must therefore, it should seem, have considered himself bound by them; and yet without any regard to these rules, without calling in the assistance of any legal adviser whatever, without any analogy to the course of proceedings in England by which the judgment of impartial persons acquainted with the law is secured, the Bishop pronounces sentence of deprivation.

On this occasion, as on the former, the sentence seems to have been founded on what are termed repeated acts of disobedience and contempt by Mr. Long, instead of on the single charge which he was called upon by the citation to meet.

We cannot say, therefore, that the proceedings in this case have been conducted in a proper manner, though our Judgment rests on the other grounds already stated.

We have been much embarrassed by the question how we ought to deal with the costs in this case. We do not doubt that the Bishop has acted in the conscientious discharge of what he considered to be his public duty, and he has succeeded, at great personal trouble and expense, in bringing this contention in the Court below to a favourable issue. On the other hand, it is impossible not to feel that Mr. Long has been subjected to probably not less trouble and expense by a course of proceeding on the part of the Bishop which we have been obliged to pronounce not warranted in law.

Feeling the hardship of the case upon the Right Reverend Respondent, we still think that we are bound to award the costs of the suit and of the Appeal to the Appellant. We cannot, of course, suggest to Her Majesty any consideration of what it may be fit to do, at the expense of the public; for this is beyond our province. But it is not beyond

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

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