

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Right Reverend Robert Gray, of Cape Town, in his capacity as the Lord Bishop of Cape Town, v. the Right Reverend John William Colenso, in his capacity as the Lord Bishop of Natal, from the Supreme Court of the Colony of Natal; delivered 20th July, 1869.

Present :

SIR WILLIAM ERLE.
SIR JAMES W. COLVILLE.
SIR JOSEPH NAPIER.
LORD JUSTICE GIFFARD.

THE Appeal in this case is from a Judgment or Order of the Supreme Court of the Colony of Natal. That Judgment or Order, after setting forth certain proceedings in which the Right Reverend John William Colenso, in his capacity as Lord Bishop of Natal, was Plaintiff, and the Right Reverend Robert Gray, of Cape Town, in his capacity as the Lord Bishop of the Diocese of Cape Town, was Defendant, and showing that these proceedings referred to land, buildings, and premises comprised in a Grant from the Crown, dated the 19th of March, 1850, gave judgment for the Plaintiff for one farthing damage, and "did decree that the land in question, and the buildings thereon, at law do now stand vested in the Plaintiff, in his corporate capacity, and his successors in office, as Bishop of Natal, with costs."

The Grant was in the name and on behalf of Her Majesty, and purported to grant "in freehold, unto the Right Reverend Father in God Robert Lord Bishop of Cape Town, and his successors of the said See in Trust, for the English Church, at Pieter-

maritzburg, a certain piece of ground, containing 1 acre 2 roods and 32 perches, situated in the town of Pietermaritzburg, in the district of Natal, and with full powers and authority henceforth to possess the same in perpetuity; subject, however, to all such duties and regulations as are either already or shall in future be established with regard to such lands."

The Plaintiff's declaration, on which the Judgment or Order proceeds, after referring to the Grant of March, 1850, continued as follows:—
 "And Plaintiff saith that thereafter the Defendant, in his capacity as such Lord Bishop of Cape Town, caused the said plot of ground to be taken possession of for the use of the English Church in Natal, in terms of said deed, and occupied same, and so continued in possession until on or about the month of October 1853, when the Defendant resigned his said See of Cape Town, which was by Her Most Gracious Majesty dissolved, and thereout various sees or dioceses created, namely, the See or Diocese of Cape Town, the See or Diocese of Graham's Town, and the See or Diocese of this Colony of Natal.

"And Plaintiff saith that the said newly created See of Cape Town, to which the Defendant was appointed Bishop, was totally distinct from the former See of Cape Town, and entirely excluded the Colony of Natal, or any part thereof, and from the date of such resignation the said Defendant ceased to have any right to hold the said property under the said trust.

"And the said Plaintiff further saith, that by Letters Patent of Her Majesty, dated the twenty-third day of November, one thousand eight hundred and fifty-three, this Colony was created into an independent and separate Bishopric, to which Plaintiff was appointed Bishop, and so became the successor in office of Defendant, with reference to said trust as far as relates to this Colony of Natal.

"And Plaintiff lastly saith that Defendant by force and violence continued to keep partial and adverse possession of said plot of ground aforesaid, and the buildings and premises erected thereon, to wit, the cathedral church known as St. Peters, to the great damage of Plaintiff, and against the peace of Our Sovereign Lady the Queen, wherefore he saith

he hath suffered damage to the value of one farthing and brings this suit, praying the Judgment of this Honourable Court that the Defendant be ejected from all or any possession he may have of the said plot of ground, or the said buildings erected thereon as aforesaid. And that the said deed of grant be reduced, or altered, or amended, by substituting Plaintiff's name and his successors in office in said deed, as the holders or trustees of said property for said purposes in the Colony of Natal, and with full costs of suit."

The Declaration is dated the 10th of September, 1866. Issue was afterwards joined, the Defendant putting the Plaintiff to proof of his case, and insisting that the whole suit ought to be dismissed with costs. Evidence was entered into on both sides, that of the Defendant being documentary and consisting, amongst other things, of certain Letters Patent dated the 25th June, 1847, on which he relied; that of the Plaintiff consisting both of documentary and oral evidence. There is proof as between the Plaintiff and Defendant of the Plaintiff's title, and there is also proof that he was excluded from St. Peter's Church, as well as obstructed in having access thereto, and in taking part in and performing the accustomed religious services there as Bishop. From the whole result of the evidence, documentary and oral, their Lordships can come to no other conclusion than that the Defendant was the cause of and authorized this exclusion and obstruction; and regard being had to the Letters Patent put in on his behalf, and to the course pursued by him, he must be taken to have done so under a supposed title, alleging that the Plaintiff has no right of any description, and that he, the Defendant, had, and has, an estate in the land, and was, and is, trustee under the grant.

Under these circumstances, the first matter to be considered is, as to the form and scope of the proceedings in the suit; and as to these, while on the one hand they are not so framed, especially in point of parties, as to have enabled the Supreme Court to alter or rectify the grant, or to remove the Defendant from being a trustee, if he be one, or to appoint the Plaintiff a trustee; yet, on the other, their Lordships are of opinion that the Plaintiff is entitled, as between him and the Defendant, to a Judgment

to some extent in his favour, provided he has, as against the Defendant, a right, either legal or equitable, to use or have access to, the church in question. In order to determine whether he has or has not any such right, their Lordships think it unnecessary to follow in detail the very able and elaborate arguments which have been directed more or less to the various questions arising, or supposed to arise, on the three cases of *Long v. the Bishop of Cape Town*, of *the Bishop of Natal*, and of *the Bishop of Natal v. Gladstone*. Their Lordships think it sufficient for them to say, that the following propositions are not at variance with any conclusions which have been arrived at in any one of those cases, have scarcely been disputed, and cannot be successfully controverted: viz., that the Patents were not wholly void; that there was by virtue of the Patent of 1847, a Corporation capable of taking as such under the Grant; that there was a valid resignation by the Defendant of the office held under the Patent of 1847; and that by the two Patents of 1853, of which the Plaintiff's was the earlier, there was a creation of two new Corporations, both capable of taking under a Grant from the Crown, but neither coming within the terms of the Grant of 1850, and consequently not taking an estate under it. The Defendant's second Patent, if the terms at the end of it be looked to, plainly creates a new Corporation. A Corporation, to be capable of taking an estate under the Grant alone, must be the Corporation described in it, and have existed at its date. Having regard to these propositions, and to the terms of the Grant of 1850, be it remembered a Grant from the Crown, "subject to all such duties and regulations as are or shall be established with regard to such lands;" having regard also to the fact of Natal being separate from the Cape, to the circumstances and state of the Colony of Natal, and the inception of the Church there, we consider that it was competent for the Crown, in the words of the Natal Patent of 1853, to "ordain and declare that the church (now in course of erection, and not yet consecrated or dedicated), in the said city of Pietermaritzburg shall henceforth be the Cathedral Church and See of the said William Colenso, and his successors, Bishops of Natal;" and this being so, that the effect

of the Grant and the Plaintiff's Patent of 1853 was at least to give the Plaintiff the right of access to the church, the right to officiate there as a Bishop, and the right to perform there all the religious services which are or ought to be performed by a Bishop in a Cathedral consistently with the laws and usages of the Church of England, so far as the same are applicable to the Church and Colony in question.

There can be no doubt but that the Plaintiff exercised all these rights, and had possession and occupation and access for these purposes from the date of his appointment in 1853 until the end of 1863, a period of ten years. There was during this time no title but under the Grant of 1850, and the Plaintiff's Patent of 1853.

Their Lordships, founding their Judgment on all these considerations, and having regard also to the former decision of this Board in the matter of the Bishop of Natal, do not hesitate to state with respect to the Defendant, that he had, and has, no estate or title as trustee or otherwise, and no right to interfere; and with respect to the Plaintiff, that he has the rights expressed by that which is, in their opinion, the Order which ought to have been made by the Supreme Court of Natal. That Order their Lordships will humbly advise Her Majesty to substitute for so much of the existing Order as begins with the word Decree, and it is as follows:—

Decree.—“That the Plaintiff, the Bishop of Natal, do have free and uninterrupted access to the land and premises in the grant of the 19th of March, 1850, mentioned, for the purpose of enjoying and exercising all rights, privileges, and immunities which have hitherto been enjoyed and exercised, or ought to be enjoyed or exercised, by the Bishop of Natal as such Bishop or otherwise, in reference to or within the cathedral thereon and its appurtenances, and that the Defendant, the Bishop of Cape Town and his Agents, do abstain from in any manner interfering with such access, enjoyment, or exercise; saving, however, to any except the Defendant, any rights in reference to the cathedral as they also enjoyed.”

Their Lordships recommend an Order thus qualified,

because their Lordships' decision relates only to the questions in dispute between the Plaintiff and Defendant.

Their Lordships, in coming to the conclusion at which they have arrived, have not failed to take into consideration the power of attorney which was revoked by the Defendant's deed of the 13th of April, 1864, and that part of the Defendant's Letters-Patent of 1853 which is in these terms:—
 “We are, moreover, pleased to order and direct that the said Bishop of Cape Town, under that title, may take up, continue, and proceed with every act or engagement lawfully commenced, done, or entered into as Bishop of Cape Town, under the Letters-Patent heretofore granted to him as Bishop of the said See of Cape Town.”

The Plaintiff's rights depend on the Grant of 1850, and his Patent of 1853. That Patent was subsequent to the Defendant's resignation, but preceded the Defendant's Patent of the same year. The fact that the Defendant gave, and that the Plaintiff accepted, a power of attorney, may be evidence of what they at one time may both have supposed their relative rights and positions to be; but the power of attorney could not call rights or interests into existence which did not otherwise exist, nor does its revocation preclude the Plaintiff from asserting the continuance or existence of the rights conferred on him by the Crown. It has already been determined that the Bishop of Cape Town has no jurisdiction, coercive or consensual, over the Bishop of Natal; the words quoted from the Bishop of Cape Town's Patent are plainly insufficient to give him any estate in the land and premises in question, or to continue any estate in him. He ceased to be trustee when he resigned. He then ceased to have any interest, legal or otherwise, under the Grant. Without an estate there could not be, and, in our opinion, there was not intended to be, any continuance in him of the trust created by the Grant. Even if the estate had remained vested in the Defendant, and he had continued a trustee, he, as trustee, would have no right to obstruct or exclude the Plaintiff, as has been done. The conclusions at which their Lordships have arrived would be the same whether considered

with reference to English Law and Equity, or Roman-Dutch Law.

It is manifest from what we have stated that we differ from the Supreme Court, so far, at all events, as the Defendant is concerned, in form more than in substance. The Judgment of the Supreme Court purported to deal with the actual estate in the land, church, and premises, and, as we conceive, with the trust. This, in our opinion, could not be properly done in a suit constituted as the present suit is; therefore we have recommended the substitution of the Order which has been read for that which was originally made by the Supreme Court. So far the Appeal has been successful; but as we are of opinion that the Defendant has no estate, and was wholly wrong in the course he thought fit to take, we shall humbly advise Her Majesty to the effect that no costs of the Appeal be given, and that that part of the Judgment in the Supreme Court which gave the Plaintiff his costs there, be not disturbed. As between the Plaintiff and Defendant, the Plaintiff was substantially right, and the fact that he asked for more than he was entitled to led to no additional issues or evidence.

Their Lordships will humbly advise Her Majesty in conformity with this Judgment.

