the successful respondents, the unsuccessful respondent cannot be called upon to pay those costs. The only way is to ascertain what those costs are, and take an aliquot part, and that would be four-fifths.

[Applicants' Attorney, C. H. VAN ZYL.
Respondents' Attorney, J. C. DE KORTE.]

MERRIMAN *vs.* WILLIAMS.

Status of Colonial bishops not appointed by Crown.—Power of Crown to appoint Bishops in Colonies enjoying representative government.—Status of Church of South Africa.—Endowment of Church of England in South Africa.—Construction of Articles of Constitution of Church of Province of South Africa.—Effects of Proviso repudiating Privy Counsel decisions.

By Letters Patent certain powers were given to the Bishop of G. and his successors nominated and appointed by the Crown, and canonically ordained and consecrated by the Archbishop of Canterbury. A Bishop not so nominated and appointed, and not so ordained, is not a successor of the first Bishop such as is meant by the Letters Patent, nor does it make any difference that the Crown has ceased to nominate Bishops to G., and to instruct the Archbishop of Canterbury to consecrate them.

Semble; *that the Crown has the power of appointing Bishops in colonies enjoying representative government, though it does not exercise that power.*

The church of the Province of South Africa has by the proviso in its articles of constitution to the effect that in the interpretation of its faith and doctrine it is not bound by the decisions of the tribunals of the Church of England, and by its determination to repudiate any alteration not specially accepted by it in the formularies of the Church of England other than the creeds, and any alteration in the creeds; as also by having excluded from its Synods the late Dr. Colenso, Bishop of the Church of England in Natal, practically declared that its connection with the Church of England is not maintained.

In a suit by the Bishop of G. (one of the dioceses of the Church

of the Province of South Africa) against W., the titular Dean and the officitating minister in possession of the Church of St. George, in G., to enforce sentence of the Diocesan Court of G., whereby W., alleged to be a member of the Church of the Province, subject to its constitution and canons and the episcopal jurisdiction of plaintiff, had been found guilty of contumacious disobedience, suspended from his ministerial functions until he should engage not to repeat the offence of preventing plaintiff from preaching or ministering in the Church of St. George, and finally excommunicated, it appeared that the Church of St. George was assigned by Letters Patent creating C. the Bishop of G. as the cathedral church of C. and his successors, and that the said church had been duly dedicated to ecclesiastical purposes in connection with the Church of England as by law established, and for no other purposes, and was held by trustees for those purposes:

Held, *that as plaintiff had not been appointed by the Crown he was not such a successor of C. as was meant by the Letters Patent, that he was a Bishop of the Church of the Province of South Africa, which Church had severed its connection with the Church of England, and that therefore plaintiff's suit must be dismissed.*

1880.
August 3.
" 4.
" 5.
" 6.
" 26.

Merriman *vs.* Williams.

The facts of this case were as follows. In June, 1849, the Governor of the Cape Colony granted the site on which the Church of St. George at Graham's Town had been erected, to Dr. Gray, the Bishop of Cape Town, and his successors in the see, on condition that the land so granted should for ever thereafter be used for ecclesiastical purposes in connection with the Church of England and for no other purpose whatever. The Church of St. George was, under an Ordinance of 1839, governed by a vestry and churchwardens elected by the male inhabitants of Graham's Town and the parochial limits thereof, being members of and holding communion with the United Church of England and Ireland as by law established. Bishop Gray had been appointed Bishop of Cape Town by her Majesty, and ordained and consecrated by the Archbishop of Canterbury, having first taken the oath of allegiance, the oath affirming the Queen's supremacy, and the oath of allegiance to the Archbishop as

Metropolitan. In the year 1853 Dr. Gray resigned his Bishopric in order that his diocese might be contracted in extent, and that his new dioceses, one of them being that of Graham's Town, might be erected. In the same year, Dr. Gray was appointed Metropolitan Bishop in the Cape Colony and its dependencies, and letters patent were issued erecting the Bishopric of Graham's Town, and appointing Dr. Armstrong the first Bishop of that diocese. Dr. Armstrong was ordained and consecrated, as was directed by the letters patent appointing him bishop, by the Archbishop of Canterbury. The letters patent further provided that the Church of St. George should henceforth be the cathedral church and see of Bishop Armstrong and his successors. The Bishop had power granted to him to found dignities in his cathedral and Archdeaconries in his diocese. In 1857 the Rev. Henry Cotterill was appointed by letters patent and consecrated by the Archbishop of Canterbury to be Bishop of Graham's Town in place of Dr. Armstrong. The terms of these letters patent were to the same effect as those of the letters patent appointing Dr. Armstrong. In 1863 the Bishop of Cape Town, having been empowered to do so by the Colonial Legislature, transferred to Bishop Cotterill and his successors the land conveyed by the grant of June, 1849, subject to the conditions in that grant mentioned and referred to. In June, 1871, Bishop Cotterill conveyed this property to himself and three other persons to hold upon the trusts upon which he himself had held.

In 1865 defendant agreed with Bishop Cotterill in England that he should accept the office of Colonial Chaplain at Graham's Town, and should also be appointed Dean of Graham's Town. In the same year he was appointed Colonial Chaplain by letter from the Secretary of State and went to the Colony, having before leaving England signed declarations of obedience to the Bishop of Graham's Town and his successors, and of submission to the rules and regulations of the Synod of the diocese of Graham's Town in all things not contrary to the laws of the United Church of England and Ireland. It was customary for the vestry of St. George's Church to accept the Colonial Chaplain for the time being to be their officiating minister. They so accepted defendant and put him in possession of the church.

1860.
August 3.
" 4.
" 5.
" 6.
" 26.

Merriman *vs.* Williams.

Subsequently Bishop Cotterill appointed him to be Dean of Graham's Town and installed him as such. In 1867 and 1869 Synods were held for the diocese of Graham's Town. In the year 1870 was held the first Provincial Synod of the Church of South Africa. Defendant took an active part in the proceedings of those Synods. In 1871 Bishop Cotterill resigned, and, as the Crown had meanwhile ceased to appoint by letters patent Bishops to Colonies enjoying representative government, Bishop Gray as Metropolitan issued a mandate to defendant ordering an election of a new Bishop. Plaintiff was elected, and in his election defendant took the leading part. In 1875, defendant after giving notice, as he was required, in the cathedral that a Provincial Synod would be held at Cape Town in January, 1876, read a protest to the effect that such notice was given by him without prejudice to the rights of the cathedral church, parish, congregation, and people, as an integral part of the mother Church of England and as bound only by its laws, and he did not attend the said Provincial Synod. The articles of constitution of the Church of the Province of South Africa agreed to by the Provincial Synod of 1870 contain a proviso to the effect that in the interpretation of its faith and doctrine it is not bound by the decisions of the tribunals of the Church of England, and another, practically repudiating any alteration not specially accepted by it in the formularies of the Church of England (other than the creeds) and any alteration in the creeds.

In the year 1878 statutes for the government of St. George's Cathedral were drawn up by plaintiff and agreed to by all the chapter except defendant. These statutes affirmed plaintiff's right to preach and perform all other ecclesiastical functions at his option within the cathedral. Plaintiff claimed that he had such right by virtue of his being Bishop of the diocese. Defendant disputed this claim and refused to accept letters of institution from plaintiff. In April, 1879, plaintiff, having previously admonished defendant not to interfere with him, attempted to preach in the church, but was prevented by defendant. Defendant was for this offence summoned before the Diocesan Court of Graham's Town, and, on his neglecting to appear, tried and found guilty in his absence, sentenced to suspension, and ordered to engage not to repeat the offence. Defendant

refused to obey the sentence and was then excommunicated. He took no notice of the excommunication, and the present suit was then brought.

The declaration prayed the Court to declare that defendant was one of the clergy of the Church of the Province of South Africa and bound by its laws; that he was bound to submit to the sentences of the Diocesan Court and was lawfully suspended from his office; that plaintiff in his episcopal capacity had the right to officiate in the cathedral church and to have free access to the land and premises. It further prayed for a perpetual interdict restraining defendant from hindering plaintiff in his lawful ministrations, and from officiating as a dignitary or priest of the said Church, or receiving any emolument in respect thereof within the diocese of Graham's Town.

Defendant in his pleas claimed to be a priest of the Church of England as by law established, and denied that he was a member of the Church of the Province of South Africa, which (in opposition to plaintiff) he maintained was entirely independent of and distinct from the said Church of England. Defendant further asserted that plaintiff was not a Bishop of the Church of England as by law established, that he was not a successor to the Bishops of Graham's Town appointed by letters patent, and that therefore he had no right in the Church of St. George. Defendant also disputed the validity of the transfer of the church made in 1871, and maintained that the Diocesan Court which tried him was improperly constituted.

Jones (with him *R. Solomon*), for plaintiff. In England a Bishop occupies a special position in the eye of the law, but in this country he is an officer of a voluntary body (*Long* vs. *Bishop of Cape Town*, 1 Moore, P. C. Rep., N. S., p. 411). The compact as a voluntary body has been recognised by the members of the Church in this country, and defendant has assented to it and is therefore bound by it. The oath of canonical obedience is sufficient to enable plaintiff to constitute a Diocesan Court. The position of the church here has been recognised by the church at home. The acts of the synods here were quite consistent with the 37th article of the English Church, which article is directed against the jurisdiction of the Pope. There is no attempt to exclude

1880.
August 3.
,, 4.
,, 5.
,, 6.
,, 26.

Merriman *vs.* Williams.

the Civil Courts from having jurisdiction. We come to the Civil Court to enforce the compact entered into between our own members. Before defendant left England he declared his submission to the resolutions of a certain Synod, and by those resolutions a certain tribunal was established for ecclesiastical causes. He subsequently took part in Synods, including that of 1870, and was nominated a trier by one Synod. The Dean of a cathedral here has no rights beyond those of any other canon, his office is merely titular. The cathedral church is the parish church of the whole diocese, and surely the Bishop has a right to preach there. The freehold of the benefice is vested not in the Dean, but in the Bishop and certain trustees.

Solomon, on the same side. The Church of South Africa has taken over all the laws and standards of the Church of England. The Crown appoints Bishops in England because it is the patron of the bishoprics, a state of things which does not apply to this Colony. Defendant has appeared at several Synods. He had no right to do so except as a member of the Church of South Africa. The Church of England is a territorial Church and there can be no Church of England except in England. The ecclesiastical laws of England have never applied to the Church in the Colonies. The Church here is the same corporate body now as it was when defendant came out; a change of name in a corporation does not avoid gifts made to that corporation. The very Ordinance of 1839 upon which defendant takes his stand is no part of the ecclesiastical law of England. In the Ordinances passed here the words "Members of the Church of England" are loosely used and only mean "In communion with the Church of England." The right of special legislation belonging to the Church here no more separates it spiritually from the Church of England than the right of this Colony to legislate for itself separates it from the British Empire. The Church here is a voluntary association in full spiritual communion with the Church of England, otherwise Lord Blachford's Act would not have permitted the clergy of this Church to have a legal *status* in the Church of England. The Church here being a voluntary body, its Synod takes the place of the Sovereign in the English Church. If a minister in a Lutheran Church wished to minister in the Church of England he would have to be

1880.
August 3.
" 4.
" 5.
" 6.
" 26.

Merriman *vs.* Williams.

ordained, while a minister of the Church of South Africa would not. Bishop Merriman was invited to the Lambeth Conference, which was entirely for members of the Anglican communion.

Leonard (with him *Innes*), for defendant. The ostensible object of this action is to enforce a judgment of an Ecclesiastical Court constituted by the Church of the Province of South Africa under its canons; its real object is to obtain for the Church of the Province of South Africa, which is a body distinct from the Church of England, property granted in trust for the purposes of the Church of England as by law established. If plaintiff could acquire any right to the Church of St. George by contract defendant had no right to enter into such a contract, and if he could make such a contract it would only be binding against his person and not against the Church. Whoever the *dominus* of the property may be, its trusts must remain unimpaired. Plaintiff is not a successor to Bishop Cotterill, as he was not appointed in the mode required by the letters patent erecting the Bishopric of Graham's Town, and the other requisites of those letters patent have not been complied with in his case. Apart from the letters patent the Church of St. George at Graham's Town is not a cathedral church at all. Persons in a colony may remain members of the Church of England, so far as it is possible for them to be so in a colony, provided they do not secede from that Church (*Colenso* vs. *Gladstone*, L. R. 3 Eq. p. 1). If the faintest divergence from the Church at home be admitted, where is the line to be drawn? The Church at home may alter its standards by Act of Parliament, but the Church here has expressly debarred itself by one of its canons from doing so. The rules of the Church here as to the marriage of divorced persons are different from those of the Church of England. Hence there is already a divergence between the two Churches. The trusts affecting Church property in this country are still in full force. The doctrine of *cy près* does not affect the present case, as there is no failure of the original mode of accomplishing the object of the charities. Defendant has always officiated in the Church of St. George as a priest of the Church of England. Defendant's submission made in England to the regulations of the Synod of the Diocese of Graham's Town was made with the qualification

1880.
August 3.
,, 4.
,, 5.
,, 6.
,, 26.

Merriman *vs.* Williams.

that it was only in all things which should not be contrary to the laws of the United Church of England and Ireland. The mere fact of defendant taking part in the business of the Synods is not binding on him as a contract. Defendant received the mandate for the election of a Bishop of Graham's Town from Bishop Gray, who possessed metropolitan jurisdiction, given by the Crown, over defendant. Defendant was in this matter a mere instrument in the hands of Bishop Gray. Defendant has received no consideration for belonging to the Church of South Africa. He expressly refused to take out letters of institution or to be re-installed at the hands of that Church. If it be argued that defendant by his conduct has contracted with plaintiff to allow him to exercise the rights which he claims, the answer is that for the breach of such a contract, supposing it to be binding, plaintiff could claim damages but not the relief which he is now asking for.

Jones, in reply. Plaintiff is seeking to enforce a right merely of access to the Church of St. George. Defendant cannot deny that plaintiff is a successor to Bishop Cotterill, after having stated in his call to the election of a Bishop that the object of the election was to provide such a successor. There can be no Church of England as by law established in the Colony, but the Church here is as nearly identical with the Church at home as is possible. The Church here wishes to preserve essential identity with the Church of England. The object of the rule which exempts the Church here from following the decisions of the English Ecclesiastical Courts is simply to preserve the Church of South Africa from the effects of casual decisions of Courts in which it is not represented. This is no attempt to exclude the jurisdiction of any Civil Court. As to the canon respecting divorce, the law of England differs from the law of the Colony on this point, and the Church here is bound to recognise this difference. This action is really not *in rem*, but *in personam*. We are asking for something as against defendant. We do not ask for the *dominium* of St. George's Church. If another Bishop of Graham's Town were to be appointed by letters patent this would not affect defendant as respects us. There would be a question as between the two Bishops. But it is unlikely that the Crown after having practically placed us in our present position

will appoint another Bishop now that an election has taken place. Probably it cannot legally appoint another Bishop.

[*Leonard*:—The case of *Dunbar* vs. *Skinner* (Dunlop's Scotch Reps.) clearly tells against plaintiff's argument.]

Cur. adv. vult.

Posteà (August 26th),—

DE VILLIERS, C.J.:—This is a suit instituted by the Right Reverend Bishop Merriman against the Very Reverend Dean Wiliams, praying for a declaration of the plaintiff's rights, as Bishop of Graham's Town, in respect of the Church of St. George, in that city, and for an interdict to restrain the defendant from interfering with such rights, and from hereafter performing any ecclesiastical functions in the said Church or elsewhere within the limits of the diocese of Graham's Town. The grounds of action are fully, if not distinctly, stated in the declaration, and may be thus briefly summarized:—That the diocese of Graham's Town was established by royal letters patent in November, 1853; that the plaintiff, as the Bishop of Graham's Town, is lawfully invested with the indelible characteristics of the episcopate, and possesses a legal *status* as such Bishop, save as to coercive jurisdiction; that under the said letters patent the Church of St. George, in the city of Graham's Town, was declared to be the cathedral church and see of the then Bishop of Graham's Town and his successors in office; that the plaintiff, as Bishop, has the right and, until prevented by the defendant, has exercised the right of officiating and performing all ecclesiastical functions within the said church; that the defendant having been nominated Colonial Chaplain at Graham's Town, did, on the 20th of October, 1865, take and subscribe the oath of canonical obedience to the then Bishop and his successors in office, and bind himself to submit to the rules and regulations of the Diocesan Synod of Graham's Town, in all things not contrary to the laws of the then United Church of England and Ireland; that thereafter the defendant entered upon the functions of Dean of the said cathedral church; that the defendant has expressly and by implication subjected himself to certain rules and regulations framed by the Provincial Synod of the

1880.
August 3.
,, 4.
,, 5.
,, 6.
,, 26.

Merriman *vs.* Williams.

Church of the Province of South Africa for enforcing discipline in the said Church; that by the canons of the said Church the Diocesan Court of Graham's Town is a tribunal competent to determine whether the rules of the said Church have been violated by any of the clergy of the diocese of Graham's Town or not, and what will be the consequence of such violation: that the defendant has been duly tried before such tribunal for disobedience of a lawful injunction conveyed to him not to hinder the Bishop from preaching in the said cathedral on the 27th of April, 1879; that by sentences passed upon the defendant by the said Court on the 5th of August and 13th of November respectively, he was suspended from his office of priest, with total loss of all emoluments derived from any office held by him as dignitary or priest of the said Church within the diocese of Graham's Town; and that inasmuch as the defendant has neither submitted himself to the sentences, nor appealed to the Appellate Court provided for by the canons, the plaintiff is now entitled to obtain from this Court a judgment which shall enforce the sentences of the ecclesiastical tribunal, and declare the rights of the plaintiff and defendant respectively in respect of the said cathedral. The defendant does not deny that the plaintiff is a duly consecrated Bishop of the Province of South Africa, nor does he deny that the Church of St. George is the cathedral church of the diocese of Graham's Town, but he contends that the plaintiff is not the Bishop of Graham's Town in terms of the letters patent which established the bishopric, that the transfer deeds of the land upon which the church stands do not support the plaintiff's title, and that his claims are inconsistent with the provisions of certain public colonial statutes. In the next place, the defendant denies that he has submitted himself to the canons of the Church of South Africa, but maintains that, even if he had so submitted himself, no tribunal constituted under those canons could lawfully deprive him of his incumbency as Rector, and of the deanery, which he held independently of that Church, and lastly he contends that, even if the tribunal which sentenced him possessed the powers which it claimed and purported to exercise, yet inasmuch as that tribunal was not properly constituted in terms of the Canons themselves, this Court ought not to give effect to its decrees.

It is to be regretted that the pleadings are not so framed as to raise more distinctly than they do the real issues which the Court has to decide. The declaration, relying wholly upon the sentences of the Diocesan Court, prays, not only for an enforcement of those sentences, but also for a declaration of the rights of the parties in respect of the cathedral quite independently of those sentences, and the pleas do not merely traverse the rights claimed by the plaintiff under the sentences, but they put in issue every other right claimed by him. It is sufficiently clear, however, from the pleadings, if taken in connection with the facts disclosed in the evidence and with the arguments of Counsel, that the real subject of contention between the parties is not the ecclesiastical *status* in the abstract of either party nor their personal relation towards each other, but the legal *status* of the plaintiff as well as of the defendant in respect of the cathedral church of Graham's Town, under as well as independently of the decision of the diocesan tribunal. It will be necessary then for the Court, in order to arrive at a satisfactory determination in this case, to consider :—First, what are the rights of the plaintiff, as a Bishop of the Church of the Province of South Africa, in relation to the Church of St. George. In the second place, what are the rights of the defendant in respect of the same church as Rector and Dean. Thirdly, whether the defendant, by his acts or conduct, has conferred on the plaintiff any rights capable of being enforced in this action, which but for such acts or conduct the plaintiff would not have enjoyed. Fourthly, whether the respective rights of the parties are in any way affected by the decisions of the Diocesan Court. And lastly, whether this Court, having regard to the form of the pleadings, to the facts disclosed and the rights ascertained in this case, and to the established practice of this Court, can give the plaintiff any portion of the relief he asks for in his declaration.

Before considering these questions, it will be convenient that I should briefly state the facts which led to the present unfortunate dispute. Until the year 1847 there existed no provision for the performance within this Colony of episcopal functions by Bishops of the Church of England, but a clause was usually inserted in the Governor's Commission giving him "the power of collating to benefices, granting licences

1880.
August 3.
,, 4.
,, 5.
,, 6.
,, 26.

Merriman *vs.* Williams.

for marriage and probates of wills, commonly called the office of ordinary." Colonial Chaplains appointed by the Imperial Government, and, in most cases, ordained by the Bishop of London, under the Imperial Act, 59 Geo. III., c. 60, ministered to the spiritual wants of members of the Church of England residing in garrison towns, and in a few other towns in which no troops were stationed. Among the parishes for which a Colonial Chaplain was thus appointed was that of Graham's Town, which was also a garrison town. The Colonial Chaplain was always attached to, and he officiated in, the Church of St. George. The site on which the church stood belonged to the Crown, but by Ordinance No. 2 of 1839 the administration and management of all matters connected with that church were entrusted to a select vestry and two churchwardens, elected under the provisions of that Ordinance. As the clergy and members of the Church of England in this colony increased in number, the want of episcopal superintendence was more and more felt, until in the year 1847 the Colony and its dependencies were, by letters patent under the Great Seal, constituted a Bishop's see and diocese, and the Reverend R. Gray was thereby appointed, and was subsequently consecrated by the Archbishop of Canterbury as Bishop. In June 1849, and again in November 1850, grants of the land on which the church stood, and the neighbouring premises, were made by the Crown to the Right Reverend Bishop Gray, upon the conditions which I shall afterwards mention. In 1853 Bishop Gray resigned the office and dignity of Bishop of Cape Town, whereupon the original diocese of Cape Town was divided by the Crown into three distinct and separate dioceses, viz., those of Cape Town, Graham's Town, and Natal. On the 23rd of November, 1853 (before the issue of fresh letters patent to the Bishop of Cape Town), letters patent were issued, erecting and constituting the see and diocese of Graham's Town, and directing the Archbishop of Canterbury to ordain and consecrate the Reverend John Armstrong to be Bishop of the said see and diocese. The terms of these letters patent, so far as they affect the present case, will hereafter be referred to. Bishop Armstrong was duly consecrated, and shortly afterwards took possession of his see. On the 30th of July, 1860, the Act No. 30 of 1860 was passed, authorizing the Bishop of Cape Town to transfer

to the Bishop of Graham's Town any of the lands then vested in the former and his successors, but situate within the diocese of Graham's Town, subject to the trusts mentioned in the grant, that is to say, that the land thereby granted should for ever thereafter be used for ecclesiastical purposes, in connection with the Church of England, and for no other purpose. In 1860 the first Diocesan Synod of Graham's Town was held, and in 1865 the defendant was appointed to the offices of Rector of St. George's Church, and Dean, in the manner I shall hereafter explain. In 1870 the first Provincial Synod was held, and to the constitution, canons, and resolutions of that Synod I shall frequently have to refer. On the 1st of June, 1871, Bishop Cotterill, by his power of attorney, authorized the transfer of the land in question to the Right Reverend Bishop Cotterill, Bishop of Graham's Town, or the Bishop of Graham's Town for the time being, the Venerable Archdeacon White, Archdeacon of Graham's Town, or the Archdeacon for the time being, the Registrar of the diocese, and the Treasurer of the Board for the endowment fund of the see of Graham's Town, subject to the trusts mentioned in the previous transfer deeds, and on the 17th of June transfer was passed accordingly. In the same year Bishop Cotterill resigned his office and dignity of Bishop of Graham's Town, and on the 21st of July the then Bishop of Cape Town issued a mandate addressed to the defendant, authorizing and commanding the clergy and laity of the vacant diocese who may be entitled to vote in terms of Canon 3 of the Church of the Province of South Africa to proceed to the election of a Bishop. In obedience to the mandate the defendant sent a circular to the clergy and lay representatives of the diocese of Graham's Town, appointing a time and place for a meeting to elect a Bishop of Graham's Town. At the meeting, over which the defendant presided, the plaintiff was elected Bishop, and he was thereafter duly consecrated as such Bishop. From that time until 1875 no dispute appears to have arisen between the parties, but in October of that year the defendant made his first public announcement indicating an intention to sever his connection with the Church of the Province of South Africa. He had been directed to notify in the cathedral that a Provincial Synod would be held in Cape Town on the 25th of

1880.
August 3
" 4.
" 5.
" 6.
" 26.

Merriman *vs.* Williams.

January, 1876, and he now gave the required notice, but at the same time read his own protest, to the effect that such notice was given by him without prejudice to the cathedral, or to the rights and position of members of the Church of England in this Colony. The Provincial Synod was accordingly held, but the defendant did not attend, nor does it appear that he took any part in the election of a clerical representative. From that time until December 1878 disputes of various kinds arose between the plaintiff and the defendant, the chief subject of contention being the right of the plaintiff to preach at his option in the cathedral. Matters were brought to a crisis in April 1879. On the 25th of that month the Registrar of the diocese addressed an official letter to the defendant, formally admonishing him not to hinder the plaintiff from preaching on the following Sunday. On that day the plaintiff attended the cathedral with the object of preaching the sermon, but instead of giving out a hymn, according to custom, immediately before the sermon, the defendant gave out the text of his sermon and began to preach, The plaintiff protested against the defendant's conduct, and left the cathedral. Articles of presentment were thereupon presented against the defendant at the instance of Archdeacon White, charging him with several ecclesiastical offences, the chief of which was that of contumaciously and contemptuously disobeying a lawful requisition not to hinder or prevent the plaintiff from preaching in the cathedral. A Diocesan Court was thereupon held, under the circumstances which I shall have to explain more fully hereafter; the defendant was found guilty of contumacious disobedience, and of conduct giving just cause of scandal to the Church, and was sentenced to be suspended from his ministerial functions for the term of one month, and, further, until he should engage not to repeat the offence. He refused to desist from performing his ministerial functions, or to give the engagement required of him; and accordingly, at a subsequent meeting of the Diocesan Court, over which the plaintiff himself presided, sentence was passed on the defendant excommunicating him from the Church of South Africa. The defendant continued to officiate at the cathedral, and the present action was the consequence.

Such being the facts of the case, the first question which

naturally arises is, What title do they establish in the plaintiff either as Bishop or as trustee, or in any other capacity, in respect of the Church of St. George? For an answer to these questions we are referred by the plaintiff himself, in his declaration, to the letters patent which founded the Bishopric of Graham's Town. Those letters patent undoubtedly ordain and constitute the city of Graham's Town to be a Bishop's see, and the Church of St. George to be the cathedral church and see of Bishop Armstrong and his successors, Bishops of Graham's Town. The subsequent letters patent to Bishop Cotterill are in precisely similar terms. If, therefore, the plaintiff can show that he is, under the letters patent, the successor of the first and second Bishop of Graham's Town, he will, as of course, be entitled to all the rights and privileges which they enjoyed in respect of the cathedral church. If the right of access for the purpose of preaching and performing episcopal functions within the cathedral, without, or even against, the consent of the defendant, is included among those privileges, the Court will be bound, in a suit properly instituted for the purpose, to enforce such right against, the defendant, or any other person interfering therewith. It becomes important, therefore, to ascertain what provisions are made by both the letters patent for the continued existence of the corporation after the death or resignation of the Bishops thereby nominated, or, in other words, in what manner and by what process their successors are to be appointed. Upon this point the terms of the letters patent are clear and unambiguous. "We do by these presents expressly declare that the same Bishop of Graham's Town, and also his successors, having been respectively by Us, Our heirs and successors, named and appointed, and by the Archbishop of Canterbury canonically ordained and consecrated according to the form of the United Church of England and Ireland, may perform all the functions peculiar and appropriate to the office of Bishop within the said diocese of Graham's Town." Now it is admitted that the plaintiff has neither been named and appointed by the Crown, nor ordained and consecrated by the Archbishop of Canterbury; but it is argued that, inasmuch as the Crown had, before the election and consecration of the plaintiff, discontinued the practice of issuing letters patent for the appointment of Bishops in colonies possessing

1886.
August 3.
" 4.
" 5.
" 6.
" 26.

Merriman *vs.* Williams.

representative institutions, the vacancy caused by the resignation of Bishop Cotterill could only be filled by means of a local election and consecration. This argument affords a very good ground for respectfully requesting the Crown to appoint or (which legally amounts to the same thing) to ratify the appointment of the plaintiff as Bishop of Graham's Town, and to issue a licence or mandate for his consecration by the Archbishop of Canterbury, but it does not, in any way, strengthen the plaintiff's title under the letters patent. No such application seems to have been made to the Crown by the authorities of the Church of South Africa, nor do I see how it could have been made consistently with the canons of that Church, even if the Crown were willing to accede to the request. It has been assumed throughout the argument that such a request would not and could not be acceded to; but it is by no means clear to me that the Crown has ever declared its irrevocable intention neither to appoint Bishops for this Colony, nor even, after a local election, to assent to their appointment by issuing a mandate to the Archbishop of Canterbury for their consecration. It may well be that the Crown will not hereafter issue letters patent for the establishment of new bishoprics in colonies possessing representative institutions, but it does not follow that the Crown would refuse, upon representations made from the proper quarter, to nominate or to ratify the local nomination of successors to Bishops appointed under letters patent which reserve the right of nomination to the Crown. At all events there is nothing in law to prevent the Crown from even now naming and appointing some other person than the plaintiff to be the Bishop of Graham's Town, and if a person so appointed were ordained and consecrated by the Archbishop of Canterbury, his title in respect of the cathedral, so far as the existing letters patent are concerned, would be complete. He would not, it is true, by virtue merely of such appointment and consecration, possess any coercive jurisdiction, either ecclesiastical or civil, within this Colony, but his consensual jurisdiction would extend over all those within this colony who had taken the oath of canonical obedience to the first two Bishops of Graham's Town and their successors in office, or had otherwise voluntarily submitted themselves to the authority of that corporation. The plaintiff does not deny the right of the Crown to create the

body corporate known as the Lord Bishop of Graham's Town, and to constitute him and his successors to be a perpetual corporation; but if the letters patent were valid to create a perpetual corporation, they must have been equally valid to regulate the course of succession. The power of the Crown to ordain the Church of St. George to be the cathedral church and see of the Bishop of Graham's Town has been questioned, but I take it that the decision of the Judicial Committee of the Privy Council in the case of *Bishop of Cape Town* vs. *Bishop of Natal* (6 Moore, P. C., N. S., 203) is conclusive on this point. That case has an important bearing upon other parts of this case, as I shall presently proceed to show. It is almost extremely important as containing the latest decision of the Judicial Committee of the Privy Council upon the legal effects of letters patent issued to South African Bishops. The question which there arose was, whether the effect of a certain grant made by the Crown to the Bishop of Cape Town in 1850, and certain letters patent which founded the bishopric of Natal in 1853, was to give the Bishop of Natal the right of access to St. Peter's Church in Pietermaritzburg, and the right to perform there all the services which are or ought to be performed by a Bishop in a cathedral. It appeared that in 1850 the land had been granted to the then Bishop of Cape Town, "and his successors of the said see, in trust for the English Church at Pietermaritzburg, and with full power and authority to possess the same in perpetuity; subject, however, to all such duties and regulations as either are already or shall in future be established with regard to such lands." The letters patent to the Bishop of Natal were issued at the same time and were in the same terms as the letters patent now under consideration. Lord Justice GIFFARD, in delivering the judgment of the Privy Council, after referring to the three previous cases of *Long* vs. *Bishop of Cape Town, in re Bishop of Natal,* and *Bishop of Natal* vs. *Gladstone,* proceeded thus:—"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 these cases, have scarcely been disputed, and cannot be successfully controverted, viz., that the letters patent were not wholly void; that there was by virtue of the defendant's letters patent of 1847, a corporation as such capable of taking under the grant; that there was a valid resignation by the defendant (the Bishop of

1880.
August 3.
" 4.
" 5.
" 6.
" 26.

Merriman *vs.* Williams.

Cape Town) of the office held under the letters patent of 1847; and that by the two letters patent of 1853, of which the plaintiff's (the Bishop of Natal'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 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 it was competent for the Crown, in the words of the letters patent of 1853, to ordain and declare that the church 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 letters patent of 1853 was at least to give the plaintiff the right of access to the church, the right to officiate there as Bishop, and the right to perform there all the religious services which are or ought to be perfomed 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. Their Lordships, founding their judgment on all these considerations, and having regard, also, to the former decisions of their Committee in the matter of the Bishop of Natal, do not hesitate to state with respect to the defendant, the appellant here, that he had and has no estate or title as trustee or otherwise, and no right to interfere." With the exception of the circumstance (which does not affect this case) that the districts comprised in the diocese of Graham's Town are not separate (as Natal is) from the Cape of Good Hope, all the remarks made by the Privy Council in regard to the see of Natal are applicable, *mutatis mutandis*, to that of Graham's Town as it existed at the time of Bishop

Cotterill's appointment. The grants of the site of the church and deanery in Graham's Town made by the Crown to the Bishop of Cape Town in 1849 and 1850 are almost identical in their terms with the grant of the site of St. Peter's in Natal in 1850, the only difference being that, in the grant of 1849, the terms employed to create the trust are, "the land hereby granted shall for ever hereafter be used for ecclesiastical purposes in connection with the Church of England, and for no other purpose or use whatever," and, in the grant of 1850, "the land hereby granted shall be appropriated for ever hereafter for ecclesiastical purposes in connection with the Church of England," instead of the words used in the Natal grant, "in trust for the English Church at Pietermaritzburg." The decision of the Privy Council is, therefore, a clear authority for the view that, by virtue of the grants to the Bishop of Cape Town and the letters patent issued to Bishop Cotterill, the latter had the right before 1863 to officiate in the Church of St. George's as Bishop; and, inferentially, it is an authority for the position that, but for his letters patent, he would have possessed no such right without the consent of the incumbent. In the year 1863 the land was transferred to Bishop Cotterill and his successors in office, with the proviso that the land so transferred should be subject to the same trusts in all respects after such transfer as it was subject to at the time of such transfer. The insertion of this proviso was required by the 1st section of Act 30 of 1860. That Act was passed, as the preamble states, in consequence of doubts which existed whether the alienation of Church property could be legally made by the Bishops of Cape Town and Graham's Town. These doubts arose, not as to the validity of the letters patent of the then Bishops (for the Act recognizes them as Bishops, and as being capable of having legal successors), but as to the power of ecclesiastical corporations to alienate land, except for good cause shown and with certain cumbrous formalities. Upon this point I need do no more than refer to *Muhlenbruch's* "*Doctrina Pandectarum*," section 201:—"*Rerum ad pia corpora spectantium alienatio fieri non potest, nisi certis ex causis certisque adhibitis solemnitatibus.*" At that time it was assumed that the Bishop of Cape Town, notwithstanding his resignation of the office held under the letters patent of 1847, had a legal estate in land granted

1880.
August 3.
" 4.
" 5.
" 6.
" 26.

Merriman *vs.* Williams.

to him in his corporate capacity, after his resignation and before his appointment under the second letters patent. That estate he transferred to Bishop Cotterill and his successors in office. After such transfer, Bishop Cotterill possessed, in addition to the rights which I have already mentioned as vested in him before 1863, an estate in the land recognized and sanctioned by the legislature of this Colony. That title he could lawfully alienate, under the provisions of Act 30 of 1860, or he might transmit it to his successors. In 1871 he transferred the land to the Bishop of Graham's Town for the time being, and certain other parties mentioned in the transfer. The defendant denies the validity of the transfer, on the ground that the requisite consent was not obtained; but so long as the transfer, which in this Colony is a judicial act, stands registered in the Deeds Office, it must be assumed to be valid until judicially set aside. The more important question upon this part of the case is, Who is meant by the "Bishop of Graham's Town for the time being"? Here, again, we can only look at the letters patent—the charter of incorporation, if I may so call it,—of Bishop Cotterill, and we find that none can be his successor as Bishop of Graham's Town unless nominated by the Crown and consecrated by the Archbishop of Canterbury. Clearly, therefore, the plaintiff has established no estate or title under Act 30 of 1860, or under the transfer of 1871. But a stronger, and at the same time less technical, objection to the plaintiff's title in respect of the Church of St. George still remains to be considered. That church was founded by and for members of the Church of England. The grant of the land upon which it stood was made by the Crown to the late Bishop of Cape Town, upon the distinct trust that it should for ever thereafter be used for ecclesiastical purposes in connection with the Church of England, and for no other purpose or use whatever. But over and above the private trusts attaching to the church by virtue of its first foundation, and of the conditions imposed by the Crown, the statute law of the land imposes upon those who have the custody of the church and the administration of its affairs, the obligation to hold it in trust for the members of the Church of England in Graham's Town. The 25th section of Ordinance No. 2 of 1839 enacts that "this Ordinance shall be deemed and taken to be a public

Ordinance, and shall be judicially taken notice of by all judges, magistrates, and others, without being specially pleaded." The preamble recites that, "it is expedient that the inhabitants of Graham's Town and the parochial limits thereof, being members of and holding communion with the United Church of England and Ireland as by law established, should be invested with the right and privilege of choosing and appointing, under certain regulations, a vestry and churchwardens, for the better and more effectual administration and management of all matters connected with the Church of Graham's Town called St. George's Church, and that the said vestry and churchwardens, after having been duly appointed, should possess certain powers and perform certain duties, as the same are usually possessed and exercised by such officers, according to the customs and usages of the said United Church of England and Ireland." In the body of the Act full effect is given to the objects of the Act as recited in the preamble. Only male inhabitants of Graham's Town, who are members of and hold communion with such United Church, are entitled to elect a vestry or to be elected as vestrymen. By the 8th section, the vestrymen are authorized "to adopt or rescind such rules as may to them appear expedient for their guidance in the discharge of their duties," and also "to make such order for the management of the said church as shall to them seem expedient," but they are expressly forbidden from framing any rules which shall be repugnant to the customs and usages of the United Church of England and Ireland. The 16th section enjoins the churchwardens and the officiating minister for the time being faithfully to administer money contributed for charitable or religious purposes connected with the said church and congregation, or to "see that they be faithfully administered and appropriated in the manner and for the purposes contemplated and intended by the persons contributing to the same." The 19th section, clearly having in view the spiritual wants of civil and military authorities, soldiers, and poor people resident in Graham's Town, who are members of the Church of England, enacts that there shall be set apart certain pews for the use of the chief civil and military authorities and officers of the garrison, and an adequate number of free sittings for the use of the troops and the accommodation of poor people. The 22nd section

1880.
August 3.
" 4.
" 5.
" 6.
" 26.

Merriman *vs.* Williams.

enacts that the burials of all persons according to the rites and ceremonies of the Church of England shall take place in ground consecrated and allotted to the said Church for that purpose. An objection to the application of this Ordinance, in the present case, has been raised on the ground that the Church of England and Ireland no longer exists, inasmuch as the Church of Ireland has been disestablished, and the union between the two Churches dissolved by an Act of the Imperial Parliament (32 & 33 Vict. c. 42), but it is a sufficient answer to this objection to say that by the same Act it is provided that enactments relating to the said United Church shall be read distributively in respect of the Church of England and the Church of Ireland. The 22nd section of the Ordinance mentions the Church of England alone, and the Ordinance, taken as a whole, sanctions and by implication directs the setting apart of St. George's Church, for the religious worship of members of the Church of England, under the spiritual guidance of ministers of the Church of England, and according to the laws and usages of the Church of England, so far as they are applicable in this Colony. Any doubts which might still remain on this matter are removed by the provisions of Act 30 of 1860. The 1st section of that Act, sanctioning and continuing as it does the terms of the trusts created by the grants made by the Crown to the Bishop of Cape Town, amounts to a distinct legislative provision that the church shall be used for ecclesiastical purposes in connection with the Church of England, and for no other purpose or use whatever. It is too late to contend, as has been done in the present case, that there can be no identity, such as the law will recognize, either in temporal or ecclesiastical matters, between the Church of England in South Africa and the Church of England in the mother country. That identity has been assumed by the two colonial statutes just mentioned, and recognized by the decisions of the Privy Council in the cases already referred to, and of the MASTER OF THE ROLLS in the case of *Bishop of Natal* vs. *Gladstone* (3 L. R. Eq., p. 1). In England, no doubt, it is an established Church, with all the rights and responsibilities of an established Church; in this Colony it is a voluntary society, constituted and subsisting by mutual agreement. It follows that the Church of England in South Africa is not governed by those rules and

laws which are confined, in their operation, to the limits of England, or which are only applicable to an established Church, but it does not follow that the two Churches are separate and distinct. The provisions of Ordinance No. 2 of 1839 bearing upon the point have already been quoted. The 5th section of Act 30 of 1860 provides that, "in the interpretation of this Act, the term 'parish' shall mean any defined district of town or country placed by the Bishop of the diocese, acting in accordance with the laws and usages of the Church of England, as received and accepted in this Colony, under the pastoral charge of a particular minister; and the Bishops and clergy mentioned in this Act shall mean the Bishops and clergy of the said Church," that is, of the Church of England. Here there is a clear recognition by the legislature of the valid existence in this Colony of a voluntary association of Bishops, clergy, and members of the Church of England, who are governed in their internal relations towards each other by the laws and usages of the mother Church so far as they are applicable here. At the time of the passing of the Act the Church of South Africa, as it now exists, had not yet been founded, and the words "as received and accepted in this Colony" can only be taken to refer to such laws and usages of the Church of England as, regard being had to the different circumstances of the Colony, are capable of being here applied, and were, at the time of the passing of the Act, so applied. In the case of *Long* vs. *Bishop of Cape Town* (1 Moore, P. C., N. S., p. 411), the judgment of the Supreme Court, as well as that of the Privy Council, was based upon the assumption that the Church in this Colony, over which Dr. Gray then presided as Bishop, was an association of members of the Church of England governed by the laws of the Church of England, so far as applicable here, and under the spiritual guidance of ministers of the Church of England, and that it was to this extent a branch of the Church of England. "We think," said Lord KINGSDOWN, in delivering the judgment of the Privy Council, "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 the taking the

1880.
August 3.
" 4.
" 5.
" 6.
" 26.

Merriman *vs.* Williams.

oath of canonical obedience to his Lordship, and accepting from him a licence to officiate and have the cure of souls within the parish of Mowbray, ... 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, 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 so far as applicable here, govern both." The principles laid down in this case were subsequently adopted and professedly followed by the Judicial Committee in the case *In re Bishop of Natal* (3 Moore, P. C., N. S., p. 115). In the latter case it was no doubt decided that after the establishment of an independent legislature in this Colony and Natal, there was no power in the Crown by virtue of its prerogative to establish a metropolitical see or province, or to create an ecclesiastical corporation whose *status*, rights, and authority, the Colony could be required to recognize, or to confer coercive jurisdiction upon the Metropolitan over the Suffragan Bishops, or over any other person. "It may be true," said Lord WESTBURY, in delivering the judgment of the Judicial Committee, "that the Crown, as legal head of the Church, has the 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 recognized by the law of the Colony, otherwise than as the members of a voluntary association." It would seem to follow that, in the opinion of the Judicial Committee, the authorities and those who bear office in the Church of England in this Colony may claim to be recognized as a voluntary association; the fact that they constitute a voluntary association and not an established Church, and that, as a consequence, their Bishops possess only consensual and not coercive jurisdiction, is not sufficient to destroy the legal identity between such an

association and the Church of England. Such at all events was the opinion of Lord ROMILLY, who was one of the judges before whom *In re Bishop of Natal* was heard in the Privy Council. In the case of *Bishop of Natal* vs. *Gladstone* (3 L. R. Eq., p. 44), after referring to the cases of *Long* vs. *Bishop of Cape Town* and *In re Bishop of Natal*, Lord ROMILLY says, "So far from arriving at the conclusion which has been pressed upon me in argument in various forms, and which may be stated thus, that these decisions have established or rather pointed out that no legal identity exists between the Church presided over by the Bishops in colonies with established legislatures and the United Church of England and Ireland, I have arrived at the exactly opposite conclusion, that is, I have come to the conclusion that, but for these decisions, such identity, though now existing, would very speedily cease to exist." And in another portion of his judgment he says, "Where there is no State religion established by the legislature in any Colony, and in such a Colony is found a number of persons who are members of the Church of England, and who establish a Church there with the doctrines, rites, and ordinances of the Church of England, it is a part of the Church of England, and the members of it are, by implied agreement, bound by all its laws. In other words, the association is bound by the doctrines, rites, rules, and ordinances of the Church of England, except so far as any statutes may exist which (though relating to this subject) are confined in their operation to the limits of the United Kingdom of England and Ireland." We may take it then to be reasonably clear that the provisions of the grants and statutes now under consideration devoting certain property to the ecclesiastical uses of the Church of England, are quite capable of being carried into effect, and that they would be carried into effect only so long as the association, whose authorities exercise control over the property and perform ecclesiastical functions in the church erected on the property, remains and professes to remain, so far as the circumstances of the Colony will permit, a part of the Church of England, and continues as well as professes to continue to be bound by the doctrines, rules, ordinances, and other laws of the Church of England so far as they are applicable here. It is not alleged on the plaintiff's behalf that he is a Bishop of the

1880.
August 3.
,, 4.
,, 5.
,, 6.
,, 26.

Merriman *vs.* Williams.

Church of England, but it is contended that by virtue of his election and consecration he is "lawfully invested with the indelible characteristics of the episcopate," and that as Bishop "he has the right of officiating and performing all ecclesiastical functions within the said cathedral church." It is clear, however, that his episcopal capacity alone would not confer upon him this right, and we are therefore bound to ascertain by what religious body he was appointed and consecrated as Bishop, and entrusted with the charge of the diocese of Graham's Town. That religious body is admitted to be the Church of the Province of South Africa. If that body is a part or branch of the Church of England, in the sense already explained, this Court would of course be bound to uphold its rights as against all persons who interfere therewith. If it is not and does not profess to be a part or branch of the Church of England, if it is not bound and does not profess to be bound by the doctrines, rules, and ordinances of the Church of England, even so far only as they are applicable in South Africa, it is difficult to see upon what grounds this Court can be asked to impose its Bishop upon an unwilling congregation of members of the Church of England, in respect of a Church which the law of the land has devoted to "ecclesiastical purposes in connection with the Church of England." We are therefore forced into the inquiry whether the Church of the Province of South Africa is a part or branch of or in any way legally identical with the Church of England, an inquiry which I for my part would gladly have avoided. The designation which it has assumed is important, but it is not decisive upon the question. Besides, it must be borne in mind that the preliminary resolution passed by the Provincial Synod of 1870 expressly declares that the title of the "Church of the Province of South Africa" is not intended to exclude other titles (such as English or Anglican Church), but is used to express the fact that the whole Church thus exhibited is united in this provincial organization through which it is connected with other Churches of the Anglican Communion, and with the Church of England in particular. A more important departure from the principles of the Church of England is to be found in the following proviso to the first article of the Constitution of the Church of South Africa:—"Provided that, in the interpretation of the standards

and formularies, the Church of this province be not held to be bound by decisions in questions of faith and doctrine, or in questions of discipline relating to faith or doctrine, other than those of its own ecclesiastical tribunals, or of such other tribunal as may be accepted by the Provincial Synod as a tribunal of appeal." No such tribunal of appeal appears to have been accepted, but the 9th clause of Canon 22 provides that, "should a spiritual tribunal be hereafter constituted in accordance with the provisions contained in Report II. of the Lambeth Conference, or by any future general Synod of the Churches of the Anglican Communion, appeal from the sentence of the Provisional Court, in a question of faith or doctrine, may be carried to such tribunal, or if three Metropolitans of the Anglican Communion unite in requiring that the case, or any portion thereof, shall be reheard or reviewed, it shall be so reheard or reviewed." It is clear, therefore, in the interpretation of the "standards and formularies in questions of faith and doctrine," decisions of the Queen in Council, which are binding upon the Church of England, are not recognised as binding upon the Church of South Africa, and, as if to leave no doubt upon the matter, another canon (the 30th) declares, "that if any question should arise as to the interpretation of the canons or laws of this Church, or of any part thereof, the interpretation shall be governed by the general principles of canon law thereto applicable." The Judicial Committee, on the other hand, is guided, not by the general principles of canon law, but by the laws of England. In support of this statement, I need only refer to one passage in the judgment of the Privy Council in the case of *Williams* vs. *The Bishop of Salisbury* (2 Moore, P.C., N.S., p. 424):—"Our province is, on the one hand, to ascertain the true construction of those articles of religion and formularies referred to in each charge according to the legal rules for the interpretation of statutes and written instruments; and, on the other hand, to ascertain the plain grammatical meaning of the passages which are charged as being contrary to, or inconsistent with, the doctrine of the Church, ascertained in the manner we have described." The same principles would guide this Court if any case involving the faith or doctrine of the Church of England were properly brought before it. Any mistake made by this Court in the application of those principles

1880.
August 3.
" 4.
" 5.
" 6.
" 26

Merriman *vs.* Williams.

would be rectified by the Privy Council as the Supreme Court of Appeal. If, however, the jurisdiction of the Civil Courts in South Africa is excluded, that of the Privy Council would be equally excluded. It may, no doubt, be said that the Judicial Committee, in deciding questions of faith or doctrine, does so as a Court of ecclesiastical appeal in respect of the Established Church of the realm and not in the same capacity in which it entertains appeals from the Civil Courts of the Colonies, but we may safely assume that the decisions of the Judicial Committee as an Ecclesiastical Court would be held to be conclusive by the same Committee as a Civil Court of Appeal. The Church of South Africa, however, so far from holding such decisions to be conclusive, expressly refuses to be bound by them, and acknowledges no other tribunal for the decision of questions of faith and doctrine, or questions of discipline relating to faith and doctrine, than its own Ecclesiastical Courts. Such an assertion of its independence by a voluntary Church is quite intelligible, and appears by no means unreasonable, but still the fact remains that it has, by its own act, severed one of the connecting links which might still have kept it bound to the mother Church. By refusing to be bound by the decisions of the Queen in Council in questions of faith and doctrine, and by laying down different rules of interpretation from those which are accepted by the Judicial Committee, the Church of South Africa has effectually excluded the possibility of uniformity of faith and doctrine between the two Churches. The first article of the constitution of the Church of the Province of South Africa contains another proviso, which may hereafter lead, if it has not already led, to a departure from the doctrines of the Church of England. The proviso is, that nothing herein contained shall prevent the Church of this province from accepting, if it shall be so determined, any alterations in the formularies of the Church (other than the creeds) which may be adopted by the Church of England, or allowed by any general Synod, Council, Congress, or other "Assembly of the Churches of the Anglican Communion." The consequence is that no alteration in the formularies of the Church of England, other than the creeds, will be binding upon the Church of South Africa until accepted by it; and as to the creeds, if any of them, such as the Athanasian Creed,

should hereafter be rejected by the mother Church, it would be impossible for the Church of South Africa, with its present constitution, to consent to such rejection. Here, again, I can quite appreciate the unwillingness of the Church of South Africa to be bound by laws of the Imperial Parliament, in the election of the members of which they have no part; but, on the other hand, if it desires to have all the advantages of a perfectly free and independent Church, it cannot claim to be part of the Church of England, and as such entitled as of right to the endowments devoted to that Church in this Colony. Nor can the argument of want of representation be carried too far, for even in temporal affairs the Imperial Parliament retains the power of legislating for the Colonies, none of which sends representatives to that Parliament. Coming next to the appointment of Bishops, we find in the 3rd canon elaborate rules laying down the mode of election. In none of them is any licence, mandate, or consent of the Crown or its representative in the Colony required; in none of them is it provided that such licence, mandate or consent should be asked for. It was said at the bar that the Crown has refused to have anything to do with the appointment of Bishops in the Colonies, but the constitution and canons do not allege such refusal as a reason for excluding the co-operation of the Crown. On the contrary, if we are to judge from the 15th resolution of the Provincial Synod of 1870, the possession of letters patent by the then Bishops appears to have been considered a hindrance rather than an aid to the development of the Colonial Church, and the question appears to have been discussed whether their sees, under letters patent, ought not to be resigned. The decision, which was in a qualified negative, was in the following terms:—"That this Synod, having absolute confidence in the integrity of the existing Bishops of this province, and being assured that legal obligations are not needed to secure their obedience to synodical acts, constitutions, or rules, to which they have themselves been consenting parties, is of opinion that the resignation of their sees, as held under letters patent, would for the present be inexpedient." Certainly, the unwillingness of the Crown to co-operate in the appointment of Bishops cannot be used as an argument by those who, by their own acts, have excluded such co-operation. Nor can

1880.
August 3.
,, 4.
,, 5.
,, 6.
,, 26.

Merriman *vs.* Williams.

it be said that such co-operation would put an end to the voluntary nature of the association, for the fact that Bishop Gray had been appointed by the Crown did not prevent the Privy Council from holding, in the case of *Long* vs. *Bishop of Cape Town*, that the branch of the Church over which he presided as chief pastor was a voluntary association, whose clergy and members are bound by the laws of the Church of England, so far as they are applicable here. So also in the case of *Bishop of Cape Town* vs. *Bishop of Natal*, the Privy Council, whilst admitting that the Church of England in Natal is a purely voluntary body, recognized the right of the Crown to co-operate with that body for certain purposes by appointing the Bishop of Natal. Of course, no coercive jurisdiction could be conferred by the Crown on Bishops in Colonies, like the Cape and Natal, which possessed independent legislatures, but this defect could be supplied, and was actually supplied, by the voluntary submission of the Clergy of the Church of England in these Colonies to the authority of the Bishops appointed by the Crown, and their duly appointed successors. As to the present Bishop of Natal, his *status* as such has likewise been recognized by the MASTER OF THE ROLLS, and his consensual jurisdiction over his clergy has been supported by the Supreme Court of Natal. Yet we find that he neither attended the Synod of 1870 nor that of 1876, although his diocese lies within the province of South Africa, as defined by the 24th article of the Constitution of the Church of South Africa; that he was intentionally excluded is clear from the 3rd sub-section of this article:—"By the Bishops of the said dioceses are meant the Bishops whose names are set forth in Schedule C, hereto annexed, or those persons who shall hereafter hold the bishoprics set forth in Schedule B, according to the rules prescribed by the Provincial Synod for determining the succession and appointment to bishoprics in this province; and by Bishops of this province are meant the Bishops of the said dioceses, and all others who are and shall be recognized as Bishops of the province by the Provincial Synod." Among the Bishops mentioned in Schedule C is the Right Reverend William Kenneth Macrorie, Bishop of Maritzburg, and in Schedule B his diocese is said to be that of Maritzburg or Natal, being the Colony of Natal. By what process of reasoning, then, can a Church, which

excludes from any direct or indirect representation in its supreme legislative body a Bishop of the Church of England having a diocese within the province, claim to be part and parcel of the Church of England? The difficulty of finding an answer to this question becomes still greater when we bear in mind that, instead of the lawful Bishop of the Church of England in Natal, the Bishop of Maritzburg, who holds no appointment from the Crown, and whose diocese is situated within the same limits as that of Bishop Colenso, is admitted and recognised as a member of the Provincial Synod of the Church of South Africa. Either this Church refuses to recognize the law of the land as expounded by its Courts of Law (a supposition which I cannot for one moment entertain), or it has separated itself root and branch from the Church of England. Let me not be misunderstood upon this matter. I do not for an instant presume to find fault with the course which the Church of South Africa has pursued to secure its freedom from external control. But I do say this, that if the Church has separated itself from the mother Church, let it not claim, as of right, endowments which have been secured for members of the Church of England by private trusts, as well as by the public law of the land. Upon every principle which regulates the relations of religious bodies towards each other, the Church of South Africa seems to be separate and distinct from the Church of England, and no authority appears to me to be required in support of this view. If authority were wanting, I need only refer to the judgment of the MASTER OF THE ROLLS in the case which I have already mentioned. I know that that judgment has been subjected to much adverse criticism in some quarters, nor am I prepared to accept every one of the *dicta* there employed, but the decision itself has not been appealed against, nor have the principles upon which the judgment was founded, so far as I am aware, ever been over-ruled. It was necessary for the MASTER OF THE ROLLS to decide what was the real *status* of Bishop Colenso as a Bishop of the Church of England in Natal, and, for that purpose, to distinguish between the conditions of the Church of England and other voluntary religious societies in Natal. "That any number of persons," he said, "if they so pleased, might, though holding the doctrines of the Church of England, reject,

1880.
August 3.
" 4.
" 5.
" 6.
" 26.

Merriman *vs.* Williams.

either wholly or in part, the discipline and government of the Church, though they preserved still the creed, faith, and doctrines of the Church of England, is unquestionable. Such an association might elect their own Bishop; they might divide the district in which they reside into sees, and elect a Bishop for each; they might parcel the district out into parishes, and appoint a minister to officiate in each parish; all this they might do, and all this would be perfectly legal, and all this would be binding on the members of the association who assented to it, as it is now in the Episcopal Church in Scotland, which is not, and by the Act of Union is prohibited from being, a part of the Church of England, and in which the Crown is prohibited from appointing or nominating any Bishop. If dissensions arose among the members of such a Church, they must have recourse to the civil tribunals; but when they did so, the question would be tried by their own rules and ordinances, which would have to be proved by evidence in the usual manner. But this association would not be a branch of the Church of England, although it might call itself in union and full communion with it. By the law of the Church of England, the Sovereign is the head of the Church, and, in substance (for the *congé d'élire* is nothing more than a form), no bishop can be lawfully nominated or appointed except by the Sovereign, nor, as I apprehend, could any person be legally consecrated a Bishop of such Church unless by command of the Sovereign." And further on the MASTER OF THE ROLLS says: "The members of the Church in South Africa may create an ecclesiastical tribunal to try ecclesiastical matters between themselves, and may agree that the decisions of such a tribunal shall be final, whatever may be their nature or effect. Upon this being proved, the civil tribunal would enforce such decisions against all the persons who had agreed to be members of such an association, that is, against all the persons who had agreed to be bound by these decisions, and it would do so without enquiring into the propriety of such decisions. But such an association would be distinct from, and form no part of the Church of England, whether it did or did not call itself in union and full communion with the Church of England." It will be observed that, for the purposes of the present case, it is not necessary to adopt the reasoning of LORD

ROMILLY in its entirety, for the constitution and canons of the Church of South Africa contain, as I have already endeavoured to show, other and more important points of departure from the Church of England than those which have been suggested by him. And not only do these canons depart from the general laws of the Church of England, but some of them appear to infringe upon the special laws made by the Colonial Legislature for the management of St. George's Church. Thus we find that the persons indicated by the ordinance as parishioners are male inhabitants of Graham's Town, being members of and holding communion with the Church of England, whereas, under the 24th canon, "by parishioners shall be understood any person, not being under Church censure, who is on the list of communicants, or (except the Synod of the diocese have ruled or shall rule to the contrary) who, being baptized, and not being a member of any other religious body, is an habitual worshipper in the church or chapel of the parish or district in respect of which he claims to vote." Then again, as to churchwardens, the 25th canon requires that they shall be communicants, of the age of twenty-one years and upwards, and shall be chosen by the joint consent of the minister and parishioners, whereas under the ordinance the churchwardens are to be chosen by the vestry out of their own number, all of them being members of the Church of England. It is true that the 16th article of the Constitution excludes the right of the Provincial Synod to frame regulations for the mode of managing property, where such management is provided for by law, or by the terms of any special trust, but as to the qualifications of parishioners and churchwardens the 24th and 25th canons are general in their terms, and contain nothing to save the rights of churches, for which other provisions are made by law. In respect of one of these churches, situated within the limits of his diocese, the plaintiff now claims to have his episcopal rights declared. That claim involves the transfer of the Church of St. George from the jurisdiction of the Church of England to that of the Church of South Africa, of the congregation from the spiritual guidance of a minister of the Church of England to that of ministers who may or may not belong to that Church, and of the management of its temporal concerns from a select vestry of members of the

1880.
August 3.
,, 4.
,, 5.
,, 6.
,, 26.

Merriman *vs.* Williams.

Church of England to a vestry not necessarily consisting of members of that Church. Such a claim involves, as I have already attempted to show, a manifest illegality. In and over the religious body which has appointed the plaintiff as its chief pastor, he is a Bishop entitled to exercise the spiritual functions and consensual authority of a Bishop, and within any Church lawfully devoted to the ecclesiastical uses of that body he is entitled to perform all those episcopal functions which appertain to his office, according to the rules and canons of that body, but he has not, as of right, any episcopal authority in and over the Church of England, as received and accepted in this Colony (in the sense already explained), or within any church devoted by law, or by private deeds of trust, to the uses of the Church of England.

Thus far I have considered the legal position of the plaintiff in regard to St. George's Church, Graham's Town. I shall now proceed to discuss the defendant's position in regard to the same church. He received his appointment as Colonial Chaplain in connection with the Church of England from the Imperial Government, upon the recommendation, it would seem, of Bishop Cotterill. He contends that this appointment vested in him the incumbency of St. George's, but I can find no sufficient authority for this contention. It is admitted that successive Colonial chaplains appointed by the Imperial Government have officiated in that church, and, until the appointment of the defendant, have been considered the incumbents, but I am not satisfied that this usage is sufficient to establish the defendant's claim. Strangely enough, there is no evidence in the present case to show by whom he was appointed rector. He states that he took possession as rector by accepting the keys from the select vestry, elected under the ordinance, and there is no evidence to disprove this statement. We may assume, however, that all parties concerned took it for granted that his appointment as rector would, *de facto*, carry with it the incumbency of St. George's Church. He was subsequently installed by Bishop Cotterill, in consequence of a verbal promise, which had been made to him by the Bishop in England, that the Colonial chaplaincy would also carry with it the dignity of Dean of the cathedral. It has been suggested, rather than stated, in the course of the

argument, that letters of institution were granted to him as Dean, but if such letters were issued they have not been put in evidence, and neither party has given or tendered secondary evidence of their contents. We may fairly assume, however, that the dignity would not have been conferred on the defendant if he had not taken the oath of canonical obedience to the Bishop of Graham's Town, and had not made the solemn declaration that he would submit to the rules and regulations of the Synod of the Diocese of Graham's Town, in all things not contrary to the laws of the United Church of England and Ireland. At that time the Bishop of the diocese, to whom obedience was sworn, was a Bishop of the Church of England, duly appointed by the Crown and consecrated by the Archbishop of Canterbury, and the only rules and regulations of the Synod of the diocese which were then in existence do not, so far as I can gather, indicate any intention of founding a church distinct from the Church of England. On the contrary, these rules and regulations carefully guard against any such separation. In the preface to these rules and regulations the Bishop pledges himself to act in concurrence with the Diocesan Synod "in applying to the Church of this diocese the laws and usages of the Church of England." In the first chapter, clergymen who are to have seats in the Synod are spoken of as clergymen "of this branch of the United Church of England and Ireland," and laymen before voting for lay representatives, are required to declare that they are members "of the branch of the United Church of England and Ireland in this diocese." In the ninth chapter a similar declaration is required from persons not being communicants, who claim to be entitled to the rights of parishioners. And, as if to leave no room for doubt, the rules and regulations conclude with the declaration, that nothing therein contained, "is intended to affect or change the position of the Church in this diocese, or the relation of its members towards the United Church of England and Ireland, and that the Church of this diocese remains as heretofore an integral portion of the Church of England." The rules and regulations do indeed contain a provision for the election of clerical and lay members "in such manner as the Bishop may determine, to sit in a Provincial Synod, should one be summoned before the next meeting of the Synod of the diocese," but a

1880.
August 3.
,, 4.
,, 5.
,, 6.
,, 26.

Merriman *vs.* Williams.

provision of this nature cannot be held, in the face of the emphatic declaration just quoted, to bind every person who accepts the rules and regulations to whatever canons might thereafter be framed by the Provincial Synod, however widely they might depart from the principles and practice of the Church of England. For the purpose of the contract between Bishop Cotterill and the defendant, "we are to take them as having contracted that the laws of the Church of England shall, as far as applicable here, govern both." It was upon this understanding that the defendant left his cure in England, accepted the Colonial chaplaincy from the Imperial Government, and received from the select vestry possession of the church as its incumbent, and it was upon this understanding, we are bound to assume, that the vestry parted with the keys, and that Bishop Cotterill, on his return from England, installed the defendant as Dean of the cathedral, with all the rights and privileges attaching to that dignity. In the view which I take of this case, it is unnecessary to enquire minutely what those rights and privileges are. The defendant seems to hold, that in his capacity as Dean, he might have prevented Bishop Cotterill from preaching in the cathedral, and that even if the plaintiff were a Bishop of the Church of England, presiding over the diocese of Graham's Town, and having St. George's Church as his cathedral, he would not be entitled to preach therein without his (the Dean's) consent. This is certainly a startling proposition, in respect of a Colonial cathedral, which has only recently been established as such, and in regard to which no express exemptions have been proved. The authorities which have been quoted seem to point in an opposite direction, and, if it were necessary for this Court to decide this question, I should be disposed to agree with the Diocesan Court, that the proposition is untenable. But it is unnecessary for me to express any opinion upon this point, inasmuch as I am clearly of opinion that the plaintiff does not occupy the same position relative to the Dean and the cathedral as Bishop Cotterill did. But for the fact that the defendant has taken part in the Provincial Synod of 1870, and in the subsequent election, consecration, and recognition of the plaintiff as Bishop of the Church of South Africa, his right to resist the plaintiff's demands would, in my opinion, have been clear and indisputable.

This leads me, then, to the consideration of the important question, whether the defendant has not, by his acts and conduct subsequent to his appointment, conferred upon the plaintiff the rights which he seeks to establish in the present action. It has been contended very forcibly and very fairly on the plaintiff's behalf that the defendant, having himself become a member of the Church of South Africa, having taken part in the election and consecration of the plaintiff as his Bishop, and having, in various ways, recognized the plaintiff's episcopal authority in reference to the Church of St. George, is estopped from setting up the defence which his pleas disclose. He has, it is averred, "both expressly and by implication, assented and consented, and subjected himself to the rules for enforcing discipline in the said Church and within the said diocese of Graham's Town by taking part in the Provincial Synod of 1870, by taking part in the Diocesan Synod of Graham's Town, by convening an Elective Assembly, and presiding at the election of and thereafter duly installing the present Bishop of Graham's Town, in express conformity with the canons of the said Church." Now, I may state at once that this averment has been proved to my satisfaction. It is idle for the defendant to deny that he joined the Church of South Africa, and became personally subject to its constitutions and canons in the face of the part which he took in the discussions of the Provincial Synod of 1870, and in the absence of any protest against the separatist canons adopted by that Synod. It is still more idle for him to deny that he has subjected himself personally to the episcopal jurisdiction of the plaintiff, according to the laws of the Church of South Africa, in the face of the documentary proof which exists of his active participation in the election of the plaintiff. At first sight it would appear to be contrary to all reason and common sense that the defendant should now be allowed to resist the plaintiff's claims; but the more I have considered what those claims really are, and what consequences they necessarily involve, the more convinced I am that the defendant is not precluded by law from resisting them, and that the objections to his so doing are more apparent than real. We are not now concerned with the question whether the Right Reverend plaintiff has been treated in this matter with that consideration, respect, and good feeling to which his years,

1880.
August 3.
" 4.
" 5.
" 6.
" 26.

Merriman vs. Williams.

if not his position, as the chief pastor of the Church of South Africa, and his labours as a missionary Bishop, have fairly entitled him. This is a Court for the enforcement of the laws of the land, and not for the inculcation of Christian charity. If the defendant's contentions are sound in law, the Court is bound to give effect to them, without regard to the question whether they have been raised in a proper spirit or not. The real question is, Are they legally sound? Now it is by no means clear to me that the principles of the English law relating to estoppel are applicable without any modification to the law of this Colony. No doubt by our law an agreement may be implied from the acts or conduct of a person without any express contract, and the Court will in all cases refuse to assist him in acting against or setting aside such implied agreement. Such an agreement may not be clothed with any binding legal force, so as to justify the Court in enforcing it at the suit of either party; but the Court will take cognizance of it as a ground of defence to an action brought by the person whose words, acts, or conduct have raised such implied agreement. In the Roman law sense of the term such a pact is said to be naked (*nudum*), and the rule applies, *nuda pactio obligationem non parit, sed parit exceptionem*" (Dig. 2, 14, 7, § 4). Now, under the Roman-Dutch law the distinctions between agreements which are a ground of action and those which only constitute a ground of defence has to a great extent been obliterated; but in the case of such an implied agreement as that which I have supposed the rule would still apply, "*favorabiliores rei potius quam actores habentur*" (Dig. 50, 17, 125). I may illustrate my meaning by reference to a Scotch case in appeal decided in the House of Lords, which was not mentioned in the argument, but which I have since found, viz., the case of *Cairncross* vs. *Lorimer* (7 Jur., N. S., part 1, page 149). There it appeared that in 1827 some members of a dissenting congregation acquired a piece of ground upon which they built a chapel, which was conveyed to trustees to be held by them "in trust and for behoof of the associate congregations of original seceders at Carnoustie, to whom solely, and those who shall in time coming accede to them and continue in adherence to the aforesaid original principles of the secession, the said subjects shall belong." All questions of adherence to such principles were

to be decided in a certain manner. The congregation continued to use the chapel until 1852, when a large majority, including the minister, joined another dissenting body called the "Free Church," which was considered to hold the same doctrines. In 1856 certain members, forming part of the minority of the original congregation, instituted a suit to have it declared that the chapel belonged to and was to be held for the use of those only who adhered to the original doctrines. The defendants pleaded that it was competent for the congregation to join the Free Church, and that the plaintiffs had acquiesced in the proceeding, and were now estopped from complaining. The Court of Session held that the plaintiffs had not objected in due time to the proposed amalgamation with the Free Church, and dismissed the suit. On appeal, the House of Lords affirmed the decision. The terms of LORD CAMPBELL'S judgment were perhaps more general than were required for the decision of the case, but he distinctly observed that the plaintiffs brought the action "as individuals for a personal wrong which they individually suffer from the wrongful intrusion of others." LORD WENSLEYDALE dissented from the judgment; but LORD KINGSDOWN, after expressing his concurrence in the judgment, added, "I regard this as simply a suit instituted by these parties in respect of their own individual interests, and in respect of those interests I think they are precluded, by their own conduct, from maintaining this action." Now, if a similar case had been tried in this Court the decision would probably have been the same, firstly, on the ground mentioned by LORD CAMPBELL, "*volenti non fit injuria*"; and secondly, on the ground that the plaintiffs, having, by their subsequent acquiescence, been parties to an implied agreement consenting to the union with the Free Church, could not be allowed to question the validity of such union. But supposing the minister, with a majority of the congregation, had reverted to the original Church of seceders, I doubt if this Court would have dispossessed him at the suit of the authorities of the Free Church, nor is it clear that the House of Lords would have done so. Of course that case is a different one from the present, for there nothing appears to have been done inconsistent with the provisions of any statute, either public or private. I mention the case rather for the purpose of illustration. Neither by the English, nor

1880.
August 3.
" 4.
" 5.
" 6.
" 26.

Merriman *vs.* Williams.

I presume by the Scotch law would the doctrine of estoppel apply so as to prevent a defendant from denying that the acts which are supposed to operate as an estoppel are contrary to or inconsistent with the provisions of the law. Let me put an extreme case. Supposing (if such a thing were possible) the Dean and Chapter of an English cathedral were, upon a vacancy in the see, to proceed to the election of a Bishop without a *congé d'élire* from the Crown; supposing they elected a clergyman of some Church in communion with the Church of England (say the Episcopal Church of Scotland or of America), and were parties to his consecration by Bishops of the Episcopal Church of Scotland and America; supposing that for years such a Bishop was acknowledged by the Dean and congregration as their lawful Bishop, and officiated as such in the cathedral; supposing that disputes were to arise between the Bishop and the Dean as to the right of the former to officiate at will in the cathedral, and an action were brought against the Dean in the proper Court to restrain him from interfering with the Bishop's ministrations, would the Dean be estopped from denying the Bishop's rights on the ground of his not being a lawful Bishop of the Church of England? I know that these suppositions involve an extreme improbability, and that the case would not in every respect be analogous to the one we are now considering, but it supplies a test as to the application of the doctrine of estoppel. I do not pretend to any intimate acquaintance with the ecclesiastical laws of England, but I think we may take it for granted that the Bishop would not succeed in obtaining an injunction even against the Dean personally. Under the English common law, at all events, the doctrine of estoppel is subject to some important qualifications. The case of *Stratford and Moreton Railway Co.* vs. *Stratton* (2 B. and A., 518) affords an instructive illustration on this point. There the question arose whether a person who, as a member of the committee of the Company, had joined in making certain calls on shares, and had afterwards actually paid some of the calls, was estopped in a suit brought against him, from denying the legality of the calls, and the Court of Queen's Bench decided that he was not so estopped. "I agree," said Mr. Justice PARKE, "to the doctrine in *Heane* vs. *Rogers* (9 B. and C., 577), that a party having made admissions by

which another has been led to alter his condition is estopped from disputing their truth with respect to that person and that transaction, but I think it does not apply here where the question raised by the party supposed to have made the admission is one not of fact but of law." And Mr. Justice TAUNTON said, "It is clear that the defendant was not estopped. It was not competent to him to dispense with the statute under which he and the rest of the committee professed to act, even for the purpose of rendering himself liable to be sued. The calls being contrary to law, it lies in his mouth to take that objection, though he was a party to their being made." Similar conclusions would, I apprehend, be arrived at under the Roman-Dutch law, although perhaps not on precisely the same grounds. But let me now consider the question at issue as one of contract rather than of estoppel. The contract between the plaintiff and the defendant was either a personal one, or it was a contract involving also the rights of both parties in respect of the Church of St. George. So far as the contract was purely personal, the defendant was bound to render due obedience to the plaintiff as his Bishop, in conformity with the laws of the Church of South Africa, and he became amenable to the discipline of that Church. If he has been guilty of conduct which by the laws of that Church is punished with excommunication, suspension, or deprivation, this Court will, so far as a temporal Court can do it, assist in giving effect to any sentences passed upon him by the properly constituted tribunals of that Church. But the powers of the Bishop and of such tribunals could, under such a personal contract, only affect his position as a member of the Church of South Africa, and such offices as have been conferred upon him by that Church. But it is admitted on both sides that the defendant has accepted no office or emolument from the plaintiff, or from the Church of South Africa. The facts relied upon by the plaintiff as constituting a fresh contract between him and the defendant cannot affect any offices which the latter held before such contract was entered into. So far as such offices are concerned, the defendant's personal submission to the rules and canons of the Church of South Africa could not call rights or interests into existence which would not otherwise exist, or preclude the defendant, at all events after being excommunicated by the plaintiff from

1880.
August 3.
,, 4.
,, 5.
,, 6.
,, 26.

Merriman *vs.* Williams.

communion with the Church of South Africa, from falling back upon his original contract, made not with the plaintiff, nor with a corporation of which he is the representative, but with a corporation which, although in abeyance, is not legally defunct. But it has been contended that the contract with the plaintiff was not a purely personal one, but one which also conveyed to the plaintiff certain real rights in respect of the cathedral, including the right of summoning the Chapter and presiding therein, "of officiating" (as the proposed statutes have it), "and performing all ecclesiastical functions at his own option within the cathedral," and, in case of a vacancy in the incumbency, of appointing a rector, who need not be a clergyman of the Church of England, but must belong to the Church of South Africa. Such a contention, if it has any meaning, involves, as I have already attempted to show, a transfer of the Church from the control and management, temporal as well as spiritual, of members of the Church of England to the control and management, temporal as well as spiritual, of members of the Church of South Africa, and is inconsistent with the provisions of two Colonial statutes, one of which is expressly declared to be a public ordinance. Of those statutes the parties must be presumed to have had knowledge before they entered into their alleged contract, and neither party can successfully ask for the assistance of this Court in establishing claims contrary to or inconsistent with the provisions of these statutes. In such a case the rule of the Roman law applies,—"*Pacta quæ contra leges constitutionesque fiunt nullam vim habere, indubitati juris est*" (Cod. 2, 3, 6). Before quitting this part of the case, I only desire to add that there are circumstances in evidence which tend to show that the defendant's acts, which are relied on as constituting an estoppel or as raising a contract, were not always quite voluntary on his part. The Provincial Synod of 1870 was convened by the late Bishop of Cape Town, whose title the defendant at all events could not dispute. He himself said that he went to the Synod with many misgivings, and he certainly never signed any declaration of adherence to the canons. The mandate for the election of a successor to Bishop Cotterill was also issued to him by the late Metropolitan. Possibly he might then have been justified in taking up a similar position to that which had

previously been taken up by Mr. Long towards Bishop Gray, but he was not prepared to take this extreme step. Having obeyed the mandate, the rest of his conduct followed as a matter of course. Neither he nor the plaintiff appears to have been then aware of the provision in the Letters Patent that the successors of Bishops Armstrong and Cotterill should be appointed by the Crown, and canonically consecrated by the Archbishop of Canterbury. It was not until the plaintiff claimed the right of preaching in the cathedral at his option that any serious controversy arose between the parties, and even then the objection raised by the defendant was to the plaintiff's unqualified right of preaching, and not to his *status* as a Bishop. It is true that in 1875 the defendant protested against the cathedral and the rights of members of the Church of England being prejudiced by the acts of the Provincial Synod, but it was only after the plaintiff had passed sentence on the defendant, purporting to eject him from the communion of the Church of South Africa, that the defendant urged his full grounds of objection.

Hitherto I have considered the questions at issue between the parties, quite independently of the sentences of the Diocesan Court of Graham's Town, and I now proceed briefly to inquire whether those sentences in any way assist the plaintiff in establishing his right to relief. A preliminary objection has been raised by the defendant to the constitution of the Court which passed the first sentence on him. That Court consisted of the Venerable Archdeacon Badnall, as the plaintiff's commissary, with the Reverend Canon Henchman, the Reverend William Llewellyn, and the Reverend William Meaden, as clerical assessors, and Mr. J. B. Currey as lay assessor. It is admitted that the articles of presentment were duly served on the defendant, together with all notices required by the canons of the Church of the Province of South Africa. Among these notices was a notice of the constitution of the Court and of the appointment of the presenter's counsel. The defendant did not appear before the Court, nor did he in any way object to the constitution of the Court. The objection which has now been raised on his behalf, is that the Court was not properly constituted, inasmuch as two of the clerical assessors were not canons of the cathedral as required by the 21st canon

1880.
August 3.
,, 4.
,, 5.
,, 6.
,, 26.

Merriman *vs.* Williams.

of the Church of the Province of South Africa. That canon directs that "the Bishop shall preside in the Diocesan Court either in person or, if reasonably hindered, by a commissary in priest's orders, ... being assisted by two grave priests well accounted of in the diocese as assessors, viz., by the dean and archdeacon, or some of the canons, if there be such, when the Court is held near the cathedral church." That canon certainly seems to require that, failing the dean and archdeacon, two of the canons shall be assessors in their stead, but the authorities of the Church, with the most laudable desire to secure an impartial trial, appointed one canon and two other priests instead of two canons, it being thought that the disputes which had taken place between the canons and the defendant might possibly have prejudiced them against him. If it were necessary to decide the point, I should be disposed to hold that as the Diocesan Court really consists only of the Bishop or his commissary, the assessors being merely advisers, and as the defendant did not, as he might have done, object at the time to the constitution of the Court, he cannot rely upon the alleged improper constitution of the Court as a defence to an action properly brought for enforcing the sentence of the Diocesan Court. The question is not free from doubt, but for the purpose of the present case we may assume that the Court was properly constituted. And here I may say that in reading the proceedings of that Court it is impossible not to admire the ability and candour with which the prosecution was conducted, or the judicial impartiality displayed by the tribunal itself. Its decisions, so far as they relate to the defendant's position as a minister of the Church of South Africa, seem to be supported by the evidence. The sentence passed on the 5th of August, 1879, was that the defendant "be suspended from his ministerial functions, with total loss of the income attached to the office or offices held by him as dignitary or priest of the Church in this diocese for the term of one calendar month from this date, and further until he shall engage not to repeat the offence of preventing the Lord Bishop of this diocese from preaching or ministering in the Cathedral Church of St. George's, Graham's Town, and thus giving just cause of scandal or offence." The defendant, however, continued to perform his ministerial functions, and refused to enter into the engagement required

of him, and accordingly on the 13th of November, 1879, the plaintiff pronounced the defendant to be excommunicated, "the sentence to take effect after fifteen days, unless he shall in the meantime submit himself to the sentence pronounced in the Diocesan Court, and shall give satisfaction by engaging to comply in future with the rules and regulations agreed on by the Synod of this diocese and province." Now the effect of all this is to deprive the defendant of all offices or emoluments which he has received from the Church of South Africa, and finally to cast him out of the communion of that Church. It is admitted that he received no such office and is entitled to no such emolument from the Church of South Africa, and the only operative sentence remaining against him is that of excommunication, which will of course prevent him from officiating in any of the churches belonging to that Church. By the first prayer of the declaration the Court is asked to declare that the defendant is one of the clergy of the Church of South Africa, but such a declaration this Court is prevented from making after the sentence of excommunication passed upon the defendant, and the remaining prayers appear to me, for the reasons already stated, to be equally untenable.

I have been induced to go thus fully into the case because the parties themselves were anxious to have the opinion of the Court upon the merits. Other, but less important, objections to the plaintiff's claims have suggested themselves to me, which require a passing notice. The action is mainly a declaratory one, and yet, contrary to the established practice of this Court in regard to such actions, only one of several parties interested has been made defendant. It has been stated on the defendant's behalf, and not denied on the other side, that he has the support in his conduct towards the plaintiff of the select vestry of the Church as well as of a great majority of the congregation. But, besides the select vestry and the congregation, the trustees, and perhaps even the Crown, may have a claim to be heard in an action for a declaration of rights in respect of the cathedral. So far as the action is not declaratory, but asks for an interdict against the defendant, the Roman-Dutch law requires clear proof of the plaintiff's right and title before the Court can interfere in his favour. Then, again, we have the fact that the defendant is actually in possession of the church, and

1880.
August 3.
" 4
" 5.
" 6.
" 26

Merriman *vs* Williams

the rule of our law applies, "*In pari causa possessor potior haberi debet*" (Dig. 50, 17, 128, § 1). From whatever point of view we regard this case the obstacles to the plaintiff's success in this action appear to me to be insuperable. In order, however, not to debar the plaintiff from hereafter having his legal *status* declared in an action properly instituted for the purpose, I am of opinion that the Court should absolve the defendant from the instance, instead of giving judgment absolutely in his favour. This form of judgment will not prevent the plaintiff from appealing against it to the Queen in Council. But whatever course may be taken in respect of this action, I feel bound to express my individual opinion as to the necessity of legislation, whether imperial or colonial, to regulate the relative rights of the Church of South Africa and the Church of England in respect of their endowments under private deeds of trust, and to legalize the transfer to the Church of the Province of South Africa of property secured by law for the uses of the Church of England in those cases in which there has been acquiescence for a certain length of time, or where a majority of the congregation consent to the transfer. In Canada and the Colonies of Australia, their respective Legislatures have settled the rights and *status* of the respective Churches of those provinces, and I feel confident that unless a similar course is adopted in regard to the Church of South Africa, or unless that Church is prepared to part with some of the property of which it now enjoys the use, there will never be a lasting peace within its own household.

The judgment of the Court will be absolution from the instance, with costs for the defendant.

DWYER, J.:—The CHIEF JUSTICE has so fully stated the facts of the case, that it is not necessary for me to reiterate any of them. I concur that our judgment should be absolution from the instance, on the ground stated by the CHIEF JUSTICE, that the cathedral of Graham's Town is held in trust for the members of the Church of England, and that the Bishop of Graham's Town has not established any right to officiate in that church in any way that would interfere with Dr. Williams, as incumbent of that church, in the performance of his duties as such incumbent, but I cannot agree that the defendant was, by the contract referred

to, bound, as a member of the Church of South Africa, to observe its canons, rules, and ordinances. The words of the alleged contract are as follows:—"I, Frederick Henry Williams, do declare that I will submit to the rules and regulations of the Synod of the diocese of Graham's Town in all things *which shall not be contrary to the laws of the United Church of England and Ireland.*" How can this be relied on as an unconditional contract binding the defendant as a member of the Church of South Africa? The learned counsel who argued the case of the presenter before the tribunal referred to, apparently felt this difficulty, and argued that there arose an "irresistible presumption that the defendant fully understood the terms and conditions upon which he accepted office, and that he was not merely bound generally to canonical obedience under oath, but that he was bound specially by the rules and regulations of the diocese of Graham's Town." But we must not construe contracts by "irresistible presumptions," we cannot go beyond the four corners of the document itself. In my opinion the contract is not one which even qualifies the defendant to be a member of the Church of South Africa. Would any private association accept as a member of it any person who would only consent to be bound by such promises of its trust deed, and such modification of it as thereafter might be made, as he from time to time might approve of? Could the defendant under this contract recover any money or other benefit to which, if a member of the Church of South Africa, he would be entitled? I apprehend not. Immediately upon the production of the alleged contract he would be nonsuited. In 1875 the defendant notified in the cathedral of Graham's Town that a Provincial Synod would be held in Cape Town, in January, 1876, and at the same time read his own protest, to the effect that such notice was given by him "without prejudice to the cathedral, or to the rights and position of members of the Church of England in this Colony." Is not this a most positive declaration, made in the most public way in which it could be made, that he would not be bound by the rules and regulations of the Church of South Africa? It cannot be denied that a member of a voluntary association may withdraw from it at any time he pleases, subject, of course, to the renunciation of all benefits to be received from it, and to

1880.
August 3.
" 4.
" 5.
" 6.
" 26.

Merriman *vs.* Williams.

any liabilities which he has incurred during the time he was a member of it. If the defendant ever were a member of the Church of South Africa, I think that the protest was a sufficient indication of his withdrawal from it. I am of opinion that the contract relied upon did not bind the defendant as a member of the Church of South Africa, and that the tribunal before which he was cited had no jurisdiction over him. It is, however, contended that the defendant, by his acts in attending the Synods and voting at them, is estopped from denying that he is a member of the Church of South Africa, but I do not think so. All those acts are referable to the terms of the alleged contract, and did not, therefore, create an estoppel against the defendant personally; but assuming that the contract was a binding one, and that the defendant was bound by the rules and regulations of the Church of South Africa, another point arises as to the constitution of the tribunal under the 21st canon. Was the tribunal properly constituted or not? The canon declaring how the tribunal for the trial of the clergy should be constituted seems to have been taken from the *Church Discipline Act.* The canon seems to me very clearly to specify the persons of whom the tribunal is to be composed, and as other persons were substituted for those specified, I am of opinion that the tribunal was not properly constituted, and had, therefore, no jurisdiction, and that the sentence pronounced was utterly void. Under the claim for an interdict it is contended that we can declare the rights of the parties to the suit, viz., whether the plaintiff has any right to preach in the cathedral without the consent of the defendant either as dean or as incumbent. The plaintiff claims the right as Bishop of the Church of South Africa and Bishop of Graham's Town *de facto* and *de jure.* The defendant resists the claim on four grounds,—1st, that he is not a member of the Church of South Africa; 2nd, that no Bishop has a right to preach in the cathedral without the consent of the incumbent; 3rd, that the plaintiff is not a Bishop of the Church of England, and, moreover, is not the successor of Bishop Cotterill within the legal meaning of the word successor; 4th, that he (defendant) has control over the cathedral, which is vested in trustees for members of the Church of England, and that it would prejudice their rights if he were to allow the Bishop as of

right to preach in the cathedral, and that, in resisting such right, he is only, as in duty bound, protecting the interests of the members of the Church of England. The first point I have already disposed of. Upon the second, it is unnecessary to give any opinion; and the two remaining have been decided by the CHIEF JUSTICE, in whose judgment on these points I concur. I agree that our judgment should be absolution from the instance, with costs. I state above that it is unnecessary to give any opinion as to whether the Bishop has a right to preach in a cathedral without the consent of the incumbent; but, nevertheless, I am of opinion that no Bishop has any such right conferred on him by law.

SMITH, J.:—I entertain great doubt as to whether the questions that have been discussed as to the right of the plaintiff and of the Church of the Province of South Africa to property granted for ecclesiastical purposes in connection with the Church of England can be raised in this case, and, therefore, I express no opinion upon them. My silence, however, must not be taken for assent to all the propositions that have been laid down by my brother the CHIEF JUSTICE in his learned judgment. I entirely agree with him, however, that the defendant has by his acts precluded himself from denying that he was, subsequently to 1870, a member of the Church of the Province of South Africa, and that the plaintiff was his lawful Bishop. It seems to me also that the defendant has precluded himself from questioning the legality of the plaintiff's claim to officiate as a Bishop of the Church of the Province of South Africa in St. George's, Graham's Town, as his cathedral church, after having sanctioned it himself for so many years (see *Cairncross* vs. *Lorimer*, 7 Jurist, N. S., part 1, p. 149). I was inclined to think then that the plaintiff was entitled to furtherance of the decision of the Diocesan Courts, at any rate to an interdict restraining the defendant from interfering with the plaintiff in the exercise of his lawful episcopal functions, for I fully concur with the remarks which have been made by the CHIEF JUSTICE as to the constitution of that tribunal and the manner in which its proceedings were conducted. This judgment would not have affected the rights of persons who were not parties to this suit, and they would have had the power of vindicating them if they thought fit. Although

1880.
August 3.
" 4.
" 5.
" 6.
" 26.

Merriman *vs.* Williams.

this was my view of the case, still, seeing the great difficulty of the question, I do not feel justified in disregarding the strongly-expressed view that the question of property must be considered, and as I consider that for that purpose all the necessary parties are not before the Court, I do not dissent from the judgment of absolution from the instance. It is very desirable that the *status* of the Church of the Province of South Africa and its right to property held in trust for the Church of England should be defined as soon as possible, and therefore it is, perhaps, better that my doubts are not shared by my brother judges, and that they are not well founded, as it is to be presumed they are not, as the case can be taken at once to the Privy Council, where these matters can be finally, if only partially, decided. I say partially, for I have a firm conviction that nothing short of an Act of Parliament can finally and satisfactorily settle the question of property. I strongly advise the Church of the Province of South Africa to modify its constitution and canons, and to apply to Parliament.

[Plaintiff's Attorneys, TREDGOLD & HULL.
Defendant's Attorneys, FAIRBRIDGE, ARDERNE & SCANLEN.]

Note.—The judgment of the Supreme Court in this case was confirmed on appeal by the Privy Council. For the judgment of the Privy Council, see Appendix to this volume, p. 196.

KERR *vs.* DONIAN.

Cheques.—Effect of delay in presenting them for payment upon the rights of parties.

On the 14*th of April, one T. drew a cheque on the local branch of the Standard Bank in favour of one K. On the* 16*th of April K. paid it to one D., who on the* 17*th paid it to one B. The cheque was not presented to the bank until June, when there were no funds to meet it, though there had been funds in the interval. D. paid the amount of the cheque to B., and brought action in the R. M. Court against K. as indorser, and obtained judgment.* Held,