

THE BISHOP OF CAPE TOWN vs. THE COLONIAL SECRETARY.

*Ordinance No. 3 of 1852, Schedule C.—Act No. 5 of 1875.—
Travelling allowance of Bishop of Cape Town.*

In 1848 an annual allowance of £400 for travelling expenses was granted by the Colonial Government to the "Lord Bishop of Cape Town." From the year 1852 this sum was paid out of an amount appropriated by Schedule C of Ord. No. 3 of 1852, to the maintenance of public worship. The sums appropriated under that Ordinance were to be payable until Parliament should otherwise direct. In September 1872 the then Bishop died. In May 1873 the House of Assembly declared against the continuance of the allowance to his successor, and it was not paid after the month of March 1873. In 1874 J. having been consecrated Bishop of Cape Town claimed the allowance, but was refused. In 1875, the Colonial Parliament repealed Schedule C of Ord. No. 3 of 1852, but reserved to ministers of religion then in receipt of any salary or payment under the Schedule the same salary or payment until their death or resignation. Held, upon action being brought by J. to enforce his claim, that since there was no contract between J. and the Colonial Government for the payment of the allowance, and J.'s right was not specifically recognized by any Ordinance or Act of Parliament, and the Colonial Government for the time being was not a trustee of the allowance for J.'s benefit, judgment must be for defendant.

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This was an action brought by the Bishop of Cape Town against the Colonial Secretary for the recovery of the arrears of an annual sum of £400 alleged to be due to him from the time of his consecration, and also for the purpose of having it declared that he was entitled to the future payment of a like annual sum for so long as he should hold his office. The facts of the case were as follows. In 1848 the Colonial Government granted to the "Lord Bishop of Cape Town" an annual allowance of £400 for travelling expenses. The Appropriation Ordinance, No. 3 of 1852, provided in Schedule C that the sum of £16,060 should be devoted yearly to the maintenance of public worship. From the period that this Ordinance became law it was out of this

sum that the allowance of £400 a year to the Bishop was paid, which allowance was thereafter continued on the estimates laid before Parliament down to and including the year 1873. The then Bishop died in September 1872. The allowance was paid regularly until the end of May 1873. The sums appropriated by the Ordinance No. 3 of 1852 were to be payable until Parliament should otherwise direct. In May 1873 the House of Assembly passed a resolution to the effect that in its opinion the travelling allowance of £400 per annum which had been paid to the late Bishop of Cape Town under the Appropriation Ordinance should not be continued to his successor. This resolution was not sent up to the Legislative Council, nor was any bill introduced to give effect to it. The Right Reverend William West Jones, D.D., was consecrated Bishop of Cape Town on the 17th of May, 1874, and assumed his duties in September 1874. He informed the Colonial Secretary by letter of his succession to the See, and in May and again in October applied by letter to him for a continuance of the said allowance of £400 a year. The Colonial Secretary's reply was to the effect that in view of the almost unanimous opinion expressed by the Legislative Assembly in 1873 against the continuance of the allowance, the Government would not be justified in acceding to a renewal of the grant. In 1875 the Colonial Parliament passed an Act (No. 5 of 1875), which repealed Schedule C of Ordinance No. 3 of 1852, but reserved to ministers of religion then in receipt of any salary or payment under the Schedule, the same salary or payment until their death or resignation. The plaintiff maintained he was still entitled to the grant, in spite of the resolution of the House of Assembly of May 1873, and the Act No. 5 of 1875.

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Jones, for the plaintiff, contended that the Government was a trustee for the Bishop in respect of the allowance. If it had not received the money it had only itself to blame, as it should have obtained it from the public revenue. There was also a contract between the Crown and the Bishop, as the late Bishop had been appointed by the Crown by Letters Patent. Government ought to have placed the sum on the reserved Schedules, as it had done in 1873 with the salaries of some of the officers of the Government in order

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to protect them from reduction. There was a vested interest intended to be preserved to the Bishop of Cape Town, not to Bishop Gray in his individual capacity, but as the Bishop of the diocese. The grant was intended to be a permanent one and the present Bishop was entitled to it.

Upington, A.G., contra.

Cur. adv. vult.

Postea (Feb. 10th),—

DE VILLIERS, C.J.:—The question arising in this case is whether or not the Bishop of Cape Town is entitled to claim from the Government the arrears of an annual allowance of £400, dating from the time of his consecration, and the future payment of a like annual sum so long as he shall hold his present office. In support of this claim the plaintiff relies, *inter alia*, upon the Appropriation Ordinance of 1852, which was confirmed by Her Majesty in Council on March 11th, 1853. The Ordinance provides that "until the Parliament of the Colony shall otherwise direct, there shall be payable every year to Her Majesty, her heirs, and successors out of the revenue fund of the Colony, the sum of £106,090 for defraying the expenses of the several services and purposes in the schedules (marked A, B, C, & D) annexed to this Ordinance; the said sum to be issued by the Treasurer of the Colony, in discharge of such warrant or warrants as shall be from time to time directed to him under the hand and seal of the Governor." Schedule C merely contains the words "Public worship, £16,060," but the plaintiff contends that it must be read in connection with the estimates of expenditure for 1852, and with the minutes of the meeting of the Executive Council, at which the Ordinance was discussed and its provisions settled. These minutes, after appropriating the sum of £15,560 to the purposes of public worship, contain the following note: "In the sum of £13,160 for fixed salaries is included the sum of £400 in aid of the Bishop of Cape Town's travelling expenses. The Bishop of Cape Town receives no salary from the Colony, and this sum of £400 was originally voted as a fixed allowance on that account, and in aid of his travelling expenses, and for which he is not required to

render an account. It is for these reasons that the Council have thought fit that this sum should now be treated as though it were a fixed salary, and secured to the Bishop." After the passing of the Appropriation Ordinance, the allowance continued to be paid annually (as it had been paid since 1848) to the late Bishop of Cape Town until his death in September 1872, and subsequently down to the month of May 1873. On the 18th of May, 1873, the House of Assembly passed a resolution expressing the opinion of the House that the allowance of £400 per annum theretofore paid under the Appropriation Ordinance to the Bishop of Cape Town, in aid of travelling expenses, ought not to be continued to his successor in the See. No Act of Parliament, however, was passed to give effect to this resolution; and it is clear therefore that if the Bishop of Cape Town is entitled, by virtue of his office, to a continuation of the allowance, his right cannot be affected by the resolution of only one branch of the Legislature. The plaintiff was consecrated as Bishop of the Diocese on the 17th May, 1874, and he entered upon his duties in the month of September 1874. After his consecration, but before he entered upon his duties, an application was made to the Government on his behalf for a continuation of the allowance, but the answer was that, in view of the almost unanimous opinion of the Legislative Assembly, the Government was not prepared to accede to the application. In June 1875 the act No. 5 of that year was passed, repealing Schedule C of the Appropriation Ordinance, but reserving to ministers of religion, then in receipt of any salary or payment under the schedule, the same salary or payment until their death or resignation. It is clear, therefore, that if the plaintiff was entitled at the time of the passing of Act 5 of 1875, as of right to claim the annual allowance of £400, he has not been deprived of that right by the Act. Now the plaintiff's right can only be founded on one of the three following grounds:—This right may exist by virtue of a contract between him and the Crown, binding the latter to pay him the annual sum claimed, or he may rely upon the Appropriation Ordinance and the Act No. 5 of 1875, as securing his rights independently of any contract; or he may, as is really done in this case, claim the money from the Government as trustees to whom the annual payments have been and are due, and by whom the

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annual payments ought to be made to himself. The two first grounds may be dismissed in a few words. It is not alleged that any express contract is in existence by which the Crown, or the Colonial Government as representing the Crown, has promised to make the annual payments to the plaintiff, and no circumstances have been proved from which a contract of such a nature could be implied. The plaintiff did not receive his appointment as Bishop of the Diocese directly from the Crown by virtue of Letters Patent or otherwise; and even if he had been so appointed, the Government did not, before his consecration, or before he assumed his duties, hold out any hopes to him that the allowance paid to his predecessor would be continued in his favour; but, on the contrary, the Government, as will be presently seen, withdrew the amount from the estimates for 1874, before the plaintiff arrived in the Colony. Then as to the plaintiff's rights, independently of any contract, the Appropriation Ordinance is wholly silent in regard to them. That Ordinance provides that the sum of £16,060 shall be annually paid to Her Majesty for defraying the expenses of public worship in this Colony; but it contains no provision requiring the Government to pay any portion of that amount to any individual or to any particular religious denomination. Its main object no doubt was to preserve vested rights, but the rights intended to be preserved were those of individuals who then held office, and not of any particular denomination, or of individuals who should thereafter take office in any church without promise of support from the Government. It is quite true that in the estimates of expenditure for the year 1852, upon the basis of which the amounts mentioned in the reserved schedules were arrived at, the then Bishop of Cape Town's allowance of £400 appears as an item; but the details of these estimates, so far as they affect public worship, are not referred to in the body of the Ordinance, nor are they referred to in Schedule C. In this respect Schedule C stands upon a different footing from Schedule A, which includes most of the items of expenditure thereunder, and from subsequent Appropriation Acts, all of which make special reference to the estimates of expenditure upon the basis of which the amounts annually appropriated are arrived at. The Bishop of Cape Town's annual allowance, not being in any manner mentioned or referred to in the

Appropriation Ordinance or in any other Act of Parliament, cannot, in my opinion, be claimed as a statutory right independently of any contract. And even if the allowance had been so mentioned or referred to, I am by no means satisfied that a legislative authority to Her Majesty in 1853 to pay it, amounts to an enactment that the same shall be paid to all future holders of the office independently of the annual estimates of expenditure sanctioned by Parliament. This leads me to the third and main ground upon which the plaintiff's counsel relied. He contended, very ably and fairly, that although the Appropriation Ordinance does not, in so many words, direct the Government to pay the allowance annually to the Bishop of Cape Town, yet when read by the light of the estimates framed by the Executive Council in 1852, it creates a trust in favour of the Bishop for the time being, which may be enforced in this Court against the Government. Now without enquiring whether or not our law would recognize a trust of this nature as against the Crown, it is a sufficient answer to the plaintiff's contention to say that, in point of fact the Government has no funds appropriated by Parliament to meet the arrears claimed, and that it would be unconstitutional, if not illegal, for the Government to pay the allowance in future without first restoring the item to the estimates of expenditure. The item was first omitted in the estimates for 1874, as sanctioned by both Houses of Parliament, and it has not figured in any subsequent estimates. It would, no doubt, have been legally competent for the Government to re-introduce the item in the estimates, notwithstanding the resolution of the House of Assembly, but it would have been equally competent for the House to expunge the item, leaving it to the Governor to exercise such powers as he possessed under the Appropriation Ordinance. I am not aware that any Government has ever maintained that it could constitutionally exhaust the amounts reserved by the Appropriation Ordinance without the sanction of Parliament; but I have no hesitation in saying that no Government would be bound to do so. If the Government chose to exercise its strictly legal rights by expending the full amount mentioned in the reserved schedules, without obtaining the sanction of both Houses of Parliament for such item, it would do so at its own risk. If that amount were not found sufficient to

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carry on the Government of the country, the Government would have to come for the deficiency to Parliament, and the answer would be, "We refuse to grant it unless you expend the sums reserved by the schedules to the Appropriation Ordinance in the manner indicated by us in the estimates of expenditure." It is impossible therefore to hold that there is any duty resting on the Government to make provision for the payment of the annual allowance of £400 to the plaintiff, and in the absence of such a duty, the Government cannot be held liable in this case as trustees. The action must therefore fail on this ground also. The judgment of the Court must be for the defendant, but inasmuch as the suit is a friendly one, and the defendant does not press for costs, there will be no order as to costs.

[Plaintiff's Attorneys, FAIRBRIDGE, ARDERNE & SCANLEN.
Defendant's Attorneys, J. & H. REID & NEPHEW.]

EWERS vs. THE RESIDENT MAGISTRATE OF OUDTSHOORN
AND THE TRUSTEE IN THE INSOLVENT ESTATE OF
ROBERTS.

General Bond.—Promissory Note.—Novation.

R. passed in favour of E. a general bond to secure a promissory note for £412, which had been given by R. to E., the condition of the bond being that if the appearer properly took up the note with interest, costs and charges due thereon, then the bond should be null and void, but otherwise should be and remain in full force and effect. On the date when the note became due, R. being unable to pay it, passed in favour of E. two promissory notes, one for £200, and the other for £212, and also paid all costs, charges, and interest, due up to that date. On the face of the original note was written "settled by renewal bills, £200 due 1st November, 1879, and £200 due 1st February, 1880." Before the latter of these notes became due, and before the former was paid, R. became insolvent, and E. claimed to be allowed to prove the bond on his estate. R.'s trustee objected in the name of several creditors to this proof, on the ground that the promissory note for £412 had been