MERRIMAN *vs.* WILLIAMS.

Judgment.

Of the Lords of the Judicial Committee of the Privy Council on the Appeal of Merriman (Bishop of Graham's Town) vs. Williams (Dean of Graham's Town) from the Supreme Court of the Colony of the Cape of Good Hope, delivered 28th June, 1882.

Present:—SIR BARNES PEACOCK, SIR ROBERT COLLIER, SIR JAMES HANNEN, SIR RICHARD COUCH, SIR ARTHUR HOBHOUSE.

Merriman *vs.* Williams.

In this case the plaintiff in the Court below and the appellant here is the Bishop of Graham's Town, one of the dioceses of the province of the Church of South Africa. The defendant in the Court below and the respondent here bears the title of Dean of Graham's Town; he is also the Colonial Chaplain appointed by the Crown for Graham's Town, and he is *de facto* the officiating minister, sometimes called the Rector of the Church of St. George in Graham's Town. The controversy between the parties has raised a very important question, but its earlier phases are comparatively unimportant, and may be briefly stated.

In the year 1878 a difference of opinion arose respecting the right to preach in the Church of St. George. The plaintiff claimed it as his cathedral, in which he had a right to preach whenever he thought fit. The defendant was willing to allow the plaintiff to preach whenever he thought fit as a matter of courtesy; but as to the matter of right, he held that he as Dean had control over the arrangements. The plaintiff would not consent to preach except as a matter of right.

On the 17th of April, 1879, the plaintiff attended the church with the object of preaching, having previously admonished the defendant in a formal way not to hinder him, but the defendant anticipated the usual time for the delivery of the sermon, and began to preach himself, whereupon the plaintiff protested and left the church.

For this conduct the defendant was presented in the Diocesan Court of Graham's Town, and was there found guilty of contumacious disobedience, and of conduct giving

just cause of offence or scandal to the Church; and he was suspended from his ministerial functions for one calendar month, and further until he should engage not to repeat the offence of preventing the Bishop from preaching or ministering in the Church of St. George. As the defendant refused to obey that sentence, he was excommunicated by a subsequent decree of the same Court.

The present suit was instituted to enforce the sentences of the Diocesan Court. By his declaration, filed on the 21st of April, 1880, after showing that he and the defendant are officers of the Church of the Province of South Africa, the plaintiff prays relief in the following terms:—

"Wherefore the plaintiff says that an action has accrued to him, and he prays that this honourable Court will by its judgment declare,—

"That the defendant is one of the clergy of the said Church within the true intent and meaning of Article XXIV. of the Constitution thereof, and is bound by the laws of the said Church, and by the rules and regulations made by the said Diocesan Synod of Graham's Town, and by the said Provincial Synod, or either of them.

"That the defendant is bound to accept and immediately submit to any sentence depriving him of any or all of the rights and emoluments appertaining to the office of Dean and Rector of the cathedral church of Saint George, or to any other office or benefice held or enjoyed by him as dignitary or priest of the said Church within the diocese of Graham's Town, such sentence having been passed upon him after due examination had by the Diocesan Court of Graham's Town, being a tribunal acknowledged by the Provincial Synod for the trial of a clergyman, saving all rights of appeal allowed by the said Provincial Synod.

"That under and by virtue of the sentences passed upon the defendant by the Diocesan Court of Graham's Town, on the 5th of August and 13th of November, 1879, respectively as aforesaid, the defendant is lawfully suspended from his office of priest and other spiritual promotion and dignity, with total loss of all emoluments derived from any benefice or attached to any office or offices heretofore held by him as dignitary or priest of the said church within the diocese of Graham's Town.

"That the plaintiff in his episcopal capacity has the right of officiating and performing all ecclesiastical functions within the said cathedral church.

"That the plaintiff, in his said capacity, shall have free and uninterrupted access to the land and premises comprised in the transfer bearing date the 17th of June, 1871, to the Trustees under the Diocesan Trust Board of the Diocese of Graham's Town, of the site of the said cathedral church of St. George, and to the said church or cathedral or other buildings erected thereon, for the purpose of enjoying and exercising all rights, privileges, and immunities which have heretofore been enjoyed and exercised, or ought to be enjoyed and exercised by the Bishop of Graham's Town as such Bishop or otherwise, in reference to or within the cathedral

thereon and its appurtenances, and that the defendant and his agents shall be restrained from in any manner interfering with such access, enjoyment, or exercise.

"And the plaintiff further prays that this Honourable Court will grant a perpetual interdict restraining the defendant from hindering the plaintiff in his lawful ministrations within the Diocese of Graham's Town, and further restraining the defendant from officiating or performing any ecclesiastical functions whatsoever, and from receiving any emoluments in respect of the performance of any ecclesiastical functions whatsoever within the limits of the diocese of Graham's Town, as a dignitary or priest of the said church."

By his pleas the defendant claims to be Rector of the Church of St. George, and to perform ecclesiastical functions in that church as a priest of the Church of England as by law established. He says that the Church of the Province of South Africa is a religious association entirely independent of the Church of England as by law established; that he himself is not a member of that Church, nor bound by its constitutions or canons; that the church of St. George is held in trust for ecclesiastical purposes in connection with the Church of England as by law established; and that the plaintiff and the Church of South Africa have no authority or jurisdiction over it.

On the 26th of August, 1880, the Supreme Court pronounced a decree absolving the defendant from the instance with costs against the plaintiff. The ground principally relied on by the CHIEF JUSTICE, Sir Henry de Villiers, was that the church of St. George had been devoted to ecclesiastical purposes in connection with the Church of England, and that the Church of South Africa was not, so far as the circumstances of the Colony would permit, a part of the Church of England. Mr. Justice DWYER concurred, but he also thought, contrary to the opinion of the CHIEF JUSTICE, that the defendant had not so acted as to give the plaintiff the episcopal jurisdiction claimed by him. Mr. Justice SMITH expressed no opinion on the main question decided by the CHIEF JUSTICE, doubting whether it could be properly raised in this suit; but he concurred in the decree on the ground that the necessary parties for discussing that question were not before the Court.

Their Lordships have now to consider whether this decree is right. Before entering on the discussion, they wish to say that in the careful and elaborate judgment of the CHIEF

JUSTICE, the case is treated with a gravity befitting its importance, and every topic in turn is handled with a fulness and clearness which are of the greatest assistance to those who have to review it.

They also wish to state their sense of the judicial method and impartiality which marks the proceedings of the Diocesan Court. An objection has been raised to those proceedings on the ground that the Court was improperly constituted, and Mr. Justice DWYER was of that opinion; but in the view which their Lordships take of the case it is not necessary to express any opinion on that point.

Turning now to the plaintiff's prayer, it is clear, and it has not been disputed by his Counsel at the bar, that the greater part of it asks relief which is beyond the competence of the Civil Court to grant in this suit.

The defendant is not receiving any emolument except as Colonial Chaplain, nor does he hold any benefice in the Church of South Africa, unless it may be the incumbency of the Church of St. George. It is clear, therefore, that there is no question before the Civil Court except that which relates to the use of the Church of St. George, and that the relief prayed must be confined to such an execution as, under the circumstance, may be proper of the trusts upon which the Church of St. George is held.

In order to entitle himself to that amount of relief, the plaintiff must show, first, that he is a proper object of the trusts, and secondly, that both as between himself and the defendant, and as between himself and other objects of the trusts, he is entitled to have the defendant restrained from and himself admitted to the use of the church in question. The first thing then to be ascertained is the precise position of the property in dispute.

It is clear that the site had at some time been vested in the Crown. It does not appear by whom the church was built, but prior to the year 1839 its affairs were regulated by a committee called the Church Committee. It seems to have been the practice for the Colonial Chaplain appointed by the Crown to become the officiating minister of the church. It is not possible upon the materials in this Record, and perhaps is not important, to ascertain more precisely the state of things prior to 1839.

On the 23rd of January, 1839, an Ordinance was passed

by the Governor of the Colony of the Cape of Good Hope, with the advice and consent of the Legislative Council and House of Assembly of that Colony. It recites as follows:—

"Whereas 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, commonly 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. And whereas on the appointment of the said vestry and churchwardens it is expedient that the office of Church Committee as at present constituted should cease and determine."

Provisions are then made for the election of a vestry and churchwardens by the male inhabitants of Graham's Town and of the parochial limits thereof, being members of and holding communion with the United Church of England and Ireland as by law established.

The officiating minister is to be chairman of the vestry, when present, and, by Sect. 8, the vestry are to make rules for their own guidance, "and for more effectually executing the provisions of this Ordinance, and also to take such order for the management of the said Church as to them shall seem expedient. Provided that the rules contain nothing repugnant to law or to the tenor of this Ordinance, or to the customs and usages of the United Church of England and Ireland as by law established."

By Sect. 10 the vestry are to have the same powers, rights and duties as were then possessed by the Church Committee.

Sect. 12 empowers the vestry to maintain suits in performance of the trusts reposed in them.

Sect. 14 provides for the keeping of accounts, which are to be audited and to be laid before the Church members at a general annual meeting.

Sect. 15 provides for the election of churchwardens, to exercise the usual functions of English churchwardens so far as applicable to the Colony.

Sect. 19 enacts that there shall be set apart in the church pews and seats for the civil and military authorities, the minister, the officers of the garrison, and for troops and poor people.

Their Lordships consider the meaning and effect of this ordinance to be reasonably clear. Whatever may have been the exact rights of the Crown and the inhabitants as between one another, the church was, at the date of the ordinance, property used for religious purposes. It was desired to place the arrangements on a more public and permanent basis, and to have a governing body more responsible and efficient than the Church Committee. For that purpose the machinery of election is put in motion. The persons so elected are called a vestry and churchwardens in analogy to the English parochial system, but they are elected by the church members not by the parishioners at large. The churchwardens receive powers analogous to those of English churchwardens. But over and above that, the vestry are clothed with duties and trusts, and made subject to liabilities, for the benefit partly of the church members and partly of the Government, such as appertain only to the trustees and managers of what we should in this country call a charitable endowment. It would be exceedingly difficult for the Crown to contend that the ordinance did not effect a permanent dedication of the site to charitable uses. But that point need not be discussed, because such a dedication was undoubtedly effected by the next transaction.

On the 7th of June, 1849, the Governor of the Colony, in the name and on behalf of Her Majesty, granted the site to Dr. Gray, the Bishop of Cape Town, and his successors in the see, "on condition that the land hereby granted shall for ever hereafter be used for ecclesiastical purposes in connection with the Church of England, and to and for no other purpose whatsoever. . . . Subject however to all such duties and regulations as are either already or shall in future be established with regard to such lands." The site is described as a piece of land on which the St. George's Church has been erected.

It does not appear that any duties or regulations had been established except those which were established by the Ordinance of 1839, nor would there seem to be any mode of

establishing any future duties or regulations except by some legislative or judicial authority.

With reference to the expression "ecclesiastical purposes in connection with the Church of England," it is to be observed that the Bishopric of Cape Town was founded in the year 1847, at which time, as is stated in the judgment in *Long* vs. *The Bishop of Cape Town*, the legislative authority over the Colony was vested in the Crown. Bishop Gray was appointed 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 obedience to the Archbishop as Metropolitan.

When the grant of 1849 was made, the see of Cape Town included Graham's Town. But in 1853 Dr. Gray resigned his bishopric in order that his diocese might be contracted in extent, and that two new dioceses, those of Graham's Town and Natal, might be erected.

On the 8th of December, 1853, the Crown issued letters patent assigning to Bishop Gray the new diocese of Cape Town, and appointing him to be Metropolitan Bishop in the Colony of the Cape of Good Hope and its dependencies, and the Island of St. Helena.

On the 20th of December, 1853, the Crown issued Letters Patent erecting the Bishopric of Graham's Town, and ordering the consecration of Dr. Armstrong as first Bishop of that diocese. The Bishop and his successors were made a body corporate. Graham's Town was erected into a city and the see of the Bishop. And it was declared "that the church called St. George in the said city of Graham's Town shall henceforth be the Cathedral church and see of the said John Armstrong and his successors Bishops of Graham's Town." But the Bishop was left at liberty to constitute any other church at Graham's Town to be his cathedral and see. The Bishop had power granted to him to found dignities in his cathedral and archdeaconries in his diocese. By the Bishop's successors were meant persons named and appointed by the Crown, and ordained and consecrated by the Archbishop of Canterbury.

Some time previously to the issuing of these letters patent the Crown had granted a constitution to the colony, and a representative Colonial Legislature had been established.

On the 20th of November, 1857, the Crown issued letters patent appointing the Rev. Henry Cotterill to be Bishop of Graham's Town in the place of Bishop Armstrong, who was then dead, and directing the Archbishop of Canterbury to consecrate him. The provisions of this instrument which relate to the Church of St. George, to the power of the Bishop to constitute dignitaries, and to the nature of the Bishop's successors, are precisely to the same effect with the corresponding provisions in Bishop Armstrong's patent.

On the 17th of July, 1860, an Act of the Colonial Legislature was passed, enabling the Bishop of Cape Town to transfer to the Bishop of Graham's Town for the time being, and his successors, all immovable property vested in the Bishop of Cape Town but situate in the diocese of Graham's Town, "provided that every such property so transferred shall be subject to the same trusts in all respects after such transfer as it was subject to at the time of such transfer."

By a deed dated the 4th of March, 1863, the Bishop of Cape Town conveyed to Bishop Cotterill and his successors the land conveyed by the grant of the 7th of June, 1849, subject to the conditions in that grant mentioned and referred to.

By a deed dated the 17th of June, 1871, Bishop Cotterill conveyed the same property to himself and three other persons, being apparently the trustees of the Diocesan Trust Board of Graham's Town, to hold upon the trusts upon which the Bishop himself held.

There has been some controversy as to the regularity of this conveyance of 1871, but their Lordships hold the question to be immaterial. The interest which was passed first to Bishop Gray, then to Bishop Cotterill, and then to the grantees of 1871, is an interest clothed with no active duties, and subject to the trusts, duties and regulations created by the Ordinance of 1839, and the conveyance of the 7th of June, 1849. It was not contended at the bar that the position of such a bare interest as this could affect the questions in this case.

Such being the legal position of the property in dispute, it is now necessary to show the position of the disputants, both with reference to one another and with reference to the property.

Merriman *vs.* Williams.

In the month of February, 1863, LORD KINGSDOWN delivered the opinion of this Board in a case which threw a new light on the position of the Church of England in South Africa, and showed that the advisers of the Crown had purported to do what was beyond its power. In the controversy between Bishop Gray of Cape Town and Mr. Long, the Colonial Court held that the letters patent of 1853, being issued after a constitutional government had been established, were ineffectual to create any jurisdiction, ecclesiastical or civil, within the Colony. On appeal to Her Majesty in Council, that opinion was upheld. LORD KINGSDOWN then proceeds to discuss the question whether the want of coercive jurisdiction in the Bishop had been supplied by the voluntary submission of Mr. Long. He states the position of English churchmen as follows:—

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

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

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

"These are the principles upon which the Courts in this country have always acted in the disputes which have arisen between members of the same religious body, not being members of the Church of England." *

In the course of the next year a controversy turning upon the same principles arose between the Bishop of Natal and Bishop Gray, claiming to act as his Metropolitan under the patents of 1853. The opinion of this Board was delivered by

* 1 Moore, P. C. (N.S.) 461.

LORD WESTBURY in December, 1864. As to the power of the Crown the law is thus laid down:—

"We apprehend it to be clear upon principle that after the establishment of an independent Legislature in the Settlements of the Cape of Good Hope and Natal, there was no power in the Crown by virtue of its prerogative (for these letters patent were not granted under the provisions of any statute) to establish a metropolitan see or province, or to create an ecclesiastical corporation whose status rights and authority the colony could be required to recognize." *

And after giving reasons for this opinion, his Lordship continues:—

"The same reasoning is of course decisive of the question whether any jurisdiction was conferred by the letters patent. . . . It is quite clear that the Crown had no power to confer any jurisdiction or coercive authority upon the Metropolitan over the Suffragan Bishops or over any other person."

The question then arose whether the Bishop of Natal had by contract given the jurisdiction claimed by Bishop Gray. On this point LORD WESTBURY says:—

"Even if the parties intended to enter into any such agreement (of which, however, we find no trace), it was not legally competent to the Bishop of Natal to give, or to the Bishop of Cape Town to accept or exercise, any such jurisdiction." †

One effect of these expositions of the law was that the Crown ceased to grant Letters Patent for bishops in colonies possessing independent legislatures. It has been supposed in this case that the Crown might still take such action as to give to Graham's Town a Bishop who should be a successor to Bishops Armstrong and Cotterill within the terms of the patent creating the Bishopric. But though the Crown has not in any formal or public way decided not to resume the practice prevailing prior to 1863, their Lordships are clear that this case must be decided on the footing that the practice no longer exists.

Another effect of the decisions was that English churchmen in the colonies took steps to organize themselves, like other independent religious societies, on the footing of contract. This was done in South Africa by the action of Synods, the effects of which will be presently discussed.

In the year 1865 the defendant, who was then the Vicar of Ashton-under-Lyne, agreed with Bishop Cotterill, who

* 3 Moore, P. C. (N.S.) 148. † 3 Moore, P. C. (N.S.) 155.

was 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. He was accordingly appointed to be Colonial Chaplain by letter from the Secretary of State, and he went to the Colony in November, 1865. He had 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. And he also subscribed to the three articles required to be subscribed by the 36th of the Canons of 1603.

On his arrival in the Colony he found that the Vestry were in possession of the Church of St. George, as according to the Ordinance of 1839 they ought to have been. They appear to have accepted the Colonial Chaplain to be their officiating minister as a matter of course, according to the usual practice, and they put the defendant into possession of the church by handing him the keys, which are the symbols of possession. This, he says, was done under the Ordinance of 1839, by the provisions of which St. George's Church has always been governed. With a natural fondness for terms which bring the familiar system of the mother country before the mind, he calls this proceeding an induction of himself as Rector.

Two or three months afterwards Bishop Cotterill returned to the Colony, and he then appointed the defendant to be Dean of Graham's Town, and installed him in the Church as such. So far as the dignity goes, the Bishop may have had power under his patent to create it, but he could not confer any authority with it except such as might flow from contracts between the defendant and others. In this case there were no special statutes for the cathedral, nor have any been made till after the present dispute began.

It is important not to be misled by the false analogies of English ecclesiastical titles. The defendant is a titular Dean, and may be called a Rector. But in point of law, and for the present purpose, he must be taken as the officiating minister of a church governed by the Ordinance of 1839 and the grant of 1849, and appointed thereto either by the Vestry, or by the Crown, or by the joint action of the two. Neither the Vestry nor the Crown have been made parties to this suit. If it were necessary to determine the precise

origin of the defendant's title, their Lordships would have to deal with the difficulty as to the frame of suit which has been indicated by the CHIEF JUSTICE, and on which Mr. Justice SMITH bases his judgment.

In the years 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. By these Synods much was done to establish that Church on a voluntary basis. It is sufficient for the present to say of them that the defendant took an active and leading part in the proceedings.

In the year 1871 Bishop Cotterill resigned his office, and, as no appointment of a successor by letters patent could be looked for, Bishop Gray as Metropolitan issued a mandate addressed to the defendant commanding an election of a new Bishop. The result was the election of the plaintiff, and in that election the defendant took the leading part.

Some time afterwards the defendant became dissatisfied with the proceedings of the Synod, but he did not withdraw from his position in the Church of South Africa. When the present dispute began the defendant did not contend that the plaintiff had not the ecclesiastical character which he claimed to have. On the contrary, the defendant insisted on his own rights as Dean, which, as he asserted quite erroneously, would, according to English ecclesiastical law, give him the right of excluding the Bishop from ministrations in the cathedral. It is only during this litigation that the defendant has contended either that he himself is not a member of the Church of South Africa, or that the plaintiff is not the successor of Bishop Cotterill, or that the plaintiff and his Church are disconnected with the Church of England.

Their Lordships consider that the defendant's present contention is wholly inconsistent with his past conduct. The CHIEF JUSTICE says on this point:—

> "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."

Merriman *vs.* Williams.

Of the same opinion was Mr. Justice SMITH, and with it their Lordships entirely agree.

So far then as this dispute turns on the question whether the defendant has come under personal contracts or equities, the plaintiff has proved his case. But the defendant cannot contract away the rights of other people. If he is occupying an office in which he owes duties to the Government, to the Vestry, or to the Church members, he cannot by his contract give to any extraneous person or body rights which may interfere with those duties. If again the plaintiff belongs to a religious body which cannot claim to be in connection with the Church of England as by law established, no contract with the defendant or with any one else can give him a right to use property which is settled to uses in connection with that Church. Their Lordships will address themselves to this latter question, which they think must govern the case. For that purpose they have to examine the Acts of the Synods which are set forth in this Record.

In conducting this examination their Lordships do not enter into the discussions whether or no the Church of South Africa is a branch of or identical with the Church of England. What the charters of the endowment now in question require is connection with the Church of England as by law established; and on this part of the case it is sufficient for the plaintiff if he can show such a connection on the part of the Church of South Africa.

One thing which their Lordships conceive to be necessary for establishing such a connection between the Church of England and another Church is a substantial identity in their standards of faith and doctrine. Where the other Church is that of a colony possessing an independent Legislature, there must be differences, as for instance in the appointment of Bishops and in the erection of courts, scuh as necessarily result from the difference of political circumstances in which the Church of England and the other Church find themselves placed. There may probably be other differences, which yet might be too slight to work a disconnection, and which need not now be considered.

Among the Acts of the Synod of 1870 there are several provisions which in the Supreme Court and here have been relied on to show a disconnection between the Church of South Africa and the Church of England, and which their

Lordships will not now discuss in detail. Such are the provisions of the 27th canon, the declarations which refer to a possible alteration of the Creeds, and to a possible alteration of formularies by a General Assembly, the provision in the 3rd canon for the election of Bishops without the consent of the Crown, and the constitution of separate courts. Their Lordships are not prepared to say that the effect of these provisions is to disconnect the Church of South Africa from the Church of England. The most important in this respect are the two last-mentioned provisions. But they are the necessary results of the legal and political situation as laid down by Her Majesty in Council, not the expression of any separatist intention. If they worked a disconnection, there would be an absolute impossibility of connection between two Churches so situated. And it appears to their Lordships that though the existence of separate systems of appointing Bishops and of ecclesiastical tribunals is likely enough in the course of time to lead to divergencies, the mere fact of their establishment does not produce any such effect.

It is the first article of the Constitution, and especially the 3rd proviso attached to it, which, in their Lordships' opinion, creates the great difficulty in the way of holding that the Church of South Africa is in connection with the Church of England. That article is as follows:—

"ARTICLES OF THE CONSTITUTION.

"1. The Church of the Province of South Africa receives the doctrine, sacraments, and discipline of Christ as the same are contained and commanded in Holy Scripture according as the Church of England has received and set forth the same in its standards of faith and doctrine, and it receives the Book of Common Prayer, and of ordering of Bishops, Priests and Deacons, to be used according to the form therein prescribed in public prayer and administration of the sacrament and other holy offices, and it accepts the English version of the Holy Scriptures as appointed to be read in churches, and further it disclaims for itself the right of altering any of the aforesaid standards of faith and doctrine.

"Provided that nothing herein contained shall prevent the Church of this province from accepting, if it shall so determine, 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, or from making at any time such adaptations and abridgments of and additions to the services of the Church as may be required by the circumstances of this province.

Merriman *vs.* Williams.

"Provided that all changes in and additions to the services of the Church made by the Church of this province shall be liable to revision by any Synod of the Anglican communion to which this province shall be invited to send representatives.

"*Provided also that in the interpretation of the aforesaid 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 and doctrine other than those of its ecclesiastical tribunals, or of such other tribunal as may be accepted by the Provincial Synod as a tribunal of appeal.*"

There are in this article and in other parts of the Synodical proceedings general expressions affirming in the strongest way the connection of the Church of South Africa with the Church of England, and its adherence to the faith and doctrine of the Church of England. But all these general expressions are unavailing for the present purpose, if on coming to particulars we find that the Constitution substantially excludes portions of the faith and doctrine of the Church of England. The trusts of the property in dispute are declared by the Ordinance of 1839, and the grant of June, 1849, in favour of persons belonging to the United Church of England and Ireland as by law established. But the standards of faith and doctrine adopted by that Church are not to be found only in the texts. They are to be found also in the interpretation which those texts have from time to time received at the hands of the tribunals by law appointed to declare and administer the law of the Church.

It has been argued that the Church of South Africa has here done all that existing political circumstances permitted it to do for continued connection with the Church of England; and again, that the proviso is a mere statement of the facts of the case, and means no more than this, that as the Church of South Africa must have tribunals of its own, it hereby places on record that their decisions should be binding.

The necessity of separate tribunals and its probable consequences has been above dealt with. But their Lordships consider that the proviso under consideration is very much more than a recognition of the facts of the case; and that the Church of South Africa, so far from having done all in its power to maintain the connection, has taken occasion to declare emphatically that at this point the connection is not maintained.

It was competent to the Church of South Africa to estab-

lish for itself any system of law which it thought fit. The facts of the case did not compel it to say that its tribunals shall not take English decisions as authoritative. It might have declared that the decisions of the tribunals established by law for the Church of England, whether past or future, should be binding on the tribunals of the Church of South Africa. That would probably keep the two Churches in connection for the longest period of time, though it would not be necessary to go so far in order to maintain the connection at the outset.

But the obvious course for a Church which desired to be in connection with the Church of England, to all intents and purposes, would be at least to say at starting that its faith, doctrine, and discipline should be those which then prevailed in the Church of England. Such a Church would, until some fresh departure occurred, be in connection with the Church of England.

Their Lordships were strongly invited by the respondent's Counsel to connect the proviso under consideration with the course of some well-known controversies. There is no judicial ground for saying that it was aimed at any special practice or doctrine. But its practical effect may well be illustrated by reference to some important decisions of Her Majesty in Council. For instance, the decisions in the cases of *Gorham* vs. *The Bishop of Exeter* * and *Williams* vs. *The Bishop of Salisbury*,† both delivered prior to the Synod of 1870, affirm and secure the right of a clergyman of the Church of England to preach freely the doctrines which were there in question; but in the Church of South Africa a clergyman preaching the same doctrines may find himself presented for, and found guilty of, heresy. Such a reservation on the part of the Church of South Africa must tend to silence and to exclude those whom the decisions of Her Majesty in Council would protect in the Church of England.

The decisions referred to form part of the constitution of the Church of England, as by law established, and the Church and the tribunals which administer its laws are bound by them. That is not the case as regards the Church of South Africa. The decisions are no part of the constitution of that Church, but are expressly excluded from it. There is not the identity in standards of faith and doctrine which appears to their Lordships necessary to establish the

* Moore's Rep. (ed. 1852). † 2 Moore, P. C (N.S.) 375.

connection required by the trusts on which the Church of St. George is settled. There are different standards on important points. In England the standard is the formularies of the Church as judicially interpreted. In South Africa it is the formularies as they may be construed without the interpretation.

It is argued that the divergence made by the Church of South Africa is only potential and not actual, and that we have no right to speculate on its effect until the tribunals of South Africa have shown whether they will agree or disagree with those of England. Their Lordships think that the divergence is present and actual. It is the agreement of the two Churches which is potential. The ecclesiastical tribunals of South Africa may possibly decide in all important points as Her Majesty in Council has done. But the question is whether they have the same standard; and, as has been shown, they have a different standard.

Of course it was perfectly competent to the Church of South Africa to take up its own independant position with reference to the decisions of the tribunals of the Church of England. But, having chosen that independence, they cannot also claim as of right the benefits of endowments settled to uses in conection with the Church of England as by law established.

Such being their Lordships' view of the Synodical proceedings in 1870, it is not necessary to consider further whether the defendant's position is such as to enable him by his conduct to give to the plaintiff the rights he claims, or whether the suit is so constituted as to enable the plaintiff to obtain any decree for the enjoyment of property situated as this is. It will have been seen by the foregoing observations that there is difficulty on both these points.

Their Lordships wish to add their opinion that courts of law cannot settle in any satisfactory way questions affecting permanent endowments after a total change of circumstances has occurred, and their concurrence with the CHIEF JUSTICE in thinking that the Legislature alone can properly deal with such cases.

The result is that their Lordships will humbly advise Her Majesty to dismiss this appeal. The costs must follow the result.

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