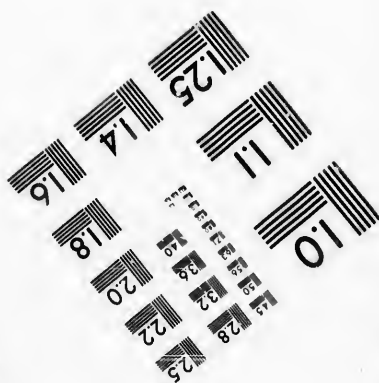
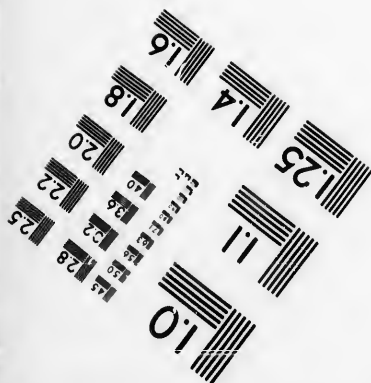
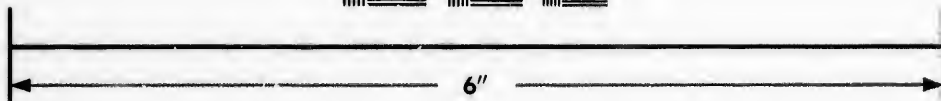
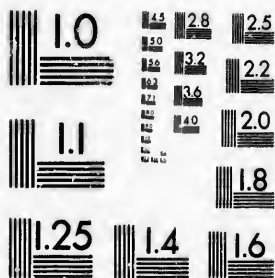


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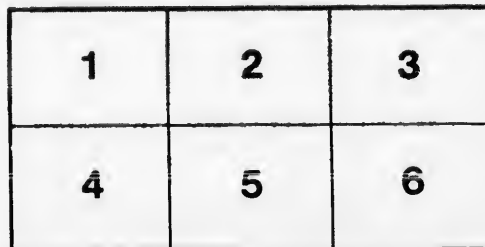
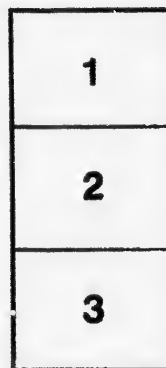
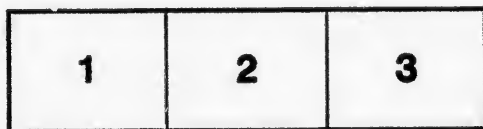
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IN THE MATTER
OF
THE PROVINCIAL SYNOD
OF CANADA.

FURTHER OPINION
OF
ADAM CROOKS, Esq., Q. C., AND E. BLAKE, Esq.

TORONTO:—1864.

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FURTHER OPINION, &c.

TO THE RIGHT REVEREND THE LORD BISHOP OF
HURON,—

Your Lordship has directed our attention to a Circular Letter from the Lord Bishop of Montreal and Metropolitan, to the Bishops, Clergy and Laity of Canada, in which, by way of answer to our opinion given to your Lordship on the subject of the Provincial Synod or Assembly, the Metropolitan sets forth the opinions of Strachan Bethune, Esquire, Q. C., and the Honorable J. Hillyard Cameron, Q. C., on the same subject; and your Lordship has requested us to state for your guidance whether from these opinions we are led to modify our own.

In order to contrast and examine the positions assumed on each side, we propose to restate our short opinion, and to state briefly what we gather to be the views of Messrs. Bethune and Cameron respectively. Our opinion was as follows:—

“ We have considered the papers and statements laid before us by the Bishop of Huron, from which it appears, amongst other things, that the Bishop of Montreal, as Metropolitan, and by virtue of Her Majesty's Patent in that behalf, convoked and presided over the meetings of Provincial Synods or General Assemblies which have taken place in Canada, and that the action of the Assembly and of the several Dioceses which participated therein, proceeded upon the assumption that this Patent was legal and valid, and that this assumption materially influenced the action of the Diocese of Huron in the matter.

“ It appears also that under judicial decisions arrived at and legal opinions taken subsequently to the last meeting of the Assembly, the Patent is invalid and illegal in all its material parts, including that which assumes to give the Bishop of Montreal, as Metropolitan, power to convoke and preside over the Assembly. We are of opinion as follows:—

1. “ The meetings and organization of the Assembly were not nor are they, under the circumstances, legal or binding on any Diocese.

2. "In order to the proper and legal organization of the General Assembly, it is necessary that all the Dioceses in Canada should concur in a new organization thereof.

3. "The refusal of any one Diocese to concur in the organization of the General Assembly, would render it impossible to effect such an organization under the Provincial Act; though of course a voluntary association, independently of the Act, may be formed by the members of any one or more of the Dioceses."

Mr. Bethune is of opinion, (1) that the Metropolitan "had a perfectly legal right to convoke and preside over the Assembly," and that therefore its organization is valid and binding on all parties.

(2.) That the Diocese of Huron, by sending delegates to the Synods, and by the action of those delegates at the Synods, *acquiesced and concurred* with all the other Dioceses in the organization which was effected, and that *this acquiescence and concurrence binds that Diocese, and confirms the organization*, even though the Metropolitan had no right to convoke or preside over the Synod.

Mr. Cameron is of opinion (1) that "the Letters Patent did not confer any right on the Metropolitan to convoke the first Provincial Synod, although they professed to do so," and that various other powers and authorities, and the coercive jurisdiction which the Letters professed to confer upon the Metropolitan were not and could not be validly so conferred.

(2.) That the Metropolitan might properly call together the Delegates from the different Dioceses, and that, when they did assemble in pursuance of that call, they found a properly constituted Synod, whether they were legally convoked or not, *as by common consent they proceeded to business, and no objection was made, either to the manner, time or place of their assembly*, and their acts are binding on the members of the Church in the several Dioceses under the Synod law; and that the Diocese of Huron, *by its action in sending delegates to, and by the action of those delegates in Synod, is precluded from objecting* either to the validity of the appointment of the Metropolitan, or to the legality of the proceedings of Synod, and is therefore bound by those proceedings, notwithstanding that the Metropolitan had not power to convoke the first Synod.

Neither the Metropolitan nor his advisers question the accuracy of the statement of facts with which our opinion is prefaced, or that of the statement of law contained in the third paragraph of our opinion.

Messrs. Bethune and Cameron hold, as your Lordship will have observed, opinions diametrically opposed on the vital question of the power assumed to be conferred on the Metropolitan by the Letters Patent.

On this question we concur with the opinion now enunciated by Mr. Cameron, and that result has been arrived at in our case, and we apprehend in his case also, after a perusal of the judgment of the Judicial Committee of the Privy Council, and of the opinions of the advisers of the Crown to which we have referred.

Under the circumstances we shall assume that the Judicial Committee, the advisers of the Crown, Mr. Cameron, and ourselves are right, and that Mr. Bethune is wrong, on this point.

There remains for consideration only the question whether there has been, on the part of the Diocese of Huron, any binding assent to the creation of Synod under the Provincial Act.

If this question be resolved in the negative, the inevitable consequence is that there is no valid creation of Synod.

We affirm with great confidence that there has been no such assent.

Let us examine upon what assumed relations, under what belief, and moved by what considerations, the Diocese of Huron acted, and how in fact it did act, in the matter. Irrespective of the Provincial Synod Act, the Church of England in Canada had no mode of forming an association such as a General Assembly, other than by the voluntary action of its members; and an assembly so constituted would have had no power to bind any persons, except those who expressly or by implication had consented to be bound by its action, and would have had no jurisdiction over the members of the Church generally; much less would it have had a right to establish Spiritual Courts, or by its action to deprive persons generally of either status or property in the Church.

Under the Provincial Synod Act, the Bishops, Clergy and Laity were authorized to meet by representation from their respective Dioceses in General Assembly, and to frame a constitution and regulations for the general management and good government of the Church in Canada; and such constitution and regulations would thereupon become binding and obligatory upon all the members of the Church.

This act is merely permissive. It is not upon compulsion, but by the voluntary combination of all the Dioceses, that the Assembly is to be formed and the Act to become operative.

At the time of the issue of the Letters Patent, therefore, the Diocese was free to dissent from or assent to any proposal for the creation of a Synod; it was not bound to obey any notice convoking a Synod, and none of its members were subject to the coercive or other jurisdiction of any one outside of the Diocese.

The Letters Patent which under these circumstances issued, after reciting the presentation by other Dioceses of petitions for the appointment of a Metropolitan, "that so the necessary powers might be vested in him for holding and presiding over the General Assembly," appointed the Lord Bishop of Montreal Metropolitan, and directed that the Bishops of all the other Sees should be suffragan Bishops to the Metropolitan; and they purported to will and declare that it should be lawful for the Metropolitan, at his discretion, to hold and preside over the General Assembly and General Assemblies; they purported to give the Metropolitan jurisdiction over the Bishops and all persons in orders in the several Dioceses; they purported to give the Metropolitan powers of visiting the said Bishops and persons, for correcting and supplying the defects of the said Bishops and persons, with all and all manner of visitatorial jurisdiction, power and coercion; they purported to empower the Metropolitan to inhibit during visitation the exercise of the jurisdiction of the said Bishops, and by himself or his commissaries to exercise such powers, functions and jurisdictions as the Bishops might have exercised if not inhibited; they purported to give to any person aggrieved by any procedure of any of the said

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Bishops, a right of appeal to the Metropolitan, and to give the latter power finally to decide and determine such appeal; and they purported to direct that proceedings which might be instituted against any of the said Bishops should be originated and carried on before the Metropolitan, and to give him authority to take cognizance of the same.

The Metropolitan erroneously believed himself to be, and asserted that he was, entitled to exercise these various powers, including that of holding at his discretion a Synod or General Assembly.

Your Lordship and your Diocese, as well as the other Bishops and Dioceses, the Secretary of State for the Colonies, and the legal advisers of the Crown—in fact all concerned—labored under the same erroneous and indeed it is difficult to conceive a stronger excuse for that belief than is to be found in the by the Crown, under the circumstances, of the right to confer these powers.

The Metropolitan, in the exercise of these assumed powers, proceeded at his own discretion to convoke and hold a Synod, and he notified the several Dioceses, including that of Huron, to attend upon the specified day.

Upon this notice, it devolved upon your Lordship and your Diocese to determine what course should be pursued; and, on the common assumption of all parties as to the relative position of each, it is obvious that there was but one course open, namely, to obey the notice and choose Delegates to Synod.

You were not asked to assent to or dissent from the creation of Synod—Synod was to be created whether you willed it or not.

Your refusal to elect Delegates would be an act of disrespect to the Royal Letters Patent, and of disobedience to the individual thereby set in authority over you, and would expose the parties chiefly concerned to the exercise of that large coercive and penal jurisdiction assumed to be conferred by the Letters.

Your refusal to elect Delegates would not prevent the creation of Synod, or hinder its jurisdiction from attaching

on the Diocese--Synod was to be created whether you elected Delegates or not, and, when created, its jurisdiction would attach on all the Dioceses.

The question was not presented whether you should negative or concur in proposals for a Synod, abortive without your co-operation. Upon that grave question you had not the opportunity of deliberating, you did not deliberate, and of course you came to no determination.

The question as presented was, whether you should disobey the notice, risk the consequent penalties, and remain without voice or part in a Synod having jurisdiction over the whole Church, or whether, seeing a Synod having such jurisdiction was inevitable, you should obey the notice, save the penalties, and participate in its deliberations.

The question was not whether there should be a Synod, but whether you should be represented in the Synod, which was being created independently of your wishes, by other and extraneous power.

To this question, we repeat, there was but one answer, —The notice must be obeyed and the Delegates chosen.

You obeyed the notice and chose the Delegates.

The Synod so convoked, the Delegates so chosen, met together; the Metropolitan, expressly by virtue of the Letters, presided at the first meeting; deliberations took place on various subjects; a committee, (of which Mr. Cameron was convener, and whose report was adopted by the Synod) determined that the Letters Patent were valid, and thus any doubts on this point must, to the apprehension of the Delegates, have been set at rest; several amendments of the Letters were suggested as desirable; a constitution was adopted; new Letters Patent were issued in accordance with the suggested amendments; and a second Synod was held under a fresh notice from the Metropolitan. In both these Synods your Lordship and the delegates from your Diocese took an active part.

We are instructed that the statements given in the opinions of Messrs. Bethune and Cameron of the part so taken are not perfectly accurate; but we do not enter into details, because, in our view of the matter, what was done is quite immaterial.

This alone is material, that the Delegates were not sent or empowered by the Diocese, they were not asked by Synod, nor did they intend, to confirm an invalid organization and an usurped authority, or to assent to the voluntary creation of a Synod, and that everything they did was done under the same common belief as to the power of the Metropolitan to convoke and hold the Synod at his discretion, existent at the period of the first notice. Subsequently it for the first time appeared that this belief was entirely erroneous; that everyone had been acting under a common mistake; that all the extensive powers, authorities and jurisdictions which the Crown had assumed to give, and the Metropolitan to exercise, were nought, and that there remained to him only his title, style and dignity.

It appeared that he had no right to convoke a Synod at his discretion; that he had no power to compel obedience or punish disobedience to his requisitions; that Synod could have been created only by the voluntary action and concurrence of all the Dioceses; that you were entitled to have considered and determined the question whether you should or should not concur in the creation of Synod; and that the result of your refusal would have been to prevent its creation.

Briefly, it appeared that the position and rights of the Diocese had in truth remained unaltered by the issue of the Letters Patent.

It is under these circumstances that Messrs. Bethune and Cameron argue that, though the assumed compulsory power under which, by a common mistake, the Synod was convoked and organized, did not in fact exist, and though all that was done by the Metropolitan and each Diocese was done in pursuance of that assumed power and under that common mistake—yet what has been so done may be maintained as a voluntary agreement on the part of each Diocese to organize a Synod under the Act, and as an assent to such organization on the part of each, binding upon all.

The bare statement of this position forms its sufficient refutation.

There has been no agreement or assent whatever on the part of the Diocese of Huron to the voluntary creation of

a Synod. That which the Diocese and its Delegates did upon compulsion, and in obedience to a supposed authority which had convoked a Synod without regard to its wishes, cannot be tortured into a willing assent to the creation of a Synod which could not have been formed without its aid and co-operation; and, even had the delegates assumed to give such assent their action would have been wholly nugatory; since they were delegated for no such purpose, nor entrusted with any such power; they were sent to represent the Diocese in a Synod already convoked under the Letters Patent, not to create a Synod by voluntary consent under the Act independent of the Letters.

But whatever the power or conduct of the Delegates, it is clear that the Diocese cannot, under the circumstances, be affected by the alleged assent to and acquiescence in the proceedings. The contrary position, whether viewed in its moral or in its legal aspect, is equally untenable.

He who, having procured a contract by a representation, erroneous in fact, but which he believed to be true, chooses after the discovery of his error to insist upon the contract, commits a moral and a legal fraud.

No man ought to be, no man is, morally or legally bound by assent or acquiescence induced through ignorance of his rights or misapprehension of his position; nor is it from proceedings, originated and continued on a false assumption and under a grave mistake, that an assent can be inferred obligatory in morals or in law.

We have, therefore, to state to your Lordships that we see no reason to doubt the accuracy of our former opinion, and we have to repeat "that the meetings and organization of Synod were not, nor are they under the circumstances, legal or binding, and that in order to its proper organization it is necessary that all the Dioceses in Canada should concur in a new organization thereof."

We have the honor to remain,

Your Lordship's faithful servants,

ADAM CROOKS,
EDWARD BLAKE.

Toronto, November 18, 1864.

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