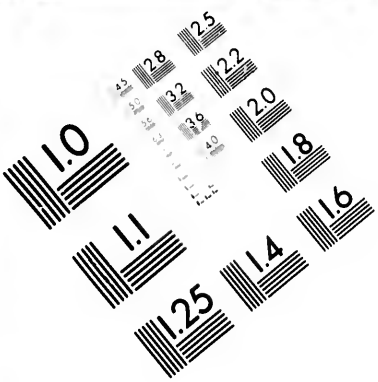

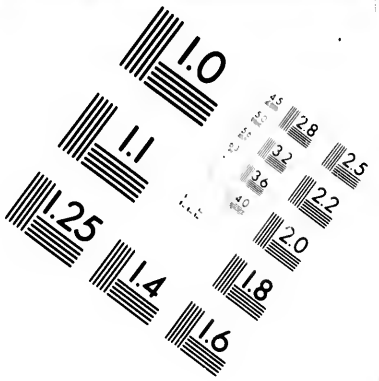

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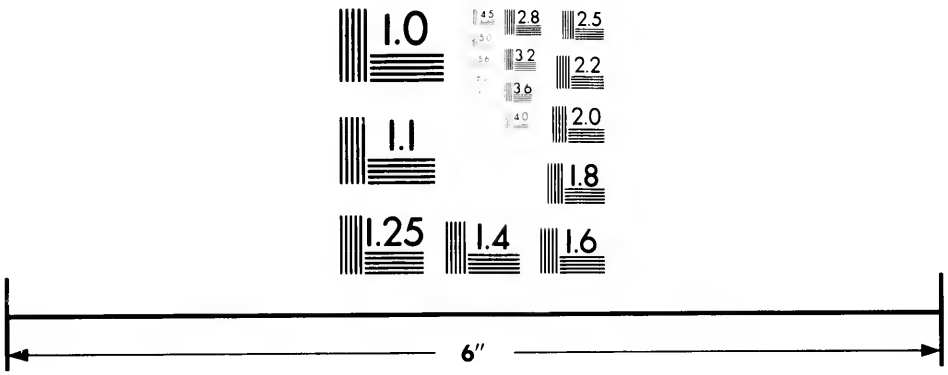

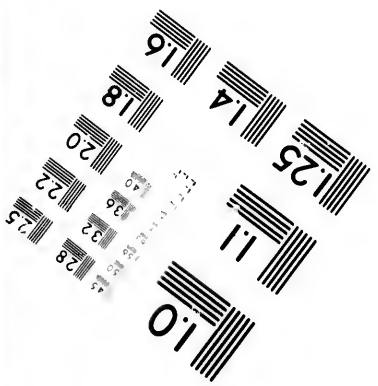

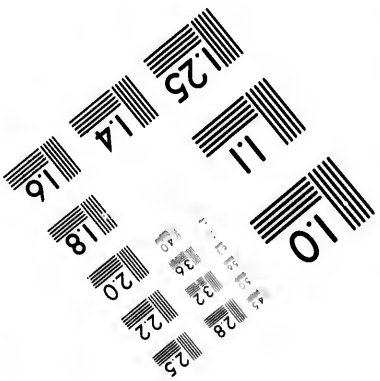

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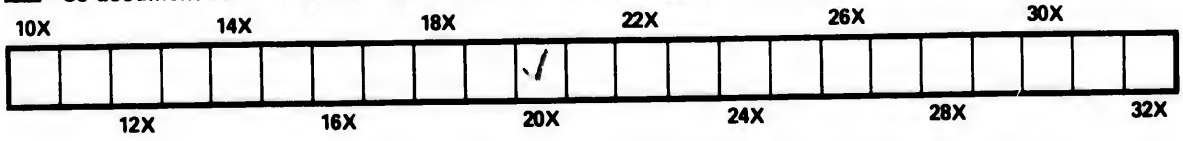

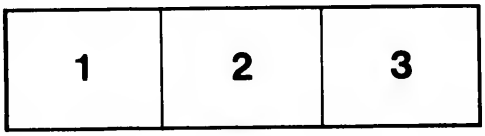

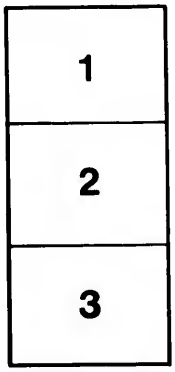

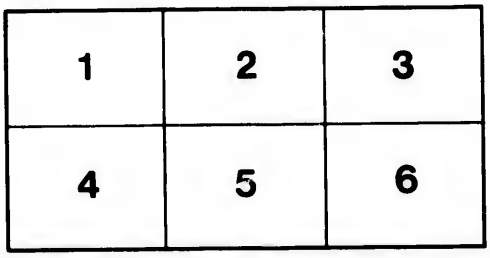

SOME ACCOUNT

OF THE

LEGAL DEVELOPMENT

OF THE

COLONIAL EPISCOPATE

BY

LORD BLACHFORD

FORMERLY UNDER-SECRETARY OF STATE FOR THE COLONIAL DEPARTMENT.

LONDON
KEGAN PAUL, TRENCH, & CO., 1, PATERNOSTER SQUARE
1883

As questions of some intricacy are continually arising respecting the legal *status* of Colonial Churches of the Anglican Communion, I have thought that a short history of the recent changes in that *status* might be useful to some of those whom they concern. The following sketch is brief and imperfect; but it has the advantage of being compiled—partly from memory, partly from memoranda made on different occasions—by a person who was attached to the Colonial Department while the most important of these changes were taking place. It was first printed in the *Guardian* newspaper, and is now reprinted with some alterations and corrections, among which, perhaps, the most material is the reference to the Colonial case of the Bishop of Natal *v.* Green in page 21, which had escaped my recollection when the paper was first printed.

BLACHFORD.

February 26, 1883.

THE LEGAL DEVELOPMENT OF THE COLONIAL EPISCOPATE.

Before the establishment of any bishopric in the Colonies, the Governor was spoken of as "ordinary," and in that capacity he collated to benefices (where, as in the West Indies, such things existed), he appointed and dismissed Government chaplains, and he exercised so-called ecclesiastical jurisdiction respecting the granting of marriage licenses and probates of wills. A certain disciplinary relation to the clergy was supposed to exist in the Bishop of London, and, as the ecclesiastical law of England does not extend to the Colonies, it appears to have been thought decent that certain moral offences, only cognisable in England by that law, should by local enactments be brought under the jurisdiction of the ordinary courts of justice. In illustration of this state of things, I quote a clause from the Instructions addressed to the Governor of Jamaica on July 15, 1778. After directing the Governor not to appoint a clergyman to any benefice without a testimonial from the Bishop of London, to dismiss delinquent incumbents, and to inquire whether any minister preached or administered the sacrament in orthodox churches without being in due Orders, the Instructions proceed as follows:—

"To the end that the ecclesiastical jurisdiction of the Lord Bishop of London may take place in that Our Island so far as conveniently may be, we think fit that you give all countenance and encouragement

to the exercise of the same, excepting only the collating to benefices, granting licenses for marriages and probates of wills, which we have reserved to you our Governor and Commander-in-Chief of our said island for the time being."

And the Instructions went on to recommend the passing of laws for the "restraint and punishment" of "blasphemy, profaneness, adultery, fornication, "polygamy, incest, profanation of the Lord's Day, "swearing, and drunkenness."

Of course, this loose jurisdiction of the Bishop, in regard to persons over whom he had no legal authority, in places which he could not personally visit, and only exercisable, "so far as conveniently "might be," by the "countenance and encouragement" of the Governor, came to very little: and efforts were consequently made from time to time by Colonial Churchmen, at least in North America, to obtain the establishment of local Episcopates. One of these, made on behalf of Virginia, is well known as having elicited from Sir Robert Walpole a brutal answer, perhaps characteristic of the statesmen of the day. And we learn from a memorial hereafter to be noticed that, in 1783, "the clergy of most of the Colonies had been "soliciting the appointment of American Bishops, at "different times, for many years past, and the answer "had ever been that the present time was not a proper "one, but a more favourable opportunity must be "waited for."

Such an opportunity at last occurred. Towards the end of the American War of Independence, a number of loyalist refugees, mostly members of the Church of England, sought a home in Nova Scotia, where, as in other American Colonies, representative

institutions had long been established, and where, in 1758, the English Liturgy had been declared by local enactment to be "the fixed form of worship." Encouraged probably by this addition to their congregations, eighteen Nova Scotian clergymen, on the 5th of March, 1783, addressed to Sir Guy Carleton, then Governor of New York, and afterwards Lord Dorchester, the memorial above quoted, in which they prayed, on grounds of religion and justice, that a bishopric might be established in their Colony. Sir Guy Carleton supported their request, not only as reasonable, but on grounds of policy, as "greatly "conducive to the permanent loyalty and future "tranquillity of . . . . a Colony which is chiefly "to consist of loyal exiles driven from their native "provinces on account of their attachment to the "British Constitution." The memorialists were at once (that is in a few months) informed that a bishopric would be established, and it was added "the proper method of effecting that establishment "and providing for the Bishop are now under con-"sideration."

This consideration could not have been perfunctorily given, the case being, on its face, a novel and important one. In point of fact, it was in hand for nearly four years. At last, in August, 1787, Letters Patent were issued, in which Doctors' Commons poured forth on the new Bishop a flood of spiritual and ecclesiastical authority. The instrument, which was approved by the Law Officers of the Crown—Sir W. Wynn, Queen's Advocate, Sir R. P. Arden (afterwards Lord Alvanley), Attorney-

General, and Sir A. Macdonald, Solicitor-General—contained the following grant of power:—

"We do by these presents give to the said Charles Inglis and his successors" (being of course first duly consecrated) "full power and authority to confer the orders of deacon and priest, to confirm those that are baptised and come to years of discretion, and to perform all other functions peculiar and appropriate to the office of a Bishop."

It then empowered the Bishop to exercise, in person or by his Commissary, spiritual and ecclesiastical jurisdiction in respect to institution to benefices and to the licensing of curates—to visit the clergy "with all and all manner of jurisdiction, "power, and coercion ecclesiastical;" to examine witnesses on oath, and to punish and correct clerical delinquents according to their demerits by deprivation, suspension, or otherwise, according to the canons and laws ecclesiastical. From the Bishop an appeal was given to the Crown in Chancery, to be decided in manner provided by the Act of 25 H. VIII. "for the Submission of the Clergy and "Restraint of Appeals"—*i.e.*, by what is called a Court of Delegates.

A separate instrument gave the Bishop similar powers in Quebec, New Brunswick, and Newfoundland.

At the time when all this fulness of ecclesiastical authority was conferred on the Bishop, Nova Scotia (as I have already observed) had been long in possession of representative institutions.

In 1791 the same representative institutions were given to Canada. The Act by which these institutions were established subjected Canadian incumbencies to "all rights of institution, and all other

"spiritual and ecclesiastical jurisdiction and authority "which have been," &c., "lawfully granted by his "Majesty's Royal Letters Patent to the Bishop of "Nova Scotia."

The saving word "lawfully" is observable. It suggests—but only suggests—the possibility that Parliament, while recognising the Letters Patent as being in general a proper exercise of the Crown's power to assign a diocese in Nova Scotia, was not prepared to give any sweeping sanction to all the particular powers purporting to be given to the Episcopate.

In 1793 (two years after the grant of representative institutions to Canada) a fresh step was taken. Canada was detached from its dependency on the diocese of Nova Scotia, and was erected into the new diocese of Quebec. The draft Letters Patent for establishing that diocese being referred to the Attorney and Solicitor General, Sir John Scott (afterwards Lord Eldon) and Sir John Mitford (afterwards Lord Redesdale), the former, considering the matter to be one of "purely ecclesiastical con- "stitution," requested the assistance of his brother Sir William Scott (afterwards Lord Stowell), and these great lawyers approved the draft Letters Patent, establishing as they did a diocese with the powers above described in a Colony possessing representative institutions.

The notion evidently prevailing in high quarters was to reproduce as far as possible in the Colony the English State Hierarchy—to weld together by the exercise of Royal prerogative an Imperial Church

Establishment—a pervading "Church of England" bound by ties of interest and loyalty to support the Throne from which its authority was derived. On some such view the same Law Officers were desired to report whether the Sovereign could give the new Bishop an *ex officio* place in the Legislative Council—analogous to the seats of the English Bishops in the House of Lords. They reported that this would not be lawful, but that each Bishop might on his appointment be summoned to the Council personally and by name. And this, I believe, for a long time was done.

In 1813 it was determined to erect a bishopric in India. Money was required for its endowment, and it was enacted by Parliament (53 G. III., c. 155, §49) that "*if it shall please his Majesty* by Royal Letters "Patent," &c., to create a bishopric, the directors should pay him a salary, and (§52) that such ecclesiastical jurisdiction as his Majesty might think necessary for the administration of holy ceremonies and the discipline of the clergy might be granted to him by Letters Patent. Here we have the first indication of a doubt respecting the power of the Crown to confer ecclesiastical jurisdiction. This, however, did not affect the course of procedure in regard to the Colonies. Probably it was thought, that even in Colonies possessing representative institutions, the ecclesiastical supremacy of the Crown was more potent than in territories governed by the East India Company in terms of their charter.*

* The Judicial Committee suggest that what turned out to be the unconstitutional grants of power, in the Colonial Office instruments

In 1819 Parliament was required to legislate respecting Colonial clergy. And in the Acts passed for this purpose the *status* and "Episcopal jurisdic-"tion" of the Bishops of Nova Scotia and Quebec were recognised inferentially, but clearly, and without the qualifying word "lawfully," which appeared in the Act of 1791.

The Act of 1819 declared, on the one hand, that no clergyman ordained by a Colonial Bishop not possessing "Episcopal jurisdiction" (whatever those words might mean) should, under any circumstances, officiate in England—the Legislature being, apparently, possessed by an apprehension that an inferior class of clergy ordained in the Colony might find their way to English preferment. But another clause provided that, under certain stringent conditions calculated to secure this country against an influx of improper candidates for preferment, clergy ordained by the Bishops of Quebec and Nova Scotia might officiate in England.

In these two Bishops, therefore, an Episcopal jurisdiction was clearly assumed to exist.

After North America came the West Indies, in respect of which the Crown exercised the same powers, with the same apparent Parliamentary recognition. In July, 1824, the Sovereign, by Letters Patent, established the bishopries, defined the dioceses, and appointed the Bishops of Jamaica and Barbados, both Colonies possessing representative

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issued in virtue of prerogative, were due to an ill-informed imitation of the terms of the Indian instruments issued under statute. It will be seen from the above statement that this is wide of the mark. The Colonial grants came first, the Indian statutes afterwards.

institutions. Here, as in the East Indies, salaries were required. These Parliament were asked to vote, and an Act was passed (6 Geo. IV., c. 88) reciting unhesitatingly that "His Majesty, by his several "Royal Letters Patent, *had been graciously pleased to* "*direct and appoint that the Island of Jamaica, &c.,* "*should be and become a bishopric.* . . . . And "in like manner that the Island of Barbados, &c., ". . . . . should be and become [another] "bishopric." With this recital the Act went on to appropriate money for the support of the bishopries, thus recognised as being already in lawful existence, and for other ecclesiastical purposes.

All this time Tory politics were in the ascendant. Lawyers were not in general likely to obtain high places on the Bench unless they held what were then considered sound doctrines in regard to the Royal Prerogative. The High Churchmen of the day were not generally, as at present, those who were zealous for ecclesiastical independence, but those who desired to find in the Sovereign—and had found in George III.—a "nursing father," and who were disposed to exalt the authority of the Crown, in the confidence that it would always be exerted, whether in England or the Colonies, on their behalf. Whigs and Dissenters probably cared little and knew less about the contents of these Letters Patent. And in no quarter, therefore, was there the disposition or opportunity to challenge them.

But if they had been challenged, it is natural to believe that Lords Eldon, Stowell, Alvanley, and Redesdale, as Judges, would have supported the

opinions which they had approved as Attorneys-General and Queen's Advocate—that the right of the Crown to confer these ecclesiastical powers would have been affirmed by the then Courts of Law, and that their construction of the Royal Supremacy would have become embodied in the law of the land, to the great embarrassment of Liberal statesmen who revolt against prerogative, and of the modern High Church clergy and laity who revolt against what is called Erastianism.

Dis aliter visum. The decision of this question was reserved for a later date, when the constitutional lawyers of the nineteenth century had taken the place of the prerogative lawyers of the eighteenth, when the progress of Liberal legislation had wholly altered the relation of Church and State in this country, and when Churchmen in the Colonies had lost the advantages and were becoming alive to the disadvantages of their dependence on the civil power in England.

The first faint shadow of reaction was, perhaps, in 1842. It was desirable to divide the dioceses and reapportion the incomes of the Bishops of Jamaica and Barbados. It was certainly necessary to obtain Parliamentary sanction for the reapportionment of public money, and it may have occurred to the framers of the Act that the Royal power of dividing dioceses was doubtful.

For even supposing, as hitherto had been supposed, that the Crown possessed the power of creating a corporate body with powers of ecclesiastical jurisdiction over a defined district, it might still be questioned whether the Crown, without the authority

of the Supreme Legislature, could recall what it had thus given, and carve a new diocese out of an old one. This question had not arisen in the case of Quebec, which had never had more than a mere provisional dependence on Nova Scotia. But it arose distinctly in the cases of Jamaica and Barbados. And the doubt would be strengthened by observing that when Henry VIII. carved the bishopries of Chester, Gloucester, Bristol, and Oxford out of the existing English dioceses, an Act of Parliament was considered necessary. Still more would this be the case when, as in the cases of Jamaica and Barbados, the dioceses had already been the subject of Parliamentary legislation, which is considered to withdraw what it touches from the grasp of the prerogative. At any rate, it was now thought wise not to rely on prerogative, but to give the Crown an express power to divide the dioceses.

The hint, however, if it was one, was not taken by the Government departments,—the official practice remained the same, and the prerogative was exerted on paper without resistance in dividing as well as creating dioceses, and in authorising Bishops to exert "all manner of coercion ecclesiastical."

In 1842, however, an active Bishop of Tasmania gave the colonists reason to apprehend that he was about to put his powers into force. Their validity was at once challenged, particularly the power of summoning witnesses: and the matter was referred to the Law Officers of the Crown, with a request that they would consider "whether any real advantage "was to be anticipated from the introduction into

"the Letters Patent of any provision whatever "beyond the declaration of the Royal pleasure that "a new bishopric should be created with a specified "titular designation and with a distinct specification "of the intended see, adding (if that were proper) "the appointment by name of the first or original "Bishop," and with the observation, perhaps somewhat exaggerated, that "the Bishop to whom such patents "had been addressed had sometimes been involved "in grave difficulties from regarding every part of "them as really operative and effectual, and from "attempting to reduce every part of them into "practice."

The Law Officers—now no longer Tory—without answering this question, reported that "Her "Majesty had no authority by Letters Patent to "create *the ecclesiastical jurisdiction complained of.*"

The Letters Patent were, accordingly, as opportunity offered, shorn of much magnificent phraseology; and thereafter the Bishop's power of punishment and correction was reduced to that of visiting the clergy, of calling them before him, and of inquiring into their morals and behaviour. Behind this right of inquiry lay, of course, the power of the Governor to dismiss State-paid clergy, and that of English societies over clergy deriving their incomes from this country.

Presently this reduced authority was brought under the notice of a court of law. And in the case of Long *v.* the Bishop of Capetown, the Judicial Committee declared, as was to be expected (24th June, 1863), that the Bishop's Letters Patent,

"being issued after Constitutional government had "been established in the Cape of Good Hope, were "ineffectual to create *any jurisdiction, ecclesiastical or* "*civil*, within the Colony, even if it were the intention "of the Letters Patent to create such a jurisdiction, "which they think doubtful."

In point of fact, as will have been seen by this narrative, the framers of the Letters Patent intended studiously to avoid any grant of a jurisdiction which they knew to be futile, and, I believe, only retained a certain number of high-sounding words because some ecclesiastical authorities were anxious for them, considering it better to lean on a broken reed than on nothing at all.

But this judgment was important, not only as destroying in self-governed Colonies the idea of an ecclesiastical discipline founded on a Crown grant and discouraging the affectation of it, but also as furnishing a new and sounder basis for that discipline. Adopting a principle faintly indicated in the case of the Queen *versus* Eton College, they laid down that in the eye of the law the basis of Church discipline must be voluntary agreement:—

"The Church of England," they say, "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 when any religious or other lawful association has not only agreed in 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 consequences of such violation, then the decision of such a 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 decisions, as they give effect to the decisions of arbitrators whose jurisdiction rests upon the agreement of the parties.

"These are the principles upon which the Courts have acted in the disputes which have arisen between members of the same religious body not being members of the Church of England. . . . To these principles, which are founded in good sense and justice, and established by the highest authority, we desire strictly to adhere."

Considered from the ecclesiastical point of view, and in relation to the Royal Supremacy, this does not of course affect the applicability to Colonial and all other Churches of the 36th Article, which is as follows:—

"The Queen's Majesty hath the chief power in the Realm of England and other of her Dominions, unto whom the Chief Government of all Estates of this Realm, whether they be Ecclesiastical or Civil, in all causes, doth appertain, and is not, nor ought to be subject to any foreign jurisdiction."

This doctrine is as true in the Cape of Good Hope as in England—as applicable to Indian Mahometans or Buddhists as to English Churchmen. The judgment leaves it intact. But the judgment, as far as it goes, withdraws Colonial Churches from that peculiar "headship" of the Crown which results in this country from establishment, and is recognised by our old divines as derived to English Sovereigns from the Jewish Kings and Roman Emperors. That "head-"ship," with its *congés d'élire*, its Courts of Appeal, its control over the proceedings of synods and other attributes of the "godly Princes" of old time, ceases to have any relation to a communion which has no Courts, but is at liberty to constitute its own tribunals of arbitration, which is to be "in the same "situation as any other communion, neither better "nor worse," which has none of the emoluments,

dignities, or privileges of a national institution, and whose rights are to be determined on the principles applicable to non-established bodies.

In point of fact, several Colonial Churches, acting partly from a sound instinct and partly on sound advice (like that of Sir William Martin in New Zealand), had been adjusting themselves in advance to this state of the law. In some cases by personal contract, in others by local enactments, they were forming themselves into societies cognisable by law, and capable of standing without the shadowy support hitherto supposed to be given by the appearance of Royal authority. The example had been set in Canada, Victoria, New Zealand, South Australia, and the Cape of Good Hope, where the Bishops, clergy, and laity, in communion with the Church of England, had legally organised themselves, and the example was rapidly spreading when, in 1865, a fresh impulse was given to these movements by the case of the Bishop of Natal.

The opinions of the Law Officers in 1842, and the decision of the Judicial Committee in 1863, are, it will be seen, directly at variance with those of the earlier Law Officers, including Lords Eldon and Stowell, who, in the Colonies of Nova Scotia and Canada, then possessing representative institutions, sanctioned the grant of "all manner of jurisdiction "power and coercion ecclesiastical." But they cannot be pronounced irreconcilable with the Acts of Parliament cited above. For although these appear to recognise the creation of "Episcopal jurisdiction" in some sense, by Letters Patent in the American and

West Indian Colonies; yet it may well be said that Parliament did not intend under the term "jurisdiction" to recognise the gift of a power to declare and enforce law, but only the assignment to a Bishop of a defined sphere of Episcopal action—a sphere within which he was to ordain and confirm, to convene, and admonish clergy and their congregations, and so on.

But the irrepressible Church of South Africa did not allow matters to rest there. In 1864-5 the case of the Bishop of Natal was brought before the Judicial Committee, consisting on that occasion of the Chancellor (Lord Westbury), Lord Cranworth, Lord Kingsdown, the Dean of Arches (Dr. Lushington), and the Master of the Rolls (Lord Romilly), and it elicited from them a judgment which completed the constitutional severance between the Church of England and her colonial offshoots in the most important Colonies of the Crown, and made it inevitable in the rest.

The case was that the Bishop of Capetown had assumed the power of deposing the Bishop of Natal in virtue of certain Metropolitical powers purporting to have been conferred on him by Letters Patent issued after the grant of representative institutions to one or both Colonies.

The Judicial Committee began by pointing out that both Bishops were consecrated under mandate from the Queen, and received and held their dioceses under Royal grants, and they proceeded thus:—

"It is plain that their legal existence [that of the Bishops] depends on acts which have no validity or effect except on the basis of the supremacy of the Crown.

"Further, their respective and relative rights and liabilities must be determined by the principles of English law applied to the construction of the grants to them contained in the Letters Patent, for they are the creatures of English law and dependent on that law for their existence, rights, and attributes."

Of course, we are all of us creatures, and those of us who, like Lord Chancellor Westbury himself, hold civil offices are, in that aspect, creatures of the law. But still to call the Bishops creatures sounds a little uncivil. However, accepting the phrase as a full account of them, the first question which arose was whether they had really been created—that is, whether the Crown had the power (not to give them coercive jurisdiction, which is treated separately in the judgment, but) to give them any existence at all. This question—the question of existence—is thus unequivocally stated by the Committee:—

"First. Were the Letters Patent of the 8th of December, 1853, by which Dr. Gray was appointed Metropolitan, and a Metropolitan see or province was expressed to be created, valid and good in law?

"With respect to the first question, we apprehend it to be clear, on 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 to establish a Metropolitan see or province, or to create an ecclesiastical corporation, whose status, rights, and authority the colony could be required to recognise.*

"After a colony or settlement has received legislative institutions" [that is, I suppose, after the Crown has parted with the power of legislation] "the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to that colony or settlement as it does in the United Kingdom.

"It may be true that the Crown, as legal head of the Church, has a 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."

It is not expressly added—but is evidently left to be inferred as obvious—that the Royal power of assignment which does not exist in the United Kingdom does not exist in the Colonies—that the

Letters Patent of the two Bishops are equally null and void, and their *status*, rights, authority, dioceses, and sphere of action, so far as they are cognisable by law, involved in one common ruin. And later on this conclusion is thus explicitly stated by the Committee:—

> "We arrive at the conclusion that, although in a Crown colony, properly so called, ... *a bishopric may be created* and ecclesiastical jurisdiction conferred by the sole authority of the Crown, yet that the Letters Patent of the Crown will not have any such effect or operation in a colony or settlement which is possessed of an independent Legislature."

All this language must be taken to have been well considered—and it seems, on its face, unambiguous. In Natal, as in the Cape of Good Hope—in respect of diocesan, as in respect to Metropolitical *status*—in respect to rank and sphere of action, as in respect to jurisdiction—in regard even to the Bishop's right to be considered as an ecclesiastical corporation, it seems that the Letters Patent are invalid and bad at law, and that nothing passes by them to Dr. Gray or Dr. Colenso, except, perhaps, that they may have been created lay (not ecclesiastical) corporations, with power of making contracts, of holding property, and of suing and being sued, and with territorial titles, like those of Dukes and Marquises, but with no more *status* or authority within Capetown or Natal than a Duke of Devonshire or an Earl of Suffolk in the shires from which they take their designations.

This judgment, it will be seen, does not only, like that in the Long case, dispose of Lords Eldon, Stowell, and the other Law Officers of the last century, but appears to show that when Parliament gave a statutory recognition to the American and

West Indian bishoprics, it was ignorant or forgetful of the law of the land.

"Appears," I say, because the construction of the language of the Committee, which seems to me inevitable, was disputed subsequently by the Master of the Rolls, and because the Committee state (citing the above-mentioned Acts, or some of them) that "the course which legislation has taken on this "subject is a strong proof of the correctness of "[their] conclusions"—a statement which I have never been quite able to understand.

It is not, however, necessary that I should understand it. It is more material to notice the judgment of the Master of the Rolls, which, it appears to me, has been taken by many persons as virtually reversing that of the Superior Court.

The question came before Lord Romilly thus:—

According to the doctrine of the Church of England, Dr. Colenso, having been canonically consecrated, was a Bishop of the Church with the powers and capacities belonging to that office. But he was made Bishop of Natal not by consecration but by certain Letters Patent—the same which gave Bishop Gray metropolitan authority over him.

To Dr. Colenso, not as Bishop but as Bishop of Natal, a certain annual income was payable by certain trustees.

But as we have seen, the Committee of Privy Council had decided that in Colonies possessing legislative institutions and *nominatim* "in the settlements "of the Cape of Good Hope 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 recognise. And more specifically still the Committee had declared that in such a Colony the Royal Letters Patent would not have the effect of creating " a " bishopric."

It was therefore natural that the trustees of the fund from which Bishop Colenso derived his salary should think it their duty to ascertain from a court of law whether he was entitled to receive his Episcopal salary after this apparent demolition of his diocese and of his character as Diocesan Bishop. For the Colonial Church it was rather a cruel question to raise. No doubt anything was better than uncertainty—but still a whole knot of Bishops might be in the same case as Dr. Colenso, and would have been left incomeless if judgment had been given against him. Happily this was not the case. Lord Romilly decided that Bishop Colenso was entitled to the emoluments of his bishopric.

Bishop Colenso's counsel might have alleged on his behalf that, in assuming Natal to have possessed independent or legislative institutions (or, rather, in assuming that the Crown had parted with its legislative power in that Colony, for that is the real point), the Judicial Committee had simply committed an error in point of fact. And the majority* of the

* The reason why one of the Judges dissented from his colleagues was one which, even if sound, could scarcely have been present to the minds of the Judicial Committee. It was notorious that in 1853 Natal was considered as a Crown Colony—the legislative power being vested in a council of officials and Crown nominees. But it appears that, in

Supreme Court of Natal, in the case of the Bishop of Natal *v.* the Rev. J. Green, held that this was so. They held the creation of the bishopric of Natal unimpeachable, because at the date of that creation Natal was a Crown Colony. But this point was not taken at the trial. The question was argued as if the bishopric of Natal stood on the same footing as that of the Cape of Good Hope, and the grounds on which the case was decided by Lord Romilly were these.

The question, he justly pointed out, was one of contract. Dr. Colenso had engaged to go out to Natal in order to perform certain functions. Did the judgment disable him from performing them? Certainly not:—

"The Bishop of Capetown, the Bishop of Natal, the Bishops of all Colonies similarly circumstanced—*i.e.*, having an established legislature, but having no established Church—can, as regards the ministers and congregations of the Church of England within their diocese, exercise all the powers of a Bishop; they can ordain, confirm, and consecrate; they can do more—they can visit, investigate, reprove, suspend, and deprive; and if, in so doing, they keep within the due scope of their authority as established by the discipline of the Church of England as by law established, and proceed in the exercise of that authority in a manner consonant with the principles of justice, their acts are valid and will be enforced by the legal tribunals."

This is, in a sense, undeniable and material. It is undeniable that if any clergymen have engaged with any Bishop to perform certain functions under his authority, with the liability to be suspended and deprived whenever the law of the Established

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the Letters Patent establishing that council, the usual clause which reserves to the Crown the concurrent, or rather superior, power to legislate by Order in Council, was omitted. If this prerogative power of legislation were thus extinguished, the prerogative power of creating a diocese would presumably be extinguished with it. And that this was so was the opinion of one of the Judges, who, however, concurred on other grounds in the judgment of his colleagues.

Church of England—(or any other law)—would justify such suspension and deprivation, the Colonial Courts would enforce such a contract. And Bishop Colenso was in a position to receive such engagements from clergy who were desirous of placing themselves under his authority, and to ordain or confirm those persons who in Natal desired ordination or confirmation from him. And these, as appears from the narrative portion of Lord Romilly's judgment, were the objects for which he was sent out, if, at least, "the Council for Colonial Bishoprics," who provided his salary, had before them the objects ordinarily paramount in the minds of Christian men. For what are those objects?

Religions, or at least many of them, confer various secondary advantages of a social or political kind, appreciable even by those who do not believe in them. But the primary object of every religion worthy of the name—the primary object, that is, in the eyes of those who do so believe in it as to support it—is of a moral and spiritual kind. The announced object of Christianity in particular is the regeneration and salvation of mankind. And the object of Christian Churches and Bishops is to furnish certain ministrations which are supposed to be in different degrees valuable for these ends. But mankind is not regenerated or saved by Letters Patent. If Bishop Colenso's Letters Patent were ever so invalid at law, Bishop Colenso was not less in a position (the question of his doctrinal incapacity not being now raised) to perform all religious functions proper to the office of an Anglican Bishop

for those who chose to accept his ministrations; and thus to give them such advantages in relation to the great objects of Christianity as purport to be derivable from the Anglican doctrine, discipline, sacraments, and ritual. To do this was his engagement, and certainly nothing in the Report of the Judicial Committee prevented him from performing it. This, I would submit, was quite sufficient to justify Lord Romilly's judgment.

But Lord Romilly, went farther, and considered it necessary to show that Bishop Colenso (in the eye of the law of course) derived his power to perform these functions in Natal from the Crown. His judgment is an able and learned exposition of his own theory of Royal Supremacy, purporting to interpret in some respects the Report of the Judicial Committee—but certainly subversive of it in its natural sense. He held, as Lords Eldon and Stowell would have held, not only that Colonial Bishops could in their so-called dioceses ordain and confirm those who presented themselves for ordination and confirmation, and reprove and suspend those who had engaged to submit to reproof and suspension, but that they received their authority to do all this from that Royal Prerogative which Lord Westbury seemed to have declared incapable of conferring any "*status*" or "sphere of action" cognisable by law. And he contended, with learning and ingenuity, that, on that basis, the Colonial tribunals would enforce an ecclesiastical authority which, on that same basis, Lord Westbury had declared the Colony would not be "required to recognise."

It must not be thought that I suppose myself capable either of reconciling or of pronouncing between these apparently conflicting authorities of the Judicial Committee and of the Rolls Court. The Law Officers of the Crown, to whom alone the Colonial Office in its perplexity could resort for counsel, advised that they were irreconcilable, and that the higher authority, in the natural sense of its words, must be taken to be—indeed that it was in fact—right. They did not dispute the correctness of Lord Romilly's decision, but they treated his doctrines as *obiter dicta*, observing that his explanation of the judgment of the Judicial Committee, of which he was only a single member, could not be accepted as an authoritative exposition of that judgment.

This is the justification of the Colonial Department for dealing with the Colonial Church on the basis of the Report of the Judicial Committee taken in its natural sense—in defiance of what would otherwise have been a cogent authority—the subsequent judgment of the Rolls Court.

It followed to consider what was the legal position of these Colonial bishopries, viewed in the light of this new doctrine of the Judicial Committee.

The East and West Indian bishoprics, nine in number, were untouched by the judgment, as being established under Act of Parliament.

The Crown Colonies, nine in number,* were

* I include among these the bishopric of British Columbia, which was badly created in part as extending to Vancouver's Island—possessed of representative institutions.

untouched, because in them the Crown was competent to establish bishopries in virtue of its sovereign legislative authority.

In the remaining twenty-three—comprising those of the North American, South African, and (with one exception) the Australian colonies—the bishopries were bad in their origin, having been created by Letters Patent after the grant of representative institutions. But in fifteen of these cases the vice of their creation might be thought to have been remedied, at least partially, by some Colonial or Imperial statutory recognition.

Thus in Canada, Victoria, and Tasmania the Church had received a legal organisation under local statute, the discipline of the Church being confided to Church assemblies, in whom, in Canada, the appointment to bishopries was substantially vested. In the Cape Colony the bishopries of Capetown and Grahamstown had been recognised by local Acts, and, in connection with these bishopries, synods had grown up, deriving their authority from the express or implied concurrence of those who desired to be held members of the Church. But I think that, except perhaps in Canada, the powers given to Church assemblies did not extend to the subdivision of dioceses occupied under Letters Patent. And as Lord Westbury's judgment had deprived the Crown of the power of subdivision, no such rearrangement of a diocese was possible so long as it continued to exist under Royal authority.

Of the remaining eight dioceses, those of New Zealand and one or two others had devised self-

supporting constitutions, on which they relied for the practical working of their Churches.

This was the state of facts and (assuming the correctness of the Law Officers' opinion) this the state of the law with which the Colonial Minister had to deal.

With the East and West Indian bishoprics and with the Crown Colonies there was no immediate necessity for interfering. The one class stood on Imperial or local legislation; the other on the sovereign legislative authority which the Crown possesses in Crown Colonies.

But with regard to the Colonies proper—the great English populations of North America and Australia—it appeared that, while, of course, the practical tie of co-operation, the spiritual tie of communion, the sentimental tie of a common origin, and the religious ties of like doctrine and similar ritual remained the same, the tie of a common relation to the supreme civil power, which, unestablished as they were, had seemed to connect them constitutionally with the great English Church Establishment, seemed to have finally and completely given way, or never to have existed at all.

Of course, the old Established Church of England as it existed under the Tudors—a great assemblage of ecclesiastical corporations divided into a definite number of dioceses, covering and confined to the limits of England proper, and each presided over by its Bishop—represented in ecclesiastical matters by its two Convocations, and in civil matters by its Episcopal peerage—exercising jurisdiction by its

ecclesiastical courts, and in those courts administering a common ecclesiastical law—this great institution, with its definite outline and legally established jurisdiction, was untouched by the decisions of the Judicial Committee. But the Church of England of George III.—the Imperial Church which was to plant not its off-hoots, but its members—its very self—wherever English Churchmen acknowledged the sovereignty of the English Crown, was now declared to be a phantom. First came doubts, then decisions—the Crown was declared incapable, first, of conferring the substance, and at last of conferring even the shadow of authority, and the whole parchment structure, viewed as a creature of the State, was swept down like a house of cards.

What, then, was to be done? And first, ought any attempt to have been made to validate by the authority of Parliament the illegitimate acts of the Crown? To this there were several objections. The larger Colonies would certainly have viewed such a proceeding as an infringement of their rights of self-government—and that in a way peculiarly distasteful to them, by giving a pre-eminence, amounting to privilege, to a particular religion. Next, a large class of Churchmen at home and abroad had become alive to the fact that their relation to the English Government, while it gave them in the Colonies neither emolument, nor power, nor organisation, had no inconsiderable effect in obstructing the free action of the Church, in rendering its position invidious, and in putting its members to sleep in reliance on an external support which did not exist. Of course,

there are always persons who, if they cannot retain the advantages of an expiring system, desire at least to retain its disadvantages. But the more energetic opinion of Churchmen was, I think, the other way, and these judgments—however distasteful to the Bishop of Capetown—were in many quarters not bewailed as disfranchisement, but hailed as emancipation.

But there was another reason against Parliamentary rehabilitation of Letters Patent—that it was impossible.

We all know the suspicions to which ecclesiastical legislation is exposed in this age and country—suspicions of ecclesiastical encroachment—suspicions of Parliamentary encroachment—suspicions of prerogative encroachment—suspicions of Liberal encroachment—suspicions of Episcopal encroachment—suspicions of judicial encroachment—suspicions of the moral effect of an enactment, or of the words in which it is expressed, even when the legal effect is precise and unobjectionable. Few persons who know what the difficulties of such legislation are would have seriously recommended it as practicable in the present case.

Failing Parliamentary legislation, it was legally impossible, in the eight crucial cases in which the past action of the Crown had been and remained bad, either to persevere in the existing course or to replace it by anything else. The Crown was simply incompetent to do one or the other.

In the fifteen cases where the original defect had to some indefinite extent been patched up by Imperial

or local legislation, the existing formalities had been found the occasions of delay, expense, and inconvenience. They were of no sort of use, and when the principle on which they had been adopted had broken down there was no sort of reason for maintaining them.

It was determined, therefore, to leave the Colonial Churches to do for themselves, with or without the assistance of the Colonial Legislatures, what the Crown could not do and would no longer affect to do for them. This decision left the Colonial Churches very nearly in the position of the Episcopal Churches of Scotland, Ireland, or the United States—voluntary religious bodies "in no better but no worse position" than any other religious body—and legally free to determine what should be the nature of their connection with the Church of England (of which, of course, communion is the basis), and what the amount of their similarity with that Church in doctrine and ritual. I believe I am warranted in saying that, in respect of their numbers, prosperity, and internal cohesion, this self-government has been on the whole as favourable to the Colonial Churches as it has been to the civil communities of which they are parts.

In one respect alone the State of England retains a formal control over the consecration of Colonial Bishops. It happens that the English Consecration Service, rendered obligatory in England by the Act of Uniformity, requires the production of the Queen's mandate for consecrating a Bishop. And this is reasonable, for the English Bishops are State functionaries, whose acts have a political significance beyond those

of a Roman Catholic prelate or a Presbyterian Moderator. The Sovereigns of Austria or Italy would have a right to complain, as of a Governmental act, if the Primate of the Established Church of England assumed to send forth into their territories a Bishop of Rome or of Vienna. Accidentally, the rubric in the Consecration Service provides against this possibility by making the consent of the Crown indispensable to the act of consecration. And the practice was adopted, and, I believe, still subsists, of issuing to the Archbishop of Canterbury, when desirous of consecrating a Colonial Bishop, a document which fulfils the rubrical condition of a "mandate"—which carefully abstains even from indicating any "sphere of action," diocesan or otherwise, but which is capable of being refused in any case in which the intervention of a prelate bearing, as it were, the stamp of the Established Church would be politically, or otherwise, objectionable.

One difficulty remained. An Act of Parliament (59 George III., c. 60, §4) had provided that (with certain immaterial exceptions) no person should be "capable in any way or on any pretence whatever of "at any time holding any parsonage or other ecclesi-"astical preferment within his Majesty's dominions," or "of officiating in any place or in any manner as a "minister of the Established Church of England or "Ireland," unless he was ordained by a Bishop having ecclesiastical jurisdiction over a defined district.

The discovery, therefore, that an indeterminate number of Colonial Bishops—indeterminate, that is, without a fresh course of expensive legislation—had

no "Episcopal jurisdiction" cognisable by law, threw an indeterminate doubt over the rights and ministrations of an indeterminate number of colonially ordained clergy "throughout her Majesty's "dominions." This, however, after some delay and discussion, was set right by an Act of Parliament which placed colonial and all other Episcopally ordained clergy on a footing somewhat less favourable than that already accorded to the Scottish Episcopalian Church.

The Act of Uniformity is framed on the assumption that, subject to fitting disciplinary or precautionary requirements, any valid Episcopal ordination gives a capacity for clerical employment. In accordance with this principle the recent Act places all foreign and colonial ordinations on the same footing, providing only that no clergyman having received such ordination shall be admitted in the first instance to English employment, except at the absolute discretion of the Bishop of the diocese—a discretion as absolute as that which he exercises in the case of his own ordinations. This enables him to exclude all persons whose foreign ordination is doubtful, or who are unsatisfactory in point of education, doctrine, character, or (it may even be) of race. Of course, the candidate for employment has to subscribe the usual clerical tests.

I have now come to the end of the subject so far as I have any claim to special knowledge of it. But I should shortly note what has subsequently happened.

In the self-governing Colonies I apprehend Lord

Westbury's judgment to have so severed the Anglican dioceses from the Church of England that it became a more slovenly inaccuracy to speak of them as part of it. They and the Church of England, with its two Archbishops, its Convocations, its Act of Uniformity, and its Royal Supremacy, are alike parts of a great communion which has been recently named Pan-Anglican; but they are no more one with the Church of England than are the Churches of Scotland or Ireland. A voluntary and very shadowy subordination to the Archbishop of Canterbury may constitute a connection; but nothing in the nature of identity. It became, therefore, necessary, as a mere matter of correctness, to speak of them, not as "the "Church of England in the Colonies," but as "colonial dioceses in communion with the Church of "England." This was what, by the course of events, they had, as a matter of fact, become.

But the West Indian bishopries and those of the Crown Colonies rested on legislative foundations to which the Crown was party, and, as being thus more or less established under civil authority, might with somewhat less impropriety be spoken of as parts of the mother Establishment.

Here the English Government intervened. The judicial disintegration in America and Australia was followed by a Governmental disintegration in the East and West Indian Colonies. In self-governing Colonies, where the European element prevailed, the doctrine of religious equality had very soon established itself; and State aid to religion was either refused altogether, or given to different persuasions in arithmetical

proportion to the number of their adherents. The English Government ultimately determined that justice, or sound policy, or both required the same principle to be applied to non-European, that is, in fact, to Crown Colonies. And the endowments of the Bishops and clergy having, in accordance with this principle, to be withdrawn, it followed as a matter of fairness and consistency, that the trappings of pre-eminence which had proved, and might again prove, so costly and inconvenient should be withdrawn also. This policy has, I believe, for the most part, been carried into effect. The whole Colonial Church is likely before long to stand on one and the same footing, without aid from the State, but with a claim to be relieved from any legacy of embarrassment which would prevent them from shifting for themselves.

I cannot say that England appears as yet to have discharged, nor, to say the truth, do I see how it can entirely discharge, all its obligations in relieving the Churches from the embarrassments consequent on all these legal misapprehensions. One instance of this has recently occurred.

The question whether the Dean of a cathedral is bound to allow his Bishop to preach in it, is in England—or, at least, in some English dioceses—a matter of question. Happily, no English prelate has thought it worth while to trouble the Church by raising it. Unhappily, in the South African Church, it has been otherwise. The Bishop of Grahamstown asserted this right over the Church of St. George, of which the (so-called) Dean was the

incumbent; the Dean resisted it, and a law-suit was the result.

The Church was held by trustees, "for eccle-"siastical purposes in connection with the Church of "England."

And, omitting immaterial disputes, it was contended for the Dean that the dioceses which had organised themselves under the appellation of the South African Church had ceased to be "in connec-"tion with the Church of England," and that he and his Church were accordingly beyond their jurisdiction; and this plea was declared good by the Judicial Committee.

In the ordinary sense of the word the "connec-"tion" between the Churches of England and South Africa is close and notorious. It is notorious that the South African dioceses are in communion with the Church of England, that they hold themselves and are held by her to be parts of one large and connected ecclesiastical brotherhood, and that their clergy derive their ordinations and much of their revenues from the Church of England. It is also the fact that the Articles of Faith and, with a certain power of abridgment and enlargement, the Prayer-book of England are declared to be those of South Africa; that their form of discipline is in all material points identical with that of England; that an English clergyman is eligible for preferment there, that an English Churchman would find there the religious ministrations which he left behind him in England; and that there is no other ecclesiastical organisation, in the Cape Colony at least, of which all this can be said. And with all these

ties—hereditary, doctrinal, disciplinary, ritualistic, and financial—it is plain that in all these respects the Churches of South Africa are fulfilling to the general satisfaction of the mother Church all the objects for which they were founded in respect to the religious interests of heathen nations and of Anglican colonists. If they have become capable of adopting, and have in fact adopted, the duties of self-government forced on them by the home Government, this is not intended or understood as an act of disruption, but is an indication of that healthy development of which a mother Church, not bent on arbitrary dictation, ought to be proud. But it appears that all these elements of "connection" are, in the view of the English law, outweighed by the fact that those new and unestablished dioceses, while accepting absolutely the formularies, and almost absolutely the ritual, of the mother Church, do not bind themselves to accept the judicial interpretations imposed upon their formularies and ritual by the secular Court which, as a consequence of the alliance between Church and State, exists in England for controlling on the part of the nation certain operations of the national establishment.

The Synod has declared that—

"In the interpretation of [its] 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 own ecclesiastical tribunals, or of such other tribunal as may be accepted by the Provincial Synod as a tribunal of appeal."

The Judicial Committee in the case of Merriman *v.* Williams treat this practical repudiation of their ecclesiastical authority to be an abandonment of the English standards of faith and doctrine: —

"There is not the identity in standards of faith and doctrine which appears to their lordships necessary to establish the connection required by the trusts in which the Church of St. George is settled. . . . . 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."

And their lordships proceed to say (as I read their judgment) that this divergence is not only potential but actual—that the authority of the Judicial Committee is part of the Anglican "standard "of faith and doctrine," and that even if the Church of South Africa were to decide in all important points as her Majesty in Council has done, yet that while it rejects the authority of her Majesty in Council it is in a state of separation, and has "a "different standard" from the mother Church.

As, however, I may have misunderstood a paragraph which is nothing less than momentous—certainly of great importance to the Church as indicating the view which the Judicial Committee take of their own position—I continue my quotation :—

"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."

An absolute present agreement in the words and authority of all formularies of religious faith, unaccompanied by any acknowledged difference as to their meaning, is (as I understand) not an actual, but a potential identity of standard. A possibility of future difference, due to plurality of authoritative

interpreters, is not a potential but an actual difference of standard.

Fully to appreciate the effect of this decision, it must be borne in mind that the law of England (however mitigated by the practice of a friendly or equitable Government) does not require any member of the Judicial Committee sitting on ecclesiastical causes to be other than an avowed opponent of religion and all that belongs to it. And I think it can hardly be denied that to declare, not only that the decisions of such a body are authoritative announcements of the sense in which Courts of Justice will enforce Church discipline, but that these decisions are parts of the Anglican "standards of faith "and doctrine"—binding definitions of what the Church believes—or, to put it pointedly, that the services of a religious society cannot be even "connected" with the "Church of England" if that society hesitates to admit prospectively and in full that the interpretation placed by such a body on the Nicene Creed is to be read into the Creed itself and taken as part of it—it can hardly be denied, I repeat, that such an announcement applied to any society professing a religion involves a signal and ruinous humiliation to that society. I am not historian enough to know whether any such announcement has ever been made before to any Christian or Pagan community in any Christian or Pagan country. Perhaps it has. If so, I should be curious to know under what form of Government or kind of Governor it was done.

At any rate, however, it appears to be the law

of England. And, that being so, Churchmen, however surprised, ought not to be less obliged to Judges who let them know unequivocally the conditions under which Courts of Justice suppose the Anglican Church to exist in this country.

Thus much for England. Returning to the Colonies, and remembering the various senses in which the phrase "Church of England" may be used—and the various languages in which men may describe their intention to furnish their co-religionists in the Colonies with the same supposed spiritual advantages which they enjoy in England, and the various degrees of importance or unimportance in which the practice of the Colonial Churches may diverge from that of the mother country—it must be clear that this judgment opens a vast field of litigation.

Of this the Judicial Committee seem fully aware, and they close their report by expressing 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."

This brings the history down to the present time.