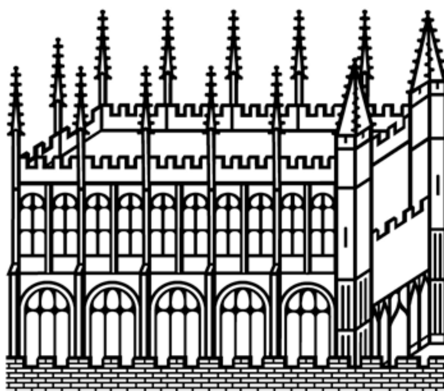

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Dr. Acland
with I. B.'s kind regards

REMARKS

ON

THE PROCEEDINGS AT CAPETOWN

IN THE MATTER OF

The Bishop of Natal.

BY

ISAMBARD BRUNEL, M.A.

OF LINCOLN'S INN, BARRISTER AT LAW.

SECOND EDITION,

WITH OBSERVATIONS UPON THE REPLY OF THE LORD BISHOP OF CAPETOWN.

London,

RIVINGTONS, WATERLOO PLACE;

HIGH STREET, Oxford. | TRINITY STREET, Cambridge.

1868.

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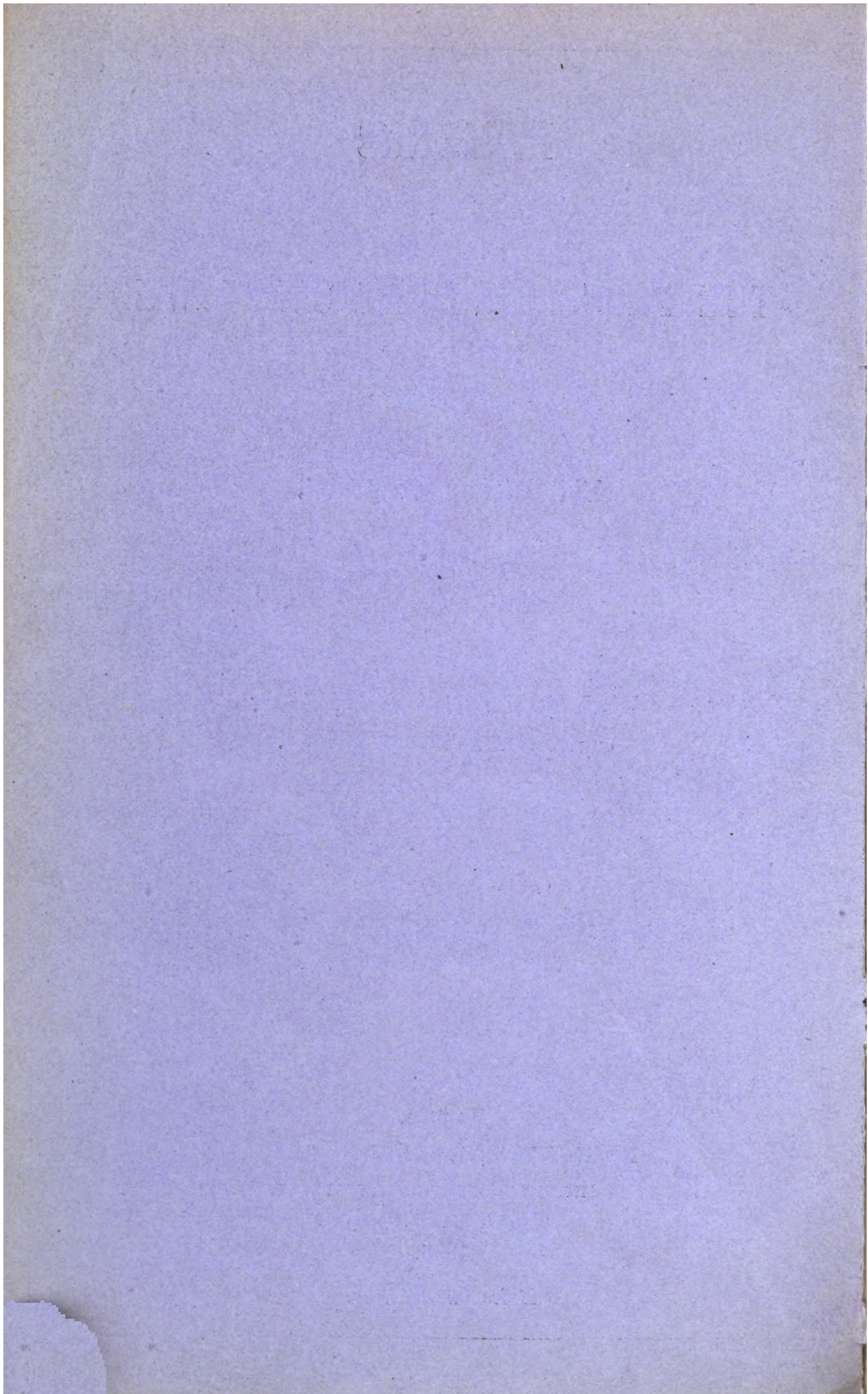

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In reprinting these Remarks I have added some observations upon the Reply of the Lord Bishop of Capetown [1], as far as it relates to the following points:—The law which governs the case, the position of Bishop Twells, the distinction between the Court and the Synod, and the sufficiency of the Citation.

I have also entered at some length into an examination of the Extracts given by the Bishop of Capetown from ancient Councils and writers on Ecclesiastical Law.

As several of these passages have been quoted in Convocation and elsewhere during the discussion of this question, it is of importance to ascertain what is their exact value as evidence in the case.

April, 1868.

[1] "Some Remarks on the Published Speeches of the Archbishop of York and the Dean of Ripon . . . . also upon a Pamphlet by I. Brunel, Esq. . . . . by the Bishop of Capetown." Rivingtons, 1868.

REMARKS,

&c.

[*The object of these Remarks is to call attention to some of the questions which have to be considered before the Sentence of Deposition pronounced upon the Bishop of Natal can be accepted as in any sense valid.*]

An examination of the records of the proceedings at Capetown discloses a state of things at once peculiar and embarrassing [1].

In 1863 the Bishop of Natal was accused of having held and promulgated certain erroneous and strange doctrines, and was cited to appear before the Bishop of Capetown as his Metropolitan; who at the time appointed (November 17th, 1863) held a "court" in his Cathedral Church.

The citation required the defendant to appear before

[1] The following publications have been relied on, as containing, when taken together, a complete and accurate statement of the facts of the case :—

1. "Verbatim Report. The Trial of Dr. Colenso, Bishop of Natal, &c. . . . London, 1867."

2. "A Statement relating to Facts which have been misunderstood, and to Questions which have been raised in connexion with the Consecration, Trial, and Excommunication of the Right Rev. Dr. Colenso, by the Bishop of Capetown, Metropolitan. Second Edition. London, 1867."

the Metropolitan [" Statement," p. 26]; the letter or petition of the accusing Clergy was addressed to the Metropolitan alone [" Statement," p. 24]; the defence of the Bishop of Natal was made in a letter to the Metropolitan [" Report," p. 39]; the sentence was pronounced by and in the name of the Metropolitan alone [" Report," p. 402]. There was, in fact, a proceeding, purporting to be a trial, before the Metropolitan alone (though assisted by assessors), after the precedent of the trial before the Archbishop of Canterbury, in the case of *Lucy* v. *the Bishop of St. David's*.

By this tribunal the Bishop of Natal was adjudged guilty, and was sentenced to be deposed from his office as such Bishop, and was also prohibited from the exercise of any divine office within the province of Capetown; but the sentence was not to take effect if retractation was made within a specified time [" Report," p. 404].

But there was another proceeding in the same matter, to which no reference is made in the " Verbatim Report " of the trial.

From the " Statement " of the Bishop of Capetown, it appears that, after the conclusion of the arguments of the accusing Clergy, the evidence which had been brought before the Court of the Metropolitan, and a judgment thereon which he had prepared, were referred by him " in Synod " to " all the Bishops of the Province who came to the trial and to the Synod," and was " discussed and agreed upon there " before it was delivered " in Court " [" Statement," p. 36].

The proceedings of this Synod have been reported in the " Colonial Church Chronicle " for 1864, p. 182 [1].

[1] They are printed below in an Appendix No. II.

From this Report, it appears that the Bishops present were the Bishops of Capetown, Grahamstown, and the Orange River; the same prelates who were at the time sitting in Court upon the Bishop of Natal's case. They met at the Bishop of Capetown's house, Bishop's Court, and there "sanctioned and sent forth" a report of the acts and constitutions adopted in the Synod.

These are eleven in number: the first five and the ninth relate to the designation, standards of faith and doctrine, and canons of discipline of the Church in South Africa; the tenth and eleventh refer to a proposed Mission to Kaffraria; the sixth, seventh, and eighth contain the Synodical Judgment on the Bishop of Natal.

The sixth Resolution is as follows:—

"The Metropolitan having communicated to this Synod the sentence which he proposed to deliver, after hearing the charges brought against the Right Rev. John William Colenso, D.D., Bishop of Natal, by three of the Clergy of this Province, and the grounds upon which he had arrived at his conclusion, the Synod desires to express its conviction that the charges have been proved, and its approval of the sentence about to be passed upon the Bishop by the Metropolitan."

In the seventh Resolution, the Synod expresses an opinion that, in this particular case, it would be desirable to allow an appeal to the Archbishop of Canterbury; and in the eighth, it declares that, should the Bishop of Natal presume to exercise episcopal functions after the sentence of the Metropolitan is notified to him (unless he appeal or be restored), "he will be *ipso facto* excommunicate, and that it will be the duty of the Metropolitan, after due admonition, to pronounce the formal sentence of excommunication."

I. To consider, first, the trial in the court of the Metropolitan.

Had the Bishop of Capetown any metropolitical authority over the Bishop of Natal?

The legal metropolitical jurisdiction supposed to have been given to the Bishop of Capetown by his Letters Patent has been declared by the Judicial Committee of the Privy Council to have no existence. [*In re the Bishop of Natal*, 3 Moore, P. C. C., N. S., 152.]

But can a claim for metropolitical authority be supported by any existing contract binding on the Bishop of Natal?

The terms of the contract, if any exists, are to be gathered from the Oath of Canonical Obedience taken by the Bishop of Natal to the Bishop of Capetown, and the Letters Patent constituting him Bishop of Natal.

The Oath was in the following words:—

> "I, John William Colenso, Doctor in Divinity, appointed Bishop of the See and Diocese of Natal, do profess and promise all due reverence and obedience to the Metropolitan Bishop of Capetown and to his successors, and to the Metropolitical Church of St. George, Capetown. So help me God, through Jesus Christ.
>
> (Signed) "J. W. NATAL[1]."

The Letters Patent define more exactly the relations between the two Bishops, and declare that the Bishop of Natal "be subject and subordinate to the See of Capetown, and to the Bishop thereof and his successors, in the same manner as any Bishop of any See within the province of Canterbury in our kingdom of England,

[1] "Statement," p. 4.

is under the authority of the Archiepiscopal See of that province and of the Archbishop of the same."

Did the acceptance of the bishopric, under these conditions, amount to a contract on the part of the Bishop of Natal to submit to the metropolitical authority of the Bishop of Capetown?

The Bishop of Natal, indeed ["Letter to the Laity of the Diocese of Natal," p. 4], denies the right of the Bishop of Capetown to exercise any kind of jurisdiction over him; though he recognizes "the dignity of his office as Metropolitan."

Even if it were possible for the Bishop of Natal to maintain this position, while bound by his oath, and claiming to act as Bishop under his Letters Patent, it would appear that he has, as a matter of fact, done more than acknowledge a primacy of honour in the Bishop of Capetown. This may be inferred from several passages in his correspondence with the Metropolitan produced at the trial ["Report," p. 33—36], and also from the circumstance that the Bishop of Natal took part in a Conference of Bishops held at Capetown on December 26, 1860, at which, amongst other business, a formal Resolution was passed as to the organization of the province of Capetown and the holding of Provincial Synods. This Resolution recognizes the Bishop of Capetown as Metropolitan, and is signed by the Bishop of Natal[1].

But although the Bishop of Natal may have recognized the Bishop of Capetown as his Metropolitan for some purposes, it may still be urged that this was done under a mistaken view of the Bishop of Capetown's

[1] See Appendix No. I.

position, and also that the intention of both parties to the contract, as well as the Crown in granting Letters Patent, and Dr. Colenso in accepting a Bishopric under them, was that the Bishop of Natal should be subject, not to any titular Bishop of Capetown, but to the Bishop of Capetown, who, as such, had actual legal metropolitical jurisdiction; and that the present Bishop of Capetown has not had, during the episcopate of the Bishop of Natal, any such jurisdiction.

If the contract to submit to the Bishop of Capetown is on this ground not binding, then, of course, all proceedings are null and void which are based on the assumption that such a contract was in existence.

Granting, however, that the Bishop of Capetown had, by contract, a metropolitical authority over the Bishop of Natal, did this give him power to depose the Bishop for heresy in his metropolitical court?

If the Letters Patent contain the terms of the contract on this point, they place the Bishop of Natal in the same subordination to the Bishop of Capetown, as the suffragans of Canterbury are to the Archbishop of that See.

It is, therefore, necessary to inquire whether there is any law of the Church in England which would permit the Archbishop of Canterbury to depose a suffragan for heresy in his metropolitical court, and which could be applied in South Africa.

To answer this question in the negative would seem to lead to a conclusion directly contrary to that arrived at in the case of *Lucy* v. *the Bishop of St. David's*, in which the Archbishop deposed one of his suffragans.

But even if it be granted that this case would, in

other respects, form a good precedent for the proceedings at Capetown [1], there is one fundamental difference between the two which appears to prevent there being any analogy between the Bishop of St. David's case and that of the Bishop of Natal.

The proceedings in the case of the Bishop of St. David's were conducted in the Court of Audience, one of the "high courts of the Archbishops of this realm" (as it is called in the preamble to the Statute 23 Henry VIII., cap. 9), with a regularly constituted appeal to the Crown, represented by the Court of Delegates; while the proceedings in the Capetown case were carried on before a tribunal without any such appeal; for, though an appeal to the Archbishop of Canterbury was given by the Bishop of Capetown's Letters Patent, there existed no power to compel the Archbishop to hear it, even if there had been any provision for an appeal in the Letters Patent of the Bishop of Natal.

If there is no English law applicable to the case, the proceedings in the court at Capetown were, for this reason, bad; and, if so, there was no trial and no sentence.

It may, however, be argued, that if there is no

[1] An inquiry into the exact value and import of the case of *Lucy* v. *the Bishop of St. David's*, as bearing upon the case of the Bishop of Natal, would involve the consideration of some of the most difficult questions in Ecclesiastical History. From a cursory examination of the authorities, it would seem doubtful whether this case is of any value as a precedent, unless it be held that the Letters Patent of the Bishop of Natal intended to give to the Bishop of Capetown greater powers than those possessed by the Archbishop *jure metropolitico.*

English law applicable to the case, recourse must be had to the general law of the Church.

The only ground for supposing that the Bishop of Natal agreed to submit to this general law, is the fact that he took an oath of "due reverence and obedience to the Metropolitan Bishop of Capetown."

Granting that this is sufficient evidence of such submission, it would be necessary, in order to form a definite conclusion on the question at issue, to explore the wide and unfamiliar field of Canon Law, and to ascertain distinctly whether, under any of its provisions, a Metropolitan, unfortified by Papal authority, could deprive a Bishop for heresy, in his metropolitical court, without appeal to a Council, or Patriarch, or to the Holy See. Unless such a practice is found to be the Canon Law of the Church, the proceedings in the court at Capetown were null and void according to that law[1].

II. Did the proceedings before the Bishops "in Synod" amount to a valid sentence of deposition?

Granting, for the purpose of argument, what has been questioned above, viz.—That the Bishop of Natal had recognized, by contract, the metropolitical authority of the Bishop of Capetown; it has to be considered:

1. Did he contract for the establishment of a Synod? If so,

2. Did he contract to be deposed by it, if found guilty after trial, in a case admitting of that sentence? If so,

[1] A few remarks are added in an Appendix No. III., on the difficulty of applying the Canon Law to this case.

3. Did the proceedings amount to such a trial as he had contracted to submit to?

1. As it would be within the power of the contracting parties to add by mutual consent to the provisions of their contract, it is unnecessary to inquire whether the original contract includes any agreement as to the creation of a Provincial Synod; since the proceedings at the Conference of South African Bishops, in December 1860, show that the Bishop of Natal has acquiesced in the establishment of a Synod for the Province of Capetown[1].

2. The next question is a more difficult one. Did he contract to submit to a trial by the Synod, and to a sentence of deposition pronounced by it[2]?

No special rules were made for the constitution of the Synod as a judicial body, or for the form of procedure to be adopted by it; and the Ecclesiastical Law of England has not provided any form of procedure applicable to the Colonies.

But if it be granted that acquiescence in the establishment of a Synod involves an acceptance of its authority as a judicial tribunal, it may be argued that, in the absence of any other provisions, the Canon Law is to govern the procedure; and that it is to be the Canon Law of the earlier ages of the Church, as interpreted by those who do not admit the Papal claim of supreme jurisdiction.

[1] See Appendix No. I.

[2] Whether or not the Bishop of Natal could, with due regard to the rights of the Crown, contract to submit to a voluntary tribunal, is a very material question; but one which cannot be decided while doubts exist as to the exact value of the Bishop of Natal's Patent.

These are propositions which require much consideration; but it is difficult to see how the Canon Law can be enforced at Capetown, unless they are accepted.

Assuming, however, that they are acknowledged, it would appear to be the more correct opinion, that, up to about the ninth century, criminal proceedings against a Bishop were heard and determined by the Provincial Synod[1].

If, then, the primitive Canon Law, as thus interpreted, is to prevail, it would follow that the Synod had the right to try the Bishop of Natal.

3. Did the proceedings amount to such a trial as he had contracted to submit to, assuming that the terms of the contract are to be interpreted by reference to the practice of the Canon Law, except where there is any express provision to the contrary?

First, as to the composition of the Synod. Did it

[1] "Sane negari non potest, quin controversiæ atque querelæ Ecclesiasticorum, et Laicorum contra Episcopos in Synodis Provincialibus olim terminari solerent; imo et accusationes quascunque etiam in causis criminalibus, quæ depositione mulctandæ erant, in Synodis institui et terminari solitas fuisse expeditum est" (*Van Espen, Jus. Eccl.*, pars i., tit. 20, cap. 3, sec. 4).

"Causæ Episcoporum in Synodis Provincialibus fuerunt examinatæ et definitæ usque ad nonum circiter seculum, quo prodiit nova quædam canonum collectio vulgo Isidori Mercatoris, cui hic impudentissimus falsarius inseruit non tantum confictas Decretales sub nomine primorum Pontificum Romanorum a Clemente usque ad Siricium, sed et plures Synodorum canones in alienum sensum detorsit, et in suam collectionem sic detortos transtulit, idque vel præcipue ad amplificandam Sedis Apostolicæ auctoritatem, et signanter in examinandis et definiendis causis Episcoporum" (*Ib.*, pars iii., tit. 3, cap. 6, sec. 3).

consist of those, and those only, who had a right to sit in it[1]?

All the Bishops of the Province must be summoned to attend[2].

Now, the Bishops of the Province of Capetown consisted originally of the Bishops of Capetown, Natal, St. Helena, and Grahamstown[3]. Of these, only the Bishops of Capetown and Grahamstown were present at the Synod in question, held on the 15th December, 1863.

But there was present another Bishop, Bishop Twells, of the Orange Free State.

Now, it is immaterial to consider whether or not Bishop Twells sat as a suffragan of Capetown, since, if the terms of the contract with the Bishop of Natal upon this point are contained in the Resolutions of the Conference of December, 1860—and there is no evidence of any other contract—it would appear that Bishop Twells was excluded altogether from sitting in judgment on the Bishop of Natal.

The facts are these: The Conference of Bishops in December, 1860, at which the Bishop of Natal attended, did not define who should be the members

[1] "Soli itaque Episcopi Comprovinciales cum Metropolitano vocem decisivam obtinent; unaque cum Metropolitano judicant" (*Ib.*, pars i., tit. 20, cap. 1, sec. 17).

[2] "Synodo Provinciali interesse debere, atque ad eam esse vocandos omnes totius Provinciæ Episcopos indubitatum est" (*Ib.*, pars i., tit. 20, cap. 1, sec. 12).

[3] This is an error; the see of St. Helena was not founded till after those of Grahamstown and Natal. But this does not affect the argument in the text, as the Bishop of St. Helena took part in the Conference of December, 1860.—*Note to Second Edition.*

of the Provincial Synod; but it did in effect, though not in express terms, declare who should not have votes in a particular case.

The Bishops resolved that Missionary Bishoprics should be established in the Orange Free State and other places, and that the Convocation of Canterbury should be asked to determine whether or not such Bishops should have seats in the Provincial Synod.

The Convocation of Canterbury, having taken the matter into consideration, determined that a "Missionary Bishop shall take his seat in the Synod of the contiguous province; and that whilst, for the avoidance of difficulties which might arise from his episcopal status not being known to or recognized by the Crown, it is not expedient that such Bishop should vote on questions affecting the Church within the Queen's dominions, he shall be entitled to a free and equal vote on all questions which may concern the Church beyond the same." ["Chronicle of Convocation," *Upper House*, June 19, 1861 (p. 717); June 21, 1861 (p. 785); *Lower House*, June 21, 1861 (p. 815); July 9, 1861 (p. 819); Feb. 11, 1862 (p. 880).]

This is, it is assumed, the only arrangement, if any, which binds the Bishop of Natal; and, under it, Bishop Twells, a Missionary Bishop, had no right to vote on Colonial Church matters.

If, then, the deposition of the Bishop of Natal, a Colonial Bishop holding Her Majesty's Letters Patent, is a question affecting the Church within the Queen's dominions, Bishop Twells could have no vote upon it; and a person sitting on the judgment-seat without a

vote in the decision cannot be deemed to be one of the judges.

Hence it follows that the Bishop of Natal was condemned in Synod by only two Bishops; and though in the ancient Canons the number of Bishops required varied, apparently in proportion to the size of the province, two would probably have been deemed insufficient[1].

If, however, Bishop Twells had a right to sit and vote in Synod, it must be ascertained whether Bishop Tozer (who is in the same position) had a summons *to the Synod.*

The published documents do not show whether the Bishop of St. Helena (who was without doubt a member of the Synod) was summoned, not only to the Court, but *to the Synod*[2].

[1] "Cum in Synodo Provinciali Constantinopolitana anno 394 examinaretur, causa Agapii et Bagadii contendentium de Episcopatu Bostrenorum (Bagadius enim depositus fuerat et Agapius in ejus locum electus), atque compertum esset Bagadium a duobus duntaxat Episcopis depositum fuisse, ne quid simile in posterum contingeret, a Nectario consentientibus reliquis Episcopis decretum est, 'non licere in posterum, nec a tribus quidem, nedum a duobus eum qui reus examinatur deponi, sed majoris Synodi Episcoporum Provinciæ sententia, sicuti Apostolici definiere Canones.' Quibus verbis hunc Canonem indigitari non obscurum est: utpote quo solo ex Apostolis constituitur, Episcopi autem accusati causam a Synodo Provinciali dijudicandum esse. Insuper ex hoc Canone et citato Synodali decreto rursus patet, causas etiam majores, qualis indubiè est Episcoporum depositio, olim in Synodis Provincialibus fuisse discussas et decisas" (*Van Espen, Scholion in Can. Apost.* lxxiv. Op. tom. iii. p. 66; ed. Lovan, 1753).

The Canon itself deserves careful examination.

[2] The Bishop of Capetown states, in his recently published correspondence with the Archbishops of Canterbury and York, and

But, granting that the Bishop of Natal was a consenting party to the establishment of a Synod, with power to proceed to his deposition in cases admitting of that sentence (of which heresy is one), and that the Synod was properly constituted under the terms of the contract, the question remains (and it is the last suggested for consideration),—

Did these proceedings on the 15th of December, 1863, amount to such a Synodical trial as is required by the law under which it was held?

In the first place, was this Synodical trial a hearing on appeal from the Metropolitical Court, or was it a proceeding in the first instance?

It cannot be contended that it was in the nature of an appeal from the Metropolitical Court (even if it is granted that such a court existed); because, at the time of the meeting of the Synod, no sentence of any kind had been given in the Court below.

Was it, then, in the nature of a judicial investigation in the first instance?

The Bishop of Capetown seems to be of opinion that it was sufficient under the Canon Law to consult his Synod ["Statement," p. 36]; but such a consultation

the Bishop of London, that "there were three [Bishops of the Province present at the Trial], and a fourth has since concurred in the sentence, upon a review of the whole published proceedings" (p. 27). If the fourth Bishop referred to is the Bishop of St. Helena; it would appear, from the extract from a letter of his given in the "Colonial Church Chronicle" (see end of Appendix II.), that he knew of no trial, except that in the Metropolitical Court. And would his subsequent assent to judicial proceedings conducted in his absence, be accepted as equivalent to his personal appearance in his place as Comprovincial Bishop?

would appear to be something very different from that solemn judicial investigation required by law, and especially insisted upon in cases of such gravity as a trial for heresy [see Van Espen, Jus. Eccl., pars iii., tit. 4, cap. 2, sec. 27].

These proceedings in the Synod at Bishops-court appear to have lacked the most elementary and essential characteristics of a trial.

There was no citation of the accused (the citation before the Metropolitan alone being clearly not a citation to appear before any other tribunal than the Court); and, without a citation, Canonists say, "Omnis alius actus judicialis ipso facto irritus et nullus est" [Schmalzgrueber, Jus. Eccl., vol. ii. pt. 1, p. 208]. There were, moreover, no accusers before the Synod, no pleadings, no evidence, and consequently there could be no judgment and no sentence.

If these objections are well founded, it would appear that the Bishop of Natal has not been tried by a Provincial Synod.

In the former part of this Paper various considerations have been advanced, bearing upon the question whether the Court held by the Bishop of Capetown was, or was not, competent to try the Bishop of Natal.

No other sentence, except those in the Court and Synod at Capetown, has been passed upon the Bishop of Natal; and if these are, for any reason, void, it would follow that no lawful sentence whatever has been pronounced upon him, and that therefore he has not been deposed.

February, 1868.

OBSERVATIONS ON THE REMARKS

OF THE

LORD BISHOP OF CAPETOWN.

I. *As to the law which governs the case.*

The Bishop of Capetown objects to my "notion about contracts" [p. 48][1]. He says "The question now before the Church is not what is legally binding on Dr. Colenso, but what the Church herself is bound to regard as his true position—his present relation to it" [p. 45]; and again, "The question is not what he (Dr. Colenso) agreed to, but what is the law of the Church in the matter" [p. 47].

On this point I am unable to withdraw from the position I had taken, namely, that "the whole proceeding is based upon contract," and that the fundamental question is, "To what law did the Bishop of Natal agree to submit?" [post, p. 64.]

The jurisdiction of the tribunal at Capetown was not a jurisdiction established by law; if, therefore, there was any jurisdiction at all, it must have been founded upon contract.

Dr. Colenso accepted the office of Bishop in Natal, and became thereby (at least as regards his relation

[1] Where the page only is given, the reference is to the Bishop of Capetown's "Remarks."

to the Provincial organization of the Church in South Africa) a member of a voluntary religious association not established by law. At his acceptance of office he entered into certain contracts or engagements; and if these contracts or engagements, and any others subsequently agreed upon with the consent of all parties concerned, contain expressly or by implication any provisions for his trial and deposition from office as such Bishop, they constitute the law of the Church in the matter.

But, on the other hand, if these contracts or engagements do not contain any rules for the trial and deposition of the Bishop, then the law of the Church is defective in that particular, and cannot now be remedied as regards past transactions.

The difficulty is, to ascertain whether there is any such law, and, if so, what are its provisions.

This difficulty has arisen from the circumstances in which the Church in South Africa was placed at the time when three of its clergy presented to the Metropolitan a letter of accusation against the Bishop of Natal.

Assuming that this Church had the power to "organize itself formally upon a voluntary basis[1]," it had not yet done so, nor had it promulgated a code of laws, declaring its terms of union, and constituting a tribunal to determine whether or not these laws had been violated[2]. Therefore, the nature of the contract

[1] I borrow this expression from Mr. Mozley's "Observations on the Colonial Church Question," p. 43.

[2] See the Judgment in the case of *Long v. the Bishop of Capetown.* 1 Moore P. C. C., N.S., 461.

entered into by the Bishop of Natal must be ascertained from other sources of information; namely, from an inquiry into the extent of the obligations created (1) by his acceptance of a Bishopric under the Letters Patent, and (2) by his having taken the Oath of Due Obedience to the Bishop of Capetown—regard being had to any regulations which may subsequently have been made by consent of all parties.

I have already called attention to some of the difficulties which surround this part of the case [antea, pp. 8—12].

If, however, it can be argued that by taking the Oath of Due Obedience to the Bishop of Capetown, the Bishop of Natal became subject to the "ancient Canons . . . held by the Church to be binding on its members" [p. 46]: then, of course, those ancient Canons are part of his contract and part of the law of the Church at Capetown.

They have on this assumption been examined, for the purpose of ascertaining what provisions (if any) they contain for the trial and deposition of a Bishop in the position of the Bishop of Natal; and extracts have been produced from various Councils and Commentaries, in which the law on this point is supposed to be authoritatively declared.

But if evidence from such sources is under any circumstances to be considered admissible, it must be collected according to certain definite rules, which will afford security that the passages quoted fairly represent the opinions of the writer, or the provisions of the code of laws from which the extract is made; care being taken that the particular system of discipline

therein described is in all essential features applicable to the condition of things which existed at Capetown in November, 1863; since the sole object of this inquiry is to ascertain what *was* the law at that time.

II. *As to the position of Bishop Twells.*

I called attention to the question whether Bishop Twells, of the Orange Free State, had or had not any right to sit in judgment on the Bishop of Natal. I cited documents which showed that the question of the position of Missionary Bishops, such as Bishop Twells, had been considered by the Conference which met at Capetown in December 1860, at which the Bishop of Natal was present, and had been referred by it to the Convocation of Canterbury; and that the Convocation of Canterbury had replied, that, in their opinion, Missionary Bishops should take their seat in the Synod of the contiguous province, but that it was not "expedient that they should vote on questions affecting the Church within the Queen's dominions," &c. [see above, p. 16].

If (I added) Bishop Twells was excluded from sitting in judgment on the Bishop of Natal, then the Synod only consisted of the Metropolitan and one Suffragan[1].

The Bishop of Capetown admits that Bishop Twells is a Missionary Bishop, and that the Convocation of

[1] The Bishop of Capetown observes [p. 53] that "a fourth, not present, confirmed the sentence in writing, as provided by the 19th Canon of Antioch." But on reference to this Canon, it will be found that it has nothing whatever to do with the trial of Bishops, but deals solely with their confirmation and consecration; and, moreover, the assent in writing of the absent comprovincial was to be given before, not after, the conclusion of the proceedings [1 *Bruns*, 85].

Canterbury had been asked to consider and determine whether he should be regarded as a Bishop of the Province, and have a seat in the Synod; but he affirms that the Bishops of the Province of Capetown "are not bound, and have never regarded themselves as bound, by the counsel given as to what Convocation thought to be expedient" [p. 52]; and for the following reasons:—

"We asked a bare question. We wished to know what the Canons ruled in such cases. . . . Unfortunately the Convocation of Canterbury went beyond the question which was asked in the reply which it gave. It said that the 'Missionary Bishop should take his seat in the Synod of the contiguous Province.' That was the full answer to our question, and the only one which, as I think, should have been given. But it went further. It did that which the Bishop of Grahamstown and the other Bishops took for granted it would not do, and beforehand objected to its doing[1]. It did say what it thought would be 'expedient' under certain circumstances, and in so doing committed several errors. It advised us to restrict the rights of certain of the Bishops whom it acknowledged as belonging to our Province, contrary to the Canons; for by the Canons all Bishops of the Province have equal rights. . . . . We did not ask Convocation to determine what the rights of Bishop Twells should be as a Bishop of the Province; but only whether he were a Bishop of the Province; and we are not bound, and have never regarded ourselves as bound, by the

[1] The question referred to Convocation, and the note of the Bishop of Grahamstown, will be found below in Appendix I. [post, p. 55].

counsel given as to what Convocation thought to be 'expedient'" [p. 51].

I venture to differ from the Bishop of Capetown on this point. I do not conceive that the answer of Convocation goes at all beyond the question put to it by the Capetown Conference. The question asked was "Shall these Bishops have seats in the Synod?" The answer was—Yes, they should have seats; but it is not expedient that they should vote on Colonial Church matters, though they may and ought to vote on matters affecting Missionary Churches. So that, really, the full answer given by Convocation to the question whether or not Missionary Bishops should have seats in the Provincial Synod, would be, not *yes*, but *no*, if by the expression "having seats" is meant the right of sitting in Synod with a *vox decisiva* on Colonial Church matters.

Therefore Bishop Twells would be altogether excluded from the Synod if the answer of Convocation is to be read in the manner now proposed by the Bishop of Capetown.

But even if the answer of Convocation went beyond the question put to it, it has to be determined whether the paragraph now objected to can be treated as waste paper, merely by the tacit disregard of it involved in the fact of Bishop Twells' sitting on the trial of the Bishop of Natal.

III. *As to the Distinction between the Proceedings in Court and in Synod.*

I called attention to the important fact that there were two distinct trials, one in the open Court in the

Cathedral at Capetown, the other in a Synod held at the Metropolitan's house; and I pointed out that there had been no citation of the accused to this Synod, and no accusers, no pleadings, and no evidence, and that consequently there could be no Synodical judgment or sentence.

It appears, however, from the Bishop of Capetown's "Remarks," that, in his opinion, the proceedings in Court and in Synod were, in reality, one and the same trial, before the same Court.

His Lordship says [p. 53],—

"Mr. Brunel, being not unnaturally led thereto by the apparently double form of proceedings, draws a distinction, which I am not prepared to recognize, between the Bishops sitting in the Cathedral to hear this cause, and the Bishops sitting at Bishops-court to pass 'Acts and Constitutions.' He seems not to admit that while sitting in the Cathedral they were or could be a Synod. I, on the other hand, hold that whenever the Bishops of a Province are met together in the name of CHRIST, there, in all its essential features, is a Synod of the Church. Formal citations are not of the essence of a Synod, nor yet the assumption of the title of a Synod. The first Synod of Jerusalem is a type of all Synods—is the normal Synod – and it exhibits all that is essential to them. 'The Apostles and Elders came together to consider of this matter.' I hold that we were a Synod met together for judicial purposes, when we were assembled together to hear the charges against our brother. We were a Synod so long as we were met together for consultation afterwards. Sometimes, during that period, we met and

discussed matters informally, just as the Bishops of the Convocation of Canterbury did more than once during their last Session; and neither we nor they furnished any record of what then transpired. Sometimes we met formally, and put forth our conclusions in a formal way." He adds further on:—"It matters little whether you call our gathering of the Bishops of the Province a Synod, or Court, or Tribunal" [p. 59].

If I rightly comprehend the meaning of this passage, the following would be a true description of the nature of the proceedings at Capetown[1]: During the first five days of the trial the Court consisted of the Metropolitan as sole judge, assisted by assessors, sitting openly in court; on the sixth day, these assessors delivered their opinions on the case; on the seventh day the Court consisted of the Metropolitan and two comprovincials—the same Bishops who before sat as assessors on the invitation of the Metropolitan—but who were now his "conjudices," meeting privately in Synod, and signing with him certain Acts and Constitutions adopted on that day (these proceedings not being reported in the record of the trial); and,

[1] It may be useful here to recall the dates.

1863—Nov. 17	*Cathedral.*	Preliminary proceedings and addresses of the prosecutors.
18	"	Addresses continued.
19	"	" "
20	"	" " Letter of Bishop of Natal read.
21	"	Reply of senior prosecutor.
Dec. 14	"	Opinions delivered by assessors.
15	*Bishops-court.*	Acts and Constitutions adopted.
16	*Cathedral.*	Judgment delivered by the Metropolitan.

lastly, on the eighth day they resume their former relations of Metropolitan and assessors, and it is the Metropolitan alone who, in his own name, delivers judgment in open court, and passes sentence.

I will now state what were the reasons which induced me to separate these two proceedings.

In the first place, the "Verbatim Report" of the trial contains no reference whatever to there having been any part of the proceedings carried on in any other place than in the Cathedral. I do not, of course, expect that there should be any allusion to the private consultations which the Bishops may have held during the progress of the trial; but I certainly think that if the proceedings at Bishops-court—when the Metropolitan and Suffragans, "met together in Synod"—were, as is now stated, part of the trial in the Cathedral, they should have, at least, been noticed in the Verbatim Report, which is called by the Bishop of Capetown, "the volume recording the transactions of the trial" ["Statement," p. 70].

Again, the report of the Synod at Bishops-court is equally silent as to the fact of its being a part, and that not the concluding part, of a trial elsewhere; and, moreover, the words of the sixth Resolution of the Synod seem to show that the two proceedings were then considered to be entirely distinct.

The Resolution is as follows:—"The Metropolitan having communicated to this Synod the sentence which he proposed to deliver after hearing the charges brought against the Right Rev. John William Colenso, D.D., Bishop of Natal, by three of the Clergy of this Province, and the ground upon which he had arrived

at his conclusion—this Synod desires to express its conviction that the charges have been proved, and its approval of the sentence about to be passed upon the Bishop by the Metropolitan[1]."

I think, therefore, that upon these documents (the "Verbatim Report" of the Trial, and the "Acts" of the Synod at Bishops-court) I was fully justified in considering that the two proceedings were distinct, and in commenting upon them as independent trials.

But I have further evidence to produce upon this point, namely, the statements of the Bishop of Capetown himself.

The extracts I shall give from his Lordship's writings are somewhat lengthy; but I think it is impossible to over-estimate the importance of this particular point in its bearing on the question whether the sentence was or was not valid according to law—ecclesiastical, spiritual, or canonical.

These passages left no doubt whatever upon my mind, not only that the Court and the Synod were distinct tribunals, but that they were intended to be distinct, for a reason which, if it did not justify, at least explained, the course adopted by the Bishop of Capetown.

I first quote from the Judgment of the Metropolitan ["Report," p. 340][2].

[1] It may be also noted, that this meeting was useless for the purposes of discussion, as far as the opinions of the assessors were concerned, as these had been already delivered in open Court, and even the Judgment of the Metropolitan had been prepared, and the parties summoned to attend on the day following to hear it delivered.

[2] I have marked by italics the passages to which I desire to call particular attention.

"*There are two ways, as I conceive, in which proceedings may be adopted when charges are brought against a Bishop involving matters of faith. The Bishops of the Province may, either of their own accord, in their Synod, call the accused to account,* hear and discuss his teaching, and acquit or condemn him ; *or,* if any members of the Church who feel aggrieved by that teaching, and have knowledge of it, promote the office of the Metropolitan, *the Metropolitan may proceed to hear those charges. This latter, indeed, is the course prescribed in the Letters Patent:* 'We do further will and ordain that, in case any proceedings shall be instituted against any of the said Bishops of Grahamstown and Natal, when placed under the Metropolitan See of Capetown, such proceedings shall be originated and carried on before the said Bishop of Capetown, whom we hereby authorize and direct to take cognizance of the same.' *This is the course which has been pursued on the present occasion.* Certain of the Clergy of this Province have brought very serious charges against one of the Bishops of the Province, before the Metropolitan. Upon this *he has cited the accused Bishop to appear before him,* furnishing him with a copy of the charges brought against him, and a statement of the Articles and Formularies which he is said to have contravened; *and has also summoned the other Bishops of the Province to assist him in the hearing of those charges.* This course was adopted:—1. *In deference to the above-cited instructions of the Letters Patent, which,* of however little authority in a legal point of view, *serve at least to show what, in the eye of the Crown and of the Church, is the right course to be pursued in this painful case.* 2. Because it would

give to the Bishop accused every opportunity of meeting the charges preferred against him. And 3. *Because it was in accordance with the course pursued in the only case furnished by the Mother Church which seemed to be applicable, and could be regarded as a precedent.*

"I allude to the trial of Watson, Bishop of St. David's, by Archbishop Tenison. The whole question as to the proper mode of proceeding in the trial of a Bishop of a Province was then fully discussed before the Archbishop in his Court of Audience, before the Court of Delegates, the Queen's Bench, and the House of Lords, the whole of the Judges being present, and *it was unanimously held by all the Judges, and also by nearly all the Bishops, that the Archbishop had proceeded in the right way, by trying his suffragan as Metropolitan, rather than by condemning him in Synod,* even though that case was complicated by the fact that the Bishop was a Peer of the Realm, and was deprived of his peerage, conferred by the Crown, by the sentence of the Archbishop."

The following passages are from the Bishop of Capetown's "Statement[1]," a second edition of which was published towards the close of last year.

"That I could proceed, and therefore ought to proceed, to hear this case, was now seemingly clear. But how? First, as to the Court. How was it to be composed? Was the Metropolitan to sit alone, as the Letters Patent implied, or to have assessors? Were the assessors to consist of all the Bishops who had taken the oath of

[1] See above, p. 5, note.

obedience to him as Metropolitan, or only of those within the Queen's dominions? *Were the assessors to deliver judgment or opinions? Ought the case to be tried before the Metropolitan in his Court, or before the Synod of the Bishops of the Province?* Some canons required that twelve Bishops should hear a case affecting a brother Bishop. Others were content with less. The 'Reformatio Legum,' (p. 79) decided that three were sufficient. In the Bishop of St. David's case, four, according to the record of proceedings at Doctors' Commons, or, as Burnet says, six, were present. In the Bishop of Clogher's case, four, in addition to the Archbishop of Armagh. In our case, four at most could be assembled" [" Statement," p. 21].

"*It* [the trial] *was conducted in the Cathedral Church. . . . The trial occupied four days. . . . On December* 14*th, the Bishops who were the assessors of the Metropolitan in the trial delivered their opinions separately in the Cathedral Church. On December* 16*th, the Metropolitan delivered his Judgment in the same place*" [ib. p. 28].

[Of the Judgment] "*though submitted before delivery to the Bishops of this Province in Synod assembled,* I should still be prepared to refer its language to revision" [ib. p. 31].

"*All the Bishops of the Province who came to the trial and to the Synod, were consulted before the sentence was decided upon. It was referred to them in Synod. We discussed it there, and agreed upon it there, before I delivered it in Court; because I was perfectly well aware that, if we condemned in Synod only, as the more canonical method, I should have been told that I ought to have done*

so, not in Synod, but in Court; and if I had delivered judgment in Court, and not referred the matter to the Synod, that the Synod, and not the Metropolitan, was the proper authority in such a case. The whole question as to procedure was fully discussed in the Bishop of St. David's case, and eminent men were ranged on either side. Hody took in turn both sides, as may be seen in his learned manuscript in the Lambeth Library [1]. *I believe that I acted rightly and wisely in referring the evidence and my judgment to the Synod, and obtaining its concurrence before delivering judgment in Court"* [ib. p. 36].

"*It is clear that Dean Stanley had seen the proceedings of the Synod as well as those of the trial, for he refers to them.* He knew, then, that *a Synod had been held after the Court had heard all the charges against Bishop Colenso, but before judgment was given;* that the Synod put forth a report of certain 'Acts and Constitutions' adopted in such Synod; that amongst them was one, signed by all the Bishops present, in which it was stated that 'the Metropolitan communicated to the Synod the sentence which he proposed to deliver, after hearing the charges brought . . . and the grounds upon which he had arrived at his conclusion,' and that the Synod desired to express its conviction that the charges had been proved, and its approval of the sentence about to be passed upon the Bishop, by the Metropolitan.' With these facts before him,—with the knowledge that *the Metropolitan did not pass sentence*

[1] Hody first wrote a treatise to prove that the Archbishop of Canterbury could by his own authority deprive a Suffragan; and he then wrote a second to prove that it could only be done in Synod.

without consultation with his Synod, that its judgment was desired, that the grounds upon which the Metropolitan had formed his own opinion were submitted to the Synod, that not its concurrence only, but its approval was sought and obtained, all agreeing, Dean Stanley does not shrink from saying that the Metropolitan 'acted quite independently of his Synod,'" &c. [ib. p. 57].

"They (the Letters Patent) do not seem to exclude the Suffragans, so as to make their presence unlawful, and thus invalidate the proceedings. They were, therefore summoned to hear the case. Clearly, however, the judgment and the sentence, according to the provisions of the Letters Patent, must be given by the Metropolitan alone. *The Suffragans were present, because their presence was right and not forbidden. They did not give judgments, but opinions,* because their doing so would not have been in accordance with the provisions of the Letters Patent. Had we departed from the course marked out in the Letters Patent, can any one doubt that the lawyers and Dean Stanley would have eagerly fastened upon the fact, and made the most of it? Every thing that could be done to guard the privileges of my comprovincials was done.

"The Canons require that a Deposition of a Bishop should be with the consent of the Synod of the Province. *The Synod was called, and the matter laid before it. Had the Suffragans not concurred, the deposition would have been uncanonical—absolutely null and void*" [ib. p. 58].

Surely, then, in the face of this evidence it cannot be contended that the proceedings in the Cathedral and at the Metropolitan's house were not distinct proceed-

ings, and were not intended to be so, for the reasons stated by the Bishop of Capetown.

IV.—*As to the Sufficiency of the Citation.*

In reply to my observation, "the Citation before the Metropolitan alone being clearly not a Citation to appear before any other tribunal than the Court" [antea, p. 19], the Bishop of Capetown writes as follows [p. 54].

"But it may be said, You summoned Dr. Colenso to appear before the Metropolitan, *i.e.* to appear before a Court (or tribunal, for we are not allowed to speak of Courts in voluntary associations). Why did you thus summon him? Why did you not summon him before your Synod, if yours was a Synod?

"1. Because it was essential, under the circumstances of this case, to adhere as closely as possible to the provisions of the Letters Patent. Had these been departed from, exception would have been instantly and successfully taken by the accused.

"2. Because the Citation to appear before the Metropolitan was in strict accordance with the course pointed out by the Canons.

"3. While citing the accused to appear before the Metropolitan as the Letters Patent and the Canons required, I took care in the Citation to intimate that the other Bishops of the Province would be present; that the cause would be heard by the Metropolitan, 'with the advice and assistance of such other of the Bishops of the Province as could conveniently be called together.'

"Mr. Brunel has misunderstood the nature of our proceedings. No Citation was needed to appear

expressly before the Synod. The Citation to appear before the Metropolitan, aided by his comprovincials, was essentially a Citation to appear before the Synod, *i. e.* before the Bishops of the Province, who, when gathered together, constitute a Synod."

Without examining the Bishop of Capetown's definition of a Synod, or pointing out the difference between a Synod and a Metropolitical Court (which I had supposed from the passages quoted above [antea, pp. 30—34,] was acknowledged and acted on by his Lordship at Capetown), I will pass on to the question of the sufficiency of the Citation served on the Bishop of Natal. This is an important question; for if the Citation was insufficient, the proceedings at Capetown were void.

If the proceedings in Court and Synod were distinct, the Citation failed as a Citation to the Synod, because it summoned the accused to the Court, before which he appeared by his proxy, and by which he was tried and condemned; and no other Citation was issued.

If, on the other hand, the proceedings were but one trial, then this objection to the Citation falls to the ground, but another remains, equally fatal to its sufficiency.

It is necessary to the validity of a Citation, that it should state the *nomen judicis:* "ut constet non solum an incompetentiæ vel justæ suspicionis exceptio ei opponi posset; sed etiam an sit ordinarius vel solummodo delegatus" [*Schmalzgrueber*, "Jus Ecclesiasticum Universum," lib. ii. pars 1, tit. 3, sec. 20[1]].

[1] So also *Reiffenstuel*, "Jus Canonicum Universum," lib. 2, tit. 3, sec. 56; *Devoti*, "Institutiones Canonicæ," lib. 3, tit. 5, sec.

The language of the Citation to the Bishop of Natal shows clearly, I think, that whatever may have been the nature of the tribunal by which he was tried, the summons was only to the Metropolitical Court.

The Citation ran as follows :—

"By direction of the Lord Bishop of Capetown, I hereby cite you to appear before the Most Reverend Robert, Lord Bishop of Capetown and Metropolitan, on Tuesday, the 17th day of November, 1863, at eleven o'clock in the forenoon, in the Vestry of the Cathedral Church of St. George, Capetown, then and there to answer to certain charges [*the charges are then set out*] . . .

"Should your Lordship fail to appear, either in person or by proctor, or otherwise make default herein, the Bishop of Capetown as Metropolitan, with the advice and assistance of such of the Suffragan Bishops of the Province as can conveniently be called together, will, after proof of the due service of this Citation, hear and investigate, at the time and place aforesaid, the charges so preferred against your Lordship, and proceed to the final adjudication thereon" [" Report," p. 2].

I conclude therefore that if the Citation was to the Synod, it was essentially defective in that it did not

15; *Bouix*, "De Judiciis," pars. 2, sec. 6, coll. 2, cap. 20; and (for English Law) *Oughton*, "Ordo Judiciorum," tit. 20, who says "In citatione originali contineri debent nomen judicis . . . et cujus Curiæ sit judex," and in the notes, "Ne quis in pluribus curiis super eodem crimine cogatur respondere. . . Citatio continet apud quem, quo loco, quo tempore, quo agente et ob quam causam, sisti reum oporteat."

give the Bishop of Natal proper notice of the character of the tribunal to which he was summoned [1].

But the Bishop of Capetown replies that the Citation to appear before the Metropolitan is sufficient, as it is "in strict accordance with the course pointed out by the Canons" [p. 54].

Although I am not prepared to admit this to be the course universally prescribed by the Canons [see, for example, *Can. Apost.* lxxiii. (1 *Bruns*, 11, numbered in Van Espen. lxxiv.)], I will admit that it may have been the practice in some Churches for the Metropolitan to summon the accused before him by a Citation which contained no express reference to the synodical character of the tribunal; but then in these Churches the Synod was properly defined and recognized as the tribunal to which the accused was thereby summoned, so that the meaning of the Citation was in such cases clearly understood, and no mistake could arise.

This, however, was not the case at Capetown, therefore it cannot be contended that a Citation to appear before the Metropolitan would contain such a description of the *nomen judicis* as would be sufficient to make it a valid Citation to the Synod.

But, lastly, it must be noticed that as the Citation is to appear before the Bishop of Capetown "as Metro-

[1] This is not, I think, a mere "technical objection," considering the circumstances of the case. If the Bishop of Natal had known that the tribunal was a Synod, and had been disposed to dispute its validity as such, he might have desired to protest at greater length than he thought it necessary to do against the jurisdiction of the tribunal as a Court; and if he had accepted its jurisdiction as a Synod, he would possibly have made a more elaborate and formal defence than that which he actually offered.

politan, with the advice and assistance of such of the Suffragan Bishops of the Province as can conveniently be called together;" it is not a Citation to appear before the Metropolitan "in strict accordance with the course pointed out by the Canons," *i. e.* as sitting in Synod, but as sitting in a Metropolitical Court formed in accordance with the precedent of *Lucy v. the Bishop of St. David's*, in which case, as the Bishop of Capetown observes, the Archbishop was held to have proceeded in the right way "by trying his Suffragan as Metropolitan, rather than by condemning him in Synod" [see above, p. 31].

V. *Upon the Bishop of Capetown's quotations from the Canon Law* [1].

After discussing the question of the Citation in the passage quoted above [antea, p. 35], the Bishop of Capetown proceeds as follows [p. 55].

"I shall be asked to furnish evidence of what I have said as to the Canons directing that an accused Bishop should be summoned to appear before the Metropolitan. The following facts and authorities will, I trust, prove sufficient."

Then follow eight quotations from Justinian, the "Corpus Juris Canonici," and Van Espen.

I am unable to form any opinion as to whether they do or do not justify the Bishop of Capetown's assertion that "an accused Bishop should be summoned to appear before the Metropolitan," as I do not clearly understand whether this appearance is to be "before the

[1] I have explained in the Preface my reasons for entering into an examination of these quotations.

Metropolitan" in Court or in Synod. But, whatever may be the object of the Bishop of Capetown's quotations, I do not think that any of them can be considered as evidence in support of the proposition that the trial of the Bishop of Natal was conducted according to the procedure prescribed by the Canon Law.

I will now examine these quotations *seriatim* :—

1. "The 123d Novel of Justinian is a sort of compendium of the Ancient and Common Law of the Church Universal. The Ecclesiastical Laws therein set forth are drawn up in conformity with the Canons, and they refer to those Canons. According to it, Bishops are to be summoned before the Metropolitan with two other Bishops (Gloss. with other Bishops) of the same Synod. There is a final Appeal to the Patriarch (Cap. xxii. Novel 123)" [p. 55].

What may be the authority of this Novel, as a law of the Church, is a question which need not be approached; because, as there is an appeal to the Patriarch, as a constituent part of the Ecclesiastical machinery established by Justinian, this enactment cannot be held to be applicable to the proceedings at Capetown, where there was not any such appeal.

The Bishop of Capetown, indeed, considers that in this case there *was* such an appeal.

Dr. Colenso, he says, was offered an appeal,—

"1st. To the Primate of all England.

2d. To the Bishops of the Province of Canterbury.

3d. To the Bishops of the United Church.

4th. To the very body which subsequently met at Lambeth, the whole Episcopate of the Anglican Communion" [p. 48].

Upon this passage it may be observed—

(1) That by the expression "an appeal" is not meant a permission arbitrarily granted by the inferior Judge to resort to one of several Tribunals in no way bound to hear the case, and not having any machinery for the proper conduct of judicial business; but a right possessed by the appellant, in the exercise of which he can require the judgment of a superior Tribunal erected by law (in this instance, the law of the Church at Capetown), whose duty it is to hear and dispose of all matters regularly brought before it.

(2) No proof whatever is given by the Bishop of Capetown in support of his assertion that the Primate of all England is the Patriarch of a Patriarchate, which contains the Province of Capetown; or that the Assemblies he mentions are Councils having appellate jurisdiction over the Provincial Synod of Capetown, in the matter of the trial of a Bishop of that Province.

2. "By the Council of Carthage (Canon III. and apud Gratianum 49, 5, Canon I.) it is said 'Quisquis Episcoporum accusatur, ad Primatem Provinciæ ipsius causam deferat accusator.'

"'Ad intellectum hujus Canonis notandum in Africâ Provinciarum eosdem fuisse qui hodie dicuntur metropolitani'" [p. 55].

It may be noted that the references are wrongly given—the Canon quoted is the seventh Canon of the Third Council of Carthage; and the passage in the Decretum of Gratian is in the Second Part, causa iv., quæstio 5, cap. 1; and quæstio 6, cap. 1.

It must also be remarked that the second paragraph

of this quotation is no part of the Canon of the Council of Carthage, but an observation of Van Espen [Pars i., tit. 19, cap. 4, sec. 1], and that the word "Primates" must be inserted after "Africâ."

I will now give the whole of the Canon, as it is to be found in *Bruns* [vol. i. p. 123]; the readings in brackets being those of the Decretum, in the edition of Richter [Lips. 1833].

"Quisquis episcoporum accusatur ad primatem provinciæ ipsius causam deferat accusator, nec a communione suspendatur cui crimen intenditur nisi ad causam suam dicendam primatis [*om.* primatis, *add.* electorum judicum die statuta] litteris evocatus minime occurrerit, hoc est intra spatium mensis ex ea die, qua eum litteras accepisse constiterit: quod si aliquas veras necessitatis causas probaverit, quibus eum occurrere non potuisse manifestum sit, causæ suæ dicendæ intra alterum mensem integram habeat facultatem; verum post mensem secundum tamdiu non communicet, donec purgetur. Sin autem nec ad concilium universale anniversarium [*om.* anniversarium] occurrere voluerit ut vel ibi causa ejus terminetur, ipse in se damnationis suæ sententiam dixisse judicetur. Tempore sane quo non communicat, nec in sua plebe [*om.* plebe, *add.* ecclesia parochia] communicet. Accusator autem ejus, si nunquam diebus causæ dicendæ defuerit, a communione non removeatur; si vero aliquando defuerit subtrahens se, restituto in communionem episcopo ipse [*om.* ipse] removeatur [a communione accusator] ita tamen ut nec ipsi adimatur facultas causæ peragendæ, si se ad diem occurrere non noluisse, sed non potuisse probaverit. Illud vero

placuit, ut cum agere cœperit [in] episcoporum judicio si fuerit accusatoris persona culpabilis, ad accusandum vel agendum [*om.* accusandum vel agendum, *add.* arguendum] non admittatur, nisi proprias causas, non tamen ecclesiasticas, [vel criminales] dicere voluerit."

Van Espen's Scholion contains the following passage [*In Canones Africanos*, 19]:—

"Et hæc lectio verior apparet, quando quidem Episcopi secundum Canones, in primâ instantiâ, non coram *electis judicibus*, sed coram *Metropolitano* ejusque Synodo conveniendi sint: unde nec Balsamon, nec Zonaras, in suis commentariis ad *electos judices* reflectunt, sed ad solum Primatem, tametsi et apud Græcos electorum judicum, sivè eorum, *qui ad judicandum electi sunt*, mentio fiat, supponentes fortè per hos intelligi Episcopos Provinciæ, qui ad judicandum, in Synodo Provinciali à jure designati, sivè *electi sunt*.

"Ex Canone præcedenti, et Scholio ad Canonem XIV. patet, singulis annis indictum fuisse ad causas Ecclesiasticas terminandas, Concilium generale Africæ.

"Itaque secunda parte Canonis, quæ facit *Canonem* VII. Hipponensem, decernitur, quod si Episcopus accusatur, nec huic anniversariæ, et universali Synodo se stiterit *ut vel ibi causa ejus terminetur*, tanta, adversus ipsum, de objecto crimine præsumptio ex hac morâ et contumaciâ in purgando oritur, ut declaret Synodus, quod non comparens, *ipse in se damnationis sententiam dixisse judicetur*."

Hence it appears that, according to Van Espen, although the Metropolitan is alone mentioned, the proceedings were to be conducted before him in Synod.

But in the African Church, as is well known, a Bishop could not be tried by less than twelve Bishops [1].

Again, there was, by the law of the Church in Africa, an Appeal from the Provincial Synod to the General Council [2] [*Thomassinus*, Vetus et Nova Ecclesiæ Disciplina, pars ii., lib. 3, cap. 45, secs. 5 and 10 (tom. ii., p. 409, ed. Venet. 1773); *De Marca*, De Con-

[1] Conc. Carth. I. can. 11 [1 *Bruns*, 115].

"Si quis tumidus vel contumeliosus extiterit in majorem natu vel aliquam causam habuerit, a tribus vicinis episcopis si diaconus est arguatur, presbyter a sex; si episcopus, a duodecim consacerdotibus audiatur. Universi dixerunt episcopi: Contemptus debet contumaciæ et superbiæ in omnibus frangi, causa vero pro personis a statuto numero audiatur."

Conc. Carth. II. can. 10 [1 *Bruns*, 121].

"Felix episcopus Selemselitanus dixit: Etiam hoc adjicio secundum statuta veterum conciliorum, ut si quis episcopus (quod non opinamur) in reatum aliquem incurrerit, et fuerit ei nimia necessitas non posse plurimos congregare; ne in crimine remaneat a duodecim episcopis audiatur, et a sex presbyter et a tribus diaconus cum proprio suo episcopo. Genedius episcopus dixit: Quid ad hoc dicit sanctitas vestra? Ab universis episcopis dictum est, a nobis veterum statuta debere servari."

Codex Ecclesiæ Africanæ XII. [1 *Bruns*, 162].

"Felix episcopus dixit: Suggero secundum statuta," &c. Conc. Carth. II. c. 10 init.

This number of Bishops was also required by the later ante-Tridentine law. "Episcopus si criminaliter est accusatus et est crimen quod exigit depositionem, tunc requiruntur duodecim Episcopi qui cognoscant de causâ, sed definitio reservatur Papæ. Si autem crimen non exigit depositionem sed ut removeatur ab episcopatu et tunc si est consecratus, requiritur idem numerus et decisio reservatur Papæ" [*Repertorium Felini* (sub voc. "Episcopus si criminaliter"), ed. Basil, 1567].

[2] "Dicuntur ista generalia sive universalia quia sunt generalia in eo regno, non autem absolutè" [*Bellarminus* De Conciliis et Ecclesia, i. 4].

cordantia Sacerdotii et Imperii, lib. vii., cap. 16, sec. 2 (tom. iii., p. 353, ed. Bamberg, 1788)].

I conclude, therefore, that this Canon has no bearing upon the proceedings at Capetown, since the Bishop of Natal was not tried by twelve Bishops, nor had he a properly constituted Appeal to a National Council.

3. "Van Espen, caput iii. 'Ad Metropolitanum tanquam Judicem primarium et ordinarium Episcoporum'" [p. 56].

This fragment is from Van Espen, pars i, tit. 19, cap. 4, sec. 2. The whole passage is as follows:—

"Patet hîc non de appellationibus sermonem esse, sed de excessibus Episcoporum, quos per modum simplicis querelæ læsi deferant contra Episcopum lædentem ad Metropolitanum, tanquam Judicem Primarium et Ordinarium Episcoporum."

It will be seen that Van Espen restricts his observation to cases "de excessibus episcoporum," an expression which in Canon law is never used to include such offences as heresy [1]. It may indeed be true that Bishops accused of heresy were, in a certain sense,

[1] See *Schmalzgrueber*, Jus. Eccl. Univ., lib. v. pars 3, tit. 31.

It is plain that Van Espen used the phrase in its proper sense, from the contents of the Canon to which he refers (III. Conc. Tolet. can. 20 [1 *Bruns*, 218]): "Multorum querela hanc constitutionem exegit, quia cognovimus episcopos per parochias suas non sacerdotaliter sed et crudeliter desævire, et dum scriptum sit: Forma estote gregis neque dominantes in clero, exactiones diœcesi suæ vel damna infligunt; ideo excepto quod veterum constitutiones a parochiis habere jubent episcopos, alia quæ hucusque præsumpta sunt denegentur, hoc est neque in angarias presbyteros aut diacones neque in aliquibus fatigent indictionibus, ne videamur in ecclesia dei exactores potius quam dei pontifices nominari. Hi vero clerici, tam locales quam diœcesani, qui se ab

summoned before the Metropolitan; but this passage cannot be quoted in support of such an assertion.

"4. Cap. iii. 10. *Concilium Matisconense*, ii., Canon 9. 'Si aliquid contentionis adversus Episcopum potentior persona habuerit, pergat ad Metropolitanum Episcopum, et ei causas alleget, et ipsius sit potestatis honorabiliter Episcopum de quo agitur evocare, ut in ejus præsentiâ accusatori respondeat.

"Quod si talis fuerit immanitas causæ, ut eam solus Metropolitanus definire non valeat, advocet secum unum, vel duos Episcopos. Quod si et ipsis dubietas fuerit, conciliabulum definito die, vel tempore instituant, in quo universa rite fraternitas collecta, coepiscopi sui causas discutiat, et pro merito aut justificet, aut culpet'" [p. 56].

It is necessary to examine the earlier part of this Canon in order to understand its object:—

"Licet reverentissimi canones atque sacratissimæ leges de episcopali audientia in ipso pæne Christianitatis principio sententiam protulerint, tamen quoniam eadem postposita humana in sacerdotes dei grassatur temeritas, ita ut eos de atriis venerabilium ecclesiarum violenter abstractos ergastulis publicis addicant, censemus ut episcopum nullus sæcularium fascibus præditus jure suo contumaciter et perperam agens de sancta ecclesia, cui præest, trahere audeat, sed," &c. [2 *Bruns*, 252.]

It will be seen at once that this Canon is designed to protect Bishops against being imprisoned by secular

episcopo gravari cognoverint, querelas suas ad Metropolitanum deferre non differant, qui Metropolitanus non moretur ejusmodi præsumptiones districte coercere."

judges, and that it has no reference to spiritual cases [1].

Besides it would appear that, even in these lawless times, the Bishops were summoned to a Provincial or a National Council, when there was occasion to try one of their number [cf. *Greg. Turon.* lib. iv. cap. 26; v. 21, 28; vii. 16; x. 19, ed. Migne]. So that this Canon would have been an innovation in the law of the Province, if it had permitted the Metropolitan, with one or two Suffragans, to depose a Bishop; and there can be no question but that it would have been contrary to the general law of the Church. Under any circumstances it can be of no authority beyond the limits of Gonthran's dominions, the King by whom the Council was called together, unless it can be shown to have been adopted by other Councils.

"5. Again iv. 'Hoc uno consensu tradunt Canonistæ de jure communi Metropolitanum esse Judicem Ordinarium suorum Suffraganeorum, et contra illos per solam querelam, etiam sine appellatione posse coram Metropolitanos induci accusationes: ipsosque Metropolitanos posse quibusque censuris in Suffraganeos ex justâ causâ agere, apertissime concedunt'" [p. 56].

It is evident that Van Espen did not intend to affirm any thing in this paragraph concerning the deposition of Bishops, whether by the Metropolitan alone, or by the Metropolitan in Synod, as he does not say more of their power to inflict punishments than that they can

[1] *Bail* [Summ. Conc. Eccl. ed. Patav., 1723, tom. ii., p. 223] points out that the case of Theodore, Bishop of Marseilles, who had been imprisoned for some time previous to the assembling of the Council, had been referred to it [cf. *Greg. Turon.*, lib. viii. 12].

pass censures; *i. e.*, the sentences of interdict, suspension, or excommunication.

Again, his statement that the Metropolitan is "judex ordinarius," professes to be based on the rulings of certain Canonists; his meaning must therefore be limited by the terms of the law as laid down by these authorities.

He adds, after the passage quoted by the Bishop of Capetown—

"Vide Stephanum Quarantam in summa Bullarii, verbo: *Archiepiscopi auctoritas;* et Panormitanum aliosque veteres Interpretes, *ad cap. Pastoralis de Off. Ordin.*"

On an examination of these references it will be found that the passages relating to the deposition of Bishops are as follows:—

Quaranta [p. 47, ed. Venet. 1607]. "Archiepiscopus est ordinarius judex omnium episcoporum suæ provinciæ. . . . In causis vero criminalibus vide Decretum Conc. Trid. sess. 24, de Ref. c. 5, et sess. 13 c. 6 & 7" (chapters by which the graver causes of Bishops were reserved for trial by the Holy See, and provisions made as to the Citation of the accused and the nature of the evidence).

Panormitan (ed. Basil, 1488). "Archiepiscopus est judex ordinarius omnium Episcoporum provinciæ suæ. De Jure communi quælibet provincia debet habere unum Archiepiscopum et decem Episcopos. Non tamen potest procedere ad depositionem quia depositio Episcoporum soli Papæ reservata est [1]."

[1] Boschus Codecha [in *Repetitiones Juris Canonici*, tom. iii. p. 28b. ed. Venet., 1587,] says, on the authority of Archidius

The *Glossa Ordinaria* [ed. Mogunt. 1473], ("quæ ponit casus in quibus ordinarius est judex in tota provincia sua et in subditos Suffraganeorum," *Casus Breves Decretal.*, ed. Argent. 1485,) makes no mention of the power of deposition; nor do any other of the canonists whom I have consulted, although they affirm that the Metropolitan is "judex ordinarius totius provinciæ in casibus a jure expressis," and of these *Hostiensis* [ed. Venet. 1581] enumerates twenty-one.

I conclude, therefore, that in this often-quoted passage Van Espen did not intend to make any reference to cases involving the deposition of Bishops.

His views as to what had been originally the proper tribunal in such cases are more than once stated in his works [see above, pp. 14 and 17, notes]. Whether he is right or wrong [1], is an important question, but it is one not of Canon law, but of ecclesiastical history.

6. "Cap. iv. 'Hinc communiter tradunt Canonistæ quod Metropolitanus quidem sit judex totius Provinciæ tanquam habens Jurisdictionem Episcopalem seu Ordinarium in totam Provinciam seu singulas ejus Diœceses'" [p. 57].

Here, again, I am unable to verify the reference, but I presume that the passage the Bishop of Capetown intended to quote is the following, which, as he

and Geminianus (in cap. *Si quis Episcopus criminaliter*), that some Provincial Councils had authority to depose; but I have not been able to verify the references.

[1] "Vetus sed jam a multis explosa atque ejecta calumnia quod falsæ decretales Isidori majores criminales Episcoporum causas Romani Pontificis judicio servaverint. Hæc cantilena est hæreticorum . . . frigida et jejuna calumnia," &c. [1 *Devoti*. Inst. Can. 187, ed. Gand. 1852].

accidentally omits a few words, has the opposite meaning to that conveyed by his extract.

[Pars i., tit. 19, cap. 5, sec. 3] "Hinc communiter tradunt Canonistæ, quòd Metropolitanus quidem sit Judex totius Provinciæ tanquam habens jurisdictionem Archiepiscopalem; non tamen tanquam habens jurisdictionem Episcopalem seu ordinariam in totam Provinciam, seu singulas ejus Diœceses."

I will add the two succeeding sentences as they may appear to have some bearing on the question.

"Jurisdictio verò Archiepiscopalis tantummodò se extendit ad ipsos Suffraganeos Episcopos, nequaquam autem in eorum subditos, nisi mediatè; quatenus nimirum Suffraganeorum negligentia sive defectus esset supplendus, aut eorum procedendi modus corrigendus.

"Quapropter Metropolitanorum auctoritas in Diœceses Suffraganeorum se non extendit, nisi ipsi Episcopi à Sacris Canonibus deflectant, aut in eorum executione sint defectuosi," &c.

These passages, which are from the chapter "Quam auctoritatem Metropolitani hodie habeant in Diœcesi suorum Suffraganeorum?" must, of course, as far as they refer to the power of a Metropolitan over his Suffragans, be subject to the same limitations as the similar passages in the preceding chapter, "In quibus causis Metropolitanus sit judex ordinarius suffraganeorum," in which the extent of that power is laid down, and therefore, as has been pointed out above [antea, p. 45—49], they can have no reference to cases of heresy.

7. "In the *Corpus Juris Canonici* Decreti Secunda Pars, causa ix., quæstio 3, c. 4, I find 'Metropoli-

tanus sine Episcoporum consensu vel præsentia alicujus eorum non audiat causas.

"'Nullus Metropolitanus absque cæterorum omnium comprovincialium Episcoporum instantia aliquorum audiat causas; quia irritæ erunt aliter actæ quam in conspectu eorum omnium ventilatæ et ipse si fecerit coerceatur a fratribus'" [p. 57].

This extract is open to the obvious criticism that it is taken from the *Decretum*, and therefore does not gain any authority from being found in the *Corpus Juris Canonici* [See 1 *Devoti* Inst. Can., 80, ed. Gand, 1852]. And the authority of this particular chapter is not very great, as the chapter happens to be one of the false decretals [*Phillips*, Du Droit Ecclésiastique dans ses Sources, 103].

But any respect one might be inclined to pay to this passage, from the sound doctrine it appears to enunciate, is sadly diminished on reference to the *Corpus Juris;* for it will then be seen that the Bishop of Capetown omits the first words of the chapter (the sentence "Metropolitanus . . . . causas" being only a heading). The chapter really commences as follows:—

"Salvo in omnibus Romanæ Ecclesiæ privilegio nullus Metropolitanus," &c.

These words are surely not unimportant, especially when it is remembered how great were the privileges claimed by the Roman See, in the matter of the deposition of Bishops. They are certainly words which prevent this passage from being cited as an authority on the law in force at Capetown.

8. "Van Espen, pars i., tit. 19, *De Metropolitanis*, cap. 3, sec. 3. 'Juxta regulas sibi ab Ecclesiâ

præscriptas, vel solus, vel una cum cæteris Provinciæ co-episcopis ipsos delinquentes, vel a Canonum præscripto in suæ Diœcesis regimine deflectentes corrigere, et interdum punire posset; eoque sensu Metropolitanus jam pridem habitus fuit ordinarius admonitor, corrector, et judex morum Suffraganeorum' " [p. 57].

This passage indicates in very general terms what are the duties and powers of Metropolitans, "juxta regulas ab Ecclesia præscriptas;" and if the rules of the Church at Capetown could be ascertained, the task which would alone remain to be accomplished would be an easy one, for nothing more would have to be done but to inquire whether the proceedings in the matter of the Bishop of Natal had been conducted according to those rules.

The Bishop of Capetown concludes his quotations by giving extracts from the works of De Marca and Dupin.

They do not call for any special remark, except indeed that, if it be true, as De Marca says, that from the sentence of the Provincial Synod there was no appeal, it is difficult to understand how the Bishop of Capetown can think that his whole course of proceeding has conformed to the Canons of the Church [p. 59], when he claims to have offered to the Bishop of Natal a choice of no less than four different appeals from the sentence of the Provincial Tribunal at Capetown [p. 48].

APPENDIX No. I.

Minutes of Proceedings at a Meeting of the Metropolitan and Suffragan Bishops of the Province of Capetown; held at Capetown, on the 26th December, 1860, and following days.

WE, the undersigned Metropolitan and Bishops of the Province of Capetown, having, in the good Providence of God, met together at Bishop's Court, near the metropolitan city of Capetown, on the 26th day of December, 1860, and following days; and having consulted together upon certain matters affecting the progress of true religion in South Africa, do sanction and send forth the following Report of the Resolutions adopted at our Conference.

(Signed) R. CAPETOWN.
J. W. NATAL.
PIERS ST. HELENA.

Not having been able to be present at the Conference of the Bishops of the Province, or at the Consecration of Archdeacon Mackenzie, I nevertheless desire to express my concurrence with the Resolutions of the Bishops who were present, by affixing my signature to them.

(Signed) H. GRAHAMSTOWN.

Objects of Conference.

The Bishop of Capetown informed the Bishops of the Province that he had, as Metropolitan, invited them to a Conference, in order that they might consult together upon such matters as affected the progress of true religion in Africa; and more especially to take into consideration the following questions:—

I. The communication of the Archbishop and Bishops of the Province of Canterbury to the Bishops of this Province, respecting the admission of Archdeacon Mackenzie into the Episcopal Order, before he be sent forth to the heathen.

II. The Resolution adopted at a special meeting of the *Society for the Propagation of the Gospel in Foreign Parts,*

on the 26th of July, 1860, the Archbishop of Canterbury being in the chair, relating to the appointment of a Bishop to the Free States.

III. The desirableness, or otherwise, of the Metropolitan summoning a Provincial Synod.

During the Conference, the following Resolutions were adopted by the Bishops of the Province:—

Resolved, I. That, in reply to the communication of the Archbishop and Bishops of the Province of Canterbury, we do agree to admit the Venerable Archdeacon Mackenzie into the Episcopal Order, before he be sent forth to the heathen; and we do earnestly pray that he may be greatly blessed of God in the work to which he is called, and be made an instrument in His hand of extending the kingdom of our Lord, and of bringing many souls into the fold of the Redeemer.

(Signed) R. CAPETOWN.
J. W. NATAL.
PIERS ST. HELENA.
H. GRAHAMSTOWN.

II. That the Bishop elect shall, at his own consecration, take the oath of due obedience to the Bishop of Capetown, as Metropolitan of the Province of Capetown.

(Signed) R. CAPETOWN.
J. W. NATAL.
PIERS ST. HELENA.
H. GRAHAMSTOWN.

III. That, previous to his consecration, he shall pledge himself, in the terms of the annexed Declaration, to teach and maintain, and to require the Clergy, whom he shall license or ordain, to teach and maintain the doctrine and discipline of the Church of England, as contained in her Articles and Liturgy: and also to adopt, as far as may be, the authorized version of the Holy Scriptures, as the basis of the translations of the same into the languages of the people to whom he shall be sent.

(Signed) R. CAPETOWN.
PIERS ST. HELENA.
H. GRAHAMSTOWN [1].

Declaration.

I, Charles Frederick Mackenzie, now to be admitted to the sacred office of a Bishop of the Church in Africa, do promise that I will teach and maintain the doctrine and discipline of the Church of England, as contained in her Articles and

[1] The Bishop of Natal is unable to concur in this and the following Resolution, for reasons which he will state in a separate paper.

Liturgy, and require all whom I shall license or ordain to pledge themselves to teach and maintain the same; and also, that I will adopt, as far as may be, the authorized version of the Holy Scriptures, as the basis of the translations of the same into the languages of the people to whom I am sent.

IV. That he shall receive from the Bishops of this Province an instrument signed and sealed by them, defining, as nearly as may be, the limits of his field of labour; and shall engage to abide by this as his written Commission.

(Signed) R. CAPETOWN.
PIERS ST. HELENA.
H. GRAHAMSTOWN [1].

V. That the Metropolitan be requested to communicate to his Grace the Archbishop of Canterbury, for the information of both Houses of the Province of Canterbury, the fact of the Archdeacon's consecration, together with the measures adopted with reference to clause 7, in the Report of the Upper House of Convocation.

(Signed) R. CAPETOWN.
J. W. NATAL.
PIERS ST. HELENA.
H. GRAHAMSTOWN.

VI. That the Metropolitan be requested to submit to his Grace the Archbishop of Canterbury, for the consideration and determination of the Houses of Convocation, the question whether Bishops appointed to regions external to Her Majesty's Dominions in South Africa should be regarded as within the Province of Capetown, and have seats in the Synod of the Province.

(Signed) R. CAPETOWN.
J. W. NATAL.
PIERS ST. HELENA.
H. GRAHAMSTOWN [2].

[1] On the ground that, by assigning this definite sphere of labour to the Missionary Bishop, the Bishops of this Province are only giving effect to the intentions of the Parent Church from which this Mission proceeds.

[2] I subscribe Resolution VI., and Resolution I. on the third subject brought before the Conference, with the following understanding, in which I believe the other Bishops of the Province will concur:—That, whilst it would be our duty to pay a respectful attention to the opinion of the Convocation of the Province of Canterbury on the general principles of the relation of Missionary Bishops to the adjoining Province, I feel assured that it would not desire to determine for any Province of the Colonial Church, without the concurrence of the Bishops and Churches of that Province, what should be the constitution of its Provincial Synod.

(Signed) H. GRAHAMSTOWN.

With reference to the second subject, to which the attention of the Bishops of the Province was more immediately directed, it was resolved:—

I. That the time seems to have arrived for sending forth a Bishop, to promote the advancement of Christ's kingdom in the regions lying beyond the Orange River.

(Signed) R. CAPETOWN.
J. W. NATAL.
PIERS ST. HELENA.
H. GRAHAMSTOWN.

II. That the Bishop to be appointed should have for his spiritual field those countries beyond the Orange River originally included in the diocese of Capetown.

(Signed) R. CAPETOWN.
J. W. NATAL.
PIERS ST. HELENA.
H. GRAHAMSTOWN.

III. That, in the opinion of the Bishops of this Province, it is right that the selection of fit men to fill the office of Missionary Bishop should rest, if desired, with the Church that maintains them, under such arrangements as to Convocation shall seem expedient; and they would respectfully urge upon Convocation the immediate appointment of a Bishop for the Free State.

(Signed) R. CAPETOWN.
J. W. NATAL.
PIERS ST. HELENA.
H. GRAHAMSTOWN.

IV. That the provision suggested above would apply only to Missions in the state of infancy; that when such Missions grow into the condition of duly organized and self-supporting Churches, they are entitled to elect their own chief pastor, with the concurrence, if within a Province, of the Metropolitan and the majority of the Bishops of the Province.

(Signed) R. CAPETOWN.
J. W. NATAL.
PIERS ST. HELENA.
H. GRAHAMSTOWN.

V. That the Metropolitan be requested to thank the *Society for the Propagation of the Gospel in Foreign Parts,* for their Resolution, conveyed in the letter of their secretary,

of August 3, 1860, relating to the above subject; and while communicating to the Society the Resolutions of the Bishops of the Province in the matter, to express the grateful sense which the members of the Church in this land entertain of the great benefits conferred upon South Africa through the means of the venerable Society.

(Signed) R. CAPETOWN.
J. W. NATAL.
PIERS ST. HELENA.
H. GRAHAMSTOWN.

VI. That it is the opinion of the assembled Bishops, that the income of the Bishop for the regions beyond the Orange River should not be less than 500*l*. a year.

(Signed) R. CAPETOWN.
J. W. NATAL.
PIERS ST. HELENA.
H GRAHAMSTOWN.

VII. That the heathen within the limits of the aforesaid region, amounting, it is supposed, to not less than 170,000 souls, offer an important sphere of labour to the Church of England, the ground being only partially occupied by other religious bodies; that, inasmuch as the children of the leading chiefs of that country are being educated in the Missionary College of Capetown, and the sons of the two most powerful chiefs are about to complete their education at St. Augustine's College, Canterbury, the time seems to have arrived when a Mission should be organized for the natives of this district; and the venerable *Society for the Propagation of the Gospel* be requested to aid the Bishops who may be appointed to that field in the establishment of such a Mission.

(Signed) R. CAPETOWN.
J. W. NATAL.
PIERS ST. HELENA.
H. GRAHAMSTOWN.

VIII. That the Metropolitan be requested to communicate to his Grace the Archbishop of Canterbury, the conviction of the Bishops of the Province, that some agency, in addition to that which now exists, is requisite, in order to draw forth an adequate supply of labourers for the widely-extended missions of the Church; and to submit, for his Grace's consideration, whether it might be expedient for Convocation, if

it should see fit, to appoint a Board for this purpose, to be also constituted a Corresponding Board, with which members of the Church in all parts of the world might communicate, respecting new openings for Missions of the Church of England.

(Signed) R. CAPETOWN.
J. W. NATAL.
PIERS ST. HELENA.
H. GRAHAMSTOWN.

IX. The assembled Bishops, while fully aware of the difficulties of the case, desire to represent earnestly to the venerable Society the importance of founding, without further loss of time, a Mission in Kaffraria Proper, for which, on the application of the Metropolitan, a grant of 300*l.* a year was made in the year 1859.

(Signed) R. CAPETOWN.
J. W. NATAL.
PIERS ST. HELENA.
H. GRAHAMSTOWN.

X. That, in view of the rapid increase and extension of the missionary labours of our Church among nations of Southern and Central Africa where polygamy is practised, we would earnestly commend to Convocation the consideration of the question: "What should be done in the case of candidates for baptism from heathen nations, who, at the time of their conversion, may have more than one wife, duly recognized as such by native laws as well as by the colonial authorities in the administration of justice?"

(Signed) R. CAPETOWN.
J. W. NATAL.
PIERS ST. HELENA [1].
H. GRAHAMSTOWN [1].

Upon the third subject brought by the Metropolitan before the Conference, it was resolved:—

I. That, with reference to Clause 8 in the Resolutions of the Upper House of Convocation, this Conference is of opinion, that, looking to the facts that Missionary Bishops are now being sent beyond the bounds of British territory; that there is no statute law to bind the Diocese in distant lands to the mother Church, that it is by moral and spiritual bonds that their union can alone, under God, be main-

[1] Signed, subject to the exposition of views contained in a separate paper.

tained, that the several members of the Colonial Church are beginning to enact laws and make regulations for themselves, not only in Diocesan, but also in Provincial Synods;—it would be very desirable if the Convocation would lay down the principles which, in its judgments, should guide such Synods in their proceedings, and the limits of their authority, before they shall be committed to any course of action from which it might be difficult to recede, and would also take into consideration what should, in the present circumstances of the empire, be the constitution of a National Synod.

(Signed) R. CAPETOWN.
J. W. NATAL.
PIERS ST. HELENA.
H. GRAHAMSTOWN.[1]

II. That the Metropolitan be requested to communicate with the Secretary of State for the Colonies on the subject of a Provincial Synod; and to pray that, if needful, Her Majesty's licence to hold such a Synod may be granted to the Bishops of the Province; and that, if not needful, they may be informed that such is the case.

(Signed) R. CAPETOWN.
J. W. NATAL.
PIERS ST. HELENA.
H. GRAHAMSTOWN.

The Bishops of this Province cannot separate without expressing the deep sorrow with which they behold the divided condition of professing Christians in this land, and their fear that much hindrance is thereby caused to the progress of Missions amongst the heathen. They would heartily desire that means might be devised whereby these divisions —the fruit, doubtless, of the separations of Christendom, and which have led to the formation of so many distinct communions—may be healed; and they earnestly pray that the Spirit of God may lead to closer union and fellowship the followers of one common Lord.

(Signed) R. CAPETOWN.
J. W. NATAL.
PIERS ST. HELENA.
H. GRAHAMSTOWN.

Having seen and carefully considered the proceedings of

[1] Signed, subject to the exposition of views contained in a separate paper.

the Conference of the Bishops of the Province of Capetown, I desire to express my full and hearty concurrence in the Resolutions adopted by them.

(Signed) C. F. MACKENZIE, Bishop.

Bishop's Court, January 4th, 1861[1].

[1] "Colonial Church Chronicle, 1861," p. 128.

APPENDIX No. II.

Minutes of Proceedings of the Synod of Bishops of the Province of Capetown, holden at Capetown on the 15th of December, 1863.

WE, the undersigned Metropolitan and Suffragan Bishops of the Province of Capetown, having, in the good providence of God, met together in Synod at Bishop's Court, near to the metropolitan city of Capetown, upon a summons from the Metropolitan, do sanction and send forth the following Report of the Acts and Constitutions adopted in such Synod.

R. CAPETOWN.
H. GRAHAMSTOWN.
EDWARD, Bishop Orange Free State.

I. This Synod affirms that the Church of this Province receives and maintains the doctrines and sacraments and the discipline of Christ, as the Lord hath commanded, and as the United Church of England and Ireland hath received the same; and that it receives the Book of Common Prayer and Administration of the Sacraments, and other rites and ceremonies of the Church, according to the use of the United Church of England and Ireland; and also the Authorized Version of the Holy Scriptures, as of the same authority in this Church as it is in the Church in England; and, further, it disclaims the right of a single province of the Church to alter the standards of faith and doctrine now in use in the Church—the Three Creeds, the Thirty-nine Articles, the Church Catechism, and other Formularies of the Church; and acknowledges that the Canons and Constitutions of the Church, in so far as they are of force in England, and as the existing circumstances of the Church in this Province permit, have authority here also, until they shall have been altered by Synods of this Province.

II. This Synod affirms that inasmuch as this Church is not, as the Church in England, "by law established," and inasmuch as the laws of England have by treaty no force in this

colony, those laws which have been enacted by statute for the English Church as an establishment do not apply to, and are not binding upon, the Church in South Africa; and that this Church, therefore, receives the English Ecclesiastical Statute Law only in so far as it may serve to remedy and supply manifest defects or omissions of the Canon Law, or of laws framed and enacted by the Synods of this Church.

III. On the grounds stated in the previous Resolution, this Synod considers that the final Court of Appeal, constituted by Act of Parliament for the established Church of England, is not a Court of Appeal in ecclesiastical causes for the unestablished Church in this Colony; and therefore this Synod declares that, while the Church in this Province is bound by, and claims as its inheritance, the Standards and Formularies of the Church of England, it is not bound by any interpretations put upon those Standards by existing Ecclesiastical Courts in England, or by the decisions of such Courts in matters of faith.

IV. This Synod sanctions and approves of the Regulations adopted by the Diocesan Synods of Capetown and Grahamstown, for use in their respective Dioceses, and postpones to a future Synod the consideration of the means to be adopted for bringing the regulations of the several Dioceses of the Province into entire harmony.

V. This Synod deems it to be consistent with the laws and usages of the Church, that the Bishop of a Diocese should, if he see fit, invite the presence of his laity in his Diocesan Synod, provided that nothing be done without the consent of a majority of the Presbyters, and that the consent of the Bishop be necessary to all the acts of the Synod.

VI. The Metropolitan having communicated to this Synod the sentence which he proposed to deliver after hearing the charges brought against the Right Rev. John William Colenso, D.D., Bishop of Natal, by three of the Clergy of this Province, and the grounds upon which he had arrived at his conclusion—this Synod desires to express its conviction that the charges have been proved; and its approval of the sentence about to be passed upon the Bishop by the Metropolitan.

VII. This Synod is of opinion that, if the Bishop of Natal should appeal to his Grace the Archbishop of Canterbury against the sentence of the Metropolitan, it would be highly desirable to allow such appeal in this particular case, which is both in itself novel and of great importance to the whole Church. As, however, the question of appeals to England from the Churches in the Colonies involves considerations as

to the rights of Provinces, and as to the hindrances which may arise from such appeals to a proper maintenance of discipline, owing to the heavy costs thereof, and other causes, this Synod does not express any opinion upon the general question of appeals to England.

VIII. This Synod is of opinion that, should the Bishop of Natal presume to exercise Episcopal functions in the Diocese of Natal after the sentence of the Metropolitan shall have been notified to him, without an appeal to Canterbury, and without being restored to his office by the Metropolitan, he will be, *ipso facto*, excommunicate; and that it will be the duty of the Metropolitan, after due admonition, to pronounce the formal sentence of excommunication.

IX. That the title recommended by the Joint Committee of both Houses of the Convocation of Canterbury, as designating the true position of the Church of this Province—"The Church of South Africa, in union and full communion with the United Church of England and Ireland"—be adopted as its full and proper title, subject to any decision that may be come to by the united action of the English and Colonial Churches.

X. That in the judgment of this Synod, it would be desirable, under the difficulties which have arisen in the endeavour to establish the Mission of the *Society for the Propagation of the Gospel in Foreign Parts* in Independent Kaffraria, that the future head of the Mission in that country should be consecrated as Bishop; and that the Society be requested to select a clergyman for that office, and present him to his Grace the Archbishop of Canterbury, for consecration; and, in the mean time, to send out any clergyman and catechists whom they may consider qualified to commence the Mission,—to be placed, for the present, under the direction and government of the Bishop of Grahamstown.

XI. That his Grace the Archbishop of Canterbury be respectfully requested to consecrate some clergyman, either selected by his Grace, or recommended to him by the Society, as the head of the Mission about to be sent to Independent Kaffraria.

The Metropolitan has received a letter from the Bishop of St. Helena, of which the following is the final paragraph :—

"Your Lordship, as Metropolitan, has called upon me to say whether I do or do not concur in your Judgment: it is, therefore, my very painful duty to state that, after having

carefully weighed the whole subject, I consider all the charges fully proved, with the exception of that of contravening the XVIIIth Article, and I do concur in the Judgment delivered by your Lordship, that the Bishop of Natal is 'unfit, so long as he shall persist in the errors' of which he has been convicted, 'to bear rule in the Church of God, or to exercise any sacred offices whatever therein.'[1]"

[1] "Colonial Church Chronicle, 1864," p. 182.

APPENDIX No. III.

On the difficulty of applying the Canon Law to the case of the Bishop of Natal.

Any attempt to apply the Canon Law to the case of the Bishop of Natal would seem to be surrounded by difficulties of various kinds.

In the first place, as the whole proceeding is based upon contract, an answer must be given to the inquiry, To what law did the Bishop of Natal agree to submit?

Secondly, Granting that the Canon Law is to govern the procedure, how is that law to be ascertained?

In England, part of the Canon Law, foreign as well as domestic, is still in force; but before any particular Canon can be relied upon as law, it must be proved that it was received here before the 25th year of Henry VIII., and is not contrarient to the statute or common law, or to the royal prerogative.

There are also the post-reformation Canons, which have a certain force in the Provinces whose Convocations passed them.

There would be great difficulty in applying the Canon Law, as it obtains in England, to the circumstances of the Province of Capetown, especially if it were unaccompanied by those statutable and other provisions for the government of the Church which are in force here.

If, however, recourse is to be had to the "general law of the Universal Church," it would seem almost impossible satisfactorily to determine what part of that law can be held to be applicable to the proceedings at Capetown, the parties to the contract not having expressly adopted any of its rules for enforcing discipline.

Various methods of grappling with this difficulty have been adopted.

Some affirm that the law is to be found in the Canons of the "undisputed General Councils."

But, after it has been determined what are the undisputed Councils, it must be remembered that, whatever may be the

authority of these Councils in matters of faith, they have not necessarily any present authority in matters of discipline.

Some, again, quote from the volume of the *Corpus Juris Canonici*, and accept some of the forms of procedure therein prescribed, while they discard the Papal authority, on which all jurisdiction is based—and the appeal to the Court of Rome, to which all judicial tribunals are made subordinate.

Others are content to take the law from the writings of some Canonist, like Van Espen.

Now Van Espen enjoys a great, and probably deserved reputation amongst English students of Ecclesiastical Law [1]; indeed, it would be hardly possible to find any other Canonist who could be used freely by those who do not admit the supreme authority of the Holy See.

Still, though Van Espen may not merit the censures which writers of a different school have heaped upon him [2], it must be admitted that he cannot, in fairness, be considered an altogether unprejudiced and impartial guide, especially in a matter which involves the question of the Papal supremacy. This circumstance makes it especially dangerous to place reliance upon extracts quoted from Van Espen's works, without a careful examination, not only of the authorities he refers to, but also of those cited on the same point by other Canonists.

[1] For this reason, the references in this Paper on points of Canon Law have been made almost exclusively to his works in the Louvain Edition of 1753.

[2] E.g. Devoti, in the Preface to his "Jus Canonicum Universum," thus speaks of the "Jus Ecclesiasticum Universum" of Van Espen. "In illo ipso apparatu, ornatu que eruditionis sæpe ambigua pro certis sumuntur, falsa pro veris, ac multa, quæ antiquissima sunt, recentiori ætate adscribuntur. In quo præsertim magna hujus hominis sive inscitia, sive impudentia est; quoniam sæpissime nihil hæsitans quasi de tribunali pronunciat, recenti memoria constitutum unum, aut alterum disciplinæ caput, quod multa ante sæcula jam obtinuisse constat."

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