

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Jenkins v. the Attorney-General of Bermuda, from Bermuda; delivered on the 23rd December, 1868.*

Present :

LORD CHELMSFORD.

SIR JAMES W. COLVILLE.

SIR EDWARD VAUGHAN WILLIAMS.

SIR ROBERT PHILLIMORE.

THIS is an Appeal from two Orders of the Court of Chancery of the Islands of Bermuda, upon an application on behalf of the Rev. Charles Alfred Jenkins for a writ *de vi laicâ removendâ* to remove any opposition which might be offered to his being inducted into Smith's Parish Church as the Rector and Incumbent thereof.

A majority of the Court refused the writ for the reasons assigned by the Chief Justice, one of the members of the Court. He said that the law relating to writs *de vi laicâ removendâ* was very obscure, and that no instance was known of such a writ ever having been granted in Bermuda. And he conceived that since the decisions of the Judicial Committee of the Privy Council in the cases of *Long v. the Bishop of Cape Town*, and the *Bishop of Natal v. the Bishop of Cape Town*, it must be considered that it is not competent to the Crown in any Colony having a settled constitution and representative form of government such as Bermuda had, to alter the constitution of the Church in the Colony, by conferring by Patent upon a Bishop any coercive or judicial powers not granted by the Imperial Parliament or the local Legislature. That it appeared to him, that according to the effect of

these decisions the Bishop had not lawful authority, without legislative sanction, to grant institution and issue a mandate for induction into benefices in Bermuda."

The Appeal was argued *ex parte*, no one appearing on the other side, although ample notice was given to a person who had been the foremost in resisting the induction of Mr. Jenkins, that leave to Appeal had been granted.

Under these circumstances their Lordships before delivering their Judgment have very carefully considered the grounds which were assigned for refusing to grant the writ prayed for, and the arguments which were urged by the Appellants against such refusal.

The Islands of Bermuda, which had previously been a Proprietary Colony, were transferred to the Crown in 1685. They then possessed, and have ever since enjoyed, an independent Legislature. They were first attached to the Colonial See of Nova Scotia in the year 1825, and were afterwards transferred, in 1839, to the newly erected Bishopric of Newfoundland.

By the Letters Patent of Dr. Inglis, who was appointed Bishop of Nova Scotia and its dependencies in 1825, authority was given to him to exercise jurisdiction, spiritual and ecclesiastical, and all and singular the functions and authorities within (amongst other places) Newfoundland and the Bermudas, which might be lawfully exercised within the Province and Diocese of Nova Scotia.

By the Letters Patent of 1839, erecting the Island of Newfoundland into a Bishop's See, the former Letters Patent were revoked so far as they related to the Islands of Newfoundland and the Bermudas. And power and authority were given to the Bishop, by himself or by his sufficient Commissary or Commissaries to be by him substituted and appointed, to exercise jurisdiction, spiritual and ecclesiastical, and all and singular functions and authorities within the Islands of the Bermudas and their dependencies, which might, by virtue of the Letters Patent, be lawfully exercised by himself or his Commissary or Commissaries within the Island and Diocese of Newfoundland.

The Islands of Bermuda seem to have been divided into parishes at the time of their becoming

a Crown Colony, or very soon afterwards, for, amongst the Acts of their Legislature, there is one as early as the year 1693 for settling a yearly revenue upon the minister or incumbent of St. George's parish, and of the other parishes within the islands. That the parochial system was completely established towards the end of the last century, appears from another Act of the 30th March, 1775, intituled "An Act for the more regular payment of the clergy; the regulating the seats or pews in the several churches in these islands; and more effectual recovery of parish assessments." And the church of Smith itself, to which these proceedings apply, has been the subject of legislative provision; for, by an Act of the 17th March, 1820, it is enacted "that the parishes of Smith and Hamilton, together with the annual interests, profits, or issues payable by law for the glebe situate in the parish of Hamilton, and which has been sold in fee simple, conditional, under and by virtue of an Act of the Legislature, shall constitute one living."

It must be borne in mind that, during the whole of this long period, when the Legislature of the Bermudas was constantly recognizing the establishment of parishes and their incumbents, the power of appointing clergymen to the different parishes was vested in the Governors. This authority they possessed, by delegation from the Crown, conveyed to them by a clause in their Commissions, directing them to collate to all vacant benefices within the islands. This form of Commission continued down to the year 1831, when it was changed by substituting a clause directing the Governor, upon the vacancy of a benefice, to present a Clerk to the Bishop (first of Nova Scotia and afterwards of Newfoundland) for institution.

This clause continued to be inserted in the Governor's Commission down to the year 1861. Since that time it has been omitted from the Commissions and introduced into the Instructions to the Governors.

In explaining the reasons for refusing the writ, *de vi laicâ removendâ*, the Chief Justice, after stating that it was not competent to the Crown to alter the constitution of the Church in the Colony by conferring by Patent upon a Bishop any coercive or judicial powers not granted by the Imperial Parlia-



ment or the Local Legislature, added, "Although the institution of a clergyman to a benefice is not an act of coercive or contentious jurisdiction, yet it is not a mere ministerial act, but is of a judicial nature."

Strictly speaking, however, it is not so much the institution which is judicial, as the previous examination of the fitness of the Clerk presented: for if the Clerk be really *idonea personā*, the Bishop would be bound to institute him. But whether institution is to be regarded as a judicial or a ministerial act is wholly immaterial.

The question is, whether the Crown has conferred an authority which was not within its competency.

Now it is a fact, which cannot be disputed, that for more than a century the Crown possessed the power of collating to all the vacant benefices in the Bermudas by direct nomination, a power which it exercised by delegation to the successive Governors, who were usually described as Ordinaries in their Patents, and who to a certain extent exercised the powers of that ecclesiastical officer. But when a Bishop or ecclesiastical Ordinary was duly appointed, with spiritual oversight of the Church in the Bermudas, the Crown, as patron, thought proper to leave to the Governor the power of nominating the Clerk, but recognized, by the Letters Patent granted to the Bishop, the power of institution belonging to his office. The Bishop, as has been said, is bound, if the Clerk be *idonea personā*, to institute him.

It cannot be supposed that when the Crown gave a clergyman a title to a living by one act of collation, the appointment was made without previous inquiry as to his qualifications. The whole effect of the alteration of the system of conferring benefices in the Bermudas is to transfer this inquiry from the Governor to the Bishop.

It seems to have been supposed, however, that the cases of *Long v. the Bishop of Capetown*, and of *the Bishop of Natal v. the Bishop of Capetown* are authorities for the proposition that the Bishop of Newfoundland has no legal status, and cannot lawfully exercise any episcopal function within the Bermudas. The first case certainly does not go the length of that proposition, for it decided only that the Crown cannot confer coercive authority on a Bishop in a Colony possessing a constitutional form

of government without the consent of the Legislature. The Judicial Committee deciding the case of the Bishop of Natal has certainly used expressions which would restrain the power of the Crown in the creation of Bishops within even narrower limits.

It has been argued that the Master of the Rolls, in his Judgment in *Colenso v. Gladstone and others*, has greatly qualified the effect of the former Judgment of the Privy Council. Their Lordships think that in the present case they are not called upon to express an opinion whether these two decisions can be reconciled. For they are clearly of opinion that the question whether the Bishop of Newfoundland has any lawful status, or can exercise any episcopal function, and particularly that of institution in the Bermudas, has been set at rest conclusively by the repeated recognition of his status and functions by the Colonial Legislature. The Acts of 1843, of 1864, of 1865, and 1866, mentioned in the Memorandum of the Attorney-General of the Bermudas, all recognise the legal status of the Bishop of the Diocese.

The Chief Justice doubted whether the institution of Mr. Jenkins to the church of Smith was valid. Upon this point he said, "Supposing the Bishop had authority to institute, it did not seem clear, under the instructions of the Governor, that a presentation could properly be made during the Bishop's absence from Bermuda to his Commissary, or that the Commissary could admit and institute a clergyman to a benefice without the special direction of the Bishop in each particular case." Now, as already shown, the Bishop of Newfoundland has authority by his Letters Patent to exercise all his functions and authorities by himself or his Commissary. And that a general authority may be given to the Commissary, and that a special direction upon each occasion is unnecessary, appears from a clause in the Letters Patent, "that during the vacancy of the See by the demise of the Bishop or his successors, or otherwise, institutions to benefices and licenses to Curates may be given by the Commissary or Commissaries who were so as aforesaid named and substituted by the last preceding Bishop, and were in possession of that office under such substitution

and appointment at the time when the See became vacant."

Mr. Jenkins was duly presented by the Governor to the Rectory of the Parishes of Hamilton and Smith by a formal presentation to the Bishop, or, in his absence, to Mr. Coombe, his Acting Ecclesiastical Commissary. And Mr. Coombe, reciting his authority derived from the Bishop as Commissary and that he was acting by virtue of it, instituted Mr. Jenkins to the Rectory and issued a mandate for his induction, upon which he was quietly inducted into the church of Hamilton; but resistance was made to his being put into possession of the church of Smith.

There can be no doubt that Mr. Jenkins was duly presented to the Rectory, and was instituted by lawful authority.

The only remaining question is as to the remedy which Mr. Jenkins sought to obtain for the obstruction offered to his induction into the church of Smith.

The writ *de vi laicâ removendâ* may be regarded at the present day as an obsolete proceeding. Very little is to be found in the books as to the nature of the procedure upon this writ. The short account which is given of it in Fitz., Nat. Brev., p. 55, furnishes very slight information. There is no doubt that the writ issued out of the Court of Chancery (as, indeed, all original writs formerly did), and of course from the Common Law side of that Court. It also was applicable only to the case of an incumbent of the Established Church who was hindered or disturbed in his possession of the church.

It is very difficult to see how this remedy could be applied by the Court of Chancery in the Bermudas to the case of the disturbance of a church in those islands.

A Court of Chancery was established by an Act of the Legislature of the islands in the year 1814. By section 29 of this Act, after enacting the mode in which the Court is to be constituted, power and authority is given to it to examine, hear, judge, determine, and decree all matters, causes, and things whatever, as fully and amply to all intents and purposes whatsoever as the High Court of Chancery may and can do, and also to make and establish



such rules, regulations, and orders respecting the practice merely of the said Court as may be necessary or expedient.

The words of this Act are very large, and confer jurisdiction in very full terms, but it may be questioned whether they are intended to apply to the case of ordering a specific form of proceeding to be applied to a particular cause of action. It may be said that they give power to judge and determine whether the facts were such as to call for a writ *de vi laicâ removendâ*; but that would be to beg the preliminary question whether such a writ is issuable. It is probable that under the power subsequently given to make rules and orders respecting the practice of the Court, this form of remedy might be introduced, as the forms of writs and remedies are matters of practice of a Court.

No rule has been made by the Court of Chancery in the Bermudas with regard to this writ *de vi laicâ removendâ*; and there is great doubt whether the Court would be disposed to make any rule or Order on the subject. The forms of procedure in the English Courts may or may not be appropriate in a Colony, or capable of being properly addressed and put in use. This writ is not an essential mode of preserving and quieting possession, and all that was practically wanted in the present case was to put a minister in possession and enjoyment of his temporalities. It is not, therefore, *ex debito justitiæ* that the Appellants should have this particular form of remedy. It is not *universi juris* wherever an Established Church exists; for it can issue only out of a Court of Chancery, and there may be no Court of Chancery in this sense, viz., with full authority to frame and issue the writ. The authority in this case, therefore, if it exist at all, must be implied, for it has never been used before. But why should it be implied? Is it a necessary incident of Chancery jurisdiction? If not, it is not conferred by the words creating the Court of Chancery in the Bermudas, words which (as already observed) apply to jurisdiction over matters in dispute, and not to modes of procedure. And an Injunction would, probably, have served all the necessary requirements in the present case, and have restrained all interference with the induction of Mr. Jenkins. It seems to

their Lordships that it would be an inconvenient precedent to imply the existence of a writ not known to the Court itself, nor necessary to the enforcement of the legal right obstructed, merely from the creation of a Court, and a general grant in large words of general jurisdiction.

Their Lordships entertain no doubt whatever of the lawfulness of Mr. Jenkins's institution to the Rectory of Hamilton and Smith, and of his right to be inducted into the church of Smith. But they cannot say that the Court of Chancery was wrong in refusing to grant him the writ *de vi laicâ removendâ* to prevent the obstruction to his induction, and therefore, upon this ground, and this ground only, they must humbly recommend to Her Majesty that the Appeal be dismissed.