Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Rev. Andrew Murray, Junior, and others, v. the Rev. François Burgers, from the Cape of Good Hope; delivered 6th February, 1867.

Present:

LORD WESTBURY.
SIR JAMES W. COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.

THE Respondent is a Clergyman of the Dutch Reformed Church at the Cape of Good Hope, and is the resident officiating Minister of the Church of Hanover in that Colony.

On the 16th July, 1864, a Decree of Suspension was pronounced by a Synodical Commission, acting by order of the General Assembly or Synod of the Church, held at Cape Town in the year 1864, by which Decree the Respondent, on the ground of errors in doctrine, was declared to be suspended from his sacred ministry until the next meeting of the Synodical Commission in the year 1865, when it was declared that the Synodical Commission would proceed to further judgment, unless certain things were in the meantime done by the Respondent.

This Decree affected the Respondent's civil or temporal rights, inasmuch as it involved the loss of some of the emoluments of the Respondent's office; and on the 30th September, 1864, he brought an action in the Supreme Court of the Colony against the Moderator and some other of the members of the Synod to set aside the Decree as illegal and void.

The declaration in the action assigned several grounds or reasons for annulling the Decree, the third of which was in these words:—

"Because, according to the laws and regulations of the Dutch Reformed Church, as altered and amended in the year 1847, the Presbytery of Graaf

Reinett was the only Court competent to try the said Plaintiff in the first instance for or upon any charge against his doctrine; and because, therefore, the proceedings in his case as hereinbefore set forth, were wholly irregular and illegal."

The Defendants took exception generally to the jurisdiction of the Supreme Court; and, secondly, that the action was barred by the 9th section of the Ordinance No. 7 of 1843, the Decree complained of being a spiritual censure.

The Supreme Court overruled these two exceptions, and gave leave to the Plaintiff to amend his summons and declaration by substituting as Defendants the members of the Synodical Commission who made the Decree complained of.

From this Order there is no appeal.

The Supreme Court then directed that the third ground stated in the Plaintiff's declaration (and which we have already cited) should be first taken and argued, and, after full consideration, the Court granted judgment for the Plaintiff, and held the Decree of the Synodical Commission to be null and void.

From this order the present Appeal is brought, and the sole question is, whether the Synodical Commission had authority to try the Respondent in the first instance, and to make the decree of suspension from the Ministry.

The Dutch Reformed Church in the Colony of the Cape of Good Hope is a voluntary society, constituted and subsisting by mutual agreement. The regulation of its ecclesiastical affairs depends upon contract, and the authority of its governing Bodies is derived wholly from the submission and agreement of the members, ecclesiastical and lay, which constitute the Church or Society.

This contract or agreement as now subsisting is embodied in certain laws and regulations which, repealing former regulations, were settled in 1843, and were afterwards, in 1847, altered in some material respects by virtue of an authority contained in the Regulations of 1843.

These Rules of 1843, under the title of "Laws and Regulations for the direction of the Dutch Reformed Church in South Africa," were set forth in a schedule annexed to an Ordinance or Statute enacted in 1843 by the Governor of the Cape of

Good Hope, with the advice and consent of the Legislative Council thereof, and it may be useful to state the 6th and 8th enactments of this statute :—

"VI. And be it enacted that the said Dutch Reformed Church shall be and remain a Church exercising its discipline and government by Consistories, Presbyteries, and a General Assembly or Synod, and acknowledging, receiving, and professing, in regard to the doctrine thereof, the doctrines contained in the Confession of the Synod of Dort and in the Heidelberg Catechism; and if any questions or divisions respecting church government, discipline, or doctrine should hereafter arise between any members or reputed members of the said Church, or of any Congregation, Consistory, Presbytery, or General Assembly of the same, then those persons adhering to and professing, respectively, the said discipline and government and the doctrines of the said Confession and Catechism, shall be deemed and taken, as against all persons who shall adhere to and profess any different discipline, government, or doctrines, to be the true Congregation, Consistory, Presbytery, or General Assembly, as the case may be of the said Church, and, as such, of right entitled to the possession and enjoyment of any funds, endowments, or other property or rights by law belonging to the said Church, or to the Congregation, Consistory, Presbytery, or General Assembly, in which any such questions or divisions shall have arisen.

"VIII. And be it enacted that no rule or regulations of the said Church, whether contained in the schedule to this Ordinance or to be afterwards framed, shall have or possess any direct or inherent power whatever to affect, in any way, the persons or properties of any persons whomsoever. But all such rules and regulations shall be regarded in law in like manner as the rules and regulations of a merely voluntary association, and shall be capable of affecting the persons or properties of such persons only as shall be found in the course of any action or suit before any competent Court to have subscribed, agreed to, adopted, or recognized the said rules and regulations, or some of them, in such manner as to be bound thereby in virtue of the ordinary legal principles applicable to cases of express or implied contract."

The Ordinances in the schedule to this Act of 1843 defined the jurisdiction or right of ecclesiastical cognizance that was to be exercised by the governing bodies of the Church, namely, the Consistories, Presbyteries, and Synod or General Assembly. Generally an appeal is given from the Consistory to the Presbytery, and from the Presbytery to the Synod: but certain subjects of complaint are appropriated to the jurisdiction or cognizance of the Synod or General Assembly in the first instance, and exclusively.

Thus, by Article 187, it is directed that "the General Assembly, or, if it does not meet that year, the Synodal Commission, shall have the immediate management of charges against the performance of duty, the doctrine or the conduct of Ministers or candidates, whether brought before them by information of one of the members, or by special indictment." This Article was followed by various regulations, prescribing the mode of proceeding to trial of charges against Ministers before the Synod, and also giving power to the Synod to inflict various punishments, or "modes of reproof," of different degrees of severity. The Synod was thus duly organized and made the sole and exclusive tribunal for the trial of charges of false doctrine against Ministers.

In 1847 it appears to have been thought that this primary jurisdiction so given to the General Assembly or Synod in matters of heresy, was inconsistent with the cardinal principle embodied in the Ordinance or Statute of 1843, that the Dutch Reformed Church should be and remain a Church, exercising its discipline and government by Consistories, Presbyteries, and a general Assembly or Synod; and, further, that it was unjust, as it took away the ordinary right of appeal; and accordingly, in the year 1847, certain alterations (in due exercise of the power for that purpose) were made in the Ordinances of 1843.

These alterations, so far as they are material to this case, consisted of an erasure or obliteration of so much of the Article 187 as we have already cited, and of all the regulations relating to the procedure and the penalties, or modes of reproof, in the case of trials before the Synod of charges against Ministers; and of an introduction into the

Articles defining the jurisdiction of Presbyteries, of the words "Ministers, Candidates," thereby making the Presbytery to which a Minister belongs, the Court, in the first instance, for the trial of its Ministers, on all charges relating to doctrine, discharge of duty, or conduct. All the regulations appended to Article 187 in the Ordinances of 1843, relating to the mode of procedure and power of punishing by the Synod, were written into the Articles that regulate trials before the Presbyteries. Thus a complete transfer of the whole of the jurisdiction and authority, given to the Synod as a Court of First Instance to try charges against Ministers, was made to the Presbyteries with an appeal to the Synod.

It is now contended on the part of the Appellants, that there were certain provisions contained in the Ordinances of 1843, which were allowed to remain in 1847, and which now operate as an exception to the rule introduced by the alterations of 1847, and invest the Synod with a discretionary power of still assuming and exercising, in cases of charges against Ministers, an original primary jurisdiction. If this be so, the state of things would be extraordinary, and one likely to be attended with much inconvenience and injustice.

Their Lordships find that the transfer of the primary jurisdiction from the Synod to the Presbyteries is clear and positive; if in any cases it is to be defeated by force of an exception, the exception must be equally clear.

Further, it must be plainly seen that the clauses contained in the Ordinances of 1843, and which operated by way of exception to the arrangement thereby made, were also intended to operate by way of exception to the new arrangement of jurisdiction made by the alterations in 1847.

The clause relied on by the Appellants, both here and in the Court below, as constituting an exception to the rule that the Presbytery shall have the sole primary jurisdiction, is the latter part of the 7th Article in the General Regulations contained in the first section of the Ordinances of 1843. For greater clearness it may be useful to cite the 6th and 7th Articles *in extenso* :—

"6. In all cases decided by the sentence of a higher Church Court, the appeal must be made to

the Court next following in rank ; but after being decided for the second time, no new appeal is admissible.

"7. The notice of cases prosecuted according to the preceding Article in appeal must be taken in regular order, and no cases be brought before the higher Court which first ought to have been decided in the inferior ones, unless, in the meanwhile, no inferior Court had been held, and the nature of the case required a speedier settlement.

"All this, however, does not affect the right of the higher Courts to take notice of cases, even without appeal, which concern the welfare of the Church in general, and come under its jurisdiction."

Having regard to the 6th Article, the 7th Article would seem to apply only to appeals actually brought or that might be brought, and not to refer to original cases.

With respect to the second part of the 7th Article, the meaning would seem to be this, that if a case which concerns the welfare of the Church in general, has been decided in an inferior Court, and no appeal is brought, the Higher Court may take notice of it, provided it be a decision from which an appeal would lie to such higher Court, and so "come under its jurisdiction."

This construction attributes to the words "cases even without appeal" the meaning of cases decided in an inferior Court, but not appealed from ; and it gives to the following words of the first part of the 7th Article, viz., "and no cases be brought before the higher Courts which first ought to have been decided in the inferior ones," the effect of prohibiting appeals at once from the Consistory to the Synod, passing over the Presbytery, unless the case be urgent, and no Presbyterial Court be shortly held, which would happen every fifth year when the Synod meets, for during that year no Presbyteries can be held. (See Article 30, section *d.*)

But the Appellants contend for a very different interpretation of the 7th Article. They insist that in the words cited above from the first part of it, viz.. "no cases be brought before the higher Court, &c.," the word "cases" means, or at least includes, original complaints, that have not been brought before any Court; and they contend, therefore,

first, that any original complaint which ought to be regularly brought, in the first instance, before a Presbytery may, in the year in which the Presbytery does not sit, be brought in the first instance before the Synod, if it be a case which required a speedier settlement than could be obtained if the next sitting of the Presbytery were waited for; and of the fact whether it be such a case, the Appellants insist that the Synod is the sole and exclusive Judge.

The Appellants contend, therefore, that as the Presbytery of Graaf Reinett could not be held in the year 1864, by reason of its being the Synodical year, the complaint against the Respondent was properly brought in the first instance before the Synod.

If this verbal interpretation of the first part of the 7th Article were admitted to be correct, it would still be clear that Article 7, when originally composed and passed in 1843, could not have applied, and was not intended to apply, to cases like that of the Respondent; for all complaints against Ministers for false doctrine could not, until the new law of 1847, be instituted in the Presbyteries, but were reserved exclusively for the Synod, and their Lordships do not think that the just rules of construction would warrant them in giving to Article 7 a meaning and effect more extended and different than its original meaning and operation, so as to make the 7th Article an exception to the positive enactment introduced by the new enactment of 1847. The effect of doing so would be *pro tanto* to control and defeat the enactment, that has, without exception, in cases against Ministers, transferred the primary jurisdiction from the Synod to the Presbytery.

There is no indication of any intention in the framers of the alterations of 1847 that Article 7 should apply to them, and for that purpose should have a wider signification than its original meaning.

On the contrary, it seems plain that, by the new amended Ordinance, which repealed all the powers of punishment which were originally given to the Synod, and re-enacted those powers in favour of the Presbyteries alone, the Synod was entirely deprived of the means of acting with effect as an original or primary tribunal; for, acting in the first instance,

it could inflict no penalty, and its sentence would have no result.

Further, the rules of procedure before it as the primary and sole Court for trying charges of false doctrine, which were minutely prescribed in Article 187 of the Ordinances of 1843, are totally repealed by the enactment of 1847; and these circumstances appear to their Lordships to be evidence that it was the object and intent of the Ordinance of 1847 to strip the Synod absolutely of all original jurisdiction in cases of charges against the doctrine or conduct of Ministers, and to reduce it simply in such cases to a Court of Appeal.

These observations would be sufficient even if the language of the first part of the 7th Article admitted of the verbal interpretation given to it by the Appellant. But their Lordships are further of opinion that such is not the true interpretation of the words. The 7th Article gives the rule as to bringing and hearing Appeals, and when, after directing that cases prosecuted according to the 6th Article in appeal, must be taken in regular order, it goes on to direct that no cases be brought before the Higher Court which first ought to have been decided in the inferior, it seems plain that the words "no cases" mean none of the cases mentioned in the preceding part of the sentence, that is, none of the cases prosecuted in appeal.

With respect to the latter part of the 7th Article, the Appellants contended that it became and was applicable to the new Ordinance of 1847, and that when so applied it had the effect of saving to the Synod the right of trying, as a Court of First Instance, cases which concerned the welfare of the Church in general; and that whether any particular case answered that description or not, the Synod alone had power to determine. With respect to the words "which come under its jurisdiction," the Appellants construe them as meaning, come under the jurisdiction of the Church. But the Church collectively, that is, apart from the Consistories, Presbyteries, and General Assembly, has no jurisdiction or means of jurisdiction under these Ordinances; and the meaning of these last words, although the expressions are inaccurate, seem to be necessarily this, viz., "which come under the jurisdiction of the Higher Court so taking notice of the

case." But since the Articles of 1847, a complaint against a Minister for false doctrine is not a matter for the jurisdiction of the Synod, except by way of appeal from the Presbytery. Their Lordships are, moreover, of opinion that the better construction of the second part of Article 7 is, to hold that it is *in simili materiâ* with the first part, and that it relates not to original complaints, but to cases decided, and that have been, or might be, the subject of appeal.

It is not, indeed, necessary to fix and declare the true meaning of the 7th Article. It is sufficient to show that the language is doubtful and obscure; and if this only were established, their Lordships would be of opinion that it could not be used for the purpose of controlling and restricting the clear and absolute enactment contained in the Ordinances of 1847.

That questions concerning doctrine shall be first tried by the Presbytery, and not by the Synod, is the positive rule enacted in 1847; and anything derogating from or taking a case out of this rule ought, in expression and intention, to be equally clear and certain as the rule itself.

On these grounds their Lordships are of opinion, and will humbly report to Her Majesty, that the Judgment of the Court below ought to be affirmed, and this Appeal dismissed with costs.