PUBLIC RELIGION IN THE ENGLISH COLONIES

C. C. AUGUR PEARCE
Solicitor
Bye-Fellow of Magdalene College, Cambridge

It has become almost a commonplace of textbooks that English public ecclesiastical law has no application to the colonies. *Halsbury* states this baldly and without qualification, relying chiefly on the judgment of the Privy Council in *Re Lord Bishop of Natal*,[1] a case of unquestioned significance for the development of the family of churches in the English Prayer Book tradition. But both from historical interest and with an eye to those colonies still in being, the issue is one which deserves a second glance. This article will argue that whether or not the *Natal* decision was right on its facts, the Judicial Committee in that case made an important distinction which later textbook generalisations—and indeed the Crown's advisers at the time—appear to have overlooked; and that other decisions, relied upon in support of such generalisations, can be supported neither from principle nor from earlier practice.

Natal was the latest of four decisions reached within a decade of each other. The first concerned New Zealand, the second New South Wales, the third the Cape Colony, and the fourth both the Cape and Natal. All were concerned with the nature of episcopal authority; in the second, episcopal authority was (thanks to a colonial statute) not directly in question, but rather the tribunals and procedures appropriate to its judicial exercise.

The first premise of this article is that public episcopal authority is not identical with public ecclesiastical law. The former presupposes the latter; but numerous examples from the earlier colonial period show the existence of the latter without the former. Public ecclesiastical law implies only the regulation of religious practice, or of related institutions like a professional ministry or the supervision of public morals, by public authority.

English public ecclesiastical law therefore presupposes only the existence of a public authority (the Crown), a constitutional framework within which the Crown acts, and congregations of subjects who meet for the collective exercise of the Christian religion. A tier of intermediate public oversight, episcopal or otherwise, is a feature long-established in England, but not necessarily applicable to the colonies.[2]

At this point some definitions may be in order. 'Public' oversight or authority, in this article, refers to oversight or authority which is directly recognised (by courts and others having powers of enforcement) as deriving from the law itself, independently of any private compact or initiative. In the four cases referred to, it is frequently referred to as 'coercive jurisdiction'. 'Public ecclesiastical law' is the law from which such authority, and other universal rules in the religious field, derive. We contrast these with 'private ecclesiastical law', the framework enabling subjects themselves to create legal relationships for lawful religious purposes—chiefly the rules of trust and contract under which, as is well known, English religious bodies other than the national church now take their place in the legal scheme of things.

In both *Natal* and the preceding case, *Long v Bishop of Cape Town*,[3] the Judicial Committee first considered the question of public authority, holding it to be lacking at the time of the contested episcopal actions. The Committee then considered the

---

[1] *Re Lord Bishop of Natal* (1865) 3 Moo PCC NS 115 at 148f; Halsbury's *Laws of England* (4th edn), vol 6 (1991 reissue), para 1103.

[2] Even in England it is not universal, as the existence of royal peculiars has hitherto demonstrated.

[3] *Long v Bishop of Cape Town* (1863) 1 Moo PCC NS 411.

issue of what we may call 'voluntary authority', the authority which might be ascribed to a bishop on the basis of voluntary submission, implied compact or the trusts of endowments—all issues of private ecclesiastical law. Further private law issues arose in later South African cases, which assumed the public law question to have been finally answered and did not reopen it.[4] The earlier colonial history, above all the episcopate of Bishops Compton and Gibson of London, and developments worldwide after the *Natal* decision, is also relevant to these issues. But the statement in *Halsbury* was clearly not directed to private ecclesiastical law and neither is this article.[5]

Our second premise is that public ecclesiastical law is a branch of the law of England, and accordingly general principles on the extension of that law to particular territories apply to public ecclesiastical law as much as to the law of nuisance or treason. Other nations which regulate the exercise of religion also have a public ecclesiastical law, which applies *prima facie* wherever their laws extend. This article will therefore first (*a*) examine the general rules for the application of English and foreign law in the English colonies, and then (*b*) consider whether either (i) public ecclesiastical law as a whole or (ii) public episcopal authority falls within any exceptions to those rules.

1. GENERAL RULES GOVERNING THE COLONIAL APPLICATION OF ENGLISH LAW

Bishop Grey of Cape Town received two sets of Letters Patent from the Crown, both purporting to give him public authority in religious matters in an area which included both the Cape Colony and Natal. The first (1847) patent was surrendered and cancelled, and all concerned proceeded on the basis that this was intended to, and did, effect a revocation and avoidance for the future. Between the issue of the first and the second patents, the Cape Colony (ignoring Natal for the present) was granted a representative legislature. Both *Long* and *Natal* turned, as regards the public law aspects which concern us, on the effectiveness of the second (1853) patent, which the Judicial Committee denied. But in *Long* the Committee's view was that 'all jurisdiction given to the Bishop by the 1847 Letters Patent ceased by the surrender of the bishopric in 1853 [...].'[6] In *Natal* it held that 'in Crown colonies properly so called [... public] ecclesiastical jurisdiction *may* be created by authority of the Crown'.[7] Both decisions therefore assumed the possibility of public episcopal authority in a colony under certain conditions. *Natal* indicated that the status of the colony was the decisive factor, and *Long* indicated that the Cape had satisifed the conditions in 1847. It is therefore to rules dependent on colonial status that we must turn.

Colonies are classified as settled or ceded, according to whether inhabitants with a recognisable legal system are already in possession before the territory passes into English hands. This principle, it must be admitted, emerged in a less enlightened age when the laws of aboriginal inhabitants were unlikely to be recognised as such. Accordingly ceded colonies normally had legal systems of European, Indian, Chinese or Near Eastern origin before coming under the rule of the Crown.

---

[4] *Bishop of Natal v Gladstone* (1866) LR 3 Eq 1; *Merriman v Williams* (1882) 7 App Cas 484. PC; *Re Colonial Bishoprics Fund 1841* [1935] 1 Ch 148; *Mills v Registrar of Deeds* [1936] SALR (CPD) 417.

[5] English law always treats one element of episcopacy on a 'public' basis, namely the capacity of bishops to transmit holy orders: see the Scottish Episcopalians Act 1711 (10 Anne, c 10) (the 'Toleration Act 1712'); and 26 Geo 3, c 84 (Consecration of Bishops abroad), preamble. This was also the law's normal attitude to the Catholic episcopate: even where its jurisdiction was strenuously denied, its power to create clerks was recognised: *R v Fielding* (1705) 14 St Tr 1327; *R v Millis* (1844) 10 Cl & Fin 534. HL, per Lord Lyndhurst LC and Lord Brougham.

[6] *Long v Bishop of Cape Town* (1863) 1 Moo PCC NS 411 at 460 (emphasis supplied).

[7] *Re Lord Bishop of Natal* (1865)3 Moo PCC NS 115 at 151 (emphasis supplied).

On principle settlers of territory with no existing law carried the laws of England with them as their 'birthright'.[8] But where a foreign ruler ceded territory to England a different principle applied. The locally existing law, excepting only any laws made by a pagan prince and 'repugnant to the law of God' remained in force until the Crown made other provision. The very act of cession, however, brought the territory under the King's sovereignty and ended any foreign jurisdiction.[9]

The statutes of mortmain gave rise to the first cases testing the limits of these principles. Mortmain restricted gifts of land to corporations in a country where land was at a premium. The licensing mechanism of the legislation involved specific courts based at Westminster. In *R v Vaughan* it was held that the settlers' birthright was only so much of English law as was 'adapted to the circumstances of a new colony'.[10]

The other critical factor was that of constitutional government. Well before the era of colonisation it was recognised as belonging to the Englishman's birthright to be governed by laws agreed to either in a representative body or through the gradual development of custom.[11] Settlers retained this right, and although royal governors had considerable latitude where no assembly existed, they were still bound by the spirit of the law to which the settlers' countrymen had agreed at home.'[12] Once in being, an assembly could consent to (or initiate) more significant changes; a form of colonial statute thus came into being alongside laws of the Imperial Parliament, and rules of construction would often prevent the latter from affecting existing colonies.[13] The continuing scope of the royal prerogative was only that which the Crown enjoyed in England alongside parliamentary legislation.[14]

Constitutional government had a similar effect upon ceded colonies. The inhabitants were presumed to be chiefly foreigners; in cases of conquest, their lives lay in the King's hand and they were in no position to claim any birthright. Without an assembly, their rights against the Crown were few indeed. But by granting them constitutional government the Crown granted them the liberties of Englishmen; and thereafter (unless the grant had been made revocable[15]) their position was little different from that of self-governing settlers.

2. APPLICATION OF THE GENERAL PRINCIPLES IN THE RELIGIOUS FIELD

The passages from *Long* and *Natal* already quoted are consistent with the application of these general principles to public ecclesiastical law. It is clear from the context in Natal that 'Crown colonies properly so called' meant ceded colonies without a representative legislature; the Cape in 1847 was such a colony, and the rights of the Crown at that date were practically unlimited. A public episcopal authority could therefore be created, and the ecclesiastical rules which that authority would enforce could be made part of the law of the colony, simply by the Crown's decree.

We could stop there, regarding the over-generalisation of *Halsbury* and the overreaction of Whitehall in 1866 (from which date no new public sees were created or bishops appointed by Letters Patent in any category of colony) as proved, were it not

[8] *Blankard v Galdy* (1693) 2 Salk 411.

[9] *Calvin's Case* (1608) 7 Co Rep 1a at 17b; *Blankard v Galdy* (1693) 2 Salk 411.

[10] *R v Vaughan* (1769) 4 Burr 2494. See also the fuller reasoning in *Attorney-General ex rel Banff Magistrates v Stewart* (1817) 2 Mer 143.

[11] See eg the Ecclesiastical Licences Act 1533 (25 Hen 8, c 21),. preamble.

[12] See *dicta* of Lord Blackburn in *Lauderdale Peerage* (1885) 10 App Cas 692 at 744, HL Committee for Privileges. Lord Blackburn's remarks on the law in settled colonies are adopted here, although his lordship appears to have been in error in applying them to the case before him, New York being not, as he said, a settled colony but a ceded one.

[13] *Anon* (1722)2 P Wms 75.

[14] *Campbell v Hall* (1774) 1 Cowp 204.

[15] *Sammut v Strickland* [1938] AC 678, [1938] 3 All ER 693, PC.

for a number of remarks in *Natal* and the other cases of the period which seem to detract from the distinction just established. Also, given that *Long* and *Natal* were directly concerned with public episcopal authority, it will be helpful to establish how far other aspects of public ecclesiastical law may extend even to colonies where public episcopal authority cannot be introduced.

To do so we must introduce the other two cases of the mid-nineteenth century.

R v Provost and Fellows of Eton College was an action in *quare impedit* following the appointment of the incumbent of a college living to be Bishop of New Zealand. Not until the college's main argument, derived from its charter, had failed, did the respondent—in fact rather the judge, Lord Campbell CJ—turn to the question of the new See's status. His conclusion amounted to a denial that New Zealand was a See with public episcopal authority (in this article, a 'public See'). Consequently an appointment to it carried no consequences for English public ecclesiastical law, and the vacated living could be filled by the usual patron.[16]

The New South Wales case of *Ex parte King*, decided after *Eton College* but before the South African cases, concerned an episcopal claim, based on Letters Patent, to exercise clerical discipline in the colony through a consistory court on the English pattern. Two judges of the colonial Supreme Court heard the prohibition suit and it is difficult to discern a common ratio in their decisions.[17]

Both of these cases concerned settled colonies, and could thus be distinguished from the situation in the Cape. But on the general point it was stated in the *Eton College* case that a newly settled colony 'there is no established church'. In *Ex parte King* Dickinson C J confined the application of public ecclesiastical law to a situation in which 'all persons are supposed to be members of an established church', pointing to the lack of any local statute recognising any one species of Christian in this way.[18] Furthermore it was said in *Natal* itself that 'where there is no established church in a colony, no ecclesiastical jurisdiction is required, so [...] the ecclesiastical law of England is not carried with the settlers from the mother country'.[19]

The expression 'established church' sometimes seems designed to confuse. It suggests a society with a finite membership which may or may not be accorded—at arm's length—a special legal status. As a legislative expression it cannot be traced earlier than the canons of 1603/4, whose authors did indeed think in such terms; but earlier references were always to some concrete aspect of religion which was 'established by law', like church government or the public liturgy. This is more consistent with the developed common law understanding of the national church as it stood prior to the Oxford Movement, best expressed in a judgment of the Supreme Court of the newly independent United States:

> 'the term "Church of England" is nothing more than a compendious expression for the religious establishment of the realm considered in aggregate'.[20]

Dickinson CJ's approach was therefore putting the cart before the horse. It is not the existence of an 'established church' that introduces public ecclesiastical law, but the existence of a public ecclesiastical law that creates (if one must use the expression) an established church. Which 'church' is 'established' depends upon which country's ecclesiastical law is in force. A statute recognising inhabitants as 'members' of such a church would be no more logical than one recognising them as members of a system of public health provision.

---

[16] *R v Provost and Fellows of Eton College* (1857) 8 E & B 610.
[17] *Ex parte King* (1861) 2 Legge 1307 (N.S.W. SC).
[18] *Ex parte King* (1861) 2 Legge 1307 at 1314.
[19] *Re Lord Bishop of Natal* (1865)3 Moo PCC NS 115 at 152.
[20] *Town of Pawlet v Clark* (1815) 13 US (9 Cranch) 292 at 325, per Story J. This approach needs to be set against the much more well known Tractarian definition of 'establishment' given by Phillimore J in *Marshall v Graham* [1907] 2 K B 112 at 126, DC.

Consequently the passages quoted amount, in essence, to a denial of any public ecclesiastical law in settled colonies. What follows shows that history does not bear them out.

(*a*) *Early settled colonies*

In the first (1765) edition of Blackstone's *Commentaries*, the rule in *Blankard v Galdy* was stated without qualification. A lengthy qualifying passage was inserted in later editions after the decision in *Vaughan*, and this was itself judicially approved (and quoted) by Sir William Grant MR in *Stewart*. It was this insertion which numbered 'the mode of maintenance of the established clergy, the jurisdiction of spiritual courts' amongst the exceptions to the application of the law to settled colonies. But did this mean, as many later writers have supposed, that the whole principle of a public religious provision was excluded from the settlers' birthright? Or simply that on *Vaughan* principles, certain details of the English mechanism for securing that provision were 'not adapted to the circumstances of a new colony'?

It is suggested that only the latter interpretation bears any comparison with the historical facts. A claim that no public ecclesiastical law at all was imported into the colonies without legislation would be patently untrue. Colonisation began, and its legal ground rules began to emerge, while the Elizabethan Settlement was taking root and religious practice remained a topic of the greatest public interest. The first charters provided for religious instruction of both colonists and savages, frequently 'in accordance with the Church of England', and governors were charged with 'the principal order and care for the true worship of God'.[21] Besides the royal supremacy, which in many cases colonists were compelled to acknowledge before embarkation, there is evidence that early legal administration in the colonies assumed the existence of a law which in England could only be termed ecclesiastical. Only the agencies employed were different.

The fact that civil tribunals administered moral and marriage discipline, or that governors granted probate, instituted to livings, and issued marriage licences, did not make the moral code, the institution of marriage, the parochial and benefice system or ministerial security of tenure any less facets of English ecclesiastical law. The Prayer Book liturgy found regular use in many early plantations in accordance with the Act of Uniformity 1558/9 which applied to 'this realm of England, Wales, and the marches of the same, or other the Queen's dominions' (s 3). The way in which representative assemblies, once these existed, began to provide for public religion in more detail with the assent of the Crown's representative, using existing concepts and building upon existing institutions, was itself consistent with the developed English ecclesiastical constitution (even if the colonies sometimes moved ahead of the mother country).

On the other hand, the circumstances of new colonies differed from those of England in four main respects.

First, there was a new geography. The boundaries of English dioceses had been settled long before by custom or under statute', and the colonies lay outside them. The English episcopal courts had a territorial jurisdiction, and elsewhere only tribunals acting under direct royal authority were in a position to administer the law. Episcopacy, as an intermediate layer of church government between Crown and congregations, had therefore to be dispensed with.

Second, there was for long an inadequate provision of clergy to cover the territory. Nor did the new lands come ready-divided into parishes', or with church buildings awaiting the settlers. The law could not require attendance at public worship if

[21] eg the Virginia Company charter of 1606 (Elizabeth H. Davidson, *The Establishment of the English Church in the Continental American Colonies* (Durham N.C., 1936), p 11), and the 1609 Governor's Instructions (John F. Woolverton, *Colonial Anglicanism in North America* (Detroit, 1984), p 56).

nobody had the duty to conduct it, nor confer a right to pastoral ministrations in the absence of a pastor. The influence of the clerical canons, marked (albeit indirect) in English religious life through their binding force on the ministry, was much less noticeable.

Thirdly, the colonial economy was in its infancy. A public ministry could not be supported by tithes from virgin soil, and even as cultivation began the English system of religious taxation did not necessarily provide a rational solution in very different conditions of climate and land ownership. Beneficed clergy were thus the exception rather than the rule, and the public ownership of church buildings was vested in authorities other than incumbents.

Finally, the degree of admitted doctrinal and liturgical consensus among the population was in many places considerably less than in England. Despite the early desire of the authorities to prevent the settlement of those discontented with public religious provision, it had soon to be admitted that some colonies possessed a religious consensus quite different from that prevailing (or claimed to prevail) at home, while in others a considerable variety of belief was represented. The grants of land for the Plymouth and Massachusetts Bay colonies were made in at least tacit awareness of the Puritan convictions of the settlers, and those for Maryland and Pennsylvania in the knowledge of the respective proprietors' Catholicism and Quakerism. The penal laws, and the requirement of uniformity of worship under the Act of Uniformiity 1558/9[22] were accordingly treated as not adapted to colonial circumstances, and alternative religion could flourish some time before the Toleration Act 1688/9 (I Will & Mar, c 18) opened the English floodgates.

Blackstone's exceptions to the *Blankard v Galdy* principle were therefore quite justified in themselves, and further examples could have been given. But a generalised conclusion against all regulation of public religion by public authority is another matter. The judgment in *Town of Pawlet v Clark*[23] recognised the existence of 'the Church of England' in the American colonies up to the moment of their independence.

In *Ex parte King*, Dickinson CJ considered the 'birthright' rule and suggested that only 'natural' law, which he contrasted to 'instituted' law or 'positive enactment', was carried to the colonies under it. In this he went well beyond Blackstone and the English authorities, and increased our inclination to confine his judgment to its particular facts.[24]

(b) The royal supremacy and public religion in non-self-governing ceded colonies

Ceded colonies raise different issues. Rules of law inseparable from the Crown's sovereignty apply immediately, but it lies in the Crown's discretion whether to introduce any other provision of English law. A royal directive applying English law generally may be held to exclude elements which would, in a settled colony, not be held 'adapted' to local circumstances;[25] but given that all aspects of the inhabitants' lives

[22] Unlike the Act of Uniformity 1558/9(1 Eliz 1, c 2), the Act of Uniformity 1662 (14 Cha 2, c 4) did not, on its own terms, extend overseas.

[23] *Town of Pawlet v Clark* (1815) 13 US (9 Cranch) 292.

[24] *Ex parte King* (1861) 2 Legge 1307 at 1313. In New South Wales the deciding factor was not directly the criterion in *R v Vaughan* (1769) 4 Burr 2494, but a statutory provision: since the Australian Courts Act 1828 (9 Geo 4, c 83), the English law of that date had applied only 'so far as the same can be applied within the said colony'. That this was to be decided (where doubt arose) by either the courts or the colonial legislature implied an element of discretion additional to a judicial assessment. Furthermore, any disciplinary jurisdiction had been supplanted by a statutory procedure for administrative revocation of licences: 8 Gul IV No 5 (New South Wales) (1837), s 20; *Ex parte King* (1861) 2 Legge 1307 at 1316.

[25] See *Jephson v Riera* (1835) 3 Knapp 130; *De Torilla v Attorney-General of Gibraltar* (1969) [1812–1977] Gib LR 244 at 252, in relation to the Second Charter of Justice 1740, substituting the laws of England for the Spanish law previously applied in the Gibraltarian courts.

prior to self-government lie in the King's hand, this can be no more than a principle of construction, and cannot stand against the specific wording of Letters Patent.

However, if there was some good reason of principle why public ecclesiastical law should not extend to settled colonies, we should expect to find exceptions in ceded colonies also; that pre-cession public ecclesiastical law did not continue in force, or that the ecclesiastical supremacy, excluding the the jurisdiction of any 'foreign prince or prelate', which is the other side of the coin of sovereignty in England did not apply. Five examples show that this was not the case.

(i) New York

The first was the Province of New York. As the New Netherlands, this had been subject to Dutch ecclesiastical law and the oversight of the Classis (presbytery) of Amsterdam. The argument advanced in the *Lauderdale Peerage* Case that Dutch ecclesiastical law remained in force until the Duke of York, acting for the Crown, should make some inconsistent provision was, it is submitted, correct.[26] The Duke clearly thought as much: his first instructions to the governor were to visit the Dutch churches in a friendly spirit, and to secure the provision of Prayer Book services on a private basis, leaving the public field to the Calvinists.[27] When instructed by the King to establish new laws for the province 'not contrary to but as near as conveniently may be agreeable to the laws, statutes and government of this Our realm of England', he prescribed as the qualification for public ministry in the colony ordination 'by some protestant bishop *or minister*, within some part of His Majesty's dominions or the dominions of any foreign prince of the reformed religion'.[28] Coming three years after England had required episcopal ordination for ecclesiastical preferment,[29] this clearly represented a compromise with the Dutch law on ministerial authorisation. Yet despite all these evidences of respect for the inherited religious provision, there was no question of the Amsterdam Classis retaining its jurisdiction. Being a species of foreign authority over public religious provision, this ceased immediately on the Dutch surrender.[30]

(ii) Quebec

In New France, prior to the English capture of Quebec, episcopal oversight had been provided under a resident bishop with the approval of the French Crown, and many legal features of the mainstream Gallican church introduced, including a tithe and tenured incumbents.[31] In matters other than jurisdiction, such features survived the conquest and the public religious provision remained Catholic until altered by authority. The first alteration was, of course, the toleration of Protestantism. But tithe and stole fees continued to be compulsorily exigible for the benefif of the Roman ministry. Even the Quebec Act 1774 only restricted this liability to the professors of Catholicism. The King was free, on general principles, to apply those laws which outlawed the Mass and excluded priests from public benefices; but was advised that to do so would derogate from his undertaking in the Treaty of Paris 1763

---

[26] *Lauderdale Peerage* (1885) 10 App Cas 692 at 736, HL Committee for Privileges. The argument was put on behalf of an ultimately unsuccessful party: but there was no ruling against it by a majority of the House of Lords. A minority decided the case on the basis that New York was a settled colony and the English law of marriage applied (pp 745–748, which must have been a clear error on Lord Blackburn's part: see note 12 above) or that the royal instructions had the effect of importing the whole common law immediately (pp 751–752). The majority refrained from any ruling on the applicable law, preferring to rule that if a licence were required for the validity of the marriage there impugned, such a licence must be presumed to have been obtained until disproved (pp 742–743, 755, 761).

[27] Davidson, *The Establishment of the English Church in the Continental American Colonies*, p 37.

[28] Davidson, p 38.

[29] Act of Uniformity 1662 (14 Cha 2, c 4), s 10. This Act of Uniformity, unlike its predecessors, did not apply in its face to the king's dominions overseas.

[30] Davidson, p 37.

[31] The Roman Catholic See of Quebec dated from 1674, the tithe from a royal edict of 1663, and the freehold from one of 1679: J. S. Moir, *Church and State in Canada, 1627–1687—Basic Documents* (Toronto, 1967), pp 9, 14, 18.

that his new subjects 'might profess the worship of their religion according to the rites of the Romish Church as far as the laws of Great Britain permit'.[32] Accordingly Roman rites and teaching remained available. Advice was also tendered in 1792 that no marriage was valid in the colony unless solemnized by such rites,[33] and in 1795 that Protestant parochial appointments could not be benefices with a right to public tithe.[34] In 1874 it was held that Catholic parishioners' pre-conquest rights of burial remained unchanged.[35]

But whether the Roman bishop's jurisdiction was thought of as deriving from the French Crown or from the Papacy, it could not stand with the English royal supremacy, and he had to be content with a merely titular recognition as 'superior of the Roman Catholic clergy' in the colony.[36] The Quebec Act summed up an already existing position: Catholics might

> 'enjoy the free exercise of the religion of the Church of Rome subject to the King's Supremacy declared & established by [the Act of Supremacy 1558/9] over all Dominions or Countries which did then, or thereafter should, belong to the Imperial Crown of this realm [...].'[37]

In 1805 Bishop Pierre Denaut petitioned the Crown for 'civil recognition as Bishop of the Roman Catholic Church in Quebec and such prerogatives rights and temporal emoluments as Your Majesty shall graciously attach to that dignity'; only his death before his prayer could be granted prevented a royal grant of jurisdiction.[38] It was accordingly held in 1874 that the *structures* of Catholicism remained on a merely private law, consensual basis and the authority of Denaut's successor was only such as the Catholics of the province could be taken to have accorded him.[39]

(iii) Cape Colony

The Reformed Church in Dutch South Africa also retained through the early decades of British rule a constitution which had been given by public authority in 1804 while the territory was subject to the Batavian Republic. In giving a new constitution by an Ordinance of 1843, the British Governor of the Cape implicitly recognised the church as a publicly-regulated institution, even while depriving it in the same breath of public status for the future and allowing the constitution to act as the 'deemed contract' of a voluntary association.[40]

---

[32] Opinion of the Law Officers submitted to the Lords Commissioners for Trade and the Plantations, 10 June 1765, extracted in Moir, p 82.

[33] The advice was tendered in a colonial service memorandum by one Richard Cartwright, which was followed by the passage the following year of the Act 33 Geo 3, c 5 (Upper Canada), for marriage before Church of England clergymen.

[34] Opinion of Jonathan Sewell, Attorney-General of Upper Canada, 10th June 1795: Moir, pp 150–151. The Quebec Act 1774 (14 Geo 3, c 83) did not provide for direct tithing to the Protestant clergy, but for the Crown to make provision as it thought expedient.

[35] *Brown v Cure of Montreal* (1874) LR 6 PC 157 at 204.

[36] The title was accorded in 1766: Moir, p 80.

[37] Quebec Act 1774 (14 Geo 3, c 83), s 5.

[38] Moir, p 127. In 1807–8 the provincial Attorney-General drafted Letters Patent in case the application should be renewed. These are quoted in Moir, p 116: 'Whereas the doctrine and discipline of the Church of Rome are professed and observed by a very considerable part of Our loving subjects of Lower Canada... We appoint ... to be Our Superintendent Ecclesiastical for the affairs of the Church of Rome in Our Province of Lower Canada ... within Our pleasure with a salary ... and do give and grant power unto him and his successors to have hold and exercise during Our pleasure jurisdiction spiritual and ecclesiastical throughout Lower Canada according to law in the several causes and matters hereafter expressed and specified and no other [...]'.

[39] *Brown v Cure of Montreal* (1874) LR 6 PC 157.

[40] See *Murray v Burgess* (1866) LR 1 PC 362. The statement denying the 'established' status of the Dutch Reformed Church in J.D. van de Vyver in *The Law of South Africa*, ed. W. A. Lambert and T. J. Scott (Durban, 1986), Tit. 'Religion', at p 179, is based entirely on cases decided subsequently to the Ordinance. As to the 'deemed contract', compare the provisions of the Irish Church Act 1869 (32 & 33 Vict, c 42) and the Welsh Church Act 1914 (4 & 5 Geo 5, c 91). These, however, did not contain the constitutions which were to be deemed agreed by the new voluntary bodies, but rather indicated by a general reference certain provisions which had hitherto been public law.

Opponents of the view expressed here may cite Lord Stowell Ch's finding in *Ruding v Smith* that Dutch marriage law was not applicable to a ceremony solemnized in the Cape.[41] The leading authorities on ceded colonies[42] were relied upon by Dr Lushington, whilst Jenner and Phillimore sought to distinguish the position of the parties from those of normal inhabitants: the bridegroom was a British soldier of the invading army', temporarily in the territory, married by a forces chaplain in 1796 after the Dutch capitulation but well before formal annexation or the restoration of civil government.[43] Such a distinction seems reasonable, could be supported in the line of authority from *R v Inhabitants of Brampton*,[44] and sufficed for the decision of the case.

The chancellor seemed inclined to go further, however, and to favour a general rule exempting expatriate residents from local marriage requirements. He cited the examples of ambassadors, gipsies, Quakers, Jews and English trading factories, to which counsel had added the recognition of English rite marriages in Gibraltar and India. It is suggested that these examples are either open to question, or themselves explicable as facets of wider exceptions. Lord Stowell himself explained the rule for factories on the basis of treaty, or 'indulgence and toleration' of the host nation, and the same arguments would apply a *fortiori* to embassies. To extend it generally would lead normal English residents in a ceded colony to expect different treatment in a variety of fields, such as criminal law, and produce absurdity. The other 'group' exceptions may be doubted or explained by legislation: the exemption of Quakers and Jews resident in England from Lord. Hardwicke's Marriage Act (the Clandestine Marriages Act 1753 (25 Geo 2, c 33)) would not have been necessary if they had carried their own marriage law with them wherever they went. Marriages in Gibraltar after 1740 were subject to English law in any event; and if English rite marriages before 1740 were indeed recognised, this must be weighed against the doubts over their validity in Quebec, an exactly comparable situation.[45]

(iv) Gibraltar

Turning to the European scene, the public ecclesiastical law of Spain remained initially in force in Gibraltar, and the *Code Rohan*[46] in Malta, following these territories' annexation by the British Crown in 1713 and 1813 respectively.[47]

In Gibraltar the law of sanctuary remained in force until abolished in 1725; the Catholic priest remained the legal incumbent, and was instituted by the Governor, who administered the oath of allegiance, charged the presentee to co-operate with the elective Board of Elders created to care for parochial property, and finally delivered the church keys as a symbol of office.[48] But from the moment sovereignty was proclaimed the Sees of Rome and of Cadiz had lost their public jurisdiction, and the activities of the Inquisition were prohibited.[49]

---

[41] ie before 1843: see above.

[42] ie *Calvin's Case* (1608) 7 Co Rep 1a, and *Campbell v Hall* (1774) 1 Cowp 204.

[43] *Ruding v Smith* (1821) 2 Hag Con 371 at 775–781.

[44] *R v Inhabitants of Brampton* (1808) 10 East 282.

[45] See the text and notes 25 and 33, above.

[46] This was promulgated in 1784 by the Grand Master of the Knights of St John.

[47] In both these cases a period of military control (in Gibraltar from 1704 and in Malta from 1800) preceded the proclamation of full sovereignty. During these periods ecclesiastical supremacy could be regarded as remaining with the previous sovereign; there was accordingly no departure from principle in the Sicilian nomination and papal provision of a Bishop of Malta in 1807–08. See Joseph Bezzina, *Religion and Politics in a Crown Colony — The Gozo-Malta Story 1798–1864* (Valetta, 1985), p 171. English royal supremacy never existed over the Ionian Islands, which were never under more than a protectorate.

[48] This was the pattern developed in 1733: Charles Caruana, *The Rock under a Cloud* (Swavesey, Cambs, 1989), p 16.

[49] General Orders for Troops and Inhabitants in the Garrison of Gibraltar, 1725, cited in Caruana, p 191. Any possible tension over the jurisdiction issue was obviated by the Catholic delegation to clergy within the colony of gradually increasing authority, sufficient to enable them to function independently of Spanish episcopal oversight: Caruana, p 32.

(v) Malta

In Malta too, ecclesiastical law continued to provide for public religious provision of a Catholic character; as early as 1812 a Royal Commission advised against significant alterations in the public status of Catholicism.[50] The bishop was accorded considerably greater recognition than his counterpart in Quebec—*inter alia* official precedence and the gun salute equivalent to a Brigadier[51]—presumably because half a century had passed and the Papacy was more ready to compromise with the Crown in matters of appointment. In 1835 he was offered a seat on the new Advisory Council of Government.[52] The *jus commune* and Tridentine decrees received in the Island formed the initial basis of the law of marriage, though the former had by its own rules a more limited effect upon those not baptized as Catholics. (One consequence was the continuing nullity of mixed Catholic-Protestant marriages without dispensation.) Sanctuary and benefit of clergy continued till abolished in 1828.[53] The public character of Catholicism in fact lasted throughout the colonial period, since the *Code Rohan* was never supplanted in Malta by English law; nor, therefore, did English public ecclesiastical law ever fully replace the *jus commune*.[54]

But from the start it was clear that this must be subject to the royal supremacy. The Crown insisted upon nomination to the episcopal see when it fell vacant in 1829. The Governor who made the error of describing the nomination as 'subject to the approbation of the Holy See' was warned by the Colonial Office that he risked the penalties of *praemunire* for suggesting the possibility of a foreign jurisdiction in such matters.[55] His successor, by an Ordinance of 1838, subjected external appointments to Island preferment to his approval.[56]

(*c*) *Early Protestant episcopal oversight*

If, then, the evidence against the existence of public ecclesiastical law generally in the colonies was weak, what was the position as regards public episcopal authority? Here we must distinguish settled colonies without self-government, ceded colonies without self-government, and colonies of both kinds with responsible legislatures.

We have already noted from our comparison of Quebec and Malta that a public episcopal authority inherited from a foreign system *can* be supported in ceded colonies, although a claim to public jurisdiction independent of the Crown makes recognition impossible. No such authority is inherited in new settlements, which as previously considered fall within no English diocese; there the issue must be whether the Crown's right to create public episcopal authority applies.

There are two possible bases for such a right: statute or prerogative. The Bishops Act 1539 under which Henry VIII had sub-divided the English sees was widely drawn, predated all colonial settlements, and might have been thought to suffice.[57] It was considered, and drafting precedents from the 1530s consulted, when a See of

[50] Bezzina, p 145.

[51] Adrianus Koster, *Prelates and Politicians in Malta—Changing Power Balances between Church and State in a Mediterranean Island Fortress 1800–1976* (Assen, Netherlands, 1984), pp 40–42.

[52] Koster, pp 47–48 (He declined because he was unwilling to take the oath imposed upon Catholic office-holders by the Roman Catholic Relief Act 1829 (10 Geo 4, c 7)).

[53] Koster, p 276; Bezzina, p 146. In fact benefit of clergy was not completely abolished, since episcopal agreement remained necessary before the general courts could try a clerk; but the convention arose that this would always be forthcoming.

[54] See the Religion of Malta (Declaration) Act 1922, c 79 (Malta); *Cassar Desain v Forbes* (1935) Malta LR 43 at 55; and Hilda I. Lee, 'British Policy towards the Religion, Ancient Laws and Customs in Malta, 1824–51' in (1963) 4 *Melita Historica* 1.

[55] Bezzina, pp 168ff.

[56] The resulting nine-year impasse is described in Bezzina, pp 172–177; but the difficulties were of a political rather than a legal nature.

[57] Bishops Act 1539 (31 Hen 8, c 9).

Virginia, with its cathedral at Jamestown, was mooted at the Restoration;[58] but its sufficiency was ultimately never tested due to that project's abandonment.

It was probably under the prerogative that the Channel Islands had been added to the Diocese of Winchester in 1569,[59] but the Crown's right in this case arose under the custom of Normandy, which has always given more generous scope to the prerogative than the law of England. The prerogative was certainly relied upon in 1726, when George I granted to Bishop Gibson a commission to exercise and delegate 'jurisdiction, power and ecclesiastical coercion, in the Americas,[60] but with dubious legal effect since the territories in question virtually all possessed representative Assemblies. The public authority of Gibson's commissaries was contested by some colonial authorities and occasionally simply ignored,[61] and his successor did not repeat the experiment.

Letters Patent purporting to create new public sees were issued from 1787 to 1866. The first, for Nova Scotia, related to a ceded colony which already possessed self-government. Modified English public ecclesiastical law, including licensing of ministers by the Bishop of London but without other manifestations of episcopacy or penal laws against protestant Dissenters, had been introduced by colonial legislation in 1758—

> 'Divine Worship according to the Liturgy of the Church established by the laws of England shall be the fixed form of worship among us; and the place where such liturgy is used shall be respected and known by the name of the Church of England as by law established'[62]

—so it was doubtful (at least with hindsight) whether a prerogative power could be relied upon to change the position. Some doubts obviously existed at the time: since although the patent purportedly authorised the bishop to perform

> 'functions appropriate to the office of bishop [...] and to exercise jurisdiction spiritual and ecclesiastical throughout the said See according to the laws and canons of the Church of England'

which would of course have included the granting of marriage licences, in fact the Lieutenant-Governor continued to perform this task.[63]

---

[58] A draft patent, conferring jurisdiction over all mainland plantations and the islands to the East, was drafted around 1660 but never sealed. It would have provided that '*ecclesiae [...] in praedita regione Virginiae et in reliquis omnibus plantationibus nostris Americanis [...] sint una eademque ecciesia cum Ecclesia Anglicana, et partes et membrae ejusdem Ecclesiae, cum eadem doctrina disciplina et regimine [...] habenda et reputanda*' (text in William S. Perry, ed, *Historical Collections relating to the American Colonial Church*, vol 1 (1870).

[59] ie by an Order in Council of that year. Earlier papal Bulls purporting to transfer the Islands to English dioceses had been disallowed, and the jurisdiction of Coutances affirmed, by an Order in Council of 1550. See Arthur J. Eagleston, *The Channel Islands under Tudor Government 1485–1642* (Cambridge, 1949), pp 35, 54.

[60] Part of the significance of this grant lies in the fact that such authorisation was thought necessary, both by Gibson himself and by his predecessor Compton. The latter had begun his episcopate in 1677 by claiming that the churches of the colonies lay 'in my diocese' as a matter of custom. But by 1685 Compton was admitting that such a belief had no legal foundation, and was seeking *de facto* control over clergy by the indirect means of royal instruction to colonial governors. See J. H. Bennett, 'English Bishops and Colonial Jurisdiction 1660–1725' in (1963) 32 *Historical Magazine of the Protestant Episcopal Church* 175 at 176–179; Arthur L. Cross, *The Anglican Episcopate and the American Colonies* (New York, 1902), pp 283ff.

[61] George Whitefield, for example, suspended from the ministry in 1740 for preaching in dissenting meetings and departing from the Prayer Book, remarked that he should regard the commissary's sentence 'as much as I would a Pope's bull'. In 1757 the Governor of Virginia deprived a minister after it was recognised that the commissary had no power to do so: Cross, pp 81–86, 136–137. That the commissaries were not wholly ineffective can be ascribed to an acceptance of the bishop's role which falls in the category of private or voluntary authority.

[62] Act for the Establishment of Religious Public Worship in this Province, and for the Suppressing of Popery 1758 (32 Geo 2, c 5) (Nova Scotia).

[63] Judith Fingard, *The Anglican Design in Loyalist Nova Scotia 1783–1816* (London, 1972), pp 18–19, 127, 179. See also the Letters Patent for Quebec, extracted in Moir, Church and State in Canada, 1627–1687—Basic Documents, p 111.

The Nova Scotian See initially included Upper and Lower Canada, and episcopal authority was placed on a statutory footing there from 1791', wide enough to cover the new See of Quebec.[64] Into the 1830s the passing of an imperial or colonial statute remained standard practice for the erection of public sees,[65] so there was still no case testing the royal prerogative in either settled or ceded colonies without their own legislature. As enthusiasm for episcopal government gained momentum with the establishment of the Colonial Bishoprics Fund, however, this precaution began to be omitted. The *Eton College* case was therefore the first opportunity to decide the law affecting non-self-governing settlers,[66] while the position of a non-self-governing ceded colony remained undetermined until the South African cases drew the distinction on which this article is based.

By his finding in *Eton College*, Lord Campbell CJ appears to have held the royal power to create public Sees—and thus public episcopal authority altogether—to be unsuited to settled colonial circumstances. He did not express himself in these terms, because the rule in *Vaughan* was not put to him; but his recognition of ministerial parity as the norm suggests that the outcome would even so have been unchanged.

The distinction in *Natal*, on the other hand, recognising that in 1847 the Queen could legitimately impose public episcopal authority on the conquered Cape, went well beyond the issue of episcopacy. If she could grant Bishop Grey the power to determine cases and impose legally binding penalties, she could impose the rules by which such cases were to be determined. Her Letters Patent were modest in their terms, concentrating upon clergy discipline; but even had she chosen to introduce rules which England had recently shaken off—disabilities of Dissenters or an episcopal probate jurisdiction—she could have done so.

3. MISCELLANEOUS OBJECTIONS

Three further objections to our analysis require consideration. One concerns a significant point of detail in the Natal case itself; the others stand separate from the main argument.

(*a*) *The status of Natal Province*

Both Bishop Grey's Letters Patent purported to cover, albeit in different ways, the Cape and the Province of Natal. The status of the Cape is clear: it had been ceded the Dutch, remained without self-government in 1847 but achieved this in 1850. Natal did not obtain self-government until well after the issue of the second patent. It was the law of Natal', not the Cape', which was at issue in *Re Lord Bishop of Natal*. Yet the second patent was held to be a nullity in relation to both colonies. Can the reasoning in this article be reconciled with the actual decision in the case?

Three answers suggest themselves.

(i) Natal was never Dutch territory; its European occupation was by northward migration from the Cape following the British conquest, in other words by British subjects. The colony should therefore be classified as settled, not ceded; in which case it was on a par with New Zealand and the *Eton College* case, and irrespective of self-government there was no possibility of creating public episcopal authority there. It would follow that even the first Letters Patent were void as regards Natal; but no reason arose to test this in the courts.

---

[64] Constitutional Act 1791 (Imperial Parliament) s 40.

[65] eg 6 Geo 4, c 17 (1824) (Jamaica); East India Act 1833 (Madras); Bishops in Foreign Countries Act 1841 (Jerusalem).

[66] Theoretical Dutch claims notwithstanding, no European power had established a legal system in New Zealand before the English arrived. Nor had the territory in 1841 (the date of the bishop's appointment) been granted responsible self-government.

(ii) Given that the pioneers from the Cape who settled Natal had not previously been subject to the common law, but to Roman-Dutch law, it may be questioned whether the usual settled colony rules applied there. In that case, an alternative explanation is that the second patent was not seen as separable; a grant of metropolitical authority over the Cape and Natal could not be void as regards one colony and remain valid as regards the other.

(iii) Either of the above answers is consistent with the decision actually reached. The third possibility, that the Judicial Committee made a factual slip, confusing the creation of a nominated Legislative Council in Natal in 1847 with the grant of responsible self-government in 1856, cannot be wholly ruled out. It was in fact judicially suggested in *Bishop of Natal v Green*.[67] This is a radical explanation, since it would vitiate (as to their outcome, not the law) the entire series of South African decisions. For it would mean that although Bishop Grey's diocesan authority in the Cape Colony after 1853 would remain voluntary, his metropolitical status (and therefore his deposition of Colenso) would have been entitled to recognition in the public law of Natal.

(*b*) *The mixed origin of settled colonies*

This objection, to the application of *any* public ecclesiastical law in settled colonies, was voiced only by West J, the other judge in *Ex parte King*, and need not detain us long. The ecclesiastical law whose application is in question is the public ecclesiastical law of England; he therefore queried whether a colony open to English and Scots could be governed by a law 'applicable only to a portion of its inhabitants'.[68]

This line of reasoning cannot be maintained. Fairly or not, the law consistently extended to British colonies settled since the Union has been English and not Scots. If individual Scots could carry their own public ecclesiastical law (or lack of it) into a joint colony, they could equally claim to carry their own land law, with the result that subinfeudation might be possible in relation to one parcel of colonial land but not the next.

(*c*) *The High Commission statutes*

West J also seems to have been the first to raise the issue of the Acts abolishing the High Commission jurisdiction.[69] The end effect of these was to forbid the creation under the royal prerogative of new courts 'to administer a law other than the common law', and he considered that establishing a public episcopal see, carrying ecclesiastical jurisdiction with it, would do just that. The same argument was accepted in the first instance hearing of *Long v Bishop of Cape Town*[70] and by the Privy Council in *Re Lord Bishop of Natal*.[71]

In none of these three cases were the seventeenth-century statutes necessary to the decision. The inapplicability of public episcopal government to settled colonial circumstances, and the presence of a representative assembly in the Cape, would have sufficed. It is doubtful whether the Acts were relevant at all to 'crown colonies properly so called', since the Crown's discretion there was probably outside their contemplation.[72] But in any event the statutes have no relevance to episcopal courts acting

[67] *Bishop of Natal v Green* (1868) 18 LT 112, [1868] NLR 138.

[68] *Ex parte King* (1861) 2 Legge 1307 at 1324.

[69] Abolition of High Commission Act 1640 (16 Cha 1, c 11), s 5; Ecclesiastical Jurisdiction Act 1661 (13 Cha 2, st 1, c 12), s 5.

[70] *Long v Bishop of Cape Town* was heard in the Cape Supreme Court by Bell and Watermeyer JJ. The fact that the first instance judgment was never printed in the English law reports was regretted by another Watermeyer J, who approved it on this point in *Mills v Registrar of Deeds* [1936] SALR (CPD) 417 at 435.

[71] *Re Lord Bishop of Natal* (1865) 3 Moo PCC NS 115 at 153.71

[72] This is why the Cape Division of the South African Supreme Court was wrong to see a contradiction between the Privy Council's remarks on the seventeenth-century statutes and on Crown colonies: *Mills v Registrar of Deeds* [1936] SALR (CPD) 417

intra vires, since such courts do not administer 'a law other than the common law'. They administer only the King ecclesiastical law, that part of the common law (and statute) relevant to the orders that they can make. This includes canonical provisions received into the common law before the Reformation, and in relation to the clergy, those more recent canons by which the common law allows them, under certain conditions, to bind themselves.[73] It does not include mere royal or episcopal injunctions, and the perceived failing of the High Commission was that it attempted to enforce these alongside the legitimately applicable sources.

In the South African cases this counter-argument was not addressed. In *Ex parte King* West J called it a contradiction in terms to say that 'an ecclesiastical court under a Chancellor is to be carried on by the common law'. But his comment can hardly stand up to comparison with the careful analysis offered twenty years later by Lord in *Mackonochie Lord Penzance*.[74] And although *Mackonochie* was not itself concerned with the colonies, the link was made by in the Supreme Court of Alberta: a rule of law derived from the *jus commune* could be enforced in the North-West Territories against English settlers because it had first become part of the common custom of England.[75]

4. POSSIBLE PRACTICAL IMPLICATIONS—GIBRALTAR AS A CASE-STUDY

The significance of our conclusion in the present day is small enough. Settled colonies to which English public ecclesiastical law may once have applied have long since adopted constitutions or legislation which either supersede or negate its rules. Where a foreign ecclesiastical law was left in force in a ceded colony which the Crown no longer holds, it is too late to replace it. (In some cases the royal supremacy may have passed to the authorities of a secular republic and caused considerable controversy before being renounced.) Responsible government in most remaining colonies prevents the Crown giving them bishops with public authority, even were it so minded. The law on voluntary episcopal jurisdiction is of much greater modem relevance, and it would take more than another article to examine this fully.[76]

But our conclusions as to public law are relevant to the government policy announced in the immediate aftermath of the *Nátal* decisions. The implication of this article is that Whitehall was right to stop appointing public bishops for settled and for self-governing colonies; but that in 'crown colonies properly so called' any ecclesiastical provision by the Crown would have been as valid after 1866 as before.

We shall conclude with an example. The introduction of English law into Gibraltar in 1740[77] had, by our conclusions, included public ecclesiastical law, albeit on the early colonial model without an episcopate. (Correspondingly, the cessation of Spanish law at that date ended the public status of Catholicism, and those who

[73] See *Middleton v Crofts* (1736) 2 Atk 650.

[74] *Mackonochie v Lord Penzance* (1881) 6 App Cas 424 at 446, HL. Much of the confusion may be traced to a loose use of language by Coke CJ in *Caudray's Case* (1591) 5 Co Rep la, when he listed a number of causes involving public ecclesiastical law 'which belong not to the conusance of the common laws of England'. The word 'conusance' (= cognisance) is significant: Coke was speaking of judicial *fora* and meant that such cases did not belong to the English common law *courts*, given the availability of episcopal tribunals more learned in some of the relevant law. But in the colonies lacking such tribunals, Coke's words have no application, since wherever the king's ecclesiastical laws apply and episcopal (i.e. civilian) expertise is not available, the ordinary courts must do the best they can: *Carter v Crawley* (1680) T Raym 496. See also *Attorney-General v Dean and Chapter of Ripon Cathedral* [1945] Ch 239, [1945] 1 All ER 479.

[75] *Re Seidler and Mackie* [1929] 4 DLR 478, Alta. SC.

[76] An invaluable modern overview is given by Norman Doe, *Canon Law in the Anglican Communion* (Oxford, 1998). The greater part of the South African cases was devoted to the question how the contract binding voluntary Protestant episcopal associations, where no public jurisdiction existed, should be construed: to the prerogatives of the Crown in such circumstances; and to presumptions arising from the use by such bodies of the name 'Church of England'.

[77] See note 25 above.

continued worshipping by Roman rites thereby formed themselves into a voluntary society.[78]) Had Gibraltar been granted self-government before the creation of the Protestant episcopal see in 1842, its situation would indeed have resembled the later Cape. But since this did not happen until well into the twentieth century, it followed that the 1842 Letters Patent,[79] including the provision for the Governor and judges of Gibraltar to assist the Bishop where necessary, legally effected their full purport within the colony.[80]

The *Natal* cases changed nothing. Until 1873 the Bishop of Gibraltar retained his court and 'coercion ecclesiastical'. But when in that year he resigned and a mere Archbishop's commission, insufficient at common law to fill a public see, was granted to a new bishop,[81] our conclusion is that the public see fell vacant without ceasing to exist.[82] No surrender and cancellation of Letters Patent took place as in Cape Town two decades before. The only consequence of the patent which had ceased to apply was the appointment of an individual. The longer-term consequences—the creation of an episcopal see and the introduction of those elements of public ecclesiastical law inseparable from episcopal oversight—remained in force.

Like any other vacant public see, therefore, the temporalities passed into the hands of the Crown until legislation (as in Malta) should dispose of them otherwise; and the spiritualities to the authority entitled at law to their guardianship. Given that the diocese possessed at that date a cathedral but no chapter, there seems little alternative to regarding the Archbishop of Canterbury (whose metropolitical role likewise stems from the Letters Patent) as guardian of the spiritualities, and it is perhaps not too far-fetched to see his commissioning of subsequent 'Bishops of Gibraltar' as amounting in strict law to the appointment of episcopal commissaries.

In a recent letter to this *Journal*, the present Bishop of Gibraltar in Europe has urged a research project which must include an analysis of the present legal status of his office.[83] It may be hoped that when such a study appears, it will take the chance to pursue further, in that specific context, some of the issues upon which this article has touched in inevitably general and wide-ranging terms.

---

[78] The compact of that society was still not identical with the *jus commune*, which is why the Catholic Vicar Apostolic, Hughes, was committed to prison in 1841 for contempt of a court order enforcing it: *Hughes v Porral* (1842) 4 Moo PCC 41 at 60.

[79] The tenor of the patent is given in Henry J. C. Knight, *The Diocese of Gibraltar—A Sketch of its History, Work and Tasks* (London' 1917), pp 42–44.

[80] The effect of the Letters Patent in Malta, where they were confined to churches consecrated for Prayer Book worship and left the public status of Roman Catholicism elsewhere unaffected, is a more complicated issue. Different questions are also raised by the Foreign Office circular of November 1842 concerning a transfer to the Bishop of Gibraltar of 'spiritual superintendence' over Prayer Book congregations *outside* the Crown's dominions. A consideration of the latter point belongs in the study of voluntary Protestant episcopacy which this article consciously omits.

[81] Knight, pp 91, 110.

[82] A recital to the contrary in the preamble to the Anglican Church (Property and Administration) Ordinance 1876 No. 6 (Malta) must be seen as an exaggeration.

[83] Letter of the Rt Revd John Hind to the Editor at (1998) 5 Ecc LJ 137.