Solicitors, for the appellant, *Moss & Barsden.*

Solicitor, for the respondent, *Crown Solicitor for Western Australia.*

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LEE FAY v. VINCENT.

[HIGH COURT OF AUSTRALIA.]

FIELDING AND ANOTHER . . . . APPELLANTS;

AND

HOUISON AND OTHERS . . . . RESPONDENTS.

TOVEY AND OTHERS . . . . . APPELLANTS;

AND

HOUISON AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *July* 29, 30, 31; *Aug.* 5, 6, 7, 10, 18, 19, 25, 26, 27; *Dec.* 9.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

Trusts of St. Phillip's glebe—Disposition of surplus rents and profits—Endowment of other Churches—Irrevocable appointment—Express trusts—Church of England Act, 8 Wm. IV. No. 5, sec. 21—Constitutions of the Church of England (N.S.W.) 1866—Sydney Church Ordinance 1891, Art. 34—Church Acts Repealing Act (N.S.W.) 1897.

In 1862 certain lands were granted by the Crown to trustees upon trust for appropriation as the glebe annexed to St. Phillip's Church of England, Sydney, in conformity with the provisions of the Acts 8 Wm. IV. No. 5 and 21 Vict. No. 4, so far as they applied to the trusts of the grant. Under sec. 21 of that Act, the trust for the application of surplus rents was as follows:—"and so often as the rents issues and profits of any such glebe

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lands so let by the trustees will admit thereof upon trust with the consent of the Bishop in manner aforesaid to apply the same in or towards the building of other such Churches or Chapels and houses of residence for clergymen and endowing the officiating minister thereof respectively to the extent of £100 yearly as aforesaid." The lands were let, and always produced a considerable income. The trustees, after satisfying the claim of the principal Church, St. Phillip's, and assuming to act under the powers conferred by sec. 21 of the 8 Wm. IV. No. 5, applied a portion of the rents towards building a new Church in the same parish and paying the officiating minister for the time being a certain sum annually by way of stipend, and subsequently at various times appropriated portions of the surplus rents to the purpose of building other Churches. They also resolved, with the consent of the Bishop, that those Churches should be endowed with certain annual payments towards the stipend fund. The intention of the trustees was, so far as was in their power, to create in favour of the officiating ministers a perpetual endowment.

Held (*per Griffith* C.J., *Barton*, *O'Connor* and *Isaacs* JJ.), that the effect of sec. 21 of the 8 Wm. IV. No. 5 was that the glebe lands were held in trust for the permanent endowment not only of the principal Church, but also of the officiating ministers of the several Churches which, by the action of the trustees, were brought within the trust, the effect of such action being in the nature of an appointment under a power, so that when the officiating minister of a new Church was endowed an express and irrevocable trust to pay that endowment after satisfying prior trusts attached to the rents and profits just as fully as a trust to pay the first £150 to the minister of the principal Church was attached by the Act itself, notwithstanding any change in the personnel of the clergy, and these trusts were not affected by the provisions of the *Sydney Church Ordinance* 1891 or of the *Church Acts Repealing Act* 1897.

Dunstan v. *Houison*, (1891) 1 S.R. (N.S.W.) (Eq.), 212, overruled.

Per Higgins J.—The word "endow" connotes permanency of provision; but the fact that the trustees of 1882 paid some of the surplus to certain officiating ministers, and intended that the payments should be continued by themselves and their successors, does not constitute an endowment. The view of *Simpson* J., as expressed in *Dunstan* v. *Houison*, (1891) 1 S.R. (N.S.W.) (Eq.), 212, is substantially right—that the surplus rents may be applied "in the endowment of a parish by investing the money on trust to pay the income to a clergyman." There had not therefore been any endowment or application in or towards the endowment of any Church other than the principal Church within the meaning of sec. 21 of the 8 Wm. IV. No. 5, and the Synod therefore had power under sec. 2 of the *Church Acts Repealing Act* 1897 to prescribe how the variable surplus rents of the glebe should be applied, subject to the limitations in the Church Acts in force, but until the Synod made a valid Ordinance the trustees should deal with the surplus rents under the Act 8 Wm. IV. No. 5 as amended by the 21 Vict. No. 4.

Per Griffith C.J., *Barton* and *O'Connor* JJ., the *Sydney Church Ordinance* 1891 Art. 34 was not invalid, but its operation did not extend to trusts excluded

from the control of the Synod by the Constitutions of the Church of England (N.S.W.) 1866, and the operation of its provisions as to those matters depended upon the extent to which effect was subsequently given to them by the *Church Acts Repealing Act* 1897; but that Act did not enlarge the limits imposed upon the powers of the Synod by the Constitutions, and, further, the exceptions in sec. 2 positively precluded the Synod from diverting the rents and profits of the glebe lands from the specific trusts created by the allocations or appointments under sec. 21 of the 8 Wm. IV. No. 5.

Per Isaacs and *Higgins* JJ.—Art. 34 of the *Sydney Church Ordinance* 1891 was invalid in its inception, being then beyond the powers of the Synod under the Constitutions, so far as it purported to alter the trusts of the 8 Wm. IV. No. 5, and the *Church Acts Repealing Act* 1897 did not validate it.

Meaning of the terms "glebe" and "endowment" discussed.

Powers and duties of the trustees of glebe lands as regards the disposal of the surplus rents and profits under the provisions of the *Church Acts Repealing Act* 1897 declared.

Decision of *A. H. Simpson* C.J. in Equity, (*Houison* v. *Fielding* (1907), 7 S.R. (N.S.W.), 677), varied.

APPEALS from a decision of *A. H. Simpson* Chief Judge in Equity in the Supreme Court of New South Wales.

These were consolidated appeals in a suit by the trustees of the glebe of the Parish of St. Phillip in Sydney, for a declaration of their duty with respect to the disposition of the rents and profits of the glebe lands. The defendants were the Attorney-General for New South Wales and the officiating ministers of several Churches in the Diocese of Sydney who had up to some time in 1902 received annual payments out of the rents and profits by way of stipend from the trustees. *A. H. Simpson* Chief Judge in Equity, before whom the suit was heard, held, *inter alia*, following a previous decision of his own: *Dunstan* v. *Houison* (1), that the defendants were not entitled as of right to have these payments continued: *Houison* v. *Fielding* (2). The present appeals were brought by different defendants against that decision. The appellants in the first appeal were two clergymen who since 1902 had been incumbents of the Church of Holy Trinity, which was the Church "in the same parish or district" as St. Phillip, the first to receive a benefit out of the surplus rents and profits after making the payment to the principal Church of St. Phillip,

(1) (1901) 1 S.R. (N.S.W.) (Eq.), 212. (2) (1907) 7 S.R. (N.S.W.), 677.

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under sec. 21 of the 8 Wm. IV. No. 5. The appellants in the second appeal were the incumbents of the other Churches to whom annual payments had been made up to 1902.

The appeals were twice argued, the first time before *Griffith* C.J., *Barton*, *Isaacs* and *Higgins* JJ., and the second time before a full bench consisting of the same four Judges with *O'Connor* J.

Cullen K.C. and *Mann*, for Rev. S. S. Tovey and others, the appellants in the second appeal, were first heard. [As to the meaning of "endowment" they referred to *Edwards* v. *Hall* (1); the *Imperial*, *Century*, *Standard* and *Webster's* Dictionaries; *Burns*, *Ecclesiastical Law*, 8th ed., vol. I., p. 323; *Wharton*, *Law Lexicon*. As to "parochial purpose" to *Stroud*, *Legal Dictionary*; *Brown's Ecclesiastical Law*, 8th ed., vol. II., p. 297; *Phillimore*, *Ecclesiastical Law*, (1873) vol. I., p. 352; and as to the objects of the trusts to *Inman* v. *Whormby* (2)].

Maughan, for Rev. S. G. Fielding and another, successive incumbents of Holy Trinity Church, appellants in the first and respondents in the second appeal, referred to 8 Wm. IV. No. 5, sec. 21; *The Church of England Acts* 1887, 1889, 1897; *The Constitutions of the Church of England N.S.W.* 1866; *Church of England Property Management Act* 1866; *Sydney Church Ordinance* 1891, cl. 34; *Dunstan* v. *Houison* (3).

Charles E. Manning, for the Attorney-General for New South Wales, respondents in both appeals, referred to *Petre* v. *Petre* (4); *Godefroi*, *Law of Trusts*, p. 719.

Langer Owen K.C. and *Lingen*, for the trustees, respondents in both appeals, referred to *In re Clergy Orphan Corporation* (5); *Conservators of the River Tone* v. *Ash* (6); *Maxwell on Interpretation of Statutes*, 3rd ed., p. 493; *Holcombe* v. *Newcastle Municipality* (7); *Beale*, *Cardinal Rules of Legal Interpretation*, p. 126.

(1) 6 D. M. & G., 74, at p. 76.
(2) 1 Y. & J., 545.
(3) (1901) 1 S.R. (N.S.W.) Eq., 212.
(4) 1 Dr., 371.
(5) (1894) 3 Ch., 145.
(6) 10 B. & C., 349.
(7) 5 N.S.W. L.R. (Eq.), 87.

Norman Walker, for the incumbent of St. Phillip's Church, who, though not originally a party to the appeal, had been allowed to intervene, appeared to submit to any order that the Court should make.

[It is not considered necessary to report the arguments of counsel in detail, as the contentions and arguments used on both sides are very fully dealt with by their Honors in the judgments.]

Cur. adv. vult.

The following judgments were read:—

December 9.

GRIFFITH C.J. These appeals, which were heard together, are brought from a decision of the Chief Judge in Equity in a suit instituted by the trustees of the glebe land annexed to the Parish of St. Phillip in Sydney, asking for a declaration of their duty with respect to the disposition of the rents and profits derived from the land. The appellants claimed that by virtue of the Act 8 Wm. IV. No. 5, and in the events that have happened, they are entitled to receive out of the rents and profits of the glebe land certain annual payments by way of stipend in priority to any other disposition that the trustees may be entitled to make of them. The learned Chief Judge, following a previous decision of his own, *Dunstan* v. *Houison* (1), held that the appellants had no such rights, and held further that the trustees were bound to apply the rents and profits in accordance with the terms of an Ordinance of the Synod of the Diocese of Sydney, passed in 1891, but which did not come into operation until 1897. The Attorney-General, who was made a party to the suit to represent the persons or institutions who would or might be entitled to the benefit of the surplus revenue after satisfying the claims of the appellants if the Ordinance did not apply, contended that, whether the appellants were or were not right in their contention, the disposition of the rents was not governed by the Ordinance, but was still governed by the Act of 8 Wm. IV. He did not formally appeal from the judgment, or give any notice of intention to ask that it should be varied, but the case has been treated as if he

(1) (1901) 1 S.R. (N.S.W.) (Eq.), 212.

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were an appellant, and it is the duty of the Court, all parties interested being before it, to make such a declaration of their rights and of the duties of the trustees as they think consistent with the law.

A great number of questions were raised and debated during the very able arguments to which we have listened, and it is necessary to determine several of them. The first question arises upon the construction of the Act of Wm. IV., passed in 1837, and entitled "An Act to regulate the temporal affairs of Churches and Chapels of the United Church of England and Ireland in New South Wales." In the previous year an Act (7 Wm. IV. No. 4) had been passed authorizing the payment of stipends from the Colonial Treasury to ministers of religious denominations on certain prescribed conditions, and also providing for the appointment of trustees to whom the real estate in the site of "any Church Chapel or minister's dwelling" and of "any lands or hereditaments thereunto belonging" should be conveyed upon trust for the erection, maintenance and repair of the said Church or Chapel or minister's dwelling, and for the provision out of the revenues belonging to or arising from the use of the said Church or Chapel in such manner as should be lawfully appointed of all things necessary for the celebration of divine worship therein" (sec. 7).

The Act of 1837, after reciting this Act, enacted that whenever any persons should at their own cost "erect or provide a Church or Chapel . . . or any minister's dwelling burial ground or glebe land" or contribute £300 for any such purpose trustees might be appointed in the prescribed manner. Then followed elaborate provisions as to the mode of election and the functions of the trustees. Sec. 20 provided, amongst other things, that the clergyman in holy orders duly licensed to officiate in any Church or Chapel under the Act should have right of free access to the Church or Chapel and attached burial ground, and might when licensed "freely use have possess and enjoy the minister's dwelling-house . . . and glebe belonging to such Church or Chapel" and receive the rents and profits thereof.

By sec. 21 it was enacted that if the glebe land belonging to any Church or Chapel and not in actual occupation by the

licensed clergyman could be improved by building or otherwise so as to produce an annual income of £150, then (subject to certain safeguards) the trustees might let the land on lease for a term not exceeding 28 years, reserving the rents to the trustees for the time being, "who shall and may receive and apply the said rents issues and profits upon trust in the first place to pay to the officiating minister of the said Church or Chapel the full sum of one hundred and fifty pounds yearly as and for an allowance for the said glebe and in the next place with the consent of the Bishop to apply the same or any part thereof in or towards building or enlarging the Church or Chapel of the parish or place to which such glebe land is annexed or a residence for the clergyman of the same if it be necessary and afterwards in or towards building or enlarging a Church or Chapel of the United Church of England and Ireland in any other place in the same township or district and in the payment of a stipend of one hundred pounds yearly to the officiating minister for the time-being of the last-mentioned Church or Chapel and as often as the rents issues and profits of any such glebe land so let by the trustees will admit thereof upon trust with the consent of the Bishop in manner aforesaid to apply the same in or towards the building of other such Churches or Chapels and houses of residence for clergymen and endowing the officiating ministers thereof respectively to the extent of one hundred pounds yearly as aforesaid."

It is upon the construction of these words that the argument of the appellants primarily depends.

Before examining the language of the Statute more particularly it will be convenient to refer to the facts on which their claim is founded. By Crown grant dated 13th September 1842 the lands in question were granted to trustees upon trust for the appropriation thereof "as the glebe annexed to the Church of the United Church of England and Ireland as by law established erected at Sydney and known as St. Phillip's in conformity with the provisions of the Act 8 Wm. IV. No. 5" (and another Act to which it is not necessary to refer) "so far as the same may apply to the trusts of this Our Grant and for no other purpose whatsoever." The land has during all material times been let, and produces a considerable income.

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Some time after the grant the trustees, finding themselves in a position to do so after satisfying the prior claim of St. Phillip's Church, applied a portion of the rents towards building a new Church in the same parish known as Holy Trinity Church, and paid the officiating minister of that Church for the time being an annual sum of £100 by way of stipend until the year 1902.

About the year 1870 a new Church called St. John's Bishopthorpe was erected in a suburb of Sydney. From about the same time the trustees of the land paid out of the rents an annual sum of £100 to the officiating minister of that Church by way of stipend, and continued the payment till the year 1902, since when the amount has been diminished. The records of the trustees prior to 1870 have been lost, and there is no distinct evidence of the circumstances under which this payment was first made, nor does it appear whether they contributed to the original cost of building St. John's, although it does appear that in 1874 they contributed £100 from the rents towards "the Church debt" of that Church.

In 1882 the question appears to have been mooted whether contributions or allocations made by the trustees from the rents towards the stipends of the ministers of new Churches under sec. 21 of the Act of 1837 were to be regarded as permanent appropriations or appointments of the rents, or as mere casual benefactions which might be renewed or not at the pleasure of the trustees. A case was submitted by the trustees for the opinion of Mr. *Alexander Gordon* Q.C., an eminent equity lawyer of those days, and he advised them that, in his opinion, "the rents and profits were not intended to be used as a sort of general Church Building Fund, but that the object is to apply them specifically to building some particular Church and its minister's manse if necessary and endowing that minister with a stipend of £100 a year, extending this disposition to other cases according to the funds at their disposal," and that "the stipends to ministers when once assigned are to the extent available to be endowments, not payments to be made or withheld at the pleasure of the trustees."

Shortly after receiving this opinion the trustees resolved (it is not contested that this was with the consent of the Bishop of the Diocese) that eight new specified Churches, being those represented

by the appellants in the second appeal other than Mr. Tovey, "should be endowed as follows:— £50 towards the Church Building Fund; £50 towards the Parsonage Fund; £50 per annum towards the Stipend Fund." This resolution was duly communicated to the officiating ministers of the several Churches. There can be no doubt, I think, that the trustees intended to act upon the view of the law taken by Mr. *Gordon*, and that it was their intention to assign the several sums of £50 a year to the officiating ministers of the eight Churches by way of perpetual endowment. I think also that the resolution so communicated was sufficient to create such an endowment, if it was an endowment, and if they had power to create it.

In their letter to the Dean (for the Bishop) asking his approval of these grants the trustees had informed him that they were already bound to make provision "by way of annual endowment" from the revenues of this glebe to the extent of £150 a year for St. Phillip's; £100 a year for Holy Trinity; £100 a year for St. John's Bishopthorpe, and £100 a year for another Church which has since ceased to exist, and the Bishop's approval was asked with respect to the surplus revenue after making this provision.

I am of opinion that upon these facts it ought to be inferred that at some time before 1882 the trustees had, so far as they lawfully could, assigned £100 a year out of the rents and profits of the glebe by way of permanent endowment of the minister for the time being of St. John's Bishopthorpe: *Inman* v. *Whormby* (1).

In the case of *Dunstan* v. *Houison* (2) the learned Chief Judge in Equity held that the trustees were not bound to continue these payments, but were at liberty to allocate the rents and profits annually in such manner as they might think fit, within the prescribed limits, and were bound to exercise their discretion in doing so from time to time. The Court is asked to review that decision.

Adverting now to the language of sec. 21 of the Act 8 Wm. IV. No. 5, it is contended on one side that the words "endowing the officiating minister thereof to the extent of £100 yearly as aforesaid," when read with the context, and having regard to the

(1) 1 Y. & J., 545.

(2) (1901) 1 S.R. (N.S.W.) (Eq.), 212.

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subject matter of the legislation, import the element of permanency, and that an allocation of income, deliberately made by the trustees with the intention that it should be permanent, operates as a valid and irrevocable appointment of the revenue derived from the rents and profits to the extent of the amount allocated, not exceeding £100 in any case, with the consequence that the rents and profits are thereafter impressed with a trust for the ministers beneficed under such appointment, in the same manner and to the same extent as the ministers of the principal Church and the second Church in the same parish. On the other side this position is altogether denied, and it is contended that, whatever may be the rights of the officiating minister of the principal Church and the second Church, further allocations must be made annually from the surplus rents and profits of each year, so that the trustees had no power to bind their successors or even themselves, even by an express promise of a permanent grant. It is further contended that, in any event, the obligation to continue a grant is limited to the person who is officiating minister when it is first made, and does not continue for the benefit of his successors in office.

In order to arrive at a satisfactory conclusion as to the meaning of sec. 21 it is necessary to put ourselves, as far as we can, in the position of the legislature in the year 1837, and to consider what was then the legal position of the Church in Australia, and what were the prevalent ideas as to the establishment and support of Churches of the United Church of England and Ireland.

The Church had at law no claim to any recognition except as a voluntary organization. But many of the ideas of ecclesiastical law and propriety which the members of the Church had brought with them from England were looked upon as almost part of the order of nature so far as church organization was concerned. In England and Ireland the parish clergy were (with a few exceptions) the holders of benefices, and the law recognized the parson as a corporation sole in whom the title to the parish land was vested, and provision was always made for his permanent support. Ordinarily a glebe was attached to every parish Church, and it was a rule that a new Church should not be consecrated until a glebe had been provided for its endowment. The notion

of the support of the clergy by voluntary contributions of their congregations was, at that time, utterly foreign to the concept of such a Church. When, therefore, it was proposed to make provision by law to encourage the building of Churches and Chapels in the new Colony, almost the first matter that would present itself for consideration would be provision for the maintenance of the officiating minister. Accordingly by the Act of 7 Wm. IV. provision was made for fixed stipends from the Treasury, which were attached to the Churches and payable to the ministers officiating in them for the time being. This applied to all religious denominations that might be able to take advantage of it.

Then, in the following year, came the Act now under consideration, which dealt with the Church of England only, and as might be expected, dealt with the subject of glebes, which were according to the ideas of the time a material if not an essential appurtenance of a parish Church. In the same way, by another Act of the same year, 8 Wm. IV. No. 7, passed three days later, provision was made with respect to glebe lands belonging to Presbyterian Churches connected with the Church of Scotland, in which country as in England glebes were a common appurtenance to a parish Church.

The idea of a glebe, then, in those days connoted permanency of endowment, and one would expect *à priori* to find in provisions for the disposition of the rents and profits of glebe lands some element of permanency.

Again: the Colony was then newly settled, it was uncertain in what direction settlement would extend, and the amount of the revenue that would be derived from lands, which for the time were of comparatively small value, was incapable of being even guessed at. It would not be desirable to allow the minister of a single Church to enjoy by reason of some accidental circumstances a disproportionately large income derived from his glebe. If, now, putting ourselves mentally in the position of persons imbued with these ideas, we read sec. 21 of the Act of 1837, its construction appears to me to be quite free from difficulty.

The main purpose was to assist in the establishment of new Churches in the new Colony, and for that purpose to make provision for the maintenance of ministers out of the revenues of

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glebe land, which, as known up to that time, were always permanently appropriated to the maintenance of the clergy. Moreover, the provision then made was commonly called "endowment." But, for reasons already given, it was not desirable that all the revenue from one piece of glebe land should necessarily go to the minister of a single Church. Yet, according to the concept of "glebe," it must be attached or annexed to some Church. Accordingly the legislature provided that the revenue should be applied in the first place to pay to the officiating minister of the Church to which the glebe "belonged" the full sum of £150 yearly as and for an "allowance for the said glebe." It is impossible to doubt that this provision was to be permanent, and a permanent provision for a Church out of the revenues of property was commonly called by the single word "endowment." Then, after authorizing contributions to be made with the consent of the Bishop towards building or enlarging the Church of the parish or place to which the glebe land was annexed or providing a residence for the minister, the trustees were directed to apply the revenue in or towards building or enlarging a Church or Chapel in the same township or district, and in the payment of a stipend of £100 yearly to the officiating minister for the time being of the new Church or Chapel. I think it is clear that in this case also the intention was that £100 of the revenue was to be permanently applied for the purposes specified, and that this permanent application would at this time have been called the endowment of a new Church.

Then follow the provisions as to other new Churches, as to which the trustees were directed, as often as the rents, issues, and profits would permit, to hold the surplus upon trust with the consent of the Bishop to apply the same in or towards building "other such Churches or Chapels and houses of residence" and endowing the officiating ministers thereof respectively to the extent of (*i.e.*, not exceeding) £100 yearly "as aforesaid." The previous provisions of the section had directed the trustees to apply the revenue by way of what was in fact and law a permanent endowment of the officiating ministers of two specific Churches. When, then, it goes on to say that they shall hold the surplus upon trust to apply it "in endowing" other ministers "as aforesaid" I think

the meaning is that the endowment of these other ministers is to be a provision of the same kind, *i.e.*, a permanent provision for their maintenance

It was contended, or rather suggested, by Mr. *Owen* that the proper mode of applying the rents and profits "in endowing" other Churches would be by way of accumulating a fund which would be itself an endowment, and the income of which would provide the stipends. I do not think that this is the natural construction of the words; and, having regard to the conditions of the country in 1837, the desire to encourage the building of new Churches, and the long intervals that would in all probability occur before any new Church could be effectually aided by such a method, I think it should be rejected. There was no necessity to establish another capital fund of endowment. That was already provided by the glebe land, while its revenues served as the endowment of the several Churches entitled to the benefit of it.

The result was that, although the glebe land was still in one sense annexed or attached to a particular parish, this had become little more than a matter of nomenclature. The substance of the matter was that glebe lands were held upon trust for the permanent endowment of the officiating ministers of the several Churches which by the deliberate authorized action of the trustees were brought within the trust.

In my opinion the effect of such action on the part of the trustees was in the nature of an appointment under a power, so that when the officiating minister of a new Church was once "endowed," an express specific and irrevocable trust to pay that endowment (of course after satisfying prior trusts) attached to the rents and profits, just as fully as a trust to pay the first £150 to the minister of the principal or original Church was attached by the Act itself. I think further that the trust continued notwithstanding any change in the personnel of the clergy. The learned Chief Judge expressed the opinion that the parishioners of a parish, who are a fluctuating body, have not any such definite interest as can be regarded as a vested interest. A trust, however, for the minister for the time being of a Church is a good charitable gift, and is not void for uncertainty: and, in any view, the specific trusts created by or under the express

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authority of an Act of Parliament could not be impeached on such a ground.

For these reasons I am of opinion that the advice given by Mr. *Gordon* to the trustees in 1882 was sound, and that the case of *Dunstan* v. *Houison* (1) was wrongly decided and should be overruled. If there were no more in the case it would follow that the appellants would be entitled to succeed.

Several other questions, however, remain to be considered, and in considering them it is important to bear in mind the legal position in New South Wales of the religious denomination called the United Church of England and Ireland. As already pointed out, it had not, nor had its ministers, any corporate existence, but in point of law all its members were members of a community voluntarily associated together for the purposes of religious worship and governed by the rules of law applicable to a voluntary association: *Long* v. *Bishop of Capetown* (2); *In re Lord Bishop of Natal* (3); *Bishop of Natal* v. *Gladstone* (4). As this new idea became more fully apprehended, it was considered desirable to formulate the terms and conditions of association, and to make them binding upon the members of the Church. Accordingly, in April 1866, a general conference of Bishops and clerical and lay representatives of the then existing Diocese of the Church in New South Wales was held at Sydney, at which "certain articles and provisions were agreed to and accepted as Constitutions for the management and good government of the Church." In point of law these Constitutions were a voluntary agreement or compact binding upon the persons who then were or might afterwards become parties to it, but had no other operation, so that any proceeding to enforce the terms of the compact against a recalcitrant member would have been an action or suit founded upon contract. The compact, however, did not affect the general law relating to the acquisition and devolution of property. For that purpose the aid of the legislature was necessary. Accordingly in 1866 an Act, *The Church of England Property Management Act*, 30 Vict., was passed by which, after reciting the conference already men-

(1) (1901) 1 S.R. (N.S.W.) (Eq.), 212.
(2) 1 Moo. P.C.C., N.S., 411, at p. 461.
(3) 3 Moo. P.C.C., N.S., 115.
(4) L.R. 3 Eq., 1.

tioned, the adoption of the Constitutions, and that the agreement could not, as regarded the management of the property of the Church, be carried into effect without the aid of the legislature, it was enacted that the several Articles and Provisions contained in the Constitutions (which were required to be registered in the Supreme Court within three months) should for all purposes relating to the property of the Church in New South Wales be binding upon the members of the Church, and that all persons holding any real or personal estate in trust for the Church "except in so far as such real or personal estate may be the subject of any express trust and then so far as such express trust shall not extend" should hold the estate subject to the rules of the Constitutions, and should be bound thereby as fully as if they had been contained in a deed of conveyance and trust of the estate.

The "Constitutions for the management and good government of the United Church of England and Ireland within the Colony of New South Wales," which were recorded in the Supreme Court on 30th October 1866, were in the form of a declaration that the members of the Church present at the Conference did "agree to accept the underwritten Articles and Provisions as Constitutions for the management and good government of the said Church." These are, of course, words of contract, or, as it has been called, of "consensual compact."

The third clause of the Constitutions provided that the Synod of each Diocese might make Ordinances upon or in respect of all matters and things concerning the order and good government of the Church and the regulation of its affairs within the Diocese, including "the management and disposal of all Church property moneys and revenues (not diverting any" (*scilicet* property moneys and revenues) "specifically appropriated or the subject of any specific trust nor interfering with any vested rights)." They contained various other provisions, including one for the establishment of a tribunal for the trial of offences committed by clergymen, and, in one Diocese, by office bearers. The Act 30 Vict. took no account of these other provisions, which were left upon the basis of contract, but was limited in its operation to the power of the Synod to deal with property.

This power was confined within two limits—one, prescribed by

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the Act, that it should not apply to cases of property the subject of express trust except so far as the express trust did not extend, the other, prescribed by the Constitutions themselves, that an Ordinance should not divert any property, moneys, or revenues specifically appropriated or the subject of any specific trust, or interfere with any vested rights.

Having regard to the rights asserted by the appellants under the Act of 1837, as already explained, I am of opinion that the Synod had no authority under the Constitutions to divert the application of the revenues of St. Phillip's glebe from the purposes of the payment of the stipends of the ministers of the respective Churches to which they had been allocated.

These powers having been found insufficient under altered circumstances, recourse was again had to the legislature, which by Acts passed in 1881, 1887, and 1889 conferred additional powers upon the Synod. These Acts do not directly affect the present case, and are only material as showing the course of legislation and the sense in which particulars words were used by the legislature in dealing with like subject matter. It is only necessary to refer in detail to the Act of 1889. That Act, after reciting that lands in various parts of the Colony of New South Wales were vested in trustees upon express trusts that they should be used as sites for Churches, clergymen's dwellings and for other purposes for the benefit of the Church, and that on some of the lands Churches, schools, clergymen's manses or other buildings had been erected, some of which lands and buildings had been consecrated, and that by reason of change of circumstances, unsuitability of site, or other causes it might be impossible or undersirable to carry out or continue to carry out the trusts declared concerning some of them or of moneys held in trust for the Church, enacted (sec. 2) that in any case in which diocesan or other moneys, lands, Churches, schools or other buildings and hereditaments belonging to or within any Diocese were vested in trustees and held upon any express trust (whether by consecration or otherwise) for the benefit of the Church, and it had in the opinion of the Synod "become impossible or inexpedient to carry out or observe the particular purpose or purposes" to which they or any of them were "by such

consecration or other trust 'devoted'" the Synod might by Ordinance passed in a particular manner declare such the r opinion, and direct that any such land, buildings or hereditaments should be sold, demised, mortgaged or let or otherwise dealt with, and that such moneys should be applied as might be specified, freed from such consecration or trust as the case might be, and that the consecration or trust should thereupon cease and determine. But the substituted purposes, in the case of parochial lands and moneys, were (unless with certain specified consents) to be for the benefit of the parish for which the lands or moneys were held in trust.

Sec. 3 enacted that when the Synod should have declared that it was expedient to let any such lands, buildings or hereditaments for the purpose of obtaining income therefrom "in furtherance or aid of the trusts attached to the same, or in furtherance or aid of some substituted purposes to which the said Synod shall have determined to apply the same in cases wherein it shall in the declared opinion of the said Synod be or have become impossible or inexpedient to carry out the particular purpose or purposes to which the lands . . . were 'devoted' by consecration or other trust," the Synod might by Ordinance passed in the prescribed manner direct the lands to be let, and the income to be applied "in furtherance of the said trust or substituted purposes." In this section the words "trust" and "purposes" seem to be used as equivalents.

In my opinion the general sense of the word "purposes" in this Act is to denote the objective use to which under the trust (whether created by consecration, as in the case of a burial ground, or otherwise) the land was to be put, such as use for a site for a Church, school, or residence, or as a glebe or burial ground, and the Act, so far extending the limits prescribed by the Act of 1866, authorized the Synod to deal with the lands etc., altogether free from the express trust to devote them to that particular purpose, and to dispose of them so as to give a good title to a purchaser. But I do not think that sec. 2 extended to authorize the diversion of a part of the revenues of a glebe, not itself discharged from the character of a glebe, from any purpose or object to which it had been specifically appropriated, or from

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any specific trust attached to part of the revenue. As I have said, this Act is material only as showing the sense in which particular words, namely, "purposes" and "devoted," were used by the legislature in this connection.

I pass now to the Ordinance under which the contest arises between the Attorney-General and the trustees, and the validity of which is asserted by the trustees and denied by the Attorney-General.

The question of validity depends mainly upon the construction of an Act passed in 1897, (60 Vict. No. 16), but some subsidiary objections were taken to the Ordinance itself, irrespective of the Act. I will deal first with these objections.

The Ordinance, which was called the "Sydney Church Ordinance," and was adopted by the Synod in 1891, made elaborate provisions for the management of Church property in the Diocese and the conduct of parochial affairs, including provisions for the appointment and powers of trustees, churchwardens and parochial councils. Clause 34 dealt with glebe lands, and provided that "whenever any glebe land may in the judgment of the trustees thereof be improved by building upon the same" it should be lawful for the trustees (with certain consents) "to let the said glebe land" upon leases for terms not exceeding specified limits, "reserving the rents and profits thereof to the trustees for the time being who shall hold the said rents and profits upon trust" for certain specified purposes, as to which it is for the present sufficient to say that they were inconsistent with the provisions of sec. 21 of the Act of 8 Wm. IV. It is not contested that so long as that Act remained in force the Synod had no power to make these provisions. Sec. 41, however, provided that the Ordinance should come into operation when and not before that Act (and others not material to the present case) should cease to be in force as regards the Diocese of Sydney. The clause concluded thus: "The said Synod hereby assents to the repeal of the said Act."

It is objected to clause 34 that its language is the language of futurity, and does not in terms apply to leases granted before the Ordinance should come into operation. It is further objected that, as the provisions were admittedly *ultra vires* of the Synod

in 1891, they could not afterwards acquire validity by the mere repeal of the Act with which, when made, they were inconsistent, and a comparison was sought to be made with the case of a local authority passing a by-law dealing with a subject matter beyond its powers, which, it was said, would not acquire validity by a mere subsequent extension of powers without an express validation, either by the local authority itself, *i.e.* by re-enactment after the power had been conferred, or by the sovereign legislature. Incidentally the question was raised whether the Act of 1897 had such an effect. No point was raised as to the limitations imposed by the Constitutions on the powers of the Synod.

There is a substantial difference between a power of legislation limited as to subject matter and a general power of legislation unlimited as to subject matter but restricted in operation by fetters arising *aliunde*. In the former case an attempt to legislate on a matter outside the limits would be wholly ineffectual. In the latter case an enactment general in terms, but excluding from its operation the excepted matters, would of course be valid. If the exclusion were made to take effect so long as the fetters continued the law would be unexceptionable in form, and if the fetters ceased to be operative the operation of the law would become unrestricted. The case of a law which is not to come into operation as to a specific thing until the fetter is removed is in substance the same. And that is the present case.

Thus, if a local authority has power to make a by-law on a specific subject matter, but so that the by-law shall not be applicable to cases governed by positive law inconsistent with it, a by-law general in terms would be valid, although its operation would be limited so long as the latter law was in force, but on the repeal of the latter law the operation would be extended. So, if the Synod is authorized to make rules or Ordinances dealing with the subject matter of Church property, but so as not to interfere with particular property governed by specific contracts or obligations, an Ordinance on that subject framed in general terms is not *ultra vires*, although its operation does not extend to cases governed by the specific contracts or obligations,

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so long as they exist. When they cease to exist the operation becomes general.

I think therefore that this objection fails.

The same arguments afford an answer to any objection to the validity of the Ordinance that might be founded on the language of the Constitutions. The Ordinance is not invalid, but its operation does not extend to the prohibited matters. As to the other objection that the language of clause 34 is that of futurity, I think that it should be regarded in the light of an arbitral Ordinance making new and general provisions for the disposal of the rents and profits of all glebe lands, and that, so regarded, it ought to be construed as relating to the rents derived from existing as well as from future leases. Indeed a rigorous grammatical criticism leads to the same result. For the antecedent to the words "the said rents and profits" is "the rents and profits thereof:" and the antecedent of "thereof" is "the said glebe land."

For these reasons I think that the validity and effect of the Ordinance depends entirely upon the construction of the Act of 1897, which I proceed to consider.

That Act first recites an Ordinance of the Church of England Provincial Synod of the Province of New South Wales (which comprised all the Dioceses of that Colony), by which it was ordained and resolved that application should be made to the legislature to repeal (amongst other Acts) the Act of 1837, but without prejudice to anything done under it before the repeal, and that in the proposed repealing Act provision should be made for bringing under the provisions of any Ordinance to be from time to time passed by the Synod of the Diocese in the Province all lands held for the benefit of the Church in such Diocese, whether the lands were held upon the trusts of the repealed Acts or other trusts "but without prejudice to anything done under such trusts respectively before the said repeal."

Here it is to be remarked that the recited Ordinance on which the proposed legislation was to be based, as well as the Act now in recital, recognized that something might have been done under the trusts of the repealed Acts which might, unless saved, be prejudicially affected by the Act, and did not intend that the Act

should have any such operation. The preamble accordingly bears on its face a statement of intention not to affect prejudicially anything so done. The preamble proceeded to recite that in every Diocese of the Province provision had been made for the management of "parochial Church property." It is common ground that in the Diocese of Sydney the only provision that had been made for this purpose was the Ordinance of 1891. It was suggested that this recital, coupled with the provisions of sec. 2, to which I will directly advert, operated as a legislative validation of clause 34, but I do not think that this contention can be supported. The recital seems, however, to me to be a legislative recognition of the Ordinance as having been adopted in fact, leaving its legal operation to be determined by the rules applicable to such a document, having regard to the limits of the authority of the framers.

Sec. 2 enacted that all lands which at the commencement of the Act should be held by any person "upon trust for any parochial church purpose in connection with the Church of England in any Diocese in the Colony" should (with immaterial exceptions) be held "subject to the provisions of any Ordinance or Ordinances in force for the time being in such Diocese freed and discharged from the provisions of the trust deeds and of the said Church Acts" (*i.e.* the Acts thereby repealed), "but not diverted from the purposes to which the said lands are respectively devoted." For the reasons just given I think that upon the passing of the Act the Ordinance in question became "an Ordinance in force for the time being" within the meaning of the section. The controversy arises upon the meaning of the concluding words. What are the "purposes" to which parochial lands are respectively "devoted"?

Having regard to the sense in which these words were used in the Act of 1889, I think that the primary meaning of the word "purposes" is to denote the objective use to which the land is to be put, as, for instance, Churches, schools, glebe lands, burial grounds, etc., so that the Synod could not by an Ordinance under the Act of 1897 divert lands from one of these uses to another. If they desired to do so they would still be obliged to have recourse to the Act of 1889. In this sense the devoting of the

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lands to a particular purpose would have been made by the words of the original consecration or deed of trust. But I think that, in a secondary sense, the word "purposes" also includes any specific trust attached to the land or to its rents and profits, and created by any valid and binding act done subsequently to the grant or consecration. I think, therefore, that this exception precluded the Synod from diverting the rents and profits of the land now in question from the specific trusts created by the allocations or appointments under which the appellants claim.

Apart from this point, I am further of opinion that the Act of 1897 did not operate to enlarge the limits which had been imposed by the consensual compact embodied in the Constitutions of 1866, and that, whatever power the Synod might have under the Act, it was still confined within these limits, not by reason of the words "not diverted," but because the Synod never had under the Constitutions any authority to divert "any property moneys or revenues specifically appointed or the subject of any specific trust."

In my opinion, therefore, the rights of the appellants were not affected by this Ordinance, and its operation, whatever that may be, must be subject to their rights.

It remains to consider what effect should be given to the Ordinance subject to these rights. Clause 34 directed that the trustees should hold the revenues of glebe lands upon trust to pay them, up to £150, to the minister of the Church to which the glebe was attached, then to pay him such further sum not exceeding £150 as they may think fit, next (with the consent of the Bishop) to apply the revenues in or towards building repairing improving or enlarging any Churches school or schools or parsonage of the parish for which the glebe was held, next, at their discretion, in payment of a sum not exceeding £150 a year toward the stipend of a curate or catechist of the parish, and afterwards upon trust, with the consent of the Bishop, to apply them "in or towards the building of Churches or schools elsewhere in the Diocese and parsonages for ministers thereof, and in the payment to such last named ministers of annual sums not exceeding £100 for each such minister for such time or times as the trustees with the like consent shall determine."

The question is how far effect can be given to these directions consistently with the words "not diverted from the purpose to which the said lands were respectively devoted," full effect being given at the same time to the words "freed and discharged from the provisions of the trust deeds and of the said Church Acts."

To answer this question it is necessary to consider from a somewhat different point of view the words "purposes" and "devoted" as used in sec. 2.

As applied to the present case I think that the word "purposes" means "purposes of a glebe" as distinguished on the one hand from all purposes not parochial, and on the other from parochial purposes which are not those of a glebe, such as a Church, school, manse or burial ground. But, as already said, I think that it also includes the specific trusts to which the rents and profits had been lawfully allocated. What then, in this sense, are the purposes to which glebe land was devoted? They are set out in sec. 21 of the Act of Wm. IV., and included the erection of Churches, the enlargement of two Churches in the parish to which the glebe is annexed, the building of one minister's residence in that parish and ministers' residences in other parishes, and the endowment of certain ministers with stipends not exceeding specified amounts.

I think that at the time of the passing of the Act of 1897 all these matters might with sufficient accuracy have been described either as "the trusts upon which" or "the purposes for which" the land was held. In the Act of 1889, as already shown, the words "trusts" and "purposes" are used as equivalents, meaning, as applied to glebe land, used in the character of glebe land as distinguished from use as a Church, etc.

The Act of 1897, however, in my opinion, draws a distinction between purposes and trusts; for it directs the trustees to hold the land freed and discharged from the provisions of the trust deeds but not diverted from the purposes to which it is devoted. It was contended for the Attorney-General that the first part of this direction is satisfied by construing it to mean freed and discharged from the machinery of the trust deeds and Acts, *i.e.* as relating to matters antecedent to the collection and receipt of the revenues of the trust property, and that it ought not to be

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construed as having a more extended operation. This construction would give a very limited effect to the Act. Yet it is quite clear that the intention of the legislature was not only to make fresh provision relating to legal title to Church lands but also to bring such lands under the complete control of the Synod within the specified limits. I think that the limited construction contended for by the Attorney-General would defeat this manifest intention, and that the only way in which any substantial effect can be given to the words "freed and discharged from the provisions of the trust deeds and of the said Church Acts" is by holding that they refer to all matters which are merely incidental to carrying into effect the general purpose to which the land is devoted. In such incidental matters I include the limits of amount of stipend, the limits of place as to Churches which may be enlarged, the condition that stipends must be allotted to the ministers of the particular Churches specified, that if allotted at all they must be allotted permanently, and such like details.

The purposes to which glebe lands are devoted within the meaning of sec. 2 are, then, in my judgment, the building and enlargement of Churches and ministers' residences and the payment of stipends to ministers, which may, I think, be extended to their assistants. But I do not think that they include schools, which are, in my opinion, a purpose of a quite different kind from those specified in the Act of 1837. The Act relating to the Presbyterian Church lands passed in the same year, and already referred to, included schools among the purposes to which the revenues of glebe lands might be applied. And the Act of 1889 mentioned schools as one of the specific purposes to which Church lands might have been devoted. So far, therefore, as section 34 of the Ordinance purports to authorize the expenditure of the revenues of glebe lands upon schools, I think that it is *ultra vires*. But subject to this qualification it is, in my opinion, valid, except so far as it purports to affect any specific trusts then already in existence.

I think, therefore, that the decree appealed from should be varied, and that a declaration should be substituted to the effect that the trustees are bound to apply the rents and profits, first, in payment of the stipends of the officiating ministers for the

time being of St. Phillip's and Holy Trinity at the rates of £150 and £100 a year respectively, next, in payment of a stipend of £100 a year to the officiating minister of St. John's Bishopthorpe, next, in payment of stipends at the rate of £50 a year to the officiating ministers for the time being of the Churches which were endowed in 1882 *pari passu*, and subject to these payments to apply them to such of the general purposes of glebe land as I have defined them, and in such manner and proportion, as may be directed by any Ordinance duly passed by the Synod and in force for the time being.

The costs of all parties here, and in the Supreme Court, should come out of the corpus.

BARTON J. The land in question was granted to trustees nominated and appointed under the Act 8 Wm. IV. No. 5, generally known as the *English Church Temporalities Act*: "Upon Trust for the appropriation thereof as the glebe annexed to the Church of the United Church of England and Ireland known as Saint Phillip's, in conformity with the provisions of the said Act and of" the Act 7 Wm. IV. No. 3, known as the *Church Building Act*, "so far as the same may apply to the trusts of this our grant, and for no other purpose whatsoever."

The object of the *Church Building Act* is shown in its preamble to be the encouragement of the observance of public worship, and the authorization for that purpose of the issue from the Colonial Revenue of sums to be applied in aid of the building of Churches and Chapels, and of the maintenance of ministers of religion. There is no provision specially favouring any religious denomination. Sums of not less than £300 raised by private contribution and applied towards the building of a Church or Chapel and a dwelling, where deemed necessary, for "the officiating minister thereof" (which clearly, as used here and elsewhere in this Act, could not have meant only the then officiating minister) might be supplemented on executive authority by grants from the Colonial Treasury "in aid of the undertaking" of any sum not exceeding the amount of the private contribution and not exceeding £1,000, on a certain condition as to rate of expenditure, and without restriction of the bounty of the legislature itself to

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the limit of £1,000, sec. 1. Further, this Act authorized the Executive to grant from the Treasury stipends towards the support of "the ministers of religion duly appointed to officiate in any Churches or Chapels to be erected in manner aforesaid," or in any Churches or Chapels already erected, and of which trustees should be appointed, for their maintenance by virtue of this Act. The rates of stipend were to be proportioned to the adult population living within a reasonable distance of the proposed Church or Chapel, and desiring to attend the services, the lowest being £100 a year and the highest £200, towards the support of any one "officiating minister of religion," sec. 2. There was a provision for the issue of increased stipends, proportioned to increases of adult population, "to the minister officiating at such Church or Chapel," sec. 4. There were other concessions and safeguards, which need not be detailed. Nothing in the Act was to be held to diminish the stipends or emoluments of chaplains or ministers theretofore appointed, or to affect the possession or occupancy of any glebe or land "possessed and occupied by or appropriated to the use of any such chaplain or minister."

The English *Church Temporalities Act*, 8 Wm. IV. No. 5, recited the *Church Building Act*, and that it was expedient to make further provision with regard to Churches, Chapels and ministers' dwellings of the United Church of England and Ireland for (*inter alia*) "*lawfully appointing and more particularly directing in what manner pursuant to the said Act the revenues to arise under the several trusts shall be applied*," and generally for regulating the affairs of such Churches, Chapels, and minister's dwellings. It then (sec. 1) provided for the mode of appointing original trustees where Churches, Chapels, burial grounds or glebe lands had been provided by private beneficence or where subscriptions of £300 or more had been raised for or toward such purposes, such trustees to be members of the Church, and their names to be registered in the Diocese. There were provisions for disqualifications by absence or otherwise (sec. 3), for the filling of vacancies in the trust (secs. 4, 5 and 6), for setting apart free seats and the renting and choice of the rest (secs. 7 and 8), for the election or nomination of churchwardens (secs. 9 and 10), for the powers of churchwardens

in the getting in and expenditure of seat rents, subscriptions and donations in salaries, repairs, fencing, drainage, &c., and the provision for the proper celebration of worship (sec. 11), for the keeping of accounts by churchwardens (sec. 12), for the qualification of seat-holders and subscribers to vote at elections of trustees and churchwardens (sec. 13), for raising seat-rents when necessary (sec. 14), for the removal of seat-holders defaulting or disturbing worship (sec. 15), for the nomination of the Bishop of Australia and his successors as sole trustee (secs. 16 and 17), and for requiring a licence as a condition precedent to the right of a minister to officiate. Sec. 20 gives the officiating minister, while licensed, free access to the Church or Chapel in respect of which he is licensed and to the burial ground belonging thereto, and the free use, possession and enjoyment of the minister's dwelling house and glebe and of the rents and profits thereof, but without the right of property in the residence. Sec. 21 has been set forth very fully by the Chief Justice. Sec. 22 relates to trustees' accounts, and secs. 23 and 24 to monuments in Churches, Chapels, churchyards and burial grounds. The temporalities of other denominations were dealt with in separate Acts, and clearly there was no State Church in New South Wales.

First, as to the provisions of sec. 21 of the Act of 8 Wm. IV., I am of opinion that the annual payments therein directed to be made to the officiating ministers of St. Phillip's and of another church " in the same township or district," namely, Holy Trinity, constituted an endowment in each case. As Lord *Cranworth* L.C., said in *Edwards* v. *Hall* (1) :—" By the endowment of a school an hospital or a chapel, is commonly understood . . . . the providing of a fixed revenue for the support of these institutions." I think that meaning extends to the providing, out of rents and profits, of a fixed revenue for the support of the minister officiating in a particular Church and the ministers who succeed him in that office, when the provision is couched in terms importing permanency. The words " officiating minister " are used here in the same sense as " minister of religion " and " officiating minister " in the *Church Building Act* of 7 Wm. IV., passed in the previous year, and one of the declared objects of

(1) 6 D.M. & G., 74, at p. 87.

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which was the "maintenance of ministers of religion," that maintenance being by the whole tenor of the Act an object to be permanently provided for. The 21st section of 8 Wm. IV. dealt with the glebe land belonging to any Church or Chapel. If the circumstances did not warrant or oblige the trustees to act under sec. 21 the glebe land was, under sec. 20, to be and remain in the occupation and enjoyment, with the residence or parsonage, of the clergyman licensed to officiate so long as he should be so licensed, and that person was in sec. 20 termed "such officiating minister." This section shows throughout that it is the clergymen successively licensed to officiate in the Church, each during the continuance of his licence, who are to possess and enjoy the parsonage and the glebe and the rents and profits thereof. But when the substituted processes under sec. 21 are undertaken by the trustees the officiating minister is to have £150 yearly, "as and for an allowance for the said glebe," and as the glebe was a permanent provision, so clearly was that. The parsonage and glebe are themselves in England an endowment of the incumbency, and notwithstanding that this Act makes changes in the use and management of glebe lands, its framers clearly had in mind the quality and character of a glebe, and provided that any businesslike application of such a property in part to the raising of rental revenue for purposes of Church building and the like should not prevent due provision for a permanent stipend to every officiating minister of that Church and of such other Churches as the rents should be found adequate to assist in erecting or enlarging. As, then, the section makes permanent provision out of the rents towards the annual income of the officiating minister from time to time of St. Phillip's, what reason is there to doubt that the provision of a *stipend* of the £100 *yearly* to the officiating minister of the "Church . . . in any other place in the same township or district"—in this case Holy Trinity—is intended to be similarly permanent? I confess I fail to see any: and in this instance the intention is made clearer still by the use of the words "for the time being" to show that it is each successively officiating minister of this second Church who is to receive the stipend. Now I come to the provision for the officiating ministers of what have been called the

"outside" Churches, or in the words of the Act, "other such Churches or Chapels," including the case of St. John's Bishopthorpe. The words used are: "as often as the rents issues and profits of any such glebe land . . . will admit thereof upon trust . . . to apply the same in or towards . . . endowing the officiating ministers thereof respectively to the extent of £100 yearly as aforesaid." These words came under the consideration of the Chief Judge in Equity in 1901 in the case of *Dunstan* v. *Houison* (1), in a suit against the now respondent trustees in respect of this glebe land, and his Honor held that the trustees had no power to bind their successors, or to grant a permanent endowment out of the future rents and profits of the glebe land. Ordinarily, no doubt, the powers of trustees are limited, as his Honor held, in the case of trusts under deeds, wills or settlements, in the absence of express and lawful authority. But here we have the express authority of the legislature. The enactment says that in certain events, which have happened, the trustees "shall and may receive the rents, issues and profits" upon trusts, of which one is defined in the words quoted. If that trust is satisfied by the giving or withholding of payments *pro re natâ*, varying and casual when given at all, what is the meaning of the words "endowing to the extent of £100 yearly as aforesaid"? It must not be forgotten that twice already in the same section the legislature had made permanent provision which, although the very word had not been used, had the effect of endowing the successive ministers of the principal Church and of another "in the same township or district." This was the one remaining provision as to stipend. In view of the two others, which were permanent without the use of the word "endow," what is there in the terms or the circumstances to make the third temporary or casual, while to it alone of the three the word peculiarly importing permanency is applied? To me it is as if the legislature had said, "we have provided a fixed and permanent revenue for every minister who shall officiate as the incumbent of the Church to which the glebe is annexed. We have done the like for the successive ministers of the other Church in the same township or district to the building (or enlargement) of which

(1) (1901) 1 S.R. (N.S.W.) (Eq.), 212.

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you are to contribute. It is for you to do the rest. Select, as often as your glebe revenues admit, other Churches or Chapels, and provide permanently to the extent named an income for their successive ministers. We have in effect endowed the two incumbencies we began with. We tell you to endow others according to your means, and to make sure that you will do it, we use the word 'endow.' "

But the trustees are between two fires. Are they to conclude that the direction or authority to "endow" does not entitle them to make a permanent fixed provision; or are they to believe that they cannot endow by making an appointment or allocation out of the glebe rents and profits for that purpose, but must wait till slowly and laboriously, by setting aside and investing surplus rents, they reach a capital sum of savings, the interest of which may provide £100 a year for one stipend, then £100 a year for another, and so on? I have endeavoured to answer the first of these questions in favour of the larger power. In doing so I must be taken to disagree, with very great deference, from the conclusion reached by the learned Chief Judge in *Dunstan* v. *Houison* (1). As to the second question, I think there is no great difficulty. The legislature has already endowed the two officiating ministers first mentioned, and their successors, to the extent of £150 and £100 a year respectively by allocating those annual sums out of the glebe rentals. It directs and empowers the trustees to "endow" the successive officiating ministers to the extent of £100 yearly "as aforesaid." To endow "as aforesaid" means, I think, to make permanent provision for yearly payments out of the glebe rentals. The closest approach to the process adopted by the legislature which is open to the trustees is the execution of some document setting apart one or more annual sums, each of the extent named, out of the glebe revenues, for officiating ministers. That is in effect what they have done, and I think that their action is in the nature of an irrevocable appointment, under which the rents stand charged *pro tanto*, subject to the two prior endowments, in the absence of anything intervening to destroy its effect. To set aside savings at interest and so in the course of time to raise an endowment

(1) (1901) 1 S.R. (N.S.W.) (Eq.), 212.

fund was within the competence of the trustees, but it was not the only course open. To accumulate capital in that way was not necessary, because the rent-producing glebe was obviously a capital properly available to provide the income, which could with equal propriety be set apart or allocated, to use Dr. *Cullen's* term, for the authorized purpose.

The questions raised as to the Sydney Church Ordinance and the validity of its 34th clause involve consideration of the position of the Church in this State. The Statute book shows amply that the Church of England and Ireland after the constitution of a legislature never was, nor was any other religious body, an established Church. "The United Church of England and Ireland is not a part of the Constitution in any Colonial Settlement, nor can its authorities or those who bear office in it claim to be recognized by the law of the Colony, otherwise than as the members of a voluntary association." *In re Lord Bishop of Natal* (1). "The Church of England, in places where there is no Church established by law, is in the same situation with any other religious body—in no better, but in no worse position, and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them." *Long* v. *The Bishop of Capetown* (2). "It cannot be said that any Ecclesiastical Tribunal of jurisdiction is required in any Colony or Settlement where there is no established Church, and in the case of a settled Colony the Ecclesiastical Law of England cannot, for the same reason, be treated as part of the law which the settlers carried with them from the mother country." *In re the Lord Bishop of Natal* (3). In *The Lord Bishop of Natal* v. *Gladstone* (4) Lord *Romilly* M.R. said :—"But if certain persons constitute themselves a voluntary association in any Colony as members of the Church of England, then, as I apprehend, they are strictly brethren and members of that Church, though severed by a great distance from their native country and their parent Church. They are bound by the same doctrines, the same rules,

(1) 3 Moo. P.C.C. N.S., 115, at p. 148.
(2) 1 Moo. P.C.C. N.S., 411, at p. 461.
(3) 3 Moo. P.C.C., N.S., 115, at p. 152.
(4) L.R. 3 Eq., 1, at p. 38.

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ordinances, and discipline. If any recourse should needs be had to the civil tribunals, the questions at issue must be tried by the same rules of law which would prevail if the question were tried in England—with this exception only, that the tribunal would probably be different, and that, as the Statutes which constitute certain ecclesiastical tribunals in England do not extend to the Colonies, the question would have to be determined by the ordinary civil Courts which administer justice in the Colonies."

In this state of the law the advantages of closer and better association became obvious, and at a conference of "the Bishops and clerical and lay representatives of the existing Dioceses" held in April 1866 certain "articles and provisions" were adopted as "Constitutions for the management and good government" of the Church within New South Wales. From the cases above cited it will be plain that of themselves these Constitutions could only have consensual force as an agreement of members of the Church among themselves. But more than that was necessary, and in the same year the Parliament of the then Colony passed an Act, 30 Vict., reciting the holding of the April conference, the acceptance of the Constitutions, and the ineffectiveness of that agreement in the management of Church property without legislative aid. Then it was enacted that the articles of the Constitutions and any rules or ordinances to be made thereunder should for all purposes relating to the Church's property in New South Wales be binding on the members of the Church, and all persons then or thereafter holding any real or personal estate in trust for, on behalf of, or for the use of the Church should hold it subject to such rules, and be bound by them as if they were contained in the conveyance or trust deed. But from this provision such real or personal estate was expressly excepted, so far as it might be the subject of any express trust and then so far as such express trust should not extend. This exception materially affects the present case, for the St. Phillip's glebe lands were subject to express trusts, namely, those of the deed of grant and of the Church Acts, and therefore any Ordinance passed under the authority of the Constitutions, however valid otherwise, could not operate to interfere with these trusts. The 30 Vict. further provided that no rule or Ordinance to be made under the Constitutions

should be in contravention of any law or Statute in force for the time being, and that within three months of the passing of the Act (which was 4th October 1866), a copy of the Constitution should be recorded in the Supreme Court. This was duly done on the 30th of the same month.

Clause 3 of the Constitutions, which provided that the Synod might make orders &c. as to the order and good government of the Church, and the regulation of its affairs within the Diocese, including the management and disposal of all its property, moneys and revenues, made it a condition that such orders should not divert any specifically appropriated or the subject of any specific trust, or interfere with any vested rights.

The Sydney Church Ordinance of 1891 was passed under these Constitutions, and the Act 30 Vict. cl. 34, on which the trustees place some reliance, appears to me, so far as it at its date interfered with the trusts of the grant, and among them the provisions of the Church Acts, not to have had any effect on the interests acquired by the clergymen who are respectively appellants, first, because of the exception in sec. 1 of the 30 Vict., the glebe lands being the subject of express trusts, and next, because the 34th clause was in respect of those lands an interference with the vested rights already acquired by the appellants mentioned. Thus in both ways the power of the Synod to deal with the property the subject of these trusts was fettered. But as to the general subject matter included within the property of the Church it was unfettered. The fetters in each case arose out of the operation of the Church Acts, for without them the Synod would have had power to deal with all glebe lands. Conscious of these fetters and acknowledging them, the Synod provided by the 41st clause of the Sydney Church Ordinance that it should come into operation when, and not before, the Church Acts already mentioned, and a later one, 21 Vict. No. 4, should cease to be in force in the Diocese. And the Synod declared in advance that it assented to such repeal. I need not stay to consider 21 Vict. No. 4, for it merely authorized the leasing of glebe lands for a larger term by the trustees. It is contended by the Attorney-General that the 34th clause of the Ordinance is altogether void on the ground that there was no legislative power to pass it in 1891, also that if not

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void it does not affect this case, as it applies only to the future. As to the argument that clause 34 is altogether void I quite agree with the distinction drawn by the Chief Justice. The inability of the Synod to deal unhampered with this matter did not arise from want of power to deal with the subject matter but from the fact that its action was impeded by difficulties of another kind, though arising outside its allotted sphere. If these impediments were removed the Synod could act freely, because its power over the subject was complete. Hence the repeal of the Church Acts would leave it free as to this part of its subject matter. In these circumstances it was competent to the Synod, as a body whose determinations had a force contractual rather than legislative, and not the less contractual because of the Act 30 Vict., to arrive at a consensus by this clause so as to agree that, as soon as Parliament should repeal the Church Acts and not before, a new scheme of trust management should come into operation. But the repeal of the Church Acts did not remove all difficulties from the Synod's path, for sec. 2 of the *Church Acts Repealing Act* of 1897 can scarcely be held to have given it an entirely clean slate. I pass over at this point the Acts for special purposes of 1881, 1887 and 1889, which do not directly affect the questions in this appeal. As they were passed for purposes differing from those of the *Church Acts Repealing Act* and with a different context, though they may give some aid in construction, it is but slight.

Now as to the 2nd section of the Act of 1897. There is no doubt that the purpose for which these lands were then held—that of the glebe lands of St. Phillip's—was a parochial Church purpose. The grant appropriates them to that purpose "and to no other purpose whatsoever," but nevertheless "in conformity with the provisions" of the Church Acts, which as to future application but not otherwise the repealing Act sweeps away. They are not "lands the management of which is *specially* provided for" by Synod Ordinance or Act of Parliament. They are, therefore, to be held subject to the provisions of any Ordinance or Ordinances in force in the Diocese. Clause 34 is in force, but not so as to upset things already done. For (1) the repeal is not expressly or necessarily retrospective in operation; (2) the preamble recites that the Ordinance to which the repealing Act

purports to give force, ordains application to Parliament only for a repeal "without prejudice to anything done under the said (Church) Acts before the repeal thereof"; and (3) it is also recited that in the repealing Act provision should be made for bringing under the provisions of any Ordinance, which might be from time to time passed, lands held for the benefit of the Church . . . whether . . . "held upon the trust of the repealed Acts or upon any other trusts, but without prejudice to anything done under such trusts respectively before the said repeal." The force of clause 34 therefore is limited both as to things done under the Church Acts before their repeal, and as to anything done under the trusts before the repeal. That is enough for the purpose of the clergymen appellants. But the lands are to be held freed and discharged from the provisions of the trust deeds (here the grant of 1842) and of the Church Acts—that is, I take it, from 24th November 1897—but not diverted from the purposes to which the said lands are respectively devoted. The purposes are undoubtedly those, primarily, of the glebe annexed to St. Phillip's, as expressed in the grant, but, as to the future, no longer in conformity with the Church Acts. That is, of course, save as to anything already done under those Acts, such as the binding appointments by which the several stipends were allocated by the trustees. What has been done in the past is to my mind in execution of the purposes to which the lands (in which term the issues of the lands must be included) have been devoted by the grant. For the grant devoted them to the glebe purposes *in conformity with the Church Acts*, which made definite provision in that behalf. So that I take "purposes" here to be not merely glebe purposes in general, but purposes created within the binding appointments made by the trustees affecting the lands or rents in conformity with the provisions of the Church Acts. Such appointments are to stand. Subject to their standing the Synod has, I think, power to deal with the land in any way within the purpose of a glebe, provided (see Constitutions, cl. 3), it does not divert any Church property moneys or revenues specifically appropriated or the subject of any specific trust, and does not interfere with any vested rights. This, again, applies to save the specific trusts in favour of the appellant clergymen, and their vested rights. The Synod had not any

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greater ordinance-making rights than these under its Constitutions of 1866, and the *Church Acts Repealing Act* has not made them any greater. To that purpose the mind of Parliament was not applied.

Reading then the Ordinance in the manner I have explained, glebe purposes seems to me to be such as are mentioned in the *Church Temporalities Act*, and the Ordinance, if we give the meanings I conceive to belong to them to the terms "freed and discharged," &c. and "not diverted" &c., appears to be good so far as it affects dealings which do not even in their inception impair the specific trusts in favour of the appellant clergymen or their vested rights. The purposes are parochial, and they are those of a glebe. The general purposes being preserved, things which are merely incidental cease to hamper the trusts: such as limits of stipends, benefit of particular Churches in that way, and many matters which are detailed, not suited to the freedom given to carry out a general parochial purpose. On the other hand, in observing that general purpose I should say the Ordinance was good as to future acts in regard to the building of Churches, the building of a minister's residence in what may be called the original parish and in other parishes, the enlargement of the original parish Church and (as there specified), another Church in the original parish and the like; but I do not see in what way schools, which I take to mean religious schools, come within the purpose.

I agree in the decree which his Honor proposes, in variation of that of the Supreme Court.

O'CONNOR J. The judgment of my learned brother the Chief Justice, in which I entirely concur, has dealt so fully with the various questions arising in this appeal that I do not think it necessary to do more than examine and determine the general principles on which the trustees should act in the matters now in controversy. In the circumstances that have arisen the duties of the trustees will depend upon the interpretation of sec. 21 of the Act 8 Wm. IV. No. 5, and the nature of the appropriations made by the trustees in pursuance of that section before 1897, the interpretation of the Church of England

Constitutions 1866 and of the Church of England Ordinances 1891 passed under the authority of those Constitutions, and of the *Church Acts Repealing Act* 1897.

The statement of claim frankly puts before the Court all the information now in the trustees' possession as to the transactions of the trust from the beginning. As to some gaps and omissions it is necessary to draw inferences, and I have no hesitation in coming to the conclusion upon the facts stated that the trustees had before 1897, in pursuance of the Act 8 Wm. IV. No. 5, made specific appropriations out of the trust funds as follows:—

> To the officiating minister for the time being of St. Phillip's Church, £150 yearly; of Holy Trinity, £100 yearly; of St. Luke's (no longer in existence), £100 yearly; of St. John's Bishopthorpe, £100 yearly; and that in 1882, out of the surplus of rents after meeting these appropriations, they further specifically appropriated as "an endowment," to use the words of the section, £50 yearly towards the stipend of the minister for the time being of the eight new Churches whose present incumbents are parties to these proceedings.

It is to my mind clear that these appropriations were made not merely as benefactions to be applied or not in the future as the trustees thought fit, but were made as a permanent endowment to the incumbent for the time being; in other words, a permanent provision for the office of incumbent in connection with each of these Churches.

Some years afterwards the trustees seem to have taken a different view of their duties, but that cannot affect the rights conferred by their deliberate and intentional appropriation of the endowment.

A question was raised during the argument as to whether in making appropriations for ministers' stipends in connection with new Churches the trustees were bound to equip each establishment complete with Church, minister's residence and stipend. The opinion of the eminent lawyer, Mr. *Gordon*, referred to in the statement of claim, upon whose advice the trustees acted in 1882, has on this point, as in all others with which he dealt, my entire concurrence. If there were any doubt what the intention

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of the legislature was in making that provision it should be set at rest by a consideration of the circumstances with which the legislature was then dealing. Bishops of the Church of England in New South Wales then held their commissions directly from the British Government, and the law and usages of the Church so far as they could be applied in a new country were those of the Church of England in England. In that country permanent provision for the clergyman's stipend was so inseparable from the idea of the establishment of the Church in which he was to officiate as to be embodied in Church law. The law was subject to exceptions in cases of necessity, but the importance which the Church attached to the inseparability of Church building, and a permanent provision for officiating clergymen, may be gathered from the following quotation from *Phillimore's Ecclesiastical Law* of the Church of England, vol. II., page 1759:—

"And after a new church is erected, it may not be consecrated, without a competent endowment. And this was made a law of the Church of England in the 16th Canon of the Council of London, 'A church shall not be consecrated, until necessary provision be made for the priest.' And the canon law goes further; requiring the endowment, not only to be made before consecration, but even to be ascertained and exhibited before they begin to build. And the civil law is yet more strict; enjoining, that the endowment be actually made, before the building be begun.

"Which endowment was commonly made, by an allotment of manse and glebe by the lord of the manor, who thereby became patron of the church."

It has also been objected that the endowments in fact made were not "endowments" within the meaning of the section, and the trust could not be complied with unless either a fund were established or lands were set apart, the earnings of which were to be devoted to the stipends in question. There is in my opinion no ground for such a contention. "Endowment" is not a word of art. It has acquired no special meaning in Church matters. It is an ordinary English word which would include any permanent appropriation of money for a specific purpose. The only

permanent appropriation at the time practicable having regard to the growing necessities of the Church in a new country was that which was made.

Such being the specific appropriations made by the trustees in pursuance of 8 Wm. IV. No. 5, the first question that arises is this: to what extent, if any, have these specific appropriations been affected by the *Church Acts Repealing Act* 1897? The effect of sec. 2 of that Act was to free and discharge the glebe lands from the trusts of the Statute of 8 Wm. IV. No. 5, and to substitute therefor the provision of any Ordinance or Ordinances in force for the time, that is to say, lawfully in force, but with this proviso, that the trustees should hold the land "not diverted from the purposes to which the said lands are respectively devoted."

There are therefore two limitations to the power of completely abolishing the old trust. The substituted trusts must be contained in an Ordinance lawfully in force, and they must not be such as to divert the lands from the purposes to which they were under the old trust devoted. For all purposes except the management of Church property the Synod is merely a voluntary association of the members of the Church of England. But its ordinances as to its property are recognized and made binding and effectual by Statute. Its authority to make such Ordinances is conferred by the Constitutions of 1866, framed and established under authority of the 30 Vict. (1866). That Act empowers the members of the Church of England and Ireland in New South Wales to frame Constitutions for the management of the Church property, and enacts that the Constitution and Ordinances made thereunder shall be binding on members of the Church, and that all persons then or thereafter holding any property in trust for the use of the Church shall hold it subject to the rules made under the Constitutions.

It has been objected on two grounds that there is no valid Ordinance in force relating to these lands. The first objection is to the whole Ordinance of 1891 on the ground that there was no power in Synod to make it at the time it was passed. By sec. 41 the Ordinance itself recognizes that at the time of its passing the Church Acts of 7 Wm. IV., 8 Wm. IV., and 21 Vict. No.

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4, stood in the way of its provisions having legal effect, because it expressly declares that the Ordinances shall not come into force until the Statutes are repealed. If Synod were constituted a deliberate body with powers of making laws or Ordinances binding on the public generally there would no doubt be ground for the objection. But it is not a body of that kind. It is a body representing the members of the Church of England, and is constituted for the management and good government of the Church in New South Wales. Its Ordinances are binding only on the members of that body and affect other persons only in respect of lands held or purchased from the Church of England in Australia. The members are duly represented by Synod. I agree with the distinction pointed out by my learned brother the Chief Justice between a power of legislation limited as to the subject matter and a general power of legislation unlimited as to subject matter, but restricted in operation by fetters arising *aliunde*. I can see no reason therefore why that body should not agree to an Ordinance to come into force at a later date when legal difficulties in the way of its being effective at the time of passing, that is the fetters arising *aliunde*, shall have been removed by Parliament.

The next objection is of quite a different character. The Act of 30 Vict. in declaring that the Constitutions and Ordinances referred to shall be binding on the members of the Church, and that all persons then or thereafter holding any property in trust for the use of the Church shall hold it subject to the rules made under the Constitutions, contains a limitation. Real and personal estate, the subject of any express trust, in so far as such trust may extend, are expressly excepted from the operation of the Act. The Constitutions themselves strictly observe this limitation, and in sec. 3, which empowers the Synod to pass Ordinances "in respect to the management and disposal of Church property and revenues," the exception is expressed in these words: "not diverting any specifically appropriated or the subject of any specific trust nor interfering with vested rights."

No Ordinance therefore could be lawfully made or be lawfully in force in so far as it purported to include lands coming within these exceptions, and general words in any Ordinance must be

taken as not applying to them. It is clear that the express appropriation made by the trustees before 1897 of stipends to the incumbent for the time being of St. Phillip's, Holy Trinity, St. John's Bishopthorpe, and the eight new Churches respectively, constituted express trusts within the meaning of the exception in the Statute of 30 Vict., and were specific trusts or specific appropriations within the meaning of the exception in sec. 3 of the Constitutions. It follows that the Ordinance can have no application to those trusts and that, there being no valid Ordinance in force applying to them, there is nothing to displace the old trusts under the Act of Wm. IV.

It has, however, been argued that the terms of sec. 2 of the Act of 1897 are so wide as to indicate an intention to sweep away the safeguards which the Act 30 Vict. and the Constitutions established thereunder had thrown round specific trusts and specific appropriations, and intended that all trusts should be in future administered in accordance with the will of Synod expressed in its Ordinances. Whether that is the true meaning of the section or whether Parliament has indicated in the last words of the section its adherence to the policy of preserving and maintaining interests already created by specific appropriations depends upon the interpretation to be placed on the word "purposes" as used in the sentence "but not diverted from the *purposes* to which lands are respectively devoted." "Purposes" is a general word; it has acquired no special meaning in connection with Church property or trusts; and it must be interpreted according to its ordinary meaning in the context in which it stands.

The word is wide enough to cover the general object of the trust, in this case glebe lands, the rent of which is to be applied to the objects for which glebe lands of a Church are usually set apart. It may be construed as meaning that and nothing more. On the other hand, its meaning may be narrowed as so to apply to every trust to which the lands are capable of being devoted. As to whether the word is to be taken as used in the broader or in the narrower sense, I shall discuss in dealing with the duties of the trustees in regard to surplus rents not as yet specifically appropriated. But where a portion of the rents has been

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specifically appropriated under the terms of the trust to endowment of ministers' stipends in connection with particular Churches it seems difficult to avoid the conclusion that the payment of those stipends are purposes to which the lands have been devoted. The word "devoted" is applicable no doubt to the "setting apart" of the lands effected by the original deed of trust, but it is also applicable to any permanent appropriation of a portion of the rents to any specific object by the trustees. The preamble indicates in my opinion that it was intended by the legislature to be so applied. It recites the Ordinance by which Synod conveyed to Parliament its request for enactment of the Act of 1897 "without prejudice to anything done under the said Acts before repeal thereof." Later on it is stated that the Synod's request to have provision made for bringing Ordinances under the Act was to be without prejudice to anything done under "such trusts respectively before the said repeal."

In a case such as this, where Parliament is moved by an association of individuals to give effect to their wishes in the management of their property, the intention indicated in the preamble may always be relied on as a safe guide to the intention of Parliament. Reading the last words of sec. 2 in the light of the preamble, I find it impossible to escape from the conclusion that the legislature, in using the words "purposes to which the said lands are respectively devoted," intended to include specific appropriations for endowment of stipends in connection with particular Churches. I am therefore of opinion that the position of the appellants, incumbents of Churches endowed with stipends for ministers under the trusts of 8 Wm. IV. No. 5, remains unaffected by the Act of 1897, and that they are entitled to be paid the full amount of their stipends in the order of the several appropriations so long as they remain respectively ministers of the Churches to which the stipends are attached—subject, of course, to the adequacy of the glebe land rents for that purpose.

I come now to trustees' duties in respect of surplus rents not appropriated at the time when the Act of 1897 come into force, the aspect of the administration of the trust which the Attorney-General represents before this Court. Here we get away from all questions of specific trusts, and are concerned only with the

future administration of the trust funds. Except in so far as any may be excepted by the last words of sec. 2 of the Act of 1897, the trusts will be administered under Article 34 of the Ordinances of 1891. I see nothing on the face of that Article that goes beyond the terms of the trust except that direction to apply portion of the rents to "*schools.*" Sunday schools and schools for the teaching of religion would, I have no doubt, be within the terms of the trust, but not schools for general education. There is no word or suggestion in the trust deed or in the Act of 8 Wm. IV. which justifies the appropriation of any portion of the rents to purposes of a general educational character, and I see no reason why the reference to schools should not be eliminated without affecting the validity of the rest of the Article.

The remaining question is as to what extent are the hands of the trustees administering the trust under Article 34 tied by the injunction against diverting moneys "from the purposes to which the said funds were respectively devoted." Here also the determination of the controversy depends upon the meaning to be placed upon the word "purposes." I have looked carefully through the Church Acts of 1887 and 1889 in which the word "purposes" is used, but they do not throw much light on the sense in which the word is used in the Act now under consideration. The object of the Acts was to confer power to alter the particular purpose to which lands had been devoted by "consecration or other express trust." In the Act of 1889 the new purposes which take the place of the old are described as "substituted purposes." Speaking generally, therefore, in those Acts "purposes" is used as meaning specific trusts. That is the meaning which fits the subjects of those Acts. So here much light is thrown on the sense in which the word is used by the subject matter of the Act of 1897. It is to be gathered from the Statutes, Ordinances and Constitutions recited or referred to in the preamble that the Church of England in the administration of its affairs had found its administration hampered by the hard and fast obligations of the old trusts, and had devised a comprehensive scheme of dealing with its property for which it asked parliamentary sanction. That scheme is set forth in Article 34,

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all of which, I think it fair to assume from the recitals in the preamble, was within the knowledge of the legislature, and I further gather from the preamble that it was the intention of Parliament to empower the Church to carry that scheme into effect.

If the word "purposes" is to be read as including every specific trust to which the trustees were authorized to apply the fund, it is difficult to see that much advance would be made in getting away from the hard and fast lines of administration which had become unsuitable to modern needs. The intention of the legislature, as indicated by the Act itself, can be made effectual only by interpreting the word "purposes" in the widest sense it will reasonably bear consistently with the preservation of the specific appropriations which I have already dealt with. In that wide sense the purposes of the trust in this case was for glebe lands attached to St. Phillip's, with a power to apply surplus rents for similar purposes in parishes outside St. Phillip's. The specific methods of appropriation were also purposes in the narrower sense. But full meaning can be given to the Act of 1897 only by reading "purposes" in the wider sense.

It follows that, in my opinion, the trust to be administered under Ordinances in future may be administered in the terms of the Ordinances so long as it is kept within the limits of the purposes to which glebe lands are ordinarily devoted. Taking a view, therefore, of the whole ground covered by the argument, the duties of the trustees may be summed up in a few words. Treat all appropriations duly made in accordance with 8 Wm. IV. No. 5 as endowments attaching to the incumbent for the time being of the several Churches endowed, pay them in full in the order of endowment so far as the rents will permit. Subject to those payments apply the rents in future in accordance with Article 34 or such other Ordinance as may take its place, always observing the injunction not to apply the rents to any object which is outside the usual purposes of glebe lands.

For these reasons I am of opinion that the decree of the learned Chief Judge in Equity must be varied. I agree in the form of the variation of declaration set forth in the judgment of my learned brother the Chief Justice, with whose view as to

costs coming out of the corpus and as to the order for their payment I entirely concur.

Isaacs J. This case is concerned principally with the interpretation of one section of an Act of Parliament, viz., sec. 2 of the *Church Acts Repealing Act* 1897. The land in question was without doubt on 24th November 1897, and immediately before the commencement of the Act, held by trustees upon trust for a parochial Church purpose in connection with the Church of England in New South Wales. Its management was not then and is not now specially provided for by Ordinance of Synod or Act of Parliament. It therefore falls within the operation of the section, and is by legislative declaration held upon the following conditions:—(1) Subject to the provisions of any Ordinance or Ordinances in force for the time being in the Diocese; and (2) freed and discharged from the provisions of the trust deeds and the Church Acts; but (3) not diverted from the purposes to which prior to the Act it was devoted.

Each of these three conditions, in view of the elaborate and able arguments addressed to us for which I desire to express my indebtedness to learned counsel, requires some elucidation at the hands of the Court.

The first condition compels consideration as to the nature of an Ordinance in force respecting Church property. Disregarding for the present the effect of the other two conditions and treating the question as arising immediately before the Act of 1897, the matter rests upon the effect of the Act of 1866 and the Constitutions therein referred to. The Synod's power may be thus stated:—

(1) It could make Ordinances in respect of the management and disposal of all Church property (Constitution 3); but

(2) No Ordinance could—

(*a*) Affect any express trust (Act of 1866, sec. 1). (Act of 1881, sec. 5).

(*b*) Contravene any law or Statute in force (Act of 1866, sec. 2).

(*c*) Divert any property specifically appropriated or the

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subject of any specific trust, or interfere with any vested rights. (Constitution 3).

This power of the Synod was and is of a quasi-legislative nature.

The words of Lord *Cranworth* in *Forbes* v. *Eden* (1) appear apposite. His Lordship said :—" The Synod of a Church seems to me to resemble rather the legislature of a State than the articles of association of a partnership." He adds :—" A religious body, whether connected with the State or not, forms an *imperium in imperio*, of which the Synod is the supreme body, when there is not, as there is in the Church of England, a temporal head."

The learned Lord in his concluding words was, of course, speaking of the Church of England in the United Kingdom ; and as regards the Colonies the case of *Long* v. *The Bishop of Cape Town* (2) must be borne in mind in which the Privy Council laid down the rule that (3) " the Church of England, in places where there is no Church established by law, is in the same situation with any other religious body—in no better, but in no worse position ; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them." The language was approved in *Brown* v. *Curé &c. de Montreal* (4). Lord *Kingsdown* for the Judicial Committee went on in *Long* v. *Bishop of Cape Town* (5) to point out that any tribunal constituted by and acting under the authority of the rules is not in any sense a Court, but in effect an arbitrator, whose jurisdiction rests entirely upon the agreement of the parties. And indeed Lord *Cranworth's* words need the qualification added by Lord *Robertson* in the *Free Church of Scotland* v. *Lord Overtoun* (6), namely, that " it was not laid down as law that powers of legislation are necessarily inherent in every dissenting body, this being in each case a question of fact. But Lord *Cranworth's* remarks make per-

(1) L.R. 1 H.L. Sc., 568, at p. 584.
(2) 1 Moo. P.C.C., N.S., 411.
(3) 1 Moo. P.C.C., N.S., 411, at p. 461.
(4) L.R. 6 P.C., 157, at p. 208.
(5) 1 Moo. P.C.C., N.S., 411, at p. 462.
(6) (1904) A.C., 515, at p. 688.

fectly clear that what he is speaking of is entirely internal regulation."

The extent of the Synod's powers as between the members themselves rests then primarily on the terms of the compact, but the nature of those powers so far as they exist is of the legislative order. And Parliament in 1866, having before it the *Cape Town Case* (1) which was decided in 1863, thought and stated it to be necessary, in order to affect the property directly by Ordinance of Synod, that an Act should be passed expressly declaring the binding character of rules and Ordinances duly passed, and limited as provided by the Act.

In 1881 when Parliament passed the *Church of England Trust Property Incorporation Act* 1881 providing for the constitution of corporate trustees of Church property, it recited that certain "powers are conferred" on the Synod of managing Church property.

Therefore the validity of any Ordinance relating to Church property must, as I conceive, be tested by ascertaining whether it transcends the legislative power conferred by Parliament. It will be convenient to deal at once with Article 34 of the Sydney Church Ordinance 1891. In my opinion that Article was *ultra vires* when passed, because its provisions if declared to operate immediately would have been clearly in contravention of the Church Acts, and would not then have been called into life by the mere repeal of those Acts. The postponement of their operation until such repeal cannot, as I conceive, add greater force to them than they otherwise would have because no power is given to make such provisions.

The Synod possessed delegated authority of a strictly limited character, to be exercised in accordance with existing law, and not an authority to legislate upon a basis of conjecture that Parliament might alter its mind and enact different laws. The Church Acts were in 1891 to be regarded as permanent; and their provisions, so long as they existed, must have been regarded as setting limits to the Ordinances of Synod.

An enactment that has no present authority to support it is not law. Nor has Article 34 been validated by subsequent legislation. The claim to such validity must fail unless it can be

(1) 1 Moo. P.C.C., N.S., 411.

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shown that the Act of 1897 either by clear intendment declares the validity of the Ordinance: *Labrador Co.* v. *The Queen* (1), or rests upon the necessary ground work that the Ordinance was authorized by the earlier legislation: *Attorney-General* v. *Clarkson* (2); *Attorney-General for Victoria* v. *Melbourne Corporation* (3), and is not opposed to the later. The recital does not fulfil those conditions. Parliament may have supposed the Ordinance to be valid under the prior law and so referred to it. But even that supposition does not conclude the Court or relieve it of the duty of ascertaining the accuracy of the legislative belief: *Mollwo, March & Co.* v. *Court of Wards* (4), and see the cases cited in *Craies' Statute Law*, 4th ed., pp. 420, 421.

No reliance then can in my opinion be placed on Article 34 of the Ordinance of 1891. Ordinances of the Synod to affect property under the Act of 1897 must, subject to any provisions of that Act, comply with the terms of the Acts of 1866 or 1881 and the Constitutions.

I now proceed to deal with the second condition of the Act of 1897, viz., "Freed and discharged from the provisions of the Trust deed and the Church Acts."

The important word here is "provisions." Supposing the Act went no further than the second condition, the whole of the provisions of the Trust deeds and the Church Acts—not merely the Trust provisions—would be set aside. Great or small, vital or trifling, each and every provision would vanish, leaving the Synod controlled by nothing in disposing of or managing the land, except the limitations already mentioned in its power of passing Ordinances. In view of the third condition of the Act of 1897, it is well to briefly refer to the nature of the provisions of the Church Acts. They related to Churches and ministers dwellings primarily established by private contribution. The first Act, 7 Wm. IV. No. 3, provided for State assistance by way of stipend, appointment of trustees, acceptance of private gifts and compulsory free seating accommodation. The second Act, 8 Wm. IV. No. 5, provided for the mode of electing trustees in certain cases, qualification of trustees, compulsory free seating, and fixation of

(1) (1893) A.C., 104, at p. 123.
(2) (1900) 1 Q.B., 156.
(3) (1907) A.C., 469, at p. 474.
(4) L.R. 4 P.C., 419, at p. 437.

pew rents, rights of subscribers to select pews, election and nomination of Church wardens, and, in default of such election, appointment, the powers of Church wardens to collect and recover pew rents, pay salaries, disburse expenditure in repairs of the Church or its furniture, accessories, &c., and the clergyman's residence, and provide for the orderly celebration of public worship; and to keep accounts; also for the qualification of electors of Church wardens, for the increase of pew rents when necessary, for the rights of pew holders to retain their seats, &c. This Act also declared in secs. 20 and 21, around which much of the argument in this case has centred, that the officiating minister should have certain rights in respect to the Church property, and that the benefits of glebe land should be extended in certain cases to the promotion of public worship beyond the particular Church to which it was annexed. For the moment I pass by these particular directions, except to say that in many instances the consent, and even the written consent, of certain persons was necessary.

The Act continued to make provision for the winding up and auditing of trustees' accounts, for the granting permission to erect or construct monuments and vaults in or about the Church land, and for conserving the rights of owners of the monuments and vaults.

The third Act, 21 Vict. No. 4, enlarged the powers of leasing possessed by trustees, and required them to furnish accounts to the Bishop. Those were the main provisions of the Church Acts forming a considerable body of regulations of substance and machinery affecting both the disposal and management of Church property.

From all these provisions, small and large, the second condition entirely frees the Synod. It is not merely freedom from "trusts" of the Church Acts, but from their *provisions*. Exactly the same word is used as in the first condition with reference to Ordinances. So, too, as regards any provisions whether of substance or form, fundamental or regulative, which may be found in any deed creating the trust. The second condition in itself knows no limitations.

Then we come to the third condition :—"But not diverted from

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the purposes to which the said lands are respectively devoted." The legislature has there used familiar and well established forms of expression in relation to such a subject, that have come down by a long and unbroken stream of authority. There ought not I think to be any real doubt as to the ordinary signification of the phrase in such a connection. It would come within what the Act of 43 Eliz. struck at and recited :—" Whereas lands . . . have been given, limited, appointed and assigned for relief of aged impotent and poor people . . . which lands . . . have not been employed according to the charitable intent of givers." Lord *Eldon* L.C. in *Attorney-General* v. *Whiteley* (1) says:—" The amount of the salary sometimes defeats the purpose. But does that give the Court power to apply the revenue of the foundation to other purposes than those to which the author of the charity has devoted it?" In the *Attorney-General* v. *Dean &c. of Christchurch* (2) *Sir Thomas Plumer* M.R. held it to be a breach of trust to give the master of a grammar school more than the £50 mentioned in the founder's will. That learned Judge drew no distinction between a trust and a purpose with regard to the application of the money. He said:—" I feel a difficulty in sanctioning what was an excess of the trust. The founder had fixed certain salaries; what was beyond that was to be applied to *other purposes*; and it would be dangerous to hold out to trustees a latitude of giving more than the founder has fixed. They were to have the management of the school, but that did not give them authority to transgress the limit that was fixed. If there was a surplus, it should have been expended for the benefit of the scholars, in providing them with books, paper, and other necessary articles; and if after that there was still a surplus, a scheme should have been laid before the Master for its application."

This decision was based on the view that on the proper construction of the will, the founder had fixed £50 as the limit, not to be exceeded. On that assumption the words quoted have a strong bearing on one branch of this case. On appeal to Lord *Eldon* L.C. (3), that decision was overruled as construction of the will only, the Lord Chancellor being of opinion that the direction

(1) 11 Ves., 241, at p. 249.
(2) Jac., 474, at p. 478.
(3) 2 Russ., 321.

in the will that the Master should have £50 a year was not a prohibition against increasing the salary. The principle of the judgment of the Master of the Rolls was untouched, and being untouched, was apparently accepted.

In *Attorney-General* v. *The Dedham School* (1) *Sir John Romilly* M.R. said :—" What this Court looks at, in all charities, is the original intention of the founder, and, apart from any question of illegality and various other questions, this Court carries into effect the wishes and intentions of the founder of the charity ; and where it sees that those intentions have not been carried into effect, it rectifies the existing administration of the charity for that purpose. If it cannot carry them into effect specifically, it carries them into effect as nearly as may be, and with as close a resemblance to them as it can."

Now, that the learned Judge in that passage is referring to the substance of the founder's intention, and not to mere ancillary regulation, becomes I think plain when the next paragraph is looked at. He said :—" With respect to the internal regulation and management of a charity, apart from any question of breach of trust, if the original founder of the charity has appointed a visitor for the purpose of seeing that certain parts of the internal regulation are carried into effect, this Court does not interfere with the visitatorial power, unless it finds *a breach of trust* ; *that is, something totally at variance with the views of the founder.*"

In *In re Church Estate Charity, Wandsworth* (2) the Court of Appeal dealt with a case which illustrates the matter very well. An estate had been held from time immemorial by the Church wardens of a parish for the repairs of the Church, although the precise terms of the gift could not be traced, and the rent of one field was originally applied to the repairs of the Church clock. A new Church was built and the income of the charity applied to both Churches. Then the parish was divided, the new parish contained the new Church. An Act of Parliament provided that the Court of Chancery might on petition apportion between the old parish and a new one formed out of it " any charitable devises or gifts which shall have been made or given to or for

(1) 23 Beav., 350, at p. 355. (2) L.R. 6 Ch., 296.

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the use of any such parish, or the produce thereof." The Court of Appeal, affirming the Master of the Rolls, refused to apportion. *Mellish* L.J. after quoting the words of the section, said (1):—"I am clearly of opinion that this section does not enable the Court *to divert any charity from the purpose* to which by the *foundation* of the charity it was to be *devoted*, to some other purpose." It will be observed that each of the three important words "divert," "purpose," and "devoted," found in the third statutory condition, appear in the one sentence of the learned Lord Justice.

He says further on:—"It appears to me that the real object of the charity is to promote religious purposes by having this particular Church kept in good repair." There the word "object" is used as synonymous with "purpose" in the former passage.

And one of the crucial questions in this case is whether similarly the real object or purpose of the charity is to promote the religious purposes of the Church of England within certain limitations marked out by the donor.

In the celebrated *Free Church of Scotland Case* Lord *Macnaghten* said (2):—"But after all the question at issue is one of a very ordinary description. It is alleged on the hand and denied on the other that there has been a breach of *trust* in the disposition of property. The complaint is that funds contributed and set apart for one *purpose* have been diverted to another and a different *purpose*. Such questions are of everyday occurrence, and the problem in each case must be solved by the ordinary commonplace inquiry. What was the *purpose* for which the funds in dispute were collected? *What was the original trust?*"

Lord *Davey* said (3):—"The more humble, but not useless function of the civil Court is to determine whether the trusts imposed upon property by the founders of the trust are being duly observed."

Lord *Lindley* said (4):—"There has been no breach of the trusts declared by the model trust deed."

Lord *Alverstone* said (4):—"The question raised by these

(1) (1) L.R. 6 Ch., 296, at p. 301.
(2) (1904) A.C., 515, at p. 630.
(3) (1904) A.C., 515, at p. 645.
(4) (1904) A.C., 515, at p. 703.

appeals is whether funds invested in the names of trustees, and real property held on trust for behoof of the Free Church of Scotland, have been dealt with in the way which constitutes a breach of trust."

The result, then, of the examination of the authorities quoted, which are only types of numberless instances, is this—that the charitable purposes to which any property is devoted consist in the destination of its application according to the intention of the donor; and that it is a breach of trust, or in other words, a diversion from those purposes, if the trust property is differently applied. "It shall be accounted and called a misemployment of a gift or disposition to charitable uses, in all cases where there is found any breach of trust, falsity, non-employment, concealment, misgovernment or conversion in and about the lands, rents, goods, money, &c., given to the *use*, against the intent and meaning of the giver or founder." *Viner's Abridgt.*, vol. 4, p. 493, citing *Duke's Ch. Uses*, 115. And the interchangeable character of the expression "use" and "purposes" is abundantly evidenced. "No agreement of parishioners, where several charities are given for several *purposes*, can alter or divert them to other *uses*, but they must be applied for the *purposes* for which they were given." *Vernon* 42 pl. 43 *Pasch* 1682, *Man* v. *Ballet* cited *Viner's Abr.*, vol. 4, 486; and so *per* Lord *Hardwicke* L.C. in *Cook* v. *Duckenfield* (1) and *per* Lord *Eldon* in *Attorney-General* v. *Dublin, Mayor of* (2). So plain indeed does this appear to me that, but for the argument addressed to us, that application of the property otherwise than as required by the trusts was not necessarily a diversion from the purposes to which it was devoted, I should not have bestowed any labour upon it. Even the Court has no power to vary the intentions of a donor regarding the destination of property, *Cujus est dare, ejus est disponere.* Unless it appears impossible to carry out his scheme, unless the particular objects and purposes marked out by him fail, no Court can appropriate his property otherwise than he has directed, and even then it must be *cy-prés.* Changed circumstances, not involving impossibility of compliance with the actual directions of the founder, afford no warrant for the Court's alteration of his scheme. As *Sir John*

(1) 2 Atk., 562, at p. 567.

(2) 1 Bl. N.S., 312, at p. 357.

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Romilly M.R. said in *Attorney-General* v. *Sherborne Grammar School* (1):—"It has no authority to vary the original foundation, and to apply the charity estates in a manner which it conceives to be more beneficial to the public, or even such as the Court may surmise that the founder would himself have contemplated, could he have foreseen the changes which have taken place by the lapse of time." The same principle has been enforced by Lord *Eldon* in *Attorney-General* v. *Hartley* (2). "If the founder thought fit to establish a grammar school, and if afterwards, from different notions about education prevailing, it becomes of less public benefit, that is not a ground upon which a Judge can alter it. He that created it had the right to determine its nature." And it requires very clear and cogent words in an Act of Parliament to enable a Court to make a fundamental change. See *Ex parte Bolton School* (3), a decision of Lord *Thurlow* L.C. I find no such words here.

The second condition would of course suffice, were it not for the third. But the third sustains the purposes of the trust, not some of the purposes, not the main purposes only, whatever they may be, in the opinion of a Court, but all the purposes to which the land is devoted.

If the words of the Act would not empower the Court to deviate from the purposes, and disappoint any of the objects—selected or selectable, and indicated by the donor as intended to be benefited—it is hard to see how the Synod can have any greater powers. One argument was presented by which it was sought to affect this result. It was said that unless some limitation be placed upon the ordinary meaning of the word "purposes" in sec. 2 of the Act of 1897, very little effect would be given to the legislation, and that in the altered circumstances of the country, the intention of the legislature must have been to give a wide effect to its new enactment. As to this, I am guided by what fell from *Sir Montague Smith* speaking for the Privy Council in *Cargo ex "Argos"* (4), and quoting the following extract from the *Sussex Peerage Case* (5):—"The only rule for the con-

(1) 18 Beav., 256, at p. 280.
(2) 2 Jac. & W., 353, at pp. 382-3.
(3) 2 Bro. C.C., 662.
(4) L.R. 5 P.C., 134, at p. 153.
(5) 11 C. & F., 85, at p. 143.

struction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the Statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver."

In its natural and ordinary sense as applied to the subject matter the word "purpose" is distinct enough.

If Parliament desired to limit it nothing could have been easier than to say so, and not leave it to conjecture. Giving to it its full meaning, there is still a more or less considerable body of regulation in each case according to the nature of the land and the terms of the deed which falls within the purview of Synod as will be seen by the abstract I have made above. But be it little or much I feel unable to go beyond the words in order to guess at the intention. "Changed conditions" is too vague and indistinct a measure by which to control plain words having at the present time a standard signification, and to subordinate them to some secondary meaning.

It was also said that the legislature in Acts in *pari materia* had impressed on the word "purposes" the more limited meaning.

Again I say it is highly improbable that Parliament would create for a word, so familiar and so important, a new sense without the clearest intimation, and even if by doubtful implication one were driven to limit it in some other Act it would I think be no justification for extending so serious a limitation to the Act of 1897.

But in the Acts of 1887 and 1889 I can discover no such limitation. For instance, sec. 2 of the latter Act declares that in every case in which lands are held upon any express trust, and the Synod thinks it impossible or inexpedient to carry out the "particular purpose or purposes to which the lands are by the trust devoted," the Synod may so declare by Ordinance, and thereupon the land may be dealt with "freed from the trusts." What is that but saying the land is to be freed from the trusts or conscientious obligations imposed upon the trustee of applying it to the declared purposes? There is so far no limitation. Then

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comes sec. 3. By this section Synod may direct the letting of lands either in furtherance of the trusts attached to the same—that is strictly the purposes to which the lands are devoted—or if they become impossible or inexpedient, then in futherance of some "substituted purposes" which the Synod have determined upon, and which take the place of the old trusts or purposes, and in the latter case of course freed from the original trust.

Sec. 9 emphasizes this in directing the application of the net proceeds where land is disposed of. They are to be applied, *inter alia, for the same purposes* as the land was previously held, unless the Synod thinks that impossible or inexpedient, and then for *some other purpose*, &c. Now the expression in sec. 9 "for the same purposes" extends to both classes of lands, those under sec. 2 which are affected by *new purposes*, and those under sec. 3 which retain the *original trusts*, and therefore I do not see how the word "purpose" can in this connection be distinguished from the word "trust."

I may at this point advert to the contention that a gift of the land to hold primarily for the benefit of St. Phillip's and in certain events to let, and apply the proceeds first for the benefit of St. Phillip's, next for Holy Trinity, and then for other objects, would not be a devotion of the *land* to any purpose but that of St. Phillip's. I do not agree with that contention. *Coke upon Littleton*, Inst. 1 Pt. 4 (b) asks—"What is the land but the profits thereof?" And as *North* J. said *In re L'Herminier*; *Mounsey* v. *Buston* (1)—"The power of appointing the income or fruit of a fund is, in my opinion, equivalent to a power over the tree which produces the fruit."

I am therefore not able to divide the purposes of the charitable trust in this case whatever they may be into two portions: one being those directly affecting the corporeal use of the land itself, and the other being the application of the profits of the land. In either case I apprehend they are purposes to which the land is devoted—that is affected by the charitable trust impressed upon it by the donor, and equally preserved by the Act of 1897.

What then are the purposes of this land, or in other words, to what application or destination has the donor dedicated the land

(1) (1894) 1 Ch., 675, at p. 676.

or its proceeds? see *Attorney General* v. *Rochester, Mayor of* (1), and *Attorney General* v. *Market Bosworth School* (2).

In this connection I may advantageously cite the words of Lord *Chelmsford* in *Attorney General* v. *Dean and Canons of Windsor* (3). Speaking of rules for the interpretation of gifts to charities his Lordship said:—"No case on this subject can, however, be a governing precedent for any other, because, as it was admitted, the whole doctrine of charitable gifts ultimately resolves itself into the intention of the donor. This was the view of the House in the *South Molton* (4) and *Beverley Cases* (5), in the latter of which it was said that 'each case, when we have to apply the doctrine, must stand on its own ground, and that whatever may be the force of certain expressions standing alone, the whole context of the instrument must be regarded to determine the meaning in each particular instance.'"

Following this direction, we have to examine the deed of grant. If when that deed is properly construed the only "*purpose*" to which the land is devoted is as a glebe for St. Phillip's, that in future—subject to what may be briefly called vested rights—is the only bar to the Synod's discretion; if, however, the purposes include the whole of the trusts mentioned in secs. 20 and 21 of the Act 8 Wm. IV. No. 5, then those purposes must for the future be observed. And if the latter be the true construction I am unable to see on the principles laid down in the cases I have cited, and especially in view of the close resemblances of the *Attorney-General* v. *Dean &c. of Christchurch* (6), how one can stop short at the objects already benefited, that is to say, Dr. *Cullen's* clients, and discharge the injunction of the statutory provisions after the limited sum of £100 a year has been applied to each of those beneficiaries, to proceed similarly with the surplus if any and fulfil the intention of the donor by advancing the interest of the Church in the particular way directed. To do otherwise in such event would, in my opinion, be a diversion of the trust property: it would be causing it to flow in channels different from those marked out by the giver.

(1) 2 Sim., 34.
(2) 35 Beav., 305.
(3) 8 H.L.C., 369, at p. 437.
(4) 5 H.L.C., 1.
(5) 6 H.L.C., 310.
(6) Jac., 474.

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The question then is what is the proper construction of the deed of grant? As to this I have been in the course of the case considerably exercised. The point ultimately turns on the effect of the phrase "in conformity with the provisions." The land is given "upon trust for the appropriation thereof as the glebe annexed to the Church of the United Church of England and Ireland as by law established erected at Sydney and known as St. Phillip's," and after reference to the Church Acts then in force, adds "and for no other purpose whatsoever." Disregarding for the moment the reference to the Church Acts, there can be no doubt whatever that the only purpose of the giver was as a glebe for St. Phillip's. True it is that while the Church Acts continued in force, they, by force of law, that is of the will of Parliament, would, even if not referred to, so far countervail and over-ride the will of the donor as to compel the trustees in certain events to perform and observe the trusts created and other directions enacted by the Statutes, so far as they apply to the case, that is so far as the facts brought the particular land within the purview of the Acts. But since the passing of the Act of 1897 those Church Acts have no further existence and no operation as laws. Whatever has been done under them stands (sec. 6, and see the recital); but as extraneous controlling factors, or enabling provisions, applicable to the case of a mere donation for the benefit of St. Phillip's, they have disappeared.

There remains the question whether the language of the deed so incorporates the provisions of secs. 20 and 21 of the Act 8 Wm. IV. No. 5 as to make them part of the deed as such independently of the Acts themselves, and to leave for all time these provisions operating notwithstanding the Acts have gone. In other words, suppose nothing more had been done by Parliament than a mere repeal of the Church Acts, and preserving matters done, would the trustees of the glebe have been entitled and bound to go on applying the surplus after satisfying Dr. *Cullen's* clients in selecting more Churches and equipping them on the same lines as heretofore, or would they have been bound, subject of course to specific and accrued existing rights, to hand over the surplus to St. Phillip's, or would they have been bound to go on acting in

some intermediate way upon some of the trusts declared by the 21st sec. of the second Church Act?

Did the Crown in employing the phrase "in conformity with the provisions" mean to incorporate secs. 20 and 21 *ipsissimis verbis*, so as to require all these provisions to be observed whether Parliament repealed them or not, or did it mean merely to require the trustees to conform to the Acts assuming them to continue in force? There are certain considerations of great weight. First the word "provisions" already considered is unlimited. It covers not merely secs. 20 and 21 of Act 8 Wm. IV. No. 5, but also all the provisions of purely regulative character both substantial and minute. All these have, under the words used, equal claim with the rest to be considered among the purposes.

Next I observe a few lines further on, in the second condition of the deed, the requirement "that they do and shall in every respect and at all times hereafter" conform to government regulations, &c. The words "conform to" clearly mean obey as law. Then, I have found in the class of legislation relating to Church lands the phrase "in conformity with"—as in the *Presbyterian Church Act* 1865, sec. 1; the *Church of England Incorporation Act* 1881, sec. 5, where it means in accordance with or in obedience to.

The same form of grant is recited in the "*St. John's Parsonage Act* 1866" with reference to the land granted for the erection of the Church itself, and the words "in conformity with the provisions" clearly do not add to the purposes in that case, but mean in accordance with the provisions. The latter expression is found later on in that Act. Lastly, I have found difficulty in giving effect to certain words of sec. 2 of the Act of 1897 if the reference in the deed to the statutory provisions is to be treated as an independent creation of trusts by way of incorporation. Those words are "and in the case of lands so subject (that is to the Church Acts) whether made so subject by reference in the deed or instrument creating the trust or otherwise."

It is thus the evident intention of Parliament that notwithstanding such reference the lands are to be free from the provisions of the Church Acts except as to purposes. In other

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words, even the word "purposes" does not include references in the deed to the Church Acts.

My earlier impression as to the proper construction of the deed has therefore been displaced by further consideration, and I have come to the conclusion that strictly the only "purpose" to which this land was "devoted" was as a glebe for St. Phillip's, and that, apart from what has been done before the Act of 1897, the Synod's power to direct the application of the land and its proceeds is limited, by (1) the prohibition against diverting the same from St. Phillip's and (2) compliance with the Act of 1866 and the Constitutions in passing Ordinances.

There still remains to be considered the legal effect of what was done by the trustees before the Act of 1897. The matter cannot be asserted to be free from difficulty, but as to this upon the whole I agree substantially in the view taken by the learned Chief Justice. The lease rents of the glebe land were in my opinion destined, by sec. 21 of the Act 8 Wm. IV. No. 5, as permanent provision for Churches in specified order of priority. Certainly that was so as to the £150 per annum for St. Phillip's, and with equal certainty as to the Churches of which the officiating ministers were "endowed"; and as these last could only be endowed after Holy Trinity was provided for, it follows that the provision for the last named Church must be regarded as permanent.

The word "endowing" leads to controversy. Webster's Dictionary includes in the definitions of "endow":—"To make pecuniary provision for; to settle an income upon;" and among the definitions of "endowment" I find "property, fund, or *revenue* permanently appropriated to any object, as the endowment of a Church, a Hospital, or a College."

Grant of tithes was always a well known form of endowment, and the permanent appropriation of a definite sum out of the rents of the glebe lands presents a strong resemblance to the endowment by grant of tithes. The legislature in using the expression "endowing the officiating ministers respectively to the extent of £100 yearly as aforesaid" meant it, as I think, as permanently appropriating to the officiating ministers respectively a portion of the rents not exceeding £100 yearly as a

stipend. Parliament intended to provide what has been called a regular reliable income for those ministers whose Churches were selected by the trustees. An analogous provision as to permanently appropriating income of lands and treating its application as endowment out of specific objects of public instruction is found in sec. 6 of the *Church and Schools Dedication Act No. 2* (1880) which should be read with the recital. The income is the endowment, and the income is distributed. When the pressing need in 1837 of provision for the celebration of public worship is considered, it seems to me highly improbable the legislature meant to insist on the accumulation of a capital fund which might from time to time produce more than the amount limited by the Act or less than the amount intended by the trustees; and particularly when the Church itself and possibly the minister's residence stood idle and empty. It is eminently an instance where of two possible constructions the effective one should be preferred. Such was the understanding acted upon, and I agree that St. Phillip's £150, then Holy Trinity's £100, and then the amounts allotted to Dr. *Cullen's* clients were and must be considered, both in fact and amounts, as permanent appropriations, endowments, and protected by the Act of 1897. The balance is in my view devoted to St. Phillip's as a purpose not to be divested. *Dunstan* v. *Houison* (1), cannot be supported. Subject to this the Synod is free to prescribe by Ordinance the management of the land.

I wish to add one word as to the Attorney-General. As he is a party to the proceedings I think he sufficiently represents all persons interested who are not represented. Lord *Redesdale* L.C., in *Attorney-General* v. *Dublin, Mayor of* (2) said:—"The King, as *parens patriae*, has a right, by his proper officer, to call upon the several Courts of Justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases."

The Attorney-General has by learned counsel representing him stated his view of the rights of the possible though unascertained objects of the charity after satisfying the claims of the parties

(1) (1891) 1 S.R. (N.S.W.) (Eq.), 212. (2) 1 Bl. N.S., 312, at p. 347.

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appearing, and the sufficiency of the representation, is not I think affected by the fact that the Attorney-General has not seen his way to argue against the priority of the claims of St. Phillip's, Holy Trinity and Dr. *Cullen's* clients.

HIGGINS J. It is unfortunate that in this case we have not before us any person interested in pressing the view adverse to the appellants. At the first hearing there was no party representing those who are interested in upholding the validity of clause 34 of the Sydney Church Ordinance—even those who have actually been receiving pecuniary benefits on the strength of that clause. At the request of the Court, the present incumbent of St. Phillip's was made a party before the second hearing, but not in a representative capacity. He was not made a defendant, in the time-honoured fashion of Chancery Courts, "on behalf of himself and of all other persons" having the same interest; and, as he had no duty towards such other persons, he took no part in the argument by his counsel, and merely submitted his rights to the judgment of the Court. Moreover, the Attorney-General has seen fit not to contest the claim of the appellants with regard to the important question as to the interpretation of sec. 21 of 8 Wm. IV. No. 5, and has not argued, by his counsel, in the interests of the broader powers of distribution favoured by *Simpson* J. in his decision in *Dunstan* v. *Houison* (1). The trustees are the plaintiffs, and ask for the guidance and protection of the Court in what they do; but they must now take the risk that the judgment on this motion for decree may possibly not bind all possible claimants—the risk of its being treated by other Churches or other persons as merely *res inter alios acta*. This very contingency has indeed already occurred as to the judgment in *Dunstan* v. *Houison* (1); for, as we are informed, that judgment is not binding on the present appellants.

The land was granted by the Crown on 13th Sept. 1842; "Church St. Phillip's; parish Petersham; county Cumberland." The grant was made to three trustees in fee simple "upon trust for the appropriation thereof as the glebe annexed to the Church of the United Church of England and Ireland as by law

(1) (1891) 1 S.R. (N.S.W.), (Eq.) 212.

established erected at Sydney and known as St. Phillip's in conformity with the provision of the said Act (8 Wm. IV. No. 5) and of a certain other Act of the Governor and Legislative Council of our said territory made and passed in the 7th year of the reign of His said late Majesty King William IV. . . . " (7 Wm. IV. No. 3) " so far as the same may apply to the trusts of this our grant and for no other purpose whatsoever."

The first important question is as to the meaning of sec. 21 of the Act 8 Wm. IV. No. 5. Now, that Act relates to endowments made by private persons for the benefit of the Church of England (sec. 51). After providing for the election of trustees of Church buildings, ministers' dwellings, burial grounds, or glebe grounds, provided by private donors for the Church of England, for the election and powers of the churchwardens, the rights &c. of the pewholders &c., sec. 20 provides that the clergyman licensed by the Bishop to officiate is to have free access to the Church and burial ground, and possess and enjoy the minister's dwelling house &c. and glebe belonging to such Church, and receive the rents, profits and issues. The land comprised in this grant, therefore, is in practically the same relation to St. Phillip's Church as the glebe land of a Church in England. It is an endowment of St. Phillip's; that is to say, it is a permanent appropriation of a definite property for the support of St. Phillip's; but it is vested in trustees, and not in the parson for the time being. The clergyman of the Church is to enjoy the glebe in person or receive its rents (if any); but, so far, he has not, nor have the trustees, any power to bind succeeding clergymen or succeeding trustees by any lease.

Then comes sec. 21. Omitting what is immaterial for the present, it provides that as often as the glebe land belonging to any Church may be improved by buildings or otherwise so as to admit of a greater profit yearly than £150 the trustees *may* —not *shall*—(with consent of the Bishop in writing) let any of the glebe land for 28 years; and then follow the trusts of the rents in this order—

(1) to *pay* to the officiating minister (of St. Phillip's) £150 per annum;

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(2) (with consent of the Bishop) to *apply* in or towards building or enlarging the said Church, or the minister's residence;

(3) (with consent of the Bishop) to *apply* in or towards building or enlarging a Church in the same district (Holy Trinity), and in *payment* of a stipend to the officiating minister for the time being;

(4) "and as often as the rents, issues and profits of any such glebe lands so let by the trustees will admit thereof upon trust with the consent of the Bishop in manner aforesaid to *apply* the same *in or towards* the building of other such Churches or Chapels and houses of residence for clergymen, and *endowing* the officiating minister thereof respectively to the extent of £100 yearly as aforesaid."

This fourth trust is the main subject of contention; although, I confess, I should have thought the meaning of the words to be simple and obvious—the only simple and obvious point in this complicated case. The obvious meaning is that just as private donors had endowed a Church out of their own money (or land), so the trustees of St. Phillip's were to endow a Church out of the trust moneys—out of the surplus rents of the glebe after making the payments previously prescribed—(in this case to St. Phillip's and to Holy Trinity). It is contended for the appellants, however, that the word "endow" means to pay a sum from year to year for ever, or to appoint a sum to be paid by the trustees from year to year for ever (so far, of course, as the rents admit after satisfaction of the prior trusts). It should be noticed however that neither the word "pay" nor the word "appoint" is used; but the word "endow," a word which has a very clear, distinctive, even technical meaning in connection with charities and with Churches. In this very section the words "pay" and "payment" are used where the perpetual series of payments by the trustees to ministers is meant, and the word "apply" is used where a single donation or casual expenditure is meant (*e.g.* in building a Church); and the words used in this fourth trust, as to what I may call the variable surplus, are "*apply* . . . *in or towards the* building of other such Churches . . . and *endowing* the officiating minister." It was not disputed before us by anyone that the word "endow" connotes permanency of provision for the Church

which is endowed. The words used by the learned primary Judge on this subject have been misunderstood; for he merely denied that the trustees of 1882 (for instance) could permanently appropriate the future surplus rents for all the years to come. The question before him was, in substance, must the trustees themselves pay the officiating minister of an outside Church out of the variable surplus, and then must they, and all future trustees, go on paying him (the minister from time to time) the same annual sum for ever (so long as the variable surplus is adequate)—no matter how circumstances may change? What is the meaning of the phrase "apply . . in or towards . . . endowing the officiating minister?" In the *Charitable Trusts Act* 1853 the word "endowment" is defined as "all lands and real estate whatsoever, and any charge thereon or interest therein, and all stocks funds monies securities investments and personal estate whatsoever, which shall for the time being belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof" (sec. 66). In other words, as *Davey* L.J. said *In re Clergy Orphan Corporation* (1):—"All property of every description belonging to or held in trust for a charity . . . . is an endowment within the meaning of the Act." This is in accordance with the definition of "endow" in Webster's dictionary:—"To furnish with money or its equivalent, as a permanent fund for support; to make pecuniary provision for; to settle an income on." It is also in accordance with the meaning of the word for centuries, in Statutes and in ecclesiastical documents relating in particular to the Church of England. For instance, the Act 1 Edw. VI. c. 14 enabled the King to confiscate lands granted for chantries—for singing masses for the repose of souls. By sec. 11 the Commissioners appointed were directed to assign such lands to make and ordain a vicar to have perpetuity for ever in a parish Church, "and to endow every such vicar sufficiently—the same endowment to be to every such vicar and his successors for ever." The person who endows does not keep up a perpetual series of payments, but he provides property or makes over some income or fruits of some property which he—the person who endows—owns or buys or causes to be bought. This is the meaning of

(1) (1894) 3 Ch., 145, at p. 151.

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the word "endow" even in the very case on which Dr. *Cullen* relied: *Inman* v. *Whormby* (1); and in the will set out in *Hunter* v. *Attorney-General* (2), ("apply the income . . . . in creating or contributing to the erection improvement or endowment of Churches . . . . or in paying or contributing to the salaries or income of rectors," &c.). Pope has the line "Die, and endow a college or a cat." In such a case the testator does not pay, but he provides some property, or some charge on property, (*e.g.* tithes), from which income shall come to the object endowed. Usually, if not always, the person who endows does not hold the property the subject of the endowment, or collect or pay the rents or fruits thereof; it is vested in the charity or in some one on its behalf. If the trustees of St. Phillip's pay the surplus income of the glebe land, which is the endowment of St. Phillip's, to the incumbent (say) of St. Barnabas, they do not thereby endow St. Barnabas, nor do they—the trustees—thereby "apply" the surplus income in or towards endowing St. Barnabas. Such payments, if an endowment at all, would be an endowment made, not by the trustees, but by the grantor of the glebe (in this case the Crown), although the beneficiary is to be named by the trustees. If they were an endowment at all, they would be an endowment made by the founder of the charity, not an endowment made by the donee of the power as in the case of an appointment under a power; but the section says that the trustees are to endow. In short, the trustees of Church A. do not "endow" Church B. when they pay surplus rents out of the endowment of Church A. to Church B., or to ministers of Church B.; and the trustees of Church A. do not apply the variable surplus "in or towards endowing" Church B. by treating the donor's endowment of Church A. as being their own endowment of Church B. To pay is not to endow; and to resolve to pay in perpetuity out of the endowment of Church A. is neither to endow Church B. nor to "apply" moneys "in or towards endowing" Church B. The resolutions of 15th December 1882 and 7th February 1883 do not constitute an application of the variable surplus of any year in or towards endowing outside Churches. In this case, therefore, the grammatical and ordinary meaning is

(1) 1 Y. & J., 545. (2) (1899) A.C., 309.

that the trustees, on each occasion when they find a surplus on hand, are to exercise a discretion—with the approval of the Bishop in each case—as to applying the surplus "in or towards the building" of (outside) Churches and ministers' residences and (in or towards) "endowing the officiating ministers thereof respectively." It is to be noticed—

(1) that the phrase is not "pay" or "apply in payment of" the officiating ministers.

(2) That the phrase is not "appropriate the surplus rents" or "appoint that so often as the rents &c. will admit thereof they shall be paid to the officiating minister of some Church to be selected once and forever"—which is the appellants' view in effect.

(3) That the words "as often as the rents &c. will admit thereof" qualify the verb "to apply"; so that the *application* (whatever it means) is to be made, the discretion is to be exercised (by the trustees and by the Bishop), whenever and as often as there is a surplus, and is not to be an appointment or appropriation by the trustees of one particular year so as to bind their successors forever;

(4) That each exercise of discretion is to have the consent of the Bishop for the time being, and not by one Bishop for all time and for every surplus;

(5) That whatever is the force of "apply" in connection with the words "in or towards building" must be the force of "apply" in connection with the words "in or towards endowing"; and if "apply" cannot mean "appoint" or "appropriate" the variable surplus from time to time for ever in or towards building a particular Church, it cannot have that meaning in relation to the ministers' stipends;

(6) That where the section means the trustees to pay the officiating minister from time to time it says so expressly (as in the case of St. Phillip's and Holy Trinity).

(7) That the word "endow" is used here for the first time, and it is our duty to treat the Statute as meaning something different when it changes its language.

(8) That the words "as aforesaid," at the end of the sentence do not qualify the word "endowing." They come after the

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long phrase, thus—"endowing the officiating ministers thereof respectively to the extent of £100 yearly as aforesaid." Looking back to the last preceding reference to officiating ministers, they probably mean merely "as said before"—"to the officiating minister *for the time being* of the last mentioned Church or Chapel";

(9) That the words of the clause *impose on the trustees the active duty of endowing, in whole or in part*; and the words are not satisfied by the trustees paying out of the existing endowment of St. Phillip's. As private donors endow other Churches with glebe and other lands, as the Crown endowed St. Phillip's with glebe land by this grant of 13th September 1842, so the trustees are out of the variable surplus of rents to *endow* the outside Churches selected, with land for a glebe, or with some other property or income. The property or income has to be purchased, or the investments have to be made by the trustees, and handed over as an endowment by the trustees, and not by the donor or anyone else.

(10) That the words of the clause are not satisfied unless the trustees of St. Phillip's themselves endow (or apply money in or towards endowing) the ministers of the outside Church out of the variable surplus. They are not satisfied by treating the endowment of St. Phillip's by the Crown grant of 1842 as being an endowment of the outside Church. They are not satisfied by treating the Crown, by its grant of land to St. Phillip's trustees, as furnishing a permanent fund for the support of the outside Church, or as making pecuniary provision for it, or as settling an income on it. The trustees of St. Phillip's are to "endow"—to apply in or towards endowing. These considerations convince me that there is no need whatever to do any violence to the primary and natural meaning of the words used. Instead of the trustees being forced—as the appellants contend—to make perpetual payments, if they make a payment at all, in aid of an outside minister, they can adjust their distribution of the variable surplus to the conditions existing from time to time. Whenever they find a surplus they can look around and see how it can be most usefully spent in building Churches, &c., and in or towards endowing them. They submit a proposal to the Bishop. The

Bishop, acting in the interest of the whole diocese, would, no doubt, see to it that the money be put to the best use, and that the endowment be placed in proper hands, and under suitable machinery for its administration. When the money has been once invested in a suitable endowment by the trustees in the names of trustees for the Church endowed by them, their responsibility therefor is gone; and they are free to apply future surpluses in further endowment of the same Churches (up to £100 per annum in all), and in building and endowing other Churches. This is the view taken by the learned primary Judge, and the view urged before us by counsel for the trustees, although the trustees have no personal interest in the matter, and I cannot but concur with it.

I agree, therefore, with Mr. Justice *A. H. Simpson* in his view that the claim now put forward by the appellants, as to the construction of sec. 21, is unfounded. It was not even suggested in the previous case of *Dunstan* v. *Houison* (1) that the words mean "appoint in permanency;" and I agree with the learned Judge in his view that the variable surplus in any year may be applied (to use his own words) "in the endowment of a parish by investing the money on trust to pay the income to a clergyman." No doubt the trustees, in passing the resolutions of 15th December 1882 and 7th February 1883, fancied that they were carrying out the trust to endow by saying that the following Churches "should be endowed (naming them) . . . £50 towards the Church building fund, £50 towards the parsonage fund, £50 *per annum* towards the stipend fund"; and by saying in the latter resolution that certain Churches "shall receive £50 *per annum* towards the stipend fund and a donation of £50 towards the Church building fund," &c. They appear to have passed these resolutions after legal advice; but from any point of view it was a mistake for them to treat a single donation of £50 to the Church building fund as an endowment. The important consideration, however, is not what the trustees meant to do, but what they could do under sec. 21; and, if my view is right, they could not bind their successors to pay £50 to officiating ministers of the same Churches yearly for ever.

(1) (1901) 1 S.R. (N.S.W.) (Eq.), 212, at p. 216.

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I ought to add that, even if the appellants' contention as to the meaning of sec. 21 is correct, it by no means follows that the Churches—represented by Dr. *Cullen* and Mr. *Mann*—are the Churches entitled in perpetuity to these payments. It seems that the books of the trustees of St. Phillip's prior to 1870 have been lost; that St. John's Bishopthorpe was built in 1870; that its officiating minister received £100 per annum from the trustees since that date till 1902; and that from 1883 to 1902 the trustees paid £50 per annum to the officiating minister of each of the other eight Churches. But (except as to St. John's Bishopthorpe since 1870) there is no evidence whatever as to the application of the variable surplus, under the fourth trust of sec. 21 of 8 Wm. IV. No. 5, before 1883. That there were surplus rents in the earlier years appears from par. 8; it is not to be assumed that these surplus rents were not duly applied; and, if the appellants' view is right, the first payees ought to be the payees for ever. Moreover, it is not even alleged that the payments to the ministers of the nine Churches were made with the consent of the Bishop; and yet his consent is made essential to any valid application of the variable surplus. True, no one has contested before us the fact that the resolution of 15th December 1882 for "endowment" of the eight Churches (as the then trustees, rightly or wrongly, styled payments by the trustees for ever), was made with the consent of the Bishop; but the consent is not alleged, and there has been no express admissions such as could be recited in the decree, and fix responsibility on the parties admitting; and the fact that the point was not pressed does not absolve us from our duty to declare the true position on the allegations appearing in the statement of claim. The allegations of the statement of claim are our only materials. This duty is all the more incumbent on us when we find that there is no party or counsel representing those who are interested in opposing the contention of the appellants. The fact that a informal letter was written to the Dean "representing the Bishop," two months or more before the resolution was passed—a letter which did not state the completed intention of the trustees—does not meet the omission, especially when there is nothing to show that the Dean made any reply, or that the consent of the Bishop, required by the Act,

could be satisfied by the consent of the Dean, or that there was any consent in writing. For these reasons, and also because of the irregularities of the resolutions of 15th Dec. 1882 and 7th Feb. 1883, to which I have referred, it seems to me that it would be proper to express the opinion of the Court in general terms, and not to declare that the eight specified Churches, or even St. John's Bishopthorpe, are specifically entitled to the money in dispute.

I am therefore of opinion that the contention of the plaintiffs fails at its very inception—fails on the true interpretation of sec. 21 of 8 Wm. IV. No 5.

But we have to advise the trustees as to their duties at the present time with regard to any surplus rents which they may have—whatever be the true construction of sec. 21. There have been several intermediate Acts; but until 1897 there was not any Act altering the trusts of sec. 21. It is true that at a Church conference held in April 1866 certain so called "Constitutions" were adopted; and the Constitutions were made binding by an Act of Parliament passed on 4th October 1866. This Act gave legal effect to any rules and Ordinances "to be made" under the Constitutions; and it provided that "all persons now or at any time hereafter holding any real or personal estate in trust for or in any way on behalf of or for the use of the said Church *except in so far as such real or personal estate may be the subject of any express trust* and then so far as such express trust shall not extend shall hold the said . . . real and personal estate subject to the said rules." This Act, therefore, did not make any alteration in the trusts of St. Phillip's glebe lands; but it will be noticed, in passing, that both in the Constitutions and in the Act itself, the Constitutions are described as "for the *management* and good government of the Church"; and that under this heading of management, &c., the trusts—the beneficial application —of certain properties, and not mere matters of Church government, &c., were put under the control of the Synod. These Constitutions (cl. 3) enabled the Synod to make Ordinances "upon and in respect of all matters and things concerning the order and good government of the Church and the regulation of its affairs within the Diocese including the *management and disposal* of all Church property moneys and revenues (not

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diverting any specifically appropriated or *the subject of any specific trust* nor interfering with any vested rights)." The trusts of St. Phillip's glebe were thus left as they were in 1842, and the Synod could not alter the trusts. However, on 6th May 1891 the Synod passed an Ordinance, which purported to be passed in pursuance of the Constitutions; and "this Ordinance" (it is provided by cl. 41) "shall come into operation when and not before the Act 8 Wm. IV. No. 5, the Act 7 Wm. IV. No. 3, . . . shall cease to be in force in and for the Diocese of Sydney." There is no doubt as to the intention of those who framed this Ordinance to bring it into force on the repeal of these Acts; but, of course, the Synod of 1891 was not the whole Church—was merely a special agent for defined purposes, and was incompetent to make any binding Ordinance as to trust property except so far as the existing Constitutions of 1866 enabled it; and these Constitutions did not enable the Synod of 1891 to enact such a clause as clause 34 of the Ordinance, dictating the trusts of property if and when the Acts declaring the trusts should be repealed. Those who happened to be members of the Synod of 1891 could not anticipate and exercise a power which might be conferred thereafter, and be exerciseable by successors. This clause 34 expressly purports to alter the trusts of such lands as St. Phillip's glebe. It follows, in the main, the language and the scheme of sec. 21 of 8 Wm. IV. No. 5; but it enabled the trustees to increase the payment to the minister of St. Phillip's to £300 per annum; it allowed the building, repairing &c., of any Churches or schools of the parish; it allowed payment towards the stipend of a curate or catechist; and it allowed application towards building schools or Churches or parsonages elsewhere in the Diocese, and in payment of annual sums to the ministers "for such term or terms as the said trustees (with the consent of the Bishop) shall determine."

Now, this Ordinance—so far as regards clause 34—was not valid at its inception; and I cannot find any Act of Parliament that validates it. The Act of 1897 does not—the *Church Acts Repealing Act* 1897. That is an Act to (*inter alia*) "repeal the Acts 7 Wm. IV. No. 3, 8 Wm. IV. No. 5, . . . *to bring lands held for Church purposes under the provisions of Ordinances of*

Synod, to validate the appointment of past trustees," &c. It recites that an Ordinance had been passed in 1895 providing for an application to Parliament to repeal the said Acts "but without prejudice to anything done under the said Acts before the repeal thereof"; that provision should be made in the Act for *bringing under the provisions of any Ordinance which may from time to time be passed* by a Synod all lands held for the benefit of the Church in the Diocese "*whether such lands were held upon the trusts of the repealed Acts or upon any other trusts*, but without prejudice to anything done," &c. It recites that "provision has been made for the *management* of parochial Church property," &c.; and that the said Church Acts should be repealed. The said Church Acts are then repealed (including 8 Wm. IV. No. 5). By sec. 2 all lands which, at the commencement of the Act, are held by any person &c. as trustee upon trust for any parochial Church purpose in connection with the Church of England in any Diocese, "and whether subject to the provisions of the said Church Acts or any of them or not (and in the case of lands so subject whether made so subject by reference in the deed or instrument creating the trust or otherwise), except lands, the *management* of which may be specially provided for by Ordinance of Synod or by Act of Parliament, shall be held subject to the provisions of any Ordinance or Ordinances in force for the time being in such diocese *freed and discharged from the provisions of the trust deeds and of the said Church Acts, but not diverted from the purposes to which the said lands are respectively devoted.*" The effect of secs. 1 and 2, so far as material to this case, is that not only is the Act 8 Wm. IV. No. 5 repealed, but, lest it should be thought that the reference in the deed of grant to that Act compelled the trustees still to obey the trusts declared in the repealed Act, it was provided that the glebe land should be held subject to the provisions of any Ordinance or Ordinances in force for the time being (this includes any valid future Ordinances) freed and discharged from the provisions both of the trust deeds and of the repealed Acts. That is to say, as soon as a valid Ordinance is made, it is not to be controlled by the provisions of the trust deed or of the Church Acts. I cannot see any room for doubt that these sections, in effect, put all the provisions of the trust

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deed in the melting pot, did not create new trusts, but gave the Synod, as representing all interests of the Church of England in the Diocese, power to declare new trusts—not merely to alter the administration, for such an alteration could be made by the Synod under the existing Constitutions. But there was a qualification of this power; in declaring the new trusts, the Synod was not to "divert" the land from the "purposes" to which the said land "is devoted." We must find the meaning which will give full effect to both these members of sec. 2, and make them consistent if possible. The provisions of the deed may be altered by the Synod; but, in altering the provisions, there must be no diversion of the land from the purposes to which it is devoted; and yet these purposes are a very substantial part of the provisions, and appear as such in the deed of grant. Where is the line to be drawn between "purposes" of the land, and the other provisions or trusts as to the land? It is to be noticed that the second member of the sentence forbids merely any diversion of the land from its *purposes*, and forbids nothing directly as to the rents. It does not forbid—as did the Constitutions of 1866, which were made binding by the Act of 1866—all diversion of any kind of Church property, moneys or revenues, the subject of any specific trust. The words in the Constitutions were "not diverting any specifically appropriated *or the subject of any specific trust* nor interfering with any vested rights" (cl. 3). The Act of 1866 itself (sec. 1) also excepted from the powers of the Synod absolutely all land the subject of an express trust. The change of language is significant, especially when the word "diverting" is seen to be retained. This Act of 1897 allows the Synod to deal with land the subject of an express trust—to deal with it "freed from the provisions (that is to say, *all* the provisions) of the trust deed" and of the Act 8 Wm. IV. No. 5 (amongst other Acts). Does not this section mean that the Synod may change the beneficiaries or may vary the benefits; but must not divert the *land* from the purpose to which it was "devoted"? The only interpretation that I can give to sec. 2 of the Act of 1897 is that, so long as the purpose—the ecclesiastical purpose or mode of use—to which each piece of land was "devoted" is retained, the Synod may make any other provision with regard to the land and its rents

and profits that it thinks fit. The Synod is a body representative of all the interests of the Church of England, and apparently is treated as worthy to be entrusted with the function of prescribing how the income of the Church lands can best be applied in the interests of the Church. But if the land was devoted to the purpose of a Church, it was to retain that purpose; if it was devoted to the purpose of a dwelling house for a clergyman, that purpose was not to be changed; if it was devoted to the purpose of a burial ground, a burial ground it should remain; if it was devoted to the purpose of a glebe, a glebe it should remain. It might be difficult, as an abstract proposition, to say where precisely the "purposes" of a piece of land, as distinguished from the rest of the trusts of the land, begin and end; but that difficulty should not prevent us from recognizing that in the Act of 1897 Parliament intended to draw such a distinction; and it is sufficient for the present case to say that the "purposes" of the land here refer to the mode of using the land, the ecclesiastical "object" to which it has been "consecrated" or "devoted"; and the word does not refer to the persons (or parishes or Churches) who are to receive the benefit of any of its rents, issues or profits. If the Synod were to make an Ordinance depriving St. Phillip's trustees of the ownership or management of the land, or even depriving St. Phillip's of its primary claim on the rents —a course which the Synod has not taken, and—if one may judge from the Ordinance of 1891 and from the Constitutions of the Synod—is not likely to take; it may be that this would be an interference with the purposes of this land. For it is of the essence of a glebe that it be, as it were, appurtenant to some Church or parish. There cannot be—if I may adopt a well known analogy—a glebe in gross. The glebe must be "annexed" to *some* Church, and the Church here is at present St. Phillip's. I am at present inclined to think that, so long as the land remains glebe land annexed to some Church or Churches, the Synod has power to commit the administration and to give the benefit of the rents to such Churches and in such manner as it thinks fit—that the Synod may change the objects of the trust, but not the character of the consecration (under the Act of 1897). But this is really not the stage for deciding the exact limits of

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the powers of the Synod. This Court can merely say, in general terms, that the Synod has power now to make any Ordinance with regard to this land, with this qualification—that it must not divert the land from the purpose to which it is "devoted"—that is to say, as a glebe, or as a glebe annexed to a Church.

There is much to confirm this view as to the word "purposes" in the words of the Crown grant and in the course of legislation, but, in view of the exhaustive examination of the grant, and of the Acts, made by my learned colleagues, I have struck out of this judgment my comments on the various clauses. I shall merely add that sec. 9 of the Act of 1889 clearly shows a complete differentiation already attained between the trusts of the land so far as regards, on the one hand, the objects and the amounts of the benefits given, and on the other hand, the purposes—the mode of use of the land. The Acts of 1887 and 1889 allowed a diversion of land even from the purposes to which it had been devoted, but only under special conditions as to majorities and as to consents. The Act of 1897 allowed any change of the trusts, so long as it did not affect the purposes of the land; and in the case of such a change these special conditions are not required to be fulfilled. I agree, therefore, with my colleagues, as I apprehend their views, as to the meaning to be given to the word "purposes" in the Act of 1897; but I do not agree with the majority in the view that there is any justification for giving it any secondary meaning.

I do not think that it is necessary to decide whether clause 34 of the Sydney Church Ordinance applies to rents derived from existing leases as well as to rents derived from future leases; for the Ordinance is, in my opinion, void, in so far as it alters the trusts of the Act 8 Wm. IV. No. 5. The Synod of 1891 was incompetent to alter the trusts of this land and its rents; and it could not anticipate a discretion which may have to be exercised by its successors.

No argument has been addressed to us with regard to the *Church of England Constitution Act Amendment Act* 1902; but that Act has hardly received the attention that it deserves. According to sec. 4, certain Constitutions actually passed by the Synod in July 1895 were made binding on the members of the

Church; and by the Constitutions (clause 3) the Synod is empowered to make Ordinances as to the management and disposal of all Church property "not diverting any specifically appropriated or the subject of any specific trust nor interfering with any vested rights." This seems to give narrower powers than those given to the Synod by the Act of 1897. But counsel concur in inviting us to treat the powers given by the Act of 1902, and by the Constitutions thereby validated, as not curtailing the powers given to the Synod by the Act of 1897; for, by sec. 7, the Act of 1902 is not to "repeal or in any way cut down or abridge the provisions of (*inter alia*) the Act of 1897; and I so treat the power for the purposes of this case.

My opinion is, therefore, in brief, that there has not been as yet any endowment or application in or towards the endowment of any outside Church by the trustees within the meaning of sec. 21 of 8 Wm. IV. No. 5; that the decision in *Dunstan* v. *Houison* (1) is substantially right, when rightly apprehended; that the Synod has power, under sec. 2 of the Act of 1897, to prescribe how the rents (at all events, the variable surplus of rents) of St. Phillip's glebe are to be applied; that the Synod has no power, except with the precautions prescribed by the Acts of 1887 and 1889, to alter the purposes of the glebe—the mode of use of the land; and that until the Synod made a valid Ordinance the trustees of St. Phillip's should deal with the variable surplus under the Act of Wm. IV. as amended by 21 Vict. No. 4.

Decree appealed from varied accordingly. Costs of all parties of the appeal and in the Supreme Court to come out of the corpus. Liberty to all parties to apply to the Supreme Court with respect to raising and payment of costs and providing a sinking fund out of rents and profits of the glebe to recoup the corpus.

Solicitors: *Norton, Smith & Co.*; *Fisher & Macansh*; *The Crown Solicitor for New South Wales.*

C. A. W.

(1) (1901) 1 S.R. (N.S.W.), (Eq.), 212.