Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Rev. Dunbar Isidore Heath, Clerk, v. *John Burder, from the Arches Court of Canterbury; delivered July* 9, 1860.

Present:

THE ARCHBISHOP OF YORK.
LORD KINGSDOWN.
LORD JUSTICE KNIGHT BRUCE.
SIR EDWARD RYAN.
LORD JUSTICE TURNER.

THIS case came before us on an appeal from an interlocutory order of the Dean of the Arches, in a cause of office promoted at the instance of the Bishop of Winchester against the Appellant, who is the vicar of a parish within his Lordship's diocese.

The question for consideration is whether the articles exhibited against the Appellant state, with sufficient certainty, the offence with which he is charged, and are admissible therefore in their present shape. The learned Judge in the Court below is of opinion that they are sufficient. The order being merely interlocutory, it was in the discretion of the Judge, by the statute under which he acted, to give or to refuse liberty to appeal, and he determined, not without some hesitation, to grant this liberty.

The Petitioner prays "their Lordships to report to Her Majesty in favour of the Appeal and Complaint of the Reverend Dunbar Isidore Heath, and that the Decree, or Interlocutory Order, or Sentence of the Judge of the Arches Court of Canterbury, appealed from, ought to be reversed; and that the Articles in this criminal suit be ordered to be further reformed, so as to contain an exact and precise statement of those portions of the Articles of the Thirty-nine Articles of Religion, which it is

alleged that the passages from the Appellant's sermons contravene; and also a specification, or statement of the unsound doctrine or heresy which the Appellant is alleged to have advisedly maintained, and which he is called upon to revoke under the statute 13th Eliz., cap. 12."

The articles thus exhibited appear to rest upon two distinct grounds of complaint; one an alleged violation of the statute of 13th Elizabeth, entitled "An Act for the Ministers of the Church to be of sound religion," the other an alleged violation of the Ecclesiastical laws, by publishing doctrines in derogation and depraving of the Book of Common Prayer.

The 13th Elizabeth above referred to, after requiring that certain Priests and Ministers shall declare their assent, and subscribe to all the Articles of Religion which only concern the confession of the true Christian faith and the doctrine of the Sacraments, proceeds to enact "that if any person ecclesiastical, or which shall have ecclesiastical living, shall advisedly maintain or affirm any doctrine directly contrary or repugnant to any of the said Articles, and being convented before the said Bishop of the diocese, or the Ordinary, or before the Queen's Highness' Commissioners in Causes Ecclesiastical, shall persist therein, or not revoke his error, or after such revocation eftsoon affirm such untrue doctrine, such maintaining, or affirming, and persisting, or such eftsoon affirming, shall be just cause to deprive such person of his ecclesiastical promotions, and it shall be lawful to the Bishop of the diocese, or the Ordinary, or the said Commissioners, to deprive such person so persisting or lawfully convicted of such eftsoons affirming, and upon such sentence of deprivation pronounced, he shall be in deed deprived."

This, therefore, is an eminently penal statute; a prosecution under it may result in depriving the the offender of his benefice, and, possibly, therefore, may destroy all his means of livelihood.

It is of the essence of justice, and is a principle fully recognized by the Law of England, that a person indicted for a breach of the law shall be distinctly informed, before he is called upon to defend himself, of the nature of the offence with which he is charged.

That the Courts of Common Law would apply this doctrine to offences of the nature of that imputed to the Defendant, if such offences came indirectly before them, may be inferred from Specot's case (Co. Rep. v. 57), in which, on *Quare impedit*, the Bishop pleaded that he was justified in refusing to admit the Clerk because on examination he found him to be an inveterate schismatic. It was held " that the cause of the schism or heresy for which the prosecutor is refused ought to be alleged in certain," and judgment passed against the Bishop.

The cases cited at the bar seem to prove that the same rule is adopted in the Ecclesiastical Courts, at least in proceedings under the statute of 13th Elizabeth.

In the case of Salter v. Davies, in the year 1692, in Whiston's case in 1713, in the King's Proctor v. Stone in 1808, the particulars of the erroneous doctrines imputed to the Defendants, and the articles to which they were repuguant, were stated with great distinctness. The Defendants could have no doubt as to the error which they were required to revoke, and in the last case the Defendant affected to recant, though in terms obviously insufficient and evasive.

The case of Saunders v. Head in 1843, was not a proceeding under the 13th Elizabeth. The Defendant was charged with having maintained propositions in derogation and depraving of the Prayer Book, and the Court seems to have taken a distinction between the two classes of offences, and to have held that in the latter a greater laxity is allowed ; " that when the general law ecclesiastical is relied on, it is not necessary to plead specifically ; that where the offence is one generally cognizable in the Ecclesiastical Courts, it is not necessary to point out the particular canons or statute on which the proceedings are founded."

Yet even here, though the same strictness of pleading may not be necessary, it is requisite that the accusation should show distinctly of what the Defendant is accused—a point upon which in the case of Saunders v. Head, no doubt could exist.

The case of Hodgson v. Oakeley, in 1845, was of the same description with Saunders v. Head. Mr. Oakeley

did not hold any living, but was merely a licensed curate within the Diocese of London. He was charged with having offended against the laws ecclesiastical, by maintaining doctrines directly contrary and repugnant to the true usual literal meaning of the Articles of Religion as by law established, or one of them, and contrary to the laws, statutes, Constitution, and Canons Ecclesiastical of the realm, and against the peace and unity of the Church.

It appeared by the pamphlet complained of, in the opinion of the Judge, that Mr. Oakeley "held, without distinction, all Roman doctrine—everything that has been, and still is, maintained and taught by that Church."

Yet, even here, the very able Judge who decided the case, Sir H. Jenner Fust, seems to have doubted whether the articles contained a sufficient specification of the offence, and he states that he had expected to hear an argument by Mr. Oakeley's counsel on the point. Mr. Oakeley, however, did not appear, nor could he with any colour of reason have pretended ignorance of the offence imputed to him. The ground on which the learned Judge held the charge sufficient was this—that there was no affirmance of any particular doctriue; Mr. Oakeley claimed to hold, affirm, and maintain all the doctrines of the Church of Rome, consequently it would be next to impossible to plead the charge in detail.

That in whatever form questions of this kind arise, both the party accused and the Court before which they are brought have a right to require that the doctrine of the Church alleged to be impugned, and the doctrine of the accused which is alleged to impugn it, shall be stated with sufficient distinctness to enable the one to frame his defence, and the other to discover from the pleadings what are the real points in controversy, is apparent from what fell both from the Dean of the Arches and the Judicial Committee in the Gorham case.

That case was brought on by Act on petition, instead of by plea and proof.

Sir H. Jenner Fust observes (Rep. 136) that the procceding ought to have been by plea and proof; that "the Court would then have had the

entire case brought clearly and distinctly to its notice, the doctrines of the Church of England upon which it was meant to rely on behalf of the Bishop would have been specifically and precisely stated, as well as those points of doctrine which it was said Mr. Gorham had impugned."

At the next page he observes, "that the law ought to have been specifically pleaded, the law of the Church, the doctrines of the Church of England, and the points in Mr. Gorham's answer, which are said to be contrary to those doctrines."

He afterwards complains that in consequence of the course which had been pursued, "it being nowhere stated clearly and distinctly what the doctrine of the Church of England is, the Court had been forced to travel through the various questions and answers, and other particulars contained in the volume referred to, in order to ascertain for itself, as well as it could, what the doctrine of the Church of England was, and in what respects Mr. Gorham held opinions contrary thereto."

When the case came before this Board, their Lordships entirely concurred in the observations which had been made in the Court below, and remarked "that the inconvenience was so great, and the difficulty of coming to a right conclusion was thereby so unnecessarily increased, that in their opinion the Judge below would have been well justified in refusing to pronounce any opinion upon the case as appearing on the pleading, and requiring the parties, even at the last moment, to bring forward the case in a regular manner by plea and proof."

It is obvious that the whole force of their remark depends upon the assumption that if the case had been brought forward by plea and proof, the statement of doctrine on each side referred to by the Judge below would have been contained in it.

Applying these principles to the case before us, we have to consider whether the articles give to the accused Clerk that distinct notice of the offences imputed to him which reason and authority alike require.

Now the articles, after the mere formal pleadings, allege (Article 6) that the Appellant wrote, printed, and published nineteen sermons which are contained

in a book described in the article. That in such book are contained certain passages, set out at length, and said to be taken from twelve different pages of the book; and they object to the Appellant that these passages "do severally and together contain doctrines directly contrary and repugnant to the doctrines of the United Church of England and Ireland, as in the aforesaid articles of religion contained," and more especially to twelve of the articles which they specify.

They then "object to him all and every other matter in the said book or pamphlet, or course of sermons, contrary or repugnant to the doctrines of the said United Church of England and Ireland."

The succeeding articles of the libel, the 7th, 8th, 9th, and 10th, pursue exactly the same line, extracting long passages from different pages of the book, and alleging them to be contrary to certain of the Thirty-nine Articles, which they specify.

Originally it appears that the libel specified none of the Thirty-nine Articles, and it was in substance merely an allegation that the passages in question were contrary to the Thirty-nine Articles.

It appears to have been held by the Court below that this mode of pleading was too loose, and the learned Judge, therefore, required the Prosecutor to specify the particular Articles of the Church of England against which the Defendant was supposed to have offended, and this has been accordingly done; but it appears to their Lordships that it has been done in such a manner as in no degree whatever to relieve the Defendant from embarrassment as to the nature of the charge which he is called upon to meet.

What may be necessary for this purpose must depend upon the circumstances of each particular case. If a single distinct passage complained of contains a plain meaning, which can admit of no doubt, it may be sufficient to set it out, and to state that it is directly contrary and repugnant to such one or more of the Thirty-nine Articles as are conceived to be opposed to it.

In such a case the Defendant is fully apprised of the real nature of the charge. He may, if he pleases, insist that the proposition which he has maintained is not contrary to the Articles, or he may admit that it is so, and recall it.

But the case is far otherwise when a number of passages are collected together, which enunciate no single definite proposition, which embrace a variety of topics, some extracts having to an ordinary understanding no meaning at all, and others expressed in language with respect to the meaning of which different guesses may be made by different minds.

Take the first class of passages collected here in the sixth Article. We presume that when they are explained by the context in which they are found, and the Court is assisted by the observations which will be made by the counsel on each side, some distinct intelligible propositions will be educed from them, which will be argued on the one side to be in accordance with, and on the other to be in contradiction to, certain doctrines of the Church of England, as laid down in her Articles of Faith, and upon which the Court will be able to form an opinion. But we cannot say that this is the case at present.

Then, is the matter mended by the reference to the particular articles of faith introduced by amendment?

We cannot think that it is.

The Articles specified relate to a great variety of subjects. They are the 2nd, 3rd, 8th, 10th, 11th, 12th, 13th, 14th, 15th, 25th, 27th, and 28th.

The 2nd is entitled "Of the Word, or Son of God, which was made very man." The 3rd, "Of the going down of Christ into Hell;" on the proper meaning of which Article we believe that some difference of opinion prevails amongst orthodox divines. The 8th, "Of the Three Creeds;" as to which, again, it may be observed, that a very great number of distinct propositions are contained in them, and with respect to some of which different interpretations have been given. The 10th is entitled, "Of Free Will." The 11th, "Of the Justification of Man." The 12th, "Of Good Works." The 13th, "Of Works before Justification." The 14th, "Of Works of Supererogation." The 15th, "Of Christ alone without Sin." The 25th, "Of the Sacraments." The 27th, "Of Baptism." And the 28th, "Of the Lord's Supper."

Can it with any reason be said that a clergyman

who is told that certain long passages extracted from his book, severally and together, contain doctrines directly contrary to these Articles, embracing such a great variety of propositions on subjects totally dissimilar from each other, has the slightest information afforded to him of what is the real complaint intended to be made against him ?

It is said that the Defendant can have no difficulty in knowing what is imputed to him, for that he must know the meaning of what he has preached and published. Assuming that he does know his own meaning, he has a right to know what is the meaning which the accuser imputes to him: that if the meaning be not his he may repudiate it; if it be his, and he persists in it, he may attempt to justify it; or if he feels it to be erroneous he may revoke it.

It is said, again, the passages complained of are so confused that the Prosecutor may be unable to say with certainty what is the true meaning. But the answer to this seems obvious. In order to convict the Defendant of maintaining false doctrines, the Accuser must show what the doctrine complained of is. A man cannot contravene the Articles by writing stark nonsense. It is not denied that the false doctrine must be pointed out at the hearing, if it be not done now. The difference between doing it now and doing it then is this, that in the former alternative the Defendant will have an opportunity of judging whether he will defend himself or abandon his defence; and if he does defend himself, he will have the means of preparing for his defence.

Their Lordships, for these reasons, are of opinion that the Appellant is entitled to a more distinct specification of the charges intended to be brought against him than he can find in the Articles as they at present stand, and that therefore they must be further reformed, so as to contain a statement of those portions of such of the Thirty-nine Articles of Religion as it is alleged that the passages from the Appellant's sermons contravene, and a specification of the unsound doctrine or heresy which the Appellant is alleged to have maintained.

Their Lordships intend to reserve this case before them until this reformation has been made, in order that they may judge of its sufficiency; and

when a sufficient reformation shall have been made, to remit it to the Court below, to proceed with the cause.

They think that there should be no costs of this Appeal. They will humbly report to Her Majesty their opinion, to the effect which they have thus expressed.

It is proper to mention that the Archbishop of York, who sat on the hearing of this case, has seen this judgment, and that his Grace concurs in it.