Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Rev. Thomas Berney v. the Lord Bishop of Norwich, from the Court of Arches; delivered 28th February, 1867.

Present:

ARCHBISHOP OF YORK.
SIR WILLIAM ERLE.
SIR JAMES W. COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.
LORD JUSTICE CAIRNS.
SIR RICHARD T. KINDERSLEY.

THIS was a proceeding under the Church Discipline Act against the Rev. Thomas Berney, in which articles were exhibited, charging him with having solicited the chastity of Mrs. Cumming on two occasions, and of Miss Durrant on two occasions, and after a trial in the Court of Arches it was decided that those articles were substantially proved, and he was sentenced accordingly to suspension and deprivation for two years. Upon the present Appeal the correctness of that decision is to be tried, and we are to say whether either of those articles is substantially proved by the evidence returned on this record.

Before we examine that evidence particularly, it may not be superfluous to observe generally that the charge described by the terms "soliciting the chastity" imputes very aggravated guilt; and the evidence would not be sufficient to prove either of the articles unless it convinced this Court that the Appellant had endeavoured to obtain criminal intercourse with both or either of the witnesses by the solicitation for that purpose appearing on the record,

and that evidence of indiscreet or improper conduct is irrelevant unless it tends to prove that purpose, either of adultery or seduction.

It may also be worth observing that the offence, if committed at all, consisted almost entirely in words supposed to have been spoken by the Defendant when no third person was present. These words do not express definite conceptions in a known course of business, such as the words of a merchant to a broker, but they are words of fleeting suggestion, words of which the meaning would be varied by reference to surrounding circumstances known only to the parties, and would be varied materially by a small addition or elision; words so spoken that they cannot be expected to be exactly recalled ; and it is obvious that there may be injustice in holding the Defendant responsible for words not really his own, but which the w tnesses believe to be equivalent thereto. These considerations have more weight when the words are recounted by one party only to the conversation, and the other party (the accused) is not allowed to be heard, to explain, or contradict them.

(This point was so decided in the case of Burder *v.* O'Neil, as to the proper construction of the statute in this respect, and the Advocate for the Defendant was bound thereby upon this trial. But the point may be worth reconsidering if need should hereafter arise.)]

Adverting now to the undisputed facts of the case. It appears that the Appellant and Mr. and Mrs. Cumming, residing near together, were living on very friendly terms of neighbourly intimacy, and that in April 1864 Miss Durrant came to visit her sister, Mrs. Cumming, and staid for some weeks. During these weeks the interchange of visits between these parties increased in frequency, and the Appellant, a single man, was frequently at the rectory, where Mr. and Mrs. Cumming resided, and found himself at times alone in company with each of these ladies, and the parties had several pursuits in common connected with life in the country. This even flow of apparently tranquil enjoyment is alleged to have been disturbed by the four offences imputed to the Defendant in the 6th, 7th, 8th, and 9th Articles; the 6th and 7th relating to Mrs. Cumming, and the 8th and 9th relating to Miss Durrant, each

being a separate offence, and the proof of each depending on the evidence relevant thereto.

We come now to the Articles, and we take first the charges contained in the 6th and 7th Articles, depending on the statement by Mrs. Cumming, of matters alleged by her to have occurred on or about the 11th and the 21st of May, 1864. In the first charge the words imputed are, "Come on the sofa with me; the blinds are down, Mr. Cumming will never know anything about it, and it will be a *liaison* between us;" and the acts imputed are that he looked at her and took hold of her hands. On the second occasion the words imputed are, "I want something so very bad, I've been so excited all the week; do let me have my own way. A slice out of a cut cake will never be missed. I shall go crazy if you don't let me have my own way. I shall go home and make a fool of myself with Susan."

The acts imputed are that he shut the doors of the room and placed a hand on the knee of the witness.

This statement, if it can be entirely relied on, is sufficient to raise the presumption that the Appellant did endeavour on each of those days to procure immediate criminal intercourse with Mrs. Cumming, a presumption which ought to prevail upon this Appeal unless we find it to be more than counterbalanced by presumptions placed in the opposite scale.

The former character of Mrs. Cumming has not been impeached, and we take it to be clear that her manner in giving her evidence prepossesses in her favour. But although the presumption from this statement is strong against the Appellant, yet daily experience shows that a tribunal trying questions of fact, ill performs its duty if it adopts as true every statement on oath not contradicted by counter testimony; it being in accordance with that experience that many such statements ought to be disbelieved, and that, without imputing perjury. The witness may be mistaken in her perceptions or in her inferences from her perceptions, or her statement may be so invalidated by reason of improbabilities, as to be insufficient for convicting of a crime.

The statement which we are now to examine makes the charge of guilt to rest almost entirely on

words, with scarcely any concomitant act. Justice therefore requires that we should be sure that the words alleged in the articles are substantially the words of the Appellant. But the presumption to the contrary is very strong. It is very rare for a witness to be able to repeat exact words, even their own. The words in question are incoherent, unless the purpose of adultery is assumed, which is the matter to be tried. No complaint was made to any third person either at the time or for weeks after, so that the Appellant might explain while the matter was fresh. When the complaint was made, it was marked with a deceptive generality, specific neither in time nor place, nor in definite conceptions, attaining at last the form appearing in the Articles by gradual steps, as alleged by the Counsel for the Appellant. It is certain that the witness' memory cannot be relied on for accuracy, as the charge in the Articles varies in some degree from the charge in her evidence; and the charge in her evidence also varies from the memorandum which was prepared by her some time after the fact, for the purpose of preparing for examination; indeed this memorandum is decisive proof of want of perfect recollection, by reason of its alteration and erasure, and interlineations.

On these grounds we think that there is reason to doubt the exact correctness of the evidence relating to the Defendant's words.

But whatever may have been the words that passed, the admitted conduct of the parties raises a strong presumption against the truth of the statement on which this part of the case turns, namely, that the witness understood that the Appellant had proposed immediate adultery.

Considering the social position of the parties, and the even tenor of agreeable society in which they lived, and the time and place alleged, it seems improbable that the Appellant should disturb that even tenor by suddenly, and without preliminary, making to the lady a proposal which must shock any but a known profligate,—that is, immediate adultery in mid day in a room comparatively open to interruption; and it is an additional improbability that this proposal should be made to a lady whose ill health, as alluded to by Counsel, was known to the Appellant. It also seems improbable that

such a proposal should be passed by the woman without any resentment manifested to any human being, and that on her refusal to consent to an act of heinous guilt, the man should resume his paint-brush and complete, as if in tranquillity, the forms and colours of the designs for flower-borders which were produced in evidence.

The subsequent conduct of the witness raises a still stronger counter-presumption against reliance on her statement.

If we take the alleged proposal of the 10th of May; after the husband's return the Appellant packed up his drawings and went home, but left his paint-box by mistake; the witness asked her husband to take it to the Appellant, who needed it for a visit he was about to make to his mother, and the husband did so. If she desired to promote the convenience of a neighbour whom she knew, this would be consistent. If she had been insulted and degraded, and an attempt had been made to bring misery on herself, her husband, and her family, this apparent courtesy would be inconsistent, and the attempt to explain it by saying she wished to avoid seeing the Appellant again, coupled with the other facts, seems to us to be an unreal pretence: this was the immediate sequel to the proposal of the 10th of May.

On the 12th the Appellant sent a vase, either as a present or a loan. Is it to be supposed that if the witness was actuated by the feelings which she now says prompted the return of the paint-box by her husband she would not have sent back the vase, and found some reason for doing so? But the vase was accepted, and the witness and her sister took pleasure in decorating it with flowers as they would a present which was valued for the sake of the giver.

Next followed the letter of the 15th of May (from Mrs. Cumming to the Appellant), which seems almost decisive against relying on her statement. It may be true that Mr. Stewart requested her to write what relates to the harmonium. It may be true that the husband gave the form of conclusion, "Believe me yours sincerely." But there are parts of the letter which, by evidence internal as well as external, are, in our opinion, her own, and express unalloyed favourable feeling, and

a desire for the continuance of friendly intercourse and correspondence. For example, she writes: "You could scarcely have had more lovely weather for gardening. I hope the plans were approved of by Mrs. Berney. I shall be anxious to know how you get on. Bessie was quite sorry she could not see the painting when it was finished. Mr. Cumming and Bessie unite with me in very kind regards."

The easy flow of allusion to small subjects seems irreconcileable with the notion that she was knowingly addressing a man who only a few days before had offered her the grossest insult a woman could endure; and the meaning of the passage, "Bessie was sorry she could not see the painting when it was finished," was realised when the Appellant proposed to show the drawing to the sister, and the witness purposely left her sister alone for an interview with the Appellant in his library, to be followed by a walk together home.

The attempt to explain this letter as the result of dictation is not satisfactory to their Lordships.

All that follows is consistent with our interpretation of this letter, if we except the second proposal of instant adultery on or about the 21st of May, on the ground of the animal impulse which troubled the Appellant; a proposal in its circumstances of time and place, and by reason of its antecedents and consequences, quite as improbable as the charge on the 11th of May; nor can we omit to observe that the presence of the Appellant at the meeting of the 21st of May, a fact denied by him in his pleading, rests on the testimony of Mrs. Cumming. On her own showing this part of her evidence might have been corroborated by her husband, her sister, and the nurse. It has not been so corroborated. Each attempt at adultery is brought into the chain of events by an apparent disruption of links; no events led up to it, none followed from it: and this must always be the case where an unreal fact is introduced into a narrative of real events.

We do not stop to inquire whether the picnic parties after the guilty proposal were one or two; whether the sacrament was administered by Mr. Berney or Mr. Moss; whether the dinner at the Hall was consented to by Mrs. Cumming for fear of

creating suspicion in her husband's mind, or in the course of neighbourly intimacy. It is undisputed that the form of the intercourse continued in appearance to be of the friendly character which would be inconsistent with the charges now brought forward down to the 15th of June.

After the 15th June came that which Counsel have called the "quarrel arising out of the last interview with Miss Durrant," resulting in the charge which led to the Articles we have now had to consider.

We have assumed that the charges contained in the 6th and 7th Articles were grounded entirely on the statement of Mrs. Cumming, and we did so because in our judgment the final letter of the Appellant after the 15th of June is no corroboration of that statement.

The facts relating to this letter appear to be, that in the course of the trial, long after the preliminary inquiry and the manifold delays of the pleadings, the Counsel for the Respondent saw the Appellant's letter, and then in the course of the trial gave notice to produce Mr. Cumming's letter to which the Appellant's letter was an answer. This letter was not produced: whether it was lost or destroyed, or in existence, the Appellant was supposed to be not admissible to prove. It was not produced, nor was secondary evidence admitted. We must take the evidence as it is on the record, and we do not see that any presumption ought to be made against the Appellant by reason of its non-production under these circumstances.

The letter of the Appellant before us is evidence on the 6th and 7th Articles against the Appellant so far only as it amounts to an admission that he had solicited the chastity of Mrs. Cumming. It ought not to weigh against the Appellant on this charge if it only indicates that he may have trespassed beyond some limits with Miss Durrant, and in our judgment that is the fair meaning of the letter. He writes, among other things, "that some little latitude is allowable when two persons are much thrown together and are daily meeting in mirth and fun. Nothing can be farther from my wish than to give offence by exceeding its proper limits." He then offers his most sincere apology

and his sorrow that anything should have occurred to mar the harmony which had existed.

Upon our construction this letter does not tend to prove the guilt imputed in the 6th and 7th charges. The Appellant has a right to the presumption in favour of innocence till guilt be proved. In a criminal case the Tribunal trying the accused cannot assume that Mrs. Cumming had complained of an attempt on her chastity, or that Mr. Cumming's letter charged the Appellant therewith. We have the Appellant's letter before us, and the words of that letter are to be taken in the ordinary sense.

We assume upon the evidence that the complaint of Mrs. Cumming to her husband was made after the Appellant had attempted some freedom with her sister. If that was the ground of the complaint in Mr. Cumming's letter, the whole of the Appellant's letter would have a reasonable meaning; whereas if the husband had complained not only of something that had passed between the Appellant and Miss Durrant, but also that the Appellant had solicited the chastity of his wife, the letter would be irrelevant to such a charge and an aggravation to the injury complained of. We, therefore, do not consider that the letter admits that the Appellant had attempted the chastity of Mrs. Cumming.

Upon this review of the evidence in support of the charges by Mrs. Cumming, we have weighed presumptions against counter-presumptions, confining our attention to the evidence relevant to each separate charge, and excluding any prejudice from a repetition of charges, not supporting each other according to legal reasoning, and we have come to the conclusion that the guilt imputed in the Articles 6 and 7 is not sufficiently proved.

With respect to the charges contained in the 8th and 9th Articles, founded on the statement made by Miss Durrant, the substance of the statement as far as it relates to the 29th May is, that being left by her sister in company with the Appellant for the purpose of seeing some drawings in his library, he then tried to kiss her, and said, "You need not be afraid, I will not get you into any trouble; do come up stairs" (meaning to the drawing-room); and on her refusal to do so he said, as he was walking home with her, "The drawing-room is unfurnished,

and a roll of carpet is a poor substitute for a sofa."

And as far as it relates to the 14th June, the substance of her statement is, that the Appellant being in the drawing-room of the rectory asked her to come and sit on the sofa, and on her refusal said, "Why not ? I will not get you into any trouble." That he then took hold of her wrist, and pulled her, adding, "Oh do!" on which she said, "Mr. Berney, if you do that I shall scream ;" and she then left the room.

The charges contained in these Articles rest entirely on the statement by Miss Durrant. The letter of the Appellant to Mr. Cummin after the 15th of June does not, in our opinion, admit that he had intended and endeavoured to have criminal intercourse with Miss Durrant, and this opinion is founded partly on the same reasons as induced us to think it did not admit that intention and endeavour with respect to Mrs. Cummins. Then if we confine our attention entirely to the statement made by this witness, and assume for the present purpose that reliance can be placed on the accuracy of her memory, still we do not see sufficient evidence that the Defendant intended and endeavoured to obtain criminal intercourse with her, that which passed being capable of a less guilty construction. The parties were on such terms that the Appellant might properly make advances to the lady if she chose to accept them ; and if, in doing so, he transgressed the bounds of good manners and decorum, and so gave offence, it does not follow that he had the guilt which the offended parties, going back over that which had passed without notice at the time, chose to impute.

Their Lordships therefore are prepared to recommend to Her Majesty that the sentence of the Court below should be reversed, and that the Defendant should be discharged from further proceedings.

Their Lordships, in the exercise of their discretion, will further recommend that this reversal of the Judgment of the Court of Arches should be without costs to the Appellant, either of the appeal or in the Court below, being of opinion that the Bishop in these proceedings was performing an onerous duty of the highest importance to the

public imposed upon him by law without recompense or protection, and that he acted throughout in perfect accordance with that duty.

In thus reversing the decision below, without imposing costs on the Respondent, we follow the precedent of Craig *v.* Farnall (reported on an incidental matter, 6 Moore, 446, and on the merits, Notes of Cases, vol. vi, 682), where the event of each proceeding was the same as in the present case, and it appears that the Respondent paid his own costs, and not those of the Appellant, Mr. Craig.