

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Rugg v. the Bishop of Winchester, from the Court of Arches; delivered on the 23rd December, 1868.

Present:

LORD CHANCELLOR.
ARCHBISHOP OF YORK.
LORD CHELMSFORD.
LORD WESTBURY.
SIR WILLIAM ERLE.
SIR JAMES W. COLVILLE.

THE Appellant in this case is the Incumbent of the benefice of Ecchinswell-with-Sydmonton, in the county of Southampton, and he appeals from a sentence of the Arches Court, pronounced in a cause instituted under the Clergy Discipline Act, by which sentence the Judge declared that the Appellant had offended against the Laws Ecclesiastical by not having regularly performed divine service in the church or chapel of St. Mary, Sydmonton, as required by the Lord Bishop of the Diocese, and monished him to resume and continue to perform, or to provide for the performance of, public divine service, as prescribed in the Book of Common Prayer, in the said church or chapel of St. Mary, Sydmonton, and further condemned him in costs.

It appears that Ecchinswell and Sydmonton were two ancient chapelries belonging to the vicarage of Kingsclere, with a church or chapel in each of the chapelries, each chapelry being also a separate parish for all civil purposes; and in the year 1852 a proposal or scheme for the union of the two chapelries into a separate parish and benefice, and for their separation from the vicarage of Kingsclere,

was set on foot by the Bishop of Winchester, under the provisions of the 1 and 2 Vict., cap. 106, and the 2 and 3 Vict., cap. 43.

This scheme was certified by the Archbishop of Canterbury to the Queen in Council, and all necessary consents having been given, it was ultimately approved of by Her Majesty in Council, and became binding under the Acts referred to.

By this scheme it was provided that the two chapelries of Ecchinswell and Sydmonton should be separated from the vicarage of Kingsclere, and be united so as to form together a separate parish for ecclesiastical purposes, and a perpetual curacy and benefice, by the name or style of the perpetual curacy of Ecchinswell-with-Sydmonton. That the proposed separate parish and benefice should be subject to the same ecclesiastical jurisdiction as the said vicarage of Kingsclere, and the incumbent of such separate parish and benefice should have exclusive cure of souls within the limits of the same. That two churchwardens should be annually chosen in the customary manner, and at the time when churchwardens are usually appointed, in and for each of the said chapelries; and every person so chosen should be duly admitted, and should do all things pertaining to the office of churchwarden as to ecclesiastical matters within the said chapelries. That the freehold of the churches and churchyards of Ecchinswell and Sydmonton, so far as the same might be vested in or belong to the incumbent for the time being of the said vicarage, and also all the glebe lands of and belonging to the said vicarage situate in the said chapelries of Ecchinswell and Sydmonton, with the appurtenances; and also (except as hereinafter mentioned) all so much and such part of the tithe rent charges or other payments or compositions for or in lieu of tithes belonging to the said vicarage as arose and accrued, or were payable within or in respect of the said chapelries of Ecchinswell and Sydmonton, should belong and be attached to the said proposed separate benefice of Ecchinswell-with-Sydmonton for ever, and be held, received, and enjoyed by the incumbent thereof for the time being, accordingly. That the parishioners of Ecchinswell and Sydmonton should be liable as heretofore to the expenses of repairing and maintaining their respective churches, and the other expenses

incidental to the due performance of divine service therein respectively, and should be exempt from all rates, charges, and assessments to be made for or in respect of the parish church of Kingsclere aforesaid, or for or in respect of any other church or chapel situate elsewhere than within the limits of the said proposed separate parish. That the patronage or right of nomination of or to the said proposed separate benefice of Ecchinswell-with-Sydmonton should be and remain in the vicar of the said vicarage and parish church of Kingsclere for the time being and his successors for ever. That the parishioners of Ecchinswell and Sydmonton should be entitled, as theretofore, to accommodation in their said respective churches, but should not henceforth be entitled to any accommodation in the parish church of Kingsclere.

It is enacted by the statutes already mentioned, that a scheme thus approved of, and made an Order in Council, shall come into operation forthwith, and be binding on all persons whatsoever, whether the benefice or benefices thereby affected be or be not vacant.

Shortly after the date of the Order in Council, the Appellant became the Incumbent of the parish or benefice thus created. The church at Sydmonton was at this time pulled down for the purpose of being rebuilt, and it was rebuilt on the lines of the ancient structure in 1853.

It appears that from the year in which the new church at Sydmonton was opened for divine worship, until 1863, service was performed in the church by the Appellant. Some doubt then arose whether the new building required reconsecration; and the Appellant taking advantage of this doubt, closed the church, and refused his consent to its being reconsecrated. To such an extent was his perverse conduct carried, that on the day appointed for the consecration, the 17th August, 1865, he caused the door of the church to be locked, carried away the key, and refused to be present at the ceremony. There can be no justification or excuse for such conduct. If the new church required reconsecration (which, as it was built on the site of the old church, may well be doubted), it was the duty of the Appellant to have promoted and assisted such reconsecration. The Appellant has since contended that the

consecration is invalid, as it took place without his consent, and even against his protest. But their Lordships entertain no doubt that even assuming reconsecration to have been necessary, the Appellant having regard to the site of the building, the purpose for which it was erected, and the provisions of the Order in Council, was not in a position to have refused his assent to the consecration. In the consideration of this case, therefore, the church at Sydmonton must be taken to be a lawfully consecrated church.

On the 5th May, 1867, the Appellant gave public notice in the church at Sydmonton that there would be no more service in that church; and for the two following Sundays divine service was not performed in it. Complaint having been made to the Bishop of Winchester, he, on the 23rd May, 1867, by a letter from his Secretary to the Appellant, desired to know whether the information he had received was correct, and if so, on what ground he had suspended the service. To this letter the Appellant on the 27th May, 1867, replied in these terms:—
 “In answer to your letter addressed to me at the request of the Bishop of Winchester, I have to inform you, that I have discontinued the service at Sydmonton, and have returned to the two full services in the church at Ecchinswell as performed by me during the first four years of my charge of this parish.

“I think I shall best discharge my duty to my parishioners generally by the return to the two full services (morning and evening) here, and that this will be more strictly in accordance with the requirements of both the Common and Ecclesiastical Law, than having only one service here in order that there may be one in a building which I cannot recognize as ever having been lawfully consecrated, and for the sake merely of one family (not much resident) and their immediate dependents, when the great bulk (more than nine-tenths) of my parishioners live nearer to Ecchinswell church, where they can better and more conveniently attend, than by having to go out of their way a mile or two more distant to Sydmonton House.” The following letter dated the 30th May, 1867, was then written by the Bishop's Secretaries to the Appellant:—“We have laid your letter of the 27th before the Bishop of Win-

chester. We are desired to state that the Bishop requires you to resume the service at Sydmonton church on Sunday next, and to continue the performance of such service in future ; and we beg to add that we have forwarded a copy of this letter to the churchwarden, and requested him to inform the Bishop whether his order is complied with."

The following is the reply of the Appellant to the order of the Bishop:—" Ecchinswell, 31st May, 1867. In reply to your communication of yesterday from the Bishop of Winchester, I beg you to inform his Lordship that, with all due deference to his authority, I see neither the necessity nor the obligation, under existing circumstances, of performing divine service at Sydmonton, and it is not my intention to resume the service there until every impediment be removed and the church (so called) has been judicially decided to be lawfully consecrated. I have, moreover, to inform you that there is no churchwarden at Sydmonton, and therefore no need to wait for a reply to any copy of a letter or request to such to know whether his Lordship's order has been complied with or not."

The Bishop, finding that the Appellant had determined to continue to keep the church at Sydmonton closed, and to disregard his order that the service in it should be resumed, instituted a suit against the Appellant in the Arches Court of Canterbury, under the provisions of the Clergy Discipline Act, 3 & 4 Vict., cap. 86. The Letters of Request stated that the Appellant was charged with having offended against the laws ecclesiastical by having omitted to perform or to provide for the performance of public divine service as prescribed in the Book of Common Prayer, and administration of the sacraments and other rites and ceremonies, in the church of St. Mary, Sydmonton, on four successive Sundays, in the months of May and June 1867, and therefore prayed that a citation might be issued to him to appear to answer to certain articles, &c., to be administered.

The Appellant appeared under protest, and by an act or petition objected that by virtue of divers provisions contained in 1 & 2 Vict., cap. 106, and more particularly in Sections 77 and 109, the Court had no jurisdiction to administer articles to him for the alleged offence of omitting to perform or provide

for the performance of public divine service in the alleged church of St. Mary, Sydmonton ;

That the building, called the church of St. Mary, Sydmonton, is not a church as falsely suggested ;

That an illegal ceremony of consecration had been performed within the building ;

That the Appellant performed two full services in the parish church of Ecchinswell-with-Sydmonton on the Sundays mentioned in the Letters of Request, and that by reason of the premises the Court had no jurisdiction to entertain a suit to compel him to answer Articles for not performing divine service in the building.

The Dean of the Arches overruled the protest, deciding that the offence charged was an ecclesiastical offence cognizable under the provisions of the 3rd and 4th Vict., cap. 86, and assigned the Appellant to appear absolutely.

Articles were accordingly brought in, which charged the Appellant with having offended against the Common Ecclesiastical law of the realm, and the statute 13 and 14 Chas. II, cap. 4, sect. 2, by omitting to perform divine service in the church of St. Mary, Sydmonton, at the times mentioned, and copies of the before-mentioned letters between the Bishop's Secretaries and the Appellant were annexed to and made part of the Articles.

The answer to the Articles principally consisted of a denial of any liability on the Appellant to perform any divine service in St. Mary's, Sydmonton, on the ground of its being an unconsecrated building, and a justification for the omission charged, by reason of his having performed two full services in the church of Ecchinswell.

The Dean of the Arches held that the Bishop had rightly exercised his discretion in commanding the Appellant to perform divine service in the church at Sydmonton, and admonished him to obey the directions of his Ordinary.

Upon the hearing of the Appeal from this Judgment, the Appellant in person urged various objections, some of which were of an extremely frivolous character. He insisted upon the illegality of the consecration of the church at Sydmonton, for which objection, as already shown, there is no foundation. He also objected that an ancient footway or entrance to the church had been stopped up by the Patron,

and a more circuitous road provided, and that it is by sufferance of the Patron only that the former approach can be used. It is clear that no defence against the present charge can be rested upon this circumstance. If there has been any improper obstruction of a right of way to the church, the Appellant has his appropriate remedy.

But the Appellant principally rested his defence to the proceedings against him upon the ground that there being two churches or places of public worship in the parish of Ecchinswell-with-Sydmonton, he had a right to shut the church against the parishioners of Sydmonton, if, in his discretion, he considered it more expedient to confine the public worship in the parish to the church at Ecchinswell.

The question is whether by so acting and persevering in keeping the church at Sydmonton closed in disobedience to the order of the Bishop, he has committed an ecclesiastical offence.

The duty of the Appellant is thus stated in the 1st Article. That by the Common Ecclesiastical Law of the Realm, and by the statute 13 and 14 Car. II, cap. 4, sec. 2, every Clerk in Holy Orders of the United Church of England and Ireland is bound on every Sunday (otherwise called Lord's day) in the year to perform or to provide for the performance of public divine service, as prescribed in the Book of Common Prayer, and administration of the Sacraments and other rites and ceremonies, according to the use in the Church of England, in every consecrated church or chapel of the ecclesiastical parish or benefice of which he is the incumbent.

It appears to their Lordships that the Act of Uniformity, 13 and 14 Chas. II, does not apply to this case, and that it is not a duty imposed by that Act upon an incumbent who has two churches or places of public worship within his parish to perform divine service in both of them.

The words of the Act, "Every church, chapel, or other place of public worship within the Realm of England," must be read in each church, &c., in and for which there is a distinct minister. The Appellant cannot, therefore, be said to have offended against the Act of Uniformity by confining the performance of morning and evening service to one of the churches in his parish, and not providing for

the same services in the other church, there being nothing in the Act requiring him to employ a curate, in order that the services may be duly performed in both churches.

But the question is, whether the Appellant was not bound by the Common Ecclesiastical Law (to use the language of the Articles) "to perform or to provide for the performance of public divine service in every consecrated church or chapel of the parish or benefice of which he is the incumbent." If so, the Article which charges an offence against the Common Ecclesiastical law, and also against the statute 13 and 14 Car. II, will be good, although the offence is only against the common law, and not against the statute, as the latter allegation may be regarded as mere surplusage.

There can be no doubt that the Order in Council which united the chapelries of Ecchinswell and Sydmonton into a separate parish or benefice, intended that there should be two churches (as they are called in the Order) within the parish, in both of which public worship should be performed. This appears plainly from the provisions contained in the Order "that the parishioners of Ecchinswell and Sydmonton should be liable, as theretofore, to the expenses of repairing and maintaining their respective churches and the other expenses incidental to the due performance of divine service therein respectively," and "that the parishioners of Ecchinswell and Sydmonton shall be entitled as heretofore to accommodation in their respective churches."

The Appellant accepted the benefice with a full knowledge that there were two churches or chapels within the parish in which, by the instrument creating the benefice, the duty of using each as a place of religious worship, and performing some service therein, is laid upon him. If the question with the Bishop had been as to the nature and extent of the services which the Appellant was bound to perform in these churches respectively, the case might have been attended with more difficulty. But the Appellant takes upon himself to shut up the church at Sydmonton, and positively to refuse to perform any divine service in it, assigning reasons for this wilful neglect of the duty which he has undertaken, every one of which is insufficient, and claiming the liberty of choosing which of the two churches in his parish

he will keep open for divine worship, which, if it were conceded to him, would, of course, equally enable him to close the church at Eechinswell, and perform the whole of the divine services in the parish in the church at Sydmonton.

If, then, the Appellant has neglected or refused to perform a spiritual duty which was imposed upon him by his induction into the benefice, has he not committed an offence against the Ecclesiastical Law? This in itself might render him liable to be proceeded against under the Church Discipline Act. But, beyond his neglect of duty, he has exposed himself to such a proceeding by his contumacious refusal to obey the lawful order of his Bishop. The duty of performing some divine service in the Church at Sydmonton having been imposed upon the Appellant, and he having shown his intention of violating it by shutting up the church and giving public notice that there would be no more service there, the Bishop, in the exercise of the authority vested in him, made an order upon him to resume the services in that church. If the Appellant had entertained a sincere wish to do his duty to the parishioners, he would have consulted the Bishop as to the best mode of meeting their requirements and his own obligation; but instead of adopting this course he defied the Bishop's authority under the semblance of deference to it, and denying the necessity and the obligation of performing any divine service at Sydmonton, expressed his intention not to resume the service there "until the church (so called) had been judicially decided to be lawfully consecrated."

The Appellant, therefore, has committed an offence against the Common Ecclesiastical Law, by wilful neglect of duty, and by wilful disobedience to the order of the Bishop directing him to perform that duty.

In his act or protest, the Appellant objected to the jurisdiction of the Court, upon the ground that the proceedings should have been taken (if at all) under the 1 & 2 Vict., cap. 106, referring to sections 77 and 109 of that Act. It may be doubted whether the Act referred to is applicable to this case. By the 77th section it is provided that whenever the Bishop shall see reason to believe that the ecclesiastical duties of any benefice are inadequately per-

formed, it shall be lawful for him to issue a Commission, to be constituted in the manner prescribed; and if the Commissioners report to the Bishop that in their opinion the duties of such benefice are inadequately performed, he may require the spiritual person holding the benefice to appoint a curate.

And the 109th section enacts, that in every case in which jurisdiction is given to the Bishop of the diocese, or to any Archbishop, under the provisions of this Act, and for the purposes thereof, and the enforcing the due execution of the provisions thereof, all other and concurrent jurisdictions in respect thereof shall wholly cease; and no other jurisdiction in relation to the provisions of this Act shall be used, exercised, or enforced, save and except such jurisdiction of the Bishop and Archbishop under this Act.

It may be open to doubt whether the shutting up one of two churches in a parish where divine worship is required to be performed in both, comes within the meaning of the words "inadequate performance of ecclesiastical duties," and can be dealt with as falling under the 77th section. But assuming that it might, if the act done involves an ecclesiastical offence, does the 109th section of the 1st and 2nd Vict., cap. 106, compel the Bishop to adopt the course pointed out by the Statute, not for visiting the offence, but for enforcing the proper performance of the duties which, by reason of the offence, have been inadequately performed? The words of the 109th section are, that no other jurisdiction in relation to the provisions of the Act shall be used. Therefore, if the Bishop were proceeding to compel the Appellant to appoint a curate, he must have pursued the course prescribed by the Act, and have issued a preliminary Commission of Inquiry. But his proceeding being for an offence committed by the Appellant against the Common Ecclesiastical Law, the jurisdiction of the Court is not taken away by the 109th section, and the suit is properly instituted under the Church Discipline Act.

Their Lordships are of opinion that the Appellant by shutting up the church at Sydmonton, and refusing to perform divine service there, notwithstanding the mandate of the Bishop, has committed an ecclesiastical offence, and they will, therefore,

humbly recommend to Her Majesty that the Judgment of the Arches Court should be affirmed, and the Appeal dismissed with costs.

