

*Judgment of the Lords of the Judicial Committee of the Privy Council on a Motion to enforce obedience to the Monition in the case of Martin v. Mackonochie from the Court of Arches; delivered 4th December, 1869.*

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Present:

THE LORD CHANCELLOR.  
THE ARCHBISHOP OF YORK.  
LORD CHELMSFORD.  
SIR JAMES W. COLVILLE.  
SIR JOSEPH NAPIER.

IN this case a motion has been made calling upon their Lordships to take proceedings in order to enforce the Monition which has been served upon the Reverend Respondent with regard to the execution of a sentence pronounced in the first instance by the Court of Arches. This sentence was in some degree extended and modified by the Judgment which this Committee was called upon to pronounce, or rather by the decision which they were called upon, after argument, to recommend as fit to be made by an Order of Her Majesty in Council.

The Order provided for several matters; as to three of which only it is now alleged that there has been a breach by the Respondent of the Monition issued in pursuance of the Order. Those three matters are:—First, that he continues to elevate the cup and paten during the administration of the Holy Communion; secondly, that he continues to kneel or prostrate himself before the consecrated elements during the Prayer of Consecration; and thirdly, that he continues to use lighted candles on the Communion-table at times when such lighted candles are not wanted for the purpose of giving light.

In order to see how far that which is complained

of has been a breach of the Monition, we must of course in the first instance look to the Monition itself. The Monition having recited that the Respondent was pronounced to have offended against the Statutes, Laws, Constitutions, and Canons of the Church of England, by having knelt or prostrated himself before the consecrated elements during the Prayer of Consecration, and also by having within the said church elevated the cup and paten during the Holy Communion, and also by having used lighted candles on the Communion-table during the celebration of the Holy Communion, at times when such lighted candles were not wanted for the purpose of light, proceeds to direct him to abstain for the future from the elevation of the cup and paten during the administration of the Holy Communion, and from kneeling or prostrating himself before the elements during the Prayer of Consecration, and also from using in the said church lighted candles on the Communion-table during the celebration of the Holy Communion, at times when such candles are not wanted for the purpose of giving light.

The evidence which is before their Lordships is addressed to these three several heads. We will deal with them in a different order from that in which they appear in the prayer of the application, and take the use of lighted candles on the Communion-table at times when such candles are not wanted for the purpose of giving light, in the first instance, because with reference to that part of the case it appears to their Lordships that the affidavits do not make out the offence charged. In the first place, it appears that the offence charged is not in strict conformity with the Monition, because the Monition is itself confined to using those candles on the Communion-table *during the celebration of the Holy Communion*; and the charge which is made in the motion now before this Committee is that they were used *on the Communion-table at times when they were not wanted for the purpose of giving light*, leaving out the words "*during the time of Holy Communion.*"

Of course it is not competent for their Lordships to proceed beyond the actual Monition which has been served upon the Respondent. It is that which he is said to have disobeyed, and it is to disobedience

of the Monition only that their Lordships can address themselves.

It is plain upon the affidavits that the candles have not been lighted during the Holy Communion, for the course taken by the Respondent has been this, that the candles are lighted as he says they always have been, and were at the time of the proceedings herein being taken, and are kept burning up to the period of the Holy Communion, and then immediately before the commencement of the Holy Communion they are extinguished.

There is no doubt, therefore, in this case of a literal compliance with the terms of the Monition. The candles are not lighted during the period of the Holy Communion. They are lighted, indeed, when there is no necessity for their being lighted for the purpose of giving light, but they are extinguished before the Holy Communion; therefore the compliance with the terms of the Monition has been literal and complete, and not, in that sense, evasive, for the Respondent was limited to a particular time, in reference to the candles; and whatever one may feel as to the course of the Reverend Respondent, looking to the spirit of the Monition, of course the Monition could not go beyond the matters that were charged: the offence charged was one which he has abstained from; and in this respect, therefore, their Lordships are clear that the prayer of this motion cannot be complied with.

The next charge is that he continues to elevate the cup and paten during the administration of the Holy Communion; and with reference to this matter, their Lordships feel that the case is placed in a position that is eminently unsatisfactory. On the former occasion the sentence of the Judge in the Court below was approved of with reference to this particular subject matter; therefore, that sentence is the sentence to which recourse must be had by their Lordships when interpreting the Monition, which cannot of course proceed further than the sentence itself. The sentence in the Court below was thus worded: the Respondent was ordered "to abstain for the future from the elevation of the cup and paten during the ministration of the Holy Communion, and also from the use of incense and from the mixing of water with the wine during the

administration of the Holy Communion, as pleaded in the Articles.”

Their Lordships think that the words “as pleaded in the Articles” must be applied to those several offences which were charged in the passage just quoted, namely, the elevation of the cup and paten, also the use of incense, and the mixing of water with wine; and their Lordships are thrown back, therefore, to the Articles to see what it was that was there pleaded, and they find this state of circumstances. Originally the third Article pleaded that there was an elevation of the cup and paten beyond what was necessary for the purpose of complying with the terms of the Rubric, which directs that at a particular part of the Prayer of Consecration, when the sacred elements are dealt with, the paten shall be taken into the hands, and at another part that the cup shall be taken into the hand or hands (for there is some little variation in the two parts of the Rubric itself) of the officiating minister. That would have been, as it appears to all their Lordships, a charge which would have raised a distinct and definite issue, whether the elevation of the paten or the elevation of the cup were or were not a *bonâ fide* raising it so far only as is necessary for anything to be raised, that is, to be taken from the table, or whether or not there was some ulterior purpose, that is to say, an act of elevation wholly distinct from and going beyond what was necessary for the mere purpose of taking the paten and cup into the hands of the officiating minister.

But the words “*and otherwise*” were also inserted in the same third Article in a part which rendered it very difficult to attach any definite sense to them. Those words are so vague that the learned Judge before whom the case first came, Dr. Lushington, conceived that he could not admit the Article in that form, and that the words introduced such a degree of vagueness as to render it improper to call upon the Respondent to answer the charge in its then shape, and therefore the learned Judge said that the Article must be reformed.

In the reforming of that Article those who reformed it appear to have gone beyond anything that was required by the decision of the learned

Judge in the course of the argument upon the admission of the Articles. They not merely struck out these words, "and otherwise," but they also materially varied the language by describing definitely in the reformed Article the act which had been performed, namely, that it was an elevation of the elements "*above the head of the Respondent.*"

The Article then became confined to that particular mode of elevation, instead of being a charge of elevation beyond what was necessary for the proper compliance with the Rubric; and, therefore, when the sentence of the Judge, which directs that he shall abstain for the future from the elevation "as pleaded in the Articles," is considered, it appears to their Lordships that they are necessarily confined to that particular charge which is there contained, and that particular mode of elevation which is there complained of.

We have been thus particular in going through all the circumstances of this case, which is left, as it appears to their Lordships, in a very unsatisfactory position, because it is most desirable, and their Lordships are all of opinion that it should be distinctly understood that they give no sanction whatever to a notion that any elevation whatever of the elements, as distinguished from the mere act of removing them from the table and taking them into the hand of the minister, is sanctioned by law. It is not necessary for their Lordships to say more (but most undoubtedly less we cannot say) than that we feel nothing has taken place in the course of this cause that can possibly justify a conclusion that any elevation whatever, as distinguished from the raising from the table, is proper or is sanctioned. All that their Lordships can say upon the present occasion is, that the point has never yet been in these proceedings raised, that a particular and definite mode of elevation only has been averred and complained of, and with that particular and definite mode of elevation we have nothing further to do, because it is conceded on all sides that such particular mode has been departed from.

It is not for us to say how far the letter to which the Respondent himself has referred, and in a part of which he says that the simple compliance with the Rubric, namely, taking the cup and the paten into his hands, would be sufficient for the purpose of

satisfying a certain portion of his parishioners as regards the elevation of the elements, may or may not have misled the Judges who had this case before them.

They say that the matter complained of having been discontinued, had not been complained of, that is, by the Articles, and we have felt it to be right and proper to say that nothing we are now determining, can therefore be pleaded hereafter as a justification for any mode of elevation which is to be distinguished from the mere act of removing the elements from the table, and taking them into the hands of the minister.

Inasmuch, then, as the Reverend Respondent has said upon oath, and it is not now contravened, that his course of procedure has only been that which he says he adopted at the time of the first hearing of the matter, owing to the complaint made of the higher elevation spoken of in the Articles, their Lordships think they cannot in that state of circumstances say that he has thereby committed a breach of the Monition which has been served upon him.

The third matter which has been complained of is as follows; and as to this matter their Lordships think the case is open to very different considerations:—

The Respondent was admonished “not to kneel or prostrate himself before the consecrated elements during the Prayer of Consecration;” and without going through the affidavits, the exact state of circumstances may be taken to be as they appear upon the affidavits made by the Respondent himself and by Mr. Walker, the gentleman who was present on the several occasions referred to in the motion. The affidavits in support of the motion stated distinctly acts of prostration and of kneeling during the period of the Prayer of Consecration. Into the details of those affidavits it is unnecessary to enter, because in the affidavit of the Respondent there is this which seems to set the case in a very clear light as far as the facts are concerned. The Respondent says: “I did not on either of the days or times mentioned in the affidavits on which this motion is founded, nor have I ever since the service of the said Monition on me, prostrated myself or knelt on steps leading to the Communion Table, or elsewhere, when

celebrating the Holy Communion during any part of the Consecration Prayer. I admit that it is my practice during the Prayer of Consecration when celebrating the Holy Communion,"—the time, therefore, is exactly fixed to which the Monition would apply,—“and whilst standing before the *Holy Table*, reverently to bend one knee at certain parts of the said prayer, and occasionally in so doing my knee momentarily touches the ground, but such touching of the ground is no part of the act of reverence intended by me. Whether my knee may have thus momentarily touched the ground on either of the days mentioned in the said affidavits on which I am stated to be the celebrating priest, I am, of course, unable to say.” Mr. Walker is a little bolder upon that point, because he says this,—he was present on these days,—“I say that the Respondent did not prostrate himself or kneel upon the steps leading to the Communion Table or elsewhere at any time during the Prayer of Consecration on the 18th day of July and the 14th day of November, 1869, as mentioned in the affidavits; and to the best of my belief he did not touch the ground with either of his knees at all during that time on the occasions on which the Respondent is accused of doing so.” Then he further says this: “And having regard to the positions of the celebrating and assisting priests during the Consecration Prayer, as well as to the length and nature of their dress, I do not believe that it is possible for any person in the body of the church to say whether the Respondent did kneel or not.”

Therefore, the case as stated is this, Mr. Mackonochie being enjoined against kneeling during this prayer, admits a gesture which he contends is not kneeling, but he admits a bowing of his knee, a bowing of it to an extent which occasions it at times momentarily to touch the ground, a bowing of it to an extent which renders it impossible (according to Mr. Walker's affidavit) for anybody to see whether he is or is not kneeling,—that is the distinct statement in the affidavits, viz., that nobody could see whether he is kneeling or not.

First of all their Lordships would consider the literal question which is before them, whether there has been even a literal compliance with the Monition in this act of Mr. Mackonochie. Their Lordships

are all of opinion that there has not been even a literal compliance; that Mr. Mackonochie has knelt; and that *bowing* the knee in the manner which he has described is kneeling; and that it is not necessary that a person should touch the ground in order to perform such an act of reverence as will constitute kneeling. Of course there may be such a bowing of the knee, as would not amount to kneeling in the sense of the Monition, but Mr. Mackonochie very properly says that he takes no advantage of any suggestion of that sort—there may be an accidental bowing of the knee, arising from fatigue or otherwise; but here is a knee bent for the purpose of reverence and in such a manner that those who behold cannot tell whether or not what Mr. Mackonochie and Mr. Walker call kneeling, that is, touching the ground with the knee, has been arrived at, and indeed Mr. Mackonochie says that at certain times his knee has momentarily touched the ground. This seems to their Lordships to be literally kneeling.

But the case must be put much higher than that, because neither this tribunal nor any tribunal will suffer its orders to be tampered with by mere evasion; and a mere evasion it would be, to allow a person when ordered not to kneel (the whole gist and purport of the order, as I shall presently show, being the kneeling by way of reverence) to say, “I did all that I could do towards so kneeling; I bowed my knee; I nearly touched the ground with it—I did not quite touch the ground, but I did it in such a manner that all my congregation, all who were attending and seeing that which I did, could not possibly tell whether I were kneeling in that sense or not.” It would be intolerable to allow any order to be trifled with in such a manner as must be implied if their Lordships were to give place for a moment to any such argument on the part of Mr. Mackonochie as that this was a compliance with the order.

Now, with reference to this particular matter of kneeling, it is one, undoubtedly, of very great importance as regards the Judgment which has been pronounced, and the occasion of that Judgment. We cannot do better, with reference to this part of the subject, than to call attention to the purport and intent of the Book of Common Prayer, when prescribing what is to be done, and in omitting to prescribe that which it does not intend to be done.



For that purpose I will refer to the Judgment which was pronounced by Lord Cairns, as the Judgment of the Judicial Committee on the former occasion. His Lordship thus expresses himself, in page 7 of that Judgment: "Their Lordships are of opinion *that it is not open to a minister of the Church, or even to their Lordships, in advising Her Majesty, as the highest Ecclesiastical Tribunal of Appeal, to draw a distinction, in acts which are a departure from or violation of the Rubric, between those which are important and those which appear to be trivial. The object of a Statute of Uniformity is, as its preamble expresses, to produce an 'universal agreement in the public worship of Almighty God,'—an object which would be wholly frustrated if each minister, on his own view of the relative importance of the details of the service, were to be at liberty to omit, or add to, or alter any of those details. The rule upon this subject has been already laid down by the Judicial Committee in *Westerton v. Liddell*, and their Lordships are disposed entirely to adhere to it: 'In the performance of the services, rites, and ceremonies ordered by the Prayer Book, the directions contained in it must be strictly observed; no omission and no addition can be permitted.'*" And then upon this very subject matter his Lordship further proceeds to say,—"*There would indeed be no difficulty in showing that the posture of the celebrating minister during all the parts of the Communion Service was, and that for obvious reasons, deemed to be of no small importance in the changes introduced into the Prayer Book at and after the Reformation. The various stages of the service are, as has already been shown, fenced and guarded by directions of the most minute kind, as to standing and kneeling,—the former attitude being prescribed even for prayers, during which a direction to kneel might have been expected. And it is not immaterial to observe that whereas in the first Prayer Book of King Edward the VIth, there was contained at the end a Rubric in these words:—'As touching kneeling, crossing, holding-up of hands, knocking upon the breast, and other gestures, they may be used or left as every man's devotion serveth, without blame,'—this Rubric was in the second Prayer Book of Edward the VIth, and in all the subsequent Prayer Books omitted.*"

We may further add an observation as to the extreme care which is taken in the Prayer Book to guard all persons who might feel a scruple with reference to kneeling at the reception of the Holy Communion from any inference that might thereby be raised in their minds of a nature contrary to that which was intended by the Prayer Book itself to be expressed, namely, any intention of adoration of the holy elements. This is most particularly and carefully guarded against, and the reason for such kneeling is explained, and said to be, "for a signification of our humble and grateful acknowledgment of the benefit of Christ, therein given to all worthy receivers, and for the avoiding of such profanation and disorder in the Holy Communion as might otherwise ensue." Then it is explained:—"Yet lest the same kneeling should by any persons, either out of ignorance and infirmity, or out of malice and obstinacy, be misconstrued and depraved, it is hereby declared, that thereby no adoration is intended, or ought to be done, either unto the sacramental bread and wine there bodily received, or unto any corporal presence of Christ's natural flesh and blood. For the sacramental bread and wine remain still in their very natural substances, and therefore may not be adored: for that were idolatry, to be abhorred of all faithful Christians."

And again, carefully does our Church provide in her 28th Article against any such adoration as we have spoken of by this declaration—"The sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped."

Now that being so, and it being of the utmost importance that for the purposes of common prayer such union should be preserved as is essential to the happiness and comfort of all who are joining in this most holy ordinance; what can be a greater offence than the offence of either by addition or omission occasioning trouble or confusion in the minds of those who are invited to join in common prayer, and in one common act of reverence? Acts of reverence, where necessary, are enjoined; and the use of additional acts of reverence, where they are not enjoined, is, according to the Judgment which has been pronounced in this very matter, a thing prohibited.

If, therefore, the Reverend Respondent, in per-

forming his own special act of reverence, does it in such a manner that no one can tell whether he is not doing the very thing which he is prohibited from doing, and has performed that special act of reverence at a time when there is no direction in the Book of Common Prayer for that performance, he certainly does that which militates, in every possible view of the case, both in letter and spirit, against the Monition which he has received, and the reasoning which occasioned that Monition to be issued.

Whether or not Mr. Mackonochie can reconcile it with his view of what is right, that a judgment of this kind should be so narrowly scrutinized, that every possible limit should be placed upon it, and that notwithstanding the reasons which are assigned for it, namely, the desire of promoting uniformity in common worship, it should be, as far as possible, evaded, it is not for their Lordships to say. There may be some who feel great grief and sorrow at any act which may appear to be at variance with the common charity and love that should induce us at all times when assembled for worship, and most especially this highest and holiest act of worship, to be as far as possible of one mind, so that then at least our unity be not disturbed.

But what one is justified in saying, as regards the act which is now complained of as a breach of the Monition, is this, that it is not possible, happily, to reconcile with the administration of our law in its narrowest sense, any mere evasion of that which the law sanctions, of that which the law has ordered, by an authority which binds this reverend gentleman, as it binds every subject of the realm, to strict obedience. That obedience may be rendered grudgingly, if so it must be; it may be rendered in a manner which I am sure the reverend gentleman would not tolerate on the part of any of his flock, if it were a question of obedience to a Higher Power; it may be rendered, therefore, strictly within the limits which are exactly prescribed by the Monition, but that Monition may not be evaded. A mere literal compliance is not all that even the law requires; the compliance must not be literal in a sense which is but evasive.

I will not, in the name of their Lordships, say more upon what I confess presses upon me individually very strongly, the narrowness of obedience shown by

the course taken, as to keeping the candles lighted until the very moment when they are forbidden, and then extinguishing them, and as to the elevation of the elements to something which, even on the affidavits themselves, appears to me to be more than necessary for simply taking the cup and paten into the hands of the officiating clergyman, since we have been obliged to hold that these acts were, nevertheless, in literal compliance with the monition having reference to the Articles.

But here, in this matter of the kneeling, their Lordships find that there is, first, not even a literal compliance with the Order; and secondly, if, upon any strained interpretation of the word "kneeling" (for strained as it appears to their Lordships it would be), they could arrive at the conclusion that it did not preclude the act of bowing one knee so low that it must at times touch the ground, and in a manner which cannot possibly be distinguished from kneeling by those who witness the act; still, if it was a representation of the forbidden act, as nearly as the party charged, dared to represent it, and in such a guise as to convey to all at a distance the impression that the act of kneeling was really performed, that would be a species of evasion of the Order which a Court of Justice would find it right and due to the maintenance of its own force and vigour to visit as being itself a breach of the order which had been made.

For these reasons it has seemed to their Lordships (and it is the opinion of us all) to say that there has been a clear breach of this special monition.

Their Lordships next take into consideration what is proper and right to be done. They did not hear Mr. Stephens upon the question as to whether or not this Tribunal has the means of enforcing its orders. Happily it has been supplied (and I say "happily," because it would be in vain to establish a Tribunal which has no power to enforce its orders) with abundant means for that purpose by the Statutes which have been passed in that behalf; but into the examination of those means, and the different modes that might be adopted for that purpose, we are not, for the reason I am presently going to mention, about to enter. In declining to take any more severe step than that of compelling Mr. Mackonochie to pay the costs of this discussion,

their Lordships have had to consider the affidavit which was last made by him, and to which they have been desirous to give the most favourable construction and allowance; and in that affidavit Mr. Mackonochie very properly says that he never intentionally or advisedly, in any respect, disobeyed the monition, or sanctioned any practice contrary to its provisions. I confess I think, as I have already intimated, that Mr. Mackonochie takes an extremely narrow view of that which the word "obedience" ordinarily implies, when he says that he has endeavoured to obey this Order, but he does say that which, in a sense, for the purpose of clearing his contempt, he may have a right to claim the benefit of, that he never intentionally or advisedly, in any respect, disobeyed the monition.

He now, we hope, will learn that mere literal compliance in a merely evasive manner will not suffice. Literal compliance with regard to the actual limits of the Order is, of course, all that he is held to in law; for an obedience to the spirit of the order, we can only trust to his own feelings and his own conscience. And when he thus tells us that it has not been, and is not his desire wilfully to disobey the law, or to disregard its Monition, their Lordships think that they are bound, upon this first occasion of the matter being brought before them of any non-compliance with the Order, to allow Mr. Mackonochie the benefit of that affidavit; and they do not think it necessary, on the present occasion to do more, after expressing their opinion judicially that the Monition has been disobeyed with reference to kneeling during the prayer of consecration, than to mark their disapprobation of such a course of proceeding by directing that he should pay the costs of the present application.

Their Lordships make no further Order.

104

104

104

104