Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of John Benjamin Lee v. *John Fagg and another, from the Arches Court of Canterbury; delivered June 25th,* 1874.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

IN this case an application was made to the Commissary General of the Diocese of Canterbury for a monition to be issued to the Rev. Charles Joseph Ridsdale, the Incumbent of the parish of St. Peter's, Folkestone, and the churchwardens, ordering them to remove certain ornaments called stations from their church, unless they could show cause why such ornaments should not be removed. The application for this monition appears to have been made by a gentleman described as Mr. John Benjamin Lee, of No. 2, Broad Sanctuary, in the city of Westminster, and their Lordships cannot take cognizance of any other description of that gentleman. Mr. Lee does not state that he has any interest in the suit. The rector did not appear, but the churchwardens, upon the day appointed by the Commissary General for holding a court to make an order in the matter, insisted that the suit should be dismissed, on the ground that the monition did not show that Mr. Lee, the promovent of the suit, had any such interest as would entitle him to maintain it. The learned Commissary General overruled this

objection, whereupon an appeal was preferred to the Court of Arches. The Judge of the Court of Arches reversed the Judgment of the Commissary General, and directed that the suit should be dismissed as against the churchwardens, with costs.

The first question which arises in the case is —whether it is in point of law necessary that the promovent of a suit of this description should have an interest in the subject of it? On this question the learned Judge of the Court of Arches observes: "In the Ecclesiastical Court "there are two kinds of suits, civil and criminal. "The criminal suit, which is the promotion of "the office of the judge, that is, of the ordinary, is "open to any person whom the ordinary may "think fit to allow to promote his office by the "institution of a criminal suit; such a suit is "'*ad publicam vindictam*,' and in some sense "concerns every member of the church. The "civil suit is not open to everyone, even with "the consent of the ordinary, but only to those "who have a personal interest in it;" and the learned judge proceeds to rule that this suit comes within the latter description. Their Lordships are of opinion that the learned judge was right.

It has been contended, indeed, at the bar that there is in the Ecclesiastical Courts a certain third class of suits, not very accurately defined, but designated generally as a *tertium genus*, partaking partly of the character of civil suits and partly of the character of criminal suits, and that this suit is one of that *tertium genus*, but no sufficient authority and no sufficient argument founded upon principle has been adduced to induce their Lordships to affirm the existence of this class of suits, or, if it exists, that the present suit belongs to it.

Their Lordships find the law on this subject

laid down by Lord Stowell in a case which has been quoted, *The Duke of Portland* v. *Bingham*, 1 Haggard, Consistory Cases, p. 157, in which he lays down the distinction between criminal and civil ecclesiastical suits, without alluding to any supposed third class of suits, in these terms:—"There are other interests in which "every man partakes, such as that of main- "taining public order, &c. These are clear, "direct, and universal, and will entitle any- "one to institute proceedings to preserve "that order. But such proceedings must be "*ad publicam vindictam* and by criminal articles "exhibited in due form, which is the usual way "of trying such matters as the present, and the "most convenient. In that case the question "would be reduced to one point only—the right "of the party who is the object of such pro- "ceedings, whereas in civil suits a previous "question may arise of equal difficulty on the "right and title of the person instituting the "suit. This, then, is an important distinction." Their Lordships, therefore, have come to the conclusion that it is necessary in point of law to enable Mr. Lee to maintain this suit that he should have some interest in it.

This being so, the questions which remain are purely questions of pleading and practice in the Ecclesiastical Courts. The first pleading question which arises is whether it is necessary that the monition should show the interest of Mr. Lee upon the face of it, and, secondly, whether, if the Defendants are entitled to object to his want of interest, they have objected to it at the proper time and in the proper manner?

It has been said that citations in suits of this kind have usually not set out the interest of the promovent of the suit, some cases have been cited upon the subject, and reference has been made to Conset's Book of Practice, in which,

although (as far as their Lordships understand) no precedent is actually set out of a form of citation or a form of monition, still the requisites of a citation are described. Those requisites are first, the name of the judge, his commission, and style; secondly, the name of the party cited; thirdly, the day and place where he must appear; fourthly, the cause for which the suit is commenced; fifthly, the name and address of the party at whose instance the citation is obtained; and sixthly, the residence of the Defendant; and it is argued that this enumeration excludes the notion that the interest of the promovent of the suit should appear in the citation. It appears however to their Lordships that that part of the citation which shows "the "cause for which the suit is commenced," would probably be defective unless it showed the interest which the promovent had in it.

Some cases were then referred to in which it has been contended that no interest was set out in the citation, but those cases do not appear to their Lordships to bear out that contention. In *The Duke of Portland* v. *Bingham*, it is said, "This is a case arising upon a decree "taken out by the Duke of Portland, as lay "rector, impropriator, and parson of the "rectory and parish of St. Marylebone, against "Dr. Bingham, citing him to appear and bring "in a license granted by the Bishop of London "authorizing him to perform the office of joint "Sunday preacher in a chapel in Quebec Street "in the said parish." It seems from this citation that the Duke of Portland did allege an interest, and the question subsequently raised by an act on petition, was whether the interest he had set out was or was not sufficient. Then again in *Line* v. *Harris*, 1 Lee, 146, it would appear, from the short report of the citation that it did show some interest on the part of the promovent.

"Mr Harris, the vicar of St. Stephen's, took out "a citation to call Line to answer in a cause "of invading and encroaching on Harris's office "by officiating in this chapel without his "leave." Possibly if the citation had been set out in full, the nature of his interest would have more clearly appeared. Again, in the case of *Hopper* v. *Davis*, 1 Lee, 640, some interest was stated on behalf of the churchwardens. Be this as it may, it is to be observed that a citation only calls upon the Defendant to appear, and then the proceedings take the ordinary course of libel and allegation, and so on. This suit is commenced not merely by citation but by monition also. The Defendant is not only called upon to appear, but to do a certain act, or to show cause why it should not be done. A monition is by no means a process of the Court to be issued like a citation as a matter of course, but is granted on application in the exercise of judicial discretion, and in the absence of cause shown becomes an imperative order. If therefore it were clear that a mere citation need not show an interest, it would by no means follow that a monition need not. As far as their Lordships are able to collect, this mode of proceeding, although it may not be altogether novel, has been more frequently adopted recently, than in former times. According to the statement of the Dean of the Arches, which undoubtedly is correct, no precedent is to be found of any monition not showing an interest in a civil suit of this kind. One precedent only has been brought before their Lordships of such a monition, but that is of a very important character. It is the well-known case of *Beal* v. *Liddell*, in which the suit was commenced in precisely the same manner as this, and in which the interest of the promovent of the suit is set out most carefully in the monition. It may be at least inferred that their Lordships, who heard

that case (the committee comprising very eminent names), were of opinion that this was proper and necessary, for Mr. Beal appeared before the Privy Council desiring the execution of the monition, whereupon counsel for the Defendant made an objection which was afterwards withdrawn, that Mr. Beal had no interest to continue the suit, although he had lawfully begun it, whereupon (according to the report of Mr. Moore) the committee observe:—"The counsel " for the Respondents took an objection, which " they did not press, to Beal being heard, as he had " ceased to be a parishioner or inhabitant within " the district of St. Barnabas, and therefore had " no *locus standi* in an Ecclesiastical Court. " Their Lordships intimated their opinion that " the objection in general law and practice was " correct, and that it was only in the particular " circumstances of the case, and having regard " to the waiver of the objection by the in- " cumbent and churchwardens, that Beal would " be allowed to proceed, but that the permission " granted him was not to be considered a " precedent." Their Lordships seem to have entertained some doubt as to whether Beal's interest must not have been a continuing interest to enable him to enforce execution in the suit, but none that it was proper and necessary that his interest in the first instance should have been stated in the proceeding by which the suit was commenced.

That being so, their Lordships are clearly of opinion that it was necessary that Mr. Lee's interest should appear upon the monition.

Then comes the question, if the Defendants had a right to object to his interest not appearing when and how they should have objected? It is stated, indeed, by the learned Judge of the Commissary Court that in his opinion the only convenient and correct mode of raising an objec-

tion to Mr. Lee's interest is, either appearing under protest and calling upon him to propound his interest, or by raising it on the admission of the libel or by the subsequent pleadings. The learned Judge of the Court of Arches speaks of three courses which were open to the Defendants. He says, "The party so "cited might have taken one of three courses, "he might have appeared and demanded a more "formal proceeding by way of libel, or by the less "formal way of act on petition, but he might "also have made his defence by appearing in "obedience to the monition and showing cause "against it to the Court." The learned Commissary gave notice that he would hold a court for the purpose of cause being shown against the monition, and he states that he held this court with a view of making an order in the matter. Under these circumstances, the Defendants being called upon, as they properly would be, to show cause, in their Lordships' opinion it was competent for them to show as cause that which was fatal to the suit, namely, that the Plaintiff had no interest in instituting it.

Their Lordships are therefore of opinion that the judgment of the Court of Arches was right, and they will humbly advise Her Majesty to affirm that judgment, and to dismiss this Appeal, with costs.