Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Reverend Charles Joseph Ridsdale, Clerk, v. *Clifton, from an Order of the Judge as Official Principal of the Arches Court of Canterbury; delivered 12th May,* 1877.

Present at the hearing of the Appeal:

LORD CHANCELLOR.
LORD SELBORNE.
SIR JAMES W. COLVILE.
LORD CHIEF BARON.
SIR ROBERT PHILLIMORE.
LORD JUSTICE JAMES.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR BALIOL BRETT.
SIR RICHARD AMPHLETT.

Episcopal Assessors:

ARCHBISHOP OF CANTERBURY.
BISHOP OF CHICHESTER.
BISHOP OF ST. ASAPH.
BISHOP OF ELY.
BISHOP OF ST. DAVIDS.

THE Appeal of Ridsdale *v.* Clifton, in which their Lordships have now to state the recommendation which they propose humbly to make to Her Majesty, is an Appeal to Her Majesty in Council brought by the Rev. Charles Joseph Ridsdale, Clerk, Incumbent, or perpetual Curate of St. Peter, Folkestone, against an Order or Decree pronounced by Lord Penzance, as Judge or Official Principal of the Arches Court of Canterbury, on the 3rd of February, 1876.

This Judgment specified various matters as to which it declared that the Appellant had offended against the laws ecclesiastical; but the Appeal is

brought in respect of four only of these matters, and it is to these only that the observations of their Lordships need be directed.

The four matters as to which the Appeal complains of the Judgment are these:—

1. The wearing during the service of the Holy Communion of vestments known as an alb and a chasuble.

2. The saying the Prayer of Consecration in the service of the Holy Communion, while standing at the middle of the west side of the Communion Table, in such wise that the people could not see the Appellant break the bread or take the cup into his hand.

3. The use, in the service of the Holy Communion, of wafer-bread or wafers, to wit, bread or flour made in the form of circular wafers, instead of bread such as is usual to be eaten.

4. The placing and unlawfully retaining a crucifix on the top of the screen separating the chancel of the church from the body or nave.

There were eight other charges against the Appellant, as to all of which he was admonished by the learned Judge, but as to none of which is there any Appeal.

Of the four charges which are the subject of Appeal, the three first were considered by the learned Judge to be covered by the decision of this Committee in the case of Hebbert *v.* Purchas, and by the Order of Her Majesty in Council made in that case; and as to them he did not exercise any independent judgment.

The fourth charge, as to the crucifix, the learned Judge did not consider to be covered by authority otherwise than indirectly and by implication.

Their Lordships have had to consider, in the first place, how far, in a case such as the present, a previous decision of this Tribunal between other parties, and an Order of the Sovereign in Council founded thereon, should be held to be conclusive in all similar cases subsequently coming before them. If the case of Hebbert *v.* Purchas is to be taken as absolutely conclusive of every other case, with the same or similar facts, there can be no doubt that the decision of the learned Judge on the first three heads, being in accordance with that of Hebbert *v.* Purchas, was correct.

In Hebbert *v.* Purchas, the Defendant did not appear, either before the Dean of Arches or before the Judicial Committee; but, after the decision of the Judicial Committee was pronounced against him, he presented a Petition praying for a rehearing.

The Judicial Committee to whom that Petition was referred were of opinion that, to have granted such an application, would have been to violate the spirit of the 2nd and 3rd William IV, cap. 92, which transferred the powers of the Court of Delegates to the Sovereign in Council, and provided that every Judgment, Order, and Decree should be final and definitive, and that no Commission should thereafter be granted or authorized to review any Judgment or Decree made under that Act.

All that this decided was the finality of that Judgment *inter partes;* and the propriety of its being held final in that case was the more obvious from the fact that a Defendant not appearing in the Primary Court or on the Appeal might be supposed to be lying by, taking the chance of a decision in the first instance, and then trying to get rid of it when it turned out to be unfavourable.

The present case, however, raises the question of finality not *inter partes,* but as against strangers.

In the case of decisions of final Courts of Appeal on questions of law affecting civil rights, especially rights of property, there are strong reasons for holding the decisions, as a general rule, to be final as to third parties.

The law as to rights of property in this country is to a great extent based upon and formed by such decisions. When once arrived at, these decisions become elements in the composition of the law, and the dealings of mankind are based upon a reliance on such decisions.

Even as to such decisions it would perhaps be difficult to say that they were, as to third parties, under all circumstances and in all cases absolutely final, but they certainly ought not to be reopened without the very greatest hesitation.

Their Lordships are fully sensible of the importance of establishing and maintaining, as far as possible, a clear and unvarying interpretation of rules the stringency and effect of which ought to be easily ascertained and understood by every Clerk before his admission to Holy Orders.

On the other hand, there are not, in cases of this description, any rights to the possession of property which can be supposed to have arisen by the course of previous decisions; and in proceedings which may come to assume a penal form, a tribunal, even of last resort, ought to be slow to exclude any fresh light which may be brought to bear upon the subject.

It is further to be borne in mind that in the case of Hebbert *v.* Purchas, the Judicial Committee, although they had before them a learned and able Judgment of the then Dean of Arches in favour of Mr. Purchas on the points now raised, had not the advantage of an argument by Mr. Purchas' Counsel on those points.

These considerations have led their Lordships to the conclusion that, although very great weight ought to be given to the decision in Hebbert *v.* Purchas, yet they ought in the present case to hold themselves at liberty to examine the reasons upon which that decision was arrived at, and if they should find themselves forced to dissent from those reasons, to decide upon their own view of the law.

Their Lordships will now proceed to consider the first charge against the Appellant, namely, that of wearing an alb and chasuble. They will, however, premise that they do not propose to express any opinion upon the vestures proper to be worn by Bishops, as to which separate considerations may arise; and in referring to the dress of the parochial clergy, they will, for greater convenience, use the term "vestments" for the purpose of denoting the alb and chasuble or cope, as distinguished from the surplice.

The argument of the Appellant on this head, which was very clearly and very forcibly stated, may be thus summed up. The Ornaments Rubric, he contends, in the revised Prayer Book of 1662 is now the only law as to the vesture of the clergy. It contains within its one sentence all that is now enacted upon that subject. It sweeps away all previous law as to the vesture of the clergy, whether that law was to be found in Statute, Canon, Injunction, or otherwise. It authorizes the use of all ornaments which had the Parliamentary authority of the First Prayer Book of

Edward the Sixth. The vestments in question are among the ornaments which had this Parliamentary authority; therefore it authorizes the use of the vestments in question.

To this reasoning, if the first proposition in the series be correct in point of fact and law, no exception could, probably, be taken. Their Lordships, however, are unable to accept that proposition. They are of opinion that it is a misapprehension to suppose that the Rubric note of 1662 as to ornaments was intended to have, or did have, the effect of repealing the law as it previously stood, and of substituting for that previous law another and a different law, formulated in the words of that Rubric note, and of thus making the year 1662 a new point of departure in the legislation on this subject.

Before, however, proceeding to trace the history of the law, their Lordships must observe upon the expression in the argument which asserts that the Ornaments Rubric "authorises" the use of the vestments in question. In the opinion of their Lordships, if the only law as to the vesture of the clergy is to be found in the Ornaments Rubric, the use of the vestments of the First Edwardian Prayer Book is not merely authorized, it is enjoined. It is not an enactment ordering the accomplishment of a particular result, and suggesting or directing a mode by which the proposed result may be attained. The sole object of the Rubric is to define the mode of performing an existing ministration. If the Rubric is taken alone the words in it are not optional, they are imperative; and every clergyman who, since 1662, has failed, or who may hereafter fail, to use in the administration of the Holy Communion the vestments of the First Edwardian Prayer Book, has been, and will be, guilty of an ecclesiastical offence rendering him liable to heavy penalties. Any interpretation of the Rubric which would leave it optional to the minister to wear or not to wear these vestments, not only would be opposed to the ordinary principles of construction, but must also go to the extent of leaving it optional to the minister whether he will wear any official vesture whatever. If the Rubric is not imperative as to the alb, and the chasuble or cope, in the Communion Office, it cannot be imperative as to the surplice in the other services, or any of them.

It is necessary now to ascertain the state of the law before the Act of Uniformity and Rubric of 1662; and then to examine whether any and (if any) what alteration was made by that Act and Rubric.

In the first Book of Edward the Sixth (1549), the directions as to the vestures of the ministers officiating in the public services of the Church (omitting all that relates to hoods and the directions as to Bishops) were as follows:

In the saying and singing of matins and evensong, baptizing and burying, the minister was to use a surplice. In the administration of the Holy Communion the celebrant was to "put upon him a white albe plain, with a vestment or cope," and the assistant-ministers (priests or deacons) were to "have upon them likewise the vestures appointed for their ministry, namely, albes with tunicles."

These directions were omitted from the Second Book of King Edward (1552); and, instead of them, a Rubric was inserted, immediately before the order for Morning Prayer, in these words:—"And here it is to be noted, that the minister, at the time of the Communion, and at all other times in his ministration, shall use neither alb, vestment, nor cope; but . . . . . being a priest or deacon, he shall have and wear a surplice only." This Book was "annexed and joined" to the statute 5th and 6th Edward the Sixth, cap. I, and was established as law thereby.

King Edward died within a few months after the time appointed for this statute to take effect, and the re-action under Queen Mary followed. Upon the accession of Queen Elizabeth, the Legislature, reverting to the state of matters which had existed when the Second Book of Edward was introduced, determined at once to restore the Liturgy and offices of religion contained in that book, with a few specified alterations, but to leave the question of the vestures of the ministers of the Church open for further consideration. The natural course under these circumstances was that adopted, viz., to "retain" the use of the vestures which had been authorized before 1552, until a final settlement of that question could conveniently be made.

No new or revised Prayer Book was annexed to Queen Elizabeth's Act of Uniformity (1 Eliz. cap. 2);

but the Second Book of King Edward, "with the alterations and additions therein, added and appointed by this statute," (viz., "one alteration or addition of certain lessons to be used on every Sunday in the year, and the form of the Litany, altered and corrected, and two sentences only added in the delivery of the Sacrament to the communicants," as specified in the 3rd section), was directed to stand and be in full force and effect from the 24th June, 1559.

The enactment, however, that the Second Book of King Edward was to be used, with these alterations and additions, "and none other or otherwise," (sect. 3), was further qualified by the provisos contained in the 25th and 26th sections, of which the former is in these words:—

"Provided always, and be it enacted, that such ornaments of the Church, and of the ministers thereof, shall be retained and be in use, as was in this Church of England by authority of Parliament in the second year of King Edward the Sixth, until other order shall be therein taken by the authority of the Queen's Majesty, with the advice of Her Commissioners, appointed under the great seal of England for causes ecclesiastical, or of the Metropolitan of this realm."

In this manner, and not by any textual alteration of the Rubrics in the Second Book of King Edward, the directions as to ornaments of the First Book were kept in force until other order should be therein taken, in the way provided by the Act.

The authorities whose duty it was to issue to the people, in 1559, a printed Book of Common Prayer, made conformable to the Statute, prefixed to the Book so issued by them a copy, *in extenso*, of the Statute of Elizabeth itself; and they also of their own authority, not by way of enactment or order, but by way of a memorandum or reference to the Statute, substituted a new admonitory note or Rubric for the note immediately preceding the order of Morning Prayer in the Second Book of King Edward.

That note or Rubric, as is pointed out by Bishop Gibson,* was not inserted by any authority of Parliament. It was meant to be a compendious and convenient summary of the enactment on this subject. If it was an accurate summary, it was

* Codex, Edn. 1761, p. 296.

merely a repetition of the Act. If it was inaccurate or imperfect, the Act, and not the note, would be the governing rule.

It is of importance to bear in mind that the Ornaments Rubric, which it is now contended contains the whole enactment or law relating to the vesture of the clergy, was not, when originally introduced in 1559, and was not meant to be, an enactment at all; and it in fact ended with a reference to the Statute 1 Elizabeth, cap. 2, set out in the beginning of the Prayer Book, in terms which showed that the Rubric claimed no intrinsic authority for itself.

The Statute, by its 25th section, had enacted that the ornaments of 1549 should be retained and be in use, but only until other order should be therein taken, by the authority of the Queen, with the advice therein mentioned. The enactment was therefore in its nature provisional, and prepared the way for the subsequent exercise of a power reserved to the Queen. If that power was not exercised, the enactment in the 25th clause would remain absolute. If the power was exercised, the order made under the power would not be an order in derogation or by way of repeal of the Act; but the order would be in pursuance of and read into the Act as if that which was done by virtue of the reserved power had originally been enacted in the Statute.

Did, then, Queen Elizabeth ever take other order within the meaning of the 25th section?

Their Lordships do not think it necessary to dwell upon the Injunctions of Queen Elizabeth, and still less upon the interpretation of those Injunctions; because they cannot satisfy themselves, either that the Injunctions pointed to the vestments now in controversy, or that they were issued with the advice required by the section of the Act of Parliament.

But their Lordships are clearly of opinion that the Advertizements (a word which in the language of the time was equivalent to "admonitions" or "injunctions") of Elizabeth, issued in 1566, were a "taking of order," within the Act of Parliament, by the Queen, with the advice of the Metropolitan.

It is not disputed that these Advertizements were issued with the advice of the Metropolitan, and, indeed, also with the advice of the Commissioners

for causes ecclesiastical; but it is said that they were not a taking of order by the Queen.

The Queen had in the most formal manner, by Her Royal Letters, commanded the Metropolitan and other prelates to prepare these Advertizements, directing them "so to proceed by order, injunction, or censure, according to the order and appointment of such laws and ordinances as were provided by Parliament, and the true meaning thereof, so as uniformity of order might be kept in every church, and without variety or contention."

There was no particular form required by statute or by law in which the Queen was to take order, and it was competent for Her Majesty to do so by means of a Royal Letter addressed to the Metropolitan. The Advertizements were issued by the Prelates as Orders prepared under the Queen's authority.

Immediately after their issue, on the 21st May, 1556, Grindal, Bishop of London, writes* to the Dean of St. Paul's, requiring him to put them in force, and stating that they were issued by the Queen's authority, and that he (Grindal) would proceed to deprive any who should disobey them. The Articles of Archbishop Parker† speak of them as Advertizements set forth "by public authority." In 1583, in Articles presented to the Queen‡ herself by the Archbishop and some of the Bishops, they are referred to as the "Book of Advertizements," and in the margin as the "Advertizements set out by Her Majesty's authority."

Against this it is said that there is, nevertheless, other matter in the "Parker Correspondence" (lately for the first time published in a collected form, though it was partially known to some historical writers of the last century, who drew from it similar inferences), from which it ought to be inferred, as a matter of fact, that the Book of Advertisements was published without Queen Elizabeth's sanction.

Their Lordships cannot lend any countenance to the suggestion that the legitimate inference to be drawn from the tenor and language of public documents, from the acts done under them, and

* MS. from Dom. Eliz., vol. 39, No. 76.

† 1 Card. Doc. An. 320.

‡ 163 State papers, Domestic, No. 31.

from the public recognition of their authority, could in any case be controlled by expressions found in a correspondence of this character. As, however, much of the argument against the authority of the Advertizements was founded on this correspondence, their Lordships think it right to say that they draw from the Correspondence, as a whole, a conclusion opposite to that in support of which it was referred to.

The first draft of the Book of Advertizements was prepared by the Archbishop and his colleagues very soon after the receipt of the Queen's letter of the 25th January, 1564-5, in the form of an order running in the Queen's name; and it appears, from passages in several letters, that they wished the Civil Power to undertake as much as possible of the formal responsibility of promulgating and enforcing the proposed new order, and that they anticipated very great difficulty if, without that support, the principal share of the burthen should be thrown upon the ecclesiastical jurisdiction. An opposite view, however, prevailed at Court, where some of the Queen's Ministers and courtiers were more favourable than she was herself to the views of the Puritans, and where it was as well understood as it was by the Archbishop that the measure would encounter much unpopularity and opposition, so far as it was contrary to those views.

It further appears that in the first draft of the book (which is printed at length in the Appendix to Strype's "Life of Parker," No. 28, p. 84,) there were several doctrinal articles, and other articles (about the temporalities of Bishops, the employment of schoolmasters, and the dissolution of marriages within the prohibited degrees), which were afterwards omitted, and the legality of all or some of which, under any powers then vested in the Crown, might have been more than doubtful.

That the Archbishop knew that no new "Order" could legally be taken by the sole authority of himself and his brother Commissioners, is abundantly clear.

When, on the 8th March, 1564-5, he sent the first draft to Secretary Cecil to be submitted to the Queen, he wrote:—

"If the Queen's Majesty will not authorize them, the most part be like to lie in the dust for execution of our parts; laws be so much against our private doings."

That draft was not approved; he sent it again a year afterwards (12th March, 1565-6), with a letter containing this passage:—

"And where once, this last year, certain of us consulted and agreed upon some particularities in apparel (when the Queen's Majesty's letters were very general), and for that by Statute we be inhibited to set out any constitutions without licence obtained of the Queen, I sent them to your honour to be presented. They could not be allowed then, I cannot tell of what meaning; which I now send again, humbly praying that, if not all, yet so many as be thought good may be returned with some authority, at the least way for particular apparel; or else we shall not be able to do so much as the Queen's Majesty expecteth for us to be done."

That the Archbishop, both from his communications (in every stage of this business) with the Secretary of State (whose answers to him do not appear in the correspondence), and also from personal interviews with the Queen, must have had the Queen's pleasure distinctly made known to him, is no less certain.

In a letter dated the 12th April, 1566, he gives an account of an audience which he had on the 10th of March preceding (exactly two days before his letter of the 12th March to Cecil), when he had explained to the Queen the difficulty of enforcing the uniformity desired by Her Majesty. "I answered, that these precise folk would offer their goods and bodies to prison rather than they would relent, and Her Highness wilied me to imprison them."

In his official letter to Grindal, dated the 28th March, 1566, inclosing the Book of Advertizements, he refers to another interview which they had both then recently had with the Queen by her own command, in which she charged them "to see her laws executed, and good orders *decreed* and observed."

In the letter which he wrote on the same 28th March to the Secretary of State, submitting the Advertizements in their final form (together with the draft of the letter to Grindal) for approval, he says:—

"I pray your Honour to peruse this draft of letter and the Book of Advertizements, with your pen, which I mean to send to my Lord of London. *This form is but newly printed, and yet stayed till I may hear your advice.* I am now fully bent to prosecute

this order and to delay no longer, *and I have weeded out of these Articles all such of doctrine, &c., which, peradventure, stayed the Book from Her Majesty's approbation, and have put in but things advouchable, and, as I take them, against no law of the realm.*" They could only be "against no law of the realm" if they were issued by the Queen's authority. For what purpose were they sent to Cecil, except to obtain that authority for their promulgation, in the form and manner proposed? It is true that the words follow (which were relied upon by the Appellant's Counsel):—"And where the Queen's Majesty will needs have me assay with mine own authority what I can do for order, I trust I shall not be stayed hereafter, saving that I would pray your Honour to have your advice to do that more prudently, in this common cause, which must needs be done." Their Lordships understand by this that the Queen had determined that the new order, made with her authority and approbation, should be enforced by the Metropolitan, through the ecclesiastical jurisdiction, without aid from the Privy Council or the secular power; not that the new order itself was to be without warrant, except from the sole authority of the Metropolitan, to whom, without the authorization of the Crown, the law had given no power to make any such order.

The facts that this duty was undertaken by the Archbishop reluctantly and possibly against his own judgment, that his wishes and opinions were on several points overruled, and that the Book of Advertizements was promulgated, not in the form which he would have preferred, but in that imposed upon it by the Royal will, all tend to prove that it was promulgated in that form with, and not without, the Queen's authority.

If, indeed, the legal effect of the Advertizements were to be judged of (as their Lordships do not think it ought to be) by the private opinion of Archbishop Parker, there is in the correspondence distinct evidence that Parker, after the Advertizements were issued, considered them to be an execution of the statutory power. Writing to the Lord Treasurer, November 15, 1573,* seven years after the Advertizements were issued, he says:—

"The world is much given to innovations, never

* Correspondence, p. 450.

content to stay to live well. In London our fonts must go down. . . . . I do but marvel what some men mean . . . with such alteration, when order hath been taken publicly this seven years by Commissioners, according to the Statute, that fonts should not be removed."

The Advertizements had ordered* "that the fonte be not removed," and this circumstance, and the expressions "order taken," "this seven years," and "Commissioners" (the Advertizements having been signed by the Bishops as Commissioners), make it clear that Parker was referring to the Advertizements. But the Advertizements could not have been a "taking of order publicly" "according to the Statute" unless they had the direct authority of the Queen.

Their Lordships now turn to the part† of the Book of Advertizements which deals with the vestures of the Ministers. It is in these words:—

"In the ministration of the Holy Communion in Cathedral and Collegiate Churches, the principal minister shall wear a cope, with gospeller and epistoller agreeably; and, at all other prayers to be said at that Communion Table, to use no copes, but surplices.

"That the Dean and Prebendaries wear a surplice with a silk hood in the choir; and, when they preach, to use their hoods.

"Item, that every minister saying any public prayers, or ministering the Sacraments, or other rites of the Church, shall wear a comely surplice with sleeves, to be provided at the charge of the parish."

It was not seriously contended that albs or chasubles could, in any reasonable or practical sense, or according to any known usage, be worn, or could be meant to be worn, concurrently with the surplice. If, therefore, the use of the surplice, at the administration of the Holy Communion, was rendered lawful and obligatory by these "Advertizements," the use of albs or chasubles, at that administration, was thereby rendered unlawful.

Their Lordships do not forget that the Book of Advertizements also contains orders upon other distinct subjects not within the 25th section of the Statute; as to some of which it was suggested in

* 1 Card. Doc. Ann. 326. † Card. Doc. Ann.

argument that the Queen had no legislative power. But this, whether the suggestion be well or ill-founded, is, for the present purpose, immaterial.

The proof of the subsequent reception and enforcement as law of the order established by the Book of Advertizements as to the vestures of the ministers of the Church in the administration of the Holy Communion throughout the Church of England from 1566 to the Great Rebellion, and again between the Restoration and St. Bartholomew's Day in 1662, is complete.

After 1566, vestments, albs, and tunicles (copes also, in parish and non-collegiate churches) are mentioned in the official acts of the Bishops and others, performed in the public exercise of their legal jurisdiction, only as things associated with superstition, and to be defaced and destroyed. They were so treated by a Royal Commission sent to Oxford by Queen Elizabeth in 1573, and by the Visitation Articles of Archbishops Grindal and Sandys (York, 1571 and 1578); and Abbot and Laud (1611 and 1637); of Bishops Aylmer, Bancroft, and King (London, 1577, 1601, and 1612), and others. The surplice, on the other hand, in a long series of Visitation Articles (sometimes accompanied by injunctions) of not less than thirty-two Archbishops and Bishops, of sixteen dioceses in England, commencing with Archbishop Parker in 1567,* and ending with Bishop Juxon in 1640,† besides those of various Archdeacons, is consistently treated as the vesture required by law to be used by all ministers of the Church, not only in their other ministrations, but expressly in the administration of both Sacraments. Among the most stringent in this respect are the Articles of Bishops Andrewes, Overall, and Wren. After the Restoration (if, as seems probable, the Visitations of Cosin and other Bishops in 1662, whose Articles of that year do not expressly refer to the Act 13th and 14th Car. 2, cap. 4, were held under the state of the law prior to that Act), we have not only Bishop Cosin‡ but Bishops Ironside of Bristol, Morley of Winchester, and eight others of as many dioceses (whose Articles of 1662 are stated in the Appendix to the 2nd Report of the Ritual Commissioners to have been the same on this

* 1 Card. Doc. Ann., 320. † 2 Rep. Rit. Com., 589.
‡ Works, vol. 4, 509, 510.

point with those of Morley), all administering strict inquiries, to the same effect.

This, however, is not all. There is direct proof in the same class of documents, and in others of a still more public and authoritative kind, that the Advertizements were accepted as law, as having the Queen's authority.

In a Visitation held in 1569, Bishop Parkhurst, of Norwich, inquired (not expressly mentioning the surplice), "Whether your Divine service be said or sung in due time and reverently, and the Sacraments duly and reverently ministered in such decent apparel as is appointed by the laws, the Queen's Majesty's Injunctions, and other orders set forth by public authority in that behalf." That he was referring to the Advertizements, and "by public authority," meant the authority of the Queen, seems clear from one of his "Injunctions to the Clergy" (the fourth), at the same Visitation, about perambulations, where he orders the clergy, on those occasions, not to use surplices or superstitious ceremonies, "but only give good thanks, and use such good order of prayers and homilies as be appointed by the Queen's Majesty's authority in that behalf." The use of homilies at perambulations was prescribed, not by the Injunctions of 1559, but by the Advertizements.

Bishop Cox, of Ely, in his "Injunctions" issued between 1570 and 1574, directed "that every parson, vicar, and curate shall use in the time of the celebration of Divine service to wear a surplice, prescribed by the Queen's Majesty's Injunctions and the Book of Common Prayer; and shall keep and observe all other rites and orders prescribed in the same Book of Common Prayer, as well about the celebration of the Sacraments, as also in their comely and priestly apparel, to be worn according to the precepts set forth in the book called "Advertizements." And, in his accompanying "Articles," he inquired, "Whether any, licensed to serve any cure, do not wear at the celebration of the Divine service and Sacraments, a comely surplice, and observeth all other rites and orders prescribed in the Book of Common Prayer, and the Queen's Majesty's Injunctions, and in the Book of Advertizements?"

Archbishop Grindal, in his Gloucester Articles of 1576, ordered the clergy "not to oppose the Queen's

Injunctions, nor the Ordinations, nor Articles made by some of the Queen's Commissioners" (naming those who subscribed the Advertizements), "January the 25th, in the seventh year of the Queen's reign." (The date is that of the Queen's letter mentioned in the Advertizements, not that of the promulgation of the book itself.) This alone seems to have been thought by Strype* (an historian sometimes cited for a contrary purpose) sufficient proof that the Queen must in the end have authorized the publication of the Advertizements.

Archbishop Whitgift, in his celebrated Articles of 1584,† enjoined "that all preachers and others in ecclesiastical orders do at all times wear and use such kind of apparel as is provided unto them in the Book of Advertisements and Her Majesty's Injunctions, *anno primo*."

Bishop Thornborough, of Bristol, in 1603, inquired "Whether at any time, and during the whole celebration of Divine service and ministration of the Sacraments, in every your churches, your parson, vicar, or curate doth wear a surplice, according to the terms and statutes of this realm of England in that behalf provided; and how often default hath been made herein, and by whom?" In another Article, as to Perambulations, he inquires whether the clergy say "the prayers and suffrages appointed" for that ceremony, "according to the late Queen's Majesty's Injunctions in that behalf provided, and according to the Book of Advertisements?"

The Book of Advertisements was referred to as of legal authority in several of the Canons of 1571; showing (though those Canons were not confirmed by the Crown, nor, apparently, ever put in force) the sense and understanding at that time, while the matter was still recent, of the Bishops and clergy of the whole Church of England represented in the Convocations of both provinces. The 24th and 25th Canons of 1603-4 repeated, with express reference to the Advertisements, as already containing the rule to be followed ("according to the Advertizements published anno 7 Eliz." "Juxta Admonitiones in Septimo Elizabethæ promulgatas") the substance of the directions

* 1 Life of Parker, 319.

† 1 Card. Doc. Ann., 413.

contained in the Advertisements, as to the use of surplices, &c., in cathedral and collegiate churches; and the 58th Canon, which relates to the use of surplices at the administration of the Holy Communion in parish churches, followed, with scarcely any variation, the exact words of the Advertisements on the same subject.

The Convocations which passed those Canons thought them consistent with others (the 14th, 16th, and 56th), which enjoined the strictest possible conformity with the orders, rites, and ceremonies prescribed by the Book of Common Prayer, without addition, omission, or alteration; a view quite sound and correct, if the Advertizements were a legal exercise of the statutory power given to the Crown by 1 Eliz., cap. 2, section 25; but, on the contrary supposition, erroneous and untenable. The Canons of 1603-4 received the Royal Assent; so that on that occasion there was the most formal, solemn, and public concurrence possible, of the Crown and the Convocation of both Provinces, in that understanding of the law, which had been acted upon for nearly fifty years by all the executive authorities of the Church. The Canons of 1640 (also confirmed by the Crown), which mention "Queen Elizabeth's Injunctions and Advertizements," carry on the public evidence of the same understanding down to the time of the Great Rebellion; and the Divines consulted by the Lords' Committee of 1641* alleged that the High Church party "pretended, for their innovations, the Injunctions and Advertizements of Queen Elizabeth," denying, indeed, that either the Injunctions or the Advertizements were in force, "but by way of commentary and imposition;" but not disputing that the Advertizements had such authority as Queen Elizabeth by law could give them.

To this it may be added that Hooker, the greatest ecclesiastical writer between 1566 and the Protectorate, describes the Advertisements as "agreed upon by the Bishops, and confirmed by the Queen's Majesty."† Cosin (although, in a passage which will afterwards be referred to, he appears to have at one time supposed that the conditions of the Statute

* Card. Conf., 273.

† 3 Hookers' Works, by Keble, 6th edition, p. 587.

had not been duly complied with,) speaks of them* as made under the Queen's reserved authority; and Wren† as "Advertizements authorized by law (1 Eliz. cap. 2, sect. penult.")

From all these facts, the conclusion drawn by this Committee in Hebbert *v.* Purchas, that the Advertisements of Queen Elizabeth on this subject had the force of law under 1 Elizabeth, cap. 2, section 25, appears to their Lordships to be not only warranted, but irresistible.

Nor is the weight of these facts diminished by the circumstance (which was, in the opinion of their Lordships, established by the Appellant's Counsel), that the extensive destruction of albs, vestments, and copes, mentioned in Mr. Peacock's book, and spoken of in the Judgment of Hebbert *v.* Purchas as if it had been later than the promulgation of the Advertizements, really preceded that event. The same causes which had led to the destruction, irregularly and without law, of a particular kind of ornaments, as to which the law, in its then provisional state, was at variance with the sentiment of the moderate, as well as of the extreme, section of the clergy of the Reformed Church, would naturally suggest the expediency of taking such order, upon the first convenient opportunity, as would give legal sanction to the disuse of those ornaments.

Reading, then, as their Lordships consider they are bound to do, the order as to vestures in the Book of Advertizements, into the 25th section of the 1st of Elizabeth, cap. 2, and omitting (for the sake of brevity) all reference to hoods, it will appear that that section, from the year 1566 to 1662, had the same operation in law as if it had been expressed in these words: "Provided always that such ornaments of the Church and of the ministers thereof shall be retained and be in use as were in this Church of England by authority of Parliament in the second year of King Edward VI, except that the surplice shall be used by the ministers of the Church at all times of their public ministrations, and the alb vestment or tunicle shall not be used, nor shall a cope be used except at the administration of the Holy Communion in cathedral and collegiate churches."

* 5 Works, p. 90. † Parentalia, p. 75.

It is clear that, during the whole of this period, except during the interregnum of the Civil War and the Protectorate, when the Episcopal Government of the Church and the use of the Liturgy were interrupted, this state of the law was generally understood, acted upon, and enforced by authority. It is also clear that throughout this long period the Ornaments Rubric, as originally printed in the Prayer Book of Queen Elizabeth, was allowed to remain unaltered. This, then, being the state of the law up to and in 1662, and the Ornaments Rubric, up to and at that time, not being in any sense a complete and independent enactment, but being merely a reference to an external law, namely, the Statute of 1st Elizabeth, cap. 2, the question has now to be asked, was it the intention, and was it the effect of the alteration in the Ornaments Rubric in 1662, to repeal the 25th section of the Statute of Elizabeth, and all that had been done under it, and to set up a new and self-contained law on the subject of ornaments?

The history of the Revision of the Prayer Book is strongly opposed to such a conclusion.

The Puritans, in their 18th "General Exception," at the Savoy Conference, stated various objections of principle to ceremonies in the Church, especially as to three matters: (1) the surplice; (2) the sign of the Cross in Baptism; and (3) kneeling at the Holy Communion. Following up their general "exceptions" with objections in detail to particular parts of the Book of Common Prayer, they said, commenting on the Ornaments Rubric, as it stood before the revision of 1662, "Forasmuch as this Rubric seemeth to bring back the cope, albs, &c., and other vestments forbidden by the Common Prayer Book, 5th and 6th Edward the Sixth, and for our reasons alleged against ceremonies under our 18th General Exception, we desire it may be wholly left out."

Baxter* seems to treat the objection as having been founded on the words in the Rubric "at the time of the Communion." "They excepted," he says, "against that part of the Rubric which, *speaking of the Sacraments to be used in the Church*, left room to bring back the cope, albe, and other vestments."

* History of Life and Times, cap. 8, p. 155.

The words, "seemeth to bring back," assumed that those vestures of the First Book of King Edward were not practically in use under that Rubric. The words did not suggest—and they would have been erroneous if they had suggested—more than that the Rubric had the appearance of giving them some legal authority. The real substance of the objection was in the reference to the 18th General Exception, and in the request that the whole Rubric might be omitted, with the object, manifestly, of getting rid of the surplice. The Bishops do not appear to have considered the suggestion about "seeming to bring back," &c., worthy of particular notice. It would have been easy to answer it by showing that, under the Statute to which that Rubric referred, the surplice had been legally substituted for the albs, &c. But knowing that the surplice itself was the only thing really in controversy, they contented themselves with saying: "For the reasons given in our answer" (in which they had defended ceremonies generally, and the surplice particularly, but had said nothing about copes, albs, or vestments) "to the 18th General Exception to which you refer us, we think it fit that the Rubric continue as it is."

Although the Bishops would not yield on this point, it could not have been their intention, when they "thought it fit that the Rubric should continue as it was," to abolish the use of the surplice, and restore the ancient vestures, in any office in which, as the law then stood, the surplice was the vesture proper to be used. No one who holds in respect the memory of the Ecclesiastical Legislature of that day (whose revision of the Prayer Book was accepted by Parliament, almost *sub silentio*) could impute to them a deliberate intention covertly to alter the substance of the law as to the vestures of the clergy (which they had in the Conference declared their intention to leave unchanged), by changes apparently verbal and trivial, in a Rubric possessing down to that time no legislative authority, and on which they themselves, as will be seen in the sequel, never meant to act, and never did act, in any such sense.

The declarations of the Legislature which bear upon this question are, (1) the recitals in the preamble of the Act of 1662, and in the second

section of that Act; and (2) the preface to the Prayer Book.

The preamble of the Act of 1662 recites that the Commission on which the annexed book was founded had been ordered "for settling the peace of the Church, and for allaying the present distempers, which the indisposition of the time had contracted."

The restoration of vestures which had not been in use for nearly a hundred years, and had become associated, not in the popular mind only, with the idea of superstition, cannot well be supposed to have been contemplated by the Legislature as a change conducive to the peace of the Church, or to agreement within its pale, even when that pale might have been contracted by the secession of those from whom conformity was not to be looked for. And if it had been intended not merely to continue an existing and well-known state of things, but to revive usages long obsolete, and to prohibit all things previously in legal use, which were not prescribed by the First Book of King Edward, it can hardly have been expected that the desired certainty of rule, and agreement in practice, would have been attained by a vague reference to a Prayer Book not generally accessible.

Of the "Preface" to the Book of 1662 it is to be observed (1) that it disallows, as without warrant in law, the practical interruption, during the Rebellion and the Protectorate, of the use of the Liturgy, "though enjoined by the laws of the land, and those laws never yet repealed;" (2) that none of the general reasons thereby assigned for the revision, and for the alterations then made, are such as to make it at all probable that for any of those reasons the old vestures would be restored; and (3) that a comparison of the new language with the old is thereby expressly invited, for the purpose of arriving at a just view of the reasons for particular changes: "If any man, who shall desire a more particular account of the several alterations in any part of the Liturgy, shall take the pains to compare the present Book with the former, we doubt not but the reason for the change may easily appear."

Entering then upon the comparison so invited, the first material observation is that, on the one hand, the Statute 1 Elizabeth, cap. 2, is reprinted at the beginning of the book as an unrepealed and

effective law, and, indeed, is transcribed in the Manuscript Book approved and signed by the two Convocations; and, on the other hand, the Ornaments Rubric of 1662 occupies the same place, and *primâ facie* retains the same general office and character which it had in the former book, in which (as has been already said) it was a note of reference to an external law, namely, that contained in the 25th section of the Statute, still printed at the beginning of the book. Their Lordships cannot look upon this Rubric as being otherwise than what it was before, a memorandum or note of reference to that law. Except for its new Parliamentary authority (which is a matter scarcely entering into the comparison of the old with the new language), it would certainly be so. It is true that the former express reference to the Act of Elizabeth at the end of the Rubric is omitted. But, on the other hand, the Act itself is exhibited as a law still in force, and the effect and the obvious purpose of all the changes in the wording of the Rubric (with a single exception) is to make it, as far as it goes, a mere extract from, and a simple repetition of the words of, that Act. The important words of the Act, "until other order shall be therein taken," &c., are not now for the first time left out; the former Rubric had also stopped short of them when it could not possibly control their legal effect. If the manuscript alterations in the handwriting of Sancroft acting as Cosin's Secretary (much dwelt upon by the Appellant's Counsel), could for this purpose be accepted as evidence, they would prove, as a matter of fact, that the change was made because (in the language of the manuscript) "these are the words of *the Act itself*." Their Lordships do not think that such evidence is admissible; but the same reason is legitimately to be inferred from the comparison suggested by the preface to the Prayer Book. It is easy to understand why the words of the Act should be as closely as possible adhered to, if those words, as found in that Act, were still the law authoritatively governing the matter. The words "shall be retained and be in use" were not in the former Rubric, but they were in the Statute. If intended as a mere extract from the Statute, or to continue and carry forward

in 1662 the use of those things which were then actually, or in contemplation of law, in use under that Statute, they are apt and appropriate; but if it was meant to bring back an old and long-disused state of things, by making the Rubric of 1662, for that purpose, a new point of departure, which repealing the 25th section of 1 Elizabeth, cap. 2, and all that had been done under it, the substitution of this particular language for the words of the former Rubric, "the Minister shall use," &c., and the recurrence to the exact phraseology of the enactment about to be superseded, would seem to be the most inappropriate way conceivable of accomplishing that object.

The only other alteration (which is also the single deviation in the Rubric of 1662, as far as it goes, from the language of the 25th section of 1 Eliz., cap. 2), is this. In that section the words were, "such ornaments of the Church and of the Ministers thereof shall be retained and be in use as was in this Church," &c. The Rubric in use before 1662 was that of 1559, as reprinted in the book of 1603–4, which said: "The Minister, *at the time of the Communion, and at all other times in his ministration,* shall use such ornaments in the Church as were in use," &c. In the Rubric of 1662 they are, "such ornaments of the Church, and of the Ministers thereof, at all times of their ministration, shall be retained and be in use as were in this Church," &c.; the words, "*at all times of their ministration,*" being interpolated into the context, of which the rest is extracted from the Act of Elizabeth. What is the reason for this change, discoverable (according to the rule of the preface to the Prayer Book) from a comparison of the new language with the old? The old language (*i.e.*, that of the former Rubric) seemed to imply a distinction which really existed when it was used in 1559, between the ornaments of the minister at the time of the Communion and his ornaments at other times in his ministration, and the objection at the Savoy Conference as understood by Baxter (than whom no one was better acquainted with all that passed) seems to have been to an apparent recognition or admission of this distinction. That distinction, in all parish and non-collegiate Churches, had been abolished by the Advertizements

and the practice under them. The new words (though not incapable of being read distributively, if and so far as such a distinction might still continue in law), ceased to imply, or to seem to imply, any such distinction. If the words of the Statute had been in this place simply followed, there would have been less force in the alteration; but these words, "at all times of their ministration," are put in as if to give emphasis to the change, and to direct attention to the fact that, in the then state of the law, the use of the same vestures by the Minister, at all times of his ministration, was the ordinary and the general rule. Such a change of language here would have been most extraordinary if it had been intended to recur in all the Churches of the Kingdom to those distinctions to which the Advertizements had put an end, but which the terms of the former Rubric seemed to recognize. On the other hand, it was a natural change of language, if the object was to remove some part, at least, of the ground for the Puritan objection, that the former Rubric "seemed to bring back" the abolished vestures.

This explanation of the change is, in fact, the only one which is in harmony with or which could justify the note or list of alterations in the book now deposited in the Library of the House of Lords, "out of which was fairly written"* the Book of Common Prayer subscribed on the 20th of December, 1661, by the Convocations of Canterbury and York, and which book, so subscribed, was by those Convocations "exhibited and presented" to the King, and sent by the King to the House of Lords on the 25th of February, 1661-2. This original book, from which the transcript was thus made, contains the actual record of all alterations and additions made by the Convocations, clearly written in manuscript into a printed Prayer Book of 1636, and at the beginning a tabular list of the material alterations. It was delivered by the House of Lords to the House of Commons as the authority for the book "fairly written" which was to be referred to in the Act;* and it is impossible to doubt that the tabular list of alterations contained in it was inserted for the purpose of enabling the changes which Parliament was asked to sanction to

* Lords' Journal, April 10, 1662.

be well understood. This tabular list sets out in parallel columns all the material changes which had been made from the old form, among which no mention of the Rubric in question occurs, and there is then a note added in these words: "These are all ye materiall alterations, ye rest are only verbal, or ye changing of some Rubricks for ye better performing of ye Service, or ye new moulding some of ye Collects."

To repeal in 1662 the 25th section of the Statute of the 1st Elizabeth, and the order taken under its authority, would have required either a clear and distinct repealing enactment, or an enactment inconsistent and irreconcilable with the former law. It was admitted in the argument, and indeed could not be denied, that the Statute of Elizabeth was not repealed in terms; and it is in fact, as has been already observed, set forth as the first enactment in the new Prayer Book. The Statute is also beyond question one of those "good laws and statutes for the uniformity of prayer and administration of the Sacrament," which by the 24th section of the Act of 1662 are declared to "stand in full force and strength, to all intents and purposes whatsoever for the establishing and confirming" of the new Book, and which are thereby directed to be "applied, practised, and put in ure for the punishing of all offences contrary to the said laws, with relation to the Book aforesaid, and no other."

In order to judge whether there is anything inconsistent and irreconcilable between the Ornaments Rubric in the new Prayer Book and the 25th section of the older Statute, that section must be read as if the order taken under the section had been inserted in it. And, as so read, their Lordships see nothing inconsistent between the Rubric and the section. The Rubric served, as it had long previously served, as a note to remind the Church that the general standard of ornaments, both of the church and of the ministers, was to be that established by the authority of Parliament in 1549; but that this standard was set up under a law, still unrepealed, which engrafted on the standard a qualification that, as to the vestures of parish ministers, the surplice, and not the alb, vestment, or tunicle, should be used.

No doubt can be entertained that for nearly two

centuries, succeeding 1662, the public and official acts of the Bishops and clergy of the Church, and of all other persons, were inconsistent with the supposition that the Rubric of 1662 had made any change in the law.

During the twenty-five years immediately succeeding the legislation of 1662, we have a series of Visitation Articles (those of fifteen Bishops and one Archbishop, of thirteen dioceses, printed either at length or by collation with Bishop Morley's form, in the Appendix to the Second Report of the Ritual Commissioners, pp. 609, 611, 615, 632, 639, 642, 645, 649, 653-4), which prove conclusively that those whose official duty it was to see the law observed, and of whose strictness in the performance of that duty the same Articles supply abundant evidence, understood the law still to be that the surplice was always to be used by the clergy officiating in the administration of the Holy Communion.

This list does not include any Articles of the year 1662 except those of Bishops Hacket of Lichfield and Henchman of Salisbury, who both expressly refer to the Act of Uniformity of that year. Upon the point in question, Bishop Hacket inquires in 1662 thus:—

"Have you a decent surplice, one or more, for your parson, vicar, curate, or lecturer to wear in the time of all public ministrations? Hath he read the Book of Common Prayer as it is enjoined by the late Act of Uniformity for public prayer, administration of the Sacrament, &c., on some Sunday before the 24th August last past, and did and doth he wear the surplice while he performed that office and other offices mentioned in that Common Prayer Book?" (*Ibid.*, p. 609).

Bishop Henchman (*Ibid.*, p. 611) inquires:—

"Doth your minister, reading Divine Service, and administering the Sacraments, and other rites of the Church, wear the surplice according to the Canons?"

Subsequently, in 1663, 1664, 1666, 1671, 1672, 1674, 1676, 1677, 1679, 1683, and 1686, Articles to the same effect, in different forms, but all equally cogent, were administered by the other prelates, whose Visitations have been referred to. Bishop Morley's form, adopted by nine other prelates in those years, and used by himself in 1674 (as he and

nine others had also used it in 1662, when the form of the Revised Rubric had been settled by the two Convocations, but before it became law), is this :—

Art. 5 (concerning churches, &c.) :—"Have you a comely, large surplice for the minister to wear at all times of his public ministration in the Church?"

Art. 7 (concerning ministers) :—"Doth your minister, at the reading or celebrating any Divine Office in your church or chapel, wear the surplice, together with such other scholastical habit, as is suitable to his degree?" (*Ibid.*, p. 615.)

Bishop Henchman, in 1664 (then translated to London), and Bishop Pearson of Chester, in 1674, used this form :—

Art. 7 (concerning churches, &c.) :—The same as Bishop Morley's.

Art. 4 (concerning ministers) : — "Doth your minister, in the Morning and Evening Service, in the administration of the Sacraments, and in performing other religious offices appointed by the Church of England, use the respective forms in the Book of Common Prayer, together with all those rites and ceremonies which are enjoined in this Church; and doth he make use of the surplice when he reads Divine Service or administers the Sacraments?" (*Ibid.*, pp. 632, 642).

Bishops Morley and Henchman were two of the three Prelates (Archbishop Sheldon being the third) who are stated by Baxter* to have "managed all things" at the Savoy Conference. Archbishop Sheldon, in his Circular Letter to the officials of his diocese in 1670,† directs them to require that all parsons, vicars, and curates, "in the time of their officiating, ever make use of and wear their priestly habit, the surplice and hood."

Archbishop Sancroft, in 1686, also used Bishop Morley's form under the head "Concerning churches;" and, under that "Concerning the Clergy," his 7th Article runs thus :—

"Doth your parson, vicar, or curate read Divine Service on all Sundays, and publicly administer the holy Sacraments of Baptism and the Eucharist, and perform all other ministerial offices and duties, in such manner and form as is directed by the Book of Common Prayer lately established, and the Act

* Life and Times, 171-2.

† 2 Card. Doc. An., 276-9.

of Uniformity therewith published . . . . without addition, diminution, or alteration? And doth he in those his ministrations wear the surplice, with a hood or tippet befitting his degree?" (*Ibid.*, p. 654.)

It was not disputed at the Bar that the subsequent practice in parish and non-collegiate churches till about 1840 or later was uniformly consistent with this view of the law.

As public declarations of what was understood to be the state of the law shortly after the completion of the Revision in 1662, their Lordships may refer in the first place to the statement of Bishop Sparrow. Sparrow was Bishop of Exeter in 1684. He had been one of the Commissioners at the Savoy Conference. In 1655 he published his "Rationale" of the Book of Common Prayer, which then contained nothing as to the Ornaments Rubric or the ornaments of the minister. In 1684, after the Revision, he published a new edition, and thus (p. 337) states the law as then understood. "The minister in time of his ministration shall use such ornaments as were in use in the 2nd Edward VI, Rubric 2:—viz., a surplice in the ordinary ministrations, and a cope in time of ministration of the Holy Communion in Cathedral and Collegiate churches.—Queen Elizabeth's Articles, set forth in the seventh year of her reign."

Their Lordships may further refer to the alterations proposed by the Commissioners of 1689 appointed to revise the Prayer Book, with a view to the relief of Dissenters.* The Rubric proposed by them to be substituted for the Ornaments Rubric may be taken to be a statement of what at that time was understood to be the state of the law: "*Whereas the surplice is appointed to be used by all ministers in performing Divine Offices*, it is hereby declared that it is continued only as being an antient and decent habit. But if any minister shall declare to his Bishop that he cannot satisfye his conscience in the use of the surplice, in that case the Bishop shall dispense with his not using it," &c.

And the "Bill of Comprehension" introduced into Parliament by the King's authority about the same time contained a clause† framed on the same principle.

It is abundantly clear that, if any person had

* Ho. of Com. Papers, vol. 36 (1854).

† MS. in Burnet Papers, Cardw. Conf., p. 457.

imagined that the Prayer Book of 1662 introduced a change on this subject, there were very many who would gladly have acted on it. No instance has been given of any person having acted on it. On the other hand, every one continued to act according to the old law, although, if the argument of the Appellant is correct, every one in so doing was acting illegally. The practice,—consistent with the old law, inconsistent with the argument of the Appellant,—has been uniform, open, continuous, and under authoritative sanction.

What, then, in a question of this nature, is the weight in law of such contemporaneous and continual usage? Their Lordships may take the answer to this question from the words, either of Lord Campbell, in Gorham *v.* Bishop of Exeter* ; or of Chief Baron Pollock in Pochin *v.* Duncombe† ; or of Dr. Lushington in Westerton *v.* Liddell.‡

Lord Campbell, referring to a Statute of 25 Henry VIII, cap. 19, said :—

"Were the language of the Statute obscure, instead of being clear, we should not be justified in differing from the construction put upon it by contemporaneous and long-continued usage. There would be no safety for property or liberty, if it could be successfully contended that all lawyers and statesmen have been mistaken for centuries as to the true meaning of an old Act of Parliament."

Chief Baron Pollock, with reference to the maxim —"*Contemporanea expositio fortissima est in lege*," said :—

"The rule amounts to no more than this, that if the Act be susceptible of the interpretation which has thus been put upon it by long usage, the Court will not disturb that construction."

Dr. Lushington said :—

"Usage, for a long series of years, in ecclesiastical customs especially, is entitled to the greatest respect; it has every presumption in its favour; but it cannot contravene or prevail against positive law; though, where doubt exists, it might turn the balance."

A Church Rubric, taking the form of directions to be acted on by large numbers of persons from week to week, and from day to day, is a subject

* 15 Q.B., 73, 74.

† 1 H. and N. 856.

‡ Moore, separate Report, 79.

above all others for exposition by contemporaneous and continual usage, and the principles laid down in the cases to which their Lordships have referred, fortified as they easily might be by many other authorities, seem to their Lordships to be decisive of the present question.

What their Lordships have already said is sufficient to show that, in their opinion, according to the ordinary principles of legal construction and interpretation, the Ornaments Rubric of 1662, on the subject of the vestures of ministers, cannot, any more than the Rubric on the same subject which preceded it, be looked at otherwise than in connection with the Statute of the 1st of Elizabeth, cap. 2. They may, however, also point out a singular incongruity which might arise from looking at it unconnected with the Statute. The Rubric states that such ornaments of the ministers, at all times of their ministration, shall be retained and be in use as were in the Church by authority of Parliament in 1549, that is, under the First Prayer Book of Edward VI. But under the Book of 1549, the Rubric as to the vestures in the Communion Service is confined to that office, and the general Rubric at the end of the Book is confined to the saying, or singing, of Matins and Evensong, baptizing, and burying. There does not, therefore, appear in the Book of 1549 to be any imperative direction as to the use of the surplice or any other vesture in the Marriage Service, in the churching of women, or by ministers assisting the Bishop in the office of Confirmation, in the Commination Service, or in the saying of the Litany, which in that Book was not connected with Matins or Evensong. These omissions, however, were filled up by the Advertizements issued under the Statute which provided that every minister saying any public prayers, or ministering the Sacraments, or other rites of the Church, should wear a comely surplice. If, therefore, the Act and the Advertisements are read in connection with the Rubric, the use in the latter of the words "at all times of their ministration" may be justified: whereas those words would be inaccurate if applied merely to the Prayer Book of 1549.

The learned Counsel for the Appellant, in the course of their argument, placed considerable reliance on passages in certain books published during

the 18th, and in the present, centuries by writers who, however learned, were not entitled to speak with any legal authority, and some of whom appear to have expressed opinions adverse to the legality of the usage as to the vestures of clergymen, which they admit prevailed up to and at the time at which they wrote.

It would, in the opinion of their Lordships, be contrary to well-settled principles of law to admit private opinions to control the legal interpretation of public documents, or the legal inferences from public acts or usage; but it may be not without advantage to point out the circumstances under which the opinions of these writers appear to have been expressed.

One of the books referred to by the Appellant's Counsel was Doctor Thomas Bennett's "Paraphrase, with Annotations upon the Book of Common Prayer." The second edition of this book was published in 1709, and the earlier edition (the date of which their Lordships have not observed) must have been still nearer the year 1662. Both editions were published before Cosin's Notes on the Prayer Book were printed, and their Lordships will, in the first place, refer to those notes, and to the writers who followed.

Three sets of Notes on the Prayer Book (as it stood before 1662), by Cosin, were published by Nicholls in 1710, the first set being supposed to have been written by Cosin some time before, and the two others at different times after, 1630, but all before the revision of 1662.

In the first Notes* he had originally suggested that the clergy, as the law then stood, were "all still bound to wear albs and vestments, howsoever it was neglected;" and that the 14th and 58th Canons of 1603-4 were inconsistent with each other. But perceiving, some time afterwards (at hat time afterwards is uncertain) that he had, in making that Note, overlooked the terms of the Statute (1 Eliz., cap. 2, sec. 25), he added: "But the Act of Parliament, I see, refers to the Canon, and until such time as other order shall be taken."

oI another passage of the same set of Notes (*Ibid* p. 90), he had distinctly recognized the authority of those Articles of the Advertizements which relate to this matter, as a due exercise of the

* Cosin's Works, vol. 5, p. 42.

powers given to the Crown by that Statute, with reference to a point which might depend on section 26 rather than on section 25. "For cathedral churches," he there says, "it was ordained by the Advertizements in Queen Elizabeth's time (that authority being reserved, notwithstanding this book, by Act of Parliament), that there should be an Epistoller and Gospeller, besides the priest, &c." And, in the execution of his official duty as Archdeacon of the East Riding of York, in 1627, he administered to the churchwardens then under his jurisdiction very stringent articles (not adopted without change from forms previously in use, but revised and altered under his own hand), in which the use of the surplice by the parochial clergy, when administering the Sacraments, was treated as legally necessary, and never to be omitted.* In his later Notes, and also in his suggested corrections of the Prayer Book, he repeated the view which had been expressed in the uncorrected form of his first Note, giving, however, no reason for that opinion, except such as may be inferred from a passage at p. 233 of vol. 5 of his "Works," where, after quoting the words of 1 Eliz., cap. 2, sec. 25, he says: "which other order, *so qualified as is here appointed to be,* was never yet made."

From this it may be concluded that Cosin's opinion at that time was founded either on some technical view of the informality of the Advertisements, or on some conclusions as to matters of fact, with respect to which (as they involved no question of peculiar ecclesiastical learning) his authority was certainly not greater than that of any other man.

After the Restoration, Cosin was made Bishop of Durham; and in his Visitation Articles of 1662, already mentioned (which may be assumed, according to the Appellant's argument, to have been anterior to St. Bartholomew's Day in that year), he still considered it to be his duty to treat the use of the surplice in the administration of both Sacraments as matter of legal obligation on all the parochial clergy.

The result appears to be that the opinions recorded in the private Notes of this divine, at dif-

* See his Correspondence, published by the Surtees Society, vol. 1, p. 106; and Preface; also "Works," vol. 2, p. 9.

ferent periods of his life, are not consistent with each other; while those of them which are adverse to the validity of the Advertisements are inconsistent with his official acts done in the exercise of a legal jurisdiction, and in the discharge of his public duty, both before and afterwards.

The private Notes of Cosin, however, originally written before 1662, and made known to the public half a century or more after they were written, appear to have been adopted without much examination by writers who followed. Bishop Gibson, in the "Codex" published in 1713, apparently echoing Cosin's words, says:—

"Which other order (at least in the method prescribed by this Act) was never yet made; and, therefore, *legally*," [the *italics* are Gibson's] "the ornaments of ministers, in performing Divine Service, are the same now as they were in 2 Edw. VI."

Burn, in his Ecclesiastical Law, follows Gibson, as Gibson had followed Cosin. Dr. Cardwell, the last author cited, erroneously supposed that there was a judicial decision which had established that an instrument under the Great Seal was necessary for a due execution of the Parliamentary power, and, for that reason only, he concluded that the Book of Advertizements had not the force of law.*

Their Lordships will now refer to the opinion expressed by the other author, Bennett, already mentioned, whose work was published before Cosin's Notes were made public.

He states† the Rubrics of 1549, 1559, and 1662, and then proceeds thus:—

"From hence it seems to follow that the present Rubric, and that of Queen Elizabeth, which are in effect the very same, do restore those ornaments which were abolished by King Edward VI's Second Book, and which, indeed, have been disused ever since that time. But it must be considered that in the latter part of the Act of Uniformity, 1 Eliz., there is this clause, ('*until other order*,' &c.); this clause explains Queen Elizabeth's Rubric, and, consequently, the present one, which is, in reality, the same. So that those ornaments of the Church and its ministry which were required in the second year of King Edward were to be retained till the

* Cardwell, Confer., p. 38, note.

† Paraphrases with Annotations upon the Book of Common Prayer, 2nd edition, pp. 4, 5.

Queen (and, consequently, any of her successors), with the advice before specified, should take other order. Now, such other order was accordingly taken by the Queen in the year 1564, which was the seventh of her reign. For she did then, with the advice of her Ecclesiastical Commissioners, particularly the then Metropolitan, Dr. Matthew Parker, publish certain Advertizements, wherein are the following directions":—

[He then quotes the Advertizements, and afterwards states the Canons.]

"From hence 'tis plain that the parish priests (and I take no notice of the case of others) are obliged to use no other ornaments but surplices and hoods. For these are authentic limitations of the Rubric, which seems to require *all* such ornaments as were in use in the second year of King Edward's reign. Besides, since from the beginning of Queen Elizabeth's reign down to our own times, the disuse of them has most notoriously been allowed; therefore, though it were not strictly reconcilable with the letter of the Rubric, yet we cannot be supposed to be under any obligation to restore the use of them. And, indeed, if that practice which our Governors do openly and constantly permit and approve be not admitted for a good interpretation of laws, whether ecclesiastical or civil, I fear it will be impossible to clear our hands of many repugnances of different kinds besides this under debate."

It only remains to consider the bearing on this part of the present case of the former decisions of the Judicial Committee in Liddell *v.* Westerton, and Martin *v.* Mackonochie.

As to Liddell *v.* Westerton, everything said and done in that case to which the Rubric of 1662 was material, had reference exclusively to ornaments of the church. The Court had "nothing to do with the ornaments of the minister or anything appertaining thereto."—(Moore's separate Report, p. 31). The questions whether the power of the Crown, under the 1st Elizabeth, cap. 2, sec. 25, had ever been duly exercised, and (if so) with what effect; whether the Rubric of 1662 was to be read with that section, as a law still in force, or not; what would be the effect of so reading it, and whether any aid towards the solution of those questions

might be derivable from usage, either before or after 1662, and what such usage had been, were none of them before Dr. Lushington, or the Court of Arches, or the Judicial Committee. It was not suggested that anything had ever been done under the 1st Elizabeth, cap. 2, sec. 25, as to any "Ornaments of the Church." Under these circumstances it was sufficient, as well as most convenient, to refer to the Rubric, and to that alone; the effect of which was, as to that matter, simply coincident and identical with that of the section in the Act of Elizabeth, assuming it to be then in force.

It is perfectly consistent that the Rubric should speak with the authority of the Statute, so far as the language and effect of both are identical, and yet should not supersede or control the operation of that part of the Statute which it does not in terms repeat.

It is true that Dr. Lushington did, in more than one passage of his Judgment, signify his assent to what he described as the "irresistible argument that the last Statute of Uniformity, by referring to the First Book of Common Prayer of Edward VI, excluded not only the Second Book but everything else effected in the interval between 1549 and 1662, whether by Act of Parliament or by Canon, which could or might have altered what existed in 1549; and, consequently, that nothing done from 1549 to 1662, however lawful during that period, had in itself force or binding authority after the Statute of 1662 came into operation." Everything which fell from that very learned Judge is entitled to most respectful consideration; but he had not been (as their Lordships now have been) upon the path of inquiry which was really necessary to support or to disprove that proposition.

Nothing to the same effect is to be found in the Judgment of the Judicial Committee, which overruled that part of Dr. Lushington's Judgment in which these *dicta* occur, reversing his decision and that of the Court of Arches as to the crosses not connected with the Communion Table; and also rejecting as erroneous his view of the meaning of the words "ornaments of the church" as used in the Rubric; which view had nevertheless been held in both the Courts below to be clear and indisputable.

There is, however, in the Judgment of the Judicial Committee, delivered by Mr. Pemberton Leigh, the following passage, which has been much relied on by the Appellant:—

"It will be observed that this Rubric (that of 1559) does not adopt precisely the language of the Statute, but expresses the same thing in other words. The Statute says: 'such ornaments of the church, and of the ministers thereof, shall be retained and be in use;' the Rubric 'that the minister shall use such ornaments in the Church.' The Rubric to the Prayer Book of January 1, 1604, adopts the language of the Rubric of Elizabeth. The Rubric to the present Prayer Book adopts the language of the Statute of Elizabeth. But they all obviously mean the same thing; that the same dresses, and the same utensils, or articles which were used under the First Prayer Book of Edward VI, may still be used. None of them, therefore, can have any reference to articles not used in the services, but set up in churches as ornaments in the sense of decorations."

This passage has been the subject, as it appears to their Lordships, of remarkable misconception. It was sufficient for the purpose of the question as to crosses then before the Judicial Committee, to consider only the meaning of the exact words of the Rubric itself, standing alone, and the words corresponding to them which were found in the Statute of Elizabeth and the Rubric of 1559; and to do this with a view only to the interpretation of the two particular phrases, "ornaments of the church," and "by authority of Parliament in the second year of the reign of King Edward VI." For that purpose of verbal exposition the statement in this passage of the Judgment (with the exception of a somewhat inaccurate expression as to the Rubric of 1604) was unexceptionably correct. The words of the Rubric of 1662, standing alone, and the corresponding words in the Statute of Elizabeth and the Rubric of 1559 and 1604, do mean what is there stated, neither more nor less. In the Act of Elizabeth there are other and further words, the effect of which, if still in force, is in the present case very important; but in that part of the Judgment of Liddell *v.* Westerton, any examination of

the effect of those words, or of the questions arising out of them with reference to any ornaments of the ministers of the Church, would have been absolutely irrelevant. Judges weigh their words with reference to the questions which they have to consider, and not with reference to questions which are not before them. If what was then said could properly be applied to a purpose not then in contemplation, the statement that the words of the 25th section of the Act of Elizabeth, the Rubric of 1559 and 1604, and the Rubric of 1662, "all obviously mean the same thing," might more reasonably be alleged in proof that the Judicial Committee thought the words "according to the Act of Parliament set forth in the beginning of this Book," or the words "until other order taken therein," &c., were still implied at the end of the Rubric of 1662, than the succeeding words can be relied on to show that they held all the vestures of the clergy prescribed by the First Book of King Edward to be lawful at all the three epochs referred to—1559, 1604, and 1662.

With respect to the decision of the Judicial Committee in Martin *v.* Mackonochie little need be said. There, too, it was sufficient to consider the effect of the mere words of the Rubric of 1662, repeating (as it did) in 1662 the language of the Act of the first year of Elizabeth, on a point unaffected by anything done in the meantime. The points determined in Liddell *v.* Westerton are succinctly stated, approved, and followed. There is no reference to the particular passage, in the Judgment of Liddell *v.* Westerton, on which the Appellant's Counsel rely; though, if there had been, their Lordships would have been of opinion, for the reasons already stated, that the present question would be in no way affected by it.

Their Lordships, for these reasons, which, out of respect for the elaborate arguments so earnestly addressed to them, and not from any hesitation as to the decision at which they should arrive, they have expressed at a length greater than is usual, are of opinion that the decision of the learned Judge of the Arches Court as to the vestments worn by the Appellant, following that of this Committee in Hebbert *v.* Purchas, is correct, and ought to be affirmed.

Their Lordships will now proceed to consider the

charge against the Appellant with reference to his position during the Prayer of Consecration.

The allegation upon that head is that the Appellant, when officiating in the Service of the Holy Communion, unlawfully stood, while saying the Prayer of Consecration in the said Service, at the middle of the west side of the Communion Table, such Communion Table then standing against the east wall, with its shorter sides towards the north and south, in such wise that during the whole time of his saying the said prayer he was between the people and the Communion Table with his back to the people, so that the people could not see him break the bread or take the cup in his hand.

The rule by which the position of the minister during the celebration of the Holy Communion is to be determined must be found in the Rubrical directions of the Communion Office in the Prayer Book, there being, as to this matter, nothing in any Statute to control or supplement those directions.

In examining these directions, their Lordships propose to put aside the argument, very much pressed upon them, that the proper and only proper position for the Communion Table is in the body of the church, or in the middle of the chancel, and that it is in a wrong position when placed, at the time of the Communion Service, along the east wall. They think this argument has no sufficient foundation. No charge is made that in the church of the Appellant the Communion Table stood where it ought not to have stood, and, in the opinion of their Lordships, no such charge could have been sustained.

The Rubric, indeed, contemplates that the Table may be removed at the time of the Holy Communion; but it does not, in terms, require it to be removed. Morning and Evening Prayer are, according to one of the early Rubrics of the Prayer Book, to be used in the accustomed place of the church, chapel, or chancel. In churches where it is customary to use both the chancel and body of the church, or the chancel alone, for Morning and Evening Prayer, the direction that the Table shall stand "where Morning and Evening Prayer are appointed to be said," is satisfied without moving it. That direction cannot be supposed to mean that the position of the Table is to be determined by that of the minister's

reading-desk or stall only, the service being "used" and "said" by the congregation as to the part in it assigned to them, as well as by the minister. The practice as to moving or not moving the Table has varied at different times. It was generally, if not always, moved, in the earlier part of the post-Reformation period. When the revision of 1662 took place, and when the present Rubric before the Prayer of Consecration was for the first time introduced, it had come to be the case that the Table was very seldom removed. The instances in which it has been removed may be supposed from that time to have become still more rare; and there are now few churches in the kingdom in which, without a structural rearrangement, the Table could be conveniently removed into the body of the church. The utmost that can be said is, that the Rubrics are to be construed so as to meet either hypothesis.

Their Lordships have further to observe that the Rubrics assume that, before the Prayer of Consecration is reached, those who intend to communicate will have drawn near to the Communion Table, wherever it may be placed, so as to concentrate the Communicants near it or round it, and thus enable them to witness the ministration more easily than if they had remained in their places throughout the church.

It is proper also to point out that the term "east" or "eastward" nowhere occurs in the Rubrics. From the mention that is made of the north side, it seems to be supposed that in all churches that expression would represent a uniform position, and there is no doubt that from the almost universal eastward position of churches in England this would be the case; but the north is the only point of the compass which is actually referred to.

During several portions of the Communion office the minister is directed, either expressly, or by reference or implication, to stand at the north side of the Table. Where this is the case, their Lordships have no hesitation in saying that whether the Table is placed altar-wise along the east wall, or standing detached in the chancel or church, it is the duty of the minister to stand at the side of the Table which, supposing the church to be built in the ordinary eastward position, would be next the north, whether that side be a longer or shorter side of the

Table. No doubt in a certain context the word "side" might be so used as to be shown by that context to be contra-distinguished from the top, or bottom, or end of a subject of quadrilateral or any other figure. But for this purpose a determining context is necessary. In the absence of such a context it is accurate, both in scientific and in ordinary language, to say that a quadrilateral table has four sides. In the Rubrics not only is there no context to exclude the application of that term to the shorter as well as the longer sides; but the effect of the context is (as it appears to their Lordships) just the reverse. The direction is absolute, and has reference to one of the points of the compass, which are fixed by nature; the figure and the position of the Table are not fixed either by nature or by law; and the purpose of the direction is to regulate, not one part or another of the Table, but the position of the minister with reference thereto. Under these circumstances, it seems extravagant to put on the word "side" a sense more limited than its strict and primary one, for the purpose of suggesting difficulties in acting upon the rule, which for nearly two centuries were never felt in practice, and which would not arise if the strict and primary sense were adhered to.

If it were necessary that there should be extracted from the Rubrics a rule governing the position of the minister throughout the whole Communion office, where no contrary direction is given or necessarily implied, the rule could not, in their Lordships' opinion, be any other than that laid down in Hebbert *v.* Purchas; and they entertain no doubt that the position which would be required by that rule—a position, namely, in which the minister would stand at the north side of the Table, looking to the south—is not only lawful, but is that which would, under ordinary circumstances, enable the minister, with the greatest certainty and convenience, to fulfil the requirements of all the Rubrics. The case, however, with which their Lordships have to deal is one which may assume the character of a penal charge. It might be a penal charge against the present Appellant that he has stood, during the Prayer of Consecration, on the west side of the Table; and on the other hand, on a construction of the Rubric the opposite of that

contended for by the Respondents, a penal charge might be maintained against a priest who stood at the north side. It is therefore necessary to be well assured, both that there is a direction free from ambiguity that the priest should stand, during this particular Prayer, either at the north or at the west side, and also that no other test is supplied by the Rubric in question which would be a sufficient and intelligible rule for the position, at that part of the service, of the priest.

Their Lordships have therefore to consider the precise wording of the Rubric preceding the Prayer of Consecration taken in connection with the Prayer itself.

It is to be observed that the Revision in 1662 introduced for the first time the breaking of the bread as one of the manual acts to be done during the Prayer of Consecration, and that, although some of the other manual acts, namely, the taking the bread and the cup into the priest's hands, had been mentioned in the Rubric of the First Prayer Book of Edward VI, they had not been contained in the Second Prayer Book of that Sovereign, or in the Prayer Books of Elizabeth or James I. The Rubric "That he may with the more readiness and decency break the bread before the people," &c., was also new; and it is not impossible that one of the reasons for its introduction may have been to meet one of the demands or suggestions of the Puritan party, who had proposed a form of service in which the priest was to be ordered to break the bread "in the sight of the people."*

Their Lordships are of opinion that the words "before the people," coupled with the direction as to the manual acts, are meant to be equivalent to "in the sight of the people." They have no doubt that the Rubric requires the manual acts to be so done, that, in a reasonable and practical sense, the Communicants, especially if they are conveniently placed for receiving of the Holy Sacrament, as is presupposed in the office, may be witnesses of, that is, may see them. What is ordered to be done before the people, when it is the subject of the sense, not of hearing, but of sight, cannot be done before them unless those of

* 4 Hall. Reliq. Liturg.

them who are properly placed for that purpose can see it. It was contended that "before the people" meant nothing more than "in the church;" to guard against an anterior and secret consecration of the elements. But if the words "before the people" were absent, the manual acts, and the rest of the service, could not be performed elsewhere than in the church, and in that sense *coram populo,* nor could the Sacrament be distributed except in the place and at the time of its consecration: and this argument would, therefore, reduce to silence the words "before the people," which are an emphatic part of the declaration of the purpose for which the preparatory acts are to be done. That declaration applies not to the service as a whole, nor to the consecration of the elements as a whole, but to the manual acts, separately and specifically.

There is, therefore, in the opinion of their Lordships, a rule sufficiently intelligible to be derived from the directions which are contained in the Rubric as to the acts which are to be performed. The minister is to order the elements "standing before the Table:" words which, whether the Table stands "altarwise" along the east wall, or in the body of the church or chancel, would be fully satisfied by his standing on the north side and looking towards the south; but which also, in the opinion of their Lordships, as the Tables are now usually, and in their opinion lawfully, placed, authorize him to do those acts standing on the west side and looking towards the east. Beyond this and after this there is no specific direction that, during this prayer, he is to stand on the west side, or that he is to stand on the north side. He must, in the opinion of their Lordships, stand so that he may, in good faith, enable the Communicants present, or the bulk of them, being properly placed, to see, if they wish it, the breaking of the bread, and the performance of the other manual acts mentioned. He must not interpose his body so as intentionally to defeat the object of the Rubric and to prevent this result. It may be difficult in particular cases to say exactly whether this rule has been complied with; but where there is good faith the difficulty ought not to be a serious one; and it is, in the opinion of their Lordships, clear that a protection was in this respect intended to be thrown around the body of the Communicants,

which ought to be secured to them by an observance of the plain intent of the Rubric.

In applying these principles to the present case, their Lordships find that some difficulty has arisen from the circumstances under which the evidence was taken. The charge against the Appellant was a twofold one; both that he had stood at the middle of the west side with his back to the people, and that the people could not see him break the bread or take the cup in his hand. The witness Nicholson undoubtedly states that, at the service of which he speaks, while sitting in the nave, he could not see the Appellant perform the manual acts; and the witness Bevan gives evidence to the same effect. But with regard to Nicholson, he explains, as their Lordships understand his evidence, that, whether persons could see what the Appellant was doing would depend on whether they were sitting immediately behind him or were sitting on one side or the other; and with regard to Bevan, he states that, what would have prevented a man who sat at the side from seeing what the Appellant did, was, that he had on a chasuble, "which is a sort of cloak which spreads his body out."

When the Appellant himself was examined, he does not appear to have been asked any question on the subject; and the inference which their Lordships draw from the whole examination is, that inasmuch as at that time it was understood to be the law, founded on the decision in Hebbert *v.* Purchas, that the standing on the west side of the Table was, of itself and without more, unlawful, neither party thought it important to carry the evidence with any precision beyond this point, the Respondents thinking they had established their case, and the Appellant not being prepared to dispute the fact of the position in which he stood.

Their Lordships are not prepared to hold that a penal charge is established against the Appellant merely by the proof that he stood while saying the Prayer of Consecration at the west side of the Communion Table, without further evidence that the people could not, in the sense in which their Lordships have used the words, see him break the bread or take the cup into his hand, and they will therefore recommend that an alteration should be made in the Decree in this respect.

Their Lordships, before leaving this part of the case, think it right to observe that they do not consider the Judgment in the case of Martin *v.* Mackonochie to have any material bearing on the question now before them. The decision in that case was that the Priest must stand during the Prayer of Consecration, and not kneel during a part of it. The correctness of that decision has not been, and, as their Lordships think, cannot be, questioned. Nothing is more clear throughout the Rubrics of the Communion office than that when the priest is intended to kneel, an express provision is made on the subject. The conclusion, however, in Martin *v.* Mackonochie, is expressed, perhaps, more broadly than was necessary for the decision. What was obviously meant was that the posture of standing was to be continued throughout the whole of the prayer. Nothing was or could be decided as to the place in which the priest was to stand, for that question was not raised, and was not in any manner argued, in the case.

Their Lordships will now proceed to the charge as to wafer or wafer-bread. The charge as to this is "that the Appellant used in the Communion Service and administration wafer-bread or wafers, to wit, bread or flour made in the form of circular wafers instead of bread such as is usual to be eaten." And this is traversed by the Appellant.

It appears that the allegation is in the same form as that used in the Purchas Case; but in that case the Defendant did not appear, and no criticism seems to have taken place as to the form of the allegation or its sufficiency.

It is probable that the allegation was meant to raise the question as to the legality of the wafer, as distinguished from bread of the kind "usual to be eaten," and there are certainly some indications that the Appellant and his Counsel so understood, and meant to meet, the charge.

A different view has, however, been taken by the Counsel for the Appellant on the Appeal, and they have maintained that there is no averment that the wafer, as distinguished from bread ordinarily eaten, was used. They contend that the charge goes to the shape, and not to the composition, of the substance.

Their Lordships are of opinion that this objection

must prevail. The charge, in their opinion, is consistent with the possibility of it having been the fact that bread "such as is usual to be eaten," but circular, and having such a degree of thinness as might justify its being termed wafers, was what was used. And if this is what was used, their Lordships do not think it could be pronounced illegal.

As, however, the question of the construction of the Rubric has been raised on this Appeal, as it was in the Purchas Case, their Lordships think it right to express their opinion upon it, at the same time that they give the Appellant the benefit of the ambiguity which exists in the form of the charge.

It is to be observed that the Rubric does not in any part of it use the term "wafer." The words are "bread:" "bread such as is usual to be eaten," and "the best and purest wheat bread that conveniently may be gotten."

Their Lordships have no doubt that a wafer, in the sense in which the word is usually employed, that is, as denoting a composition of flour and water rolled very thin and unleavened, is not "bread such as is usual to be eaten," or "the best and purest wheat bread that conveniently may be gotten."

The only question on the construction of the Rubric is that raised upon the words "it shall suffice."

There is no doubt that in many cases these words standing alone, and unexplained by a context, would be quite consistent with something different from, larger or smaller, more or less numerous, more or less costly, than what is mentioned, being supplied.

Here, however, the sentence commences with the introduction: "To take away all occasion of dissension and superstition, which any person hath or might have concerning the bread, it shall suffice," &c. These words seem to their Lordships to make it necessary that that which is to take away the occasion of dissension and superstition should be something definite, exact, and different from what had caused the dissension and superstition. If not, the occasion of dissension remains, and the superstition may recur. "To suffice," it must be as here described. What is substantially different will not "suffice."

The Rubric, which orders that the bread and wine

shall be provided by the curate and churchwardens at the charges of the parish, seems to contemplate ordinary bread as the only material to be used, and the 20th Canon is still more precise in the same direction.

The former Rubric (of 1552, 1559, and 1604) had said, "It shall suffice that the bread be such as is usually to be eaten at the table with other meats, but the best and purest wheat bread that conveniently may be gotten." Queen Elizabeth's Injunction of 1559 on the same subject (in its form mandatory, and acted upon for many years afterwards) was issued when this Rubric had the force of law, and must be understood in a sense consistent with, and not contradictory to, it. That Injunction distinguishes between* "the sacramental bread" and "the usual bread and water, heretofore named singing cakes, which served for the use of the private mass;" directing the former to be "made and formed plain, without any figure thereupon, and of the same fineness and fashion round" as the latter, but "to be somewhat bigger in compass and thickness." The form, and not the substance, is here regulated. To order the use of the substance properly called "wafer," which was not "bread such as is usual to be eaten at the table" would have been directly contradictory to the Rubric; and this cannot be supposed to have been intended.

There was evidently "dissension" on this subject, and some diversity of practice, in the reign of Elizabeth. It appears from passages in the Fourth Book of the "Ecclesiastical Polity,"† published in 1594, that Hooker considered the use, either of leavened or of unleavened bread, to be at that time lawful. But the point was one as to which controversy then existed, and had given occasion to strife. In 1580, Chaderton, Bishop of Chester, acting as Commissioner in Lancashire, under the Crown, applied to the Privy Council for instructions as to "two special points worthy of reformation;" one of which was "for the Lord's Supper, with wafers, or with common bread?" The Lords of the Council replied (26th July, 1580) that they thought both points ought to be referred to the consideration of Parliament; adding:—"In

* 1 Card. Doc. Ann., 202.

† 1 Hooker's Works by Keble, 6th edition, pp. 449-451.

the mean time, for the appeasing of such division and bitterness as doth and may arise of the use of both these kinds of bread, we think it meet, that in such parishes as do use the common bread, and in others that embrace the wafer, they be severally continued as they are at this present. Until which time, also, your Lordship is to be careful, according to your good discretion, to persuade and procure a quietness amongst such as shall strive for the public maintaining either of the one or the other."*

In a later letter, the Bishop recurred to the same question, and was thus answered (21st August, 1580), by Lord Burghley and Sir Francis Walsingham :—"Concerniug the last point of your letter, contained in a postscript, whereby appeareth that some are troubled about the substance of the Communion bread it were good to teach them that are weak in conscience, in esteeming of the wafer bread, not to make difference. But, if their weakness continue, it were not amiss, in our opinions, charitably to tolerate them, as children with milk. Which we refer to your Lordship's better consideration."†

In 1584, Bishop Overton, of Lichfield, issued an Injunction to the clergy of his diocese :—"That the Ordinance of the Book of Common Prayer be from henceforth observed in this, that the bread delivered to the communicants be such as is usual to be eaten at the table with other meats, yet of the purest and finest wheat; and no other bread to be used by the minister, nor to be provided for by the Churchwardens and parishioners, than such finest common bread."‡

The 20th Canon of 1603-4, already mentioned, seems to have proceeded on the same view of the law; and, after the passing of that Canon, the usual form of inquiry in the Visitation Articles of Bishops and Archdeacons (*e.g.*, Archbishop Bancroft in 1605, Bishop Babington, of Worcester, in 1607; and Bishop Andrewes in 1619), was, whether the churchwardens always supplied, for the Holy Communion, "fine white bread."

The same form of inquiry continued to be generally used after the Rubric had been altered, upon the Revision of 1662, so as to express its purpose to

* Peck's "Desiderata Curiosa," p. 91.

† Ibid., p. 94.

‡ Appendix to 2nd Report of Rit. Comm., p. 430.

be, "to take away all occasion of *dissension*," as well as of "superstition" (which alone had been previously mentioned). The same motive had been expressed in the Rubric of King Edward's First Prayer Book, "for avoiding all matters and occasion of dissension" ("superstition" not being then added); when the opposite course was taken, of requiring unleavened bread, of a certain form and fashion, to be everywhere and always used. The practice of using fine wheat bread such as is usual to be eaten, and not cake or wafer, appears to have been universal throughout the Church of England from the alteration of the Rubric in 1662, till 1840, or later.

Their Lordships think that if it had been averred and proved that the wafer, properly so called, had been used by the Appellant, it would have been illegal, but as the averment and proof is insufficient, they will advise an alteration of the Decree in this respect.

There remains to be considered the charge as to the Crucifix. As to this the allegation is, that the Appellant unlawfully set up and placed upon the top of the screen separating the chancel from the body or nave of the church a crucifix and twenty-four metal candlesticks, with candles which were lighted on either side of the Crucifix.

This charge was accompanied by two other charges, in respect of which the Appellant has been admonished to abstain from the acts complained of, and to this part of the monition he has submitted. One of these charges was for having formed and accompanied a procession from the chancel, down the north aisle and up the nave back to the chancel again, on the occasion of public service, those taking part in the procession at one time falling upon their knees, and remaining kneeling for some time. The other charge was the setting up, attached to the walls of the church, representations of figures, in coloured relief of plastic material, purporting to represent scenes of our Lord's Passion, and forming what are commonly called stations of the Cross and Passion, such as are often used in Roman Catholic Churches.

The learned Judge, whose decision is under Appeal, thus describes the Screen and Crucifix:—"There is a screen of open ironwork some 9 feet high stretching across the church at the entrance to the

chancel; the middle portion of this screen rises to a peak, and is surmounted by a crucifix or figure of our Saviour on the Cross in full relief and about 18 inches long—this is the crucifix complained of. The screen of course, from its position, directly faces the congregation, and the sculptured or moulded figure of our Lord is turned towards them. There is, further, a row of candles at distances of nearly a foot apart all along the top of the screen, which is continued up the central and rising portion of it, the last candles coming close up to the crucifix on either side, so that when the candles are lighted for the evening service, I should presume that the crucifix would stand in a full light."

For the erection of this screen at the entrance of the chancel, in the form in which it is now found there, and surmounted by the crucifix in question, their Lordships think it clear that no faculty has been obtained. There is, indeed, a faculty, dated the 23rd of August, 1870, authorizing the building of "a dwarf wall with screen thereon of light ironwork between the chancel and the nave;" and this faculty appears to have been granted with reference to a ground plan annexed to the petition for the faculty; which ground plan specifies the place where this screen of light ironwork was to be erected. But no further information was given to the Ordinary of the character of the structure, much less of the crucifix by which it was to be surmounted.

Technically, therefore, it must be held that, in the absence of a proper faculty, the crucifix was unlawfully set up and retained. If, however, their Lordships were of opinion that the case was one in which, under all the circumstances, the Ordinary, on the application for a faculty, ought to grant, or might properly grant, a faculty, they might probably have thought it right, before pronouncing any Judgment, to have given an opportunity to the Appellant to apply for a faculty.

Their Lordships, however, are of opinion that, under the circumstances of this case, the Ordinary ought not to grant a faculty for the crucifix.

The learned Judge refers to two cases, decided by this Tribunal, which have a material bearing upon the present question.

The first of these was the case of Liddell *v.*

Westerton.* In this case, as the learned Judge states, the Court had to pronounce upon the legality of a Cross set up in the Appellant's church. And it was decided that, although before the Reformation the symbol of the Cross had no doubt been put to superstitious uses, "yet that Crosses, when used as mere emblems of the Christian faith, and not as objects of superstitious reverence, may still lawfully be erected as architectural decorations," and that the wooden cross erected in that particular case "was to be considered a mere architectural ornament."

The Court determined nothing directly as to the legality of a crucifix, but was at great pains throughout the Judgment to point out that crosses were to be distinguished from crucifixes, saying that "there was a wide difference between the Cross and images of saints, and even, though in a less degree, between a Cross and a crucifix," the former of which, they said, had been "used as a symbol of Christianity two or three centuries before either crucifixes or images were introduced."

The other case is that of Philpotts *v.* Boyd.† As to this case, the learned Judge states that this Tribunal, in justifying the erection of the Exeter reredos, adhered entirely and very distinctly to the position taken up in the previous case, and pronounced that erection lawful, though it included many sculptured images, on the express ground "that it had been set up for the *purpose of decoration only*," declaring that it was "not in danger of being abused," and that "it was not suggested that any superstitious reverence has been, or is likely to be, paid to any of the figures upon it."

The learned Judge then proceeds to consider whether it would be right to conclude that the crucifix in the present case was set up for the purposes of decoration only; whether it is in danger of being abused, and whether it could be suggested that superstitious reverence had been, or was likely to be, paid to it.

The learned Judge states that the crucifix, as formerly set up in our churches, had a special history of its own.

He refers to the Rood ordinarily found before the Reformation in the parish churches of this

* Moore's Special Report.

† 6 L. R., Pr. C. Ap. 435.

country, which was, in fact, a crucifix with images at the base, erected on a structure called the rood loft, traversing the church at the entrance to the chancel, and occupying a position not otherwise than analogous to that which the iron screen does in the present case.

He refers to the evidence as to the preservation of the crucifixes or roods during the reign of Queen Mary, and of their destruction, as monuments of idolatry and superstition, in the reign of Elizabeth.

He takes notice of a letter of Bishop Sandys in 1561 in the "Zurich Letters," first series, p. 73, in which he states :—

"We had not long since a controversy respecting images. The Queen's Majesty considered it not contrary to the Word of God, nay, rather for the advantage of the Church, that the image of Christ crucified, together with Mary and John, should be placed, as heretofore, in some conspicuous part of the church, where they might more readily be seen by the people. Some of us thought far otherwise, and more especially as all images of every kind were at our last visitation not only taken down, but also burnt, and that too, by public authority, and because the *ignorant and superstitious multitude are in the habit of paying adoration to this idol above all others.*"

The learned Judge arrives at the conclusion that the crucifix so placed formed an ordinary feature in the parish churches before the Reformation, and that it cannot be doubted that it did so, not as a mere architectural ornament, but as an object of reverence and adoration.

He further points out that the worship of it was enjoined in the Sarum Missal, in which the order of service for Palm Sunday ends with the adoration of the Rood by the celebrant and choir before passing into the chancel. And to this reference might be added one to the order for the Communion according to the Hereford use, in which there is a prayer with this introduction :—

"Postea sacerdos adorans crucifixum dicat."

Proceeding then on these considerations, and dealing with a Church in which was found not merely an illuminated crucifix, but also those stations of the cross and other acts in the conduct of the

services, the illegality of which the Appellant does not challenge in his Appeal, the Judge continues thus :—

"It is no doubt easy to say, what proof is there of danger of idolatry now? What facts are there to point to a probability of 'abuse'?

"But when the Court is dealing with a well-known sacred object—an object enjoined and put up by authority in all the churches of England before the Reformation, in a particular part of the Church and for the particular purpose of 'adoration'—when the Court finds that the same object, both in the Church and out of it, is still worshipped by those who adhere to the unreformed Romish faith, and when it is told that, now, after a lapse of 300 years, it is suddenly proposed to set up again this same object in the same part of the church *as an architectural ornament only*, it is hard not to distrust the uses to which it may come to be put, or escape the apprehension that what begins in 'decoration' may end in 'idolatry.'

"If this apprehension is a just and reasonable one, then there exists that likelihood and danger of 'superstitious reverence' which the Privy Council in Philpotts *v.* Boyd pronounced to be fatal to the lawfulness of all images and figures set up in a church."

In these observations of the learned Judge their Lordships concur; and they select them as the grounds of his decision which commend themselves to their judgment. They are prepared, under the circumstances of this case, to affirm the decision directing the removal of the crucifix, while at the same time they desire to say that they think it important to maintain, as to representations of sacred persons and objects in a church, the liberty established in Philpotts *v.* Boyd, subject to the power and duty of the Ordinary so to exercise his judicial discretion in granting or refusing faculties, as to guard against things likely to be abused for purposes of superstition.

On the whole, therefore, their Lordships will humbly recommend Her Majesty to affirm the Decree of the Court of Arches except as regards the position of the minister and the use of wafer-bread or wafers; and as to these excepted matters they will humbly advise Her Majesty that inasmuch as it is

not established to their satisfaction that the Appellant, while saying the Prayer of Consecration, so stood that the people could not see him break the bread or take the cup into his hand, as alleged in the representation; and, inasmuch as it is not alleged or proved that what was used by him in the administration of the Holy Communion was other than bread such as is usual to be eaten, the decree of the Court of Arches should be in these respects reversed. And they will further humbly advise Her Majesty that in respect of the charges as to which the Decree is reversed, the costs in the Court of Arches should be paid by the Respondents to the Appellant; and further that there should be no costs of this Appeal.

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