

Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of Marsters v. Durst, from the Court of Arches ; delivered 11th July, 1876.

Present :

LORD CHANCELLOR.
LORD HATHERLEY.
LORD PENZANCE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.

THIS is a criminal suit promoted in the Court of Arches against the Appellant, who is one of the Churchwardens of the Parish of St. Margaret, in the Borough of King's Lynn, for having removed from the church, without a faculty, a certain moveable cross of wood which had been placed on a ledge called a "re-table," at the back of and above the Communion Table.

The Respondent is the Vicar of the parish, and the cross was placed there by his authority, but without the sanction of a faculty.

In the Court below exception was taken to certain passages in the responsive allegation filed by the Appellant, and they were ordered to be struck out.

The present Appeal is in form an Appeal from that Order, but on the case being opened it appeared to the parties that, as the facts were not really in dispute, it would save both expense and delay if they agreed to a statement of fact in the form of a Special Case, and took the decision of the Court of Appeal upon the merits of the case.

Their Lordships consented to that course being

pursued, and the case has been fully argued upon the Special Case so stated.

The question which their Lordships are thus called upon to decide is the single one of the legality of a cross of this description in the place which it occupied when the Appellant removed it from the church.

The Special Case states that the cross is above 3 feet in height; that it is a movable one; that it was placed by the Respondent's orders on a structure of wood called a "re-table," consisting of a wooden ledge at the back of the Communion Table, having a front of wood about 8 inches deep, coming down to within five-sixteenths of an inch of the surface of the Communion Table, and that this structure is fixed to the wall by nails.

A photograph is appended to the Special Case, from which, and the statements in this case, it is plain that the Communion Table and the "re-table" would at a very short distance bear the appearance of one entire table or structure.

It is further stated that the cross was placed on this ledge with "the intention that it should remain there permanently."

On the part of the Respondent it was contended that the cross was a moveable one, and constituted part of the church furniture; that it was not one of the "ornamental instruments" used in the church services; and that it fell within the category of things "inert," which were mere architectural decorations.

On the part of the Appellant it was contended, amongst other things, that the case fell within the principle of the well-known decision in the cases of *Liddell v. Westerton*, and *Liddell v. Beal*; and as their Lordships are of that opinion, it will not be necessary to go again into the subject at large, or do more on the present occasion than point out what it was that those cases really decided, and give reasons for the conclusion that the present case cannot in principle be distinguished from them.

The two cases in question concerned the Church of St. Paul and the Chapel of St. Barnabas. In both instances there had been placed on the Communion Table a cross, and in both instances these crosses were held to be illegal. It is important therefore to consider what the character of these

crosses was, and on what grounds they were ordered to be removed. In the Chapel-of-ease of St. Barnabas the things complained of were first a rood-screen and a cross thereon, which cross was held to be lawful; and secondly, "a stone table or altar with a metal cross attached thereto," and this cross was held to be unlawful.

The cross complained of in the Church of St. Paul was attached to the Communion Table, and is thus described in the Judgment at page 2:—

"Their Lordships understand that this Table, described as an Altar or Communion Table, is made of wood, and is not attached to the platform but merely stands upon it; that it is placed at the east end of the church or the chancel, according to the ordinary usage as to Communion Tables; that at the end nearest the wall there is a narrow ledge raised above the rest of the Table; that upon this ledge which is termed 'super-altare,' stand the two gilded candlesticks, which are moveable, and between them the wooden cross which is let into and fixed in the super-altare so as to form part of what is thus described as the Altar or Communion Table."

It will be observed that this description closely tallies with the description as given in the special case of the Communion Table in the present case. There is here, as there, a movable table, and a ledge of wood raised above the table at the back of it, and on this ledge two candlesticks, and a cross between them. The differences are that in St. Paul's Church the ledge of wood was called a "super-altare," while in this case it is called a "re-table"; in St. Paul's Church the ledge stood upon the table, while in this case it is fixed to the wall and does not quite touch the table, being separated by about a quarter of an inch from it; and finally, that in St. Paul's Church the cross was "let into and fixed" in the ledge, while in the present case it was not fixed but placed on the ledge "with the intention that it should remain there permanently."

It is upon these differences of structure that the Respondent relies, and he points particular attention to a passage in the Judgment relating to the cross in St. Paul's Church, which is as follows:—

"Next with respect to the wooden cross attached to the Communion Table at St. Paul's. Their Lord-

ships have already declared their opinion that the Communion Table intended by the Canon was a table in the ordinary sense of the word, flat and moveable, capable of being covered with a cloth, at which or around which the communicants might be placed in order to partake of the Lord's Supper; and the question is whether the existence of a cross attached to the table is consistent either with the spirit or with the letter of those regulations. Their Lordships are clearly of opinion that it is not; and they must recommend that upon this point also the decree complained of should be affirmed."

It is argued by the Respondent that their Lordships must have intended to have condemned only crosses which were "fixed" to a ledge standing on the Communion Table or to the Communion Table itself, and that the two circumstances in the present case, of the ledge being a quarter of an inch above the Table, and the cross not fixed in the ledge but moveable, are sufficient to take it out of the principle of that Judgment.

Their Lordships are unable to accept or approve so narrow and limited a view of the conclusion arrived at in those important cases.

It is hardly to be conceived that a distinction should have been intended to be drawn between a cross "attached" to the Table (or the ledge above the Table) and a cross occupying a "permanent" position upon it; and still less that the lawfulness or unlawfulness of the cross should be declared to reside in such a distinction.

Upon such a view of the law, further refinements would be inevitable; for, on the one hand, a cross might be "let into and fixed" in the "re-table" in such a manner as to be easily removed if and when desired, and therefore practically moveable; and, on the other hand, it might be ponderous, not easily moved, and intended to remain permanently in its place, and yet not actually "fixed" in the sense of being fastened to the ledge or table on which it stands.

To hold that such refined differences as these constitute the distinction between what is lawful and what forbidden by the law would be to give every importance to matters which are trivial and incidental, to the exclusion of those which are substantial and of serious import.

To any stranger entering the church, the present structure is not perceptibly different from that which was presented to the eye in the Church of St. Paul. The flat table, the narrow ledge rising above it, the candlestick at either end of this ledge, and the cross in the middle, constitute the apparent structure in both cases. It would be only by a minute inspection, instituted close at hand, that any difference would be revealed between them. For those who attend the services in this church, therefore, these differences do not practically exist, and whatever objection attended the Communion Table with its cross in the case of St. Paul's Church is equally present here.

When the Judgment in the above cases is carefully considered, it is very apparent what that objection was; and why the crosses on the Altar or the Communion Table in both cases were declared unlawful.

Speaking of the Altar in St. Barnabas, their Lordships said "the question was whether the structure was a Communion Table within the meaning of the law," and with respect to St. Pauls "whether the existence of a cross attached to the table is consistent either with the letter or the spirit" of the regulations made by law.

To answer these questions their Lordships inquired at length into the character and appearance of the Roman Catholic altar as it existed before the Reformation—the doctrines respecting the Holy Communion which that altar was designed to subserve, and to which it was intended to conform—the change in these doctrines which was effected by the Reformation, and the consequent substitution of the plain flat moveable table of wood for the fixed altar with its super-altare, its crucifix, and candlesticks at either end.

It was upon a careful review of these facts and considerations, and not upon any refined distinction as to the mode in which the cross was connected with the table, that their Lordships, construing the legal regulations bearing on the subject, came to the conclusion that a Communion Table such as that in the Church of St. Paul, was not warranted by those regulations; and their decision, therefore, applies to and governs the present case, in which the structure complained of is, their

Lordships think, in no substantial or essential feature distinguishable from it.

Some additional light is thrown on the meaning and intention of the Judgment above discussed by the subsequent proceedings in one of the cases (*Liddell v. Beal*) to which that judgment gave rise.

It was thought by Mr. Beal that the monition of the Court for the removal of the cross in the Chapel of St. Barnabas had not been complied with by removing the cross from the Altar and placing it on the sill of the great eastern window of the church, immediately above the Communion Table, though at a distance of five feet from it, and he instituted proceedings complaining of this as an evasion.

Their Lordships thought differently, and expressed themselves as follows:—

“Now there was formerly a cross which stood upon the stone table, and was in a sense at least affixed to it, which was objected to, and, as it appears, properly objected to. The stone table has been altogether removed, and with it the cross, but the cross has been placed in another part of the church, not in any sense upon the table which has been substituted for the stone table, nor in any sense in communication, or contact, or connection with it. It remains in the church as an ornament of the church . . . and does not conflict with the order contained in this monition.”

It will here be observed that no stress is laid on the fact that the cross was no longer alleged to be “fixed,” which, if the Respondent’s view of the principal decision were correct, would at once have determined the question; but the retention of the cross in its new position is justified upon the ground that it was not “in any sense upon the table, nor in any sense in communication or contact or connection with it.”

It is plain, therefore, that, in the decision of the principal case, it was not to the cross itself that any objection was made, nor to the particular means or fastenings by which it was retained in its place, but to its connection with the Communion Table; and if, instead of removing the cross to a place several feet above the table, and quite unconnected with it, Mr. Liddell had simply made the cross a moveable

one, and fixed a re-table to the wall (such as in the present case) for it to stand upon, it is inconsistent with the language just quoted to suppose that their Lordships would have held the monition to have been complied with.

Their Lordships are therefore of opinion that the cross in the position which it occupied while in the church is forbidden by law ; and they will advise Her Majesty that the present suit should be dismissed ; but, as both parties have been in the wrong in acting without a Faculty, without costs.

