Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Martin v. *Maconochie from the Court of Arches, delivered Wednesday, 22nd February* 1882.

Present:

THE LORD PRESIDENT.
THE LORD CHANCELLOR.
THE ARCHBISHOP OF YORK.
LORD BLACKBURN.
LORD WATSON.
SIR BARNES PEACOCK.
SIR ROBERT COLLIER.
SIR JAMES HANNEN.

Ecclesiastical Assessors.

THE BISHOP OF DURHAM.
THE BISHOP OF WINCHESTER.
THE BISHOP OF LICHFIELD.

The suit out of which this appeal arises was instituted under the Church Discipline Act (3 & 4 Vict., cap. 86), by letters of request from the Lord Bishop of London to the Court of Arches, on the 6th January 1880. In it the Respondent, a beneficed clergyman of the diocese of London, was charged with eight several unlawful acts, specified in the articles as having been committed on two distinct occasions, in the performance of divine service in his church, within the two years last preceding, all which acts had been previously determined to be illegal, either by the Court of Arches, or by Her Majesty in Council, on appeal from that Court.

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There had been two previous suits in the Court of Arches against the same Defendant, both promoted by Mr. Martin, who is also the promoter of this suit. In the earlier of them, a sentence was pronounced by Sir Robert Phillimore, then Dean of Arches, on the 28th March 1868, by which the Respondent was found to have offended against the ecclesiastical law in two out of four points then charged against him, and was admonished to abstain for the future from the like acts. On the two charges to which this sentence of Sir R. Phillimore did not extend, the promoter appealed to Her Majesty in Council, and Her Majesty in Council, by the advice of the Judicial Committee (23rd December 1868), amended the sentence, declaring the Respondent to have offended against the law in those points also, and directing him to be admonished against the repetition, for the future, of those offences.

The Respondent, having disobeyed (on one point) the monition issued against him in that suit pursuant to the order of Her Majesty in Council, was, by an order of the Judicial Committee, dated the 4th December 1869, further admonished to abstain for the future from any such act of disobedience; and, on the 25th November 1870, their Lordships, finding him to have repeated the same offence, and also to have disobeyed the monition issued by Sir Robert Phillimore on another point (which had not been the subject of appeal), suspended him, *ab officio et beneficio*, for three months. That suspension expired on the 25th February 1871; and (for anything that appears in the present suit) the orders, both of Sir Robert Phillimore in 1868, and of Her Majesty in Council, may have been afterwards obeyed by the Respondent, during the interval between February 1871 and November 1879. No further proceeding in that first suit was taken, either in the Court of

Arches or before the Judicial Committee. Of the offences charged against the Respondent in the present suit, the four first are acts of the same kind with those which had been in question in that suit.

The second suit was instituted by letters of request from the Bishop of London, on the 1st June 1874. The offences charged in it did not include any of those four, which had been in question in the first, and which are also charged in the present suit. They included all the others now in question. By the decree made at the hearing, by Sir Robert Phillimore, on the 7th December 1874, all those charges were declared to be established, and the Respondent was suspended *ab officio* for six weeks, and was admonished to abstain from like practices for the future. On the 23rd March 1878, the present Judge of the Court of Arches declared that the Respondent had disobeyed Sir Robert Phillimore's monition in certain particulars, and granted a further monition against him. On the 1st June 1878 he was suspended, *ab officio et beneficio*, for three years, for continued disobedience. That suspension was in force when the present suit was instituted. It is alleged, by the articles in the present suit, that the Respondent, nevertheless, did not desist from officiating in his church; and that, of the offences now charged, some were committed on the day on which that decree of suspension was published, and others on the Sunday afterwards. No proceeding was taken by the Appellant to put in force against the Respondent, in either of the former suits, the penalties for contumacy and contempt provided, in lieu of excommunication, by 53 Geo. 3, cap. 127.

The present suit prayed for a sentence of deprivation, or other canonical punishment,

against the Respondent. At the hearing before Lord Penzance, on the 5th June 1880, his Lordship pronounced a decree by which he found all the contents of the articles sufficiently proved, except three which had been abandoned, and condemned the Respondent in costs; but he, at the same time "refused" the prayer, that the Respondent should be deprived of his ecclesiastical promotions within the province of Canterbury, or might be otherwise duly and canonically punished.

The reasons for this judgment stated by His Lordship were, that, in the second of the two former suits, the promoter had taken no step to enforce the orders made by the Court; and, after obtaining from the Court a decree sufficient to put a stop to the practices of which he complained, had abandoned it, and asked for a fresh remedy; that the Court had a "discretion in the passing of all such sentences," and that it would not be consistent with the due maintenance of its authority to pass a sentence of correction, and, while that sentence was still subsisting, to pass a second sentence "directed to the same "end, without any allusion to the first, or any "attempt to punish its non-observance."

It may be observed, that the learned Judge did not, in giving these reasons, expressly refer to any charges, except those as to which orders had been made in the second suit. But His Lordship may, probably, have considered the same principle to be applicable to the other charges also; as practices similar to those alleged in them had been the subject of monitions in the first suit.

From this judgment, and from the reasons assigned for it, their Lordships find themselves compelled to dissent. They do not think that it can have been the intention of the learned Judge to affirm the existence, generally, of a discretion,

in an Ecclesiastical Court, to refuse by decree to pass any sentence of canonical censure or punishment upon a clerk in Holy Orders, found by the same decree (in a suit duly instituted and prosecuted) to have been guilty of offences against the law, properly charged.

It is, no doubt, within the discretion of the Judge, (whether subject or not to appeal) to inflict a censure or punishment, more or less lenient or severe, according to his judgment of all the circumstances of the case. But their Lordships think, that the Judge has no discretion, while finding the Defendant guilty of ecclesiastical offences, to absolve him from all ecclesiastical censure or punishment for those offences.

If the promoter, in the present suit, had been any other person than Mr. Martin (who was also the promoter in the former suits), their Lordships cannot doubt that the learned Dean of Arches would have acted on this view of his duty. The offences charged in this suit are all new and substantive offences against the law ecclesiastical, not coming within the principle, "*nemo debet bis vexari pro eadem causâ.*" That principle would have been applicable if these acts had been the identical acts which had been adjudicated upon and punished in the former suits, or in either of them; but it is not applicable, merely because they are repeated offences, of the same description with those so adjudicated upon and punished. It may be, that each of those acts might have been treated, in a proceeding for contempt in one or other of the former suits, as an instance of such contempt; and might, in that way, have been visited with any punishment due to persons disobeying orders of the Court. The judgment of the House of Lords, in Maconochie *v.* Lord Penzance (L. R. 6 App. Cas., p. 424) has conclusively settled that it is not an excess of ecclesiastical jurisdiction so to treat acts, con-

trary to monitions of the Court, although they may also be substantive offences against ecclesiastical law; and that, for this purpose, a new suit, under the Church Discipline Act, is not necessary. It may also be, that it would not be proper to institute a second suit for the mere purpose of punishing contumacy or disobedience, as such. That question is not now before their Lordships; but, assuming that to be the law, it can have no application, when the new suit is for new and substantive offences.

The disobedience of the Respondent to the previous orders is now before the Court (having regard to the abandonment of certain articles), not as a substantive offence, but only as matter of aggravation; in which point of view the case of Pullen *v.* Clewer (1 Hagg. Eccl. Reports) seems to show that it may be not immaterial.

Contempt or contumacy, in another suit, cannot deprive the Bishop, or a promoter who satisfies the Bishop that there is reason for proceeding in respect of new offences by a new suit, of the remedies given by the Church Discipline Act. If the promoter were a different person, the offender could not plead, by way of defence, his own contempt in a former suit, or the unwillingness of the promoter in that suit to imprison him for it. When the promoter is the same person, the new suit is not his only, but is also (in more than a merely formal sense) that of the Bishop, whose consent was necessary to its institution. Unless it can be shown that either the Bishop or the promoter is open to some personal exception recognized by law, because he has not thought proper to enforce the penalties of contempt in a former suit, or that the whole objects of the new suit are substantially comprehended and necessarily attainable by means of proper proceedings, in the former suit, their Lordships think that the identity of the promoter

in both suits ought to make no difference, so far as concerns the question now under appeal. At the most, it is one of those circumstances which it may be open to the learned Judge to consider, when determining what censure or punishment to inflict.

Their Lordships do not find that any obligation is cast by law upon the promoter of a suit in an Ecclesiastical Court to take proceedings for the imprisonment of a party guilty of contempt. In the present case, it appears to them to be by no means impossible (consistently with what was determined by the House of Lords in Maconochie *v.* Lord Penzance) that an application to the Court of Arches or to the Judicial Committee to make a declaration of contumacy, and issue a significavit against the Respondent, grounded on the monitions of 1868 and 1869, might have been unsuccessful; the acts which are the subject of the four first charges in the present suit having taken place nearly ten years after the latest of those monitions. Whether this be so or not, the sentence of deprivation, which is asked for in the present suit, seems clearly to be one which, in a proper case, might be pronounced at the hearing of such a suit (Caudrey's Case, 5 Co., p. 1, and Pullen *v.* Clewer, 1 Hagg. Eccles. Rep. App. B, following p. 353); and it does not appear that there is any precedent for the infliction of that penalty for mere contumacy or contempt. In Hebbert *v.* Purchas (L. R. 4 P. C. Cas., p. 312), such precedents were searched for in vain; and Lord Hatherley, delivering the judgment of the Judicial Committee, said, "Without pausing "to inquire whether by any substantive pro- "ceeding, founded on the ecclesiastical offence of "disobedience to the Order in Council that has "been already pronounced, a sentence of depri- "vation or amotion might have been obtained, "we are of opinion that we cannot proceed to

" enforce compliance with the order which has " been disobeyed by any summary process of " contempt, through the medium of amotion." (In the print of this passage, the sense is obscured by substituting " a motion " for " amotion ").

It is further to be observed that, besides deprivation, there are other canonical punishments (degradation and excommunication) which might be inflicted in a proper case by an order having the force of a definitive sentence, but which could not lawfully be inflicted for mere contumacy or contempt.

It remains to be considered what order their Lordships ought now to advise Her Majesty to make. They have been asked to retain the suit, and to advise Her Majesty to pronounce against the Respondent an immediate sentence of deprivation. But it was for the learned Judge in the Court below to determine what particular censure or punishment would be most proper under all the circumstances of this case, and to that question (for the reasons appearing in his judgment) the mind of the learned Judge was not addressed. Notwithstanding what is there said as to " a second sentence of suspension " being " out of the question," their Lordships cannot assume it to be impossible that such a sentence might be pronounced if the learned Judge thought it sufficient. If, on the case as it now stands, a more severe penalty should appear to him to be called for, he might still give the Respondent (who has hitherto not thought fit to appear in this suit) one more opportunity of being heard against such a sentence, and of submitting himself to the Court and the law.

The decree under appeal, although not interlocutory in form, is not, in substance, a decision upon the question in the cause. Their Lordships think that it comes within the prin-

ciple (stated by Lord Campbell when delivering the judgment in Head *v.* Sanders, 4 Moore, 197) that, "except under peculiar circumstances, "a Court of Final Appeal ought not to decide "any cause in the first instance, as it ought to "have the benefit of the discussion and judg- "ment in the Court below, and there ought "not to be an original judgment pronounced "from which there is no appeal."

Their Lordships will, therefore, humbly advise Her Majesty to reverse the sentence of the 5th June 1880, so far as relates to the matter complained of by this appeal; and to remit the cause to the Court below to decree against the Respondent such lawful and canonical censure or punishment as to that Court shall seem just.