Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Rev. E. Parker v. *Leach, from the Chancery Court of York; delivered 20th November*, 1866.

Present:

LORD WESTBURY.
SIR JAMES W. COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.

THE Appellant in this case is the perpetual curate and incumbent of the parish church of Waddington, in the Diocese of Ripon and Province of York; the Respondent an aged gentleman resident within the same parish.

There is in the chancel of the parish church a pew, claimed as belonging to the Honourable Mrs. Ramsden, in respect of her being the owner of an ancient messuage within the parish. Mrs. Ramsden has given license and permission to the Respondent to occupy that pew, of which she is the proprietor; the Respondent has had the use and enjoyment of it for nearly forty years.

In the month of December 1863 the Appellant, without the authority of the churchwardens, appears from the evidence to have gone to a carpenter, an inhabitant of the parish, to have brought him into the chancel, and to have pulled down and entirely destroyed the pew which the Respondent had been in the habit of enjoying.

This was followed by an action for perturbation of the pew commenced in the Diocesan Court, and removed by letters of request to the Appellate Court at York.

To the libel of the Respondent, the Appellant pleaded that there was no jurisdiction in the Archbishop, because the church was not, in law, a church at all, never having been re-consecrated since its general repair or rebuilding in the year 1826.

Now the Appellant has been himself for three years the incumbent of the church; Divine service has been celebrated there by him, and by his predecessors; baptisms have been performed there; marriages have been solemnized there; the Holy Communion has been administered in it for nearly forty years. It is a plea, therefore, pregnant with the most formidable consequences, if it be found to have any support in law.

The points which have been argued may be thus arranged. It is contended by the Appellant, as a general proposition, that if a church be taken down and rebuilt, though it be rebuilt again upon the same foundations, the new edifice requires to be re-consecrated; and until it be re-consecrated the Appellant contends that it can have none of the character of a church; that such an edifice, in point of law, is to be regarded no more than if it were any common building within the parish.

Such is the legal proposition which is first put forward on the part of the Appellant.

The second proposition is, that the church in question, viz., this parish church of Waddington, had been rebuilt in such a manner as to bring it within the scope of the first proposition which he lays down, viz., that it was wholly rebuilt, and therefore required re-consecration.

The third ground that has been maintained by the Appellant is a technical one, relating to the form in which the title to the enjoyment of this pew was laid by the Respondent in his libel.

To prove the first proposition, viz., that a church rebuilt upon the old foundations, if it be entirely or substantially rebuilt, requires re-consecration, very little authority has been produced. No decided case has been cited to their Lordships, with the exception, perhaps, of a case noted in Burn's Ecclesiastical Law, in which it is said that the church of South Malling having been polluted and pulled down, was new built and then

used for divine offices without new consecration. Archbishop Abbot interdicted the minister, churchwardens, and parishioners from the entrance of the church until the church and the churchyard thereof should be again consecrated.

The particulars of the case are not given. It is a citation from Gibson's Codex, and it can hardly be regarded as anything like a solemn legal decision on the point. Two things, however, appear to have occurred, viz., that the original church was polluted in some manner not described, and probably on that ground was ordered to be pulled down, and then there was a new fabric which was considered by the Archbishop as requiring consecration.

The other cases cited to their Lordships contain mere *dicta* of different Judges, and do not involve the point now in question.

The case most relied on is one which occurred in the diocese of Rochester, the case of Battiscombe *v.* Eve (7 Law Times N. S. 697), in which the Chancellor, Dr. Robertson, cited a treatise of very early date, written anterior to the Reformation, in which the following expressions are used:—"In tribus casibus debet ecclesia dudum consecrata iterum consecrari." After stating two instances which do not bear on the case, he proceeds:—"Tertius est, si ecclesia *funditus sit disrupta vel etiam ex toto reparata* sive ex eisdem lapidibus sive ex aliis." That is to say, where the church has been destroyed from the foundation stone, "funditus disrupta," or where the church has been "ex toto reparata"—restored "ex toto," completely from the top to the bottom in every part.

It is unnecessary in the present case that their Lordships should give any judicial opinion upon this general question for reasons that will presently appear; but their Lordships are particularly desirous that it should be understood that they do not mean by any observation to give authority to the position that if a Church be rebuilt upon the old lines of foundation, including within it the same originally consecrated ground, and no more, such Church does need re-consecration. We give no judicial opinion upon that. We desire, however, to have it clearly

understood that we do not by any means intend to recognise or to sanction such a doctrine, as being in our opinion a just view of the law. But that point will not be involved in our present judicial determination.

The judicial ground for the determination we arrive at, rests upon the view we have taken of the second question; the second question being an inquiry whether in this particular case the church was wholly rebuilt, so as to come within the meaning of a church *ex toto reparata*, assuming for the moment that such a new building might require re-consecration.

Now the history of the proceedings is this :—

A faculty was applied for and granted for the repair of the church. The church consisted of a nave, two aisles, the chancel, and tower. It would seem that it had been ascertained that the walls of the body of the church, including the nave and aisles, required to be completely taken down and renewed. The tower did not stand in need of reparation, but all the walls, running from the tower north and south to the east, required entire rebuilding. The eastern wall did not stand in need of being rebuilt. Accordingly the faculty directed the repair of the church to be made in conformity with that necessity. The tower, therefore, remained untouched; the eastern wall, in which were three windows—a large window and two smaller windows, one on either side—also remained untouched, except so far as it was necessary to pull down a part at either end of the eastern wall for the purpose of tying on to it the new north and south walls that were erected.

The whole of the interior of the nave or body of the church appears to have been altered; and whereas in former times there was an arched doorway communicating between the nave and the tower, that doorway was stopped up; a new porch or entrance to the body of the church was erected, the north and south walls were erected, and the interior of the nave of the church was renewed.

With reference to the chancel there is some conflicting evidence, but the witnesses agree that the Communion-table, within the chancel, had

to present an expression of opinion that whatever was done under the faculty, being done under ecclesiastical authority, the building in respect of which it was so done must be considered as remaining subject to ecclesiastical authority.

But that is not by any means the whole of the case, for the Respondent avers that when the portions of the church which were rebuilt were pulled down, and while the edifice was therefore no longer fit to receive the parishioners for the purposes of public worship, marriages were still performed in the church, and the sacrament of baptism continued to be administered. Marriages were celebrated in the tower whilst the church was in the act of being rebuilt; marriages were also celebrated within its incipient walls. At no time, therefore, has there been any disuser of the edifice as a church. It has been treated as the parish church, and used, even during the very act of rebuilding, for those ceremonies which could only be performed within the parish church. That which remained, therefore, the tower and other portions of the building, still retained their ecclesiastical character; and its user as a parish church has never been abandoned.

It is impossible to suppose that under such circumstances the building can have become desecrated, and so stripped of its original sacred character as to require that it should be again consecrated.

A question was put several times to the learned Counsel, by whom we have been much assisted, and who would have been able to answer the question if there are any Counsel able to answer it, whether pulling down the nave would involve a desecration of the tower, so that it also must be re-consecrated. Whether the same doctrine would apply to the eastern wall and the chancel? Whether those marriages and baptisms were all illegally performed which were performed when a certain part of the church was on the ground, and while the act of rebuilding was going on?

It was impossible that the answer to those questions could be either that these things were

on either side of it, north and south, two low walls forming as it were an interior chancel. These low walls were not touched, so far as removal was concerned, but they appear to have been added to and carried to a greater height. The Communion-table being very old was replaced by a new one.

It is said that some of the pews then existing in the chancel were taken down and new ones erected, but upon the whole of the evidence the conclusion is that the pews in the chancel were allowed to remain. There may have been in some instances new woodwork, but substantially the chancel remained, save so far as we have mentioned, unaltered.

Now it must be observed that this was done under a faculty granted by the diocesan; it was done, therefore, by virtue of ecclesiastical authority. It is extremely difficult to understand how that which was done by virtue of ecclesiastical authority could have the effect of rendering the thing itself, when done, exempt from that authority which was necessary for the doing of it. We put it, therefore, to the learned counsel whether there was any instance of repairs or rebuilding done under a faculty which had been held to require re-consecration? No such case has been produced to us. That case which occurred in the diocese of Rochester appears to have proceeded wholly upon the ground that there the church had been repaired or rebuilt without a faculty; and having therefore been called into being not under ecclesiastical authority, the learned Judge thought, rightly or wrongly, that it required re-consecration or re-dedication (the two words legally meaning the same thing), in order to give it the character of an ecclesiastical edifice, so as to be subject to the jurisdiction of the diocesan. It is a decision which, so far as it goes, would seem to carry with it, by implication, the conclusion, that if the reparation, however extensive it might be, had been done under a faculty, it would have precluded the allegation that it was a building which remained free from ecclesiastical authority until it was re-consecrated.

So far, therefore, as that decision goes, it seems

illegally done, or that the tower and the other buildings had lost their original sacred character acquired by virtue of the prior consecration.

Another question was put to the learned Counsel: whether there was any form given, or whether any instance could be cited of a partial consecration of a church, *i.e.*, of a portion of the church? Because the rule being, that what has been once consecrated shall not be reconsecrated, the consecration in the present case must be limited entirely to the body of the church, excluding the chancel and the tower. That would be an anomaly of which no example or precedent has been mentioned.

Reference was made to a case which occurred before Dr. Lushington in the Court of Arches—the case of the parish church of Hanwell, and words were relied upon as seeming to intimate the opinion of the Judge that in that case the church had lost entirely its sacred character, and would require to be re-consecrated.

The note of this case, which is a very short one, must be accurately looked at for the purpose of seeing what was the nature of the application, and the question which the Court was called upon to decide. The application was by a parishioner for a faculty to make a burial-place for himself and his family in the parish church, to the exclusion of others. At the time of the application, the note goes on to say, there was no parish church, the old church having been almost entirely taken down, and a new one in the course of rebuilding.

Now an application for a faculty to make a burial-place is one the propriety of which it would be impossible to determine until it was ascertained what was the area of the church, and in what manner the interior of the church would have to be arranged and disposed of.

Dr. Lushington's answer to the application was this: "I cannot grant such a faculty. How can I grant a faculty for a church not built?" And the answer appears to us to have been a very conclusive one to that application.

Then words are attributed to the learned Judge which could hardly have been used by him as

they are here reported; but if they were so used, they were *obiter dicta,* not necessary for the case before him. He is reported to have said, "If the altar has been taken down, there must be a re-consecration, as my jurisdiction depends entirely *ratione loci.*" If the learned Judge used those words, it is quite clear he must have borrowed them from the equivalent expressions which are found in John de Burgh and other writers at a period anterior to the Reformation, and intended to apply wholly to Roman Catholic churches. In a Roman Catholic church there is an altar, or place where the priest offers sacrifice. In a Protestant church there is no altar, in the same sense; but there is a communion-table on which bread and wine are placed, that the parishioners may come round it to partake of the Sacrament—the Supper of Our Lord.

It is impossible to derive from language applicable to a Roman Catholic altar a conclusion of law applicable to a Protestant church, which conclusion cannot be drawn unless you hold the communion-table to be in all respects equivalent to the altar of a Roman Catholic church.

The note afterwards goes on to say that the motion was renewed subsequently; and "the church having been rebuilt and consecrated, the faculty was granted." It is impossible to tell (if it be correct that there was a re-consecration of the church) what were the circumstances which induced the supposed necessity for that re-consecration. We cannot accept the language as amounting to a judicial determination that when, in the repair of a church, a new communion table is put in the place of an old one, the church must be re-consecrated.

But that brings us back to the inquiry (which is one of fact), has this church been rebuilt in the sense in which the word rebuilding must be taken to be used whenever reference is made to the re-consecration of a church that has been rebuilt?

We repeat that this was not the rebuilding of an entire church, but was the renewal of a portion only; that it was done under the authority

of the diocesan as matter of reparation, and not of rebuilding, and that there remained untouched an important portion of the original consecrated structure, in which the offices of a parish church still continued, without interruption, to be performed.

Upon these grounds, therefore, their Lordships act; and confining their decision to the objection to jurisdiction, they found it upon the fact that there was no rebuilding of this church, that it is not a new church, but part of an old church, with new buildings introduced into it by way of repair; and finding this was done by the authority of the diocesan, under a legal faculty for the purpose, they are of opinion that the church never ceased to be a parish church so as to require re-consecration, but remained subject to the authority of the diocesan. They decide, therefore, that the protest against the jurisdiction in the Court below was rightly and properly overruled.

The point remains upon the nature of the case, as stated by the Respondent in the libel.

Their Lordships have no doubt, from the manner in which the title of the Respondent is pleaded in the libel, that it will, when it is substantiated, give him in law a good right to the enjoyment of this pew. It is a pew in the chancel, which legally may belong to a person in respect of the ownership of a house, or which may belong to a lay rector; it is very different from a pew in the body of the church, which can only be acquired by virtue of a faculty, or by virtue of immemorial possession, *i.e.*, by prescription, which is founded on the notion of there having originally been a faculty. Their Lordships think, therefore, there would be no weight in the objection made in point of law, even if it were at present capable of being raised by the Appellant, from the course which was taken in the Court below: but we find that no such point was raised in the Court below; no objection on that ground was urged upon the Judge in the Court below; the only question which was argued there was the question which is raised by the plea of the Appellant, viz., the

plea alleging want of jurisdiction, which, we think, was properly overruled.

We cannot imagine anything more dangerous or more deplorable than to come to the conclusion which the reverend Appellant, who has for three years been the Incumbent of this church, seems not to be reluctant to arrive at, viz., that this fabric has been for the last forty years an unconsecrated place, in which the rites of the Church have not been duly performed,—in which, therefore, all that has been done would, in all probability, be legally good for nothing; notwithstanding that successive diocesans, notwithstanding that all anterior incumbents, notwithstanding that the whole of the parishioners have been led to believe, and have believed, that the church needed no re-consecration; that when it was repaired it could be re-occupied and restored to its original purposes without the necessity of that solemnity. We are happily able to arrive, without difficulty, at the conclusion that there was no need of such a ceremony. We regret that such a question should have been raised by the Appellant, and we shall advise Her Majesty to reject his Appeal, and condemn him in costs.

I may add one thing to avoid the possibility of its being supposed that any word has been used in this place in a manner irreverent or contrary to the doctrine of the Church. In speaking yesterday of the usage of dedicating churches to Saints, or to God the Son or God the Holy Ghost, I spoke of the second and third Persons in the Trinity, using, inaccurately, the word "inferior;" I meant only that they are named second and third in the enumeration of Persons. We all know the doctrine of the Church is that the three Persons of the Trinity are co-equal and co-eternal, and nothing different was intended to be implied by the expression so inaccurately used. I meant only to express that, when you speak of the Persons of the Trinity, you say God the Father, God the Son, and God the Holy Ghost,—God the Son and God the Holy Ghost being necessarily named second and third in order, but without implying any

inferiority. I mention this because I have been informed the expression was misunderstood, and I am anxious there should be no misunderstanding on such a subject.