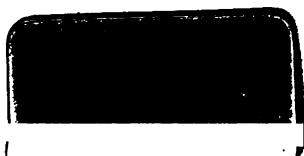


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OF

THE JUDGMENT

DELIVERED IN THE

Ecclesiastical Court of Gloucester,

ON

THE TWELFTH DAY OF APRIL, 1848,

BY THE

WORSHIPFUL JOSEPH PHILLIMORE, LL.D.,

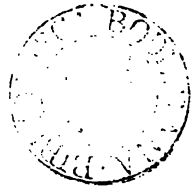
IN THE CAUSE OF

HOPTON AND QUARRELL,

CHURCHWARDENS OF KEMERTON,

v.

THE MINISTER AND CHURCHWARDENS OF KEMERTON.



LONDON:
WILLIAM BENNING AND Co., LAW BOOKSELLERS,
43, FLEET STREET.

1848.

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LONDON:
PRINTED BY RAYNER AND HODGES,
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ADVERTISEMENT.

My attention has been directed to certain detailed and elaborate strictures on my judgment, in the case of the Kemerton Faculty, which have made their appearance in the *Gloucestershire Chronicle*.

Some of these strictures are founded on such inaccurate premises, as would almost necessarily find their way into the report of any judgment taken *ore tenus* by a short-hand writer, who had no opportunity of access either to the Judge or his manuscript notes.

Unfortunately, however, the strictures are not anonymous—inasmuch as they have the name of the Venerable Archdeacon of the diocese of Bristol prefixed to them, who had himself made a long affidavit in the cause.

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Under the circumstances, I have thought it right to publish the Judgment, which, from the copiousness of my Notes, I am enabled to do almost in the very words in which it was delivered.

J. P.

Doctors' Commons,
May 2, 1848.

HOPTON AND QUARRELL,

CHURCHWARDENS OF KEMERTON,

v.

THE MINISTER AND PARISHIONERS
OF KEMERTON.

THIS was a case arising out of a suit brought by the Churchwardens against the inhabitants and parishioners of Kemerton, in the county of Gloucester, for the purpose of obtaining a faculty to take down and rebuild the northern aisle and tower of their parish Church, and to erect a spire on the tower, *provided an adequate sum* could be raised, and to erect a porch and make an entrance into the north aisle.

12th April,
1848.

The cause was argued at much length by Mr. Bonnor, for the Churchwardens, and by Mr. Smallridge, for the Parishioners.

JUDGMENT.

DR. PHILLIMORE.

This is a proceeding instituted by the Churchwardens of the parish of Kemerton, for the purpose of obtaining a faculty from this Court, for taking down, rebuilding, and repewing the north aisle, in conformity with the rest of the Church; and also for taking down and rebuilding the tower, with a

spire thereon, according to certain plans which have been submitted to the consideration of the Court.

Summary
statement of
the plead-
ings.

The grant of this faculty was opposed by Mr. Charles Tidmarsh and Mr. Samuel Powell, two of the parishioners, who prayed leave to be heard on their petition against it; and an act in conformity with the practice of the Ecclesiastical Courts, was entered upon, by the Proctors on each side.

The petition of the Churchwardens has been met by a counter-petition.—The counter-petition has called forth a rejoinder—the rejoinder has been replied to—and the reply has been counter-pleaded in its turn.

In short, the pleadings have been swelled to an unusual and inconvenient length.

Pleadings so unnecessarily diffuse have naturally led to the delay of which I have frequently had to complain in the progress of this cause, and to the introduction of much matter, wholly irrelevant (as it seems to me), to the true issue in the suit.

I may, therefore, with propriety, be spared the superfluous labour of entering very minutely into the details of the several pleadings, and proceed without further preface to the more material facts of the case.

Facts of the
case.

On the 9th of October, 1839, the Rev. Thomas Thorp, Archdeacon of Bristol, and one of the resident Fellows and Tutors of Trinity College, in the University of Cambridge, was collated to the living of Kemerton, by the Bishop of the diocese—the right however of the presentation to the benefice

was disputed by the Corporation of Gloucester—and this dispute gave rise to protracted litigation, which was eventually decided in favor of the Bishop—so that it was not until the 10th of July, 1844, that the new incumbent came to reside on his benefice—indeed it was not, I think, 'till the month of July, 1845, when he resigned his function of Vice-Master at Trinity College, that he became entirely resident at Kemerton.

It is a fact placed beyond controversy, that at this period, part of the interior of the Church obviously stood in need of repair, and from the moment that the Archdeacon was secured in the possession of the living, it seems to have become a favorite, as it was undoubtedly a laudable object of his ambition, that the whole of the Church should be taken down, and an entirely new edifice erected in its stead.

On the 22nd of May, 1845, a vestry meeting was convened by the Rector and the Churchwardens, “to receive a report on the state of the Church, and “to adopt such measures as might appear expedient “for the necessary repair of the same.”

At that meeting it was proposed by the Churchwardens, that they should be empowered and instructed to borrow, on the credit of the Church-rates, the sum of £750, for the rebuilding of the Church—the Rector undertaking by himself or his friends, to raise all the other sums essential to the purpose.

This motion was opposed, on the ground that

the Church did not require to be rebuilt, but only to be repaired, and that the repairs might be effected for an infinitely less sum than £750.

Much difference of opinion prevailed—which consequently gave rise to much discussion—a poll was taken on the vote, and the proposal of the Rector and Churchwardens was rejected by a majority of twelve.

After the close of the poll, a rate of two shillings in the pound for the necessary repairs of the Church, was proposed by the Churchwardens—carried—and finally entered in the minute book of the vestry: although it was protested against by several of the ratepayers who were present, as well on their own behalf, as on that of those who had quitted the meeting, on the ground, that the business of the day had terminated with the close of the poll.

Scarcely was this affair concluded when the Churchwardens commenced the demolition of the nave and south aisle of the Church, the only portions of the Church at that time considered in need of necessary repairs, without any license or authority for so doing from any competent authority,—an act of singular imprudence, considering the magnitude of the undertaking in which they embarked, and the difference of opinion respecting it, which existed throughout the parish.

Considering, too, with whom the Churchwardens were consulting and advising, this act of theirs is the more unaccountable—the sources of information must have been so open to them, that it is hardly

possible to suppose that they were not carefully forewarned, that the only secure mode of proceeding in such a matter, was to apply to the Ordinary for a faculty, inasmuch as the Ordinary alone (represented as it is by this Court), has the right to decide whether such extensive alterations should be made in any parish Church, the Churchwardens must also have been instructed that the Ordinary, on being applied to in the common course of such proceedings, would not only exercise its own judgment on the subject, but call upon all persons having a right to be heard to shew cause why the permission should not be granted, and would hear and determine on the force of any objection that might be raised against it; and that should no valid objection exist, or be brought forward against the grant, the Ordinary would proceed summarily and accede without any delay to the application.

This (a) injudicious precipitation, and the disputes

(a) The following is a notice, dated 14th of Nov., 1845, which was served on the incumbent and the churchwardens, by the direction of the parishioners who had affixed their signatures to it:—

To the Rev. Thomas Thorp, clerk, Rector of the parish of Kemerton, in the county of Gloucester, George Quarrell, and William Woodward, the Churchwardens of the same parish, and to whom else it may concern.

Whereas at a vestry meeting held for the said parish of Kemerton on the 23rd day of August last, by adjournment from the 22nd day of the same month, you the said Thomas Thorp in the chair, it was proposed and seconded that the Churchwardens be empowered and instructed to borrow, on the credit of the rates, the sum of £750, for the rebuilding of the said Church, when the proposal was rejected on a poll by a majority of twelve votes, but after most of the ratepayers had left the meeting, a rate of two shillings in the pound was proposed by the churchwardens towards the necessary repairs, and stated in the minutes of the said meeting to be carried, notwithstanding the undersigned Charles Tidmarsh and George Mumford objected to the right

Notices served on the incumbent and churchwardens of Kemerton, on behalf of twenty-five parishioners.

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 which arose about the legality of the rate of two shillings in the pound, agitated and divided this

of the said meeting to vote a rate, having rejected the proposition for which the meeting was called. And whereas, in the opinion of us the undersigned, and in the opinion of competent persons consulted by us, the said parish Church did not require pulling down, rebuilding, and enlarging, as the same could have been put in such complete repair with the proceeds of the said rate of two shillings in the pound, which was ample and sufficient for that purpose, so that the said Church might be kept in such repair for a great number of years, with the rent of the Church land, without any further rate, and that the said Church did not require to be enlarged, as the same was large enough to accommodate the whole of the inhabitants of the said parish of all denominations, the number of such inhabitants having decreased between the dates of the last two censuses from 599 to 561, the number at the date of the last census, and are still on the decrease, on account of several cottages in the parish having lately been pulled down, and whereas we, the undersigned, and other the ratepayers of the said parish, have been induced to submit to the said rate of two shillings in the pound, purported to be granted at the said meeting of the said 23rd day of August last, on the understanding that we should not be called upon for any sum of money towards the expense of pulling down, rebuilding, enlarging, and reseating the said Church, over and above the proceeds of the said rate of two shillings in the pound, and that an undertaking and guarantee to that effect would have been given by you to the said ratepayers, but which undertaking and guarantee, on being presented to you the said George Quarrell and William Woodward, you refused to sign, and whereas a vestry meeting was convened by you the said Thomas Thorp, George Quarrell, and William Woodward, by notice dated the 26th day of October last, for Thursday, the 30th of the same month, to empower the Churchwardens to apply for a faculty for taking down, rebuilding, and enlarging part of the said parish Church which you had commenced doing, and the meeting was adjourned to Monday, the 3rd of Nov. inst., on account of the absence of you, the said Thomas Thorp, from illness, and whereas, on the said 3rd of Nov. inst., it was moved, seconded, and carried, that the said meeting be further adjourned for three months, and whereas you, the said Thomas Thorp, George Quarrell, and William Woodward (you the said William Woodward as tenant of the rectory farm not paying Church-rates) are, without the consent of us the undersigned parishioners, paying *nearly one-half of the said Church-rate, and without any faculty empowering you to do so, pulling down, rebuilding, and enlarging the said parish Church at a very considerable and (if to be paid by the ratepayers), ruinous expense.*

parish for several months. On the 7th of February, 1846, however, a vestry was called, at which a compromise was effected; and it is to be observed, that this appears to be the solitary occasion in the history of these parochial agitations in which the vestry were unanimous.

They then came to a resolution by which they

Now, we the undersigned parishioners and ratepayers do hereby give you notice that we will not in anywise contribute to such unlawful and unnecessary expense, but that we object to anything further being done to the said parish Church than the necessary repairs required to be done to the same, and that we do object to and will oppose any faculty being granted for the pulling down, rebuilding, and enlarging the said parish Church, as quite unnecessary, and that if you persist in the course you are adopting without first giving the ratepayers for the time being of the said parish ample security that you will put the said parish Church and tower, and the pulpit, pews, doors, windows, bells, and other the goods and furniture of the said parish Church, together with the walls, gates, and fences surrounding the said Church, and the churchyard thereto belonging, in a good, substantial, and necessary state of repair, with the proceeds of the said rate of two shillings in the pound, and from your own resources pay for all the alterations now being made, and contemplated to be made, by you to the said parish Church (both inside and outside) without calling on or putting the ratepayers of the said parish of Kemerton for the time being, to any further costs, charges, or expenses whatsoever, beyond the proceeds of the said rate of two shillings in the pound, proceedings will be forthwith taken against you for causing part of the said Church to be pulled down, without first obtaining the consent of the ratepayers and a faculty for that purpose. Dated this 14th day of November, 1845.

RICHARD BALDWIN.
CHARLES TIDMARSH.
GEORGE MUMFORD.
JAMES BOMFORD.
CHARLES BUCKLE.
SAMUEL POWELL.
HENRY FRANKLIN.
JOHN BARNES.
JAMES GRIZZELL.
WILLIAM WHITE.
JOSEPH DOBBS.
THOMAS BOWDLER.
JAMES SMITH.

ELIZABETH BERKELEY.
NICHOLAS THROCKMORTON.
RICHARD TIDMARSH.
THOMAS MEADOWS.
THOMAS FACE.
CALEB BAYLIS.
TIMOTHY HAWKER.
WILLIAM BUCKLE.
JOHN PURSER.
JAMES DUDFIELD.
WILLIAM HENRY ALDRIGE.
GEORGE GRIZZELL.

confirmed the validity of the rate of two shillings in the pound, and allowed the Churchwardens to apply for a faculty to confirm the rebuilding and repairs then in progress, according to the designs of Mr. Carpenter, on condition that the Rector and Churchwardens should undertake to perform all the necessary alterations and repairs with the produce of such rate, and not call on the parishioners for any further sum for that purpose.

On the 11th of June, 1846, the faculty was granted by my predecessor in accordance with this arrangement.

Meanwhile the active operations going on in the nave and north aisle of the Church led to the discovery of other infirmities in the opposite parts of this time-honored fabric, for the Church is of great antiquity, and the architecture of the part in question is evidently to be traced back at least to the times when the Normans were in possession of this portion of our island.

It appeared, on closer examination, that reparation was manifestly called for, both in the north aisle and in the tower.

The disputes were revived as to the mode and manner of dealing with these dilapidations.

The one party contending that it would be advisable to take down the north aisle and tower, and to rebuild them in conformity with the style of architecture, which had recently been introduced into the nave and south aisle of the Church, the other party insisting that the character of the ancient

fabric should be retained in the north aisle,—that reparation alone was necessary,—and, further, that according to the agreement of the 9th of February, 1846, the Rector and Churchwardens were bound to defray the expense of any such reparation without calling on the parish for a fresh levy (*a*).

A vestry was holden on the 20th of August, 1846, for the purpose of taking into consideration the state of the north aisle and tower; at this meeting it was proposed that the remainder of the Church should be rebuilt in conformity with the rebuilding of the nave and the south aisle; an amendment was moved that the north aisle should not be taken down, but should be put in a fit and proper state of repair according to the undertaking of the Rector and the Churchwardens.

On the question being put, the votes were even, and the rector, who was in the chair, and who had already voted in his individual capacity, gave his casting vote in favour of the original proposition. This proposition, however, so far remained in abeyance, that it was finally qualified by the following resolution:—"That this meeting approves of the works in progress in the parish Church, desires that the rest of the Church be forthwith rebuilt in uniformity with the nave and south aisle, provided adequate funds can be obtained."

(*a*) One of the pretexts put forward on behalf of the Churchwardens, for not applying to competent authority, before they ventured on pulling down so large a portion of the fabric, was the danger which would arise from delay!—the ready answer to this excuse is, that the Kemerton faculty was not applied for till the 13th of May, 1846, and actually granted on the 10th of the ensuing month of June.

Thus matters rested till the 3rd of September, 1846, to which day the last vestry had been adjourned, when the vestry re-assembled, and the stormy discussions, which had characterised the last meeting, were renewed.

he resolutions of vestry.

Two resolutions were moved, which had for their object the rebuilding of the north aisle and tower, and the mode of providing for the expenses of so great a work, which resolutions, it will be essential that I should consider more in detail hereafter.

A poll was demanded, and the resolutions were reported to be carried by a majority of twelve,—in opposition to this result, an elaborate analysis of the property and condition of the several voters has been introduced into the pleadings of the opponents to the faculty, for the purpose of shewing that many of the voters on the side of the Churchwardens were paupers, proletarii, (if I may be allowed the expression), who paid no rates, and that several persons were otherwise so disqualified, that in point of fact, the real result of the poll was a majority of only two in favor of the resolution—this has been met by a counter analysis of the votes of both parties by the other side:—but in the view I take of the case, the exact number by which the resolutions were either affirmed or rejected, will not bear upon my judgment.

It is sufficient to state, that many ratepayers of consideration and respectability were opposed to them.

Such are the facts of the case partly admitted in the pleadings, partly set forth in affidavits, for

there have been twenty (a) affidavits brought in by the Churchwardens, and four by the opposing parishioners.

Out of the two last mentioned vestry meetings, viz. those of the 20th of August and 7th of September, the present application for a *second* faculty has taken its rise, and, as the whole case hinges on this application, it may be material to consider it in all its details.

Mr. Bonner, one of the proctors of this Court, exhibited a proxy, under the head and seal of the two Churchwardens of Kemerton, and alleged that in 1845, the parish Church of Kemerton being in an unsafe condition, it was determined to take down and rebuild the nave and south aisle thereof, and to repair the same, and that a faculty was granted by the Consistory Court of Gloucester, for confirming, authorizing, and sanctioning the doing "thereof."

Application
for the
faculty stated
in detail.

That a great part of the work has been already performed, but that other parts are still in progress and advancing towards completion, and that it has been recently discovered that the north aisle and tower of the Church are very much dilapidated, and that the latter is reported by a competent architect to be in such a state as to require an expenditure to secure its duration; and that the north aisle could not be taken down without risking the stability of the tower; that a vestry meeting duly convened, was holden on the 20th day of August, now last past, for the purpose of taking

(a) Archdeacon Thorp's affidavit filled nearly one hundred folio pages.

into consideration, the state of the parish Church, and authorizing and adopting such measures as might be deemed practicable and expedient for completing the rebuilding of the same, when it was resolved that that meeting, approving of the works then in progress in the parish Church, desired that the rest of the Church should be forthwith rebuilt in conformity with the same, provided adequate funds could be obtained, and that the meeting be adjourned to that day fortnight, for the purpose of considering what means could be procured for obtaining the necessary funds. And the proctor further alleged, that at a vestry meeting holden on the 3rd day of September, now last past, by adjournment from the vestry meeting which was so holden on the 20th day of August, as also in pursuance of the following Notice, which remained affixed on the Church door, from and inclusive of Sunday, the 23rd day of August, until the said 3rd day of September, namely—" Notice is
 " hereby given, that a vestry meeting will be held
 " in the School Room, on Thursday, the 3rd day of
 " September next, at eleven o'clock precisely, in the
 " forenoon, at which it will be proposed to raise the
 " necessary funds, by borrowing a sufficient sum
 " upon the credit of the Church-rates, or upon the
 " Church-land, or otherwise, as shall be agreed to,
 " and to adopt all such other measures as are re-
 " quired by law, or shall then appear practicable
 " and expedient, for taking down and rebuilding
 " the rest of the Church, in conformity with those

~~“ parts of it now in progress of rebuilding. Dated~~
 “ Sunday, 23rd August, 1846, and signed by the
 “ Rector and the two Churchwardens.”

“ It was resolved, that the Churchwardens be thereby authorized to raise money on the credit of the Church-rates, for completing the rebuilding of the parish Church, and to apply the rent of the Church-land to the repayment of the money so raised, *provided that the rate levied for that purpose, in addition to the rent of the Church-land, shall not in any one year exceed fivepence in the pound, and shall not average more than fourpence in the pound yearly, for a period of ten years, nor more than twopence halfpenny in the pound yearly, for a period of twenty years, and likewise to take any other measures which might be necessary for the execution of the work.*”

“ It was also resolved, that the offer of the rector to complete the rebuilding of the entire Church, in conformity with the chancel, nave, and south aisle, with the assistance of the funds provided by the last resolution, be accepted, the Rector giving security to the Churchwardens for completing the same, with all reasonable dispatch. And the proctor further alleged that a plan consisting of three drawings, drawn by Mr. R. C. Carpenter an eminent architect, for the execution of the said work, shewing a porch and entrance into the said north aisle, and a spire to be erected on the tower, was produced to and approved by the last mentioned vestry meeting, but that it was then understood that the spire was not to be erected,

unless or until adequate funds could be procured for that purpose; and the proctor produced before the Surrogate a copy of the before mentioned plan in three parts, numbered respectively—one, two, and three, and also copies from the vestry book of the minutes of the said several vestry meetings, to be deposited in the Registry of the Consistory Court, and further alleged that the Rector was ready and willing to give the security mentioned in the said recited resolution, with the understanding before mentioned, that the spire drawn on the said plan is not to be erected, unless or until sufficient funds be raised for that purpose, according to the true intent and meaning of his printed address and proposal, bearing date the 1st day of September now last past, which he caused to be circulated among the parishioners of Kemerton, a copy whereof the proctor aforesaid produced before the Surrogate aforesaid.”

“And the proctor aforesaid further alleged that the said Churchwardens are desirous of having a faculty granted, to authorize the taking down, rebuilding, and reseating the said north aisle in conformity with the rest of the Church, and also for taking down and rebuilding the tower, with a spire thereon, the whole according to the aforesaid plan of the said Mr. R. C. Carpenter.”

Such is the extraordinary application addressed by the Churchwardens to this Court, and I now turn from this petition, and the statement of facts which has preceded it, to consider for a moment what is the nature and extent of the law applicable to such

a petition, combined with such a statement of facts; and, I do this the rather, because, from all I have seen of the proceedings in this cause, it is clear that much misapprehension prevails as to this point.

By the law of the land the parishioners, *i. e.* the actual residents within, or the occupiers of lands and tenements within a parish, are bound to repair the body of their parish Church, whensoever repair may be necessary. Law of the case.

To this extent the law is of entire obligation on all. The repair of the parish Church is not a voluntary act, which any parishioner may perform or decline at his discretion, or which any one may avoid, or escape from, on the plea, however well founded, of his not conforming to the doctrines and discipline of the Established Church.

To this extent then, it is the duty and the very function of the Ecclesiastical Judge, to exact obedience to the law, and to resort even to compulsory process, should compulsory process unhappily be rendered necessary, for the purpose of enforcing the due execution of it.

But the law nowhere arms the Ecclesiastical Court with authority to compel parishioners to make a rate for extraordinary alterations or improvements in their parish Church, or for the entire rebuilding of it, or for any repairs whatsoever, which are not essentially connected with the stability and security of the fabric, nor can it compel a rate, which, not being necessary, would, nevertheless, contribute to the ornament and embellishment of the edifice, as little does it arm the Ecclesiastical Court

with authority, to compel the levy of a rate for the purpose of altering the architectural character of the building, or for the purpose of exchanging the massive columns of a ruder time, for the lighter pillars of the middle ages, or in fine, to transform the Church, in whole or in part, from a Norman to a Gothic edifice.

True it is, that in the present instance, the munificence of the Incumbent, aided by the spontaneous and liberal contributions of piously-disposed persons, has enabled the Churchwardens, with the addition of a rate of two shillings in the pound, to change the whole architectural character of the nave and south aisle of this Church, but they have not effected this by the force or operation of law, or by virtue of any compulsory process on the inhabitants. Nor has this Court otherwise interfered than to grant a faculty with the unanimous consent of the parishioners duly authenticated, to give effect and validity to acts of the Churchwardens, which were originally neither "legal nor habilitate," and to sanction the levy of a reasonable rate in aid of the expenses which had been incurred. I am now called upon to go a step further in administering the law, and to compel a similar transformation to be made in the remaining portions of the edifice.

It has been contended, that the majority of parishioners in vestry assembled, have sanctioned this extensive and extraordinary alteration,—that they are anxious to give uniformity to the whole interior of the Church, by rebuilding the northern in conformity with the southern aisle and the nave—and it

is urged upon me, that it is the duty of this Court to give effect to the declared wishes of the majority of the parishioners.

In the first place, for reasons at which I have already glanced in passing, it is not quite clear to me, if the votes (*a*) were to be critically examined, in which scale the majority might preponderate. Secondly, but if I were quite satisfied, that the majority was with the promoters of the suit, and if I were to admit for the sake of argument, such to be the result, I might still hold it my duty to protect the parish itself, from its own indiscretion and imprudence, and to protect a minority as considerable and respectable as this, as well as to protect *the future* inhabitants of this parish, from the costly and extravagant expenditure with which it is proposed to clog and encumber the parochial resources of Kemerton for a series of years.

(*a*) The votes were,

<i>For</i> the Resolution	-	-	-	-	105
<i>Against</i> it	-	-	-	-	62

Majority - - 43

And although there was a scrutiny, the Chairman still declared that the above numbers represented the correct result of the poll.

It was contended, that if the scrutiny had been allowed, the numbers would have stood,

<i>For</i> the Resolution	-	-	-	-	56
<i>Against</i> it	-	-	-	-	49

Majority - - 7

The opponents alleging that 49 who voted *for* the resolution had no votes—and the supporters of the resolution, (if they had acted on the same principle of scrutiny), alleging that 10 of them who voted against the resolution had no votes.

Again, it has been pressed on my consideration, that the real opposition to the proposed plan arises from ratepayers who dissent from the Established Church, and it is undoubtedly true, that on examining into the component parts of the constituency of the parish, so far as these are evidenced by the statements actually before me, I see amongst them both Roman Catholics and Protestant Dissenters, who are stated to have respectively chapels and meeting-houses of their own within the parish. I see also, as I think might naturally be expected, that these Roman Catholics and Dissenters, were all ranged under the same banner in favor of the more moderate expenditure, and all adverse to the entire rebuilding of the northern aisle and tower. But on the other hand, I nowhere find these individuals acting in disobedience to the law; they offer no opposition generally to the payment of Church-rates, but they profess themselves ready and willing to contribute to any levy which may be requisite, to place the fabric of the parish Church in a solid and substantial state of repair.

I feel that I should be exceeding the legal authority I possess, if I were by any act of mine to endeavour to compel parishioners so circumstanced to bear the burden of a rate, not for necessary and ordinary, but for superfluous and extraordinary repairs.

Then as to the Resolutions which are embodied in the application for the faculty, it is impossible to disguise the fact, that by giving effect to the Resolutions in question, and by acceding to the applica-

tion of the Churchwardens now under consideration, the Ordinary would burden this parish with a heavy rate, for ten or twenty continuous years as the case may happen, but in either case, with a very heavy rate. For what? not to maintain the ancient character of the structure, not to place the Church in a state of substantial repair, but to complete a rebuilding of the entire Church, and to render the architecture of the north aisle conformable in style to that newly introduced into the nave and the south aisle; and further than this, it is proposed by a clause, the like of which none ever met my eye in the four corners of any faculty, to permit, under a vague, ill-defined, but possible contingency, a spire to be erected on the tower; and all the expense, present and future, amounting at the lowest estimate to many hundred pounds, to be sanctioned by the Ordinary in the very face of an affidavit, made by three competent and experienced architects, that the whole of the necessary reparations of the north aisle and tower, may be substantially effected for the sum of £120.

Before I could judicially sanction any such application, I must have clear proof laid before me, that funds could be raised spontaneously, *i. e.*, without any rate; and that such funds sufficient for the due completion of the plans, would be derived from such well secured sources, that the ratepayers of this parish could not be burdened beyond the sum which the architects have sworn to be sufficient to place the Church in a state of decent and substantial reparation.

(a) It is the bounden duty of the Ordinary never to grant a faculty for expensive alterations in any Church, which are professed not to be paid by a Church-rate, unless the Judge has before him the most ample security that the funds will be otherwise provided for, than by the parish.

objections to
faculty
founded. I am clearly of opinion, that the objections taken to the grant of this faculty are well founded, and that I have not the power, if I had the inclination, to grant it in the form and manner in which it is prayed.

second
in the Another point remains for my consideration, which grows out of the following circumstances.

In compliance with the wishes of both the litigant parties in this suit, I have taken, as it is technically termed, "a view" of this Church at Kemerton.

taken
Church
merton. This view has satisfied me that the north aisle stands in need of repair, and moreover, that the necessity of such repair is urgent; if I had not ascertained this from personal inspection, the affidavits of the professional gentlemen on the one side and the other, would be conclusive on the subject, for, however they may differ as to the nature and extent

(a) Such is the uniform practice of the Superior Court. In the case of *Roop and Clark, Churchwardens of Chesterfield v. The Vicar and Parishioners of Chesterfield*, Arches, Dec. 21, 1841, which has since been followed as a precedent. The Judge would not allow the faculty to pass till a bond of 3,200*l.* was given by the parties applying for it, with sureties for the performance of the intended alterations, and the repairing and refitting of the parish Church of Chesterfield, and for the payment of all expenses attending the same, without making any rate or assessment on the parish in respect thereof; and he (the Judge) further directed, that a clause should be inserted in the faculty, providing that the parishioners should not be liable to any expenses incurred in respect of the said repairs and alterations.

of the repairs required, they at least concur, as to the necessity of some reparation.

In accordance with the principles I have already laid down, the parishioners, would be bound to adopt prompt measures, for the repairs of this portion of the Church:—*primâ facie* they acknowledge that they are so bound;—but they claim to be exonerated *pro hâc vice*, from the admitted obligations of the law, by reason of a mutual engagement entered into by the unanimous concurrence of all parties assembled in vestry in the year 1846, and it is accordingly averred in the act on petition, that all the repairs required now to be done, must be performed at the expense of the Rector and Churchwardens, in pursuance of their undertaking, and agreement with the parishioners.

Exemption
from repairs
claimed
under an
agreement.

The agreement is couched in the following terms:

“We, the undersigned, the Rev. Thomas Thorp, clerk, Rector of Kemerton, in the county of Gloucester, and William Woodward and George Quarrell, farmers, the Churchwardens of the said parish, in consideration of the ratepayers of the said parish not disputing, but submitting to and paying a certain Church-rate of two shillings in the pound, purported to be granted at a meeting held for the said parish, on or about the 23rd day of August, 1845, by adjournment from the 22nd of the same month, for the necessary repairs of the parish Church of Kemerton aforesaid, as appears by the minutes of the said meeting entered in the vestry or Churchwarden's book, and signed by the said Thomas Thorp, as chairman of the said meeting, do hereby

Agreement
of Rector and
Churchwar-
dens with the
parishioners
set forth.

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 respectively promise, agree, and undertake, to and with the ratepayers for the time being of the said parish of Kemerton, that the said ratepayers shall not be called upon for any further sum or sums of money, than the amount of the said rate of two shillings in the pound, as we consider such rate to be ample and sufficient to pay for all necessary repairs required to be done to the said parish Church. And we the said Thomas Thorp, William Woodward and George Quarrell, do hereby respectively, for the considerations aforesaid, further promise, agree, and undertake to put the said parish Church, and the pulpit, pews, or seats, doors, windows, and other the necessary furniture and appurtenances, to the said Church belonging, together with the walls, gates, and fences, surrounding the said Church and Churchyard, in a good substantial and necessary state of repair, *leaving the north aisle and tower in fit and proper repair*, with the proceeds of the said rate of two shillings in the pound, without calling on or putting the ratepayers of the said parish, to any further costs, charges, or expenses whatever, beyond the proceeds of the said rate of two shillings in the pound."

I do not sit here to give effect to any such agreement as this, but if the construction I am disposed to put upon it, can be serviceable to both parties, and prevent the resort to protracted and expensive litigation elsewhere, I should be reluctant to withhold my opinion respecting it.—I must repeat, however, for I am anxious to place myself beyond the possibility of misapprehension as to this point,

that no agreement entered into amongst the parishioners, could bar the ordinary from the exercise of the undoubted right and power it possesses, to compel the parishioners to repair their parish Church.

Apart, however, from this consideration, it is to be remembered that the agreement was discussed and settled, at a protracted and stormy meeting, in a crowded room, and it is very possible that differences of opinion, and unintentional misapprehension, may exist in the minds of the persons present, as to the exact bearing and purport of the terms.

Certain it is, that there is a very extraordinary difference in the evidence of the witnesses, as to the sense and signification, in which such terms were intended to be used by the parties who adopted them.

For instance, the Archdeacon who was in the chair deposes, "that eventually after many other amendments were proposed and declined by Mr. Tidmarsh, still on the same ground," namely, that he was unwilling to alter what had been drawn up by a lawyer—this deponent said, "come, I think I have hit it—will not this do? Let Mr. Tidmarsh's words stand—as he says, we are all agreed about the meaning," (that is, that the obligors were bound only to rebuild the nave and south aisle, and to leave the rest of the Church as good as they found it)—we will insert a clause, undertaking to put the nave and south aisle in substantial repair, and to leave the rest of the Church in the same repair it is at present, which Mr. Tidmarsh says, is fit and proper repair—or words to that effect.

Deposition
of Arch-
deacon
Thorp.

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 And then the meeting became more impatient, as if vexed with Mr. Tidmarsh, for his resistance to the general understanding—and this deponent, who had all along used his endeavours to induce the meeting to assent to as much of Mr. Tidmarsh's paper, as was compatible with the understanding before referred to. Nevertheless, instead of the word "leaving" being inserted, with reference to those parts of the Church, for which the obligors would not bind themselves, pressing upon the Churchwardens and their friends, that this word secured them against anything beyond leaving those parts in such repair as they were, by all parties understood to be in at the time.

Depositions
 of Mr. Tid-
 marsh, Mr.
 Mumford,
 and Mr.
 Powell.

Whereas, Mr. Tidmarsh, Mr. Mumford, and Mr. Powell, swore, that they and the other ratepayers, opposed to the granting of the faculty, perfectly understood and believed, at the time the undertaking was signed by the Rector and Churchwardens, that the Rector and Churchwardens undertook, and fully intended to put the whole of the parish Church, including the tower, north aisle, and the pulpit, pews and seats, doors, windows, and the necessary furniture and appurtenances belonging to the said Church, together with the walls, gates, and fences surrounding the Church and Churchyard, in a good, substantial, and necessary state of repair, with the proceeds of the rate of two shillings in the pound, without calling on or putting the deponents and the other ratepayers, to any further costs, charges, or expenses whatsoever, beyond the proceeds of the rate of two shillings in the pound, otherwise they

would not have agreed, that the Churchwardens should have been empowered and instructed to apply for a faculty.

Mr. Hopton, who is possessed of considerable property in the parish, deposes that Mr. Tidmarsh produced the form of an agreement, which he said he should require the Rector and Churchwardens to enter into, provided they were allowed to receive the rate of two shillings in the pound, without further dispute, and proceed with the repairs or restoration of those parts of the Church, for which designs and estimates had been given by Mr. Carpenter, an architect of London.

Deposition of
Mr. Hopton.

That on the agreement being read, objection was taken thereto by the Rector and Mr. William Woodward, on the ground that it was so worded as to involve the rector and Churchwardens in the substantial repair of the other parts of the Church, besides those parts for which Mr. Carpenter had given designs—and much conversation on the subject ensued, when a clause was proposed in the words as to this effect, “leaving the north aisle and tower in fit and proper state of repair,” which seemed to satisfy all parties, and the draft of the agreement so altered, was then entered into the vestry book, and signed by the Rector and Churchwardens; and he further swears, that by this agreement the Rector and Churchwardens were to receive the rate of two shillings in the pound, and then to complete the nave and south aisle, as designed by Mr. Carpenter, and when those works were substantially performed, to leave the north aisle and tower in as good a state

of repair as it then was, in making good any damage that might be done thereto during the progress of the other works, and from what passed at the said meeting, he believes it have been the feeling of the parishioners generally, that at that time the north aisle and tower, though old, were in a fit and proper state of repair."

Several other affidavits as to this point and of the same tenour have been brought in by the Churchwardens.

It is scarcely possible, that evidence can be more conflicting.

But I do not attribute this extraordinary discrepancy to intentional misstatement, still less to intentional perjury.

I attribute it rather to the excitement which prevailed during the discussions in question, an excitement calculated to warp the understanding and distract the attention of the persons present: something also may be ascribed to the infirmity of human memory,—to the bias of party spirit,—and to the natural propensity every individual has, to refer to bygone transactions, in the manner most favorable to his own views, and preconceived opinions.

From the best consideration I have been able to apply to these disputed facts, I am led to think that it was not intended that the general repairs of the north aisle and tower, should fall within the scope of this agreement.

I am led to this opinion, from the general tenour of the document, and because, that at the moment the agreement was signed, not the slightest danger

was contemplated by any ratepayer present, of any repairs being necessary for the north aisle and tower. These parts of the edifice were assumed by all present, to be in a satisfactory and secure state.

Again, the course of transaction—the whole res gesta leads to the same conclusion, and the words “leaving the north aisle and tower in fit and proper state of repair,” admitted to have been introduced into the agreement in the course of the discussion by the Rector, could have no other reasonable object than to provide that if the north aisle and tower should suffer injury from any act done in the progress of the repairs of the nave and south aisle, such injury should be made good by the Rector: they point to the same conclusion.

No *mala fides* imputable to the Churchwardens or to the Rector.

Upon the whole, then, I am of opinion that there is nothing in this agreement which can relieve the parishioners, from the obligation they are under to repair the north aisle and tower of their parish Church, and it appears to me equally clear, and I think I am also bound so to testify, that the charge of “*mala fides*” averred against the Rector and Churchwardens in the pleadings, has not been substantiated.

The only question remaining to be considered, is Costs. that of costs.

And I own that I have felt more doubt as to this than to any other part of the case.

Costs are in a special manner in the discretion of the Court, and under the peculiar circumstances of this proceeding, I think I shall best meet the justice of the case by making no order as to costs.

~~The consequence of which~~ will be, that each party will have to pay their own costs.

I refrain from being more explicit as to this point, because I am unwilling to touch on any thing which may foster and increase irritation.

That the cause has been unnecessarily protracted, that the pleadings have been unnecessarily multiplied, and that there has been an expense of litigation totally disproportionate to the nature of the suit, and to the facts which bear upon the merits of the case:—is to a certain extent attributable to both parties.

Unhappily delay has tended to keep alive a spirit of dissension which I would fain allay—I would fain lull and compose by any sedative it might be in my power to administer, this parochial irritation—*hos motus animorum atque hæc certamina tanta.*

The supporters and opposers of the faculty, ought alike to bear in mind that however they may differ as to their religious creeds, and although they may not all be within the fold of the incumbent of the parish, still that the common Christianity which they all profess, admonishes them to eradicate angry and acrimonious feelings—to vie with each other in forgiveness of injuries,—and to cultivate conciliation, peace, and goodwill towards neighbours whose lot is cast in the same parish with their own.

FINIS.

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