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here, of carrying the cause in the first instance to the Court of Arches, has been recognised by that Court in *Hawes* v. *Pellatt* (*b*).

Cur. adv. vult.

[209] Lord Denman C.J. now delivered the judgment of the Court.

This was a motion for a prohibition to the Court of Arches in a suit for subtraction of church rate.

Two objections were urged. First, that the depositions were improperly taken with reference to the statute 10 G. 4, c. 53, s. 9. The answer is clear, that, even if it were so, it is matter of irregularity in practice only, and no ground for this Court to interfere by writ of prohibition (*a*).

Secondly, that the party was cited out of his diocese, and that a suit for subtraction of church rates cannot, by the law civil or canon, be referred by letters of request to the Superior Ecclesiastical Court, and so is not within the exception of the statute 23 H. 8, c. 9. No authority was cited for this position, nor any reason assigned at the Bar, why a suit for subtraction of church rate might not be so referred as much as a suit for subtraction of tithes, or for brawling, or any other contentious matter. But it was said by counsel that they were not aware of any instance in which it had been done.

We have made inquiry, and find that suits for subtraction of church rate have frequently been referred by **[210]** letters of request, and that no objection has ever been taken on that ground, although in several such instances a prohibition has been moved for on other grounds. The ground usually assigned in the letters of request is, that the parties can, in the Superior Court, have the benefit of counsel learned in the law, which advice cannot be had in the inferior jurisdiction; and this ground is obviously applicable to the case in question.

We see, therefore, no reason to doubt that the letters of request were in this case proper: and the rule must be discharged.

Rule discharged.

THE QUEEN *against* BAINES. [Saturday, November 28th, 1840.] A writ de contumace capiendo, under stat. 53 G. 3, c. 127, s. 1, for disobeying the monition of the Arches Court, may issue on a significavit from the official principal. If the writ purport to have issued against defendant for not paying a sum of money and costs, according to the monition of the Arches Court, the proceedings being carried on in pain of the contumacy of defendant, duly cited to appear in the cause, &c., with the usual intimation, but not appearing, this Court will not discharge him on habeas corpus. For a practice of the Ecclesiastical Court to give judgment against a party on such non-appearance may be legal; and, if no such practice exists, the party should appeal. The writ shews sufficiently that the Ecclesiastical Court had jurisdiction, if it state that defendant was contumacious in not paying the churchwardens of St. M. the sum of two pounds

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(*b*) The reporters are favoured by Dr. Curteis with the following note.

Arches Court of Canterbury. Trinity Term, 1839.

Hawes and Vicat against *Pellatt.*

[S. C. 1 Curt. 473. Referred to, *Asterley* v. *Adams*, 1871, L. R. 3 Ad. & E. 368.]

This was a cause of subtraction of church rate, brought by Hawes and Vicat, the churchwardens of the parish of Christ Church, Surrey, against Mr. Apsley Pellatt, a parishioner, by letters of request from the commissary of the Bishop of Winchester for the parts of Surrey within that diocese.

Mr. Pellatt appeared to the citation, under protest, and prayed to be dismissed from the suit, on the ground of his having been cited out of his diocese, contrary to stat. 23 H. 8, c. 9.

The Court (Sir Herbert Jenner) overruled the protest with costs, and directed Mr. Pellatt to appear absolutely.

The case came before the Court in Michaelmas term 1839 and Trinity term 1840, on other points, and will be reported in vol. 2, part 2, of Dr. Curteis's Reports.

(*a*) See *Regina* v. *Baines*, post, 210, 229.

five shillings "rated and assessed" upon him, and costs, pursuant to a monition, &c. "in a certain cause or business of subtraction of church rate" depending, &c. The form of a writ de contumace capiendo, given by stat. 53 G. 3, c. 127, Sched. (B), addressed "To the Sheriff of ———," describes the contumacious party as "——— of ———, in your county of ———." Quære, whether a writ describing the defendant as "W. B. of the Market Place, in the borough of Leicester, hatter, a parishioner and inhabitant of the parish of St. M., in the said borough of L., in the county of Leicester," sufficiently complies with the statute. But, Held, upon motion for discharge on habeas corpus, that the alleged variance could not be taken advantage of on a return setting out the writ, though the motion was supported by an affidavit verifying a copy of the writ; for that the proper course was to move that the writ itself might be set aside for irregularity. It is no objection to the writ, that it purports to have been delivered of record to the sheriff in the Court of Q. B., but does not appear to have been "opened" at that time, pursuant to stat. 5 Eliz. c. 23, s. 2.

[S. C. 4 P. & D. 362; 10 L. J. Q. B. 34; 5 Jur. 337. Referred to, *Martin* v. *Mackonochie*, 1878-81, 3 Q. B. D. 758; 4 Q. B. D. 697; 6 App. Cas. 424; *London County Council* v. *Dundas*, [1904] P. 28.]

A habeas corpus issued in Michaelmas term, 1840, to the Sheriff of Leicestershire, to bring up the body of William Baines, who had been committed to the gaol of that county, with the cause, &c. The sheriff, in the same term, made the following return.

[211] "I," &c. "do humbly certify," &c., "that, before the said writ came to me (that is to say) on the 13th day of November in the year within written, William Baines in the said writ named was taken, and in Her Majesty's gaol for the said county under my custody is detained, by virtue of Her Majesty's writ de contumace capiendo, the tenor of which said writ follows in these words, to wit. Victoria, by the grace," &c., "to the Sheriff of Leicestershire, greeting. Herbert Jenner, Knight, Doctor of Laws, Official Principal of the Arches Court of Canterbury, lawfully constituted, hath signified to us that one William Baines, of the Market Place, in the borough of Leicester, hatter and hosier, a parishioner and inhabitant of the parish of St. Martin in the said borough of Leicester, in the county of Leicester, is manifestly contumacious, and contemns the jurisdiction and authority of the law and jurisdiction ecclesiastical, in not obeying the lawful commands to pay or cause to be paid to William Fox, the proctor of William Jolly and William Berridge, the churchwardens of the said parish of St. Martin, the sum of 2l. and 5s. of lawful money of Great Britain, rated and assessed upon him, and the sum of 125l. and 3s. of lawful," &c., "being the amount of costs on their behalf duly taxed and moderated, pursuant to a monition duly issued under seal of the said Arches Court, and duly and personally served on him the said William Baines for that purpose, and duly returned into the said Arches Court with a certificate and affidavit of the execution thereof, of the said Herbert Jenner, Knight, Doctor of Laws, Official Principal of the Arches," &c., "lawfully authorized, by not paying or causing to be paid to the said William Fox, the proctor of the said William Jolly **[212]** and William Berridge, the said sums of 2l. and 5s., and 125l. and 3s., of lawful," &c., "pursuant to the said monition, on a day and hour now long past, in a certain cause or business of subtraction of church rate depending before the said Herbert Jenner, Knight, Official Principal," &c., "in judgment, by virtue of letters of request from the worshipful Christopher Hodgson, Master of Arts, Commissary of the Right Reverend Father in God, John by divine permission Lord Bishop of Lincoln, in and for the archdeaconry of Leicester lawfully constituted, between the said W. J. and W. B., churchwardens of the said parish of St. M. in the borough of Leicester, in the county, archdeaconry, and commissaryship of Leicester, in the diocese of Lincoln and province of Canterbury, the parties promoting the said cause or business, of the one part, and the said William Baines of the Market Place, in the borough of Leicester aforesaid, hatter and hosier, parishioner and inhabitant of the said parish of St. Martin, the party against whom the said cause or business was promoted, on the other part, and the proceedings wherein were carried on in pain of the contumacy of the said William Baines duly cited to appear in the said cause or business, and also duly cited to see proceedings

thereon, with the usual intimation, but in no wise appearing, nor will he submit to the ecclesiastical jurisdiction. But, forasmuch as the Royal power ought not to be wanting to enforce such jurisdiction, we command you that you attach the said William Baines by his body until he shall have made satisfaction for the said contempt; and how you shall execute this our precept notify unto us on the 11th day of January next, wheresoever we shall then be in England; and in nowise omit this; and have you **[213]** there this writ. Witness ourself at Westminster, the 12th day of November, in the fourth year of our reign. "BENTALL."

This writ is allowed, enrolled, and delivered of record before our lady the Queen at Westminster, of Michaelmas term, in the fourth year of the reign," &c., "according to the form of the statute in such case made and provided. In Court, by Le Pipre, 12th of November, 1840. And these are the causes of the taking and detaining the said William Baines, which together with his body I have ready as by the said writ I am commanded."

The return being in Court, Sir J. Campbell, Attorney-General, moved that the prisoner might be discharged. He put in affidavits, verifying copies of the significavit and writ de contumace capiendo. The motion was supported by

Sir J. Campbell, Attorney General, Hill, Baines, and Mellor (*a*)[1]. The return discloses several objections to the commitment.

First, the significavit ought to have been issued by the archbishop, not by the official principal. The writ de contumace capiendo is substituted by stat. 53 G. 3, c. 127, s. 1, for the writ de excommunicato capiendo: that was a proceeding to enforce an ecclesiastical censure; the sentence of excommunication was spiritual; **[214]** and the Ordinary was the proper person to notify it to the civil power. In 3 Bac. Abr. 335, Excommunication (C) (*a*)[2], it is said, "The sentence of excommunication can only be pronounced by the bishop, or other person in holy orders, being a Master of Arts at least." "Excommunication must be certified by the bishop of the diocese, whose proper subject the party is, and cannot be certified by his commissary or official; the reason whereof, according to the civilians, is, because no person inferior to a bishop can call in the secular arm, by the laws of the Church; but my Lord Coke (*b*), assigns the reason of it to be, because no certificate of excommunication by any shall disable one, but the certificate of him to whom the Court may write to absolve the party excommunicated. But the vicar general, episcopo in remotis agente, or the guardian of the spiritualities, vacante sede, may do it, either by direct certificate, that the person is excommunicate, or by letters testimonial, reciting the entry thereof in the register, and attesting that such entry is there found." So in Com. Dig. Excommengement (B, 2), it is said (citing Co. Litt. 134 a.), that "none except the bishop or other Ordinary, that is immediate officer to the King's Courts, regularly can make a certificate of excommunication." **[215]** To the same effect are 10 Vin. Abr. 513, Excommunication (B); Oughton, Ordo Judiciorum, vol. i. p. 74 (*a*)[3], tit. note (*g*). The statute alters

(*a*)[1] November 23d, 1840. Before Lord Denman C.J., Littledale, Williams, and Coleridge Js. A question being made as to the order in which the case should be argued, Lord Denman C.J. said that the Court would consider the course pursued in the case of the Canadian prisoners, *Leonard Watson's case*, 9 A. & E. 731, as the established practice; that the counsel for the prisoner should be first heard, then the counsel for the Crown; and then the Attorney General, for the prisoner, reply generally. See 9 A. & E. 767, 772, 776.

(*a*)[2] 7th ed. See Lyndwood's Provinciale, p. 235, ed. 1679, lib. iii. tit. 28 (Sæculi Principes), note d.: p. 350, lib. v. tit. 17 (Præterea Contingit), note c.; in which last passage, Lyndwood, speaking of excommunicated persons, mentioned in the text as being "de mandato prælatorum secundum regni consuetudinem capti," says, "Prælatorum, i.e., episcoporum: nam ad rogatum prælatorum inferiorum Rex non consuevit scribere pro captione excommunicatorum. Unde si aliquis fuerit excommunicatus ab inferiori episcopo, utputa, decano, vel archidiacono, invocatio regiæ majestatis fieri debet per episcopum: nam inferiores episcopis non possunt invocare brachium sæculare, ut dixi suprà," &c.

(*b*) *Trollop's case*, 8 Rep. 68 a., is cited.

(*a*)[3] Ed. 1728. See also Fitz. N. B. vol. 1, 62 N., 63 C.; titles, Writ de Excommunicato Capiendo; Writ de Cautione admittendâ.

the proceeding in case of contumacy, but does not change the person with whom it is to originate. The power to certify excommunication, which the archbishop had under the old law, was recognized by stat. 5 Eliz. c. 23 (see sect. 10); and by sect. 1 of stat. 53 G. 3, c. 127, "No sentence of excommunication shall be given," except in particular cases, "but instead thereof, it shall be lawful for the Judges or Judge who issued out the citation, or whose lawful orders or decrees have not been obeyed," to pronounce the person contumacious, and "to signify the same in the form to this Act annexed, to His Majesty in Chancery, as hath heretofore been done in signifying excommunications;" and thereupon the writ de contumace capiendo shall issue. Now the Judge, in the Court of Arches, is the archbishop; Com. Dig. Courts (N, 1), (N, 3); and he may act in person; *Bishop of St. David's* v. *Lucy* (1 Salk. 134). The significavit is required by stat. 53 G. 3, c. 127, s. 1, to be in the form prescribed by the schedule, and there it purports to issue from "——— by divine providence," &c., which is the style of an archbishop. And it is "given under the seal of our ——— Court." The Temporal Courts know who is archbishop, but not who is his officer (*d*). It may be said that Sir Herbert Jenner issues the significavit as respresentative, and on behalf of the archbishop; but then he should have issued it expressly in the archbishop's name. The **[216]** second resolution in *Combes's case* (9 Rep. 75 a.), applies: "When any has authority, as attorney, to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place, and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name, and as the act of him who gives the authority" (76 b.). In *Rex* v. *Ricketts* (6 A. & E. 537, 541), Lord Denman C.J. says that, in signifying contempt, "The Judge is to convey the information, but he is to do so as the instrument of the archbishop." In 4 Chitty's Practice of the Law, 225, part 7, chap. 7, Q, the form of significavit is the name of the Archbishop of Canterbury. In *Regina* v. *Thorogood* (page 183, ante), the significavit, from the Consistorial Court of London, was in the name of the bishop himself. The strictness of the Courts of Westminster Hall, in cases originating with the ecclesiastical jurisdictions, appears in *Rex* v. *Dugger* (5 B. & Ald. 791), and *Rex* v. *Eyre* (2 Stra. 1067), there cited. *Bruyeres* v. *Halcomb* (3 A. & E. 381), and *Ranson* v. *Dundas* (3 New Ca. 123), are analogous cases, of a different class. *Deybel's case* (4 B. & Ald. 243), shews the nicety with which this Court will enquire into jurisdiction on returns to habeas corpus.

Secondly, it appears by this return that Baines, failing to appear when cited, was not pronounced contumacious (which was done in *Regina* v. *Thorogood* (page 183, ante)), but was condemned, without having appeared, to pay the rate demanded, and costs. Such a course is contrary to the general rule of law, that judgment shall not **[217]** be given against any party till he can be heard. If a contrary course of practice were recognised in the Ecclesiastical Courts, the significavit should have averred it; this Court would not notice a mode of proceeding so repugnant to the common law, unless directly certified. But the practice of the Ecclesiastical Courts in this respect is not such as the return suggests. (Upon this point, on which the Court gave no decision, they cited 1 Oughton's Ordo Judiciorum, 68, 70, de Excommunicatione, tit. 38, 40; Conset's Practice of the Spiritual Ecclesiastical Courts, 3d ed. p. 35, 36, 39, part 2, c. 3; p. 49, part 2, c. 4; p. 85, part 3, c. 2: Cockburn's Clerk's Assistant in the Practice of the Ecclesiastical Courts, 4th ed. p. 11, c. 3, s. 14; and p. 134, c. 30, s. 10, where a proceeding is allowed in the absence of the party to be affected, but in a peculiar case: Law's Forms of Ecclesiastical Law, 121-3, tit. 55 ,125-6, tit. 57, and the notes: Reports of the Commissioners appointed to enquire into the Practice and Jurisdiction of the Ecclesiastical Courts, p. 35, 36 (ed. 8vo, 1832); *Regina* v. *Thorogood* (page 183, ante)). Stat. 10 G. 4, c. 53 (see sect. 9), gives some additional powers to the Ecclesiastical Courts for expediting suits, but not the authority here assumed. Proceedings against a party in his absence are not favoured at common law; *Williams* v. *Lord Bagot* (3 B. & C. 772). Formerly, if a defendant did not appear after being served with process, the plaintiff could not proceed; the power of entering an appearance for the defendant, and proceeding thereon, was given by statute. If the Court of Arches has power to proceed ex parte in any case, the significavit here does not shew circumstances which rendered it necessary. The words, "with the **[218]** usual intima-

(*d*) On this part of the case, Chilton, amicus Curiæ, mentioned *Regina* v. *Jones*, 10 A. & E. 576.

tion," are as vague as "the usual penance" in a decree; which words were held in *Rex* v. *Maby* (*a*), not to convey sufficient information.

Thirdly, the significavit, as stated on the return, does not shew that the commands disobeyed by the defendant were such as the Ecclesiastical Court might lawfully issue. It recites that he was contumacious in not obeying lawful commands to pay 2l. 5s. of lawful money "rated and assessed upon him," but does not say for what. And it alleges that he disobeyed by not paying the said sum, pursuant to monition, "in a certain cause or business of subtraction of church rate depending before the said Herbert Jenner," &c., in judgment, between the defendant and the churchwardens of St. Martin. The monition is here stated to have been issued in a cause of subtraction of church rate; but the monition itself may not have required payment of church rate; nor does it appear that the rate mentioned was for lawful repairs of the defendant's parish church, or that it was made by the churchwardens with the assent of the parishioners. Nor is it stated to have been a rate which the Ecclesiastical Court had jurisdiction to enforce; primâ facie, indeed, the contrary appears, according to *Ricketts* v. *Bodenham* (4 A. & E. 433), since the proceedings do not shew that the validity of the rate was in question, and the amount of rate recovered did not exceed 10l.(*c*)[1]. If any intendment can be made, this Court will make it for and not against liberty: *Souden's case* (*d*) is an example. The Temporal Courts **[219]** will not lend their assistance to the spiritual, except where it appears clearly that the Spiritual Courts have jurisdiction; and will not trust them to determine what is a matter merely spiritual; *Rex* v. *Eyre* (2 Stra. 1067). The first resolution in *Rex* v. *Fowler* (1 Salk. 293), is to a like effect. In *Regina* v. *Hill* (*c*)[2], the significavit stated that Hill was excommunicated for contempt in not paying 8l. in which he was condemned "in quodam negotio concernente eruditionem puerorum absque licentia of the bishop," &c.; and the excommunicato capiendo was quashed, because it did not appear that the matter was of ecclesiastical cognizance, for it might be that Hill was a writing master, which is not within any of the canons. [Lord Denman C.J. In *Rex* v. *Fowler*, as reported in Lord Raymond (1 Ld. Ray. 618), there seems to have been a doubt as to the jurisdiction of this Court. The nature of the suit there was stated in an absurd manner.]

Fourthly, the statute 53 G. 3, c. 127, Sched. (B), prescribes a form for the writ de contumace capiendo; and statutory forms of process must be closely adhered to; *Richards* v. *Stuart* (*e*), *Nicol* v. *Boyn* (10 Bing. 339). Now the commencement of the writ, according to Schedule (B), should be thus framed: "The ——— hath signified to us, that ——— of ——— in your county of ——— is manifestly contumacious." The writ, as stated in the return, begins: "That one William Baines, of the market place, in the borough of Leicester, batter and hosier, a parishioner and inhabitant of the parish of **[220]** St. Martin in the said borough of Leicester, in the county of Leicester, is manifestly contumacious." This is not equivalent to saying that the defendant is of ——— in the sheriff's county of ———. There may be the same want of jurisdiction in the sheriff which was held fatal in *Rex* v. *Ricketts* (6 A. & E. 537). The borough may not be wholly in the sheriff's county. And a person may be a parishioner and inhabitant of a place within the county, so as to answer to the language of this writ, without being a resident. If the description be even of questionable certainty, the observations of Tindal C.J. and Bosanquet J. in *Richards* v. *Stuart* (10 Bing. 319), apply here: the statute form gives a rule which all may follow; any departure from it introduces conjecture and promotes litigation.

Fifthly, stat. 5 Eliz. c. 23, s. 2, directs that the writ of excommunicato capiendo, when made and sealed, shall be brought into this Court, and there, in the presence of the justices, shall be opened and delivered of record to the sheriff." Stat. 53 G. 3, c. 127, s. 1, enacts that the regulations of the former statute, as to that writ and the proceedings following thereupon, shall extend and be applied to the writ de contumace capiendo proceedings following thereupon. The present writ, as set out on the return, appears only to have been "allowed, enrolled, and delivered of record before our lady

(*a*) 3 D. & R. 570. See *Kington* v. *Hack*, 7 A. & E. 708.
(*c*)[1] Stat. 53 G. 3, c. 127, s. 7. But see *Regina* v. *Thorogood*, p. 183, ante.
(*d*) 4 B. & Ald. 294.
(*c*)[2] 1 Salk. 294. S. C., more fully, in *Regina* v. *Watson*, 2 Ld. Ray. 818.
(*e*) 10 Bing. 319. See the cases cited, ante, p. 190.

the Queen," &c. The enactment is in favour of liberty, the intention being that, when the writ is opened, the Judges may have an opportunity of ascertaining its validity.

Wightman, contrà. First, the significavit is properly in the name of the official principal, for he is (in **[221]** the words of stat. 53 G. 3, c. 127, s. 1), the "Judge who issued out the citation, or whose lawful orders or decrees have not been obeyed." It appears from 2 Gibs. Cod. 986, tit. 43, c. 2, note l. (where Stillingfleet (*a*)[1] is cited), that in matters of contentious jurisdiction the power "is supposed to be conveyed to the official," though the voluntary jurisdiction remains in the Judge (*b*). If the citation here had been from the bishop, but the cause had gone before the official principal, there might have been more difficulty. But here, if the significavit had been by the archbishop, it would have been irregular. The argument drawn from the style used in Schedule (A) of stat. 53 G. 3, c. 127, does not establish that the archbishop is the person who must signify. [Coleridge J. The schedule seems to contemplate a significavit by a person other than the Judge before whom the contempt was committed. Littledale J. No significavit could have been made, before stat. 53 G. 3, c. 127, by any but the party excommunicating: now the official principal could not excommunicate; and stat. 5 Eliz. c. 23, s. 2, of which the provisions are applicable to stat. 53 G. 3, c. 127, s. 1, contemplates only excommunication.] The words of stat. 53 G. 3, c. 127, s. 1, expressly give the power now to the Judge, whoever he may be. Even if the citation here were irregular in this respect, the irregularity would be merely one of practice in the Ecclesiastical Courts, which might be discussed there, but not here on a return to a habeas corpus. The citation might have been objected to in *Jolly* v. *Baines* (ante, p. 201), but was not.

Secondly, the final decree upon the non-appearance **[222]** of Baines is authorised by the practice of the Ecclesiastical Court. Stat. 10 G. 4, c. 53, s. 9, gives the Ecclesiastical Judges power to make orders to expedite and regulate the proceedings of their Courts. This Court will not interfere with the practice of the Ecclesiastical Courts. The rules of foreign Courts, unless manifestly contrary to natural justice, are enforced here; *Becquet* v. *Mac Carthy* (2 B. & Ad. 951). In *Ex parte Smyth* (3 A. & E. 719, 724), this Court said, "The Temporal Courts cannot take notice of the practice of the Ecclesiastical Courts, or entertain a question whether, in any particular cause admitted to be of ecclesiastical cognizance, the practice has been regular. The only instances in which the Temporal Courts can interfere by way of prohibiting any particular proceeding in an ecclesiastical suit, are those in which something is done contrary to the general law of the land, or manifestly out of the jurisdiction of the Court." The same rule as to practice was acted upon by the Court of Exchequer in *Ex parte Smyth* (*c*). But, further, it does not appear that the decree is final. [Coleridge J. It imposes costs.] That may be in pœnam contumaciæ. No argument can be drawn from the amount.

Thirdly, this Court cannot assume that the Ecclesiastical Courts have passed an erroneous judgment, unless that appear on the proceedings or in fact. It is urged that, as the sum appears to be less than 10l., the Ecclesiastical Courts have primâ facie no jurisdiction, and that the only method of enforcing the rate is by the order of two justices, under stat. 53 G. 3, c. 127, s. 7. But the mere declaration of a party summoned by the justices, that he disputed the liability to pay, would **[223]** oust the justices of jurisdiction; *Rex* v. *The Chapel-Wardens of Milnrow* (*a*)[2]. And here is a primâ facie jurisdiction; for all questions of church rate are liable to be tried in the Ecclesiastical Courts. In *Rex* v. *Dugger* (5 B. & Ald. 791), the Court merely ruled that jurisdiction must appear; not that every fact which could possibly destroy jurisdiction must be negatived. In *Rex* v. *Maby* (3 D. & R. 570), the proceedings were imperfect on their face. [Littledale J. I do not see how the objection is open. Stat. 56 G. 3, c. 100, s. 3, does not seem to authorise the questioning more than the truth of the return: how can we enquire as to the regularity of the proceeding itself?] The writ is not properly before the Court for this purpose.

Fourthly, it is not necessary for the writ to follow the Schedule (B) minutely. In effect, the place is shewn to be within the sheriff's bailiwick, by the words "in the said borough of Leicester, in the county of Leicester." That is tantamount to saying "in

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(*a*)[1] See Discourse Concerning Bonds of Resignation, p. 60 (ed. 1698).
(*b*) See *Regina* v. *Thorogood*, ante, p. 183, 197.
(*c*) 2 C. M. & R. 748. S. C. Tyrwh. & Gr. 222. See *Jolly* v. *Baines*, p. 201, ante.
(*a*)[2] 5 M. & S. 248. See *Rex* v. *Wrottesley*, 1 B. & Ad. 648.

your county." It would be impossible to follow the schedules verbatim. Schedule (A) has the words "George the Third." [Coleridge J. The styles of an archbishop and a bishop are different; on any view there must sometimes be a deviation from the words. Lord Denman C.J. The borough of Leicester might be said to be in Leicestershire, if part of it were so and part without; and the market place and all the parish of St. Martin's might be in the part without.] The more natural construction is, that the whole borough, or at least all St. Martin's, is in the county.

[224] Fifthly, the Court must presume that the writ was opened; that is part of the practice of this Court, and will be intended to have been ritè actum.

Sir J. Campbell, Attorney General, in reply. A party unlawfully detained is not confined to the return, but may bring all the facts before the Court. The proceedings are not sanctioned by any thing which occurred in *Jolly* v. *Baines* (ante, p. 201). That was decided on points altogether different from those now raised. As to the first objection, stat. 53 G. 3, c. 127, was not passed to alter the practice with respect to the person issuing a significavit; and it is now admitted that, before that statute, the official principal could not issue it. The official principal has no peculiar privilege, as distinct from other Judges who exercise jurisdiction for the bishop; the Dean of the Arches, for instance. *Regina* v. *Thorogood* (ante, p. 183), shews that the bishop may signify: if so, no one else can. This view is confirmed by *Walker* v. *Levers* (2 B. & Ad. 951), cited from Year Book, Tr. 7 E. 4, 14, A, pl. 6, in the note to 10 Vin. Abr. 517, Excommunication (D), pl. 5. [Littledale J. The editor has made some alterations in the report there.] The practice of the Ecclesiastical Court, in at once passing a final decree for contumacy, is contrary to general justice, as the authorites cited shew. Stat. 10 G. 4, c. 53, s. 9, has no reference to such a case. In *Becquet* v. *Mac Carthy* (2 B. & Ad. 951) there was service on an officer who was, legally, agent for the party; and this prevented any practical injustice. It is urged that nothing here shews the decree to be final, or more than an attachment for contempt. If so, the party **[225]** should be released: for he is confined, not for failing to appear, but for not paying the costs. Then, as to the intendment of facts to take the case out of the jurisdiction of the two justices, *Burder* v. *Veley* (post, p. 233), shews that churchwardens endeavouring to enforce a church rate are bound to make its legality apparent; and that case furnishes one instance in which the rate would not be legal. The present case is not like *Regina* v. *Thorogood* (ante, p. 183); for here it does appear that the sum is less than 10l. As to the suggestion, that the Court will now presume the writ to have been openly delivered, the language of Gibson, Codex, vol. ii. p. 1056, tit. 46, c. 6, note s. (ed. 2), on sect. 2 of stat. 5 Eliz. c. 23, is, "It hath been often adjudged, that this form of taking out the writ, and the several steps therein (as contained in this clause of the Act) ought to be precisely pursued; and for default thereof, many persons have been discharged."

Cur. adv. vult.

Lord Denman C.J., in Michaelmas vacation (November 28th), 1840, delivered the judgment of the Court.

This defendant was brought before us by writ of habeas corpus. The return was, that he was imprisoned by the Spiritual Court by reason of his contempt in not paying 2l. 5s. for a church rate, and 125l. 3s., costs incurred in a suit for subtraction of church rate; and that, upon a significavit from Sir H. Jenner, Dean of Arches, the writ de contumace capiendo had issued under stat. 53 G. 3, c. 127. A copy of the significavit, **[226]** and of the writ on which he was apprehended, were also brought before us by affidavit; and many objections were taken to the legality of his detention.

The first objection is to the significavit, as being issued by Sir H. Jenner, Dean of the Arches, not by the archbishop himself, the real though not the acting Judge of the Court, nor in his name. The statute just quoted was referred to, by which the contumacy of a party is directed to be signified, in the form annexed to the Act, to His Majesty in Chancery, as had theretofore been done in signifying excommunications; and then it was shewn that stat. 5 Eliz. c. 23, requires the significavit to be issued by the Judge himself.

This statute appears, in Co. Litt. 133 b. (see 134 d.), to have been passed for correcting the laxity that had crept into practice, by which the acting Judge was permitted to certify excommunication. On examining his authorities, cited in the margin, we find Bracton expressly declaring (l. 5, fol. 426 b. (cap. 23, s. 1)), that the certificate should proceed from archbishop, bishop, or from the Ordinary or Delegate Judge. Some of

the cases cited there from the Year Books clearly shew the general rule to be, that the Judge himself, i.e. the bishop, who alone could assoil the excommunicated, should certify to this Court, as its immediate officer, the sentence. In some instances, even in those early times, it appears that the certificate of a delegated Judge had been received, and the stat. 5 Eliz. brought back the original practice.

It was argued, for the defendant, that the form of the significavit itself, as given by stat. 53 G. 3, c. 127, in the schedule, proves that the Judge, i.e. the bishop, is the only person who ought to certify, as "——— by divine [227] providence ———" is a form that can only apply to a bishop. It would indeed be singular, if any change in this respect had been intended, that it should have been nowhere indicated in the enactments of the statute, and that this style and title should have been carefully preserved by it. Yet such form, although embodied in the Act, cannot be deemed conclusive of a question of this nature: we have also to consider the language of the section itself to which the schedule is appended; and, if there be any contradiction between the two, which upon fair construction there perhaps will not be found to be, upon ordinary principles the form, which is made to suit rather the generality of cases than all cases, must give way. Now, in the form itself "the Judge or his representative" are both mentioned as capable of making orders, giving judgment, and having a Court in the face of which a contempt may be committed; and the significavit is expressly required by the first section to be made by the Judge who issued the citation, whose orders have not been obeyed, or before whom such contempt in the face of the Court shall have been committed. And it is expressly that Judge who is authorised to pronounce the party in contempt and contumacious. All three cases are put upon the same footing; and, when the nature of a contempt in the face of a Court comes to be considered, there seems something amounting to an inconsistency in holding that, when a contempt had been committed before a Judge actually sitting in Court, it should be necessary to call for the archbishop, who had not been present, to pronounce the party in contempt, and then to signify. We may observe, too, that there was a reason for the former practice, when [228] the sentence of excommunication, a strictly spiritual sentence, was to pass, which does not exist in the present state of the law.

What effect, however, is to be given to the words of the schedule in the case of proceedings of bishops in their several Courts, we need not now positively decide, having ascertained upon inquiry that the Archbishop of Canterbury never has certified any thing to the Court of B. R. as Judge of his Court, but that such certificates have uniformly been given by the Dean of Arches.

There is a remarkable instance of the difference between the Court of Arches and a bishop's court, in a case of deprivation, reported in 1 Phillimore (*a*). That sentence was orally pronounced by Sir W. Scott in the presence of the Bishop of London; but on appeal it was confirmed by Sir J. Nicholl as Dean of the Arches, or, more properly, as Official Principal to the Archbishop of Canterbury, who took no part, and whose name never appeared in the proceedings. We are also informed that this very objection was made without success, in the Court of Chancery, to the issuing of the writ de contumace, in *Rex* v. *Ricketts* (*b*).

We are led, then, to conclude that the Judge who made "the citation" in the Court of Arches is the Dean of Arches, and that he is the officer whose authority is preserved by 53 G. 3, c. 127.

And it is not an wholly unimportant circumstance, in [229] an argument which relies on the precise language of the schedule, that the style of the Judge there given, though applicable to other bishops, does not accurately agree with that of the archbishop.

The second objection was, that the act of the Court was in itself repugnant to the first principles of justice, as the defendant had never appeared, and was condemned to pay the rate and costs, though he had only been brought into contempt for that reason, and not heard in his own defence. But we cannot say that this is necessarily

(*a*) *H. M. Procurator General* v. *Stone*, 1 Hagg. Cons. Rep. 424, seems to be the case alluded to. See, also, *Oliver* v. *Hobart*, 1 Hagg. Ecc. Rep. 43, 47; and the Appendix (same vol., following p. 354) there referred to; particularly p. 4, in marg. *Saunder* v. *Davies*, 1 Add. Ecc. Rep. 291. Rogers's Ecc. Law, 307, tit. Deprivation.

(*b*) 6 A. & E. 537 (in B. R.).

wrong. A Court must, in some cases, proceed against those who do not choose to appear when duly served with notice, even to the extent of adjudging them to do the very thing which, if they had appeared, they might have shewn a justification for leaving undone. A plaintiff may enter an appearance for the defendant in our Courts. A defendant in a Chancery suit, who is in contempt for failing to answer, is taken to confess the charges in the bill. Both these are statutory provisions; but they sufficiently prove that such condemnation of the voluntarily absent is not a violation of natural justice. And the practice of the Ecclesiastical Court may give all just and reasonable protection to defendants.

What is complained of here, however, is either according to the practice of the Spiritual Court or it is not. If it be the former, the observations just made apply: it is a course of proceeding which we cannot pronounce to be illegal; for it must then be taken to have been sanctioned by their law and immemorial usage, equivalent to statute: or, if not to be considered legal, the defendant's course was to come here for a prohibition. But, if it be contrary to their practice, **[230]** which was the line taken in argument for the defendant, and for which many strong authorities were cited, then it is clear that the proper remedy for the defendant is to appear, and appeal to some higher Court, in order to reverse an erroneous judgment. His present application leaves that judgment in full force.

The next objection was, that the jurisdiction of the Ecclesiastical Court does not appear on this return. Primâ facie it certainly does appear; for the cause is described as one for subtraction of church rate, a matter clearly within the jurisdiction of the Ecclesiastical Court. In the case of *Rex* v. *Fowler* (1 Ld. Ray. 618), where the description, pro subtractione "decimarum vel aliorum jurium ecclesiasticorum," was held bad for uncertainty, Holt expressly declares his opinion (1 Ld. Ray. 620), that, if it had been pro subtractione "quorundam jurium ecclesiasticorum" it would have been good. The case of *Rex* v. *Dugger* (5 B. & Ald. 791), founded on former decisions, merely established the proposition that vague and unmeaning language, not correctly pointed to describe any cause whatever, cannot be stretched into a description of an ecclesiastical cause by general words so claiming it. It was next objected that the significavit does not set out a proceeding for a church rate, or shew that the commands disobeyed were lawful, as a church rate can only be due from a parishioner, which defendant is not stated to be; and further, that, even if that did appear, it may still be such a church rate as the Court Spiritual has not cognizance of, by force of 53 G. 3, c. 127, from its being under 10l. in amount, and not disputed. The same answer will serve for both these objections. The **[231]** return properly describes the subject matter of a suit over which the Court of Arches primâ facie has jurisdiction, and it is properly described in the return. When the Court assumes to act within its jurisdiction, and facts appear which primâ facie give it jurisdiction, we are not to presume the existence of other facts which might either deprive the Court of jurisdiction, or, if true, be a defence for the party libelled (*a*).

Some objections were lastly taken to the form of the writ, as not being that prescribed by 53 G. 3, c. 127.

We thought it possible that, in conformity to more recent practice, we might arrive at the conclusion of the insufficiency of the writ on argument on the habeas corpus; and that, if we should deem it invalid, the defendant might immediately obtain his liberty. But on a fuller investigation we cannot find that this has been done in any case; and may observe that in *Rex* v. *Ricketts* (*b*), where the defendant was discharged on an objection to the writ, it was not taken on the return to an habeas corpus, but on a motion to set aside the writ itself for irregularity.

In the argument in the present case, Mr. Wightman urged that we were not at liberty to enter into the consideration of it, as it was not set out upon the return, nor itself brought before us except by means of a copy verified by affidavit; and we are of that opinion in the position in which the case now is. We have it not in our power to quash the writ; and we cannot direct the defendant to be discharged upon this return while the writ remains in force, and, so far as appears upon the return, not open to objection. We need not, **[232]** therefore, pronounce any opinion upon the point made in this respect, further than to guard ourselves against being supposed

(*a*) See *Regina* v. *Thorogood*, p. 183, ante.
(*b*) 6 A. & E. 537. See *Regina* v. *Jones*, 10 A. & E. 576, 582.

to pronounce indirectly in favour of the form very needlessly substituted for the express words of the schedule. And we leave it entirely open to the defendant to make such direct application as he may be advised to make against the writ.

To the objection, that the writ was not opened in this Court before delivery to the sheriff, we attach no weight.

Upon the whole, therefore, we are of opinion that the return must now be taken to be sufficient, and the prisoner must be remanded.

Prisoner remanded (*a*).

[233] BURDER *against* VELEY AND ANOTHER. 1840. Where the churchwardens duly convene a parish vestry, and propose a rate for the necessary repair and expenses of the parish church, which a majority of the assembled parishioners then refuse to make; a rate, made by the churchwardens alone at a subsequent day and meeting, not being a parish meeting, is illegal and void. And, where the churchwardens libelled a parishioner in the Spiritual Court for non-payment of such rate, and the above facts appeared on the face of the rate and in the proceedings in that Court, and the Judge admitted the libel to proof, this Court held that a prohibition ought to be awarded. Judgment affirmed by the Court of Exchequer Chamber on error. Held, by the Court of Exchequer Chamber, that the obligation of parishioners to repair the body of the parish church is by the common law, and is not qualified or voluntary, but absolute and imperative; and, when repairs are needful, the only question on which the parishoners in vestry can by law deliberate is, how the obligation may be best, most effectually, and most conveniently and fairly between themselves, carried into effect.

[See note to S. C. in Exchequer Chamber, 12 Ad. & E. 265.]

Prohibition. The declaration stated that defendants, on 10th June 1837, being then the churchwardens of the parish of Braintree in the county of Essex and diocese of London, made a certain pretended rate and assessment upon certain inhabitants of the said parish, as and for a church rate assessed upon and payable by the inhabitants of the said parish, which pretended rate was in the words and figures set forth in the paper writing thereinafter mentioned and referred to; and that afterwards, to wit, on the 26th August in the year aforesaid, defendants caused a citation to be issued against plaintiff, purporting therein that the Lord Bishop of London thereby authorized and commanded all and singular clerks, &c., peremptorily to cite plaintiff to appear personally, or by his proctor, before Stephen Lushington, Vicar General and Official Principal of the Episcopal and Consistorial Court of London, his surrogate, or some other competent Judge in that behalf, to answer the defendants, therein described as the churchwardens of the said parish, in a certain cause of subtraction of church rate: that, in pursuance of and in obedience to the said process, plaintiff duly ap-[234]-peared in the said Court; whereupon the proctor for defendants, as such churchwardens as aforesaid, prayed the said Stephen Lushington to admit to proof a certain libel, containing, amongst other things, certain allegations and propositions by way of complaint against plaintiff; that is to say:

That, the parish church of the said parish being in need of several necessary repairs, the same not having been substantially or sufficiently repaired for several years then last past, the churchwardens, overseers of the poor, and divers other of the most substantial parishioners and inhabitants of the said parish, on 2d June 1837, met together in vestry in the vestry room of the said parish, pursuant to public notice previously and duly given, for the purpose of making and granting a rate for the repairs of the church of the said parish, and for defraying the expences incident to the office of the churchwardens thereof for the remainder of their year of office; and

(*a*) The prisoner, in the same vacation, sued out a habeas corpus returnable in the Court of Chancery, and a motion was there made for his discharge on objections to the significavit, and on the ground that the writ did not appear to have been opened according to stat. 5 Eliz. c. 23, s. 2. The points discussed (December 8th, 9th, and 15th, 1840) were nearly the same as those argued in the above case. Lord Cottenham C. overruled all the objections; and the prisoner was remanded. *In re*