JUDGMENT DELIVERED BY THE RIGHT HON. SIR ROBERT PHILLIMORE, D.C.L., OFFICIAL PRINCIPAL OF THE COURT OF ARCHES, IN THE CASES OF MARTIN V. MACKONOCHIE AND FLAMANK V. SIMPSON

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649620456

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Edited by Trieste Publishing Pty Ltd.
Cover @ 2017

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AND

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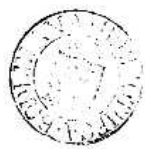

EDITED BY

WALTER G. F. PHILLIMORE, B.A.,

OF THE MIDDLE TEMPLE,

FELLOW OF ALL SOULS COLLEGE, AND VINERIAN SCHOLAR, OXFORD.

SECOND EDITION.

LONDON:

BUTTERWORTHS, 7, FLEET STREET,

Law Publishers to the Queen's most excellent Majesty.

1868.

THE arguments in these cases, which occupied sixteen days for the hearing on the merits, included a wide range of matters connected with ecclesiastical jurisprudence. The Judgment will be found to extend to a discussion of the general legal and ecclesiastical principles of the Reformation in the 16th century, and of the present position of our Church.

It contains also an historical and legal analysis of the value of the argument drawn by the Counsel for the Promoters from the practical disuse of particular ceremonies.

The following points underwent judicial investigation to a greater extent than is to be found in any former decided cases; namely, the authority of the Crown *per se*, and under the Supremacy and the Proclamation Acts of Henry VIII., to issue Injunctions; the legal meaning of the term "Ceremony," as used in the Statutes of Uniformity; the rubric as to the discretion of the Ordinary; and the principles upon which the Court should proceed in the construction of rubrics, and the existence of a common unwritten law of the Church, side by side with the written statutes, rubrics, canons, and constitutions.

The Counsel in the case of—

MARTIN v. MACKONOCHIE, were,

For the Promoter,	*For the Defendant,*
Dr. A. J. Stephens, Q.C.,	Mr. W. H. James, Q.C.,
Mr. Coleridge, Q.C.,	Mr. Prideaux, Q.C.,
Dr. Swabey, and	Dr. Tristram, and
Mr. Droop.	Mr. A. Charles.

In the case of—

FLAMANK v. SIMPSON,

For the Promoter,	*For the Defendant,*
Dr. Stephens, Q.C.,	Dr. Deane, Q.C.,
Dr. Swabey, and	Dr. Tristram,
Mr. Droop.	Mr. (now Mr. Justice) Hannen, and
	Mr. A. Charles.

Before these cases came on for hearing on the merits, there had been a previous argument in each case as to the form of the articles;* and in the case of Martin v. Mackonochie as to the power of the Judge to delegate his jurisdiction to surrogates, which will be seen to be referred to in the Judgment.

* 1 Law Reports, Adm. & Eccl. p. 276: 1 Privy Council Appeals, p. 463.

JUDGMENT delivered by the Right Hon. Sir ROBERT PHILLIMORE, D.C.L., Official Principal of the Court of Arches, on the 28th day of March 1868, in the Cases of—the Office of the Judge promoted by—Martin *v.* Mackonochie and Flamank *v.* Simpson.

Preliminary Observations.

This case of Martin *v.* Mackonochie was brought before my predecessor in this chair, by Letters of Request from the Bishop of London, under the provisions of the 3rd and 4th Victoria, c. 86. That Statute, passed in the year 1840, enables any bishop within the Province of Canterbury either to try the case of a clerk for a criminal offence before himself with certain assessors, or to send it to the Court of the Archbishop for trial in the first instance. Since the passing of this Statute, bishops have very generally availed themselves of the latter provision, and this Court has now before it several cases so sent from several suffragan dioceses of the Province of Canterbury.

Under the old law, when these cases were triable in the Consistorial Court of each bishop, if they were sent by Letters of Request to the Court of Arches, these letters contained an averment that the lack of counsel, and difficulty of obtaining proper legal assistance, rendered it expedient, for the ends of justice, that the case should be tried in the first instance in the Court of Appeal, that is, in this Court. It is not to be wondered at, therefore, that this is, I believe, the only case but one which has been sent by Letters of Request from the great Diocese of London, amply furnished as it is with all means and appliances requisite for the administration of justice, to the Court of Appeal; and I much regret that I am deprived of the great assistance which I should have derived from the judgement of the Bishop of London upon the important matters now before me, if the case had been brought to this Court in the regular course of appeal.

The Letters of Request were accepted by Dr. Lushington, my learned predecessor in this chair, and in an early stage

of these proceedings, before evidence had been taken, or argument heard upon the merits of the case, I was counsel for the accused clerk, and took objections to the manner in which the offence was charged in the criminal articles. When the Archbishop of Canterbury was pleased to confer upon me the Judgeship of his Grace's Court, I proposed to hear the case, with the assistance of two learned persons well skilled in ecclesiastical law, the Vicar-General of the Archbishop, and the Chancellor of Rochester (to whom I take this opportunity of publicly expressing my thanks), but this arrangement was demurred to on behalf of the promoter of the Bishop of London's office, that is the accuser; and I then appointed, as my patent gave me full power to do, those two learned persons to be my surrogates for the hearing of this cause. They held one Court, and in consequence of arguments addressed to them touching the validity of their appointment, they adjourned the hearing of the cause until an opportunity had been afforded for an application to the Temporal Court for a prohibition. The counsel for Mr. Mackonochie applied to the Court of Queen's Bench for a rule *nisi* to show cause why the prohibition should not go to these surrogates, upon the ground that I had exceeded my power in appointing them.

The promoter or accuser did not appear to show cause against the prohibition, and the rule, upon an *ex parte* statement, was perhaps almost necessarily made absolute.

But I think if the rule had been opposed, and the powers given by my patent, and also the fact of the invariable usage of this Court, as proved by its earliest records, to appoint surrogates, been duly brought to the attention of the Court of Queen's Bench, it would have refused the rule. I mention this circumstance, in order to prevent any inconvenience which might ensue from it being supposed that this Court had no power to appoint surrogates. After these proceedings in the Court of Queen's Bench, the surrogates whom I had appointed, by a formal instrument entered upon the records of this Court, resigned the powers which I had conferred upon them.

I then proceeded to hear this cause, and the other, that of Flamank *v.* Simpson, brought before this Court by Letters of Request from the Bishop of Exeter, in which almost the same questions were raised. The arguments in both cases have occupied the attention of the Court for 16 days. The learning, ability, and industry of the counsel have greatly assisted the Court in the execution of the difficult task which it has to perform, namely, to give judgement upon the charges preferred against Mr. Mackonochie and Mr. Simpson.

A good deal has been said by the counsel on both sides respecting the motives of the accuser and the accused in this suit, but upon this subject the Court need say but very little.

Mr. Martin has been allowed by the Bishop of London to promote his Lordship's office in this case, and I must, of course, presume that his Lordship was satisfied upon good grounds, both that it was proper that his office should be promoted, and that Mr. Martin was a proper promoter; because his Lordship, who has the advantage of having a very learned legal adviser, was, no doubt, aware, from the decision of the Queen's Bench in "Regina v. Bishop of Chichester," (2 El. & El., 209,) as well as from the decision of the Privy Council in "Ray v. Sherwood," (Moore P.C. Reports, 397,) that it was competent to him to exercise his discretion as to whether his office should be promoted or not. I must, therefore, consider Mr. Martin as having obtained full sanction for the course which he has adopted, and wholly decline to impute to him any unworthy motive whatever for the part which he has taken in this suit. It is, however, a matter of fact, admitted or proved before me, that Mr. Martin is not, legally speaking, a parishioner of St. Alban's, nor, of course, a churchwarden, a part of whose office it is to represent to the Ordinary any misconduct on the part of the incumbent. This fact, however, if it should prove to be of any importance at all in this case, can only relate to the subordinate question of costs, and in no way affects my judgement upon the principal questions before me.

Upon the other hand, it is only fair to Mr. Mackonochie to state, that it appears from the documents in the cause, that having the cure of souls in one of the worst and most neglected districts of London, and receiving moderate temporal emolument, he has devoted himself to the discharge of his holy office, and evangelizing an almost heathen population.

It is hardly necessary to say that he is not on this account entitled to conduct the services of the Church (if he has done so) in a manner not authorized by the law.

There are two modes of procedure in the Ecclesiastical Courts, one of a civil, and the other of a criminal, character. There have been, in recent times, two leading judgements delivered upon the lawfulness of certain ornaments (to which word a precise legal meaning has been attached) used during the celebration of Divine worship and certain decorations of churches.

In both these judgements the questions for judicial decision were raised in the civil form of procedure.

The "Stone Altar Case" (as it has been commonly called) arose on an application for a faculty in the Consistory of Ely, and was brought on appeal to this Court.

The causes relating to the Knightsbridge Churches* were instituted in a similar way in the Consistory of London, from the decision of which Court an appeal was prosecuted, first to the Court of Arches, and ultimately to the Judicial Committee of the Privy Council, which last tribunal recommended Her Majesty to reverse, upon many points, the decision of the Courts below. As the Archbishops and the Bishops, who are Privy Councillors, are only members of the Judicial Committee in cases of criminal proceedings against clerks in holy orders, the prelates who did sit on this last occasion sat only as assessors and not as members of the Court.

The proceedings taken in this case are of a criminal character, and the sound of them, so to speak, is harsher than that of those in the cases to which I have referred, but substantially the same end is sought, and the same remedy pursued; and, with an exception to be hereafter stated, I am not prepared to say,—inasmuch as not only certain ornaments, but also the use of them in the services of the Church, are complained of,—that it would have been competent to the promoters to have brought before me in a civil form all the matters contained in these criminal articles.

They are comprised under the following heads:—

(1.) The elevation of the Blessed Sacrament of the Lord's Supper, accompanied in Mr. Mackonochie's case by kneeling "or excessive kneeling" at times not prescribed by the Rubrics.

(2.) The use of incense during the celebration of the Eucharist.

(3.) The mixing of water with wine at the time of the administration of the Lord's Supper.

(4.) The use of lighted candles upon the Holy Table.

It will be necessary presently to enter into a fuller and more detailed statement of each of these charges, and of the answers to them. I will only observe that, with one exception to be noticed hereafter, there is no dispute in the case as to the facts to which the law is to be applied.

Statutes of Uniformity.

The law principally, though not exclusively, relied upon by the counsel for the promoter is contained in the Statutes of Uniformity. I must refer to these statutes.

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* These cases are afterwards referred to as Liddell v. Westerton, &c.