

*Judgment of the Lords of the Judicial Committee of the Privy Council on a Motion to revive the Appeal of Elphinstone v. Purchas, from the Court of Arches; delivered 14th July, 1870.*

Present :

ARCHBISHOP OF YORK.  
LORD CAIRNS.  
SIR JAMES W. COLVILLE.  
JUDGE OF THE HIGH COURT OF  
ADMIRALTY.

THIS was a cause of the office of the Judge promoted by Colonel Charles James Elphinstone, a parishioner of Brighton, against the Rev. John Purchas, Perpetual Curate of the Chapel of St. James in that Borough. The Lord Bishop of Chichester sent the case, in the first instance, by letters of request, to be tried in the Court of Arches. Mr. Purchas was charged with having offended against the laws ecclesiastical by the use of certain rites and ceremonies which were set forth in the Criminal Articles exhibited against him. Mr. Purchas did not appear in that Court, and the cause was heard *in p̄enam*. The Dean of the Arches pronounced that Mr. Purchas had offended against the law with respect to some of the charges, admonished him to abstain from the use of certain rites and ceremonies which were the subject of those charges, decreed a monition to issue against him, and condemned him in the costs incurred by the proof of those charges. But with respect to the charges contained in other articles, the Court held that they were not proved, and declined to admonish Mr. Purchas, or issue any monition with respect to them.

From this sentence the Promoter appealed on the 16th of February, 1870; and, having extracted the usual inhibition and citation, served them on Mr. Purchas on the 26th of February, and on the

Registrar of the Arches Court on the 28th of February.

On the 22nd of March the inhibition and citation were returned, and the Process of the Arches Court was filed in the Registry of this Court. On the 30th of March the Promoter died.

On the 20th of April Mr. Henry Hebbert, a parishioner of Brighton, executed a proxy authorizing the Proctors of the late Promoter to carry on the proceedings in his name and on his behalf; and they now pray their Lordships that Mr. Hebbert may be admitted and substituted as a Promoter in the place of the late Charles James Elphinstone.

Mr. Purchas, being served with a notice of this motion, has appeared by Counsel before their Lordships and contended that the suit was determined by the death of the Promoter and ought not to be revived, and that Mr. Hebbert ought not to be substituted as a Promoter.

It was admitted, on the one hand, by the prayer of Mr. Hebbert, what indeed could not be disputed, that the criminal suit had abated by the death of the Promoter; and it was admitted, on the other hand, by the Counsel for Mr. Purchas, that the suit could be revived by the substitution of a Promoter of a particular character. The principal question which has arisen for their Lordships' consideration is, whether the substituted Promoter must be clothed with that particular character, or whether it be not *ex debito justitiæ* to admit any proper person who applies to the Court for permission to carry on the suit; and, if this be so, there remains the subordinate question whether Mr. Hebbert be a proper person.

In order to give a satisfactory answer to the first question, it becomes necessary to make some observations as to the nature of the suit. All criminal proceedings in the Ecclesiastical Courts are carried on in a certain sense by the exercise of the Office of the Judge: it may be exercised in two ways by the Ordinary—that is, by the Judge himself, *ex officio mero*, or by the Judge at the instance of another party, *ex officio promoti*. The proceedings in this case belong to the latter category. It was decided by their Lordships in the case of *Sherwood v. Ray* (1 Moore, 397), which was one of great importance, and very carefully considered by the eminent Judges who sat upon it, among whom was Sir John Nicholl,

perfectly acquainted with the practice of the Ecclesiastical Courts, that the promotion of the office of the Judge, though generally permitted as a matter of course, cannot be demanded *ex debito justitiæ*.

Subsequently to this decision, the Statute 3 and 4 Vict. c. 87, was passed. By the 13th section it was enacted "that it shall be lawful for the Bishop, if he shall think fit," either to issue a Commission of Inquiry, or, in the first instance, to send the case by Letters of Request to the Superior Court. In the case of *Regina v. the Archbishop of Canterbury* (6 Ellis and B. 546), the Queen's Bench held that, when the Bishop had once issued a Commission at the instance of a Promoter, the Bishop could not refuse to allow his Office to be further promoted.

In the case of *Regina v. Bishop of Chichester* (2 Ellis and E., p. 228), the Queen's Bench refused to compel by mandamus the issue of a Commission of Inquiry, at the instance of a person who was unconnected with the Parish or Diocese; and Mr. Justice Wightman expressed a strong opinion that, under the general law, and under the words of the statute, the Bishop had an absolute discretion to allow or refuse his office to be promoted in the first instance.

In the present instance, however, it appears that the local Ordinary, the Bishop of Chichester, thought both that the cause was one which, on the ground of public interest, ought to be instituted, and also that a proper person had applied for leave to promote the office of Judge. He, moreover, availed himself of the provision of the statute to send the case by Letters of Request to be tried in the Superior Court of the Province.

Having taken this course, it was not competent to his Lordship, according to the decision to which we have referred, to stay or prevent the further prosecution of the suit. The Court of the Province had alone jurisdiction over the matter, while the trial was pending before it; and this Appellate Court having duly inhibited the Court below, and duly cited the Defendant to appear before it, has now exclusive jurisdiction over the suit. To this Court, therefore, the application has been properly made.

The precedents on the subject are not numerous; they are principally furnished from the records of the Court of Delegates, whose authority has been

transferred to this Tribunal. It was not the habit of the Delegates to deliver reasons for their Judgment; and there are no printed reports of the cases which they decided, or of the arguments of Counsel which were addressed to them. It is, however, to be collected from the records with which their Lordships have been furnished by the industry and research of the Registrar of Ecclesiastical and Maritime Appeals, that suits which have abated by reason of the death of the Promoter have been revived by the appointment of a new Promoter in several cases in which the Promoter was Respondent and died pending the Appeal. In these cases the executor of the original Promoter appears to have been substituted as a new Promoter, on the ground probably of his having an interest in the costs which the Testator Promoter had obtained by the Judgment appealed from; and on the same principle the executors of the Promoter have been allowed to take out a monition to enforce a decree for costs already obtained.

There are also cases, both in the Delegates and in the Court of Arches, in which an Appellant Promoter, who was an official person, a Churchwarden in one case and a Mayor in the other, having died pending the Appeal, a new official Promoter was appointed by the Court. It is true that in the year 1731, on an Appeal from the Consistory of York before the Delegates, the Promoter having died pending the Appeal, the Delegates assigned the cause for hearing (*ad informandum in jure*) on the legal question, "whether by law the office of the Ordinary has not such a concern in all prosecutions of a spiritual nature that a proper Promoter may be permitted on any emergency to carry on the cause either in the first instance or the Appeal?" Eventually they dismissed the Appeal, but on the special ground that the Promoter had died before the inhibition and citation were returned; in other words, the jurisdiction of the Court appealed from remained, and the jurisdiction of the Appellate Court was never founded, as it has been in the case which is being now considered.

Their Lordships are unable to discover any sound distinction in principle between these precedents and the case which is now before us. There seems no good ground for the proposition that the power

of the Court to appoint a new Promoter is limited to the two categories of a deceased Promoter whose representative has a pecuniary interest, or of a deceased Promoter who was clothed with an official character.

The cases of the Dean of Jersey *v.* the Rector of ——— (3 Moore, 229), and Liddell *v.* Beal (14 Moore, 1), decided in this Court, and that of Sumner *v.* Wix (3 L. R. Adm. and Eccl. 6), decided in the Court of Arches, though in some respects distinguishable from the present, tend to support the principle of the substitution of a new Promoter where the former one has died during the progress of the suit.

Criminal ecclesiastical suits ought not to be, and, it must be presumed, would not be allowed to be instituted in the first instance by the Ordinary, who has full control *in limine* over the subject, unless the public interest requires their institution. But it would be a great evil if, after the due institution, under proper authority, of such suits, the course of justice with respect to them could be arrested on any technical or formal ground.

If this were the legal doctrine, an immoral or heretical Clerk in Holy Orders might escape a sentence against him which the welfare of the Church demanded, because the Promoter of the office, happening to be a private person, had died before the cause was tried. We are satisfied that such a doctrine is contrary to the analogy to be derived from other systems of law in this country, and is not founded on the practice or principle of Ecclesiastical Law, when thoroughly examined and properly understood.

We are of opinion, therefore, that it is the duty of the Court before which proceedings are pending when the Promoter dies, to allow a proper Promoter to be substituted in his place.

The subordinate question only remains, whether Mr. Hebbert, who is proposed as the new Promoter, be a proper person to discharge that office.

In deciding this point we are not embarrassed by the consideration whether the personal representative of Colonel Elphinstone might not have a prior claim, if he desired it, to this office. No such personal representative is before us, or has made any

application to this Court. Indeed, it would appear that he has no intention of doing so.

It appears to their Lordships that Mr. Hebbert, a parishioner of Brighton, is a proper person to be substituted as a Promoter in this case. And they will humbly tender to Her Majesty, in a proper form their advice to this effect.