

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Rugg v. Kingsmill, from the Court of Arches; delivered March 11, 1868.*

Present :

MASTER OF THE ROLLS.

SIR JAMES W. COLVILLE.

SIR EDWARD VAUGHAN WILLIAMS.

SIR RICHARD T. KINDERSLEY.

JUDGE OF THE ADMIRALTY COURT.

THIS is an Appeal from a sentence pronounced by the late Judge of the Arches Court at Canterbury, whereby he affirmed the sentence of the Consistorial Court of Winchester, which decreed a Faculty to issue to Mr. Kingsmill, authorizing the appropriation to that gentleman of a vault under the Chancel of Sydmonton Church.

This Church is situate in the parish of Sydmonton, in the county of Southampton.

It appears that the whole property, as well as the principal house in the parish, belongs to Mr. Kingsmill, and that, with the exception of the consecrated ground upon which the Church is built, he is proprietor of all the land up to the very walls of the Church, which has no burial ground attached to it.

In the year 1849 there was a Chapel which occupied the site of the present building. Under the Chancel of this former Chapel the father of Mr. Kingsmill possessed a vault.

In 1849 the Chapel was pulled down.

In 1852, Sydmonton, with Eechenswell, which formerly formed part of the parish of Kingsclere, was formed, under an Order in Council bearing date 19th August, 1852, into a distinct and separate parish for ecclesiastical purposes.

In September 1852, Mr. Rugg, the Appellant, was instituted Incumbent of Eechenswell with Sydmonton.

In 1853, the present Church was built by Mr. Kingsmill, at his sole cost and expense.

In August 1864, the Church was consecrated. In August 1865, the Faculty now in question was granted by the Consistory of Winchester.

Before a Faculty, either to the parishioners in general or to a private inhabitant of the parish, can be decreed, the ecclesiastical law requires that all persons interested in opposing the grant should have an opportunity of being heard before the Ordinary.

The Faculty which has been decreed in this case is, as has been stated, for a burial vault underneath the Chancel.

The objector to the grant of the Faculty is the Incumbent, who is either Vicar or Perpetual Curate. The applicant for the Faculty is the Improper Rector, who resides in the parish, and whose father appears to have rebuilt and partially endowed, at his own cost, the Church.

The Vicar or Perpetual Curate, although entitled to officiate in and to have free access to the Chancel, has no right, strictly speaking, to fees for the erection of monumental tablets, or for the construction of vaults (in the very rare instances in which they should be allowed) in the Chancel; but he has certainly a *persona standi*, by reason of his general spiritual position as Incumbent, to oppose the grant of such a Faculty as the present.

The objections of the Appellant to the sentences from which he appeals are various :

First, he contends that the Ecclesiastical Court had no jurisdiction to grant this faculty. He supports this objection by reference to the facts that there is no burial-ground attached to this chapel,—that no funeral has ever taken place there,—that the inhabitants of the district have consequently no general right of burial connected with the chapel, and his argument appeared to extend so far as to question the validity of the consecration of the Chapel itself by the Bishop.

Their Lordships, however, see no reason to doubt that the Bishop had full authority to consecrate this building, and they are of opinion that the objection founded on the absence of any burial ground, and of

any general right of burial on the part of the parishioners, did not render unlawful the act of the Ordinary, though it imposed upon him the duty of exercising with much caution the discretion which the law has vested in him as to granting a Faculty of this kind.

The Appellant further contended that the grant of this Faculty was bad upon the ground that the proper forms prescribed by the practice of the Ecclesiastical Court had not been complied with. Their Lordships, however, are of opinion that the case was regularly and properly conducted in the Diocesan Court of Winchester, and that this objection cannot be sustained.

The Appellant contends that this Faculty could not be granted without his consent, but this contention is not supported by authority or practice. The Vicar or Perpetual Curate, as has been stated, is entitled to be heard against the grant of the Faculty, and his objections ought of course to be considered by the Ordinary, but the discretion of the Ordinary is not fettered or taken away by the dissent of the Vicar.

There are objections, however, urged by the Appellant which are of a more serious character;—they may be all ranged under the general head—that the discretion of the Ordinary was unwisely exercised in the grant of this Faculty.

From the decision of the Ordinary an Appeal lies to the Archbishop, and ultimately to the Crown, under the advice of the Judicial Committee of the Privy Council.

If we think that the grant of this Faculty, though not absolutely illegal, was, as it at present stands, indiscreet and likely to give rise to future troubles and difficulties in the Church and District of Sydmonton, which were not duly considered by the Ecclesiastical Courts, we ought to advise Her Majesty accordingly.

The Appellant has pointed out to their Lordships that the ground upon which the Church stands alone is consecrated, that the jurisdiction of the Ordinary depends upon the consecration of the ground, and does not extend over any part of the ground which comes up to the very walls of the Church. The legal consequences of this circumstance, upon which the Appellant insists, will presently be noticed.

Their Lordships, having regard to the peculiar circumstances of this Church and parish, are not disposed to dissent from the opinion expressed by the Judge of the Arches Court, that the judicial discretion of the local Ordinary was lawfully exercised in granting permission to Mr. Kingsmill to retain, for the use of himself and his family, so long as they shall remain proprietors of Sydmonton Court (for this must, of course, be a provision contained in the instrument), the vault which has been constructed underneath the Chancel.

Their Lordships desire that it should be understood that they do not mean to express any approbation of a general practice of granting Faculties for interments in Chancels or the body of churches. On the contrary, they are of opinion that very exceptional circumstances can alone justify such an exercise by the Ordinary of the discretion which the law has vested in him.

With respect to the particular Faculty the consideration of which is now before their Lordships, they have come to the conclusion that it ought not to be issued, at the present time, in the manner proposed.

Their Lordships are extremely reluctant to interfere with the exercise of the discretion in these matters by the local Ordinary, and they fully recognize the expediency of the rule of practice which discountenances such interference. But their Lordships think that the objection to the immediate issue of this Faculty, while the only entrance to the vault is in the private and unconsecrated ground of Mr. Kingsmill, is deserving of great consideration. In the first place it is clear that the Ordinary could not compel the Incumbent by ecclesiastical censures to perform the burial service in the unconsecrated ground in which the only entrance to the vault is to be found. It has not been argued that the Ordinary could so compel the Incumbent: indeed, it has been very properly admitted by the Counsel for Mr. Kingsmill, that no authority can be found for such a practice.

In the next place it appears to their Lordships to be inexpedient that the spot upon which a portion at least of the burial service is usually performed by the Minister should be exempt from the jurisdiction of the Ordinary.

It is true that the Ordinary would have jurisdic-

tion over the vault itself, and that the whole service might lawfully, their Lordships think, in the peculiar circumstances of this case, be performed in the Church, and the corpse afterwards taken into the garden, and deposited in the vault; and their Lordships do not mean to say that the Ordinary might not be enabled to punish any unlawful proceedings which might precede or accompany the act of burial; but it is also true that the absence of any ecclesiastical jurisdiction over this spot of ground might afford an apparent impunity to evade the law, and thereby possibly cause a scandal in the parish.

If, in the present state of circumstances, the grantee of this Faculty or his successors in the mansion to which it is in fact attached, were hereafter, either perhaps on account of their having ceased to be Members of the Church, or on account of some quarrel with the Incumbent, or for any other motive, to cause a service different from that which is enjoined in the Prayer Book to be read over the corpse, or if they were to place the body in the vault without the previous performance over it of any religious service, in any case of this kind the present or future Ordinary might be considerably embarrassed in the exercise of his proper jurisdiction to remove the scandal, or to punish the authors of it.

Their Lordships think that it is the duty of the Ordinary, when granting a *privilegium* of this kind, to take every precaution in his power against the possibility of a misuse by the grantee or his representative of the special favour which is conceded to him. They see no reason why the grant of this Faculty to Mr. Kingsmill should not be made conditional upon his consenting to allow a sufficient piece of ground near the aperture to the vault, to be first duly consecrated for the sole and special purpose of burials in this vault. The jurisdiction of the Ordinary, *ratione loci*, would then be unquestionable; and any impropriety with relation to the performance of the burial service would be subject to his correction and control.

Their Lordships therefore think that this cause should be remitted to the Court of Arches, with directions to issue the Faculty in question whenever it has been duly certified to that Court that the consecration of the additional portion of ground has

taken place; and with power, if it should be deemed necessary, to vary the terms of the Faculty by a reference to a recital of the fact of such consecration having been effected.

Their Lordships think that both parties ought to bear their own costs incurred in this Court and in the Court of Arches.

Their Lordships will humbly advise Her Majesty in accordance with the opinion which they have now expressed.

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