

ST. MARY'S CHURCH,
HITCHAM.

(Copy)

OPINION
of
Mr. E. B. Charles, C.B., K.C.

9 December 1921.

ST. MARY'S CHURCH, HITCHAM.

OPINION

of Mr. E. B. Charles, C.B., K.C.

Quest. 1.

Whether a Faculty is necessary to enable the present choir seats to be replaced by carved oak seats, to occupy the same place and space, and accommodate the same number of persons as the existing seats?

Answer:

A faculty is necessary under the circumstances. The general rule of law being that no man has authority to make any changes in the furniture of the Church without authority.

Quest: 2.

Whether it is competent for the Bishop or the Chancellor to refuse to grant, or for the Advisory Committee to refuse to recommend the Bishop or Chancellor to grant, a Faculty (if one is necessary at all) for the replacement of choir seats, except upon a condition involving the removal of the organ and other alterations of which the Rector, Churchwardens, and congregation disapprove, and which it is impossible to raise the necessary funds to carry out?

Answer:

The Chancellor may, in the exercise of his judicial discretion, refuse a faculty for the replacement of choir seats, but I very much question whether such discretion is judicially exercised if it attaches to the grant the stipulation that something shall be done which is undesired and in this case impossible.

Quest 3.

Is the grant of a Faculty the act of the Bishop or the Chancellor, and if the latter, is it the act of the Chancellor qua Chancellor, or as the representative of the Bishop?

Answer:

A Chancellor is governed in his powers entire-

OPINION

of Mr. E. B. Charles, C.B., K.C.

Quest. 1.

Whether a Faculty is necessary to enable the present choir seats to be replaced by carved oak seats, to occupy the same place and space, and accommodate the same number of persons as the existing seats?

Answer:

A faculty is necessary under the circumstances. The general rule of law being that no man has authority to make any changes in the furniture of the Church without authority.

Quest: 2.

Whether it is competent for the Bishop or the Chancellor to refuse to grant, or for the Advisory Committee to refuse to recommend the Bishop or Chancellor to grant, a Faculty (if one is necessary at all) for the replacement of choir seats, except upon a condition involving the removal of the organ and other alterations of which the Rector, Churchwardens, and congregation disapprove, and which it is impossible to raise the necessary funds to carry out?

Answer:

The Chancellor may, in the exercise of his judicial discretion, refuse a faculty for the replacement of choir seats, but I very much question whether such discretion is judicially exercised if it attaches to the grant the stipulation that something shall be done which is undesired and in this case impossible.

Quest 3.

Is the grant of a Faculty the act of the Bishop or the Chancellor, and if the latter, is it the act of the Chancellor qua Chancellor, or as the representative of the Bishop?

Answer:

A Chancellor is governed in his powers entirely by his patent of appointment. If the grant or refusal of such a faculty as here applied for is within his powers under the Patent, he is bound in the exercise of his

delegated power to act judicially upon his own discretion unfettered even by the expressed opinion of the Bishop, which may be contrary to his own. In all matters excluded by the Patent from the ambit of the Chancellor's powers, the Bishop acts directly upon his own authority.

Quest: 4.

Has the Chancellor a right to refuse a Faculty for something which is approved by the Bishops concerned, and by the Advisory Committee, and desired by the Rector and Churchwardens, as well as the Vestry, and is it reasonable for him so to refuse? Conversely, can the Bishop grant a Faculty notwithstanding the disapproval of his Chancellor?

Answer:

A Chancellor, if he exercises his discretion judicially, and within the limits of his Patent, has a right to refuse a faculty irrespective of the approval or agreement of the Bishops, Advisory Committee, Rector and Churchwardens, and the Vestry. As I have already stated, the Bishop's disapproval does not in law affect the Chancellor's action, if he is proceeding within the limits of his delegated authority.

Quest: 5.

Has the Advisory Committee any position or power recognised by law, or is it appointed merely as a matter of convenience; and is its function to advise the Chancellor or the Bishop?

Answer:

The Advisory Committee has no position or power recognised by law. It is appointed to assist the Chancellor by expert advice, but the Chancellor is certainly not obliged to follow such advice unless, acting fairly as a judge, he considers such advice ought to be accepted. The Committee is by its very name advisory and no more.

Quest: 6.

In the matter of granting a Faculty, is it competent for the Chancellor, whether in consultation with other Chancellors or not, to lay down for himself certain general rules, to which he or they must conform in all circum-

may be contrary to his own. In all matters excluded by the Patent from the ambit of the Chancellor's powers, the Bishop acts directly upon his own authority.

Quest: 4.

Has the Chancellor a right to refuse a Faculty for something which is approved by the Bishops concerned, and by the Advisory Committee, and desired by the Rector and Churchwardens, as well as the Vestry, and is it reasonable for him so to refuse? Conversely, can the Bishop grant a Faculty notwithstanding the disapproval of his Chancellor?

Answer:

A Chancellor, if he exercises his discretion judicially, and within the limits of his Patent, has a right to refuse a faculty irrespective of the approval or agreement of the Bishops, Advisory Committee, Rector and Churchwardens, and the Vestry. As I have already stated, the Bishop's disapproval does not in law affect the Chancellor's action, if he is proceeding within the limits of his delegated authority.

Quest: 5.

Has the Advisory Committee any position or power recognised by law, or is it appointed merely as a matter of convenience; and is its function to advise the Chancellor or the Bishop?

Answer:

The Advisory Committee has no position or power recognised by law. It is appointed to assist the Chancellor by expert advice, but the Chancellor is certainly not obliged to follow such advice unless, acting fairly as a judge, he considers such advice ought to be accepted. The Committee is by its very name advisory and no more.

Quest: 6.

In the matter of granting a Faculty, is it competent for the Chancellor, whether in consultation with other Chancellors or not, to lay down for himself certain general rules, to which he or they must conform in all circumstances, or must he consider every case on its merits and act reasonably; and must he give his reasons for refusal, if requested to state them?

Answer:

A Chancellor is bound to consider every case upon its merits and to exercise his judicial discretion thereon, or to give his judgment in law if the laws ecclesiastical are involved in his consideration of the matter. If it is the intention of the petitioners to appeal in the matter, in my opinion the Chancellor should be asked to give his judgment in the matter in writing, a judgment from which an appeal could be lodged.

Quest: 7.

Is the Chancellor within his rights in refusing a faculty in this case, and to allow the erection of a memorial (to which in itself he has no objection) within the Communion rails, simply because it is not a memorial to a past incumbent or a Lay Rector, and if he is, is it reasonable so to refuse in this case?

Answer:

The question to be borne in mind is not whether the refusal is reasonable but whether the Chancellor has or has not exercised a judicial discretion in the matter. I cannot understand how the basis of the refusal can have been that the memorial is not to a past incumbent or lay rector. If this was the sole reason for refusal I think that a Court might say that the Chancellor's discretion had not been used judicially.

Quest: 8.

What would be the consequences if, in this case, the Memorial were erected or the choir seats replaced, without a faculty? On whom would those consequences fall, and how could they be enforced?

Answer:

If the Chancellor's refusal to grant a faculty is disregarded the consequences will fall upon the Rector who, with the assent of the Bishop, might be proceeded against under the Church Discipline Act 1840 and, if his disobedience was continued, might either be suspended from or deprived of his living. I certainly should deprecate such disobedience

to give his judgment in law if the laws ecclesiastical are involved in his consideration of the matter. If it is the intention of the petitioners to appeal in the matter, in my opinion the Chancellor should be asked to give his judgment in the matter in writing, a judgment from which an appeal could be lodged.

Quest: 7.

Is the Chancellor within his rights in refusing a faculty in this case, and to allow the erection of a memorial (to which in itself he has no objection) within the Communion rails, simply because it is not a memorial to a past incumbent or a Lay Rector, and if he is, is it reasonable so to refuse in this case?

Answer:

The question to be borne in mind is not whether the refusal is reasonable but whether the Chancellor has or has not exercised a judicial discretion in the matter. I cannot understand how the basis of the refusal can have been that the memorial is not to a past incumbent or lay rector. If this was the sole reason for refusal I think that a Court might say that the Chancellor's discretion had not been used judicially.

Quest: 8.

What would be the consequences if, in this case, the Memorial were erected or the choir seats replaced, without a faculty? On whom would those consequences fall, and how could they be enforced?

Answer:

If the Chancellor's refusal to grant a faculty is disregarded the consequences will fall upon the Rector who, with the assent of the Bishop, might be proceeded against under the Church Discipline Act 1840 and, if his disobedience was continued, might either be suspended from or deprived of his living. I certainly should deprecate such disobedience as is suggested apart altogether from the danger the Rector might be visited with in the matter.

Quest: 9.

What course, under all the circumstances, should be taken to over-ride the Chancellor's refusal of the faculty in this case, and what prospect of success would there be?

Answer:

The only proper course to over-ride the Chancellor's refusal is by appeal to the Arches Court. If the decision is within the ambit of the Chancellor's delegated authority, the appeal would have to be upon the ground that the Chancellor had not exercised his discretion judicially. It is my duty to point out that both in Courts of Common Law and in Courts Ecclesiastical, the appellate Court, where the question is merely one of discretion, is invariably very slow to decide that such discretion was not exercised judicially.

I am therefore unable to advise that there would be much likelihood of success upon the ground indicated although upon the circumstances shown to me in the case it comes as nearly as possible to a failure to exercise discretion judicially as any case I can imagine.

I am assuming that the tablet was to be erected either on the North or South wall, of the Chancel. Chancellors have repeatedly refused to allow a memorial tablet of this nature to be erected on the East Wall facing the Communion rails for reasons that an Appellate Court would certainly consider good and sufficient.

My comment upon the exercise of discretion in this case presupposes that the tablet does not face the Communion rails.

(Signed) ERNEST CHARLES,

2 Mitre Court Buildings,
Temple.

9th December 1921.