For the Church Living and Universal

ARGUMENT

OF

EDWARD M. SHEPARD

AS COUNSEL FOR THE

REV. ALGERNON S. CRAPSEY, S.T.D.

BEFORE THE

COURT OF REVIEW OF THE PROTESTANT EPISCOPAL CHURCH

UPON HIS APPEAL FROM THE JUDGMENT OF THE

COURT OF THE DIOCESE OF WESTERN NEW YORK

OCTOBER 19, 1906.

Archives Note: Excerpt (pp. 32-60) begins on the following page.

And so, with equal clearness, the Diocesan Court was bound to fit, and must in this Court be conclusively presumed to have fitted, the maximum punishment it prescribed to the offense then adjudged. If there had been three offenses, the punishment presumably would be more than if there had been two; if only one offense, it would presumably be less than if there were two. Dr. Crapsey was convicted of three separate offenses separately charged; but upon these three together a single punishment was prescribed adequate to both of them together. If either conviction were erroneous then the maximum limit of punishment was erroneous, and the entire judgment must of necessity be reversed.

With these preliminary considerations, I now beg the attention of the Court to specific errors of procedure in the court below.

FIRST: UNDER CHARGE I, SPECIFICATION 1, DR. CRAPSEY WAS CONVICTED OF AN OFFENSE WITH WHICH HE HAD NOT BEEN CHARGED AND FOR WHICH HE HAD NOT BEEN TRIED.

This specification was

> "That at divers times during the years 1894 "and 1905 the said presbyter did openly, ad- "visedly, publicly and privately, utter, avow, "declare and teach doctrines contrary to those "held and received by the Protestant Episco- "pal Church in the United States of America, "*by the delivery of the sermons* thereafter pub- "lished in said book 'Religion and Politics,' "and among other statements *in said sermons* "in particular *by the use therein* of the follow- "ing language:" (here following the fifteen passages under criticism).

The offense was the delivery of sermons and not the publication of a book. The presentment had already pleaded* that these statements had been

> "made and uttered and * * * the ser-
> "mons * * * delivered by the said Rev-
> "erend Algernon Sidney Crapsey *in his official*
> "*capacity as a presbyter of the Church and rector*
> "*of the said St. Andrew's Church.*"

The book was not pleaded to have been published by Dr. Crapsey in any such capacity; and of course, in fact, it was not. Whether his unofficial publication of the book would or would not have been an offense, certain it is that *that* was not the specification. Official preaching in a pulpit and unofficial publication of a book may be equally right or wrong; but that they are perfectly distinct, each with its own qualities, is open to no doubt whatever. Remembering that this is a proceeding of a *quasi*-criminal nature, that every presumption is with the accused, and that the court below was powerless lawfully to act upon any case not brought before it by the presentment, I am unable to see that the question of the distinction between these offenses is really susceptible of debate.

It was on this account that the book "Religion and Politics," when offered, was objected to by Dr. Crapsey's counsel and rejected as evidence, although the parties were permitted, according to a later ruling of the court,

> "to quote from this book, to refer to the
> "context *as far as it may tend to explain the*
> "*charges.*" †

Now, when we turn to the decision, we find

* Record, page 3.
† Record, pages 50, 51, 121, 122.

no conviction according to this specification, but, legally speaking, a conviction for the utterly different offense of a publication of a book. The findings below are only these*:

1. Of Dr. Crapsey's official position.
2. That he published *in 1905* in *book form* "a "series of sermons theretofore delivered "by him in his official capacity, as the rec- "tor of St. Andrew's Church, and *said book* "*was published* and caused to be sold and "circulated by the said defendant."
3. That "contained *in said book* and prepared as "a part thereof by the said respondent are "the matters and statements set forth in "said presentment."

Then (after a fourth finding about the sermon of December, 1905) is the legal conclusion of the Court "with respect to the said matters and things *written and published* by said respondent." So that the conviction, so far as concerns the first specification, was for something of which Dr. Crapsey was not accused. The Diocesan Court below, there being no such accusation, was utterly without power to try for the offense; and the judgment must fail so far as it depends upon Charge I, Specification 1.

SECOND: THE CANONS OF VIOLATION OF WHICH DR. CRAPSEY WAS ACCUSED WERE NOT IN FORCE UNTIL JANUARY 1, 1905; AND AS THERE WAS NO PROOF OF THE DELIVERY AFTER THAT DATE OF ANY SERMON PRINTED IN "RELIGION AND POLITICS," HE COULD NOT BE CONVICTED FOR SUCH DELIVERY.

This proposition needs little argument, for it

* Record, pages 130–131.

was in effect conceded by the Diocesan Court. The charges were express and solely these: First, that Dr. Crapsey had "violated canon 23 of the general canons of the church, and, in particular, subsection (*b*) of section 1 thereof;" and, secondly, that he had "violated canon 23 of the general canons of the church, and, in particular, subdivision (*f*) of section 1 thereof." *

Dr, Crapsey's counsel raised the point on the trial. † Judge Stiness for the prosecution, while disputing the proposition, urged ‡ that an amendment of the presentment should be permitted to cure the difficulty. A motion was thereupon formally made by the prosecution to amend the presentment so as to charge violation of the former canon which was in force in 1904; the Diocesan Court took the motion under consideration, and in its final decision denied it. § The presentment alleged delivery of "a series of the sermons in the years 1904 and 1905"; but there was no evidence that any of the sermons said to be heretical were delivered in 1905.

It was obviously for this reason that the court below abandoned delivery of the sermons as the gravamen of the offense and instead convicted Dr. Crapsey of the offense of publishing a book.

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* Record, page 439.

† Record, page 129.

‡ Fuller Copy of the Proceedings at Batavia, page 234.

§ Record, page 133.

THIRD: THE CANONICAL OFFENSE SET FORTH IN CHARGE I WAS THE HOLDING AND TEACHING HERETICAL DOCTRINES "ADVISEDLY" WITH INTENTION TO IMPUGN ORTHODOX DOCTRINE, BUT NO SUCH OFFENSE IS FOUND BY THE DECISION.

This point is clear as matter of technicality; but it is far more than technical. It involves a plain question of plain justice.

When canon 23, section I, subd. (*b*), made such holding and teaching of heretical doctrine an offense only if done "advisedly," it took over the ecclesiastical law prevalent in England in like cases.* Unless there were *intention* to contravene some doctrine, there was no offense. In this respect there is an analogy between an ecclesiastical prosecution, which, as I have already shown, is held to be *quasi*-criminal, and strictly criminal cases. In such case the indictment must charge that the act was done knowingly and wilfully,† that is to say, advisedly and intentionally. There needs to be no proof that an accused knew the specific law which he violated, for every man is conclusively presumed to know every law. But there is no crime unless the thing itself done were done knowingly and wilfully, nor a valid indictment unless that be clearly charged. In the present case the law said to be violated is canon 23; and doubtless Dr. Crapsey must be presumed to have known it.

Perhaps the Diocesan Court might, as matter of

* In every English case for heresy which I have examined, including those referred to in this argument, the charge set out the doctrine held by the Church, and then as in this presentment, accused the respondent of *advisedly* impugning the doctrine.

† Bishop; New Criminal Procedure, vol. II, § 521.

mere power, have inferred intention and the "advisedly" heretical character of his preaching from the sermons or book without other proof of intention. But none the less the intention to be heretical had to be charged and found by the Court; and any evidence bearing upon intention was admissible.

The thing said to have been done was the preaching of doctrines impugning the doctrine of the Church; and there would be no offense unless that were done "advisedly" and intentionally. This was perfectly recognized in the presentment itself, which, under Charge No. 1, Specification 1, alleged* that Dr. Crapsey did "*advisedly*, publicly and privately utter, avow, declare and teach doctrines contrary to those held" * * * (page 8) "*it being intended* by said language, words and terms to express the presbyter's disbelief." Charge I, Specification 2, did not allege that by the sermon of December 31, 1905, Dr. Crapsey "advisedly" uttered doctrine which was heretical; but it did allege his intention as follows†: "*it being intended* "by the said language, words and terms to express "the presbyter's disbelief," etc. It needs no argument that a clergyman called upon to preach a hundred sermons a year besides doing his parochial work and keeping up the sacred and diligent study to which his vows bind him, is not to be held to mistakes in doctrine into which he unwittingly falls—denials of doctrines which he unwittingly makes. Every bishop, every presbyter—yes, every layman—knows that now and then the most sincere and orthodox in thought and

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* Record, page 4.

† Record, page 9.

speech fall into error. That is to say, the clergy are human. We have before this Court a striking illustration of what I am saying in this very presentment where the Rt. Rev. Bishop, and the doctors of divinity and laymen on the Standing Committee, beyond doubt and most sincerely meaning to be orthodox declare the doctrine of the Church to be* that "Our Lord Jesus Christ is God." And yet, if I understand theology aright, this statement is the famous Patripassian heresy, a perversion of the doctrine of the Trinity always rejected by our Church. Certainly the doctrine thus affirmed by the presentment is nowhere stated in its creeds or articles or formularies or prayer book.† If we were to prosecute for heresy those who signed this presentment we should have to allege and prove that they had erred "advisedly;" and this we could not do. They fell into an error; but they did not advisedly or intentionally impugn orthodox doctrine.

Since, then, there was canonical offense only if Dr. Crapsey preached error "advisedly," "intending" so to do—since that is the offense charged by the presentment—the decision had to find him guilty of that very offense. Otherwise the decision was without authority. The decision does not find him so guilty. There was no general verdict or judgment of "guilty," the finding being this, and only this:

"We find the respondent guilty of the

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* Presentment; Record, p. 9.

†Encyc. Britt.: Articles on *Jesus* (vol. XIII, at p. 671); on Sabellianism (vol. XXI, p. 127); Monarchianism (vol. XVI, p. 719). The derivative as distinguished from the absolute Godhead of the Son "begotten of his Father before all worlds" is emphasized by the Nicene Creed, and is represented in the second petition of our Litany.

"charges set forth in the presentment *to the "extent now here stated.*"

This absolutely excludes any implication, without expression, of findings necessary to sustain the judgment. The judgment depends absolutely upon the findings "to the extent here stated." That is to say, Dr. Crapsey was, except to that extent, acquitted.

Then follow the two items of the finding under Charge I, Specification 1:

1. "That by his writings * * * the respond-"ent impugns if he does not express dis-"belief in and denial of the doctrines" of the Trinity and that Jesus Christ is God.
2. "That in the said writings * * * said re-"spondent expresses his disbelief in, and "impugns and denies the doctrines" of the Conception by the Holy Ghost, the Virgin Birth and the Resurrection.

You will observe that here are bald findings that Dr. Crapsey's writings impugn and deny orthodox doctrine—not that he intended to deny them or supposed he was doing so or did so advisedly.

A like finding was made under specification 2. Here also was not a word of intention or of error "advisedly" committed. Not a suggestion. The verdict was of guilt only "to the extent here stated"; and the extent stated excluded *intention* or any doing *advisedly* of a wrong.

It would seem, indeed, that the Diocesan Court did not overlook this essential feature of the case. For, in the recitals of the decision, * is given verbatim from the presentment, for verbal convenience in identifying doctrines, the words "It being intended by said language," etc. With that alle-

gation freshly before its eyes, copied out by itself as one of the allegations with which it had to deal, the Diocesan Court excluded as I have said, the "advised" and "intended" character of Dr. Crapsey's acts.

And Dr. Crapsey has said, and this Court, I think, will believe him, that he never advisedly or intentionally preached or published anything which impugned the doctrine of the Church. Such was his formal answers to the presentment. Such also was his impressive statement read by Mr. Perkins.*

The judgment of the Court below, taking its text in connection with the texts of the presentment and answer, is therefore in substance this: *What Dr. Crapsey did was to publish a book or preach a sermon which impugned or denied doctrines of the Church; but such impugnment or denial was not made by him advisedly or intentionally.* Now this, I submit to be clear beyond a possible doubt, was not an offense under any canon or in morals. The judgment, ought, therefore, to be reversed.

FOURTH: THE CONVICTION SO FAILING UNDER BOTH SPECIFICATIONS OF CHARGE I AND THE PUNISHMENT HAVING BEEN PRESCRIBED UNDER THEM AS WELL AS UNDER SPECIFICATION I OF CHARGE II, THE JUDGMENT SHOULD BE REVERSED.

I have already‡ shown sufficiently that an integral and essential part of the decision was the prescription of a maximum punishment. The punishment was, of course, intended to fit the offense. In

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* Record, page 131.

† Printed hereafter at page 125.

‡ *Supra*, pages 31, 32.

the mind of the Diocesan Court it fitted Charge I and Charge II together, and not Charge II only. It fitted, in the mind of that Court, the offenses found under both specifications of Charge I, and one specification, the first, of Charge II. The punishment was to be mated to the seriousness of the three offenses, the persistence in them, their number, their quality.

The Diocesan Court, as I have already said, acquitted Dr. Crapsey under specification 2 of Charge II. That specification, the Court will remember, accusing Dr. Crapsey of violation of his vow to frame and fashion himself and his family according to the doctrine of Christ, and to make himself a wholesome example and pattern to the flock of Christ. The specification was in effect abandoned on the trial; it was rejected by the Court, and it was one unfit and unseemly ever to have been made at all. If then Charge I fail entirely, as I have submitted it ought, there remains only Charge II, specification 1; that is to say, one out of the four accusations in the presentment.

The punishment having been fixed for two offenses under Charge I and one under Charge II, and the former having been erroneously found, the punishment is presumably wrong. And if wrong, the judgment should be reversed. For, as I have already pointed out, this Court of Review under the canon* has no power to modify or vary the judgment, but may only reverse in whole or in part.

* Canon 29, sect. xviii.

FIFTH: THE FINDING UNDER SPECIFICATION I OF CHARGE II OF A VIOLATION OF ORDINATION VOWS BEING BASED SOLELY UPON THE FINDINGS UNDER CHARGE I OF PUBLISHING OR PREACHING THINGS WHICH IMPUGNED OR DENIED DOCTRINE OF THE CHURCH, BUT NOT ADVISEDLY OR INTENTIONALLY, SUCH FINDING UNDER CHARGE II WAS ERRONEOUS.

Specification 2 under Charge II having been rejected by the Diocesan Court, there remains only specification 2, which that court sustained, but only to this extent: *

> "That the accused did, by said utterances "contained in said book and sermons and "quoted as aforesaid in the presentment, vio- "late and break the following declarations "made by him at the time of his ordination"— (there being then quoted the vows of belief in Holy Scriptures, to conform to the doctrine of the Church, etc.)

The court below having rejected the accusation of the presentment that Dr. Crapsey's heresies had been uttered advisedly and intentionally to impugn doctrines of the Church—that is to say, that court having acquitted Dr. Crapsey of intentionally or advisedly committing his errors—I submit that they could not rightly be held—certainly not in this which is a *quasi*-criminal prosecution—to constitute violation of the ordination vows. In this very finding the Diocesan Court declined to insert any statement of intention. Unadvised and innocent errors—mere mistakes in understanding doctrines —surely it is not against these that such vows are directed or for which the canon prescribes punish-

* **Decision, Record, page 132.**

ment. For them there might properly be sound advice, fatherly or brotherly instruction or remonstrance. But as the vows were supposed to come from the heart and will of the postulant or deacon, so the only violation of these fit for ecclesiastical condemnation must come from the heart and will of the presbyter.

The second and third vows were of "faithful diligence" to minister sound doctrine and banish error. It needs no argument that violations of these obviously could not be predicated of unadvised and unintentional error or mistake.

The Diocesan Court, like this Court, is not a court of general jurisdiction; it could act only validly or effectually within the powers expressly conferred upon it by the law of the Church and only in the manner prescribed to it by that law. Upon this branch of the case we submit, therefore, that Dr. Crapsey's exoneration by the Diocesan Court from intentional or advised infringement upon sound doctrine deprived that court of any right whatever to render a judgment against him; that such judgment on its face is erroneous; and that it would not be enforceable within the law of this Church or within the law of the land.

SIXTH: THE DIOCESAN COURT ERRED IN UNDERTAKING TO RULE AT THIS TIME UPON QUESTIONS OF DOCTRINE AND FAITH.

Upon this I can add nothing to Mr. Perkins' argument. If this Court of Review, representing the seven dioceses of New York and New Jersey, can, for the present, deliver no determination upon matters of doctrine, faith or worship, it ought to be clear it would seem, *a fortiori*, that a diocesan

court should not rule upon such greater and deeper questions.

SEVENTH : THE DIOCESAN COURT ERRED IN NOT GRANTING DR. CRAPSEY'S APPLICATION FOR PROPER TIME TO PREPARE FOR TRIAL, AND TO PERMIT THE CAUSE TO BE HEARD BY AN IMPARTIAL TRIBUNAL NOT CONSTITUTED BY THE PROSECUTORS.

Here was a presentment taking fifteen passages from sermons and comparing them for doctrinal accuracy with the prosecutors' statements of mighty doctrines of the Church, the divine nature and personality of Our Saviour, His Resurrection, the mystery of the Trinity. Here was a presentment imputing intentional error upon those matters to a clergyman after a sacred and unblemished service of thirty-two years. Here was a presentment imputing to him upon many occasions during the years 1904 and 1905 violation of his vows in his ministration of the sacraments and in the manner in which he framed and fashioned his family and himself. Here was a presentment involving Dr. Crapsey's priesthood and his career for the entire remainder of his life. If in any cause a court, intelligent and anxious to do right, would be deliberate—if in any cause such a court would make sure that the defendant was permitted a fair and truly sufficient preparation, for the sake of the Church even more than for him—surely this was the cause. Dr. Crapsey was then in sole and active charge of a parish church with 342 families and 614 communicants ; he was then holding three services a Sunday and without an assistant ; the Committee of Investigation had in 1905 declared

that there ought not to be a presentment ; and the Standing Committee had found it not inconsistent with the welfare of the Church to wait many months after the publication of " Religion and Politics." They chose to launch their presentment on March 2, the next day after Ash Wednesday ; and the second day after Easter was appointed for the trial. Besides all his other and necessary work Dr. Crapsey had alone during this time to carry on the most laborious and important services of the whole year during the Church's season of fasting and prayer. Over and beyond all these he was now required to prepare his defense to charges so grave and far reaching, involving his whole career and work and of mighty moment to the Church of his life-long and loyal love. The apparent reason for the haste of the majority of the court (the Rev. Mr. Dunham voted to grant the application for delay) made their error far more serious. The court, rather than take Dr. Crapsey's compulsory default tendered by Mr. Perkins,* granted a delay of eight days from April 17th to April 25th ; and Dr. Crapsey's counsel upon the latter day submitted the same reasons for a reasonable adjournment of a few weeks.† And besides they filed a special written plea,‡ showing that all the members of the court had been appointed or selected by the Standing Committee and Bishop; that on the next May 15th, only three weeks distant, the Diocesan Council of Western New York would be held; and that, under the

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* Record, page 25.

† Record, including letters, pages 34–42.

‡ Record, page 28.

canons* of the diocese, the Council would chose a new Standing Committee and also a new Diocesan Court from ten presbyters nominated by such new Standing Committee. That is to say, a delay of only twenty-one days in this critical and far-reaching matter would enable the Supreme Council of the diocese to provide an impartial court, or to rule that the present court was impartial.

That there should be such a reasonable delay was enforced upon the court by a petition† to the Bishop numerously signed by a most distinguished and representative body of the clergymen and laity of the Diocese, among them Rectors of St. Thomas Church, Trinity Church and the Church of the Ascension, Buffalo, and St. Luke's and St. Paul's Churches, Rochester, and the President and Chaplain of Hobart College, Geneva, an important and the only college in the diocese under Protestant Episcopal auspices. They declared that, if the trial were not to be so delayed, it would be "impossible to disarm criticism of the fairness and justice of the result" and that criticisms would "surely follow to the lasting injury of the Church." In this respectful and solemn remonstrance the unfairness was thus declared :

> "Thus a majority of the members of the "court will have been appointed by the "Standing Committee and not elected by the "Council. But the Standing Committee is "the accuser of Dr. Crapsey."

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* Canons of Western New York, Title Third, Canon I, Sects. II and III.

† Record, page 19.

I remind this Court of Review that the canons of Western New York provided that

> "the trial shall be conducted according to "the *principles* of the common law as adminis- "teredin this State." *

And I declare it to be my positive conviction that, in a like situation any civil court of the State of important rank, would have held that to secure impartialty of the tribunal, which is a fundamental, perhaps the most fundamental, requirement of the common law, a postponement (certainly one no longer than twenty-one days) was peremptorily required. Nothing is or ought to be so abhorrent in any process of justice as a court packed by one party, however innocent of such an intention as the party may be. Would a Governor of New York, having a cause of his own ready in 1905, delaying its prosecution until 1906, and meantime himself appointing judges, dare to press his cause before them, or would such judges hesitate a moment to delay the cause twenty-one days until there should be on the Bench judges not appointed by the plaintiff?

EIGHTH: THE TESTIMONY OF MANY DISTINGUISHED CLERGYMEN AS TO THE UNDERSTANDING AND PRACTICE OF THE CHURCH WAS ERRONEOUSLY REJECTED BY THE DIOCESAN COURT.

It was certainly an incident to impress a pious and wise churchman praying for a benign and universal spread of our Church that so many distinguished rectors doing great and living work should

* Ordinances for the Ecclesiastical Court, § xiv.

have come to Batavia to stand by Dr. Crapsey and to testify their opinion that, as they understood and had known the Church, it had permitted the method and liberty of interpretation which he had used. With them, or perhaps going beyond them, and clearly in the open, were the many times greater numbers who had signed the recent Declaration by English and American clergy and laity.

A court anxious for light might well have listened to the testimony of these witnesses. They might fitly have done this even, if, strictly speaking, they considered the testimony inadmissible. But it was strictly admissible. It bore clearly upon the accusation that Dr. Crapsey had *intended* to impugn orthodox doctrine or had done so *advisedly*. Upon the question whether his sermons were innocently mistaken, that is to say, upon the question of *intention*, it was clearly admissible.

Moreover, the Judicial Committee of the Privy Council, the highest ecclesiastical tribunal for our brethren of the English communion, had ruled that such opinion testimony was admissible in a case like this, although it would not be in cases affecting property. In the prosecution of the Rev. Charles Voysey in 1870 and 1871 for heresy,* the Judicial Committee (including the Archbishop of Canterbury and the Dean of the Arches) expressly so ruled. The Lord Chancellor speaking for the whole court, said:

> "But it is to be observed, that in inquiries
> "of the nature now before us, this Committee
> "is not compelled, as in cases affecting the
> "right of property, to affix a definite mean-

* Noble vs. Voysey, L. R., 3 Priv. C. Appeals, p. 357, at pp. 385, 386.

"ing to any given Article of Religion the "construction of which is fairly open to "doubt even should the Committee itself be "of opinion (on argument) that a particular "construction was supported by the greater "weight of reasoning. Thus, Lord Stowell, "in the case of "*Her Majesty's Procurator* vs, "*Stone* (1 Hag. Cons. Rep., 429), thus ex-"presses himself:

"'I think myself bound at the same time "'to declare that it is not the duty nor "'inclination of this Court to be minute and "'rigid in applying proceedings of this na-"'ture, and that if any Article is really a "'subject of dubious interpretation it would "'be highly improper that this Court should "'fix on one meaning, and prosecute all those "'who hold a contrary opinion regarding its "'interpretation. It is a very different thing "'where the authority of the Articles is "'totally eluded, and the party deliberately "'declares the intention of teaching doctrines "'contrary to them.'

"We have thought it right to refer to the "canons of construction thus judicially ex-"pressed, because on the one hand they allow "to the party accused a fair and reasonable "latitude of opinion with reference to his "conformity to the Articles and Formularies "of the Church, and on the other they afford "no sanction whatever to the contention of "Mr. Voysey, that unless there be found in "the publication complained of a contradic-"tion, *totidem verbis*, of some passage in the "Articles, he is at liberty to hold, or rather "to publish, opinions repugnant to or incon-"sistent with their clear construction.

"As regards those Articles of Religion as "to the construction of which a reasonable "doubt exists, the question may arise how "far opinions of a similar character to those "charged to be heretical, have been held "by eminent Divines without challenge or

"molestation, because the proof of their "having been so held may tend to show the "*bona fides* of the doubt. In this respect also "we have ample guidance from authority; "and it will be found that, where the Article "in question is subject to reasonable doubt, "and eminent Divines have held opinions "similar to those impugned in the case "before the Court, that circumstance alone "has been held to be of great weight in in- "ducing the Court to allow a similar latitude "of construction to the party accused, without "itself deciding upon the construction of the "Articles."

How can it be said—if Dr. Crapsey's intention advisedly to impugn orthodox doctrine be of any moment in this cause—that the opinions and expressions of other, many, unimpeached and distinguished clergy was irrelevant to the issue presented by the presentment and answer.

There was a further and all sufficient reason for the admission of the testimony. The Court will observe the relevance and competence of the testimony to the maximum measure of punishment which, if Dr. Crapsey were found guilty of heresy, it would be the duty of the Diocesan Court to prescribe. That Dr. Crapsey's error, if he erred, were committed through his sharing with a great and representative body of professional brethren of the highest and unimpeached standing views of the comprehensive liberty which the Church allowed him, was surely a fact which a court in prescribing punishment would be bound to consider.

NINTH: THE DIOCESAN COURT ERRED IN PRESCRIBING DR. CRAPSEY'S INDEFINITE AND UNCERTAIN SUSPENSION UNTIL HE SHOULD "SATISFY THE ECCLESIASTICAL AUTHORITY OF THE DIOCESE" OF HIS ORTHODOXY "IN HIS BELIEF AND TEACHING."

This proposition is conclusively argued by Mr. Perkins; and it is perhaps presumptious for me to argue it further. I venture, however, to ask the Court to note the requirement of the constitution of the National Church, Article IX, that

> "A sentence of suspension shall specify on "what terms or conditions and at what time "the suspension shall cease."

And the national canon, No. 35, sect. I, provides that,

> "Whenever the penalty of suspension shall "be inflicted on a Bishop, Priest or Deacon in "this Church, the sentence shall specify on "what terms or conditions *and* at what time "the penalty shall cease."

This simply applied to ecclesiastical judgments in our Church the rule of certainty required in civil courts upon trials for crime. Except where the Penal Code authorizes indeterminate sentences, as the canon does not, the time must be precisely ascertainable. This has been repeatedly decided.* Here the time may be one day or it may be the whole remainder of Dr. Crapsey's life, even if he shall live to the age of the Beloved Disciple.

But this, although a sufficient difficulty, is not

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* People *ex rel.* Johnson vs. Webster, 92 Hun, 378.
Gibbs vs. State, 45 N. J. L., 379.

the most serious one. What is the "Ecclesiastical Authority" which is to be "satisfied." Is it the Standing Committee, which according to sect. III of Title 7 of the diocesan Constitution of Western New York,

> "shall be the Ecclesiastical Authority in "all cases provided for by the General "Constitution and canons of the Church?"

Is this, which is a prosecution under the general canons of the Church, a "case provided for by" them? If so, as it seems to be, we have as the sentence simply this, that Dr. Crapsey shall be suspended, that is to say, *punished*, as long as his prosecutors deem proper; that is to say, as long as they wish.

The Standing Committee are the prosecutors, the complainants in the cause. Such a punishment would be abhorrent not only to the principles of the common law, which are to prevail under the canon of Western New York, * but to the most fundamental notions of justice.

The national canons and those of Western New York certainly assume that the Bishop is the Ecclesiastical Authority within the jurisdiction assigned to him, although I find no express provision to that effect. † In certain cases, mostly, but not all ‡, of absence, vacancy or disability in the episcopate, the Standing Committee is expressly

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* Ordinances for the Ecclesiastical Court, Sect. XIV.

† Constitution of National Church, Articles IV, V. National Canons, No. 1, Sect. IV; No. 3, Sect. I; No. 4, Sect. I; No. 6, Sect. II; No. 12, Sect. V; No. 48, Sect. III. Constitution of Western New York, Title Two, Sects. I, III; Title Seven, Sect. II. Canons of Western New York, Title Four, Canon 4, Sect. I.

made the Ecclesiastical Authority. But obviously, whether the Bishop or the Standing Committee be the Ecclesiastical Authority, he or they are such only with respect to authority or power conferred by the national or diocesan constitution or canons. And, as Mr. Perkins clearly shows, no power to determine any question of doctrine or faith, any question of orthodoxy, is anywhere conferred upon either the Bishop or the Standing Committee. If in the diocese of Western New York there be any such Ecclesiastical Authority it must be the Diocesan Court in cases before it involving doctrine, or perhaps the Diocesan Council by reason of its power, * when exercised with the assent of the Bishop, or, without his assent, by a two-thirds vote to amend the diocesan constitution.

There is, therefore, no such Ecclesiastical Authority as the Diocesan Court assumed; the sentence prescribed is vague and uncertain; and the judgment, therefore, erroneous.

If the Bishop could be held to be sufficiently identified as the Ecclesiastical Authority, and if he had a function with respect to doctrine, then we should have a result, less abhorrent doubtless than if the Standing Committee were so identified, but nevertheless absolutely and profoundly repugnant to the common sense of justice and intolerable for a court administering justice. With great deference to the Bishop of Western New York, it must be remembered that he himself is a prosecutor; for he has "approved" these charges. And, whether or not a prosecutor, he is not a court. If he be the "ecclesiastical authority" then the sentence is one of suspension at his pleasure, per-

* Canons of Western New York, Title Ten, Sect. I.

haps for one day, perhaps for the remainder of Dr. Crapsey's life.

There is a further and serious difficulty. The sentence was not one of suspension until Dr. Crapsey's belief and teaching should in truth and fact accord with the creeds, but until the Ecclesiastical Authority should be "satisfied." No matter how orthodox Dr. Crapsey should become and no matter how long his suspensory punishment should have been, it would continue until the faculties of one man or of a body of men should have been "satisfied."

Nor is any means provided of ascertaining the "satisfaction" of the authority. After Dr. Crapsey shall be duly enlightened or submissive about doctrine, and the authority shall be "satisfied" how is such satisfaction to be proved or ascertained? Who is to declare it and how? For the Ecclesiastical Authority is not, by the judgment, required to make any declaration; nor does the judgment make the declaration sufficient. Is a word to Dr. Crapsey sufficient, or a letter to him, or a formal statement to the Ecclesiastical Court or the Diocesan Council? Is such a letter or statement final, or is it revocable by the Ecclesiastical Authority upon second thought?

There is still another and almost humorous anomaly in this most anomalous penalty. Dr. Crapsey, it would seem, is to be suspended until he satisfy the Ecclesiastical Authority "that his belief and *teaching* conform to the doctrines" of the Creeds. During his suspension, however, he must not teach. For the time being, and as part of his punishment, he is prohibited from teaching. Since then he cannot teach at all, his teachings will obviously not conform to doctrines sound or un-

sound. The Court could not have supposed that, while he was partially excluded from any service whatever as a priest he would be invited to service in a church or seminary of sacred learning. Nor could it have intended that, as a condition of terminating his suspension, he should teach the doctrines of our Church in some non-church society or school. The condition, as intended by the Court, is impossible.

And why, we may reasonably ask, is Dr. Crapsey to convince his superior that *all* doctrines believed or taught by him are sound? He was accused of heterodoxy in only two points; but the sentence requires him, a presbyter of thirty-three years standing, to show that not only has he recovered from such heterodoxies, but that in beliefs and teachings of his never doubted by any one, and upon the great mass of orthodox doctrine in no way involved, he is sound.

Beyond any doubt whatever any such sentence as was prescribed in the Diocesan Court, would be void if pronounced in a court of this State. I do not believe you will hold it valid for an ecclesiastical court of our Church.

TENTH: THE DIOCESAN COURT ERRED IN ACCEPTING MR. ALEXANDER'S TESTIMONY AS PROOF OF THE SUPPOSED QUOTATIONS FROM THE SERMON OF DECEMBER 31, 1905.

This testimony did not bind Dr. Crapsey to become a witness, or otherwise to be held to have conceded its truth. Before he needed to take the stand and open prolonged and indefinite vistas of cross-examination upon his views on all the doctrines of the Church, the need was upon the prose-

cution to establish its case by testimony fit for acceptance by the tribunal. And Mr. Alexander's testimony was not fit for such acceptance. Every presumption being, of course, in favor of Dr. Crapsey's innocence of the charges until they were sufficiently proved, the Alexander evidence did not furnish the sufficient proof. It would have been rejected by a jury in a civil court.

Here was an assistant minister on terms presumably of tender and sacred intimacy with his rector. He had heard the rector preach the sermons printed in "Religion and Politics." If there were heresy in them he had remained quiet under it; he had continued in his place. Nay, more; he had asked that his salary be increased. When his rector was criticized in 1904 or 1905, Mr. Alexander, in most unseemly fashion assuming that there would be a prosecution and that it would be successful, behind his rector's back sought the support of some of the vestrymen for his own appointment to the hoped for vacancy. With this scheme in his heart, but without, so far as appears, discarding his manner of loyalty to Dr. Crapsey, he conducted with him the evening service on Sunday, 31st December, 1905. Thinking some sentences of his rector's sermon might help those who wished to remove him, he took notes immediately upon his return home. He was asked upon cross-examination this question*:

> "As I understand you say here before the "Court that you are unwilling to answer, or "that you refuse to answer, whether when "you made this memorandum you made it "with the thought that you might testify to

* Record, pp. 58, 59.

"it against Dr. Crapsey; that you refused to "answer?"

And he thus testified;

"I have no recollection of having made the "statement for that purpose.

"Q. You have no recollection? A. No, no "recollection.

"Q. That is all the answer you can give "here, is it? A. I think so.

"Q. You have no recollection whether that "was the purpose in your mind, or whether "it was not the purpose in your mind; is that "the answer? A. That is my answer."

The witness further testified as follows:*

"Q. What I want to know is, whether at "the time you made this application for an in- "crease in salary, Dr. Crapsey had uttered "any of those views of which you disap- "proved? A. I think his later utterances "were very specific and certain in the book. I "always gave, I might say, the defendant the "benefit of the doubt; I had always hoped Dr. "Crapsey would come back to his old position, "and I saw that—I saw there was no further "question——

"Q. What we would particularly like to know "is the state of your mind with reference to "Dr. Crapsey's sermons at the time that you "asked to stay at his church if you could re- "ceive an increase of salary; that is the point "to which I am directing my question. A. "At that time I couldn't tell which way Dr. "Crapsey would go.

"Q. You were willing to stay there if you "received an increase of salary, were you, "whichever way he went? A. Not indefin- "itely, no. I wouldn't say I would have re- "mained indefinitely.

* Record, pp. 62–64.

"Q. You were willing to listen to heretical "statements if it was remembered in the "wages? A. I don't know I was willing; I "might be obliged to. * * *

"Q. Now, I will have to ask you that ques- "tion again, and, certainly, Mr. Alexander, "as a truthful and intelligent witness you can "answer a plain question. Did you or did "you not, to any vestryman of St. Andrew's "Church, state, if Dr. Crapsey were removed "you would like to have their support for the "position as rector of the church, did you or "didn't you? A. I wouldn't answer such a "question; I have stated all I can say in re- "gard to that. I was called by the vestry, "and it was a matter I wished to consult with "the vestry about, whether I should remain "or resign.

"Q. And you are willing in the presence of "this Court and of this audience to deny that "you made such statements and requests to "the vestry of St. Andrew's Church? A. The "way I will put it, Dr. Crapsey frequently "spoke of resigning, and on several occasions "asked me to remain; and one day he sent for "me and requested me to take charge of the "parish. On several occasions Dr. Crapsey "spoke of resigning, and on several occasions "he asked me if I would be willing to carry "on the work.

"Q. That is interesting, but it does not "answer the question. Are you willing to "testify that at the very time you took down "those minutes of what Dr. Crapsey said, at "the very time you knew, and all men knew, "that these proceedings were pending, you did "not apply to the vestry of St. Andrew's "Church to have the the position from which "Dr. Crapsey might be removed? A. No, I "wouldn't say so.

"Q. You wouldn't say you did or you "wouldn't say you didn't? A. I wouldn't "put it that way at all.

"Q. You are willing to deny that you did "that? A. I wouldn't put it that way.

"Q. That is all the explanation you have to "make, you—— A. I spoke to some of the "vestry as to whether I should resign or "whether I should remain. Of course, those "matters I didn't think necessary to discuss; "you can call the vestry if you wish.

"Q. I should think quite possible you would "not. Then the information you give us is "that those matters you don't think necessary "to discuss. That is your answer, is it? A. "I have stated sufficient, I think, in answer "to your question. * * *

"Q. * You kept this statement for future "use, did you not? A. I wouldn't be very "positive about it. I kept it.

"Q. Perhaps after this history you can tell "us now whether on that night of the 31st of "December, you made those statements for "future use as evidence to be given in court "against the rector of the church where you "were assistant. Can you tell us that now? "A. No, I don't think I had that in view. "We didn't know there was going to be a "trial or anything of that sort.

"Q. Did you take them to furnish persons, "that a charge might be brought and it might "be tried? A. I made memos of the state-"ment; I can't say as to what use I intended "to put them. * * *

"Q. When did you first show these state-"ments to any member of the Standing Com-"mittee? A. I never did show them to the "Standing Committee.

"Q. To whom did you ever show them? "A. I have no recollections of having shown "them to any member of the Standing Com-"mittee.

"Q. Where do you suppose the Standing

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* Record, pages 67, 68.

"Committee got these words they put into "the presentment?

"*By Mr. O'Brian.*—If the Court please, I "am desirous that the whole truth should "come out here and that Mr. Perkins should "have the widest possible scope.

"*By Mr. North.*—Do you object to this "question?

"*By Mr. O'Brian.*—I certainly do.

"*By Mr. North.*—I advise that the objection "be sustained."

Mr. O'Brian in the closing speech for the prosecution was compelled to disclaim any contention that respect was due to Mr. Alexander's testimony. He said: *

"It may be that Mr. Alexander was unfor- "tunate in temperament—that he went be- "yond the bounds of what we lawyers are ac- "customed to regard as fairness in giving "evidence."

The wholesome distrust which right thinking men, whether within or without the Church would be likely to have for a man who thus exhibits himself, would, we believe, have prevented a civil court from resting any judgment upon his testimony. And yet, if I am right as to the failure of the judgment so far as it depends upon Specification 1 of Charge I, there is nothing left of the judgment except what rests upon Mr. Alexander's account of one sermon. Mr. Perkins well said in the Diocesan Court that the Church of Christ would be indeed wounded and humiliated if it must dismiss men like Dr. Crapsey and retain men like Mr. Alexander.

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* Full Report of Trial, page 242.