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Churchwardens: An Introduction to the Nature of the Office

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It is important in my view that changes in ecclesiastical law are made in a full knowledge and understanding of existing law and in the light of its origins and development, especially when the rights of parishioners are affected. It may therefore be helpful to set out briefly the nature of the office of churchwarden so that the extent to which temporal and spiritual rights are involved in the changes introduced by the Churchwardens Measure can be appreciated, and some misconceptions of the past can be corrected. The Measure is clearly right to impose on those seeking to hold the office of churchwarden the same liability to disqualification as charity trustees generally.¹ What is at issue, is whether the structures of control and supervision envisaged by the Measure are appropriate having regard to the history, nature and functions of the office.

The office of churchwarden is a very ancient office going back to the fourteenth century, and perhaps even earlier. The office today is in fact an amalgam of a number of offices and duties. At one time the churchwardens also had duties imposed on them by the Poor Law legislation, and this may to an extent have given rise to a belief that the temporal nature of their office was derived solely from those local government functions, now removed.

It is clear, however, that even at its inception, the churchwarden was a temporal officer. The office of churchwarden originated as the treasurer of the church who was responsible for holding the parish stock on behalf of the parishioners.² They were creatures of the common law which, in the absence of modern notions of the company or the trust, sought to deal with such parish property through the medium of a guardian or warden in much the same way as it dealt with the property of infants who were similarly under a legal incapacity. Their primary responsibility was therefore to the parishioners, and accordingly they were required to account each year to the parish meeting for the goods and funds in their

¹ Section 2

² See *Y B Trin 37 Hen 6 fo 30 pl 11*, per Moyle, J; *R v Rice* (1697), 1 Ld Raym 138, *sub nom Morgan v Archdeacon of Cardigan* 1 Salk 166

care while in office.³ The spiritual courts, on the other hand, had no right to demand such accounts.⁴ Although responsibility for the maintenance of such parish property has now passed to the PCC,⁵ the churchwardens remain the legal owners as custodians on behalf of the parish, and as such have for several centuries been recognized by the common law as lay quasi-corporations.⁶

The office of churchwarden has therefore consistently been held by the courts to be a temporal office,⁷ and the churchwarden to be an officer of the parish.⁸

Another function was devolved on the office of churchwarden towards the end of the fifteenth century, namely the presentment of offenders and the state of the buildings, ornaments, furnishings, etc, to the ordinary on his visitation, thereby replacing the lay juries of presentment hitherto drawn from the parishes – the *testes synodales* (the remnants of this jury continued to support

3 Statutes of Exeter II 1287 c 12 (F M Powicke & C R Cheney *Councils and Synods, with other Documents relating to the English Church* II (Oxford 1964) p 1005 at p 1008); Y B 8 Edw IV Trin pl 5 f 6 (1468); *per* Serjeant Frowyk in YB 12 Hen VII Trin pl 7 f 27 at f 28; *R v Morgan Rice* (1696), 5 Mod 325; *Tarlour and Rous v Parner* (1670) 1 Vent 88, 1 Mod 65, *sub nom Parker v Taylor and Rous* 2 Keb 675, 703; *Leman v Goulty* (1789), 3 T R 3; Injunctions to the Laity of Archbishop Grindal 1571, no 3 (*Remains of Edmund Grindal* p 133); *Brooke Abridgement* I, 'Accompt' n 71 f 12, 'Corporations' n 55 f 184b, 'Garden desglise', n 7 f 7b; *Lambard Duties of Constables* etc p 72; *Blackstone Commentaries* I 394; *Bacon Abridgement 'Churchwardens'(E)* II 79. The duty to account and to 'deliver up to the parishioners whatsoever money or other things of right belonging to the church or parish, which remaineth in their hands' was confirmed by canon 89 of the Canons 1603.

4 *Snowden v Herring* (1730), Bunb 289; *Wainwright v Bagshaw* (1734), 2 Stra 974; *Adams v Rush* (1740), 2 Stra 1133

5 Parochial Church Councils (Powers) Measure 1956 c 4; Canon F 14

6 Sir Matthew Hale *Analysis of the Law* (London 1713) p 59; *Gibson Codex* 215; *Starky v Churchwardens of Walington* (1692) 2 Salk 547

7 *Longeley v Meredine* (1595), Henry Rolle *Abridgment des plusieurs Cases* (London 1668) I 'Dismes' (H) para 6 p 653; *Anon* (1610), 13 Co Rep 70; *Bishopps Case* (1619), 2 Rolle 71 106; *Dawson v Fowle* (1664), Hardr 378; *Anon* (1675) 1 Vent 267; *Mr Leigh's Case* (1691), 3 Mod 332 at p 335; *R v Rice* (1696), 5 Mod 325, Comb 417, 12 Mod 116, 1 Ld Raym 138, *sub nom Morgan v The Archdeacon of Cardigan* 1 Salk 166; *Catten v Barwick* (1718), 1 Stra 145; *R v Harwood* (1725), 8 Mod 380; *Williams v Vaughan* (1748), 1 Wm Bl 28

8 *R v Rice*, 1 Ld Raym 138, 1 Salk 166; *Castle v Richardson* (1726), 2 Stra 715; *Governors of St Thomas's Hospital v Treborne and Cove* (1752), 1 Lec 126 at p 129; *R v Marsh* (1836), 5 Ad & El 468, *per* Lord Denman C J at p 487: 'the churchwarden is peculiarly, and emphatically, a parish officer'; *Godolphin Repertorium* p 160; *Prideaux Guide to the Duties of Churchwardens* p 1; *Toulmin Smith The Parish* (London 1854) p 59. See also *Lambard Duties of Constables* etc p 72.

the churchwardens in their presentments and may have been the origin of the synodsmen or sidesmen). They were obliged to take an oath to make due presentments to the ordinary, and in this capacity they formed a part of the structures of ecclesiastical discipline and supervision. In the execution of these functions they were, and in theory still are, subject to the authority and discipline of the spiritual ordinary, though the spiritual censures which might at one time have been used to enforce this duty were, it seems, personal ones, and did not give the ordinary the right to remove or suspend from office. It should be noted, that though the functions of the churchwardens with respect to presentments to the ordinary might be seen as spiritual in nature, this does not of itself make the office a spiritual one, and though possibly amenable to spiritual discipline of a limited kind, a churchwarden in this respect is in my view no more an officer of the ordinary than the original jury of presentment which it replaced.

The obligation of the parishioners to provide what was necessary for the worship and proper care of the church, such as the maintenance of the fabric of the nave, the provision of bells, candles, bell ropes, ornaments, books, furnishings, etc, could always be enforced by the spiritual ordinary (usually by means of orders directed to the churchwardens as their representatives in the course of a visitation), but this did not in any sense imply that the parishioners were themselves spiritual *personae* or that as individuals they were under a duty to act on behalf of the ordinary. Nor does it follow that because the churchwardens could be compelled by the ordinary to attempt to enforce the parishioners' obligations in this regard either by raising a church rate or spending parish money already in their hands, the churchwarden was a spiritual office or could be categorized as an officer of the ordinary.

The churchwardens also have a responsibility for the maintenance of order and decency in the church and churchyard, particularly during the time of divine service.⁹ It is not clear where this facet of their office came from, but it seems likely that as the representatives of the parishioners they assumed an oversight of the behaviour of those who came to the church for which they had the dual responsibility of maintaining the place in good order and informing the ordinary of those offending against the ecclesiastical laws.

⁹ Canon E1(4) See eg *Haw v Planner* (1665) 2 Keb 124; *Cox v Goodday* (1811) 2 Hag Con 138 at 141

The allocation of seating in the church is, however, a special case. In the absence of a prescriptive right to a seat, the distribution of seats rests with the ordinary,¹⁰ and churchwardens in allocating seats are acting on behalf of the ordinary. A churchwarden may therefore in this respect be described as an officer of the ordinary.¹¹ But it should be noted that here the right to allocate seats is one which is recognized as belonging to the ordinary and the churchwarden is simply being used as an executory agent. It is not, however, possible to extrapolate from this a general premise that the churchwarden is in other respects an officer of the ordinary.

It is clear, however, that the temporal nature of the office is not affected by the fact that some spiritual responsibilities were later devolved on the churchwardens. As was said in *Bishopps Case*: 'although the execution of his office concerns the church, yet he is a temporal officer ...'¹²

The right to appoint

Irrespective of the functions of the office of churchwarden, of perhaps crucial significance is the fact that the right to appoint to office belongs to the parishioners, except where there is a custom to the contrary by which the incumbent is permitted a share in the appointment.

It is quite proper that this should always have been so, for the churchwardens are there to represent and act on behalf of the parishioners, and the risk of a bad appointment falls on the parishioners whose money and property are in the custody of their churchwardens. It follows, therefore, that this appointment cannot be controlled by the ordinary. The admission to office by the ordinary has been held to be merely a ministerial act¹³ which confers no discretion on the ordinary and no right to reject,¹⁴ other than where the appointment is wholly illegal¹⁵ or there has been no valid election.¹⁶

10 Y B Pasch 8 Hen 7, fo 12, pl 4; *Corven's Case* (1612) 12 Co Rep 105; *Coke's Institutes* III 202

11 *Pettman v Bridger* (1811) 1 Phil Ecc 316 at 323; *Vicar etc of Claverley v Parishioners etc of Claverley* [1909] P 195 at 213; Canon F7(2)

12 (1619) 2 Rolle 106 at 107

13 *R v Rice* 1 Ld Raym 138; *R v Simpson* (1724) 1 Str 609-10; *R v Dr. Harris* (1763), 3 Burr 1420; *R v Bishop of Sarum* [1916] 1 KB 466

14 *R v Rice*, 1 Salk 166; *R v Bishop of Sarum*, 1 KB 466

15 *Anthony v Seger* (1789) 1 Hag Con 9 at p 10; *R v Bishop of Sarum* at p 472

16 *R v Williams* (1828) 8 B & C 681

The position is well summarized in the leading case of *R v Rice*¹⁷ which held that the archdeacon had no power to refuse admission because:

[T]he church-warden is an officer of the parish, and his misbehaviour will prejudice them and not the archdeacon; for he has not only the custody, but also the property, of the goods belonging to the church, and may maintain actions for them; and for that reason it is an office merely temporal, and the archdeacon is only a ministerial officer.

Since the right to appoint is vested in the parishioners, any custom concerning that right is therefore a temporal custom cognizable only by the common law courts.¹⁸

Just as the right of appointment is in the parishioners, so is the right of removal, so that a churchwarden may be removed by the parishioners for bad conduct or for wasting the church goods.¹⁹ Consequently, the ordinary has no right to remove a churchwarden, even for good cause,²⁰ for the parishioners alone may remove their own officers, since it is they who would be prejudiced by the misbehaviour of the churchwardens.²¹ The right to remove or suspend from office therefore at common law belongs only to the parishioners.²² It is suggested that this would be by resolution of an extra-ordinary meeting of the parishioners.²³

17 (1696) 5 Mod 325, Comb 417, 12 Mod 116, 1 Ld Raym 138, *sub nom Morgan v The Archdeacon of Cardigan*, 1 Salk 166

18 *Carpenter's Case* (1681) Sir T Raym 439

19 Y B 26 Hen VIII Trin pl 25 f 5 (1534); *Anon* (1610) 13 Co Rep 70; Brooke *La Graunde Abridgement* pt ii f 7 n 1; Lambard *Duties of Constables* etc p 72; Ayliffe *Parergon* p 171; Blackstone *Commentaries* I 394; Comyns' *Digest* 'Eglise' F 1 (4th ed III 654); Watson *Clergy-Man's Law* c 39 p 391; Phillimore *Eccl Law* II 1489

20 *Anon* (1610) 13 Co Rep 70: 'the party chosen [as parish clerk] is a mere temporal man, and the means of choosing him, *scil* the custom is merely temporal, so as the official cannot deprive him; and his office is like to the office of a churchwarden, who ... for cause they (the parishioners) may discipline them.'

21 Y B Hen VIII Trin pl 25 f 5; *R v Rice* (1696) 5 Mod 325 1 Ld Raym 138, *sub nom R v Morgan Rees*, 12 Mod 116, *sub nom Morgan v Archdeacon of Cardigan* 1 Salk 166

22 Y B Trin 26 Hen 8, fo 5, pl 25 (1534); *Anon* (1610), 13 Co Rep 70; Ayliffe, *Parergon* p 171

23 See Watson *Clergyman's Law* p 390-1. The argument that removal could only be effected by complaint to the bishop or other ordinary is to be found in Prideaux *Guide to the Duties of Churchwardens* p 46, citing only Comyns' *Digest*, which in fact does not say this! The authorities cited by Halsbury's *Laws* XIV para 547 n 4, p 275, do not support the proposition that churchwardens may be removed from office by an ecclesiastical court.

If further evidence is required that this temporal right and custom is not affected by any spiritual functions which may have become associated with the office of churchwarden, then it is to be found in the analogous treatment by the common law of the parishioners' right to appoint the parish clerk.²⁴ The parish clerk was never required by statute to perform civil functions and his duties remained entirely connected with the worship of the parish church; indeed the office originated from the ranks of the minor clergy.²⁵ Nevertheless it has been widely held by the common law and chancery courts to be a temporal office.²⁶ Although the reasoning behind this is not always abundantly clear from the cases, the underlying suggestion appears to have been that it was a freehold office²⁷ held by a lay person²⁸ so as to give rise to a temporal right.²⁹ Furthermore, it is clear that the general rule which required that any proceeding which involved the proof or enforcement of a custom should be within the exclusive cognizance of the common law applied to actions concerning the appointment to (and removal from) the

24 *Parish Clerk* 13 Co Rep 70. See *Dawson v Fowle* (1664) Hardr 378 at p 379; *Inter the Parishes of Gatton and Milwich* (1712) 2 Salk 536

25 His chief duty appears to have been that of *aquebaiulus* or 'water-bearer': Gibson *Codex* I 214; Hobhouse 'Churchwardens' Accounts', p xix; Gasquet *Parish Life in Mediaeval England* (London 2nd ed 1907) p 112. See Joseph Shaw *Parish Law* (7th ed London 1750) p 66. The office appears at one time to have been used as a means of maintaining poor scholars, see Statutes of Worcester II (1229) c 20 (Powicke & Cheney *Councils* p 174); Statutes of Coventry (1224 X 1237), c 5 (*ibid* p 211); Statutes of Worcester III (1240), c 53 (*ibid* p 309); Statutes of Winchester II (1247?) c 23 (*ibid* p 407); Statutes of Wells (1258?), c 33 (*ibid* p 606); Statutes of Winchester III (1262 X 1265), c 58; Statutes of Exeter II (1287) c 29 (*ibid* p 1026).

26 *Candict and Plomer's Case* (1610), Godbolt 163; *Gaudyes Case with Doctor Newman* (1611), 2 Brownl 38, *sub nom Parish Clerk*, 13 Co Rep 70; *Wallipooles Case* (1625), Benl 142; *Anon* (1641), March N R 101; *Anon* (1662), 1 Keb 286; *Mr Leigh's Case* (1691), 3 Mod 332 at p 335; *R v Ashton* (1754), Say Rep 159; *Inter the Parishes of Gatton and Milwich* (1712), 2 Salk 536; *Peak v Bourne* (1732), 2 Stra 942; *Pitts v Evans* (1739), 2 Stra 1108; *Tarrant v Haxby* (1757), 1 Burr 367; *R v Warren* (1776), 1 Cowp 370; *Lawrence v Edwards* [1891] 2 Ch 72; *Shaw Parish Law* p 67. See also Y B 18 Edw 3, Trin pl 24 f 27. Cf *Townsend v Thorpe* (1727) 2 Stra 776, where a parish clerk was said to be an ecclesiastical officer in everything but his election, but this was described as a 'hasty opinion' in *Peak v Bourne* above. Some of the judges in *Parker v Clerk* (1704) as reported in 6 Mod 252, regarded the office as spiritual because of its origins.

27 *R v Ashton* (1754), Say Rep 159; *Blackstone Commentaries* I 395. See *Inter the Parishes of Gatton and Milwich* (1712) 2 Salk 536

28 *Gaudyes Case with Doctor Newman* (1611) 2 Brownl 38, *sub nom Parish Clerk* 13 Co Rep 70; *Parker v Clerk* (1704), Holt K B 599, 6 Mod 252, 3 Salk 87; *Tarrant v Haxby* (1757), 1 Burr 367

29 *R v Ashton* (1754), Say Rep 159

office of a parish clerk.³⁰

It may be observed, therefore, that the duties of the office were not the determining factor in establishing that the common law courts rather than the spiritual courts should have jurisdiction to adjudicate on questions concerning matters of appointment and removal of parish clerks and churchwardens, but rather the temporal character of the *right* to appoint which was vested in the parishioners.

Conclusion

It may be observed therefore that the office of churchwarden is a temporal office and a churchwarden is fundamentally an officer of the *parish*, not the ordinary. In my view Canon E1(4) does not accurately reflect the position at common law. The right to appoint, and with it the right to remove or suspend, belongs to the parishioners, and any custom concerning that right is cognizable only in the common-law courts. Any control over the appointment and removal of churchwardens into the hands of the ordinary as envisaged by the Churchwardens Measure, however understandable may be the motives, must therefore be seen as having a direct impact on the temporal rights of parishioners.

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³⁰ *Gaudyes Case with Doctor Newman* (1611), 2 Brownl 38, *sub nom Parish Clerk* 13 Co Rep 70; *Jermyn's Case* (1623) Cro Jac 670, S C Palmer 379; *Hasnet v Sparkes* (1627), Benl 204; *Dawson v Fowle* (166), Hardr 378 at 379; *Godolphin Repertorium* p 165. See also *Parker v Clerk* (1704), Holt K B 599, 6 Mod 252, 3 Salk 87