We See Not Our Tokens, There Is Not One Prophet More

John Masding

'Wherever the corpse is, there the vultures will gather.'[1]

A yew tree stands across the brook on the rising farmland opposite my study window, and I speculate how many stones from the Church are now built into the farmhouse, or, for that matter, into my house. *X marks the spot.* Until the 1547 Chantries Act, where the yew stands there was a Chantry too. The tomb effigy of Sir John de Hauteville was moved to Chew Magna when the government demolished the Chantry, as it did two thousand others. Chantries, like almost all Monasteries and a large number of Colleges, fell prey to insatiable lust. Nor was a more demonstrably useful Parish like Chew Magna as much safer as one might think – the Bishop of Bath and Wells had a Manor there, with a fine Episcopal Residence. It had a bridge which led from the Court directly into the South Transept of the Parish Church. Later in the sixteenth century the Bishop was forced to surrender that to the Crown, which granted it out like much other ecclesiastical spoil. What of our day? England's parishes have been denuded of their assets, stripped, in some cases, even of the Parish Church itself. The Vicarage has gone. Sometimes such sales are justified, and welcomed by parishioners. But *so many*? *Ichabod.* The vultures preen.

Utilitarianism in the aftermath of the French Revolution and our own Great Reform Act eyed the Church afresh. 'The Church, as it now stands, no human power can save.'[2] It is easy for us to be lulled into a false sense of security, just because we know that the forming by the government of the Ecclesiastical Commission gave the Church a respite. What seemed the excessively large incomes of certain bishoprics and cathedrals were redistributed, crowning the wonderful established work of Queen Anne's Bounty (itself a *government war-chest* tax burden made available to help

1 Matt. xxiv.28 (N.E.B.)

2 Matthew Arnold (June 1832). 'When I think of the Church I could sit down and pine and die.' (February 1833, to a friend who was leaving for India as a missionary.)

poorer benefices and to stimulate new endowment), and laying the foundation of an ecclesial culture which has persisted almost to our own day, and was very much alive and kicking when I was ordained: *the Church Commissioners will provide....*

What was the fatal step?

The Benefices (Stabilisation of Incomes) Measure 1951 undermined the independence of parochial benefices and underlined a culture of already increasing centralisation by taking over all the actual historic endowments, and giving incumbents an annual and unvariable return on a now fixed nominal capital value. The profits, which were increasingly substantial as inflation took hold of Britain, were subsumed within the Commissioners' General Fund, reappearing as largesse from time to time – but of useful grace rather than of real right. Perceptive clergy soon saw the irony of having to apply to the Commission for monies which were actually the profits made from their own and others Livings.

Then in 1976 the Glebe was taken from the Parishes, and assigned to the Dioceses. And historic Endowments were reduced further by being limited to £1000p.a. for each future incumbency.

So the centralizing tendency relies upon the three main sources of funds: the historic endowments (as duly augmented by the work of the 1951 Measure, to an extent undoing the redistributive effect of the Ecclesiastical Commission); Glebe; and Quota, now rapidly rising. When I took office, my Quota, at £400p.a. or so, was the equivalent of about a third of a stipend: when I retired, it was getting on for double a stipend – a sixfold increase in comparative real terms and values perhaps more, if you allow for the falling real value of the stipend. Central diocesan funds, especially since the Pastoral Measures of 1968 and 1983, have been swollen by the proceeds of sale of Parsonages by the hundred, and, increasingly, of Parish Churches themselves.

Bel and the Dragon is a very popular title for a Public House made by converting a former Church to other uses. Max Davidson's illuminating article reveals the thin end of a tasty wedge – 'Restaurateurs are bringing new life to disused churches', he claims.[3] 'Terence Conran will not get his hands on Westminster Abbey just yet.' The process, after all, seems to have begun most strikingly with non-conformist chapels, as one would expect, perhaps. Do you like the sound of the *Font and Firkin* in Brighton?

Simon Jenkins' prophetic *Unlock them or lose them: the key question*[4] sounded a round warning, in blunt words: 'The parish churches are too important to be left to the custodianship of the Church of England – the task is beyond it'. He would see the parson's freehold going not to a remote and despoliative diocese, to a cash-strapped P.C.C., but to a Parish Council – which could at least levy a Rate for the support of what would be in a new way a community building.

How can these things be? Did not men of old give, and give substantially and sacrificially, to build Churches and parsonages, and to endow the Living for a clergyman to serve the people of the place? Aye, there's the rub. So often, now, the clergyman has been taken away. So has the endowment. The house is sold, and the proceeds taken. The Parish Church is left, exposed and vulnerable.[5] Who gets it first? The Diocese, under the Pastoral Measure 1983, or do we revert to an earlier understanding of 'whose Church is it anyway? Who is it for? Who maintains it?' – and claim what is left of the Church's presence in that community for the community itself, the parish rather than an ecclesiastical rump? Indeed so is our prayer with the Psalmist: 'forget not the congregation of the poor for ever.'[6]

3 *Daily Telegraph*, 7th October 2000, *Weekend* p.11.

4 *Church Times* 13th February, 1998, pp. 12,13.

5 O think upon thy congregation:whom thou hast purchased and redeemed of old....Now they break down all the carved work thereof: with axes and hammers.
They have set fire upon thy holy places: and they have defiled the dwelling-place of thy Name, even unto the ground.
Yea, they said in their hearts, Let us make havock of them altogether: thus have they burnt up all the houses of God in the land.
We see not our tokens, there is not one prophet more: no, not one is there among us, that understandeth any more.
Ps. 74: 2, 7-10 (Coverdale).

6 Ps. 74 v.20b.

It may help to look at the history, therefore, of the Parson's Freehold. We need to know why it came about, and what it means.

The Bishop had the right of Institution, yes, a thousand years and more ago, and a limited right to prevent a scandalously improper appointment in certain cases; but the Patron appointed to the benefice he had founded and endowed – if it was a Donative, the Bishop was not involved at all. It was part of the bargain, understood and respected: the lands of the benefice, its Church and Parsonage, were set aside from all profane and secular uses as holy gifts, and the freehold vested in the Minister as part of the bargain, on the basis that he used what was entrusted to him in the service of God amongst and for the people of the place. That was the deal. Is it now being broken? Should Churches and parsonages revert to the people who gave them, or their heirs or other local successors, when disused as redundant for the purposes for which given? Should the best of the bargain be kept, and the property at least remain for village uses, as Simon Jenkins has suggested? A partial analogy might be drawn with the Act by which certain disused Church schools reverted to their donors? Can it be right that the very person appointed by the law as guardian during a vacancy, the Bishop, should be able to sell parochial benefice properties for the use of the Diocese? Is this not to be judge in one's own interests and cause?

I believe that it is helpful to consider, in this year of the Human Rights Act, the origin of the 'contract' (if we may employ an anachronism for the sake of understanding) – a 'contract' between Church and People – not least because of the light it throws, in my view, upon the true, underlying nature of the Parson's Freehold.

Anglo-Saxon Charters record frequent grants of land to the Church. At the Norman Conquest, King William took all the lands of the English, excepting those of the Church, and granted them to barons to hold as Tenants-in-Chief by noble service. In a sense it was a fiction that all land was the King's, but this fiction of tenancy still lives. Thus today husband and wife, in most households, as they contemplate their awesome mortgage, are reminded that they are joint tenants of the freehold. Land held by the tenants-in-chief, who served the

King, would in large part be granted out to their knights to hold by knight service, and other land was held in free socage, the origin of our freehold.

Just as the student of Fourth Century Imperial Rome will realise that the emancipation of the Church from the Catacombs led to an accelerating assimilation with the patterns of the State, so the Medieval Historian observes an assimilation in the holdings of the Church to the patterns of the nobility and freemen of England. There will be plenty of cases where a Church has no title deeds, as modern solicitors have known them: nor, of course, will there be Registered Title. The lands of the Church are often held from time immemorial, and, we would submit, originally at least, and morally still today, in return for prayer and spiritual service. There never has been land which was the property of the Church of England, which is not a Corporation or entity. Nor are Churches part of a diocesan property portfolio, let alone owned by the Archbishops' Council.

To the Saxon lands of the Church were added by a constant stream of gifts new Norman donations. A Lord would endow a local parish and its church with lands, the basis of glebe, which endured almost to our own day, but is now diocesan property; each priest would hold that glebe to farm for his own maintenance and that of his church. The stipend of a priest was not in any sense his private income. Such nice distinctions were not known until comparatively recent times. The stipend was the endowed income of the church, always augmented by fees, and Easter offerings, and came to the priest as of right, simply because he held the land of his Rectory or Vicarage and with it drew the appropriate greater or lesser tithes. Some lands became impropriate or appropriate (the distinction between the two was by no means clear, and never has been; there is no strict and nice distinction between Monastic impropriation and lay appropriation.[7] The Rector lived of his own; the Vicar, who as the name suggests was his deputy, though also assured of security in his tenancy, which in the course of time became recognised as a freehold, lived of his own.

Knight service was abolished in 1660[8] and all the freehold land converted to

7 Lord Stowell in Portland (Duke) v. Bingham (1792) 1 Hagg. Coms. 157.
8 12 Car.2 c.24.

socage tenure; villein land had become largely copyhold. The concept that one held land of the King by service faded into folk memory. But the use of the word tenant rather than owner remained the language of lawyers, because lawyers are always conservative, and until the mammoth reforms of 1925 land law was a matter of extra-ordinary complexity.

That is the context in which we must consider the Parson's Freehold of the land upon which his church and parsonage stand. Since the confiscation of glebe, this, with its buildings, is all that he has as incumbent. The best expression of the situation is probably to say that Mr. X. has the freehold in his Office as Vicar of Y., and is a Corporation Sole, as such owning, *viz.*, holding, the freehold vested in him *iure officio*: the Church and Parsonage with their gardens, grounds, churchyard and curtilage. And that he so holds for the performance of his ecclesiastical duties. The two are inseparable notwithstanding that the anomaly of a sinecure rectory was also a freehold.

The late[9] Chancellor Garth Moore's *Introduction to English Canon Law*[10] holds that 'Legislation facilitating the removal of incumbents and the reorganisation of parishes has eroded a beneficed clergyman's rights to such an extent that it is no longer entirely accurate to describe his office as a freehold'. This is a curious comment. After all, in the middle ages, say, every freehold, to use that anachronism for convenience, because all land was held for service or, as we would say, duty, had the possibility of penalty, even of confiscation as escheat upon outlawry. So for Briden and Hanson to argue that the Incumbents (Vacation of Benefices) Measure 1977, say, diminishes the freehold is misleading: it merely creates a situation for today's clergyman analogous to that of the medieval military tenures in some respects, should duty and performance fail.

It is alleged, for the contrary view, that often the parson is but leaseholder, having tenure for a term of years (e.g. certain Team Rectors), or for a term of

9 The Worshipful the Reverend Garth Moore was for many years the distinguished Patron of the Clergy Association.

10 Third Edition, thoroughly and well revised by Brian Hanson and Timothy Briden.

years less than life in that if he took office after the 1st January 1976[11] then he is obliged to 'retire at seventy' (effectively at 71) (Ecclesiastical Offices (Age Limit) Measure 1975). But this is surely an error. If he be but a leaseholder, in whom is the freehold? It has been argued that the freehold is in abeyance, but the better view must be that an ecclesiastical freehold may be for life or for a term of years less than life, determinate or indeterminate.

Moreover, to every such parson belong all the incidents of freehold. A sale upon the statutory consents would run in his name, for example. Only during the avoidance of the benefice is the freehold or fee simple in abeyance: the Bishop and the Commissioners are joined in the sale, if any takes place – as it often does, in these asset-stripping days!

Against the comparison with the contemporary norm, lay freeholds, it may be alleged further that the parson cannot bequeath his estate, that he is but tenant for life, at most, if not for some lesser period. Since 1925 the usual layman who is tenant for life 'has the legal estate in settled lands vested in him, and at the same time he is tenant for life in equity'[12] The rents and profits belong to him; like an incumbent upon his benefice he cannot commit voluntary waste – in some ways analogous to dilapidations. Like the incumbent, with his right to sell upon the statutory consents, the powers of the lay tenant for life include power of sale or exchange, the power to grant leases, the power to mortgage, and so on, all of which the Incumbent has too. If it be alleged that the Incumbent needs consents, it may be alleged against that observation that the tenant for life may have to exercise his powers restrictedly, under an order of the court or with the consent of or after notice to the trustees, and so forth. Monies raised upon sale etc. will be capital monies, just as with the benefice. So the comparison holds.

The jurisdiction of the Ordinary extends to the Chancel as to other parts of the Church; the Rector, whether impropriator or incumbent, has the freehold

11 The Measure was passed on 1st August, 1975 but the Archbishops under the usual power contained therein appointed 1st January, 1976 for the date at which the Measure came into operation.

12 Settled Land Act 1925 s.4(2).

in the chancel in the same way as, and no further than, he has in the church and churchyard.[13] He is not therefore entitled as of right to make a vault, affix tablets &c. as it pleases, but requires a Faculty, and is not entitled to a Faculty as of right.[14] In the absence of proof that that, by custom or special statutory provision, the duty to repair the chancel is to fall upon the parishioners or others, the right to be Rector and enjoy the profits and tithes of the rectory carries with it in the case of a lay rector or impropriator the duty of repairing the chancel. The repair of the chancel is not an ecclesiastical due chargeable on the profits of the Rectory but a liability on the Rector.[15] A Clerical Rector, or, rather, incumbent rector, no longer has to carry the chancel responsibility so long as he is rector only by reason of his incumbency. Where there is a lay Rector the freehold is in him, but possession in the Incumbent Vicar, and control, such that he will be treated as owner and occupier for all other purposes. *A fortiori*, at least an incumbent Rector, Parson Imparsonee, is as much the freeholder as any man can be, if these other designations of lesser possession mean what they say. Blackstone describes him as possessing the most legal, beneficial and honourable title that a parish priest can enjoy, seised in *iure ecclesiae*. Interestingly, it appears that apart from statute or special custom, personal property cannot be vested in such a one as a corporation sole.[16] This used most often to be a consideration with the works of art and furnishings in episcopal Palaces, or Deaneries.

The incumbent gets scant sympathy from bishops and dignitaries since they are now merely holders of freehold office, without freehold land attaching to such office, or the buildings thereupon. But a Dean and Chapter as a corporation aggregate have the freehold of the Cathedral and the precincts except insofar as houses have been transferred to the Commissioners – and now Cathedral Councils are entering upon that scene.

A rose by any other name would smell as sweet. So let us look back at the beginnings again. This is where what today we would call the *contract* began.

13 Griffin v. Dighton (1863) 33 L.J.Q.B. 29, 181, per Cockburn C.J. citing Clifford v. Wicks (1818) 1 B. & A. 498, 507.
14 Nickalls v. Briscoe [1892] P. 269.
15 St. Asaph (Dean and Chapter) v. Llanrhaiadr-yn-Mochnant (Overseers) [1897] 1 Q.B. 511.
16 Power v. Banks [1901] 2 Ch. 487, 495.

Frankalmoign, the free tenure originating in Saxon times, by which Church lands were sometimes held (ecclesiastics quite often acquired land held by military service too) involved no Services beyond praying for the soul of the donor. It is, of course, now, embraced within socage tenure. It is easy to see how such a splendid concept became assimilated to the common Norman tenures. It is surprising how late such Saxon patterns of grants can be found. The Charter of Ralph, son of Stephen of Holland, Lincolnshire to Kirkstead Abbey is probably somewhat before 1187 and confers the land in full freedom of possession with the expected obligations of piety.

One of the earliest authentic Charters, a grant by Frithuwold displays exactly the same pattern of free gift for free use, with prayer, and with the Service of prayer, which endured in many respects for almost a thousand years... *I grant it to you, Eorcenwold, and confirm it for the foundation of a monastery, that both you and your successors may be bound to intercede for the relief of my soul....Therefore all things round about, belonging to the aforesaid monastery, just as they have been granted, conceded and confirmed by me, you are to hold and possess, and both you and your successors are to have free license to do whatever you wish with the same lands. Never, at any time, shall this charter of my donation be contravened by me or my heir....*

The ownership, or at least possession, of the church and vicarage is such that the only controls upon the incumbent's beneficial occupation of his properties are those imposed by the constraints of law. His jurisdiction, such as it is, albeit limited, and inferior to that of the ordinary, so called, in nevertheless in itself an ordinary jurisdiction. That is to say, those things which the law empowers him to do it empowers him to do without reference to others beyond the duty to consult with the Parochial Church Council. Perhaps we may take this control of his house for granted, although there is a canonical requirement upon him[17] that he provide occasions upon which his parishioners may regularly resort to him for spiritual council or advice, and, of course, the justification for a clergyman having a house larger than many if not most or even all of his parishioners is that it should be in some sense a public house; and so it is. There the work of the parish is carried on, letters

17 Canon C 24 (6).

typed, meetings held, people seen, but all under his control, and with no suggestion that the house is not his home, the Englishman's castle.

But so it so too with the Church. The keys of the church are held by the Minister as a matter of prerogative, although he must admit both the Parochial Church Council and the Churchwardens for the proper performance of their duties; however, he is not obliged to issue them with keys, and in the case under discussion no-one but he possesses keys to some parts of the building, not so much out of a desire in fact to assert his proprietorship and freehold as to prevent unnecessary duplication where need does not require it. Although the Churchwardens are owners of the moveables, in so far as moveable goods of the church may be said to have an owner, they hold those goods, for which they would sue, at the disposal and for the use of the incumbent. They must not suffer the bells to be rung nor the organ to be played contrary to his directions. They keep order during the Services for the benefit of his ministrations, and so for the good of all, to their spiritual health. The incumbent still has the right to pasture his beasts in the Churchyard – sheep make good lawnmowers, and goats are said to be quite a good security device – and until recently the concept of freehold was such that the timber of the trees of the Churchyard was his. A very recent change in the law gives the trees some protection against dilapidations by involving (somewhat oddly) the Diocesan Parsonages Committee, whose very involvement proves the highly institutional nature of the link between church and parsonage, and felled timber is now to be used to repair the church or to be sold that its profit may be used for such repairs.

The incumbent, or his wife, perhaps more to the point, who tries to keep parishioners out of the parsonage is operating as inimically to the spirit under which church property is held upon freehold as if the parishioners were discouraged from attending divine worship itself. Such behaviour demonstrates a complete lack of comprehension of the whole ethos of the Church of England expressed in its dealings with the properties with which it has been blessed. Given, sometimes fictionally, very often by a Patron of old, or by the parishioners themselves, they are held in free socage by the incumbent for the duties which the law enjoins upon him, a concept which the Anglo-Saxon mind would readily have recognised. And, in the oldest of

parishes, frankalmoign is just what it was. The privilege is granted only for the responsibility.

It must be said that the mean expressions used by the Repair of Benefice Buildings Measure 1972 do not help anyone to realise the true nature of the incumbent's position in his house – for example, the Measure requires him to look after it as would a tenant; but it does not mean a tenant of the life interest, but rather a lodger.[18]

The definition of fee given in Osborn's Concise Law Dictionary is 'Originally a feudal benefice; land granted to a man and his heirs in return for services to be rendered to the grantor'.

So beyond the Settled Land Act of 1925, beyond the Act of 1660, beyond all hair-splitting between fee simple, freehold, and life tenure (because in practice all confer, or should confer, the same effective controls and powers to grant an estate in fee simple upon sale) we mark beyond doubt the purpose for which this privilege of the beneficed clergy came about in the mists of antiquity, the Christian purposes of our Faith in the Lord Jesus, Who gives all. In the beneficed clergyman we have, or ought to have, the last true example of antique tenure: not even in fee simple by knight service, as it were, but tenure in frankalmoign by prayer and sacrament.

When Prayer and sacramental services cease, should not the freehold interest, granted for that purpose only, and held by its performance, also cease? Not as a matter of modern law, but of old morality, should the land not *escheat*, as they used to say? not to the bishop, whose land it never was: but, if not to the Patron, why not to the parishioners? that is to say, the villagers? Should the Church come down, and the land be sold for redevelopment, or used as a Public House, or upmarket restaurant – or become just a smart address? As the man at the next table said to his admiring friends, 'I've just acquired one H - - - of a swell address – *The Church, Grabworthy, Barsetshire*'.

18 s.13 (1).

There's another morality in giving the lands back to the people. It is they who have been repairing the Church, paying the Parsonage Dilapidations or Repair Rate, and shouldering the burden of Quota. They have done so because, for better for worse, the Parish Church lies at the heart of their village or community. They have always felt that it is theirs.

Are they to be left with nothing in THE SALE OF THE CENTURY?

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