1935 2 K.B. 432.

THE BISHOP OF ELY *v.* GIBBONS AND GOODY. Arches Court, Hilary Term, By-Day, 1833.—Upon an application for a prohibition propter delectum triationis, the Court of Arches had been enjoined from proceeding as to a custom till an issue was tried, the record of the judgment setting forth a verdict finding a custom for the parishioners to repair the chancel is conclusive evidence in the Ecclesiastical Court of the existence and validity of the custom.

[Referred to, *Morley* v. *Leacroft*, [1896] P. 93; *Winstanley* v. *North Manchester Overseers*, [1910] A. C 10.]

On appeal from Norwich.

This suit commenced in the Episcopal Consistorial Court of Norwich, and was originally a business of the office of the Judge promoted by the churchwardens of Clare, Suffolk, against the Bishop of Ely, impropriator of a portion of rectorial or great tithes of that parish, for not repairing the chancel of Clare church.

Articles on the part of the promoters were admitted.

The bishop, in his answers to these articles, admitted that by law parsons or rectors of pa-**[157]**-rishes are bound to sustain the chancels of their parish churches, save as to exemptions by special composition, custom, or otherwise. He also admitted that, among the hereditaments, &c of which, as appertaining to the Bishop of Ely, he was in possession, was a portion of tithes arising within Clare parish: that such portion heretofore belonged to, and was from time immemorial (as he believed) in the possession of, the dissolved religious house of St. John the Baptist at Stoke near Clare; that it became vested in the Crown, and was granted by 42 Eliz. to the see of Ely.(*a*)[1]

An allegation on behalf of the Bishop of Ely was afterwards admitted, which—after setting forth that neither the Bishops of Ely nor their lessees had ever exercised any right in, or enjoyed any advantage from, the chancel, either in respect of pews, burials, or monuments; (*b*) and that the benefits therefrom had always been enjoyed by the vicar and churchwardens of the parish—pleaded, that "from time immemorial the chancel had always been repaired by the churchwardens out of certain rents, or by means of rates equally levied on the parishioners for the repairs of the church including the chancel, to which rates the lessees of the portion of tithes, appertaining to the see of Ely within Clare parish, **[158]** were assessed, and had paid, in respect of such tithes, in common with the other parishioners, and that in no instance, except the present, had any proprietor or his lessee of such portion of tithes been called upon to repair the chancel."

The answers of the churchwardens to this allegation were objected to; and being pronounced sufficient, that decree was, on appeal, reversed by the Court of Arches, and the cause retained. Further answers were given in, and evidence was taken on both sides, and the cause was set down for hearing.

On the second session of Hilary Term (28th of January), 1831, the registrar of the Court of Arches alleged that he had been served with an order from the Court of Common Pleas, setting forth that a rule nisi had been granted to shew cause why a prohibition should not issue to prohibit the further proceedings in the Court of Arches, and enjoining it to stay proceedings in the mean time

This rule for a prohibition nisi, generally, was obtained at the instance of the churchwardens. On the 15th of April the rule was made absolute.

On the 3rd Session of Trinity Term (12th of June), 1832, the registrar of the Arches alleged that the writ of prohibition had been amended by limiting the prohibition to the trial of the custom (*a*)[2]

On the 1st Session of Michaelmas Term, 1832, the Court, upon the application of the proctor for the churchwardens, directed the hearing of the **[159]** cause to be suspended until the question of the custom had been tried.

(*a*)[1] From that period to the present the see of Ely had granted leases of such portion of tithes at the reserved rent of 10l These leases had been generally renewed about every seven years upon payment of a fine.

(*b*) The respective rights of the impropriator, the vicar, and the parishioners in, and the authority of the ordinary over, these matters in the chancel were much considered in the case of *Rich* v. *Bushnell*, which is printed below, vide p 164.

(*a*)[2] This amended rule was obtained at the instance of the churchwardens on their payment of the defendant's costs.

On the 8th of January, 1833, the trial came on before Lord Chief Justice Tindal and a special jury, when a verdict was given—that in the parish of Clare there is and hath been from time immemorial a certain ancient and laudable custom for the parishioners to repair the chancel. Judgment was signed on the 30th of January: and the churchwardens were condemned in the costs attending the application for the writ of prohibition.

On the 4th Session of Hilary Term an office copy of the judgment was brought into the registry of the Court of Arches; and on the by-day the cause stood for hearing.

After the pleadings had been opened the Court said: there is in this case a decision at law that from time immemorial the parish of Clare has repaired the chancel of its own parish church.

Phillimore and Lushington for the churchwardens The jury have decided on the fact, not on the law, and the question now is whether their finding can exonerate the impropriator of the great tithes or his lessee from the repair of the chancel, which is imposed upon them by the general law. The question of the legality of such a custom is most important, and belongs to this Court.

Per Curiam. A custom, which is found by a jury to be imme-**[160]**-morial, will here be considered valid: a composition or agreement will be presumed.

Argument resumed. The mere existence of the fact, that there is a particular custom, is not sufficient to establish the validity of the custom. Many customs, or rather usages—for the word custom implies the notion of legal validity—may prevail which are not legal e.g. that tithes shall be assessed to the church-rate, instances of which seem to have occurred in this parish of Clare. but however ancient such an usage may be, we apprehend that it cannot be sustained, whether the parsonage and tithes be in lay or spiritual hands. The whole of the parsonage, be the possession in whomsoever it may, is subject to the repairs of the chancel all persons who are in the reception of the rectorial tithes are liable in this respect: their relative proportions may be settled among the parties. If the fabric of the chancel be very solid it may not require repair within the memory of man: but though there is an absence of proof that the person, who is de facto liable to repair the chancel, has ever been called upon to repair it, that will not exonerate him; his liability to make the repairs when they are required will still remain.

Per Curiam. The finding of the jury is that the parishioners have repaired the chancel from time immemorial whereas the argument goes on the assumption that no repairs have been done If that had been the case, the jury could not have found that the parishioners repaired and the general law would take place

[161] Argument resumed. Where it is shewn that the chancel has been repaired by the parishioners at large out of a church-rate, they may have taken a burthen upon themselves which seems to admit a liability, but it is different where the repairs have been paid for out of a church estate. We know of no authority, nor of any instance, where the parishioners are bound to repair the chancel, except in London: but in London the custom arose from the land in the different parishes being covered with houses, whence also grew that other custom prevailing in this city—that of the appointment of both churchwardens by the parishioners. Ignorance may often lead parishioners to repair the chancel; but that will not bind them when better informed. 1 Burn, Ecc Law, tit. Church, s. 6 (Repairs). Prideaux, p 74 Gibson, vol 1, p. 199. Lyndw p 53. *Williams* v *Bond* (2 Vent. 238), *Pence* v. *Prowse* (1 Ld Ray. 59), *Haukins' case* (5 Mod 390).

Per Curiam. The general impression in *Hawkins' case* seems that the parishioners may be bound to repair Is there any case where it has been held that a custom for the parishioners to repair the chancel is illegal?

Dr. Lushington None that I am aware of. *Haukins' case* must be taken with reference to all its circumstances We submit that there is no authority by which it can be held that great tithes are exempted from a portion of liability in the repairs of the chancel

[162] The King's advocate and Addams for the Bishop of Ely We are surprised to find the case argued, the hearing of the cause having been suspended by a prohibition on the other side. The fact that there is "a good and laudable custom" for the parishioners of Clare to repair the chancel is now established by a verdict How can this Court take the question into consideration? We admit that, generally, the lessee of the great tithes is bound to keep the chancel in repair, but there may be a special

exemption: and when a custom exists for the parishioners to sustain the chancel, they may be compelled so to do. It is however said that a custom may have existed, and yet be invalid; and this perhaps may be so in a case of very gross manifest invalidity. *Hawkins' case* has been remarked upon by the Court: the other cases do not affect the question

Judgment—Sir John Nicholl. This was originally a suit by the churchwardens of Clare, in the diocese of Norwich, against the Bishop of Ely, as impropriator of a portion of the great tithes, to compel him to repair the chancel. The bishop in defence pleaded that he never had repaired the chancel, that he had no enjoyment of it, nor emolument from it, either as to seats, or burials, or monuments; but that the rights in respect thereof had always been exercised by the vicar and churchwardens of the parish, and that from time immemorial the parishioners had by custom repaired the chancel. To try this latter defence the churchwardens moved for a prohi-**[163]**-bition, which accordingly issued to this Court; the question of custom has been tried in the Court of Common Pleas, and a verdict given that the parish is bound to repair the chancel: this verdict is accompanied with costs. In trying the question of custom at common law it was open to the churchwardens, I apprehend, to shew that there was no such custom, but that the expense of the repairs, as they were wanted, had been defrayed out of the rents of estates vested in the churchwardens for such a purpose. However that may have been, the finding of the jury is in general terms, and in favour of the defendant, the Bishop of Ely.

This seems to me quite decisive of the question. It is not open to this Court now to investigate the custom whether it be legal or not. The finding of the jury in this case sets the matter at rest; and so I think it must have been considered, because on the part of the parish the proceedings here have stood over from time to time until the result at common law should be ascertained: and upon the verdict being given it certainly was the expectation of this Court that the churchwardens would have proceeded no further in the suit. Whatever then may be the general law and primâ facie presumption in regard to the repairs of a chancel, still they are liable to be controlled by special custom and I can see no reason why such a custom, as has been found, should not exist in Clare parish in London such a custom exists generally: that indeed may be on peculiar grounds, but the inference from the authorities upon the point is that such a custom may also exist in country parishes. It turns out then that these **[164]** proceedings have been an attempt of the parishioners of Clare to throw a burthen from themselves upon the impropriator, and they prove to have been unfounded Under these circumstances, I am of opinion that the impropriator is entitled to be dismissed with his costs both in this Court and in the Episcopal Court of Norwich.

RICH *v.* BUSHNELL, Clerk.(*a*) Trinity Term, 4th Session, 1827.—The lay rector is not entitled as of right to make a vault or affix tablets in the chancel without leave of the ordinary, nor is he entitled to a faculty for such purposes without laying before the ordinary such particulars as will afford the vicar and parishioners an opportunity of judging of it, and satisfy the ordinary that such vaults or tablets will not interrupt the parishioners in the use and enjoyment of the chancel: nor has the vicar an absolute veto, though he may shew cause against the grant of a faculty. Semble, that the consent of the lay rector must precede the leave of the ordinary for the construction of a vault or the erection of tablets in the chancel.

[Referred to, *Rugg* v. *Kingsmill*, 1867, L. R. 1 Adm. & Ecc. 347; *Winstanley* v. *North Manchester Overseers*, [1910] A. C. 10]

The present case came before the Court by letters of request from the Chancellor of Sarum, under which a decree with intimation issued, "calling upon the vicar, churchwardens, parishioners and inhabitants of the parish of Beenham, in the county of Berks, to shew cause why a faculty should not be granted to Sir Charles Rich, Baronet, lay rector of Beenham and sole owner and proprietor of the chancel of the parish church thereof, to make a vault for burials in the chancel for himself and his family, and to erect tablets against the wall to the memory of himself and of his family."

An appearance was given for the Reverend John Bushnell, the vicar, and an act

(*a*) See the preceding case, p 157, in notis.