

The Reform of Chancel Repair Liability

The purpose of this paper is to argue that the 1985 Report of the Law Commission recommending the abolition of Chancel Repair Liability should now be implemented.

The Law Commission Report can be read here:

<http://www.official-documents.gov.uk/document/hc8586/hcoo/0039/0039.pdf>

I also recommend reading the evidence of the Cardiff Law School Centre for Law and Religion to the Joint Committee of Parliament on Human Rights:

<http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/39we22.htm>

I hope the Law Commission, and all others interested in law reform and Church affairs, will consider the Law Commission's report again.

Chancel repair liability is a confusing and troubling law for everyone who has contact with it. It is waste of time and money, and produces very little money for chancel repairs. It needs to be reformed, as the law is very unsatisfactory. It can be reformed in various ways. I have no personal interest in this.

I became interested in the subject through my work as a solicitor in a town where in theory according to searches of records at the National Archives, chancel repair liability exists, though the parish church has a new chancel and the Church Commissioners have advised that there is no enforceable liability. The Church Commissioners in practice accept a percentage of the liability, as there was once a sinecure rector who was entitled to tithes, which passed to the Ecclesiastical Commissioners. The sinecure rector held some land out of which tithes were payable, which merged in the land. The tithe records are unusually complex but incomplete and indecipherable.

The ancient liability of a lay rector to repair the chancel of a church grew out of the Anglo Saxon system of tithes. The church was entitled to receive one tenth (or 'tithe') of the produce of the land. The rector of each parish collected the tithe and was responsible for the repair of his chancel.

Monasteries bought up the right to receive the tithes, then Henry VIII sold it to lay rectors when he dissolved the monasteries and expropriated their assets. Parliament reformed the old church tax in 1839, and finally abolished it in 1936. Yet it allowed an odd exception, a remnant of the old church tax to continue in existence.

Anyone might be a lay rector without knowing it. You may own only a tiny fraction of the land once owned by the original lay rector, and yet, in theory, be held liable for the whole cost of repairing the chancel of a church near where you live.

The law that has been declared by the courts, is not the law as Parliament intended it to be. There is old judge-made law that has been wrongly applied in changed circumstances. Parliament reformed the law, but left odd remnants of the old law, unclearly expressed. The existence of chancel repair liability may be discerned only from ancient tithe maps, records of ascertainment prepared by the Tithe Commissioners of His Majesty's Inland Revenue, the declarations of merger made by the tithe owners with the help of the Tithe Commissioners, and Enclosure Acts and Awards. These historic documents are unclear, and their effect is uncertain. The law is an anachronism, well overdue for the attention of Parliament. A new insurance industry has grown from the fear that this liability will make property unsaleable.

The Law of England and Wales should be free of historical religious discrimination. I believe that it is wrong that part of our property law benefits only one denomination of one religion.

Reformers will bear in mind that the Church is not a public authority, though it has a strong historical connection with the State. Its lawyers claim that abolition would infringe the human rights of the Church, but argued in Court that suing a farming couple for hundreds of thousands of pounds did not infringe the couple's human rights.

In our modern democracy people do not accept that the law of property cannot be reformed or modernised but must retain this odd remnant of Anglo Saxon Canon Law. Reform is possible, within the Human Rights Act 1998. Parliament respects

the human rights of all, and this involves balancing conflicting interests and acting in the general public interest. Ultimately, Parliament is supreme and is free to decide where the public interest lies. Judges have no power to annul primary legislation under the Human Rights Act 1998. The European Court of Human Rights can order a State to pay compensation to any person whose human rights have been infringed by legislation. I hope to show that there is no real prospect of any such claim succeeding.

Some people see chancel repair liability as simply a harmless and irrelevant ancient property right, which can be ignored and be allowed to fade away. I would argue that our property law should be kept up to date and simplified. It is not acceptable to ignore bad laws that have the potential to cause hardship and unfairness.

The Church as an institution has no real interest in preserving the status quo. The law is widely regarded as unsatisfactory. Church officials such as diocesan registrars must be troubled by the constant enquiries they receive and the bad publicity the law generates. The Legal Advisory Commission recognises that claims for chancel repair liability antagonise local residents and so frustrate the pastoral ministry of the Church.

The Church intends to consider possible changes in the law after 12 October 2013, by which date any parishes that wish to claim Chancel Repair Rights will have registered them against the titles of their lay rectors.

Legislation will be necessary to moderate and clarify the law, if chancel repair liability is not abolished entirely. The Church should also agree that any claims not registered by 12 October 2012 should lapse and be extinguished. The proposal for outright abolition is radical, but any other reform is likely simply to lead to further confusion and new claims.

There is no chancel repair liability in Scotland. Chancel repair liability applies in England and in Wales, but the law in Wales is different from the law in England. The tithe rentcharges were transferred to the county councils under the Welsh Church Act 1914, a reform first proposed by David Lloyd George at the end of the nineteenth

century. The county councils had to pay the Representative Body of the Church in Wales an annual amount in respect of such rentcharges. These annual payments were to be held in trust for the original tithe rentcharge owners, who continued to be liable for chancel repairs. The Representative Body of the Church in Wales is entitled to collect chancel repair payments rather than PCCs. The tithe rentcharge payments ceased with the Tithe Act 1936, which extinguished them. There was a case in 1944 on chancel repair liability in Wales, Representative Body of the Church in Wales v Tithe Redemption Commissioners [1944] AC 228. This case is mentioned in a footnote in the 1985 Report of the Law Commission. In Wales the Representative Body received the compensation stock under the Tithe Act 1936 for the extinguishment of tithe rentcharges, and is responsible for most, if not all, chancel repairs. The immense confusion caused by the Welsh Church Act 1914 can be seen from reading the case report. The 1914 Act abolished the existing ecclesiastical law in Wales, transferred the jurisdiction over tithes and chancel repairs from the ecclesiastical courts to the county courts. The Chancel Repairs Act 1932 therefore extends only to the Provinces of Canterbury and York.

Past attempts at reform

In 1982, the General Synod commissioned a report from its Chancel Repairs Committee which recommended that the liability be phased out. The Synod accepted the report, after a lively debate, but introduced no legislation to bring this about. Synod took the view that it was not for them to legislate.

Chancel repair liability was a civil rather than an ecclesiastical matter, a matter for the civil courts rather than the ecclesiastical courts to rule on, and for Parliament rather than the Synod to legislate on. Though founded on ancient church customs and decisions of the ecclesiastical courts, it had become part of the common law of England and Wales, on which only Parliament was competent to legislate. The Church of England General Assembly had, however, passed the Ecclesiastical Dilapidations Measure in 1923, which relieved clergy rectors of Chancel Repair Liability, and provided for a system whereby lay rectors could compound their liabilities. It is unclear why Synod now takes a different view of its own competence.

It was no doubt regarded as an internal church matter, since the Ecclesiastical Commissioners would have taken over the collection of tithes and instead paid the clergy rectors stipends out of the tithe income. Article 52 of the 1923 Measure provided for the compounding of the liability but on terms decided by the diocesan authorities. The authorities are not obliged to agree to the compounding of liability and do not have to accept amounts proportionate to the lay rector's individual share of the liability, since it is regarded as a joint and several liability.

Synod expressed the hope that the Government would act. In response, the Government asked the Law Commission to report, which it did, in 1985, recommending abolition. The Conservative Government then failed to act. In 1996 Lord Irvine of Lairg, the Labour Lord Chancellor, rejected the report, saying that, although chancel repair liability might infringe the human rights of lay rectors under Article 1 of the First Protocol of the European Convention on Human Rights, abolition without compensation could infringe the human rights of the Church under the same Article. I will examine the arguments as to why that view may well be incorrect.

Aston Cantlow PCC v Wallbank

This was the case which brought chancel repair liability to the attention of the media and the public. Andrew and Gail Wallbank owned Glebe Farm at Aston Cantlow in Warwickshire, and this included 12 acres of farm land known as Clanacre, which had been allotted to their predecessors in lieu of tithe under an Enclosure Award in 1742. It was believed that this made them lay rectors who had the Chancel Repair Liability of the former tithe owner and they were sued by the PCC as they refused to pay for the repairs. They were advised that the old law was open to challenge as an unfair tax, under the Human Rights Act 1998. The Court of Appeal accepted this view - Aston Cantlow PCC v Wallbank [2001] EWCA Civ 713.

Contrary to the view of Lord Irvine, the Court of Appeal decided that the Church was a hybrid public authority, which had to respect human rights when exercising powers as such; Chancel Repair Liability was an unfair tax, so contrary to the Article 1 of the

First Protocol. It seemed that the Courts had brought about the demise of the liability without the need for legislation. The Law Commission simply noted this result, and Parliament too seemed content.

The House of Lords judicial committee then reversed the decision (Aston Cantlow PCC v Wallbank [2003] UKHL 37).

Andrew and Gail Wallbank were forced, not only to sell the 12 acres of Glebe Farm, known as Clanacre, which had been allotted to their predecessor in lieu of tithe under the Enclosure Award of 1742, but also the rest of their land and their farmhouse at Aston Cantlow. I do not believe the ecclesiastical court would have dealt with them in so harsh a manner, if the claim had been brought before the passing of the Chancel Repairs Act 1932.

Land Registration

The members of both Houses voted unanimously for the Land Registration Bill 2002, which omitted Chancel Repair Liability as an overriding interest. Shortly afterwards, and before the Land Registration Act 2002 had been brought into operation, the House of Lords reversed the decision in Aston Cantlow.

The Lord Chancellor then made the Land Registration Act 2002 (Transitional Provisions) (No. 2) Order 2003, preserving Chancel Repair Liability as an overriding interest until 12 October 2013, ten years after the operative date of the 2003 Act. This was done under powers granted by Parliament, to make statutory orders, which did not need to be laid before either House, for either negative or positive approval.

The 2003 Order will not help those who have the liability registered against their title, or those who purchase before 13 October 2013 who will face the risk of registration with its harmful consequences to the saleability of their property.

The 2003 Order followed the recommendation of the Law Commission in its White Paper, Land Registration for the Twenty-First Century, that the number of overriding interests should be reduced. It recommended that chancel repair liability should

continue to be an overriding interest, as it was not practicable to require all liability to be registered. The Church has not however objected to the 2003 Order, which was signed by David Lammy MP, as the Minister at the Department for Constitutional Affairs on behalf of the Lord Chancellor. David Lammy had been a member of the Archbishops' Council until the previous year.

Chancel repair liability had been left out of the Land Registration Act 2002 as the Court of Appeal had held in the Aston Cantlow case that it was not an interest in land at all - it was an unfair tax and contrary to the Human Rights Act 1998. The Government could not have used the power to make transitional provisions by statutory order, to add chancel repair liability to the list of overriding interests on a permanent basis, since that was not within the powers reserved to the Lord Chancellor. It could have introduced an Amendment Bill, but then wrecking amendments could have been introduced in Parliament to abolish chancel repair liability immediately. So Ministers rapidly decided on the 'quick-fix' solution of a 10-year registration period, even though the Law Commission had advised that registration was impracticable.

Very few registrations have occurred since 2003. This shows that parochial church councils are not interested in preserving chancel repair liability, as they recognise that in most cases it is virtually impossible to ascertain what land, if any, is affected. Furthermore, that registration only causes local difficulties, and is a severe hindrance to the pastoral and evangelistic work of the Church.

I conclude that preserving the existing system of chancel repair liability is of no real benefit to anyone.

How the law can be reformed

Reform can be achieved by a new Chancel Repairs Act, as recommended by the Law Commission and set out in the Appendix to its report.

The Church Commissioners and English Heritage will be able to continue to help parishes with the cost of church repairs. English Heritage will no longer withhold repair grants from parishes which had a lay rector, and the Church Commissioners, instead of being liable to repair certain chancels, will be able to consider fairly the merits of all requests from parishes for grants out of the funds released.

Whether the House of Lords was right or wrong, Parliament can and should legislate to abolish what ordinary people regard as an unfair law imposing an unfair levy.

Parliament cannot easily reverse the decision of the House of Lords as to whether a parochial church council of the Church of England is a public authority. To do that would require a hybrid or partly private bill, which is unusual and has a long drawn out parliamentary procedure. The Supreme Court could reverse the decision if there were another similar case, but there is not likely to be one.

What Parliament can do is to abolish chancel repair liability.

Parliament could also pass a new Human Rights Act 1998 to widen its scope by redefining 'public authority'. The Aston Cantlow case has resulted in decisions, particularly in housing cases, adversely affecting the human rights of occupiers of care homes, housing association housing and others. Arguably, the existing Act derogates from the Convention in regard to some kinds of legislation including Measures of the Synod. The Cardiff Law School evidence includes Jack Straw expressing concern, when he was the Lord Chancellor in 1998, to avoid vexatious litigation against Churches.

How did the law get into this state?

Under the Tithe Act 1936 almost all tithe-based liability passed either to the PCC or to the Church Commissioners or other bodies which received compensation stock for the extinguishment of their tithe rentcharges. An exception was made where the tithe rentcharges were payable out of the land of the lay rector himself. The lay rector

did not have to pay these rentcharges to himself, so the chancel repair liability was said to have merged in his land, to the extent of the value of the rentcharges which were payable out of that land. The Government paid no compensation for the extinguishment of those merged tithe rentcharges, as they were not extinguished. They were transformed into a new, and very limited, continuing chancel repair liability. As far as I am aware there have been no reported claims by PCCs against lay rectors under the 1936 Act for tithe rentcharges merged in land. The limited nature of this continuing liability is not widely understood. It has never been tested in the courts.

The 1936 Act did nothing to reform the law relating to liability arising from land allotted in lieu of tithe under Enclosure Acts. It is only that kind of liability which has continued very occasionally to be sued for since 1936. I know of only two reported cases of claims since 1936 in respect of land allotted in lieu of tithe under an enclosure award (Chivers & Sons Ltd v Air Ministry (1955) Ch 585 and Aston Cantlow PCC v Wallbank (2001-2003)). In neither case did the defendants attempt to argue that, since tithes no longer existed as a legal concept, land could no longer be said to be held 'in lieu of tithe'. It was only because the lay rectors were believed to hold their land which had been allotted to their predecessors 'in lieu of tithe', that the land was deemed to be burdened with the incidents formerly attached to the ownership of the tithe.

Equally, the defendants could have argued that it was no longer the custom in the parish for the Church to charge the lay rector for chancel repairs. In the case of Aston Cantlow it was certainly the case that there was no record of any previous proceedings ever having been brought against the lay rector, but this may have been because voluntary payments had been made, so that the Church had no need to invoke its customary rights.

I believe the decision of the House of Lords in Aston Cantlow PCC v Wallbank [2003] UKHL 37 was unreasonable, that an excessive liability was imposed on the defendants, and that the ecclesiastical court not have made that decision if the jurisdiction had remained with the ecclesiastical court. Lord Scott of Foscote was the only one of the law lords who recognised that Wickhambrook PCC v Croxford

[1935] 2 KB 417 (CA – Lord Hanworth MR, Romer LJ and Eve J) was possibly wrongly decided. Even if it was not wrongly decided, it should surely be confined to its own facts, and comments which were made *obiter* about the supposedly unlimited nature of Chancel Repair Liability should not be taken out of context and applied as a universal rule. The Croxfords had received some tithe rent-charges, and expected to receive more so they would not end up out of pocket. The cost of the repairs was relatively modest, though more than one year's rent-charge. Lord Scott was also the only one to recognise that the PCC is at least a hybrid public authority for the purposes of the Human Rights Act 1998. He did not accept the view of the Court of Appeal that the PCC was acting as a public authority in collecting chancel repair liability payments, or that these were a tax.

Was the House of Lords wrong?

Aston Cantlow PCC v Wallbank [2003] UKHL 37

We have to accept that under the hierarchy of our court system, House of Lords or Supreme Court decisions are deemed to be right, as they can overrule Court of Appeal decisions. In this case, it is difficult to accept that the House of Lords decision was actually fair or just.

The Law Lords declared that the Church of England was an 'amorphous' body, and not a public (that is governmental) authority. The Law Lords considered themselves bound by European Court of Human Rights case law to declare so. None of the cases referred to concerned England or the Church of England, which is in a unique position.

The Church of England is a continuation of the pre-Reformation Church, and has its own ecclesiastical courts. Its courts declared the law of England and Wales in upholding the customs of the realm, and how those customs had become part of the common law of England and Wales. It had and still has its own Parliament, the General Synod, which can pass Measures, which become part of the law when they are approved by the Queen in Parliament, through its Ecclesiastical Committee under the Church of England Assembly (Powers) Act 1919. Would a private person have his own courts and legislature? The Law Lords only asked itself the question

whether the parochial church council was a public authority. Was that the right question? A Crown Prosecutor is not a public authority, but he is part of the Crown Prosecution Service, which undoubtedly is. Similarly, a PCC may not be a public authority of itself, but it acts as a constituent part of the legal structure of the Church of England, which has its own separate system of ecclesiastical courts and legislature, the General Synod, and has all the appearance of a public authority.

The General Assembly abolished chancel repair liability for clergy rectors under the Ecclesiastical Dilapidations Measure 1923. Therefore, actually, it can legislate to relieve its own staff of liability, but the Synod now argues that it has no power to legislate to relieve the public.

Tithes were indisputably a tax, and so were tithe rentcharges and tithe redemption annuities. The latter were collected by HM Inland Revenue. Some tithe rentcharges were converted into chancel repair liability, though the law lords in the House of Lords, declared that liability not to be a tax, for reasons which they did not adequately explain. All they did was to criticise the judges of the Court of Appeal for not explaining why they thought it was a tax.

The Court of Appeal thought not only that it was a tax, but an unfair tax. If the 1935 decision was correct, the tax was entirely unlimited and unrelated to the value of the rectorial property in the hands of the defendant, so it was unfair in the same sense that inheritance tax charged at a rate of 200% would be unfair.

Lay rectors were exempt for church rates because they had their own form of tax to pay, chancel repair liability. So yes, the Court of Appeal was indeed right. PCCs are part of an amorphous public authority, and when they sue for chancel repair liability, to garner funds for the repair of buildings open to the public, which the public use if only for weddings and funerals. Church buildings are part of the National Heritage. PCCs are acting as officials of the Church of England, enforcing a law that the Church created through its institutions, under royal authority.

Lord Nicholls said in a crucial passage in his opinion:

“If a statutory provision cannot be rendered Convention compliant by application of section 3(1), it remains lawful for a public authority, despite the incompatibility, to act so as to 'give effect to' that provision: section 6(2)(b). Here, section 2 of the Chancel Repairs Act 1932 provides that if the defendant would have been liable to be admonished to repair the chancel by the appropriate ecclesiastical court, the court shall give judgment for the cost of putting the chancel in repair. When a parochial church council acts pursuant to that provision it is acting within the scope of the exception set out in section 6(2)(b)”.

However, the PCC was not just applying the provisions of the Chancel Repairs Act 1932. All those provisions were intended to do was to transfer jurisdiction over chancel repair matters from the ecclesiastical court to the county court. The 1932 Act did not create chancel repair liability or lay down under what circumstances or to what extent it arose. By applying the jurisprudence of the ecclesiastical court more faithfully, the Court could have interpreted the 1932 Act in a manner compatible with the Convention.

The General Synod acts as a public authority when it legislates for the community. It was established by Act of Parliament, and is presided over by Her Majesty the Queen as Head of the Church. The Diocesan Synods, Deanery Synods and the Parochial Church Councils, through which the members of the General Synod are elected, are all part of the same administrative system, acting under the lawful authority of the General Synod. Therefore, it is clear surely that they are all part of the same public authority.

The General Assembly acted as a public authority when it legislated to remove the chancel repair liability from its own staff but not from the public.

The House of Lords relied on the Wickhambrook case in saying that the liability of lay rectors was unlimited. I will now consider whether they were right about that.

Wickhambrook PCC v Croxford [1935] 2 KB 417

(CA – Lord Hanworth MR, Romer LJ and Eve J)

In the Wickhambrook case of 1935, Lord Hanworth MR seemed to show favour towards the ecclesiastical establishment, quoting at length from mediaeval writings on the responsibilities of rectors, as though these had any relevance. He failed to adopt a purposive construction of the Chancel Repairs Act 1932, which was intended simply to transfer the jurisdiction of the ecclesiastical court to the county court, and enable money judgments to be given, which is clear from reading Hansard. Prior to that Act the admonitions of the ecclesiastical court could only be enforced by means of actions in the High Court for contempt of the ecclesiastical court. Lord Hanworth and Romer LJ in my view misinterpreted the phrase 'liable to be admonished'. They disregarded the authority of the writings of Dr Phillimore, the leading ecclesiastical lawyer of his day, and implied that his comments had been made without the basis of any true learning. There was in fact ample authority for Dr Phillimore's assertion that the liability was limited to the amount of the tithe received, which Mr Vaisey KC, Counsel for the defendants, could have relied upon.

Lord Hanworth went on to say:

"The real argument which was urged on behalf of the respondent in the present case was an appeal asking 'is it fair to impose the liability when at present so little has reached the hands of the tithe owner? More will come, and it may be hoped that the sum estimated to be required if laid out, will render the chancel sound for a number of years. This appeal ad misericordiam does not appear to be founded on precedent. All hardship can be avoided by an order being made under section 26 of the County Courts (Amendment) Act 1934 for payment by instalments of the sum due."

That passage seems to contain the true *ratio* of the case.

Romer LJ said: *"The word liable [to be admonished] shows in my opinion that the question to be considered by the Court is whether the defendant could, consistently with the law, have been admonished, and not the question whether the defendant would in fact have been admonished in the particular case."*

This was an odd decision as the purpose of transferring the jurisdiction from the ecclesiastical court to the county court was clearly not to prevent appeals *ad misericordiam*. The right question for the court should have asked itself was surely, whether the defendant ought in justice be admonished to repair the chancel or not. Ecclesiastical courts were presided over by ecclesiastics for whom to show mercy would have been second nature.

The Wickhambrook case was of course in 1935, before the Tithe Act 1936 extinguished the tithe rentcharges on which the claim was based, so its facts could not arise today. In Wickhambrook, the judges relied on the case of *Wise v Metcalf*.

I will now look at that case as well.

Wise v Metcalf (1829) (1829) 10 B&C 299

In Wise v Metcalf it was argued as follows:

“Here the rector had from his rectory an income of £600 per annum; he ought, therefore, to have kept the premises in a state of repair, even as to painting, papering, and white-washing, fitting for the occupation of a man of that income”.

Cardinal Othobon’s Constitution of 1283 was also quoted from Gibson’s Codex. It required bishops and archdeacons *“to admonish their clerks decently to repair the houses of their benefices and other buildings and if they neglected to do so within the space of two months, the bishop would cause this to be done at the cost and charges of the clerk out of the profits of his church and benefice.”*

So even in 1283 those liable for chancel repairs were not made bankrupt, and were not expected to use their own money or sell their own property to pay for chancel repairs.

Cardinal Othobon’s Constitution provided for sequestration of the tithes as the method of enforcement of Chancel Repair Liability. The harvested grain would be seized by the Churchwardens from the rector’s tithe barn, and sold to raise the money required. The Constitution left it to the bishop to decide how much of the grain was required. By injunctions in the reigns of Henry VIII, Edward VI and Elizabeth, mentioned in a note to Gibson’s Codex, the amount to be sequestered was limited to one fifth of the tithe, and by the *Reformatio Legum Ecclesiasticarum* to one seventh.

It was stated by the Court in North v Barker (1 Phill 309) that Lindewood’s Provinciale lib iii tit 27 p 250 a very early Canon of Edmund Archbishop of

Canterbury (Henry V) that the Ecclesiastical Court rarely allows more than one fifth of the tithe to be sequestered for chancel repairs.

Lay rectors were not subject to sequestration and the ecclesiastical courts could only enforce their obligations by admonition or excommunication. However, they could be referred to the civil courts for contempt, known as contumacy. This does not justify holding lay rectors liable in any one year for more than the amount of the tithe revenue which could have been sequestered if they had been clergy.

In the Aston Cantlow case in 2003, Andrew and Gail Wallbank were forced, not only to sell the 12 acres of Glebe Farm, known as Clanacre, which had been allotted to their predecessor in lieu of tithe under the Enclosure Award of 1742, but also the rest of their land and their farmhouse at Aston Cantlow. I do not believe the ecclesiastical court would have dealt with them in so harsh a manner, if the claim had been brought before the passing of the Chancel Repairs Act 1932.

Legislative History

I will now look at the legislative history of chancel repair liability.

The Tithe Act 1839

Section 1 of the Tithe Act 1839 Act reads: On merger of tithes or rentcharge, the charges thereon to be charges on lands.

“In every case where any tithes or rentcharge shall have been or shall hereafter be released, assigned, or otherwise conveyed or disposed of under the provisions of the said Acts, or any of them, or of this Act, for merging or extinguishing the same, the lands in which such merger or extinguishment shall take effect shall be subject to any charge, incumbrance, or liability which lawfully existed on such tithes or rentcharge, previous to such merger to, the extent of the value of such tithes or rentcharge; and any such charge, incumbrance, or liability shall have priority over any charge or incumbrance existing on such lands at the time of such merger taking effect; and such lands, and the owners thereof for the time being, shall be

liable to the same remedies for the recovery of any payment and the performance of any duty in respect of such charge, incumbrance, or liability, or of any penalty or damages for non-payment or non-performance thereof respectively, as the said tithes or rentcharge, or the owner thereof for the time being, were or was liable to previous to such merger”.

In other words, where tithes or rent-charges merge in land out of which they are payable the land and the owner of the land become liable for chancel repairs only to the extent of the value of the tithe or rentcharge which merged in the land. So if the rentcharge which the lay rector would have had to pay on his own land, if he had not been the lay rector, was only £1 per year, he was only to be liable for chancel repairs costing up to £1 per year.

The Ecclesiastical Dilapidations Measure 1923

The Church of England General Assembly passed the Ecclesiastical Dilapidations Measure in 1923, which relieved clergy rectors of Chancel Repair Liability, and provided for a system whereby lay rectors could compound their liabilities. It no doubt regarded this as an internal church matter, since the Ecclesiastical Commissioners would have taken over the collection of tithes and instead paid the clergy rectors stipends out of the tithe income and parish quotas from offertory collections. Article 52 of the 1923 Measure is still in force, and it provides for the compounding of the liability, but on terms decided by the diocesan authorities or central church authorities, rather than by an independent court or tribunal. The authorities are not obliged to agree to the compounding of liability and do not have to accept amounts proportionate to the lay rector’s individual share of the liability, since it is regarded as a joint and several liability. In the Aston Cantlow case it was very difficult for Mr and Mrs Wallbank to arrange compounding, though eventually a settlement was negotiated with the Aston Cantlow PCC, enabling them to sell their property, pay an amount to cover the cost of all future repairs, and be relieved of further liability.

Lay rectors do not seem now to be regarded as church officials, and it is unclear why the General Assembly considered it had legislative competence to make a law which affects members of the public. The General Synod does not appear to take the same view as it says that it is for Parliament to legislate in what is a civil rather than an ecclesiastical matter. This change may be because the Chancel Repairs Act 1932 transferred the jurisdiction in these matters from the ecclesiastical courts to the county courts. The Ecclesiastical Dilapidations Measure 1923 provided some relief for lay rectors in theory, but its provisions do not satisfy modern requirements under the Human Rights Act 1998 (see below).

The Chancel Repairs Act 1932

The purpose of this legislation was to transfer the jurisdiction of the ecclesiastical courts, that is the diocesan courts known as consistory courts, to the county courts. The case of Hauxton PCC v Stevens (1929) P240 had shocked the public. The Consistory Court of Ely had prosecuted the defendant, a lay rector, for failing to repair the chancel, and had admonished him. As he still refused to repair the chancel he was prosecuted in the High Court, Kings Bench Division for contempt of court, and was sent to prison. A lay rector is liable for a money judgment for chancel repair costs if, having been sent a notice by the PCC requiring him to repair the chancel, he fails to do so, if the ecclesiastical court would have found him to be 'liable to be admonished'. The meaning of that phrase has caused great confusion, as I have explained.

The Tithe Act 1936

This Act has to be interpreted in the same way as the corresponding provisions of the 1839 Act, as mentioned above. This interpretation is quite clear and is consistent with the statements made by the Minister of Agriculture, Mr Elliott, in moving the second reading of clause 31 of the Tithe Bill, on 26 June 1936. He said:

"...the tithe owner will only be liable to pay a proportionate part of the cost of chancel repairs having regard to the amount of the rentcharge owned by him for which he is to receive stock. That is a point of obvious justice, that the Church should

not be able to make a demand for a liability in respect of which the tithe owner is not receiving a sum.”

Mr Elliott was referring to those tithe owners receiving stock as compensation under the proviso to section 31, that is the Universities and Colleges, Deans and Chapters and Church Commissioners.

He went on to say that any existing liability for the repair of chancels which attaches to the ownership of land in which tithe rentcharge was merged under the Act of 1839 or clause 21 of the Bill was to “*remain unaffected*”. So the limitations on the liability imposed in 1839 on the amount which could be claimed for merged rentcharges were to continue unaffected – the annual amount of liability for chancel repairs was limited to the annual amount of the merged tithe rentcharges which had formerly been payable out of the lay rector’s land, not as some might think the amount of the rentcharges which had been payable to the lay rector before extinguishment.

In respect of the rest of that, compensation stock was being issued, so it would not have made sense for the lay rector still to have to pay again in respect of the benefit of extinguished rent-charges that the Church had already been compensated for losing.

In *Aston Cantlow* the Law Lords in my respectful submission wrongly relied on *Wickhambrook* as laying down that Chancel Repair Liability was completely unlimited, an interpretation of the law which seems to have been suggested by a simple reading of the Chancel Repairs Act 1932. It just says that if someone has some liability, he has to pay for all the repairs.

It could have been urged on behalf of the Wallbanks that they no longer held their land “in lieu of tithe”, since tithes no longer existed as a legal concept. Tithes had been abolished in 1839.

The present legal position as laid down in *Aston Cantlow* is rather absurd. Gilbert and Sullivan might have satirised it as comparable to the case of the Lords of the Admiralty being responsible for maintaining her Majesty’s Dockyards and the Naval

Fleet. If their right to receive funding from her Majesty in Parliament to support them were extinguished, but their liability for the maintenance of the Dockyards and the Naval Fleet had continued unaffected, one can imagine their Lordships would have some jolly words to sing about being forced to sell their estates to maintain the Queen's Navy.

The proviso to section 31 of the 1936 Act preserved the liability where certain institutions, including the Church Commissioners, the Deans and Chapters of some Cathedrals, Eton and Winchester Colleges and certain Oxford and Cambridge Colleges, received the compensation stock for the extinguishment of their tithe rentcharges. They opted to continue to accept the chancel repair liability. The compensation stock was provided by the Government and the expense was covered by tithe redemption annuities which continued to be collected by HM Inland Revenue until 1977.

The Dean and Chapter of Hereford Cathedral is one such body which would welcome the extinguishment of chancel repair liability. It is responsible for numerous chancels and the proceeds of the compensation stock it received are in no way sufficient to cover the expense it incurs every year.

Eton College also regards the chancel repair payments it makes as part of its charitable giving as the proceeds of the compensation stock have long since been expended. The body which has the greatest liability under the proviso is probably the Church Commissioners. There is no justification for continuing to impose on such bodies the liabilities which they accepted in 1936.

The Statute Law (Repeals) Act 2004

The forerunner of section 31 of the Tithe Act 1936 was section 1 of the Tithe Act 1839, which is referred to in section 31. Section 31(3) reads as follows:

“In respect of liability to repair arising from the ownership of a tithe rentcharge extinguished by this Act to which the provisions of section 21 of this Act apply, the land out of which the rentcharge issued immediately before the appointed day and the owner thereof for the time being shall be subject to liability to repair in like

manner as if the land had been land to which the provisions of section 1 of the Tithe Act, 1839, apply”.

Section 21 was repealed by the Statute Law (Repeals) Act 2004.

This means there is no longer any liability to repair arising from the ownership of tithe rentcharge to which the provisions of section 21 apply. Section 31(3) has therefore ceased to have effect.

There is nothing in the Law Commission report to suggest that the Law Commission intended this to be the consequence. However, the Courts have to give effect to the legislation and assume Parliament intended to legislate as it did.

The Law Commission thought that section 21 should be repealed as it was “spent”. If that is so, it is unclear when it became spent, as having served its purpose of defining the tithe rentcharges which created the new limited chancel repair liability, on the tithes payable on land owned by lay rectors, it could have been repealed straight away so that there was no longer any such land. Section 21 was in a part of the Act headed ‘transitional provisions’, which may have misled the Law Commission’s statute law revision section.

The Human Rights Act 1998

In the Aston Cantlow case defendants claimed that their human rights were infringed under Article 1 of the First Protocol of the European Convention on Human Rights. When the Church first made its claim the 1998 Act had not yet been brought into effect, but the Courts nevertheless considered the legal position in the context of the new law, at the request of the Church. The jurisprudence of the European Court of Human Rights (ECtHR) has developed considerably since that time. The question arises whether any reform of the law of chancel repair liability would be held to infringe the human rights of the Church, as Lord Irvine believed. Parliament when legislating is not a ‘public authority’. Section 6(3) of the Act states that ‘public

authority' does not include either House of Parliament. So the legislation could not be nullified by a judicial decision, but the Courts could make a declaration of incompatibility, and the ECtHR could order the UK Government to pay compensation to any PCC which considered its human rights had been infringed.

It is much more likely that any lay rectors could successfully claim that their human rights had been infringed by the continuation of claims against them, especially if they were unlimited in amount and unrelated to the value of any rectorial property held by them.

The website of the ECtHR provides access to a Practical Guide on Admissibility Criteria, which has the authority of the Registry of the Court and contains a wealth of information about the way in which complaints of human rights infringements are dealt with and complaints are often declared inadmissible under the criteria. Physical property is not the only kind of asset that is considered to be a 'possession' protected by Article 1 of the First Protocol. Debts and claims are also relevant as assets, but only where they have a sufficient basis in national law, for example where there is settled case law establishing them (paragraph 321). A judgment debt which is sufficiently established as to be enforceable is regarded as an asset (paragraph 322). Prospective future debts or claims, however, are not protected by Article 1. A right to make a claim for repairs becoming necessary in the future, or for which no notice has been served under the Chancel Repairs Act 1932 is a claim to future income, which is not protected (paragraph 330) unless the income has been earned or an enforceable claim for it exists. The Church has in no way earned the right to sue lay rectors for chancel repair costs.

The domestic law is not sufficiently clear or certain, and furthermore the rights claimed by the Church are discriminatory in a way prohibited by Article 14 of the Convention. The law needs to be reformed for that reason, and it seems inconceivable that the ECtHR would find there to have been a breach of the Convention in the enactment of the reforming legislation.

Article 4 prohibits forced or compulsory labour, but excludes from this normal civic obligations. Chancel repair liability is not a normal civic obligation. A lay rector is

not required by law to carry out repairs personally, but if he cannot afford to pay for them, he has no alternative but to use his own labour.

It has even been suggested that chancel repair liability infringes Article 9 (freedom of thought conscience and religion). (*John Burgess – Ecclesiastical Law: Chancel Repair Liability, The Church of England and the Strange Case of Aston Cantlow and Wilmcote with Billesley v Wallbank: A Continuing Crisis for the Church of England? – Word-Power Books, 2007*).

Section 10 of the Human Rights Act 1998 gives remedial powers to Ministers of the Crown or Her Majesty in Council to order a change to the provisions of any legislation that has been declared incompatible with convention rights either by the High Court under section 4 of the Act or by the European Court of Human Rights. Section 10(6) provides that 'legislation' does not include any Measure of the Church Assembly or General Synod of the Church of England.

Church Measures are exempt from the remedial provisions of the Human Rights Act 1998 and primary legislation is necessary to remove any incompatibility in the Ecclesiastical Dilapidations Measure 1923. The Measure does not contain any provision for the assessment of the amount required to compound the liability by an independent court or tribunal, and so it infringes Article 6 of the ECHR, the right to a fair trial.

A remedial order could, nevertheless, be made to supersede the 1923 Measure with new provisions for the fair compounding of liability. However, no such remedial order may be made without a declaration of incompatibility having been made by the courts. Primary legislation will therefore be necessary to bring in the required reforms. The draft Bill set out in the Appendix to the Law Commission Report is long overdue.

Michael Hall

10 March 2011