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MIDGLEY, DECD., *In re.* BARCLAYS BANK LD. *v.* MIDGLEY.

Harman J.

"it is difficult to *see* what reason there is for setting aside "the fund. Therefore I am necessarily driven to the eonclu- "sion that the proper fund to meet the legacies in the present "case is the undisposed-of property according to paragraph 1 of "Part II of Schedule I to the Act." That seems to me, if I may say so, to be right.

I am told, however, this does not apply to a case where there is a trust for sale, and I was referred to a former decision of the same judge, *In re Beaumont's Will Trusts.*[26] The end of the headnote in the Law Reports begins: "*Held,* that, in effect, "no provision at all was made by section 84 (3), with regard to "such things as legacies, so that the law in force before 1926 "applied to the legacies in question, and the pecuniary and "specific legacies and the duty on them were all payable out "of the whole estate before the division of the residuary estate "into four equal parts . . ." The judge purports to follow the case of *In re Thompson."*

The argument that prevailed in *Beaumont's* case[28] was apparently that where there was a trust for sale imposed by the will, that excluded the Act altogether, because it excluded section 33 of the Act. I confess that I do not follow that argument.

In coming to this conclusion, Danckwerts J. did not follow the decision of Eoxburgh J. in *In re Gillctt's Will Trusts,*[29] which was apparently not cited. In that case (it is true on some concessions from counsel) it was held that the first paragraph of the Schedule made the legacies payable out of the undisposed-of property. That rule may not apply when there is no intestacy apparent at the death of the testator. I am not suggesting that anything I say covers such a case; but where, as here, it is apparent that the testator is to some extent intestate at his death and where no contrary intention appears in the will, then, as it seems to me, the effect of the first paragraph of the second part of the Schedule does apply to make the pecuniary legacies payable out of the undisposed of money or property, whatever they may be, and I so hold in this present case.

Declaration accordingly.

• Solicitors: *T. D. Jones & Co. for Hargreaves, Barking; Woodcock, Eyland & Co. for Standring, Taylor & Co., Rochdale.*

P. E. D.

[26] [1950] Ch. 462.
[27] [1936] Ch. 676; [1936] 2 All E.E. 141.
[28] [1950] Ch. 462.
[29] [1950] Ch. 162.

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Wynn-Parry J.

CHIVERS & SONS LD. *v.* AIR MINISTRY. QUEENS' COLLEGE, CAMBEIDGE (THIRD PARTIES).

[1951 C. No. 2436.]

Ecclesiastical Law—Benefice—Burden—Layrectory—Repairs to chancel —Repairs paid for by one impropriator—Claim for contribution to costs from another impropriator—All rectorial lands sold by original impropriator—Burden to repair chancel on owner for the time being of rectorial lands—Not within implied covenant on sale for valuable consideration—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *Sch. II.*

Vendor and Purchaser—Implied covenant—Indemnity as to purchaser's liabilities—Repairs to chancel—Liability not imposed by vendor.

By an enclosure award of 1834 and a private Act of Parliament of 1833 certain lands were allotted to Queens' College, Cambridge, in lieu of rectorial tithes and glebe land and rights of common belonging to the Rectory of Oakington, of which Queens' College was then the sole lay rector. Queens' College conveyed part of those lands to the plaintiffs in 1924, a second part to persons not concerned in this action in June, 1940, and the remainder thereof to the defendant, the Air Ministry, in December, 1940.

On May 16, 1950, the plaintiffs, at the request of the Parochial Church Council of Oakington, paid £80 10s. for the repair of the chancel of the parish church of Oakington. The plaintiffs claimed a contribution from the defendant, as one of the impropriators. The defendant denied that it was an impropriator and contended that Queens' College remained the impropriator notwithstanding the sale of all the rectorial land.

In third party proceedings against Queens' College, the defendant claimed that if it should be held liable to contribute to the cost of the repair of the chancel, it was entitled to compensation under the implied covenant on conveyance for valuable consideration in Schedule II to the Law of Property Act, 1925, as being a liability within the words "claims, and demands, other than those subject "to which the conveyance is expressly made, as ... have been or "shall be made, occasioned, or suffered by that person [the vendor] ". . . ".—

Held, (1) that as the liability to repair the chancel was a personal and several liability which fell on the owner or owners for the time being of the rectorial lands, the plaintiS was entitled to contribution from the defendant.

Wickhambrook Parochial Church Council v. *Croxford* [1935] 2 K.B. 417; 51 T.L.R. 424 applied.

(2) That as the liability to repair the chancel was not imposed by Queens' College but by the combination of the common law, the Enclosure Act of 1833, and the enclosure award of 1834, which attached to the land at the moment Queens' College received it,

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it did not fall within implied covenant under Schedule II, so that the claim against the third parties failed.

David v. ***Sabin*** [1893] 1 Ch. 523; 9 T.L.R. 240 and *Egg v.* ***Blayney*** (1888) **21 Q.B.D.** 107 applied.

Stock v. ***Meakin*** [1900] 1 Ch. **683**; 16 T.L.R. 284 distinguished.

ACTION and third party proceedings.

The plaintiff company, Chivers & Sons Ld., as one of the impropriators of the impropriate rectory of Oakington, in the county of Cambridge, sued the Air Ministry for a declaration that the Ministry was also one of the impropriators of the rectory and as such was liable to maintain or to contribute to the maintenance in a proper state of repair of the chancel of the parish church of Oakington. They also asked for an order that the defendant should pay a proper contribution to the plaintiffs, who, on May 16, 1950, at the request of the Parochial Church Council of Oakington, had paid the sum of £80 10s., which was agreed to represent the reasonable costs of repairs to the chancel effected in November and December, 1949. It was agreed that for the purposes of this case if the defendant was liable so to contribute, the proper basis on which to calculate its liability was by reference to the acreage of the rectorial land held by the plaintiff company and the defendant respectively.

The defendant denied that it was an impropriator of the rectory, and claimed, therefore, that it was not liable to make any such contribution. In case that defence should fail, it had brought third party proceedings against Queens' College, Cambridge, from whom, in that event, it claimed compensation.

The relevant facts were agreed between the parties, and embodied in the "agreed admissions" from which the following statement of facts is taken. By a conveyance dated February 8, in the second year of the reign of Queen Elizabeth I (1559–60), and made between Anthony Pope of the one part and Queens' College of the other part, the said Anthony Pope conveyed unto Queens' College the Lordship and Manor of Oakington in the county of Cambridge, and the rectory and parsonage of Oakington, with all tithes and emoluments belonging thereto, together with the patronage gift and nomination of the vicarage of the parish church of Oakington, and other interests therein contained. By an enclosure award made on November 6, 1834, in pursuance of a private Act of Parliament (8 & 4 Will. 4, c. xv), certain lands were allotted to Queens' College as to part in lieu of rectorial or great tithes and as to part in lieu of glebe lands

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and rights of common belonging to the rectory of Oakington. Before the enclosure award the rectorial property had consisted exclusively of all the great tithes arising within the parish and certain glebe lands and rights of common, and after the enclosure award the rectorial property was replaced exclusively by these lands. During the period between the conveyance of February 8, 1559–1560, and October 1, 1924, Queens' College was the sole lay rector of the impropriate rectory of Oakington, and as such, prior to the award, had been entitled to all tithes, rights of glebe and rights of common appurtenant to the rectory, and thereafter to the lands allotted under the award. By a conveyance dated October 1, 1924, and made between Queens' College of the one part and the plaintiff company of the other part, Queens' College conveyed to the plaintiffs the fee simple in a part of these lands. The plaintiff company had since October 1, 1924, remained and still was the owner of the fee simple in those lands. By a conveyance dated June 7, 1940, Queens' College conveyed a further part of the lands allotted under the award of 1834; Queens' College had not since the conveyance of June 7, 1940, been, and was not now, owner of the land then conveyed, or any part of or interest in it. By a conveyance dated December 9, 1940, and made between Queens' College of the one part and the Secretary of State for Air of the other part, Queens' College conveyed to the Secretary of State for Air the fee simple in the remainder of the lands which they had received under the award. The Secretary of State for Air, or the defendant, had since December 9, 1940, remained and still was the owner in fee simple of that land. The lands conveyed respectively by the three conveyances formed the whole of the lands included in the enclosure award of 1834 which were allotted to Queens' College as rector in lieu of their former rectorial property.

The defendant claimed that Queens' College remained the lay impropriator notwithstanding that they had alienated the whole of the rectorial property; and in the third party proceedings it contended that the conveyance not being expressly subject to the liability to repair the chancel, it was entitled to be indemnified under the covenants implied under Schedule II to the Law of Property Act, 1925.[1]

[1] Law of Property Act, 1925, Sch. II: "Part I. Covenant implied in a conveyance for valuable consideration, other than a mortgage, by a person who conveys and is expressed to convey as beneficial owner. That, notwithstanding anything by the person who so conveys or anyone through whom he derives title otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered . . .

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J. Neville Gray Q.C. and *Peter Foster* for the plaintiffs. The plaintiffs claim contribution from the Air Ministry on the ground that it is one of the impropriators of this rectory. The judgment of the Court of Appeal in *Wickhambrook Parochial Church Council* v. *Croxford*[2] shows, where the rectorial properties are divided up, that: (1) each owner of any portion of it is liable to repair the chancel; (2) each owner is severally liable to pay the whole costs of repairing it, and (3) he is entitled to get back from the other several owners the contribution properly payable by that person. It may be that the Air Ministry can establish some right to compensation against Queens' College, but, as between the plaintiffs and the Air Ministry, the *Wickhambrook* case [2] is clear authority that the plaintiffs are entitled to get back the proper proportion payable by it as an impropriator. A slight indication of how that proportion is to be ascertained is given at the end of the judgment of Romer L.J. in the *Wickhambrook* case.[2] In the present case, if the plaintiffs are entitled to any contribution, it is not disputed that it is based on the proportionate acreage of the impropriators concerned.

Denys Buckley and *H. A. Fisher* for the defendant. The Air Ministry is not liable to contribute to the repair of the chancel; alternatively, if it is so liable it is entitled to be indemnified by Queens' College. That can only be so if on the true construction of the facts the Air Ministry is not, as it contends it is not, one of the impropriators. Before 1834, Queens' College was the sole impropriator and the Air Ministry could only have become an impropriator if the sale of these lands to it in 1940 had deprived the college of its character of impropriator.

Liability to repair the chancel is the personal liability of the rector. The rectory is the name given to the bundle of rights which constitute the rectory, i.e., the compendious name for all the rights and liabilities which go to make up the benefice: see *In re The Alms Corn Charity*.[3] But these are not rights which subsist in perpetuity in particular property. A person could always alienate land in respect of which he was the rector, for

"freed and discharged from, or "otherwise by the person who so "conveys sufficiently indemnified "against, all such estates, incum- "brances, claims, and demands, "other than those subject to which "the conveyance is expressly made, "as, either before or after the date of "the conveyance, have been or shall "be made, occasioned, or suffered by "that person or ... by, through, or "under anyone through whom the "person who so conveys derives title, "otherwise than by purchase for "value; ..."

[2] [1935] 2 K.B. 417; 51 T.L.R. 424.

[3] [1901] 2 Ch. 750.

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instance, where glebe land was exchanged for other land: see Clergy Residences Repair Act, 1776, and Halsbury's Statutes, 2nd ed., vol. 7, p. 712. Tithes have rather a different character, and the court might be more ready to assume on the sale of tithes than on the sale of land that rights were being disposed of which were part of the rectory, although even tithes could be disposed of without the purchaser becoming a rector: see Eagle on Tithes (1836), vol. 1, p. 75. It is clear from that passage that tithes could be disposed of by the rector so that they became severed altogether from the rectory: see also *Williams* v. *Bacon*.[4] A severance should be presumed against even a spiritual impropriator.

It is not suggested that the rector cannot sell the whole or a part of the rectory, but one must see whether what he has sold is or is not the whole of the rectory. The Glebe Lands Act, 1888, which authorized the sale of glebe lands, makes it clear that the purchaser acquires them free from any rights of glebe, and glebe land when disposed of would lose its character of glebe land. In in *re The Alms Corn Charity* [5] the Ecclesiastical Commissioners conveyed the land free from the obligation to repair the chancel of the church, which they could not have done if the plaintiffs be right.

The effect of the Enclosure Act was to vest in the college land on which there was no clog and which could be disposed of freely. The documents relating to the sale to the Air Ministry show that this was not the sale of property carrying part of the liabilities of the rectory; it was merely the sale of a piece of land.

Alternatively, if the Air Ministry is one of the impropriators and has a collateral liability to repair the chancel, it is entitled to be indemnified by Queens' College under the implied covenants contained in Schedule II to the Law of Property Act, 1925: see Wolstenholme and Cherry's Conveyancing Statutes, 2nd ed., vol. 1, p. 637. This liability is a claim or demand, within the meaning of Schedule II, suffered by Queens' College when they accepted the land allotted under the award. The Air Ministry is therefore entitled to be indemnified, unless it had expressly agreed that it should he excluded.

A lay impropriator who becomes entitled to property as part of the rectory is as free to dispose of it as any other landowner, and unless he sells expressly subject to the liability to repair

[4] (1828) 1 Sim. & St. 415.

[5] [1901] 2 Ch. 750.

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the chancel, as was done in *Hauxton Parochial Church Council* v. *Stevens*,[6] the purchaser will take free from that liability.

W s. Wigglesworth for Queens' College. The three impropriators of the rectory are now the plaintiffs, Papworths and the Air Ministry, and Queens' College has wholly ceased to be the lay impropriator. The rectorial property consisted, and still consists, exclusively of the three pieces of land hitherto owned by them, and nothing that Queens' College could do could deprive those pieces of land of their rectorial quality. The duty to repair the chancel is a personal duty imposed by the common law on whosoever may own the rectorial property. The right of the parishioners of Oakington is to have the chancel repaired by the impropriator, and Queens' College has no power to do anything to impair that right, which is against the owners of that land: see the argument of *Errington* in *Hauxton's* case.[7]

It was argued that Queens' College had the option to sell the land as land or as part of the rectory; that is not well founded, as it would mean that the rights of the parishioners could lie either against the owners of the rectorial land or against the sellers who had parted with possession of the land, and who might not have the means to repair the chancel. On that argument the vendor of rectorial land could gravely affect the rights of the parishioners who were not parties to the conveyance. Queens' College cannot choose who should repair the chancel; the common law imposes the duty on the owners for the time being of the rectory.

[WYNN-PARRY J. Of what does the rectory consist?]

It is a bundle of rights attached to property with which Queens' College parted on these conveyances.

[WYNN-PARRY J. You are saying that the nature of the rectory was fixed once and for all by the Enclosure Act and the award?]

Certainly; it would take another Act of Parliament to alter the constitution of the rectory so that it consisted of anything other than these three pieces of land. Although this liability can only be altered by statute, the several owners can among themselves make what arrangements they like.

Hauxton's case [8] is an example of this liability being enforced against the impropriator of the impropriate rectory, who was liable as the person in receipt of the profits. The duty to repair the

[6] [1929] P. 240.
[7] [1929] P. 242, 243.
[8] [1929] P. 240.

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chancel only arises when it is out of repair: *Neville* v. *Kirby*.[9] This liability, which is always a personal duty imposed on the owner of rectorial property, arises not from his having peculiar property or an interest therein, but by the custom of the realm. This duty was imposed by the common law on the rector not because the chancel was vested in him—the rest of the church was equally vested in him—but as the owner of the profits of the benefice; it is based on the principle that he who has the benefit of the emolument must bear the burden.

This is not a charge on the land; it is a claim or demand affecting the land, for failure to perform which the owner of the land was liable to be admonished before the Chancel Repairs Act, 1932.

The position under the Tithe Act, 1936, in respect of tithe rentcharge is a parallel case; it is a modern example where the liability falls on whoever is the owner of the particular land. In *Wickhambrook Parochial Church Council* v. *Croxford*[10] the owners of a severed rentcharge were all held to be liable.

The Clergy Residences Repair Act does not assist the defendant in this case, as that relates to sales under statute, and it is conceded that property could lose its rectorial character by statute. *Williams* v. *Bacon* [11] was cited as an example of how a spiritual rector could convey away tithes, but that is no authority for the proposition that the grantee of part of rectorial land should be free of the liability to repair the chancel. In *Hauxton's* case [12] the parishioners would have had the right to demand that all the owners should repair the chancel, and the Ecclesiastical Commissioners could have done nothing to alter that right as between the several owners, because there is an apportionment of liability. Section 31 and Schedule VII of the Tithe Act, 1936, made provision for the apportionment of the liability to repair the chancel which attached to tithe rentcharge.

Queens' College admit that this liability was overlooked by their solicitors when the preliminary inquiries were answered, but it was equally overlooked by the solicitors for the Air Ministry, as the abstract of title began and ended with the award under the Enclosure Act. [He referred to the Enclosure Act, 1833, ss. xxxii to xxxv.] The abstract showed plainly that these lands were being allotted in lieu of rectorial property, such as glebes, tithes and rights of common. The Ministry's solicitors had the

[9] [1898] P. 160.
[10] [1935] 2 K.B. 417.
[11] 1 Sim. & St. 415.
[12] [1929] P. 240.

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opportunity of raising the point and should have done so; if it were not raised that would constitute a defence to an action for specific performance.

The form of the covenants contained in Schedule II to the Law of Property Act is not new; it represented the practice of conveyancers over a long period: see *Browning* v. *Wright* [13]; *David* v. *Sabin*,[14] and Wolstenholme and Cherry's Conveyancing Statutes, 2nd ed., vol. 1, pp. 637–8. The covenant is governed by the opening words: see *David* v. *Sabin*,[14] *per* Lindley L.J.[15] Queens' College received these lands under the award by way of exchange; that constitutes a purchase for value and the covenants extend only to the acts and omissions of Queens' College between the award of 1834 and the conveyance to the Air Ministry of 1940. The liability to repair the chancel arose under a combination of the common law, the Enclosure Act and the award of 1834, and was not imposed on Queens' College by any act or omission by them after the purchase. The liability was not something "suffered" by Queens' College within the meaning of the schedule, which means something which a person could avoid, otherwise it would cover all kinds of liabilities imposed on a landowner. Queens' College could not help this liability accruing to them as owners; it attached to them at the moment they received the land from the Ecclesiastical Commissioners. The liability is not, therefore, within the covenants.

Buckley in reply. There is nothing in the cases to support the contention that the parochial church council had rights which had crystallized for all time in the land awarded under the Enclosure Act. In *Hauxton's* case [16] this was not considered to be so, and it was held there to be a matter of construction of the relevant documents; but if the argument for Queens' College be right the chancellor could not have so held. It begs the question to say that the parishioners' rights are against the owners of the land; they are against the person entitled to the benefice. The Tithe Act cannot be relied on to show that this liability attaches to particular land: see Millard's Tithes, 3rd ed., p. 143.

It was never part of the case for the Ministry that the lay rector may not sell part of his rectorial property if he adopts the right procedure, but no case has been cited where the purchaser has become one of the lay impropriators. Eagle on Tithes (p. 75) shows that a lay impropriator has an absolute right to alienate the rectorial property without ceasing to be the impropriator.

[13] (1799) 2 Bos. & P. 13.
[14] [1893] 1 Ch. 523; 9 T.L.R. 240.
[15] [1893] 1 Ch. 531.
[16] [1929] P. 240.

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Williams v. *Bacon* [17] is relied on not because it has anything to do with the repair of a chancel, but for the principle that a lay rector can dispose of part of his tithe lands apart from the rectory. Even where he has parted with the land the rector is the person liable to repair the chancel; the liability rests on the rector and his successors.

This liability, although it was not anything done or omitted by Queens' College, was "suffered" by them because, when the property vested in them, this liability attached to it. In these covenants "suffered" does not mean something which the owner has omitted to do; it means something to which the owner has become subject, and knows that he is subject to it. Thus, in Stock v. *Meakin* [18] it was held that the apportioned expenses of private street works was an incumbrance "suffered" by the vendor.

Wigglesworth in reply. The qualifying words preclude Queens' College from being liable on the covenants. The distinction between *Stock* v. *Meakin* [18] and this case is that expenses under the Private Street Works Act, 1892, constituted a charge on the land. This liability is not a charge on the land; it cannot be asserted against Queens' College after they had parted with the land. This case is more like *Egg* v. *Blayney*.[19] Alternatively, the words of Lord Eldon in *Browning* v. *Wright*,[20] that the property was transmitted in the condition in which it was received, are relied on.

Gray Q.C., in reply, adopted the argument of Wigglesworth, and referred to *Rex* v. St. *Edmundsbury and Ipswich Diocese (Chancellor)*.[21]

Cur. adv. vult.

May 27. WYNN-PAREY J. read a judgment, in which he stated the facts and continued: It has long been established that the liability of an impropriator of a lay rectory to maintain the chancel is rested on the maxim that he who has the profits of the benefice should bear that burden. This burden is imposed for the benefit of the parishioners who by the custom of England have the liability to repair the nave but the corresponding right to require the rector to repair the chancel, and the rector, in turn, has the rectorial property out of the profits of which he is considered to have the means to do this. The history of the

[17] 1 Sim. 4 St. 415.
[18] [1900] 1 Ch. 683; 16 T.L.R. 284.
[19] (1888) 21 Q.B.D. 107.
[20] 2 Bos. & P. 13.
[21] [1948] 1 K.B. 195; 63 T.L.R. 523; [1947] 2 All E.R. 170.

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matter is dealt with at length by the Court of Appeal in *Wickhambrook Parochial Church Council* v. *Croxford*,[1] and there is no need for me to refer to the older authorities which were so exhaustively reviewed in that case. It is sufficient for me to say that, as that case shows, the liability, which, where there is more than one impropriator, is a several and not a joint liability, is not a charge on the rectorial property, but a personal liability imposed on the owner or owners for the time being of the rectorial property. Before the decision in *Wickhambrook Parochial Church Council* v. *Croxford*[1] it was thought by Writers that the liability of an impropriator was limited to the profits which he derived from the rectorial property, but in that case the Court of Appeal held that it is not so limited. As I read the judgments in that case, they proceed on the basis that the duty to repair the chancel arises out of the fact of owning the rectorial property or some of it, and that the only question left open was the extent of the liability. If that be a correct appreciation of the basis of those judgments, it follows that in order to decide who is liable to repair the chancel of a church, all that is necessary is to find the owner of the rectorial property. If there is only one owner, he is solely liable. If there is more than one owner, each is severally liable.

Mr. Buckley, however, contended that this is not the test. He submitted that although Queens' College had alienated the whole of the rectorial property they still constituted the lay rector. What they had done by the several transactions to which I have referred, was, according to him, merely to substitute one type of property, namely, cash, for the previous property, namely, land. They might, he said reinvest these proceeds of sale in land, and that land would then constitute the rectorial property. His proposition appears to me to involve saying "once a rector, "always a rector," and further to involve shutting one's eyes to the reality of a transaction involving, according to the language of the documents brought into existence to evidence it, a sale of rectorial property.

In the case of the conveyance of December 9, 1940, by Queens' College to the defendant, and of each of the documents which preceded it, they proceed on the basis that Queens' College are selling and conveying Queens' College land, which in fact is rectorial land. If the transaction is indeed a sale and transfer, with what show of reasoning can it be said that Queens' College

[1] [1935] 2 K.B. 417; 51 T.L.R. 424.

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retained in respect of the land sold and transferred that personal liability to repair the chancel, which attaches to the owner of rectorial property? It was urged that the documents are silent as to this liability, and that therefore Queens' College must be taken to have intended to retain the liability. I am quite unable to accept this argument. The abstract of title shows upon the face of it that the subject-matter of the sale is rectorial land, and in my view it would necessarily follow that the duty of repairing the chancel of Oakington Parish Church would pass to the defendant on the conveyance of the property to it whatever was inserted in or omitted from the conveyance. In my judgment an express clause in the conveyance designed to provide for the retention by Queens' College of the personal liability to repair in exoneration of the defendant would have been quite ineffective against a subsequent claim by the Parochial Church Council against the defendant. The most that could have been achieved by the conveyance, to which the Parochial Church Council was not a party, would have been the inclusion of a provision by which Queens' College indemnified the defendant against any claim by the Parochial Church Council in connexion with the repair of the chancel: see *Hauxton Parochial Church Council* v. *Stevens*,[2] where on the sale of most but not the whole of the lands of a rectory there was as between the Ecclesiastical Commissioners as vendors and the purchaser a covenant to repair the chancel.

Lay rectors, as constrasted with spiritual rectors, have always enjoyed the right freely to alienate the rectorial property; and on a sale by a lay rector, or for that matter one of several impropriators of a lay rectory, of the whole of his interest in the rectorial property, he could not before the Chancel Eepairs Act, 1982, have been admonished to repair the chancel, for having no longer any interest in the rectorial property he would not have been a proper object of admonishment, and therefore no money judgment could be given against him since the passing of that Act. The action therefore succeeds.

I turn now to the claim in the third party proceedings. Mr. Wigglesworth, on behalf of Queens' College, admitted that the solicitors for Queens' College overlooked the liability to repair the chancel when negotiating for and carrying through the sale to the defendant; but he pointed out with force that the abstract of title began and ended with the enclosure award, which showed

[2] [1929] P. 240.

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that the lands in question were allotted in lieu of rectorial property to Queens' College as impropriators, and therefore the solicitors acting for the defendant had full opportunity of raising the point on the requisitions. The matter, however, proceeded to conveyance, and in the result the case against Queens' College is rested solely on the implied covenants in Schedule II to the Law of Property Act, 1925.

Mr. Buckley's case is that the liability to repair the chancel falls within the words "claims, and demands, other than those "subject to which the conveyance is expressly made, as, either "before or after the date of the conveyance, have been or shall "be made, occasioned, or suffered by that person . . ." In his submission the result of the parcels being vested in Queens' College was to subject the college to the liability to repair, and therefore by accepting the allotment the college suffered the liability to claims or demands to repair the chancel to arise.

In *Browning* v. *Wright*,[3] Lord Eldon, sitting as Chief Justice, said[4]: "This transaction is a purchase of an estate of inheritance "in fee, and the first question is, what will be the nature and "effect of a conveyance carrying such a contract into execution? "If a man purchase an estate of inheritance and afterwards sell "it, it is to be understood prima facie that he sells the estate as "he received it: and the purchaser takes the premises granted "by him with covenants against his acts. If the vendor has "taken by descent, he covenants against his acts and those of "his ancestor; and if by devise, it is not unusual for him to "covenant against the acts of the devisor as well as his own. "In fact, he says, I sell this land in the same plight that I "received it, and not in any degree made worse by me. It was "argued, that if this were so, a man who has only an estate for "life, might convey an estate in fee, and yet not be liable to "the purchaser. This seems at first to involve a degree of "injustice, but it all depends on the fact, whether the vendor "be really putting the purchaser into the same situation in "which he stood himself. If he has bought an estate in fee, "and at the time of the re-sale has but an estate for life, it must "have been reduced to that estate by his own act, and in that "case the purchaser will be protected by the vendor's covenants "against any act done by himself. But if the defect in his title "depend upon the acts of those who had the estate before him, "and he honestly but ignorantly proposes to another person to

[3] (1799) 2 Bos. & P. 13. [4] Ibid. 22.

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"stand in his situation, neither hardship or injustice can ensue. "What is the common course of business in such a case? An "abstract is laid before the purchaser's counsel; and though to "a certain extent he relies on the vendor's covenants, still his "chief attention is directed to ascertaining what is the estate, "and how far it is supported by the title. The purchaser, "therefore, not being misled by the vendor, makes up his mind "whether he shall complete his bargain or not, and if any doubts "arise on the title, it rests with the vendor to determine whether "he will satisfy those doubts by covenants more or less extensive. "Prima facie, therefore, in the conveyance of an estate of "inheritance, we are led to expect no other covenants than those "which guard against the acts of the vendor and his heirs."

In *David* v. *Sabin*[5] Lindley L.J. said[6]: "On looking at the "covenant set out in section 7 (1) (A), of the Conveyancing Act, "1881, it will be seen that the covenants for right to convey, "for quiet enjoyment, freedom from incumbrances, and for "further assurance, are not four separate and distinct covenants, "but parts of one entire covenant beginning with and controlled "throughout by the words, 'That notwithstanding anything by "'the person who so conveys, or any one through whom he "'derives title, otherwise than by purchase for value.' These "words render a vendor's covenant a qualified covenant, and "not an absolute warranty of title, as is the covenant by a "mortgagor who conveys as beneficial owner (see clause C of "the same section). The statute has, in this respect, followed "the long-established and well-known practice of conveyancers, "as may be seen from *Browning* v. *Wright*,[7] *Church* v. *Brown*,[8] "and the ordinary forms of conveyances. But, although a "vendor's covenant for title is not an absolute warranty of title, "it is very wide. The acts and omissions covenanted against "are reducible to four heads—viz., (1) the acts and omissions of "the vendor himself; (2) the acts and omissions of persons "through whom he claims otherwise than by purchase for value; "(3) the acts and omissions of persons claiming through him; "(4) the acts and omissions of persons claiming in trust for "him."

As Lindley L.J.[9] points out, the covenant is one and is controlled throughout by the opening words. The covenant extends, therefore, to the acts and omissions of the vendor and

[5] [1893] 1 Ch. 523; 9 T.L.R. 240. [6] [1893] 1 Ch. 531. [7] 2 Bos. & P. 13. [8] (1808) 15 Ves. 258, 263. [9] [1893] 1 Ch. 531.

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to the acts and omissions of anyone who has conveyed to him otherwise than for value. It is clear to my mind that Queens' College received the lands allotted to them under the enclosure award of 1834 by way of exchange and therefore that they were in the position of purchasers for value. Thus the covenants for title extend to the acts and omissions of Queens' College between the date of the award, November 6, 1834, and the conveyance to the defendant of December 9, 1940. Queens' College did not impose the liability to repair the chancel of Oakington Parish Church on the owner for the time being of the land in question. That liability was imposed by a combination of the common law, the Enclosure Act of 1833, and the enclosure award of 1834. It is a liability which attached to the owner of the land in the moment in which Queens' College received the lands by allotment under the enclosure award. That was the plight in which the college received it. Thus it follows that the liability is not one which is covered by the implied covenants in Schedule II to the Law of Property Act, 1925.

I should perhaps refer to *Stock* v. *Meakin*,[10] on which Mr. Buckley relied. The headnote to that case reads as follows: "The amount of the apportioned expenses of private "street works executed by a local authority under the Private "Street Works Act, 1892, becomes a charge on the premises in "respect of which they are apportioned as from the date of the "completion of the works, and not merely as from the date of "the final apportionment. If, therefore, the premises are sold "by the owner free from incumbrances after the completion of "the works, but before the date of the final apportionment, the "vendor must indemnify the purchaser against the sum finally "apportioned in respect of the premises."

Towards the end of his judgment, which was the judgment of the court, Vaughan Williams L.J. said [11]: "The charge takes "effect under the Act of 1875 before the apportionment is made, "and in our judgment it is intended that this shall be so under "the Act of 1892. If this view is right, we have no doubt that "this charge is an 'outgoing' which the vendor was bound by "his contract to discharge. We also have no doubt that the "charge is an 'incumbrance, claim or demand suffered' by "the vendor, notwithstanding the fact that the expenses were "incurred without any default on his part, and that the time for

[10] [1900] 1 Ch. 683; 16 T.L.R. 284. [11] [1900] 1 Ch. 694.

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"payment had not arrived before the conveyance was executed. "Nor have we any doubt that this charge is inconsistent with "the express terms of the conveyance."

Apart from the circumstance that the liability in question became a charge on the premises, in contrast to the liability under consideration in this ease, it is clear that the claim or demand to which the Court of Appeal held that that liability gave rise was a claim or demand suffered by the vendor during his ownership, and on that ground the case is distinguishable from the present case.

Egg v. *Blayney* [12] more nearly approaches this case. The headnote reads as follows: "The expenses of paving a new street "apportioned under section 77 of the Metropolis Management "Amendment Act, 1862, are not a charge upon the property in "respect of which they are payable, and therefore if the owner "sells the property while the expenses are unpaid, and conveys as "beneficial owner, and the purchaser is compelled to pay such "expenses, the purchaser cannot recover the amount so paid from "the vendor under the implied covenant against incumbrances "contained in the conveyance by virtue of section 7 (1) (A) of "the Conveyancing and Law of Property Act, 1881."

In the course of his judgment Field J. said [13]: "If this were "a charge under the Public Health Act, 1875 (38 & 39 Vict. "c. 55), the plaintiff's contention would be correct, for that "Act, by section 257, expressly makes the expenses a charge "upon the land, as was held by North J. in the ease of *In re "Bettesworth and Richer*.[14] In the Act now before us, how"ever, there is nothing which makes these expenses a charge "on the land, and, therefore, it was only a claim or demand "upon the defendant personally up to the time of the sale, and "did not affect the land. The county court judge was, therefore, "right in holding that it was not an incumbranpe within the "meaning of the statutory implied covenant."

Wills J. said [15]: "I am of the same opinion. It is clear that "there is no charge upon the land in the present case, but only "successive personal liabilities imposed upon the successive "owners, and therefore there is no liability under the implied "covenant."

[12] (1888) 21 Q.B.D. 107.
[13] Ibid. 108.
[14] (1888) 37 Ch.D. 535; 4 T.L.R. 248.
[15] 21 Q.B.D. 108.

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For these reasons I am of opinion that the claim in the third party proceedings must fail.

Judgment for the plaintiffs in the action; defendant's claim in third party proceedings dismissed.

Solicitors: *Field, Roscoe & Co. for Ginn & Co., Cambridge; Treasury Solicitor; Taylor, Jelf & Co. for Francis & Co., Cambridge.*

I. G. E. M.

C. A.

1955 Feb. 28; March 17.

Evershed M.R. Jenkins and Romer L.JJ.

In re MAJORY, A DEBTOR.
Ex parte THE DEBTOR *v.* F. A. DUMONT LD.

[No. 757 of 1954.]

Bankruptcy—Extortion—Costs wrongly demanded—Writ issued—Costs offered by debtor—Judgment debt—Demand for offered costs—Whether subsequent bankruptcy petition tainted.
Practice and Procedure—Abuse of process.

After issue of a specially indorsed writ claiming £800 for money lent with £12 5s. costs, but before the issue of any judgment summons, the debtor visited the solicitors acting for the creditor and, having admitted the debt, offered to make an arrangement whereby he could pay off the debt by instalments. The solicitors said that, in addition to being satisfied as to the arrangement, their client might require the debtor to pay all the costs which he, the creditor, had had to incur. The debtor agreed to do so. No mention was made at that stage of bankruptcy proceedings, but the solicitors said that their instructions did not permit them to delay issuing a summons for judgment, and a summons was in fact issued. The debtor's solicitors wrote confirming the offer made to pay by instalments, and adding that the debtor was prepared to pay "your reasonable costs." After judgment was obtained, the creditor's solicitors informed the debtor's solicitors that the offer made by the debtor was unacceptable, and that deferment, if any, could only be on immediate payment of £440 and the balance to be paid in two instalments. The amount of the costs to be paid in addition was stated to be £21, i.e., £8 15s. more than that awarded by the judgment, representing the full amount of legal costs which the creditor had incurred. In bankruptcy proceedings which followed the debtor disputed the petition and opposed the making of a receiving order on the ground that the creditor had attempted in connexion with the proceedings to extort £8 15s. from the debtor in excess of the sums lawfully due:—

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MAJORY, *In re.*

Held, (1) that there was no hard-and-fast rule that any agreement made by a creditor with his debtor after the institution or under the shadow of bankruptcy proceedings whereby the creditor was able to get more than he could have recovered at law amounted to "extortion" in bankruptcy law.

In re Bebro [1900] 2 Q.B. 316 applied.

(2) That "extortion" in bankruptcy law was not used in any special or artificial sense divorced from its ordinary meaning.

(3) That while, in general, court proceedings, whether bankruptcy or otherwise, could not be used to obtain for a person some collateral advantage, and a party so using them would be guilty of abusing the process of the court, in bankruptcy proceedings the court would always look strictly at the conduct of the creditor using or threatening such proceedings, and if it concluded that he had acted oppressively the court would not hesitate to declare the creditor's conduct extortionate and would refuse to allow him to make use of the process.

Principle in *In re a Judgment Summons (No. 25 of 1952); Ex parte Henlys Ld.* [1953] Ch. 195; [1953] 1 All E.R. 424 applied.

In re a Debtor (No. 883 of 1927) [1928] Ch. 199 distinguished.

(4) That, on the facts, the creditor was not guilty of extortion, for the promise by the debtor to pay costs was given before any mention of bankruptcy proceedings and even before the issue of the judgment summons, and was not given as the result of any threat by the creditor.

APPEAL from Mr. Eegistrar Bowyer.

On August 9, 1954, F. A. Dumont Ld. issued a specially indorsed writ in the Queen's Bench Division of the High Court claiming £800 for money lent and costs amounting to £12 5s. The writ was served on the debtor, George Julius Majory, on August 20. On August 31 the debtor of his own volition called on the solicitors acting for the creditor, and at an interview with their managing clerk, he, the debtor, suggested that he should make an arrangement whereby commission due to a company, Hingeless Products Ld., which, he said, was controlled by him and his wife, from a company known as Thurloe Holdings Ld., should be paid direct to the creditor to discharge his debt of £800, together with a further sum of £40, the amount which the debtor admitted was owing. The managing clerk said that, in addition to being satisfied as to the proposed arrangement with the two companies, his client might require that the debtor should discharge all the costs that the creditor had had to incur over the matter. To this the debtor agreed. No mention was made of bankruptcy proceedings, but the debtor was informed that the instructions given to the solicitors by their client did not permit them to delay issuing a summons for judgment. A