1928
Oct. 8, 20.

[IN THE CONSISTORY COURT OF ELY.]

HAUXTON PAROCHIAL CHURCH COUNCIL *v.* STEVENS.

Ecclesiastical Law—Repair of Chancel of Parish Church—Liability of Impropriator—No Notice in Conveyance.

The impropriator of an impropriate rectory in the receipt of the profits thereof is personally liable for the repair of the chancel of the parish church although at the time of the conveyance to him of the lands forming part of the rectory he had no notice of the liability.

CAUSE of office at the promotion of the churchwardens and parochial church council of Hauxton against the defendant J. H. Stevens as impropriator of certain lands, claiming that he was liable for repairs to the chancel of Hauxton Parish Church.

The claim came on for hearing before the Chancellor of the Diocese of Ely, Mr. Kenneth M. Macmorran. The following statement of facts is taken from the written judgment:

"The facts of the case are, in the main, not disputed. So far as there is a dispute I find them to be as follows: Hauxton and Newton are contiguous parishes in this diocese, the benefices in which have been united for hundreds of years, under the name of Hauxton-with-Newton or Hauxton-cum-Newton. The chancel of Hauxton Church is in serious need of repair, and an estimate procured two years ago put the cost of necessary repairs at about 30*l.* This figure would probably be exceeded if a new estimate were now obtained. At the time of the estimate the defendant, Mr. Stevens, was asked to carry out the repairs, but he then refused and still refuses to do so.

In 1798 there was passed an Inclosure Act (38 Geo. 3, private Act, Number 55), the preamble to which recites that the Dean and Chapter of Ely are the owners of the great tithes arising and renewing from certain parts of land lying in the parishes of Harston, Hauxton, Little Shelford and Newton, and are lords of the manor of Newton-with-Hauxton, and are impropriators of the impropriate rectory of

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Newton-with-Hauxton and in right thereof are entitled to the rectorial tithes. The Act provided that commissioners appointed by the Act were to allot to the impropriators such lands as should be a full equivalent and compensation for the said tithes, and also to make an allotment in lieu of tithes and other payments due to the impropriators. Upon the allotments being awarded the tithes were to be extinguished, and the lands so allotted were to enure to the same uses and subject to the same charges, services and incumbrances. The Act in effect took away the tithe and the right to receive tithe, and substituted land. The award under the Act was made in 1802, and by it were allotted to the Dean and Chapter as impropriators three allotments lying in Hollick Meadow, Fen Meadow and Pessils Field, and, as lords of the manor, an allotment lying in Church Field. In 1863 the Dean and Chapter granted to one Henry Hurrell a lease for twenty-one years of the allotments above referred to, other than that lying in Fen Meadow. I may mention that the Fen Meadow allotment was relatively a small proportion of the total acreage under the award. This lease contains a covenant binding on the lessee to repair the chancel of Hauxton Church. The next steps in this complicated history are two Orders in Council, one of which, in 1869, transferred the rectory of Hauxton with its endowments to the Ecclesiastical Commissioners, and the other, in 1870, authorized the commissioners to sell. The commissioners did sell, in 1871, to the same Henry Hurrell as had been the lessee of the three allotments since 1863. The land so purchased amounted to 48 a. 2 r. and 13 p., and it is interesting to note that it comprised all the land originally allotted except the Fen Meadow allotment. The conveyance is subject to a perpetual covenant to repair the chancel of Hauxton Church, and the payment to the vicar of 4*l.* 1*s.* 8*d.* in tithe commutation rentcharge. Lastly, in 1916, one Arthur Hurrell, to whom had descended the estate of his father, Henry Hurrell, sold to Mr. Stevens, the present defendant, all the property comprised in the conveyance of 1871, with a certain small addition. The indenture recites that Arthur Hurrell is seised

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in fee simple free from incumbrances, and no reference is made to the conveyance of 1871. It is here that a dispute of fact arises between the parties. Mr. Hurrell, who gave evidence before me, stated that he told Mr. Stevens about the liability in respect of the chancel. Mr. Stevens, on the other hand, denies this, and says that he first heard of the claim in 1922. [The learned Chancellor then discussed the evidence and continued:] While, therefore, making no imputation against Mr. Stevens' veracity, I am prepared to hold that he had notice of the liability when he bought in 1916."

F. H. L. Errington for the council. The defendant, as impropriator of the impropriate rectory of Hauxton, is liable for the repair of the chancel: *Serjeant Davies' Case.* (1) This liability does not constitute a charge but is a personal duty: *Walwyn* v. *Awberry.* (2) By rectory or parsonage is meant the sum total of its endowments: *In re The Alms Corn Charity.* (3) The mere fact that the freehold of the chancel is in the rector does not impose the liability, because the freehold of the whole church is in him; his liability has its origin in custom: Gibson's Codex, vol. i., p. 223; Phillimore's Ecclesiastical Law, 2nd ed., vol. ii., p. 1416; and *Griffin* v. *Dighton.* (4) The reference to the freehold in the judgment in *Morley* v. *Leacroft* (5) is a slip. The liability is imposed because the rector has the profits and should therefore have the burden: *Griffin* v. *Dighton* (4); *Smallbones* v. *Edney* (6); Watson's Clergyman's Law, p. 394; Ayliffe's Parergon, p. 457; and Phillimore's Ecclesiastical Law, 2nd ed., vol. ii., p. 1415; and if the profits are divided amongst several persons, all those persons are liable for the repair and must settle the proportions among themselves: Burn's Ecclesiastical Law, 9th ed., vol. i., p. 352; Rogers' Ecclesiastical Law, 2nd ed., p. 161. It is true that the rectory was not conveyed by the conveyance of 1871, and the defendant alleges that the persons then conveying are the lay rector and as such are liable. But all that he can

(1) (1621) 2 Rolle, 211.
(2) (1676) 2 Mod. 254, 258.
(3) [1901] 2 Ch. 750, 758.
(4) (1864) 5 B. & S. 93.
(5) [1896] P. 92, 93.
(6) (1870) L. R. 3 P. C. 444.

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have is the freehold of the rectory, while the defendant has the profits. If the defendant's contention is right it would be easy to get rid of the liability to repair and throw it on the parishioners—namely, by selling the property of the rectory to A., and the rectory itself to B. A. could then urge that he was not lay rector and B. could say that he had no profits from the rectory, and there would be no necessity for the provisions of s. 52 of the Ecclesiastical Dilapidations Measure, 1923 (14 & 15 Geo. 5, No. 3). The fact that the respondent had not notice cannot affect his personal liability. In fact, as he had complied with other obligations imposed by the conveyance of 1871 it is clear that he must have had notice of its contents.

[*Walwyn* v. *Awberry* (1); *Bishop of Ely* v. *Gibbons* (2); *Slowman* v. *Churchwardens of Longrevil* (3); and *Lanchbury* v. *Bode* (4) were also referred to.]

G. A. Wootten (solicitor) for the respondent. The respondent had no notice of this liability when he purchased the land, and the conveyance recited that the land was free from incumbrances. The respondent is not lay rector and has no right to a seat in the chancel. Moreover he pays tithe rentcharge and cannot therefore be called upon to pay for these repairs.

1928. Oct. 20. THE CHANCELLOR (MR. KENNETH M. MACMORRAN). In this case the office of the judge of this Court is promoted at the instance of the parochial church council of Hauxton against John Herbert Stevens, who is charged by them with the liability to repair the chancel of the parish church, which liability he repudiates. [The learned Chancellor stated the facts as above set out and continued:]

On this finding, I believe that the only defence which is seriously raised breaks down. But in view of Mr. Errington's interesting argument I think I should also deal with this case apart from the question of notice. In *Serjeant Davies' Case* (5) it is stated that he who has the

(1) 2 Mod. 254.
(2) (1833) 4 Hagg. 156.
(3) (1670) 2 Keb. 742.
(4) [1898] 2 Ch. 120.
(5) 2 Rolle, 211.

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impropriation of the rectory or parsonage ought to repair the chancel, and ought to contribute to the repair of the church. In *Walwyn* v. *Awberry* (1) Atkins J. said (2) it was agreed by all, that an impropriator is chargeable with the repairs of the chancel; but the charge was not personal but in regard of the profits of the impropriation; and to this may be added the observations of Mellish L.J. in *Smallbones* v. *Edney* (3), where he explains the liability of a tithe owner.

It seems, therefore, clear on the above mentioned authorities that the liability in this case attaches to the profits accruing to the benefice (by which I mean the impropriated benefice), and the person who receives the profits becomes by virtue of such receipt liable for the repair of the chancel. On this aspect of the case, notice of the liability is not material in the sense that a purchaser can escape liability merely by pleading ignorance of the liability at the time of his purchase. The question of notice thus becomes a matter between Mr. Stevens and his vendor.

The result, then, appears to me to be capable of enunciation as follows: I find as a fact that Mr. Stevens is, on the true construction of the relevant documents, the impropriator of the impropriate rectory or a substantial part thereof, and is the owner of lands forming the greater part of the rectory, and is in the receipt of the rents and profits of such lands. I further find that when he purchased the lands in 1916 he had notice of the liability to repair the chancel of Hauxton Church attaching to the rents and profits of the lands so purchased, though I also hold that notice was not material for the purposes of this case. In these circumstances I have no alternative but to pronounce that Mr. Stevens has herein offended against the law and that he be and hereby is admonished forthwith to put the chancel of Hauxton Church into proper repair and condition. Mr. Stevens must further pay the costs of these proceedings.

Solicitors for plaintiffs: *Crawley, Arnold & Co.*

Solicitors for defendant: *Wootten & Wallis, Cambridge.*

(1) 2 Mod. 254. (2) 2 Mod. 258.

(3) (1870) L. R. 3 P. C. 444, 450.

W. L. L. B.

VIGON *v.* VIGON AND KUTTNER.

C. A.

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April 19.

Divorce—Practice—Custody of Child—Previous Order of Court of Summary Jurisdiction—Variation of Order—Guardianship of Infants Acts, 1886 *and* 1925 (49 & 50 *Vict. c.* 27 *and* 15 & 16 *Geo.* 5, *c.* 45).

APPEAL from a decision of Bateson J. (1)

On September 15, 1927, the wife obtained from a Court of summary jurisdiction an order under the Guardianship of Infants Acts, 1886 and 1925, for the custody of the child of the marriage, a boy born on April 1, 1926. On

not be drawn up for one month. That would give the opportunity of informing the Court of summary jurisdiction that he had found the wife guilty of adultery, and that he thought that the husband should have the custody of the child.

The wife appealed. The appeal was heard on April 19, 1929.

S. R. Sidebottom for the wife.

H. Durley Grazebrook for the husband.

(1) Ante, p. 157.