(1929). P. 244.
1935; 2 K.B. 424.

[254] CASE 146. WALWYN *against* AWBERRY AND OTHERS.

Tithes of a rectory shall not be *sequestered* for repairs of the chancel.—S. C. 1 Mod. 258. S. C. 2 Vent. 35. S. C. 1 Freem. 230.

Trespass for the taking and carrying away of four loads of wheat, and four loads of rye, &c. The defendants justify, for that the plaintiff is rector of the rectory impropriate of B. and that the chancel was out of repair, and that the Bishop of Hereford, after monition first given to the plaintiff, had granted a sequestration of the tythes of the rectory for the repairing the chancel; and that the defendants were churchwardens of the parish; and that the particulars mentioned in the declaration were tythes belonging to the plaintiff as rector foresaid; and that by virtue of the said commission they took the same for repairing of the said chancel, and that for these tythes so taken they had accounted to the bishop. To this the plaintiff demurred.

The question was, whether *an impropriate rectory* be chargeable for the repairs of the chancel by the sequestration of the tythes by the bishop?

Those who argued in the negative for the plaintiff could not deny, but that church reparations did belong to the Ecclesiastical Courts, and that as often as prohibitions have been prayed to that jurisdiction, consultations have been as often granted; notwithstanding in many cases the rates for such reparations have been very unequally imposed; and the reason is, because those Courts have original jurisdiction of the matter. It was admitted also, that parishioners are bound to repair the church, and the rector the chancel, and this in respect of their lands; and therefore if a man hath lands in one town and dwell in another, he shall be contributory to the reparation of that church where his lands are, and not where he inhabits; and that all this was by the common custom of England long before the making of the statute of 31 Hen. 8, c. 13, by which parsonages were made lay fees. But then it must be understood, that this was no real duty incumbent upon them, but was a personal burthen, for which every parishioner was chargeable proportionably to the quantity of land which he held in the parish; in which case if he refused to be contributory, the Ordinary did never intermeddle with the possessions, but always proceeded by ecclesiastical censures, as excommunication of the party refusing; which is the proper remedy. **[255]** But in case of an appropriation in the hands of an ecclesiastical corporation, as dean and chapter, &c. there, if a refusal be to contribute to the repairs, the Ordinary may sequester; and the reason is, because a corporation cannot be excommunicated. The Ordinary may also sequester in things of ecclesiastical cognizance, as if the King do not present; so he may take the profits within the six months that the patron hath to present, and apply them to the pastor of the church by him recommended, because the Ordinary hath a provisional superintendency of the church; and there is a necessity that the cure should be supplied until the patron doth present, and this is a kind of sequestration. But in some cases the Ordinary could not sequester the profits belonging to spiritual persons, though he was lawfully entitled to them for a particular time and purpose: for by the statute of 13 Eliz. c. 20, it is enacted, "that if a parson make a lease of his living for a longer time than he is resident upon it, that such lease shall be void, and he shall for the same lose one year's profits of his benefice, to be distributed by the Ordinary amongst the poor of the parish." Now he had no remedy to recover the year's profits but in the Ecclesiastical Court; he could not sequester; and to give him authority so to do, a supplemental statute was made five years afterwards, in the eighteenth year of the Queen's reign (*a*), by which power is given him to grant a sequestration; so that if he could not sequester in a case of which he had a jurisdiction by a precedent statute, *à fortiori* he cannot in a case exempted as this is from his jurisdiction. But admitting a sequestration might go, then this inconveniency would follow, that if other lands should be sequestered for the same purpose, the former sequestration could not be pleaded to discharge them, because the interest is not bound thereby, no more than a sequestration out of Chancery is pleadable to an action of trespass at the common law. This case cannot be distinguished from that of Jefferies in 5 Co. and from what the civilians testified

(*a*) 18 Eliz. c. 11.

to the Court there, viz. that the churchwardens and greater part of the parishioners, upon a general warning given, may make a taxation by law, but the same shall not charge the land, but the person in respect of his land; so that it is he that is chargeable and may be excommunicated in case of refusal to contribute, but his lands cannot be sequestered, because it is not the business of the Ordinary to meddle with the temporal possessions of lay-men, but to proceed against them by ecclesiastical censures; and the parishioners **[256]** lands may be as well sequestered for the repairs of the church, as the lands of the impropriator for the repairs of the chapel; for which reasons it was held, that a sequestration would not lie.

But *on the other side* it was said, that before the making of the statute the rector was to repair the chancel under pain of sequestration, which the Ordinary had power to grant in case of refusal; and that his authority in many cases was not abridged by the statute. The case of *Parry* v. *Banks* (*a*) was cited, where in the twenty-fourth year of Henry the Eighth a parsonage was appropriated to the deanery of St. Asaph, and a vicarage endowed, which the bishop dissolved in the twenty-fourth year of Queen Elizabeth; and Parry, pretending that notwithstanding this dissolution it was in the King's hands by lapse, obtained a presentation: and it was resolved, that after the Statute of Dissolutions, which made parsonages lay fees, the Ordinary could not dissolve the vicarage where the parsonage was in a temporal hand, but being in that case in the hands of the dean he might. The rector is to repair the chancel because of the profits of the glebe, which is therefore *onus reale impositum rebus et personis;* and of that opinion was John de Atkin, who wrote one hundred years before Lyndwood, where in fol. 56, he saith, that if the chancel be out of repair, it affects the glebe. And that the constitution of the canon law is such will not be denied; and if so, canons, being allowed, are by use become parcel of the common law, and are as much the law of the kingdom as an Act of Parliament; for what is law doth not *suscipere magis aut minus.* Several cases were put where the bishop doth intermeddle with the profits of a parsonage; as in the case of a sequestration upon a judgment obtained against a spiritual person, where a *fieri facias* is directed to the sheriff upon that judgment, and he returns *clericus beneficiatus non habens laicum feodum;* for which reason he cannot meddle with the profits of the glebe; but the bishop doth it by a sequestration to him directed. He may likewise retain for the supply of the cure, and pay only the residue; which hath been omitted on the other side. As the Ordinary might dissolve a vicarage endowed where the parsonage was in the hands of a dean, so he may sequester an appropriation in any spiritual person; and there is no statute which exempts an impropriation from such a sequestration, because it is *onus reale* at the common law; and as the lay impropriator may sue for tithes and receive them as before the making **[257]** this statute, it is as reasonable, since he hath the same advantage, that he should have the same charge; and the rather, because the saving in the statute of 31 Hen. 8, c. 13, doth still continue the same authority the bishop had before, though the possession was thereby given to the King: the words of which are, viz. "saving to all and every person, &c. such right which they might have had as if the Act had not been made," which must be the right of the Ordinary, and of no other person. An impropriator pays *synodals* and *procurations* as well as an appropriation in the hands of ecclesiastical persons, and it would be very inconvenient if a sequestration should not lie, which would quicken them more than an excommunication; and it was said, that in England there were about a thousand appropriations belonging to corporations aggregate, as deans and chapters, which could not be excommunicated; and if the bishop could not sequester, then there was no remedy to repair the chancel: for which reasons judgment was prayed for the defendant.

But the whole Court, except Atkins, Justice, held, that the lay impropriation was not to be sequestered for the repairs of the chancel.

And the Chief Justice said, that the repair of the chancel was an ecclesiastical cause, but that the rectory and impropriator were lay, and not to be sequestered, as the possessions in the hands of ecclesiastical corporations may, which he did agree could not be excommunicated, but the persons who made up such corporation might. And as to the sequestration upon a judgment, it made nothing for the matter to

(*a*) Cro. Jac. 518.

entitle the Ordinary to a sequestration in this case, because what he doth in that is in the nature of a temporal officer; for the sequestration is like the *fieri facias*, and being directed to the bishop, he is in that case (if he may be so called) an ecclesiastical sheriff, and by virtue thereof may do as the sheriff doth in other cases, that is, he may seize ecclesiastical things and sell them, as the sheriff doth temporal things upon a *fieri facias;* but it is to be observed, that he must return *fieri feci*, and not *sequestrari feci*, upon this writ. And as to the saving in the statute, that doth not alter the case; for if any right be thereby saved it is that of the parson, for the parishioners have no right to sit there; indeed the vicar may, because he comes in under the parson. So that this case is not to be put as at the common law, but upon the Statute of Dissolutions, by virtue whereof the **[258]** rectory, being in the hands of a lay person, is become a lay fee, and so cannot be subject to a sequestration; if it should, the next step would be, that the bishop would increase vicarages as well in the case of an *impropriation* as *appropriation*, which would lessen the possessions of such as have purchased under the Act.

But Atkins, Justice, was of a contrary opinion. He said, that 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, which are originally the debtor, according to the first donation. That the primary rights of rectories are, the performance of divine service and the repairs of the chancel; and that the profits which are over and above must then go to the impropriator, and are to be esteemed then a lay fee; but that those duties are the first rights, and therefore must be first discharged. That this right, this duty of repairing was certain, and therefore shall not be taken away by implication, but by express words in the Act, which if wanting shall remain still, and the parties shall be compelled to repair under the same penalties as before. But admitting it should be taken away, yet the saving in the Act extends to the right of the parishioners, which is not to sit in the chancel, but to go thither when the sacraments are administered, of which they are deprived when it is out of repair; nor can they have the use of the church, which properly belongs to them, because when the chancel is out of repair, it not only defaces the church, but makes it in a short time become ruinous. He denied that a sequestration in Chancery cannot be pleaded to bar a trespass at the common law; for if it be said that the Chancery have issued such sequestrations, it will be as binding as any other process issuing according to the rules of the common law. And he also denied the case put by the Chief Justice, that the lands of the parishioners might as well be sequestered for the repair of the church as those of the impropriator for repair of the chancel, because the profits of the rectory might originally be sequestered, but the lands of the parishioner could not; and so the cases are quite different.

But in Easter term following judgment was given against the defendant upon the point of pleading, which the Court all agreed to be ill. **[259]** First, the defendants should have averred that the chancel was out of repair(*a*). Secondly, that no more was taken than what was sufficient for the repair thereof(*b*). Thirdly, for that the plaintiff had declared for the taking of several sorts of grain; and the defendant justifies the taking but of part, and saith nothing of the residue(*c*), and so it is *a discontinuance;* and the general words *quoad residuum transgressionis* will not help, because he goes to particulars afterwards and doth not enumerate all.

And thereupon judgment was given accordingly.

(*a*) 1 Vent. 35.

(*b*) 1 Mod. 261.

(*c*) 8 Mod. 120, 218. 10 Mod. 212. 11 Mod. 219. 12 Mod. 421, 539, 578, 668. Stra. 302. Ld. Ray. 1121. 4 Bac. Abr. 141.