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It was further pressed upon me that sub-s. 3 of s. 10 shows that section could not be intended to apply to a cancellation of an insurance certificate before the Act came into operation, as it was suggested that proceedings could not be taken for the declaration mentioned in that Act before the Act came into operation.

In this case, however, the Act of Parliament was known, as it had received the Royal Assent on July 31, 1934, and I cannot see why the defendants could not have taken proceedings under sub-s. 3 to obtain protection under that section.

Even if such proceedings could not have been taken, I do not think this fact would prevent the plaintiffs from recovering, the real question, in my view, being whether or not the judgment was obtained subsequent to the coming into operation of s. 10. It was so obtained in this case and is a liability in respect of which the certificate of insurance had been granted.

My attention was drawn to the case of *Ward v. British Oak Insurance Co.* (1), but that was a decision under different sections of The Third Parties (Rights against Insurers) Act, 1930, (21 and 22 Geo. 5, c. 25) and I do not think it assists me in coming to a conclusion.

There must be judgment for the plaintiffs for 3000*l.*, the amount of the judgment in the previous action, with interest thereon at 4 per cent. from the date of that judgment, and costs.

Judgment accordingly for plaintiffs.

Solicitors for plaintiffs : *E. C. Kilsby & Son, for E. Edwards & Son, East Ham.*

Solicitors for defendants : *A. D. Vandamm & Co.*

(1) [1932] 1 K. B. 392.

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WICKHAMBROOK PAROCHIAL CHURCH COUNCIL *v.* CROXFORD.

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Ecclesiastical Law—Repair of Chancel—Liability of Owner of part of tithe rentcharge—Cost of repairs exceeding amount of tithe rent received—Liability, whether limited to amount of tithe received—Right to contribution from other tithe rent owners—Chancel Repairs Act, 1932 (22 *Geo.* 5, *c.* 20), *ss.* 1, 2, 3, 4.

The liability of a lay impropriator of a tithe rentcharge to pay the costs of the repair of the chancel of a parish church is personal and several and not joint and is not limited to the amount of the tithe rent received by him.

In an action by the plaintiff council against the defendant under the Chancel Repairs Act, 1932, calling upon her to pay 123*l.* 12S. 6*d.*, the reasonable estimated cost of repairing the chancel of the parish church, on the ground that she was the owner of an impropriate rentcharge of the value of 39*l.* us. *gd.*, the defendant contended that but for s. 2, sub-s. 3, of the Chancel Repairs Act, 1932, she could only have been held liable if she was a person who would have been liable to be admonished by the appropriate Ecclesiastical Courts, and that she could not in fact have been so admonished, since the amount she had received from the tithe rentcharge was less than the cost of the repairs. The county court judge accepted this view and dismissed the action. On appeal :—

Held (reversing the decision of the county court judge), that the liability of the defendant being personal and several and not joint, she would have been liable to be admonished by the appropriate Ecclesiastical Courts to repair the chancel, and was therefore liable to do so notwithstanding that the sum received by her in respect of the rentcharge was less than the estimated cost of the repairs.

But, *held,* that the defendant on payment of the cost of the repairs would be entitled to obtain contribution from the other tithe owners.

APPEAL from the Bury St. Edmunds County Court.

This was a proceeding under the Chancel Repairs Act, 1932, instituted by the Parochial Church Council of the Parish of Wickhambrook in the county of Suffolk against Yvonne Croxford (spinster) and Constance Edith Marie Croxford, wife of Frank Leonard Croxford and mother of Yvonne Croxford, claiming against the defendants as lay impropriators and as such liable for the repair either wholly or in part of the chancel of the parish church of Wickhambrook the sum of 123*l.* 12*s.* 6*d.*,

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the estimated cost of putting the chancel in repair. Notice to repair as required by s. 2, sub-s. I, of the Chancel Repairs Act, 1932, was duly served on the defendants, and it was admitted at the hearing before the county court judge that the sum of 123*l*. I2S. 6*d*. represented the reasonable cost of the necessary repairs.

of the matter, so far as material, was stated by the county court judge (Judge Hildesley) in his considered judgment as follows. By a tithe commutation agreement made in 1840 there was effected a merger of a large portion of the tithes issuing out of lands in the parish of Wickhambrook. The remaining portion was commuted for a tithe rentcharge amounting in the aggregate to 120*l*. per annum. This was apportioned between the vicar and the impropriate rector, whose apportioned share amounted to 52*l*. 10*s*. The impropriate tithe rentcharge was now owned by several persons, of whom the defendant and/or her daughter owned rentcharge to the extent of 39*l*. us. 9*d*. Prior to November 7, 1933, this tithe was under mortgage to one Edgar Armstrong Everington. By letter dated September 28, 1933, Mr. Everington's solicitors informed a Mr. Justin Brooke, who was liable for tithe amounting to 6*l*. 14*s*. 6*d*., part of the amount of 39*l*. us. 9*d*., that Mr. Everington had disposed of tithe to the Church Property Trust, Ld., and requested him to pay all tithes due or thereafter to become due to that Trust or to their solicitor, Mr. Buttle. On the following day, September 29, Mr. Buttle wrote to Mr. Brooke informing him that his clients, the Trust, had acquired the tithe, enclosing a letter of authority from Mr. Everington's solicitors and an account of the amount due, and requesting payment. To this Mr. Brooke replied on September 30, noting that the Trust had purchased the tithe and adding : " I welcome this, as the church is badly in need of repair. . . . . I shall be glad to hear from you that the work is to be put in hand at once." Correspondence followed between Mr. Brooke and Mr. Buttle, and ultimately, on February 27, 1934, the plaintiffs sent to the Church Property Trust, Ld., a notice to repair the chancel. To this Mr. Buttle replied stating that the Trust " are not the owners of the

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rectorial tithe at Wickhambrook " but that " The tithe has been acquired for Miss Yvonne Croxford for whom her mother Mrs. Croxford is trustee." That was the fact, Mr. Everington having conveyed the tithe, amounting, as before stated, to 39*l*. us. 9*d*., to Mrs. Croxford on November 7, 1933. By a deed poll dated January 10, 1933, Mrs. Croxford executed a declaration of trust in favour of her daughter Yvonne. On March 28, 1934, notice to repair was given to each of the defendants.

The proceedings were commenced on May 12, 1934. On June 18 an order was made by the Registrar at the instance of the defendants adding the Governors of Queen Anne's Bounty and Mr. Justin Brooke as defendants. The Governors of Queen Anne's Bounty were subsequently struck out at the defendants' instance. The plaintiffs appealed against the joinder of Mr. Justin Brooke, and after hearing argument the county court ordered him to be struck out as a defendant.

The action then proceeded against the two original defendants. It was proved that prior to March 28, 1934 (the date of the notices to repair), the total amount of impropriate tithe received by and on behalf of the defendants amounted to 39*l*. 7*s*. 4½*d*. A further sum of *ml*. 7*s*. 2*d*. was received subsequent to the notices.

On October 18, 1934, the county court judge delivered a considered judgment in favour of the defendants. After stating the facts as above set out he proceeded as follows : " Before dealing with the questions that have to be determined as between the plaintiffs and the original defendants it is desirable that I should state the reasons why I directed that Mr. Justin Brooke be dismissed from the action, as this matter has a material bearing on the issues between the plaintiffs and the original defendants. Mr. Justin Brooke's interests were watched at the hearing of the appeal by a solicitor, but the appeal was that of the plaintiffs and their counsel argued it. It appears that Mr. Brooke is the owner of land in the parish in which certain tithe rentcharge has been merged under the agreement of 1840, and it was assumed by both parties, although no evidence to that effect was adduced, that he must

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be regarded as being in the position of an owner of part of the impropriate tithe rentcharge arising out of lands in the parish. On this assumption it was contended on behalf of the two original defendants that in the event of a judgment being given against them they would have no right of contribution or indemnity against Mr. Brooke (a proposition which I do not accept), but that they were liable, if at all, jointly with Mr. Brooke and for that reason entitled as of right to have him joined. On behalf of the plaintiffs it was contended that the liability of the original defendants was several and not joint ; that they were entitled to sue any impropriator who was in receipt of rentcharge, and that having elected to sue the original defendants only, no order could be made against them in invitum joining another defendant. It therefore became necessary to consider the nature of the liability of an owner of impropriate tithe in respect of the repair of the chancel where there are other owners. The only authority to which I was referred was a passage in Phillimore's Ecclesiastical Law, ed. 1895, vol. ii., p. 1417, which is adopted from Burn's Ecclesiastical Law, ed. 1842, vol. i., p. 352. This passage is as follows : ' Where there are more impropriators than one (as is very frequently the case) and the prosecution is to be carried on by the churchwardens to compel them to repair, it seemeth advisable for the churchwardens first to call a vestry, and there (after having made a rate for the repair of the church and other expenses necessary in the execution of their office) that the vestry do make an order for the churchwardens to prosecute the impropriators at the parish expense. In which prosecution the Court will not settle the proportion amongst the impropriators, but admonish all who are made parties to the suit to repair the chancel, under pain of excommunication. Nor will it be necessary to make every impropriator a party, but only to prove that the parties prosecuted have received tithes or other profits belonging to the rectory sufficient to repair it ; and they must settle the proportion amongst themselves. For it is not a suit against them for a sum of money, but for a neglect of the duty which is

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incumbent on all of them. Though it may be advisable to make as many of them parties as can be come at with certainty.' This assumes that a party who is held liable to repair has a right of contribution against any other party liable. The defendants had not issued a third party notice, and did not do so during the interval between the first hearing of the action and the adjourned hearing. As I was not (and I am not now) satisfied that when the impropriate tithe is in the hands of more than one impropriator the liability is joint the defendants were not entitled as of right to have Mr. Justin Brooke joined as a defendant in accordance with the principle of *Pilley v. Robinson (i)* decided under Order XVI., r. II, of the Rules of the Supreme Court to which Order XIV., r. 2, of the County Court Rules corresponds. No notice under s. 2, sub-s. I, of the Chancel Repairs Act, 1932, had been served on him, and in the absence of such notice there could be no justification for making an order against him under the Act. Moreover *Pilley* v. *Robinson* (1) does not lay down any rule of universal application: see *Wilson Sons & Co.* v. *Balcarres Brook Steamship Co.* (2) ; *Robinson* v. *Geisel* (3), and even if I had considered that the defendants and Mr. Justin Brooke must be treated as being in the position of joint contractors I should have declined, in the circumstances, to make the order." The county court judge then proceeded to deal with the main questions involved in the action as follows: " The rector of a parish, whether spiritual or lay, is liable to maintain the chancel in repair: see *Whinfield* v. *Watkins* (4) ; *Morley* v. *Leacroft.* (5) Before the passing of the Chancel Repairs Act, 1932, the jurisdiction to enforce this liability was exclusively in the Ecclesiastical Courts. These Courts, on proof of the allegation of failure to repair, issued a monition to the parties in default in a cause of office in a criminal suit, followed if necessary by the appropriate ecclesiastical censures, but they had no jurisdiction to enforce a claim for the payment

(1) (1887) 20 Q. B. D. 155.
(2) [1893] 1 Q. B. 422.
(3) [1894] 2 Q. B. 685.
(4) (1812) 2 Phillim. I.
(5) [1896] P. 92.

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of money: *Neville* v. *Kirby*. (1) The only means of enforcing compliance with a monition was by resort to the civil power. This procedure is set out in the Report of the Chancel Repairs Committee presented by the Lord Chancellor to Parliament in May, 1930. As a result of disobedience a party in default may be committed to prison by order of the King's Bench Division Such an order was made following upon a monition in *Hauxton Parochial Church Council v. Stevens*. (2) Thereafter the Chancel Repairs Committee was appointed to inquire (inter alia) 'whether the remedy now provided in such cases is appropriate in modern conditions.' The Committee reported that it was not and made certain recommendations, and thereafter the Chancel Repairs Act, 1932, was passed. By *s.* 1 of the Act the jurisdiction of the Ecclesiastical Courts to enforce the repair of chancels is abolished. Sect. 2, sub-ss. 1 and 2, lay down the procedure to be followed to give jurisdiction to the county court to order payment of a sum required to execute the necessary repairs. By s. 2, sub-s. 3, it is enacted that if the Court finds that if the defendant would, but for the provisions of the Act, have been liable to be admonished to repair the chancel by the appropriate Ecclesiastical Court in the cause of office promoted against him in that Court on the date when the notice to repair was served, the Court shall give judgment for such sum as represents the cost of putting the chancel in proper repair. This Court, therefore, must be satisfied before giving judgment for the sum claimed, that the case is one in which a monition would have issued in an Ecclesiastical Court. For this purpose it is therefore necessary to ascertain what would have been the decision of an Ecclesiastical Court, administering a system of law other than that exercised in its ordinary jurisdiction by this Court, that is to say, the law administered in the Courts Ecclesiastical consisting of such canons and constitutions ecclesiastical as have been allowed by general consent and custom within the Realm as altered and supplemented by statutes: *Mackonochie* v. *Lord Penzance*. (3)

(1) [1898] P. 160. (2) [1929] P. 240.
(3) (1881) 6 App. Cas. 424, 446.

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The principles upon which those Courts acted are stated in the passage from Burn above cited. Burn cites no authorities, nor does Dr. Phillimore. But this statement of the law, adopted by so eminent a civilian as the late Dr. Phillimore, must be regarded as authority for the following propositions: First, it is not necessary to make every impropriator a party. Second, it must be proved against an impropriator who is made a party that he has received tithes or other profits belonging to the rectory sufficient to cover the cost of repair. Third, a person against whom a monition issues must settle the proportion between himself and the remaining impropriators. Fourth, while it is not essential so to do, it is advisable to make as many of the impropriators as may be come at with certainty. As regards the third proposition, this would seem to imply that an impropriator against whom a monition has issued has a right of contribution against other impropriators. I have found no authority in support of this proposition, and in view of the conclusion at which I have arrived under the second proposition it is not necessary to express an opinion. As at present advised I am prepared to hold in a proper case that this right to contribution does exist and that it is enforceable in this Court. I now come to the second proposition. It is submitted on behalf of the defendants that they have not received sufficient to satisfy the claim, and this is beyond dispute. They therefore claim that they are not liable to admonition, and would not have been admonished by an Ecclesiastical Court. The plaintiffs contend that it is sufficient to prove that the defendants have received some tithe, that on this being proved they would have been liable to have been admonished and that an impropriator would only be excused from being admonished by an Ecclesiastical Court in a case where he had received nothing whatever. This involves the proposition that the defendants in this case ought to have expended such moneys as they have received irrespective of any evidence that this sum could usefully have been expended in repairs the total cost of which is estimated and is now agreed at 123*l.* 12s. 6*d.* It is not an easy task which Parliament has imposed on this

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Court of determining how an Ecclesiastical Court would have dealt with the matter. My own opinion is that a monition would not have issued for the reason that the defendants have not received sufficient to defray the cost of the necessary repairs. Further I venture to assume that an Ecclesiastical Court, sitting as a Court of conscience as well as a Court of law, would have declined, in the exercise of its judicial discretion, to issue a monition against these defendants upon its being made to appear not only that they had not received sufficient to defray the expenses of repair, but that it was alleged and not denied by other parties whom the promoters in a cause of office had refrained from citing that these parties had received sums which they ought to have devoted to the same purpose. The reported decisions of the civil courts to which I have referred, such as *Walwyn v. Awberry* (1), throw no light on the questions I have to determine. As regards reported decisions of the Ecclesiastical Courts, it should be noted that in *Whinfield* v. *Watkins* (2), a claim against a sequestrator for non-repair of vicarage houses and other buildings, the libel alleged that the sequestrator had received more than sufficient from the profits of the living to execute the repairs. I may add that the inquiries I have made in the Registry of the diocese of Norwich, in which the parish of Wickhambrook was included until the recent constitution of the diocese of St. Edmundsbury and Ipswich, have yielded a negative result. There would appear to be no records of any litigation in the Consistory Court which throw light on the problem. It follows that the claim fails and that there must be judgment for the defendants with costs on Scale C. Before arriving at this conclusion I have not omitted to take into consideration that this leaves the defendants in possession of money which is impressed in a non-technical, if not in a technical sense, with a trust to expend it in repairing the chancel of the church, and I have considered whether the plaintiffs be not entitled to a declaratory judgment that the moneys received by the defendants as impropriators must be applied to that purpose as and when received. But in view of my conclusion that the claim as formulated must fail, I am precluded from making such an order by the decision in *Rex* v. *Cheshire County Court Judge and United Society of Boilermakers*; *Ex parte Malone* (1)."

(1) (1677) 1 Mod. 258; 2 Mod. 254. (2) 2 Phillim. 1.

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The plaintiffs appealed. The appeal was heard on March 20, 21 and 22, 1935.

On the appeal the plaintiffs asked for judgment against Mrs. Croxford alone.

F. J. Tucker K.C., *W. T. Elverston* and *W. S. Wigglesworth* for the appellants. The point in issue is important because there is no real authority upon it. It arises under the Chancel Repairs Act, 1932, which was passed as a result of the decision in *Hauxton Parochial Church Council* v. *Stevens*. (2)

The liability of rectors to repair the chancels of churches was imposed by ancient custom: *Smallbones* v. *Edney* (3); see also *Dean and Chapter of St. Asaph* v. *Overseers of Llanrhaiadr-yn-Mochnant*. (4) The practice was that on the failure of the rector, or, after the dissolution of the monasteries, the lay impropriator to repair the chancel the matter could be brought before the Consistory Court when the Ordinary admonished him to do the repairs. Originally disobedience to this monition led to execution and later could be enforced by the writ de excommunicato capiendo: see 5 Eliz., c. 23. Afterwards the pronouncement of a person to be contumacious or in contempt was substituted for excommunication and enforced by a writ de contumace capiendo: see 53 Geo. 3, 127. The liability of the lay impropriator was personal and not by charge on the profits of the tithe and quite independent of whether the profits sufficed to do the work: *Morley* v. *Leacroft* (5); *Walwyn* v. *Awberry* (6); see also *Neville* v. *Kirby*. (7) *Hauxton Parochial Church Council* v. *Stevens* (2) led to the passing of the Chancel Repairs Act, 1932, under which judgment can be given for the cost of putting the chancel in repair where the lay impropriator would but for

(1) [1921] 2 K. B. 694. (4) [1897] 1 Q. B. 511.
(2) [1929] P. 240. (5) [1896] P. 92.
(3) (1870) L. R. 3 P. C. 444. 450. (6) 2 Mod. 254.
(7) [1898] P. 160.

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the Act have been liable to be admonished. Judgment therefore can be given independently of whether the profits that have been received are sufficient to do the repairs. There is no justification for the view taken by the judge in the Court below, which is based on a passage in Phillimore's Ecclesiastical Law, 1842 ed.; 1895 ed., vol. ii., p. 1417, adopted from Burn's Ecclesiastical Law, vol. i., p. 352. The passage in Burn's Ecclesiastical Law did no more than recommend a course to be adopted—namely, that proceedings should be taken against an impropriator who has failed to repair the chancel where the cost of the repairs would exceed his profits. But the authorities cited show that the liability of the impropriator was always personal and not subject to any such limitation.

[They also referred to *Ball* v. *Cross* (1); *Serjeant Davies'* case (2); *Pense* v. *Proust* (3); *Griffin* v. *Dighton* (4); *Bishop of Ely* v. *Gibbons* (5); 2 Co. Inst. Part III., p. 289, paras. 8, 9; Comyn's Dig., vol. iii., p. 614; Gibson's Codex, vol. i., p. 223.]

Vaisey K.C. and *Miss H. M. Cross* for the respondent. The Court has to consider the accuracy of the passage already referred to in Burn's Ecclesiastical Law. The origin of that passage has never been discovered, but Dr. Burn was a person with prolonged experience as Chancellor of the Consistory Court and the passage was adopted in the first and second editions of Phillimore's Ecclesiastical Law by persons of very great experience and learning. Further it is to *be* remembered that a proceeding for a monition is a criminal proceeding and that a man when once admonished was in danger of excommunication if he failed to obey. It is inconceivable that proceedings having this grave result would be maintainable unless it was shown that the impropriator had received sufficient from the tithes to enable him to do the work. Further it is to be observed that the Chancel Repairs Act, 1932, s. 2, sub-s. 3, imposed a liability when the defendant

(1) (1689) 1 Salk. 164.
(2) (1621) 2 Rolle Rep. 211.
(3) (1695) 1 Ld. Raym. 59.
(4) (1864) 5 B. & S. 93.
(5) (1833) 4 Hagg. Ecc. 156.

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"would, but for the provisions of this Act, have been liable to be admonished to repair the chancel by the appropriate Ecclesiastical Court"; and that, when this was so, judgment was to be given "for such sum as appears to the Court to represent the cost of putting the chancel in proper repair." The Court therefore had no discretion in such a case as was wrongly exercised by the county court judge to take into account the means of the defendants and to allow payment by instalments. The nature of a monition is explained in *Mackonochie* v. *Lord Penzance*. (1)

The Ecclesiastical Courts would never have granted an admonition where the impropriator had not received sufficient profits to enable him to pay for the repairs: see also Ayliffe's Parergon, pp. 217, 458. There was no liability to pay out of other money. Thus, Lyndwood's Provinciale, p. 250, showed that the liability for repairs in the case of a rector was not to pay out of his private money unless he had used the fruits of his living to increase his private money. It is inconceivable that an order would have been made admonishing an impropriator who owned, say, a yearly tithe of 6*d.* for not effecting expensive repairs to the chancel. The plaintiffs have therefore failed to prove their case, that any such an admonition would have been given to Mrs. Croxford by the Ecclesiastical Courts to repair the chancel. The infant in this case, Miss Croxford, could in no case have been admonished.

[ROMER L.J. Are there any authorities as to contribution amongst the tithe owners themselves?]

Nothing beyond the statement in Burn's that they "must settle the proportion amongst themselves." In Lyndwood, p. 253, where a rector and vicar were in possession of the tithe it was stated that contribution depended on the proportions of their interest in the benefice—"secundam qualitatem." It is submitted that the same principle applies between lay impropriators.

F. J. Tucker K.C. replied.

Cur. adv. vult.

(1) 6 App. Cas. 424, 433.

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May 3. The following judgments were delivered.

LORD HANWORTH M.R. The chancel of the parish church of Wickhambrook, in the county of Suffolk, is out of repair, and it has been estimated that a sum of 123*l.* 12s. 6*d.* represents the reasonable cost of executing the necessary repairs.

These proceedings are taken by the Parochial Church Council of Wickhambrook under the Chancel Repairs Act, 1932, to enforce liability for the repair of the chancel on the defendants, Yvonne Croxford, and Constance Edith Marie Croxford, her mother and trustee, who are lay impropriators of a part of the tithe rentcharge issuing out of lands in the parish of Wickhambrook, which amounts in the aggregate to 120*l.* The share of this sum which belongs to Mrs. Croxford as trustee for her daughter is 39*l.* us. 9*d.* per annum, and the remainder of the tithe belongs to other persons who are not parties to these proceedings. The facts in detail relating to the case are set out in the judgment of the learned county court judge and it is unnecessary to repeat them.

By the Chancel Repairs Act, 1932, s. 1, the jurisdiction of the Ecclesiastical Courts to enforce the repair of chancels is abolished and proceedings in future to enforce this liability are provided by s. 2 of the Act. These provisions are that where a chancel is in need of repair, "the responsible authority," which is later defined in the Act to mean the parochial church council of the parish in which the chancel is situate—if, as is the case in the present proceedings, there is one—may serve on any person who appears to them to be liable to repair the chancel a notice in a prescribed form stating in general terms the grounds on which that person is alleged to be liable, the extent of the disrepair, and calling on him to put the chancel in proper repair. If the chancel has not been put into repair in the course of a month from the service of the notice to repair, the responsible authority may bring proceedings in the county court of the district in which the chancel is situate against the person on whom the notice was served, to recover the sum required to put the chancel into proper repair; and, by s. 3, sub-s. 4 *(b)*, where judgment is given for the payment of a sum of money

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in respect of repairs not so far executed the Court may give directions in accordance with rules made therefor for the purpose of ensuring that the money is spent in executing the repairs.

The sum for which judgment is to be given is, by s. 2, sub-s. 3, to be such sum as appears to the Court to represent the cost of putting the chancel into proper repair. And the person against whom judgment for this sum is to be given is a defendant who "would, but for the provisions of this Act, have been liable to be admonished to repair the chancel by the appropriate Ecclesiastical Court in a cause of office promoted against him in that Court on the date when the notice to repair was served." It is obvious that the Legislature in this section adopted the precedent of obscurity set many years back by a statesman who, when confronted with a question as to what are the duties of an archdeacon, contented himself by explaining that he was an officer required to perform the archidiaconal functions.

The facts of the present case prove that the defendant is in possession of a right to a quota of the great tithe, not more than 39*l.* us. 9*d.* in value per annum; that Mrs. Croxford became possessed of that right in November, 1933, and executed a declaration of trust in favour of her daughter on January 10, 1934; and that the total sum received, or to be received, from this quota of the tithe during a considerable time would be insufficient to defray the liability which is charged by the notice at 123*l.* 12s. 6*d.* The county court judge gave judgment for the defendants on the ground that "it must be proved against an impropriator who is made a party that he has received tithes or other profits belonging to the rectory sufficient to cover the cost of repair." He expressed his own opinion "that a monition would not have issued for the reason that the defendants have not received sufficient to defray the cost of the necessary repairs." Further, he added, "I venture to assume that an Ecclesiastical Court, sitting as a Court of conscience as well as a Court of law, would have declined, in the exercise of its judicial discretion, to issue a monition against these defendants upon

its being made to appear not only that they had not received sufficient to defray the expenses of repair, but that it was alleged and not denied by other parties whom the promoters in a cause of office had refrained from citing that these parties had received sums which they ought to have devoted to the same purpose." The Parochial Church Council appeal to this Court.

It is obvious that many difficult questions fall to be determined. They may be divided as follows: (1.) Is there a liability upon a possessor of a part of the great tithe to repair the chancel? (2.) Is that liability personal, or only to the extent of the receipts from the tithe actually received by him? (3.) In either case above, would the defendants have been liable to be admonished to repair this chancel by the appropriate Ecclesiastical Court if a cause of office had been promoted against them? (4.) Is the mere question of liability arising from the ownership of tithe in whole, or in part only, to be considered, or is the county court, and this Court, to consider whether it would have been right and proper in all the circumstances of the case to issue an admonition? (5.) Can an owner of a part of the tithe against whom a liability is established recover contribution from the other owners of the remainder of the tithe?

At the outset it is necessary to construe the word "liable" as used in s. 2, sub-s. 3. It is I think used in that sub-section in a sense different from that in which it is used in s. 2, sub-s. 1. In s. 2, sub-s. 1, the words "any person, who appears to them to be liable to repair the chancel" connote a liability that imports a duty resting on that person for which he is answerable in law. In the later sub-section it intends a peril of being admonished, to which he *is* exposed and subject, or from which he is likely to suffer.

The learned judge based his judgment on a passage which he cited from Burn's Ecclesiastical Law, 9th ed., 1842, vol. i., p. 352, and which I need not repeat. Sir Robert Phillimore was the editor of that edition and "corrected" and added to the original work, but no authorities are cited for the propositions advanced. The same paragraph, again without

any authority being attached to it, is found in Phillimore's Ecclesiastical Law, 2nd ed., 1895, vol. ii., p. 1417, though slightly amended so as to bring it into accord with the state of the law in later years. Dr. Burn's paragraph had referred to the advisability of the churchwardens summoning a vestry. Then the vestry, having made a rate for the repair of the church, were to make an order for the churchwardens to prosecute the impropriators of the tithe, at the parish expense. Suits and proceedings to enforce church rates for ecclesiastical purposes were abolished in 1868, by the Compulsory Church Rate Abolition Act (31 & 32 Vict. c. 109), hence the paragraph was altered in this particular of procedure by the editor of his father's work in 1895—Sir Walter Phillimore, afterwards a judge of the High Court, and of the Court of Appeal, and created Lord Phillimore in 1918. But the substance of the statement for the present purpose remains the same. The learned county court judge was right in attaching weight to this statement, and the propositions involved in it, laid down as it was by a succession of such eminent authorities on ecclesiastical law. But the propositions are not easily interpreted and reconciled with what would seem to be just and equitable. It is clear that the statement imports that a suit brought against the impropriators is to enforce: *(a)* a duty and not the mere recovery of a sum of money; *(b)* a duty which lies on each and all the impropriators; and *(c)* that no abatement of the suit could be asked for by those sued on the ground that other impropriators were also liable.

But the liability is affirmed to be enforceable only if "the parties prosecuted have received tithes or other profits belonging to the rectory sufficient to repair it." It is not necessary to make every impropriator a party. It would seem, therefore, that the parties sued might escape because of the insufficiency of their receipts, although the total receipts of those sued, and not sued, might be sufficient to attract liability. If a liability is enforced, the burden of it is to be divided among those who have been held liable, and nothing is said as to any contribution being made by others

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liable who were not sued. It seems necessary therefore to g° behind the authority of these text-books and examine the question afresh in the earlier authorities.

On the first question propounded above, it seems clear that a rector of a parish, whether spiritual or lay, is liable to maintain the chancel in repair: see Coke's Inst., Pt. II., vol ii , p 489 · Com Dig Esglise (G. 2.p. 606); *Whinfield Watkins* (1) and *Morley* v. *Leacroft*. (2) In *Pense v. Prouse* (3) Sir John Holt C.J. said that : " by the canon law the parson ought to repair the whole ; but by the custom of England, the parson shall repair the chancel, and the parishioners the nave of the church." He decided the same in *Ball* v. *Cross* (4); and see also the judgment of Sir A. Cockburn C.J. to the same effect in *Griffin* v. *Dighton*. (5) But the liability to repair the chancel may remain with the parishioners, altering the usual liability of the rector thereto, in parishes where a special custom to that effect has been established : *Bishop of Ely* v. *Gibbons*. (6) If more modern authority for the proposition that a rector is liable in law to repair the chancel is required, it is to be found in the judgment of Mellish L.J. in *Smallbones* v. *Edney* (7), where he said : " Now a tithe owner is exempted from an ordinary church-rate for the repair of the body of a church because he is under a particular liability to repair the chancel. He is not less liable, but more liable, than the owners of other property in the parish to repair the Church, being under a personal liability to repair a particular part of it."

I pass, then, to the second question : Is that liability personal and general, or only to the extent of the receipts from the tithe actually received by the tithe owner ? The above authorities clearly show that the liability is personal and several, not joint. But is it limited to the extent of the tithe owner's receipts from the tithe ? In *Neville* v. *Kirby* (8) Lord Penzance delivered a judgment which involved the question whether a liability could be attached to a lay rector

(1) 2 Phillim. 1.
(2) [1896] P. 92.
(3) 1 Ld. Raym. 59.
(4) 1 Salk. 164.
(5) 5 B. & S. 93, 105, 106.
(6) 4 Hagg. Ecc. 156.
(7) L. R. 3 P. C. 444, 450.
(8) [1898] P. 160.

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in respect of an outlay already made in the repair of a chancel which the lay rector had a duty to repair. He thus states this liability (1) : " If the chancel of a parish church is in need of repair, the Ecclesiastical Court entertains a suit complaining of its defective condition, and, on proper proof as to the persons liable to repair, it issues a monition to such persons, commanding the thing to be done, which it follows up, if need be, by the usual ecclesiastical censures. But this is the limit of the Court's interference, and there is no precedent or warrant for the exercise of the coercive powers of the Court to enforce against a layman a payment of a money claim." It is noticeable that he does not introduce any limit to the liability based on the actual receipt of profits from the rectory ; and this in spite of the question being definitely raised as to the jurisdiction over a person in respect of a money claim.

Turning to the chief authority on English canon law, the Provinciale of William Lyndwood, who wrote in the reign of Henry VI. in the earlier part of the fifteenth century, for he died in 1446, I find in Book III., title 27, of the edition printed at Oxford, 1679, a precept of Archbishop Winchelsea, who was Archbishop of Canterbury from 1293 till 1313, a translation of which runs as follows : " In order that the parishioners of the several churches of our province of Canterbury may henceforth be more certain about the defects that fall upon them, lest any doubt arise in times to come between the rectors and them, we will henceforth and command that they be bound to find all the things below mentioned—namely, Legend, Antiphonary, Gradual, Psalter, Tropery, Ordinal, Missal, Manual, Chalice, principal vestment with Chasuble, Dalmatic, Tunicle and with a cope in the choir with all its accessories, a frontal for the High Altar with three towels, three surplices, one rochet, a processional cross, a cross for the dead, Thurible, a lantern and little bell for carrying before the body of Christ in the visitation of the sick, a Pyx for the body of Christ, a suitable lenten veil, banners for the Rogations, bells with ropes, a bier for the

(1) [1898] P. 167.

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dead, a vessell for holy water, a Pax, a candlestick for the Easter candle, a font with a lock, images in the church, the principal image in the chancel, the wall of the churchyard, the repair of the nave of the church inside and outside as well in images (or statues) as in glass windows, the repair of the books and of the vestments whenever it shall happen that they need repairs. But every thing else as well in the repair of the chancel as in other things not here expressed, according to divers approved customs, have to be repaired by the rectors and vicars of the places or those to whom (the liability) belongs, in all respect at their expense."

Then *Serjeant Davies'* case (1) affirms this liability. The whole report is as follows: "A person who has the impropriation of the Rectory ought to repair the Chancel and in addition, if he has any land in the parish, he ought to contribute to the repair of the (nave of the) church as in this case the farmer and tenants of Mr. Serjeant Davies have the impropriation and also a farm in the same parish. This was decided by the Court without question."

In Ayliffe's Parergon Juris Canonici Anglicani (1726), pp. 458, 459, the question of the remedy for failing to carry out the repair of the chancel is discussed. The duty so to do is founded in Lyndwood, and the remedy in the case of clergymen is sequestration of the amount necessary to cover the outlay on the repairs, and if a larger sum is taken "the party aggrieved may be relieved by the benefit of an appeal." The position of a lay impropriator is not defined, but again it is noticeable that the liability is not restricted to or measured by the receipts.

Gibson in his Codex Juris Ecclesiastici Anglicani 2nd ed., 1761, at pp. 198, 199, quotes this same passage from Lyndwood, and mentions the passage of Archbishop Winchelsea already referred to with the words "in omnibus reparari sumptibus eorundem." His words are: "as rectors or spiritual parsons, so also impropriators, are bound of common right to repair the chancels . . . . under the limitations expressed in the foregoing article." None of those limitations impose the

(1) 2 Rolle Rep. 211.

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limit of receipts from the tithe. The doctrine is said to be "clear and uncontested," the only difficulty being in what manner they shall be compelled to do it; whether by spiritual censures only, in like manner as the parishioners are compelled to contribute to the repairs of the church, since impropriations are now become lay-fees; or whether by sequestrations. This point, he says, was twice under consideration in the time of Charles II.—in the first the Court inclined that there could be no sequestration. He must be referring to the case of *Walwyn* v. *Awberry* argued in Trinity Term of 1677. There are two reports of the argument on the case. (1) It was an action of trespass for taking away certain loads of wheat and other agricultural produce, to which the defendants pleaded a justification that the goods were taken in sequestration of the tithes falling due to the plaintiff, who was rector, and as such bound in law to repair the chancel of the parish church then out of repair. The facts relied on were that, the chancel needing repair, and the plaintiff being liable to execute it, the Bishop of Hereford had issued a monition to the plaintiff requiring him to fulfil his duty, and as he failed to do so, the Bishop had granted a sequestration of the tithes of the rectory, and that the defendants, as churchwardens, had carried out the sequestration and had taken the goods as alleged, which taking and trespass was thus justified. To this plea the plaintiff demurred. The question argued was whether a sequestration could be ordered as against a lay impropriator. The case was ultimately decided upon a defect in the pleading, which (inter alia) had omitted to aver that the defendants did not take into their hands more than was sufficient for the reparation of the chancel. A note is appended to the report in 1 Mod. Rep. (2) that from two other reports of the same case (3) it appeared that the majority of the Court inclined to the view that, as impropnations are now lay-fees, they cannot be sequestered for the reparation of the chancel. Serjeant Barrell, who argued the demurrer on behalf of the

(1) 1 Mod. Rep. 261; 2 Mod. Rep. 259.
(2) At p. 261.
(3) 2 Mod. Rep. 257; 2 Vent. 35.

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plaintiff, admitted " that the rector of a rectory impropriate may perhaps be bound of common right to repair the chancel." He makes no reservation that the liability extended only to the amount received into the rector's hands from the tithe.

Atkyns J. (1) suggests the limitation that the liability of the rector was in respect of the profits which he received and that sequestration could be applied to them. This view was the result of the character which, in his opinion, still attached to tithe, for it was still subject to the same penalties — including sequestration — as before the Statute of Dissolutions. The learned judge thought that the tithe was first to be expended in the performance of divine service and that only such surplus as remained after the discharge of " the first rights " passed to the rector. With this view of tithe he held that sequestration as an ecclesiastical form of execution still obtained, and the lay rector's duty as to the chancel was limited to what he had received by way of surplus from carrying out ecclesiastical requirements. There is no trace that the other members of the Court acquiesced in this view.

Ventris (2) gives a report of the same case, although the date is stated to be 32 Charles II. and not 29 Charles II. as in the Modern Reports. He states the defects in the pleadings on which the decision was given, but adds that the Court inclined that there could be no sequestration " for being made lay-fee, the impropriation was out of their jurisdiction, and it was now only against the parson as against a layman for not repairing the church." Again, there is no trace of any condition limiting the liability of the lay rector, and the inclination of the Court's opinion cuts away the basis on which Atkyns J.'s view rests.

There is a note in Keble's Reports (3) of the same case, where the date is once more restored to 29 Charles II., which records the doubtful view of the Court as to sequestration, but records that the Spiritual Court clearly may excommunicate the impropriator for not repairing the chancel of the Church.

(1) 2 Mod. Rep. 258. (2) 2 Vent. 35.
(3) 3 Keble 829.

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There is still another report of *Walwyn* v. *Awberry* (1), and again the date of the decision is given as 1677. It states that : " the only question was, whether or no, in case the impropriator did neglect to repair the chancel, the Ordinary might sequester the profits of the rectory to repair it ? " It was agreed that sequestration was a proper remedy against spiritual persons, but not against lay rectors. It was admitted that the Ecclesiastical Court had cognizance of the matter, and that they might proceed, by way of personal censures, to excommunication against the impropriator. But then it is stated that North C.J. inclined that the Ordinary could not sequester now it was become a lay-fee ; " but the other three judges inclined contra." No decision is reported and the case ultimately turned on the pleading point. I have examined and referred to all these reports, for insistence was naturally laid on the opinion of Atkyns J. (2). There is no decision upon the point, and the contradiction as to the view of the majority of the judges as reported in 2 Modern and in Freeman's Reports, makes the case an unsatisfactory one upon which to found a limitation of the liability laid down so expressly in Lyndwood (supra).

Watson's Clergyman's Law, ed. 1747, p. 395, takes note of the divergence of the reports on the question which procedure was proper to enforce the liability of the rector to repair, but he offers no solution ; he deals (p. 394) with " chancels repaired by rectors, impropriators, or appropriators " without any limitation of that liability, and passes on to consider the Ordinary's power over the seating in chancel and church.

On the authorities, I have come to the conclusion that the liability of a lay impropriator is personal, and is not limited to the amount of his receipts from the tithe. In view of his right of contribution from other owners of a part of the tithe, which I deal with later, this view is not so harsh as it might appear at first sight to be, and it secures that the duty of repair shall be effectively carried out.

With regard to the third question propounded, it is, in my opinion, clear from the above authorities that the defendants

(1) Freem. (K. B.) 230, 231. (2) 2 Mod. Rep. 258.

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would have been liable to be admonished to repair the chancel by the appropriate Ecclesiastical Court if a cause of office had been promoted against them. The report in Freeman (1) is explicit that the whole Court were agreed on this point. Gibson's "Codex Juris Ecclesiastici Anglicani (supra) treats the sanction by spiritual censures as undoubted, and his law is derived from Lyndwood (supra). See also Degge's Parson's Counsellor, 7th ed., 1820, p. 209. Lord Penzance's statement in *Neville* v. *Kirby (2)* above set out as to the remedies against an impropriator for failure to fulfil his duty, appears to be well founded on the authorities.

On the fourth question Mr. Vaisey reminded the Court that the jurisdiction that it is called upon to exercise is criminal, or quasi-criminal, and penal. But as Lord Selborne L.C. said in *Mackonochie* v. *Lord Penzance* (3), even in proceedings which are called (and in some sense are) criminal and penal, the ecclesiastical law has for its object, not the punishment of the individual offenders, but the correction of manners and the discipline of the Church.

In *Morley* v. *Leacroft* (4), in which the liability of a lay rector to repair the chancel of a parish church was made clear by admission, an admonition was issued in pursuance of a duty which the chancellor felt was clear, and he indicated that he had power to enforce it if it were disobeyed.

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. Sect. 2, sub-s. 3, of the Act of 1932 refers to the defendant who would have been liable—i.e. in peril—of being admonished on the date when the notice to repair was served on him. Those words appear to indicate the time when the liability is to be discovered, which may be before the question

(1) Freem. (K. B.) 230.
(2) [1898] P. 160, 167.
(3) 6 App. Cas. 424, 433.
(4) [1896] P. 92.

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of the appropriateness, or harshness, of an admonition could have been determined by an inquiry into the figures relevant to the case, and the portion of tithe received, or receivable, by the defendant.

Finally it appears to me that the respondent would be entitled to enforce contribution from the other tithe owners; for they must settle amongst themselves the proportion that each is to pay. That is the statement of Dr. Burn and Sir Robert Phillimore. Order XI. of the County Courts Rules provides the method whereby contribution can be enforced by third-party procedure, and the respondent can make use of this for reimbursement of moneys paid by her beyond her proper share. Meantime all hardship against the respondent can be avoided by an order being made under s. 26 of the County Courts (Amendment) Act, 1934, for payment by instalments of the sum due.

For these reasons I am of opinion that the appeal should be allowed and an order made as asked for in the notice of appeal.

ROMER L.J. The question to be determined upon this appeal is whether the defendant Mrs. Croxford would, but for the Chancel Repairs Act, 1932, have been liable on March 28, 1934, to be admonished by the appropriate Ecclesiastical Court, in a cause of office promoted against her in that Court, to repair the chancel of Wickhambrook parish church. The facts existing on that date material to a decision of this question are as follows. The chancel was out of repair and could only be put into proper repair by an expenditure of 123*l.* 12*s.* 6*d.* Mrs. Croxford was the legal owner in fee of impropriate tithe rentcharges charged on land in that parish amounting in all to 39*l.* 11*s.* 9*d.* a year. Such rentcharges had only been conveyed to her on November 7, 1933, and she had received in respect of them no more than 39*l.* 7*s.* 4*d.*

On this state of facts it is contended on her behalf that, inasmuch as the sum received by her was less than the amount necessary to put the chancel into repair, the Ecclesiastical Court would have had no power to admonish her to do the repairs or any of them. Alternatively, it is contended that even if

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the Court would have had such power it would not have exercised it in the circumstances. It is contended on the other hand upon the part of the Parochial Church Council that Mrs. Croxford could have been admonished, inasmuch as she was on March 28, 1934, the owner of the tithe rent-charges, and that it is immaterial whether she had or had not at that date received any payment in respect of them. As to her alternative contention, they say that it is equally immaterial to consider whether the Court would or would not have admonished her in the circumstances, and that the only question to be determined is whether the Court had the power to do so. On this latter point I think that the Parochial Church Council are right. The Act does not impose as a condition precedent to the Court giving judgment for the responsible authority that it should find that the defendant would, but for the provisions of the Act, have been in fact admonished, but whether the defendant would, but for those provisions, have been liable to be admonished. The word "liable" 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.

The only question, therefore, to be determined upon this appeal is whether the defendant could, but for the Act, have been admonished "to repair the chancel." If so, then the Court was obliged by the Act to give judgment for the plaintiffs for the full sum of 123*l.* 12S. *6d.* That this may in certain cases lead to considerable hardship is not a matter which we are entitled to take into consideration, because the words of the Act itself are unambiguous. All that we have to ascertain is the law relating to the repair of a chancel before the Act came into operation. As to this law one thing clearly emerges from the numerous authorities to which our attention has been very properly called. It is this. The parson or other the owner of the rectory, whether ecclesiastical appropriator or lay impropriator, was liable to keep the chancel of the parish church in repair. The real

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difficulty consists in finding out whether the duty to repair was one arising out of the possession of the rectory, irrespective of the profits received by its possessor, or whether it was merely a duty to apply the profits as and when received in effecting the repairs. On this question there does not appear to be any direct authority. Nor is this at all surprising, for down to comparatively recent times the question could not often have arisen.

In earlier times the rectory can very seldom have been divided up among numerous holders all or many of whom might be in possession of a share the profits derived from which would be wholly insufficient of themselves to keep the chancel in repair. But as a result of the numerous Inclosure Acts passed during the latter end of the eighteenth century, and the general commutation of tithes for tithe rentcharges, and the subsequent redemption of many such rentcharges for money, or their extinguishment by merger in the lands out of which they issued, the property of the rectory, or what now represents it, is often in modern times found in the hands of a numerous and not easily ascertainable class. What the Ecclesiastical Courts would have done in such circumstances must, in the absence of direct authority, be largely a matter of inference to be drawn partly from what is said in the various authorities and partly from what is left unsaid. These authorities have been reviewed by the Master of the Rolls in his judgment, which I have had the privilege of reading, and need not be referred to in detail here. They are unanimous in this, that, except in some few cases where there has grown up a custom to the contrary, the parson or rector is responsible for keeping the chancel in repair. This is to be found stated over and over again without any qualification being added, and it seems reasonable to infer from this fact that no qualification was recognized.

There is, however, a passage in the judgment of Atkyns J. in *Walwyn* v. *Awberry* (1) from which it may be inferred that in the view of that learned judge the liability of a lay impropriator of a rectory to repair is not unqualified. In

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

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that case, of which the best report is to be found in 2 Modern Reports, p. 254, a lay impropriator of a rectory had been admonished by the ecclesiastical authority for not having kept the chancel in repair, and the question arose whether such admonition could be enforced by a sequestration of the profits of the rectory. The question was not in fact decided, inasmuch as the case went off on a matter of pleading. Atkyns J., however, was of opinion, differing apparently in this respect from the view entertained by the majority of the Court, that the profits of a lay impropriator could properly be sequestrated by the Ecclesiastical Court for the purpose of enforcing its admonition. His view was that the lay rector was entitled to retain only so much of the profits of the rectory as was not required for the repairs. If this were so, then it would seem to follow that such a rector could only properly be admonished for not having applied the profits come to his hands in effecting the repairs. So that if he had only received profits that were insufficient for the purpose he would not be admonished. But the majority of the Court did not presumably take the same view of the lay rector's right to the profits that commended itself to Atkyns J. The question whether an admonition to repair could be enforced by sequestration of the profits or merely by excommunication, would not necessarily have thrown any light upon the nature of the liability to repair, even if it had been decided. The case would, however, be valuable if the view taken by Atkyns J. of the nature of a lay impropriator's interest in the rectory could be accepted. Unfortunately, as I have pointed out, he appears on this question to have been in a minority. In these circumstances the case cannot be regarded as an authority for imposing a qualification upon the liability of a rector to repair that is not mentioned by any one of the other authorities, and which in four of them, at any rate, would almost certainly have been alleged if it had existed.

These four authorities are: *Bishop of Ely v. Gibbons* (1); *Morley* v. *Leacroft* (2); *Neville* v. *Kirby* (3); and *Hauxton*

(1) 4 Hagg. Ecc. 156. (2) [1896] P. 92.
(3) [1898] P. 160.

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Parochial Church Council v. *Stevens* (1). In all these cases impropriators of a rectory or part of it were admonished for non-repair of the chancel, and in no one of them was it even averred that the person admonished had received profits from the rectory sufficient to enable him to effect the repairs. It is true that in all of them it was highly probable that sufficient profits for the purpose had in fact been received. But if such a receipt was a condition precedent to the existence of the liability it is almost incredible that the fulfilment of the condition should not have been averred.

There is one further matter to which I ought to refer before passing from the reported cases. It was stated by Sir A. Cockburn C.J. in *Griffin* v. *Dighton* (2) on the authority of a passage in Lyndwood (supra) that where there are both rector and vicar in the same church, they shall, there being no custom to the contrary, contribute to the repair of the chancel in proportion to their benefice. Some reliance was placed on behalf of the respondents upon this statement. It does not, however, help them, for it throws no light upon the question of whether the rector's liability is conditional on his having received profits of the rectory. Indeed, so far as it goes, it seems to be against them. For the liability of the rector to contribute to any expenses incurred by the vicar in effecting the repairs is again stated in general terms and without reference to the amount of profits actually received by him.

The respondent's case, however, receives considerably greater support from the passages in Burn's Ecclesiastical Law and substantially repeated in Sir Robert Phillimore's book, to which the Master of the Rolls has referred. They appear to lay down the following propositions: (1.) That, where a rectory is held by several impropriators, any one or more of them may be proceeded against for non-repair of the chancel without making the others parties to the suit, if the parties proceeded against can be proved to have received between them profits belonging to the rectory sufficient to effect the repairs; (2.) that the parties so proceeded against must settle between themselves

(1) [1929] P. 240. (2) 5 B. & S. 93, 105.

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the proportions in which these expenses of repair are to be found. But no authority for the propositions is cited, and they seem in some respects very unsatisfactory and illogical. That one only out of several impropriators may be proceeded against for non-repair of the chancel seems reasonably clear. Neither in the case of *Bishop of Ely* v. *Gibbons* (1), nor in that of *Hauxton Parochial Church Council* v. *Stevens* (2) was the impropriator in question the owner of the whole rectory, yet no objection was taken on this score. But this throws no light upon the question whether the liability of a rector to repair the chancel is a merely personal one, or whether it is dependent upon the receipt of profits sufficient for the purpose. For in the former case each owner of a share in the rectory must owe an unqualified duty to repair. In the latter case he must owe a duty to repair if he has received sufficient profits to cover the expense of repairing. In either case he could be admonished for the neglect of his duty without citing the owners of the other shares.

But it is difficult to see why two or more impropriators can only be proceeded against for non-repair when it can be shown that they together have received sufficient profits to effect the repairs. For if the duty of each one to keep the chancel in repair be unqualified, any such proof would be unnecessary. If, on the other hand, his duty be contingent upon his having received sufficient profits for the purpose, how can one impropriator, who has received either no profits at all or profits insufficient for the purpose, be made liable to admonition merely by joining with him another impropriator who has received enough profits to enable him to discharge his duty ? For it can hardly be suggested that one of several impropriators is under any obligation to compel the others to perform their own. The fact that two or more impropriators may be admonished for non-repair of the chancel without showing that each one has received profits for the purpose necessarily tends, therefore, in my opinion, to the conclusion that the duty of each one is an unqualified one. So too, though in a lesser degree, does the fact that one of several

(1) 4 Hagg. Ecc. 156. (2) [1929] P. 240.

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impropriators who has repaired the chancel can obtain contribution towards the expenses from all the others. I say " all the others, " as I cannot accept the proposition that contribution can only be obtained from those impropriators who have been joined in the proceedings—if Dr. Burn intended to lay down any such proposition, which I venture to doubt. If the liability to repair be unqualified, then all the impropriators will have to contribute, and, on the analogy of the rector and the vicar, will do so proportionately to their shares in the rectory. If, on the other hand, the liability to repair be a qualified one as is suggested, the impropriators will only contribute proportionately to the profits they individually receive and the amount of these may be very difficult to ascertain. But, apart from the difficulty of ascertaining the amount of the individual contributions, an apportionment of the expenses according to the profits received would or might be grossly inequitable. For the owner of perhaps the largest share in the rectory would escape having to contribute anything at all if he had only recently acquired his share and had not at the time received any profits from that share.

In my opinion, for these reasons and for those given by the Master of the Rolls, this appeal should be allowed.

EVE J. I have had an opportunity of reading both the judgments just delivered, and, in acquiescing therein, I hope I shall not be regarded as guilty of undue temerity, in a case involving the consideration of matters in which I have had but little experience, when I say that the result of those judgments does not appear to me to be reasonable or just, and would seem to be one to which the attention of the Legislature might properly be directed.

F. J. Tucker K.C. Mr. Vaisey has drawn my attention to the fact that in para. 8 of the note to Order L. r. 63, which appears on p. 1841 of the Annual County Courts Practice, 1935, it is stated : " In any proceedings under the Chancel Repairs Act, 1932, in which judgment is given for the payment of a sum of

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money in respect of repairs not yet executed the sum for which judgment is so given shall, unless the judge shall otherwise direct, be paid into court to the credit of an account intituled in the action, and any sum so paid into court may be invested or be paid from time to time out of court to such person as the judge may direct, and rule 25 of Order IX. shall apply withregard to such moneys." It is submitted that the proper order would be that the money be paid into the county court to abide the directions of the county court judge under this rule.

LORD HANWORTH M.R. That seems right, Mr. Vaisey.

Vaisey K.C. Yes, I think so.

Appeal allowed against defendant Mrs. Croxford. Leave to appeal to House of Lords granted.

Solicitors for appellants : *Thomas Eggar & Son, for Greene & Greene, Bury St. Edmunds.*

Solicitors for respondents : *Heald, Johnson & Co., for Steed & Steed, Long Melford.*

W. I. C.

K. B. D. 1935 *April*, 3, 4. C. A. *July* 8, 9.

KELLY (INSPECTOR OF TAXES) *v.* ROGERS.

Revenue—Income Tax—Foreign Possessions and Securities—Dividends not remitted to England—Trustee resident in England administering Foreign Trust—Assessability—Residence in Division during Year of Assessment—Removal to another Division before Date of Assessment—Jurisdiction of Commissioners of Original Division to Assess—Income Tax Act, 1918 (8 & 9 *Geo. 5, c.* 40), *Sch. D, Miscellaneous Rules, r.* 4—*All Schedules Rules, r.* 4.

The respondent, a woman of American birth married to an Englishman and residing in England, was appointed, under the will of her mother, an American citizen, trustee for her sister, whose domicil of origin was American and who suffered under an incapacity. The trust fund in the main consisted of stocks, shares and securities in America :—

Held, by Finlay J. and the Court of Appeal, that the respondent, being in receipt and control of the income of the trust fund, as trustee, was liable to be assessed on the whole of that income and not merely on that part of it which was brought over to this country and applied for the benefit of her sister, although the income did not arise in this country or under an English trust.

Observations of Lord Cave in *Williams* v. *Singer* [1921] 1 A. C. 65 applied.

In 1932 the respondent left the S. division in which she had resided for some years, including the year 1926–27, and went to live elsewhere. In 1933 the Commissioners of the S. division made an assessment on her in respect of the year 1926–27 :—

Held, by Finlay J. and the Court of Appeal, that the Commissioners of the S. division had jurisdiction to make the assessment.

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CASE stated by Special Commissioners of Income Tax.

At meetings of the Commissioners for the Special Purposes of the Income Tax Acts held on October 16 and 30, 1933, the respondent, Mrs. Amy W. Rogers, appealed against estimated assessments to income tax for the year ending April 5, 1927, in the sum of 1600*l.* in respect of income from possessions out of the United Kingdom and in the sum of 1600*l.* in respect of income from securities out of the United Kingdom. These assessments had been made on the respondent in her capacity as trustee under the will of the late Harriette Willmer.

Harriette Willmer, an American citizen, died in New Jersey in 1910. By her will, dated December 18, 1907, she appointed the respondent trustee for her (the testatrix's) daughter, Jennie, " with full power to receive, hold, use, invest, re-invest, sell and manage all and singular the moneys, securities and property of every description given in trust for the benefit of my said daughter, Jennie, by any clause of this will."

The respondent, who was married to an Englishman, had lived in the United Kingdom since 1889, and Jennie Willmer had lived with her since 1910. Jennie Willmer was an incapacitated person within the meaning of General Rule 4, Income Tax Act, 1918. Her domicil of origin was American.

For many years the fund settled by Harriette Willmer on the trusts mentioned had consisted for the most part of stocks, shares and securities in America. The respondent at first brought over from America the sum of 400*l.* a year, which was spent each year for the maintenance of Jennie Willmer. After a time she brought over 600*l.* a year, but the balance of 200*l.* a year was not spent for the maintenance