LETTERS TO THE EDITOR

THE OFFICE OF CHANCELLOR

From Augur Pearce Esq.

Dear Sir,

In view of my own study of the role of the diocesan Vicar-General ((1990) 2 Ecc LJ 28), I naturally read with great interest Chancellor Coningsby's recent article published at (1992) 2 Ecc LJ 273. I am all for chancellors 'casting a careful eye upon themselves'! But it is clearly possible to take more than one view of the development of diocesan judicial offices, and I should like to put forward an alternative analysis.

If I may simplify somewhat, the thrust of the recent article was to identify certain things that a modern chancellor does as 'official principal's functions' and others as 'vicar-general's functions' (whether performed in or out of the consistory court), and to make a practical distinction in terms of the powers available and accountability to the bishop. That the vicar-general has a different jurisdiction and *modus operandi* I would not deny; but with respect I believe the learned Chancellor has attributed to him many statutory functions which have no connection with his office, and that the true position is actually much simpler than suggested.

1. As I see it, three officers emerged in mediaeval times: (a) the chancellor, who had no jurisdiction as such, but a largely ministerial role as 'keeper of the seals'; (b) the official principal, who had (by the 'concession of princes') an ordinary jurisdiction in cases *inter partes;* and (c) the vicar-general in spirituals, delegate of the bishop in non-contentious matters such as the exercise of the dispensing power, institution to livings, and visitation. The 'correction of abuses' was indeed a part of visitation, but was done of the superior's own motion, rather than at the suit of a second party. By contrast the later faculty jurisdiction belonged to the official principal – note the fiction by which older faculty cases are cited as a suit between incumbent and churchwardens on the one hand, and parishioners and inhabitants on the other.

2. The offices remained distinct down to the present century. But since they were almost invariably held by one person, some laxity of language became accepted. The offices that mattered were (b) and (c) above; but the *title* most commonly used for the combined office holder was that of office (a). In the passage quoted from Phillimore at (1992) 2 Ecc LJ 277, the references to 'constituting an official principal' and 'constituting a chancellor' clearly refer to the same essential act.

3. The crucial modern statute is the Ecclesiastical Jurisdiction Measure 1963, a Measure 'to reform and recontruct the system of ecclesiastical courts'. The Measure had a considerable effect on the jurisdiction which the official principal had previously exercised in the consistory court, but expressly left the vicar-general's jurisdiction on one side, neither merging the office with any other nor enlarging its role.

4. The consistory court was the court in which the bishop, or later his official principal, had sat to hear cases *inter partes*. It had gained and then lost a matrimonial and probate jurisdiction; it retained the faculty jurisdiction and certain other matters until 1963. Section 1(1) of the 1963 Measure uses language implying the creation of a new court to replace the old, but having the same name (cp. Courts Act 1971, s.42), and s.81(1) also requires this construction if the modern consistory court is to have the powers there given to 'courts *established by* this Measure'. But ss. 6(1)(e), 6(2), 65(4) and 82(2)(c) all imply that the old consistory court continued in existence, and the point cannot be said to be free from doubt.

5. Yet whatever the true identity of the modern consistory court, there is nothing in the Measure to contradict the clear impression from the language of s.2(1) that a new judicial office with an old name is there being created – '*a* single judge who *shall* be called the chancellor'. Since 1963, then, in my submission, there has been a fourth diocesan office in existence: that of the new-style or 'statutory' chancellor (d), to whom any later statutory use of the word 'chancellor' must apply.

6. What became, then, of the offices listed at 1 (a), (b) and (c) above? The old-style ministerial chancellor, who was not really a judge at all, had long since lost any meaningful role in the bishop's household, and I suggest that office (a) became obsolete after 1963 when it was no longer requried even as the source of a title. The official principal could have represented a much more serious problem: he was not abolished, and if the new consistory court was in fact meant to be identical with the old he would have been entitled to sit there. His *inter partes* jurisdiction overlapped with that given by the Measure. But the problem was solved by s.13(2), providing that the old office (b) and the new office (d) were thenceforth to be held together in all cases.

7. No such provision was made for the vicar-general's office (c). It may not be true to say that his powers and functions are completely non-statutory (cf. Marriage Act 1949, s.16(2), and Marriage (Prohibited Degrees of Relationship) Act 1986), but they were deliberately untouched by the 1963 legislation (s.83(2)(d)) and the potential for the bishop to appoint a different person to this office remained.

8. Chancellor Coningsby refers to the Letters Patent appointing a new Chancellor. I am all for flowery language and a little repetition in such documents, never having belonged to the functionalist school of drafting; but I would argue, if pushed, that only one element is essential (or two, if the bishop so decides). The appointee must be constituted 'Chancellor of Our Diocese of. . . '. This is, by s.2(1) of the 1963 Measure, the correct title of the judge of the consistory court. The appointee will thereby become that judge, and also gain the out-of-court functions which various legislation confers upon 'the chancellor'. He will also (whether the Letters Patent say so or not, since it is implied by the operation of s.13(2)) become official principal with any additional powers which that office may still confer. In short, he will possess the offices distinguished as (b) and (d) above. Office (a) he no longer needs. But if he is to have office (c) as well, the second element in the document must be a line constituting him vicar-general, with such functions and powers 'in spirituals' as the bishop may choose to give him. (See, for typical wording, (1990) 2 Ecc. L.J. 30-31.)

9. Suppose then that such an appointment to the joint offices has been duly made. It remains a well-known principle of law that a person who happens to hold two offices cannot use the powers of the one in discharging the functions of the other. A vicar-general dealing with a marriage licence application cannot rely on the powers given to a chancellor in faculty matters in order to summon witnesses before him. And I cannot see any way in which functions which modern legislation expressly confers upon 'the chancellor' can be said to be functions of the separate office of vicar-general. They are quite simply 'chancellor's functions', and go with the office created by the 1963 Measure.

10. Thus the modern disciplinary jurisdiction, the power to deal with contempt, injunctions, restoration orders and the like, all derive from statute. The basic faculty jurisdiction – apart from new extensions such as Faculty Jurisdiction Measure 1964, s.1 – and the residual matters covered by Ecclesiastical

Jurisdiction Measure 1963, s.6(1) (c)-(e), while in part statutory, also overlap with the jurisdiction inherited from the official principal's court. Any attempt to relate any of these to the vicar-general's office is misconceived, and in all such matters the chancellor acts free from episcopal supervision or correction. But if the chancellor wishes to act in faculty-related matters in an inquisitorial or 'interventionist' manner, he must be able to justify this (as to some extent he clearly can) from the legislation itself, without appealing to the quite distinct role which he may have as vicar-general.

Yours faithfully,
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10th February 1992.

THE FREEHOLD

From the Revd. Stephen Trott

Dear Sir,

Chancellor Bursell's article in the Ecclesiastical Law Journal on the parson's freehold and clergy discipline tends, in my experience, to describe the freehold as it was before various reforms in the course of this century stripped away several important aspects which formerly provided the incumbent with almost unassailable independence.

The freehold has already been greatly modified, in that the tithes, glebe and parochial endowments are effectively removed; and in that retirement at 70 is now compulsory. The modern parsonage house, only rarely these days anything more than a modern family house, may remain in theory part of the freehold, but the incumbent is treated for most practical purposes as the tenant of a tied property.

What remains of the freehold is under active consideration by the General Synod, with a view to providing simpler and less costly disciplinary procedures; and, on a larger canvas, towards fundamentally altering the relationship between incumbents and the diocese, by means of either the introduction of leasehold on fixed terms of years, or outright abolition and the employment of clergy by the Diocesan Board of Finance.

What became clear in the course of discussion at the Ecclesiastical Law Society's conference this year is that the disciplinary issue is not such as to justify by itself the removal of freehold, which raises the much wider issues mentioned briefly above. The grave difficulties posed by disciplinary action against a priest, in terms of adverse publicity, and the cost of legal proceedings, would not be removed by the abolition of freehold *per se,* which would have to be replaced by employment rights at least equal to those enjoyed by secular employees. The only gain in such a situation would be that the term of office of the clergyman concerned would expire eventually, enabling his replacement. The clergyman would become unemployed, and probably unemployable elsewhere because of his track record. Responsibility for ending his employment and his subsequent pastoral care would depend on the bishop concerned to an unacceptable degree. For the clergyman, who has committed himself for most practical purposes for the whole of his working life to the stipendiary ministry, there would be no right of review

or appeal against the judgement of his employer, where a system of fixed term contracts operated.

The wider question as to the nature of the relationship between parish and diocese is a separate issue and must be discussed separately. The need for effective means of discipline against clergy whose conduct is professionally unbecoming need not, however, involve anything more than a further modification to the already limited freehold which incumbents at present retain. Such a freehold marks the professional character of an incumbent's ministry, comparable to that of most professions, where office holders may face dismissal or suspension for unprofessional conduct, but otherwise may expect to choose where to live, whether and where to relocate their place of work, and in general to exercise considerable control over the direction of their working lives. To modify the freehold in any way which removed that control over one's own stability, in the name of easier disciplinary procedures, but with more than an eye to providing fewer restraints on clergy deployment, would be in the view of many incumbents seriously to undermine the nature of the pastoral relationship of priest and parish which is one of the strengths of the Church of England.

The need for good professional standards is apparent to all but a tiny number of clergy, and in order to achieve this, many work exceptionally long hours, and accept restrictions on their own time and interests which would not be countenanced in most other professions, on a stipend which has fallen to subsistence level. There would surely be little opposition to the creation by Measure of a disciplinary tribunal, at provincial or national level, with power to override the individual's freehold rights (or statutory rights in the case of unbeneficed clergy) where it could be shown that the clergyman concerned had acted with conduct unbecoming a clergyman, and ought to be either suspended or removed from office? There will, of course, be unwelcome publicity, as there is with every disciplinary hearing by a professional body. But the achievement of good professional standards, and the reality of an effective tribunal which is independent of the diocese concerned, ought to be well worth paying such a price. Those charged with offending against good practice could be assured of a hearing by an independent judicial body, and those who might be tempted to transgress would know that there was a real risk of censure, suspension or deprivation.

To provide such a disciplinary procedure would involve a modest modification of the freehold, which would be no different in principle to the various penalties provided under earlier legislation, but would provide in practice a tribunal which was more obviously pastoral and spiritual, showing the Church dealing at that level, rather than with the quasi-criminal proceedings available, for example, under the 1963 Ecclesiastical Jurisdiction Measure, with those who had not committed offences at law, but had fallen short of the moral and ethical standards of the Church.

What is clear is that the narrow issue of clergy discipline, and any necessary amendments to the freehold which this may involve, is quite distinct from the desire of some sections of the Church at present to secure greater control over clergy deployment.

Yours faithfully,
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31 March 1992.