

Article reprinted from *Cross+Way* Issue Summer 2000 No. 77

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CHURCHWARDENS: A PECULIAR BREED

The following text was included in a briefing by Church Society for General Synod members in July 1999. In it The Rev John Masding, chairman of the English Clergy Association explains briefly the complex historical and legal background to the Churchwardens Measure.

What is the legal status of a Churchwarden?

The Courts and legal authorities recognise Churchwardens as temporal rather than ecclesiastical officers, so that questions about their election, for example, fall to the secular courts to decide and not the ecclesiastical. The Canon describing them as bishop's officers does not, of course, alter the common law, or give the whole legal picture, perhaps rather misleadingly in the light of the ill-founded provisions of the proposed Churchwarden's Measure.

In what sense are Churchwarden's bishop's officers?

It is unfortunate that the whole picture is not given, since one hears the mistaken argument that a bishop should discipline a bishop's officer. Despite the privilege of access to the Bishop or other Ordinary (and the duty of response to his proper interrogatories) the Churchwardens are admitted by him as a ministerial act only and are his officers only in that sense, being fundamentally in law and history Parish Officers, regulated by the High Court in respect of their election. The responsibilities and duties they hold for the good of the Parishioners as a whole and are answerable to the Parishioners.

Should Bishops be able to suspend Churchwardens?

Just as the right of appointment is in the parishioners, usually the inhabitants and the incumbent acting jointly or severally as the case may be should they disagree, to choose two churchwardens unless there be a valid custom to the contrary, so the right of removal, legal opinion states, lies with the parishioners: "so that a churchwarden may be removed for bad conduct or for wasting the church goods. Consequently, the ordinary has no right to remove a churchwarden, for the parishioners alone may remove their own officers." (from a legal submission to the Ecclesiastical Committee).

Suspension, it may be said, is not removal and would be novel; but the principles are the same, and appropriate legislation could be devised to establish and regulate a means of suspension of which the parishioners might avail themselves should they be persuaded that the occasion required a temporary suspension rather than removal.

It is worth noting in passing that as Parish Officers the Churchwardens, at the historic and legal core of their responsibilities in mediaeval times, had the responsibility for the church goods and property. A demand from the bishop or his ecclesiastical court that they should give account would have been countered by a Prohibition and there are cases in the law reports. In process of time but still centuries ago, the Churchwardens have also acquired the originally quite separate duties of the ancient *testes synodales*, who at the Visitation had the duty of making presentments to the Ordinary about the morals and behaviour of the clergy and parishioners alike. By the time of the

Reformation it seems that parishioners were represented at Visitations by the Churchwardens rather than by Synodsmen, and the whole surviving duty of these episcopal witnesses has devolved upon the Churchwardens. It would seem that that is probably how they came to be sworn in by the Ordinary and admitted, and so also became his officers as well as officers of the parish.

Is a Churchwarden answerable to a Bishop?

Only in one particular respect: the Churchwardens must follow the bishop's lawful directions about the seating of the parishioners otherwise than by faculty or prescriptive right - and saving the rector's right to the chief seat and place in the chancel, or as it may be the vicar's - being in Cripp's phrase, "the parochial officers of the ordinary for this purpose" so "that there being no contention in the church" (from a case settled in 1604). To that extent they are correctly described as bishop's officers for that purpose, which is his purpose. But for their own original purposes they are their own men. They decide what to do within their legal responsibilities and duties, and neither the bishop, nor the incumbent, nor the parochial church council, can direct them as to the exercise of any discretion which they may have. The bishop or other ordinary may properly in his visitation or otherwise put questions to which he is entitled to expect an appropriate response.

Is there an alternative?

At the very least there must be provision for the person to act as churchwarden during the period of suspension to be chosen by the body or person who chose the suspended churchwarden. The disfranchisement of the Parish is unwarranted and coincidental punishment.

Why can we not have a new legal procedure and in this area a novel one: summary proceedings before a Magistrate, instead of executive action by the Bishop as prosecutor, jury, judge and executioner?