CHANCELLOR, VICAR-GENERAL, OFFICIAL PRINCIPAL – A BUNDLE OF OFFICES

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The immediate reason for this paper is the imminent coming into force of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 which makes several references to 'chancellor' but does not specify in which of his offices the chancellor will be acting. A wider reason is that chancellors are increasingly needing to consider the capacities in which they act for such purposes as issuing practice directions and issuing instructions about the care of churches and churchyards. In the 1991 Measure, section 6 (3) requires every chancellor to issue written guidance to parochial church councils (PCCs) about trees in churchyards. Section 11 (8) requires every chancellor to issue written guidance to PCCs, ministers and churchwardens as to those matters which he considers to be of such a minor nature that they may be undertaken without faculty. Section 13 (6) allows a chancellor 'of his own motion' to issue an injunction to restrain an unlawful act or to make a restoration order if such an act has been done. Section 14 requires every chancellor to confer jurisdiction to grant faculties to archdeacons to such extent as is prescribed in rules. Section 18 provides a procedure whereby a chancellor may by instrument authorise the demolition of a church where this is necessary in the interests of safety or health without a faculty having been sought or granted. When the chancellor acts under these various sections will he do so as chancellor, as vicar-general or as official principal, or in all three capacities, and should he specify in which capacity he acts? In relation to directions or instructions given outside the authority of such a measure do similar questions arise?

The word 'chancellor' describes a whole fasciculus of offices. It is the ancient title of the ecclesiastical judge. Sir Walter Phillimore says in the second edition of 'Ecclesiastical Law in the Church of England' (1895) referring to an earlier writer on the subject, Bishop Gibson, that the title seems to have grown into use in imitation of the like title in the state, inasmuch as the proper office of a chancellor as such was to be keeper of the seals of the bishop. The word chancellor is used in two statutes of Elizabeth I, in the canons of 1603 and in certain Victorian statutes (4 Vict c 86, 55 and 56 Vict c 32 s.1). Gibson says that the office includes within it two other offices distinguished in the commission or letters patent by the titles of official principal and vicar-general. The commission does not usually include the word chancellor, but this office clearly exists at common law and is exercisable by the person appointed by the commission. He distinguishes between the other two offices in these words: 'The proper work of an official is to hear causes between party and party and formerly concerning wills legacies marriages and the like, which are matters of temporal cognizance, but have been granted to the ecclesiastical courts by the concession of princes. The proper work of a vicar-general is the exercise and administration of jurisdiction purely spiritual, by the authority, correction of manners, granting institutions and the like, with a general inspection of men and things, in order to the preserving of discipline and good government of the church' (Phil.p.929, referring to Gibson's

Tracts at p.xxii). Today we would summarise these propositions by saying that the official principal is an ordinary (a judge having independent jurisdiction) while the vicar-general is not.

Since the judicial work of a chancellor now relates mostly to faculty applications it is necessary to decide into which of the two categories described by Phillimore this work falls. It has some features of both categories. In its origins it is a spiritual jurisdiction arising from the bishop's sentence of consecration following which the bishop's faculty (or some other form of permission, eg a licence) is required before an alteration can be made or an item disposed of. Obviously the original act of consecration is of a spiritual rather than a secular (or temporal) nature. This jurisdiction therefore falls into the same category as 'visitation, correction of manners and granting institutions' and as such it is in essence a vicar-general's jurisdiction rather than a matter of determination of causes within the official principal's jurisdiction. However as a result of legislation it has certain features of the latter jurisdiction. The characteristics of this jurisdiction are (i) the element of deciding disputes between parties and (ii) the fact that the jurisdiction is 'conceded by princes', ie it would be a temporal jurisdiction but has been ceded to the ecclesiastical court by the State.

As to (i) the procedure provided for by the Faculty Jurisdiction Measure 1964 (FJM) contains a substantial *inter partes* element. The court has jurisdiction to decide issues between Petitioners and Parties Opponent and there are detailed provisions in rules as to the procedure for controlling such disputes. As to (ii) the position since the introduction of Town and Country Planning legislation in the secular law is that the Church of England has been granted ecclesiastical exemption from listed building control, the State (through Parliament) permitting the church to operate its own system of control. This is not exactly the 'ceding of princes' referred to by Phillimore since the faculty jurisdiction did not previously exist in secular legal administration and could never have been handed over to the ecclesiastical court. Rather the secular jurisdiction developed later and, when it did so, it permitted the ecclesiastical system to continue. This first occurred by a provision of the Ancient Monuments Consolidation and Amendment Act 1913 and has been continued in successive Town and Country Planning Acts. However, although there has been no 'ceding' in the strict sense, it is submitted that a similar situation exists. The State allows the church to have a jurisdiction which otherwise the State would exercise. Recent discussions between the Church of England and the government over whether or not the ecclesiastical exemption will continue certainly make it look as if the government is conceding something in a general sense. It appears to reserve the right to withdraw the concession and also to require stricter control over the church's own exercise of the faculty jurisdiction, on the basis that the exemption could be taken away. The discussion about the exemption in Chapter III of the Report of the Faculty Jurisdiction Commission in 1984 proceeds on the basis of a concession by the government. It is therefore submitted that the faculty jurisdiction is a hybrid in the terms of Phillimore's categories. It partakes of some characteristics of the vicar-general's jurisdiction and some characteristics of the official principal's jurisdiction. The writer considers that both offices are needed in modern times to carry out this part of the chancellor's work.

Under the Care of Churches etc Measure 1991 (CCM) the court will have power to grant injunctions, and it is of interest to consider whether this extension of jurisdiction falls clearly within one office or the other, so as to clarify the position in favour of one or other of Phillimore's categories. Again it is submitted that there are features of both categories. Essentially injunctive relief is an exercise of 'control' or 'correction' and arises from visitatorial powers and the office of vicar-general. On the other hand there is often an element of *inter-partes* litigation when an injunction is sought; the rights of individuals (parties) may be significantly affected and therefore must be considered and adjudicated upon. The need for an injunction could arise either in a context where individual rights are strongly involved (stopping building work already commenced, so that contractual claims may arise) or it could arise in circumstances where the protection of the church or churchyard is the issue but without affecting the rights of individuals. It is submitted that generally CCM is drafted upon the (assumed) basis that the judge of the court is not only vicar-general but also official principal, ie he has some quasi-temporal jurisdiction (in respect of faculties) as well as the vicar-general's jurisdiction (arising from delegation to him of the bishop's jurisdiction in matters of a spiritual nature). In passing, a contrast can be made with the disciplinary jurisdiction contained in the Ecclesiastical Jurisdiction Measure 1963 (EJM) which falls entirely within the scope of the vicar-general's office. This is a purely church area related to the enforcement of the church's own law – the canon law – and the maintaining of proper moral standards of conduct by the clergy.

It follows that, apart from any aspects of the faculty jurisdiction which involve use of the jurisdiction of official principal, the modern judicial jurisdiction of the chancellor derives from his office of vicar-general. The former jurisdictions of the official principal (wills, inheritance, testamentary capacity, matrimonial relationships) have gone, the 'ceding' of these by 'princes' having been revoked.

The fact that the functions exercised by the ecclesiastical judge are now essentially those of the vicar-general is in line with recent encouragement from the government (accepted in the report of the Faculty Jurisdiction Commission 1984, in the church's recent legislation (CCM) and also the Care of Cathedrals Measure 1991) for the ecclesiastical court and other controlling bodies to be more interventionist, and to take a firmer control of matters of conservation. The origins of the jurisdiction in visitation, discipline and control of those subject to the law of the church fit in well with a greater degree of supervision and initiative by the court.

An example of the trend towards greater intervention by the court is the provision in CCM section 13(6) for the court to be able to make injunction and restoration orders 'of its own motion'. The court will need to devise its own procedure for conducting proceedings in which it is itself the 'applicant'. What is clear is that this jurisdiction is entirely encompassed by the visitatorial, disciplinary, interventionist function of vicar-general.

What makes the consideration of the separate roles of vicar-general and of official principal worth pursuing is that the extent of the powers is greater in the latter than the former. Phillimore (at p.929) makes an important distinction between the independence of the official principal and the delegated authority of the vicar-general. He sets out a passage from Gibson's Tracts p.987 which in turn quotes from Stillingfleet's Discourse on Resignation Bonds p.60:

> There is a difference in law and reason between an ordinary power depending on an ancient prescription and composition (as it is in several places in the deans and chapters within certain precincts) and an ordinary power in a substitute, as a chancellor or vicar general. For although such an officer hath the same court with the bishop so that the legal acts of court are the bishop's acts by whose authority he sits there, so that appeal lies from the bishop's officer (not) to the bishop himself but to the superior;* and although a commissary be allowed to have the power of the ordinary in testamentary causes which were not originally of ecclesiastical jurisdiction . . . yet in acts of spiritual and voluntary jurisdiction the case is otherwise. For the bishop by appointing a chancellor doth not divest himself of his own ordinary power; but he may delegate some parts of it by commission to others, which goes no further than is expressed in it. For it is a very great mistake in any to think that such who act by a delegated power can have any more power than is given to them where a special commission is required for the exercise of it. For by the general commission no other authority passeth but that of hearing causes; but all acts of voluntary jurisdiction require a special commission which the bishop may restrain as he sees cause. For, as Lindwood saith, nothing passes *virtute officii* but the hearing of causes; so that other acts depend upon the bishop's particular grant for that purpose. And the law nowhere determines the bounds of a chancellor's power as to such acts, nor can it be supposed so to do, since it is but a delegated power; and it is in the right of him that deputes to circumscribe and limit it. Neither can use or custom enlarge such a power which depends upon another's will . . . The law still distinguisheth between *potestas ordinaria et delegata;* for the former supposeth a person to act in his own right and not by deputation, which, I suppose, no chancellor or official will pretend to.

Phillimore comments on this passage as follows: 'Voluntary jurisdiction is exercised in matters which require no judicial proceeding, as (formerly) in granting probate of wills, letters of administration (and now) sequestration of vacant benefices, institution and such like; contentious jurisdiction is where there is an action or judicial process and consists in the hearing and determining of causes between party and party'. So, apart from statute or measure, it was only when hearing causes as official principal that the chancellor had a jurisdiction which could not be restrained by the bishop. Now when acting within a statutory jurisdiction (eg FJM) the chancellor cannot be challenged by the bishop even if his function is that of vicar-general because the measure itself, by providing an appeal to the Court of Arches (or Chancery Court of York), effectively rules out a challenge by the bishop. But in exercising any other function within his jurisdiction the chancellor can be restrained if the bishop disapproves. It follows that in these other functions the chancellor should make sure that the bishop agrees with the course he is taking.

* In this sentence the word 'not' has been inserted by the writer to give the obvious meaning of the sentence, but in the passage quoted in Phillimore the word is absent.

Phillimore comments thus (p.930):

> The distinction which Bishop Stillingfleet here lays down between contentious and voluntary jurisdiction, as the one is supposed to be conveyed to the official and the other to remain in the bishop, is supported, as to the contentious jurisdiction, by the books of common law; which affirm that a bishop may well sue for a pension or other right before his own chancellor; and say that the archbishop having constituted an official principal to receive appeals, cannot afterwards come into that court and execute the office himself. Add to this, what is generally said, that if a bishop does not constitute a chancellor he may be obliged to do it by the archbishop of the province (Gibson p.986). . . It has been holden to be no ground for prohibiting a cause before the chancellor of a diocese in the consistorial court of the diocese that the bishop of the diocese is interested in the cause and that the decision had the effect of giving costs to the bishop – *Ex parte* Medwin and Hunt (1853) 1 E & B 609. But as to the other branch, to wit, voluntary jurisdiction, as visitation, institution, licences and the like, all this remains in the bishop, notwithstanding the general grant of all and all manner of jurisdiction to the official, and therefore in our ancient ecclesiastical records we find special commissions to hear and determine matters found and detected in the visitation, granted by the visitors to such persons whose zeal and integrity they could confide in, for the official prosecution of the crimes and vices detected. In like manner institutions, licences, and the like, can belong to chancellors no otherwise than as the right of granting is conveyed to them distinctly and in express terms; And all that is here said of chancellors holds equally in the case of commissaries and officials, according to the respective powers delegated to them.

As to the distinction between a chancellor and a commissary Phillimore quotes from Ayliffe's *Parergon Juris Canonici Anglicani* at p.163;

> It has been said that a bishop's official or chancellor is he to whom the bishop delegates the cognizance of causes in a general manner and as such an official or chancellor has the same consistorial audience with the bishop himself that deputes him. An appeal does not lie from such an official to the bishop himself but to him only unto whom it ought to be appealed from the bishop himself. But it is not the same thing in commissaries who are not principal officials, though deputed to an universality of causes in a certain part of the diocese, because a principal official is an ordinary and the other only a delegated judge.

Since it appears that it was only when engaged in the trial of causes that the chancellor exercised the jurisdiction of official principal it is of interest to consider to what extent if at all a modern chancellor tries causes. Since the Ecclesiastical Jurisdiction Measure 1963 (EJM) the consistory court has existed only as a statutory court. Its remaining jurisdiction under that measure is that contained in section 6 of the measure, viz, the disciplinary jurisdiction over the clergy set out in the measure, the faculty jurisdiction, two rare special jurisdictions (proceedings upon a *jus patronatus* and proceedings for the recovery of a penalty or forfeiture incurred under s. 32 of the Pluralities Act 1838) and a residuary

jurisdiction in respect of 'any proceedings which prior to the measure the court had power to hear and determine . . . not expressly abolished by the measure'. This residual category will be limited to purely ecclesiastical disputes not suitable to resolution in the secular courts, for example a dispute as to which of two clergymen should be entitled to distribute communion alms – Proud v Price (1893) 63 LJQB 61 at 64-66.

It is submitted that it is still possible for the court to be called upon to adjudicate on *inter partes* issues of a purely spiritual nature but that it is much more likely that such issues will be settled by the bishop exercising his general episcopal authority. In the event of the court hearing such a cause it is submitted that it will be exercising the vicar-general jurisdiction of discipline and control rather than as official principal adjudicating on an issue which, apart from a ceding of jurisdiction by the State, would be dealt with in a secular court. Possibly however such proceedings would fall to some extent within both jurisdictions.

If it is correct that the jurisdiction of the official principal has almost gone, and that in almost the whole of his court work the chancellor is exercising the vicar-general jurisdiction, does this mean that the office of official principal has lapsed? This is not the case. EJM 1963 section 13 provides: 'The chancellor of a diocese shall by virtue of his office be the Official Principal of the bishop of that diocese'. This preserves the office of official principal, even if the jurisdiction of the office is not currently used in the determining of causes. The measure provides for the appointment of the judge of the now-statutory court and declares that he is to be known as 'chancellor' (section 2(1)). It then makes that same person the 'Official Principal'. What precisely does this sequence achieve? If the jurisdiction formerly exercised *qua* official principal is now exercised pursuant to the authority of the measure (ie it is a statutory jurisdiction) and if it partakes of the essence of vicar-general's jurisdiction and not that of official principal, in what sense is the chancellor still the official principal, and for what purpose?

The jurisdictions conferred by EJM s. 6 have been extended by CCM in certain respects, for example the power to grant injunctions and restoration orders (s.3) the power (and duty) to delegate to archdeacons (s.14) and the power to authorise demolition of a church without faculty in case of emergency (s.18). These are all within the vicar-general's functions or (in the case of s.18) a new statutory jurisdiction of a similar nature. These new jurisdictions therefore do not affect the question of the extent to which the modern chancellor acts as official principal. The key to this question would appear to be to recognise that the official principalship confers not only jurisdiction (now largely lapsed) but judicial independence, authority and status. The office remains though the in-court jurisdiction may not be required to dispense justice in the range of proceedings with which, under the measures, the court is left to deal. Thus in his capacity as the judge of the court (EJM s.2(1)) the chancellor has authority not only as vicar-general but also as official principal and in the latter office he is independent of the diocesan bishop. So when he acts as judge of the court (even when his act is not done within any particular proceedings) he does so as official principal, but when he acts not as judge but as chancellor (in a non-judicial role), eg when granting a common marriage licence, he does so as vicar-general, not having total independence but only a delegated authority.

When determining court proceedings or giving orders or directions in such proceedings the chancellor has a further basis of independence from the bishop. This arises by statutory provision, ie by the appeal procedures laid down

for the various types of proceedings by EJM 1963. Since appeal is stated to be to a court other than the diocesan bishop it would clearly be wrong for the bishop to attempt to exercise a veto or right of review or in any way to restrain the chancellor. It is submitted that this provision of an appeals procedure accords entirely with the underlying legal principles whereby the chancellor in his office of official principal is not subject to control by the bishop. These matters were discussed in detail in the report of the Commission on Ecclesiastical Courts set up by the Archbishops of Canterbury and York entitled 'The Ecclesiastical Courts' (1954) which led eventually to EJM 1963. It was that report which recommended bringing together the previously separate courts under the Clergy Discipline Acts with the Consistory Court (dealing with faculties and other matters) and making the chancellor the judge of the 'combined' court. When this was done in the 1963 measure the Consistory Court became a purely statutory court, and the office of official principal would have lapsed in practice (if not also as a matter of law) had it not been preserved by s.13. The report says (p.50) 'We accordingly recommend that only one court at a diocesan level be retained . . . the Consistory Court'. It rejects (p.52) a proposal that the bishop should be allowed in the letters patent of the chancellor to reserve a right to sit in the consistory court.

In passing it may be of interest to note what the report says (at page 7) about the origins of the office of official principal:

> Until the middle of the twelfth century an archbishop or bishop exercised his judicial functions in his *curia*, which consisted of the leading clerks of his diocese.* But in the course of the second half of the twelfth century there began what in the later middle ages was to result in a partial separation of the person of archbishop or bishop from the exercise of his judicial functions, and the formation of different courts for dealing with the different causes subject to his jurisdiction. From 1150 onwards one clerk in the archbishop's or bishop's *curia* begins to judge on the bishop's behalf. He acquires a title, that of 'official'. In the thirteenth century he has become the judge of a permanent court which deals with the great mass of judicial business coming to the bishop; and he is now called the bishop's 'official principal'. The court itself acquires a name, that of Consistory Court. But the Consistory Court did not deal with all the bishop's judicial business. The bishop heard in person cases requiring delicacy or where the parties were of prominent social position, and any which were brought before him during visitations of his diocese. He could still sit as judge in his Consistory Court if he so wished. The martyr Hooper, for instance, during his tenure of the see of Gloucester from 1551 to 1554 presided frequently in his Consistory Court and won golden opinions for his impartiality, firmness and strong handling of cases.

The judge of the Consistory Court was something more than the bishop's delegate. He was the bishop's *alter ego,* and appeals from his sentences lay not to the bishop but to the archbishop. He is the bishop in a judicial capacity and therefore his judgements are the bishop's judgements. He was called official principal or commissary general because the bishop might appoint other officials

* This is the origin of the title "Consistory Court".

or commissaries to hear only a limited number of cases in particular areas of the diocese. In a large diocese the Court might sit in more than one place.

The report also discusses the origin of the office of vicar-general (at p.10):

> In the sixteenth and early seventeenth centuries important changes were made in the name by which bishop's judges were usually known, the functions of ecclesiastical judges, their method of appointment, and the qualifications for the office. The judicial functions of a medieval bishop or archbishop were not the only functions belonging to his office which were performed by some other person on his behalf. When absent from his diocese, he constituted one of his leading clerks as vicar-general to perform on his behalf acts pertaining to episcopal jurisdiction, for which the possession of episcopal orders was not necessary – such acts, for instance, as giving institution to benefices or granting licences or dispensations. In the later middle ages it was often the official principal who, when the bishop was away from the diocese, was thus constituted vicar-general; by degrees the office of vicar-general, instead of being a temporary creation in the bishop's absence, grew into a permanent part of diocesan administration and seems always to have been held by the official principal. From the middle of the sixteenth century onwards the person thus appointed by the bishop to exercise the two offices has been called a chancellor. The acts performed by a diocesan chancellor fall therefore into two categories: when he sits as judge in the Consistory Court it is as official principal; it is as vicar-general that he grants marriage licences.
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> In the early seventeenth century a change took place in the method of appointing ecclesiastical judges. The practice of appointing them by commissions during pleasure or for a limited period was given up, and instead the method was adopted under which the bishop granted the two offices of official principal and vicar-general for life by means of letters patent, confirmed by the Dean and Chapter. From these offices the judge could not be removed either by the bishop by whom he was granted the offices or by the bishop's successors.
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> The new method of appointment had the effect of making more pronounced the separation between the bishops and their courts, always inherent in the system of appointing officials to exercise judicial functions. These functions of a bishop are excercised in his court by a judge who is in theory his representative; but though he may disagree wholeheartedly with the sentences which his judge pronounces and may never have consented to his appointment, it is impossible for the bishop to remove him.

Section 83(2) of EJM 1963 provides that 'nothing in this measure affects the mode of appointment, office, and duties of vicars-general of provinces or dioceses'. Thus the office of vicar-general is recognised and preserved, but it is of interest that this office is not automatically attached to the office of judge under the measure as in the case of the official principalship. This means that the vicar-

general could be a different person from the judge (chancellor). In practice this does not occur, but, because the office of vicar-general is not automatically given to the judge, it is submitted that all letters patent should expressly appoint the judge to be also the vicar-general. Were this not to be done the judge would not have some of the powers he needs. He would have only the statutory powers given to him by the relevant measures and would not have the powers deriving from the common law office of vicar-general.

Returning to the provisions of EJM 1963 it is clear that the chancellor has judicial authority as official principal and that directions given as judge are valid without approval from the diocesan bishop. But what is the position if the chancellor gives general directions, not within any particular proceeding? An example would be a direction that certain types of petition for faculty are to be accompanied from the outset by certain documents, plans, photographs, specifications or the like, being in addition to those statutorily required by virtue of the *pro forma* petition. Could the bishop overrule such directions, either generally or in their application to a particular case? It is not impossible to envisage an application by a parish to a bishop to be relieved from such directions if they were thought to be onerous or to cause undue expense.

A recent case in the secular courts is of interest. In Langley v North West Water Authority [1991] 1 W.L.R. 697 (CA) the plaintiff commenced a personal injury action in the Liverpool County Court. Under a code of practice issued by that court for pre-trial management of actions there were automatic directions which provided for the exchange of medical evidence within 10 weeks of the date of the direction and it was further provided that to enable the defendant's solicitor to obtain his medical evidence more quickly the plaintiff's solicitor was required to send with the particulars of claim the authority to inspect hospital records. The plaintiff's solicitor failed to comply with the direction about the authority and was in breach of other directions. He was ordered to pay costs personally. On appeal he challenged the validity of the court's code of practice document which included the direction about the authority. The Court of Appeal held that the County Court had inherent jurisdiction to make directions regulating its own procedures provided that no direction was inconsistent with rules of court or other statutory provisions. The local county court's code of practice contained no such inconsistency and should have been complied with and the order for costs was sound. By analogy it is considered to be within a chancellor's jurisdiction to make directions as to procedure (to come into operation in proceedings before the court) which may be of general application, so long as they are not inconsistent with the rules or other statutory provisions. These however will be directions which will apply once proceedings have been commenced. But what is the position where the directions relate to a state of affairs prior to the commencement of proceedings so that they do not come into operation within any proceedings, as for example a direction that if a particular parish wishes to have churchyard regulations which are stricter than the normal chancellor's regulations for the diocese the parish must apply to the chancellor to sanction its proposals? This would be a practice direction but it would not lead to a direction during the course of proceedings. Has the chancellor jurisdiction, without the approval of the bishop, to issue such directions, since they relate to a stage before proceedings are commenced? It is submitted that this will depend upon whether the directions can properly be given as official principal or only as vicar-general. In other words are the directions given as judge of the court? The writer's view is that the type of direction referred to will be a judge's direction as its intention is to regulate proceedings.

Before leaving EJM 1963 a comment may be made on the use of the words 'judge' and 'chancellor' in that measure. As stated the measure says that the judge is to be 'styled chancellor', suggesting by inference perhaps that 'chancellor' is no more than a title. But the office of chancellor existed for centuries prior to the 1963 measure (see the references to statutes on the first page of this paper). So the measure is applying this term in a special way to the judge. To some extent this is confusing because at common law the chancellor is not just the judge of the court. As already stated section 13(2) then provides that 'the chancellor of a diocese shall by virtue of his office be the Official Principal of the bishop of that diocese'. Before the measure one would perhaps have expressed it the other way round; that the person who was appointed the official principal (or chancellor) was also the judge of the court. It seems to the writer that modern letters patent have not been brought into line with the requirement of EJM to appoint the judge of the court. By clear inference from the wording of the letters patent the person appointed as chancellor is to be also the judge of the court, but it would be better to say so the other way round to be in line with the measure. The official principalship then follows under section 13(2) but it would still be appropriate to specifically appoint as vicar general. The probability is that those who prepare commissions are still using a form of words going back before the 1963 measure.

The Faculty Jurisdiction Measure 1964 correctly speaks throughout of 'the judge' and no difficulty arises. However the Care of Churches etc Measure 1991 (CCM) can be seen as muddying the waters since it refers to 'chancellor' in places where it would be better to say 'judge' and does not distinguish between chancellor in his function as official principal and in his function as vicar-general. Since the tasks which the chancellor has to perform under this measure are statutory and since it is stated in each case with whom he has to consult no difficulty will arise in practice; the justification of his acts will be that he acts under the measure. Nevertheless it may be of interest to consider which function he is truly exercising in each case because apart from the statutory authority, he would in some cases need to have the backing of the bishop, but in others not. If he were to give a direction in excess of his authority under the measure this could be challenged by an application for judicial review in the Divisional Court. But a direction given as a judge and official principal could only be challenged by judicial review on the grounds of unlawfulness, excess of authority, refusal to exercise the jurisdiction or some other ground recognised for judicial review purposes.

The written guidance about trees in churchyards (section 6(3)) has nothing to do with any court proceedings; the chancellor will do this as part of his office of controlling those who have responsibility for property which is subject to the bishop's jurisdiction. This is a function of the vicar-general. Because of the statutory nature of the function he need not consult the bishop but otherwise for such a function he would need to be sure that his bishop approved. It is quite possible to envisage similar instructions being given by a chancellor without special statutory authority, in which case he acts as vicar general in what Gibson and Phillimore describe as the voluntary jurisdiction. For example the chancellor may wish to direct when any churchyard in the diocese has only a limited number of spaces available for burials that no further applications to reserve a gravespace in that churchyard are to be submitted. That would be regulatory. It is suggested

that when a chancellor wishes to issue instructions of such a kind he should make sure he has the approval of the bishop. In some dioceses there is a move to providing incumbents, churchwardens and PCCs with a summary of instructions and guidance in legal matters. If this is done it will be important to consider which matters amount to practice directions by the official principal or judge and which are directions or instructions from the vicar general; and to ensure that the bishop has approved those which are not in the independent jurisdiction of the judge.

The written guidance to be given under section 11 (8) as to matters *de minimis* would appear to fall to some extent within the office of judge (official principal) and to some extent within the office of vicar-general. It is procedural in the sense that some matters will not have to be the subject of a faculty petition. It is substantive and regulatory in that it will allow some work to be carried out by those responsible for churches and churchyards without leave, so that in a sense it touches on 'discipline'.

Where the chancellor confers jurisdiction on the archdeacon under section 14 will he do this as official principal or vicar general or both? It is submitted that the essential jurisdiction delegated will be part of the vicar-general's jurisdiction, as it is unlikely that the archdeacon will have any role in deciding *inter partes* issues which apart from the faculty legislation could have arisen in secular proceedings. The rule for delegation by the chancellor will exclude such jurisdiction. Thus when for example the archdeacon issues a direction (in a case which has to be referred to the chancellor) that work is not to be commenced until the matter has been considered by the chancellor his function will be that of vicar-general. He does have some jurisdiction of his own as archdeacon and an interesting question arises whether he can do what he needs to do by virtue of his office. It is submitted that the powers of the archdeacon will be that of the chancellor (as vicar-general) delegated under the measure and not any pre-existing – or newly created – powers of the archdeacon in his office. It is submitted that although the power delegated will be part of the vicar-general's jurisdiction the act of delegation will be carried out by virtue also of the office of official principal.

Under Section 18 the chancellor will be able to authorise demolition of a church or part of a church without a faculty petition or faculty. He will do this by instrument. Hitherto the judge has not had jurisdiction of this nature and in particular he has not been empowered to make court orders without a legal process being initiated before him. For example where there has been a breach of faculty jurisdiction but not in the context of proceedings the chancellor has only been able to act if the archdeacon has issued a petition for rectification, thereby giving the court jurisdiction. The section 18 jurisdiction does not fit neatly into the analysis of the chancellor's roles as described by Gibson and Phillimore. This will not be a judicial determination of a cause. Nor will it be a regulatory or disciplinary function arising in the vicar-general's office. The latter office really depends upon the powers of the chancellor as visitor. These are preserved by canon C 18(3) which says that the jurisdiction of the bishop as ordinary (including the visitatorial jurisdiction) is exercised by the bishop himself or by a vicar-general, official or other commissary. Paragraph (7) of the canon says the bishop 'shall correct and punish all such as be unquiet, disobedient or criminous within his diocese according to such authority as he has by God's Word and is committed to him by the laws and ordinances of the realm'. Canon G.5 which deals with visitations says that these are for 'the correction of such things as are amiss'. These are not

concepts which are wide enough to incorporate the new section 18 jurisdiction. The reality is that this is not part of the faculty jurisdiction at all. The chancellor is being given an authority to act of his own motion. It is submitted that failure on his part to act in an appropriate case would result in an application for judicial review in the Queens Bench Division and not an appeal to the Dean of the Arches. It is doubtful whether the chancellor will act as judge under this section and it is submitted that the instrument will be an administrative act under special statutory authority done outside court. The chancellor thus becomes not only the judge of the consistory court, the official principal and the vicar-general but also the person with statutory authority to act under section 18 in a situation where emergency demolition is necessary.

Similar considerations apply to the procedure under section 21 of CCM whereby the archdeacon will be able to make an order of his own motion for the removal to a place of safety of an article of value if it is exposed to danger of loss or damage. If his order is not obeyed he will apply to the consistory court for an order for the article to be delivered to the place of safety and the court after considering the matter will be able to make the order. This will be an order in the nature of a mandatory injunction but it will not be granted in support of any proceedings then before the court, and the chancellor will therefore be exercising a new and specifically statutory jurisdiction which will be of a quasi-administrative, quasi-judicial nature. If the chancellor makes the order and the article is removed to the place of safety sub-section (6) requires the archdeacon within twenty-eight days to apply for a faculty authorising the retention of the article in the place of safety. It is at this stage that the proceedings return to a recognisable pattern within the faculty jurisdiction. Since the initial order will be made outside faculty proceedings it is considered that appeal will not lie to the Dean or Auditor because the order (or refusal of order) will not have been 'in causes of faculty' for authorising 'an act for the doing of which the decreee of a faculty is requisite' (see section 6 (1) (b) and 7 (i) of EJM 1963).

For completeness it should be said that the Chancellor has other non-specific functions including advising the bishop on legal matters, usually through the registrar of the diocese but not necessarily so, and he has (in his capacity as vicar-general) the jurisdiction in relation to common marriage licences (which he ususally delegates in part to surrogates).

Other situations in which a chancellor may wish to give directions (although in due course some of these may be covered by rules made under Section 26(3) of CCM) may be worthy of mention. He may wish to lay down a procedure for churches to be able to deposit valuables in a bank or other safe place, without having to apply for a faculty, but subject to appropriate notices and records (a procedure which is much wider than the new 'emergency' procedure of CCM s.21). This could be done by a general faculty applied for by the archdeacons on behalf of all the parishes, but the instruction to the parishes (possibly in a diocesan legal summary) would be outside the faculty proceedings and would be given in the vicar-general's regulatory jurisdiction. Similar considerations would apply to a procedure enabling parishes to deposit treasures in a cathedral museum or treasury. Again this might be achieved in part by general faculty with the persons responsible for the treasury joining in the petition with the archdeacons, but the instruction to the parishes would be as vicar-general.

Directions to parishes requiring them to keep plans of their churchyards, records of graves and reserved gravespaces, and to take other actions with regard to churchyards would be given as vicar-general. In all these directions and instructions the chancellor must ensure that he does not place a fetter on the exercise of his own powers within the faculty jurisdiction since to do so would be juridically improper. The chancellor will also have to accept that there is no ultimate sanction in respect of directions given as vicar-general except against persons under ecclesiastical jurisdiction, which for purposes of the EJM disciplinary provisions (which are effectively the only ones which are usable) means the clergy only and then only where the bishop will support the chancellor in viewing the default as an offence under that measure. In matters of this sort the chancellor is not acting as official principal and he does not have statutory authority.

Under section 26(3) of CCM the Rule Committee set up under that measure will have powers to make a provision enabling parochial church councils to deposit specified moveable articles for safe keeping in places approved. It remains to be seen to what extent this provision will render it unnecessary for a Chancellor to give his own directions (as suggested above) for the deposit of valuables in a cathedral treasury or bank without faculty. The exercise of the powers given by rule will be pursuant to the statute so that if the Chancellor is involved in the procedure he will act by statutory power rather than as official principal or vicar-general.

The same sub-section empowers the Rule Committee to provide for parochial church councils to keep records of burials and reserved grave spaces and as to the safe-keeping of records and books. Again it remains to be seen whether such provision will make all directions by the Chancellor unnecessary in these areas, but the writer considers that areas will remain in which the chancellor will need to give directions outside these rules or any other statutory procedure.

In 1072 William the Conqueror issued an ordinance confirming the ecclesiastical jurisdiction and separating the ecclesiastical court from the secular court. This ordinance is set out by Sir Edward Coke in his Institutes, par. 4 cap 53 fo 259 and cap 74 fo 338. Referring to the ordinance John Godolphin, writing in 1687 in his *Repertorium Canonicum* (p.85), says:

> The chancellor of a diocese, as he is *oculus episcopi,* ought to have an eye in all parts of the diocese and hath immediately under the ordinary jurisdiction of all matters ecclesiastical within the same, not only for the reformation of manners and punishment of enormities of a spiritual nature by ecclesiastical censures but also in causes matrimonial. It is most evident that the bishops Consistories are of great antiquity and that they were erected when causes ecclesiastical were removed from the tourne (which is a court of record holden by the sheriff) to the Consistory. So that this law, made by the Conqueror, seems to give the Original of the Bishops Consistory as it now sits with us distinct and divided from the hundred or county court wherewith it seems probable, in the time of the Saxons, to have been joined.

So the separate jurisdiction has existed at least from the eleventh century and the office of chancellor as official principal from the twelfth century. He is still the judge of the consistory court. Also he is still, as vicar-general, the *oculus episcopi,* looking into the diocese on behalf of the bishop. This paper has suggested that he should also cast a careful eye upon himself and make sure that he sees the true nature of the particular jurisdiction which from time to time he is exercising.