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ARTICLE

Free election in the age of Erastianism: the case of *R v The President and Chapter of Exeter Cathedral*

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Abstract

On 29 December 1838, the Dean of Exeter Cathedral, Whittington Landon, died. In the months that followed, the cathedral chapter repeatedly refused to elect the individuals nominated by the Crown, setting the stage for a protracted struggle that would play out in Parliament and in the Court of Queen's Bench. This is the story of *R v The President and Chapter of the Cathedral Church of St Peter in Exeter*.[1]

Keywords: cathedrals; Church of England; dean; establishment; patronage; reformation; royal prerogative

Introduction

English Erastianism was at its apogee in the early nineteenth century. Governments often treated ecclesiastical appointments as another form of political patronage. The Convocations of the Clergy still met, but their business had been confined to formalities since the early eighteenth century. This left Parliament as the main source of ecclesiastical legislation, but an increasingly crowded legislative timetable left less time for discussion of Church matters. The legislature itself was also becoming less Anglican thanks to the removal of religious disabilities.[2] While the nascent Oxford Movement critiqued the status quo, their views had yet to find much favour within the Establishment.

Decanal elections in cathedrals of the Old Foundation

The dean's role as head of the cathedral chapter began in northern France starting in the tenth century, and took root in England following the

[1] 4 Per & Dav 252; 9 LJQB 308.

[2] Protestant Dissenters had been allowed to stand for Parliament since the Toleration Act 1688, while the Roman Catholic Relief Act 1829 opened the door to Catholics. Later, the Jews Relief Act 1858 and the Oaths Act 1888 paved the way for Jews and the openly irreligious to enter the legislature as well.

Conquest.[3] The dean and chapter came to serve as a council of advisors to the bishop for both spiritual and temporal matters. For example, in the sixteenth-century *Case of the Dean and Chapter of Norwich*, Sir Edward Coke noted that 'every bishop should be assisted with a council, scil. with a chapter, and that for two reasons: first, to consult with them in matters of difficulty, and to assist him deciding of controversies concerning religion, to which purpose every bishop *habet cathedram*. Second, to consent to any grant, &c. which the bishop should make to bind his successors, for it was not reasonable to impose so great a charge, or to repose such confidence in any single person, or to give power to one person only to prejudice his successor'.[4]

The dean also had responsibilities of his own. These evolved over time, shaped by a combination of legal judgments, charters, statutes, and chapter decisions.[5] By the time of the Reformation, his duties generally included presiding over chapter meetings and overseeing the cathedral's affairs, and with the chapter he held title to its property.[6]

In the Middle Ages, the dean was initially appointed by the bishop, but the growing wealth and power of cathedral chapters led them to elect the dean from among their number.[7] The conduct of the election varied from diocese to diocese. Some chapters held elections on their own authority, while others (including Exeter) sought a licence from the bishop first.[8] By the later Middle Ages, the Crown nominated candidates with increasing frequency.[9] The Reformation ushered in significant changes to England's cathedrals. The statute 31 Hen. 8 c. 9 allowed Henry VIII to create new bishoprics with the property of dissolved religious houses.[10] Cathedrals created under that Act became known as cathedrals of the 'New Foundation'. The letters patent establishing these new cathedrals made their deaneries royal donatives,[11] while the subsequent statutes empowered the Crown to dispense with their provisions as necessary.[12] In some cases, the Crown used these powers to reward favoured courtiers with

[3] K Edwards, *The English Secular Cathedrals in the Middle Ages: A Constitutional Study with Special Reference to the Fourteenth Century* (Manchester, 1967), 139–141.

[4] 3 Co. Rep. 73.

[5] Edwards (note 3), 142. For an overview of the dean's duties in the Middle Ages, see Edwards (note 3), 143–148.

[6] S Lehmberg, *The Reformation of Cathedrals: Cathedrals in English Society 1485–1603* (Princeton NJ, 1988), 6.

[7] Edwards (note 3), 139–140.

[8] Edwards (note 3), 121–122.

[9] Lehmberg (note 6), 6.

[10] The Act can be found in E Gibson, *Codex Juris Ecclesiastici Anglicani*, second edition (Oxford, 1761), 180–181. The King would use this power to secularise the monastic cathedrals at Canterbury, Carlisle, Durham, Ely, Norwich, Rochester, Winchester, and Worcester, and create entirely new cathedrals at Bristol, Chester, Gloucester, Oxford, and Peterborough (the short-lived Diocese of Westminster was also an entirely new foundation).

[11] See, for example, the letters patent re-establishing Carlisle Cathedral in J Prescott (ed), *The Statutes of the Cathedral Church of Carlisle* (Carlisle, 1879), 83–90.

[12] See, for example, the relevant provision of Carlisle's statutes in Prescott, (note 11), 73–76.

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cathedral deaneries even though they were not qualified under the cathedral's statutes.[13]

In contrast, cathedrals with foundations dating from before the Reformation (which included Exeter) were known as cathedrals of the 'Old Foundation'. They continued electing their deans, although there were exceptions. The Dean of St Asaph was appointed by the bishop of that see,[14] and the Dean of St Patrick's, Dublin, was elected by the chapter.[15] However, there was considerable confusion surrounding the appointment of Old Foundation deans. Richard Burn's claim that they 'come in by election of the chapter upon the king's *congé d'eslire* [sic], with the royal assent, and confirmation of the bishop'[16] reflected the dominant view. In reality, any licence to elect would come from the bishop rather than the monarch, and there was no need for royal assent.

In practice, chapters of Old Foundation cathedrals often chose deans who had been recommended to them by the Crown. However, the Crown's role in the election of deans remained informal, unlike its role in choosing diocesan bishops. The statute 25 Hen. 8. c. 20 had placed episcopal appointment firmly under royal control. Not only were chapters explicitly required to elect candidates nominated by the Crown, but if they failed to do so, the monarch could make the appointment directly by letters patent. But Parliament made no such provision for deans of the Old Foundation, and these cathedrals continued to be governed by pre-Reformation statutes that gave the Crown no role in the appointment of their deans. This legal ambiguity meant that, if a chapter chose to reject a royal nominee, the Crown could not simply force the issue like it

[13] Notable lay appointments included Thomas Smith, John Wolley, and Christopher Perkins (all at Carlisle), and Thomas Wilson (Durham). However, the statutes of both cathedrals explicitly required the dean to be a priest. For the requirement at Carlisle, see Prescott (note 11), 27–28. For Durham, see A Thompson (ed), *The Statutes of the Cathedral Church of Durham* (Durham, 1929), 87. The practice of appointing laymen to cathedral deaneries was rare, however, and later commentators viewed these appointments as irregular. The legal position is summarised in R Burn, *Ecclesiastical Law*, ninth edition, vol 2, revised by R Phillimore (London, 1842), 82–83.

[14] J Le Neve, *Fasti Ecclesiae Anglicanae*, vol 1, revised by T D Hardy (Oxford, 1854), 81, n 8.

[15] The question of whether the Deanery of St Patrick's was elective or donative was litigated twice in the eighteenth century. The Crown claimed that it was donative, while the dean and chapter argued that it was elective. These cases do not seem to have been formally reported, but they are discussed in William Mason's history of St Patrick's Cathedral. Mason recorded few details of the first case beyond the fact that, in 1745, the Chapter of St Patrick's chose Gabriel Maturin as their dean, and the Crown attempted to appoint Viscount Strangford to the office instead. The matter ended up in the Court of King's Bench, and after lengthy delays, the special jury for the county of Dublin handed down a verdict stating 'That the late Charles the Second was not seized of the advowson of the deanery of the cathedral church of St Patrick, by itself as of fee and in right of his crown of this realm'. The matter was revisited several decades later when the Crown attempted to appoint Peter Carleton to the deanery in 1793 even though the chapter had already chosen Robert Fowler. This led to another round of litigation (albeit on slightly different grounds) that lasted from 1794 to 1798. Notably, both sides relied on precedent rather than on explicit legal provisions. The matter once again came before a special jury in the King's Bench, which ultimately found against the Crown and in favour of the dean and chapter. See W Mason, *The History and Antiquities of the Collegiate and Cathedral Church of St Patrick Near Dublin* (Dublin, 1820), 445–447 and 457–463.

[16] Burn (note 13), 81–82.

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could with diocesan bishops. This distinction would prove to be of crucial importance in the Exeter case.

Prior to 1840, the election of a Dean of Exeter was primarily governed by several thirteenth-century instruments. The most important was the Charter of Foundation issued by the Bishop of Exeter, William Briwere, in 1225.[17] This established the deanery and gave the chapter the right to fill it by free election. The chapter then elected a certain Serlo and presented him to the bishop for approval.[18] Briwere accepted their choice, but he made it clear that future deans-elect would also require episcopal approbation. Additionally, he required the dean to be chosen from among Exeter's canons.[19] Serlo's election set a precedent that would be followed for over 600 years.

The Crown nominates Lord Wriothesley Russell

Following Dean Landon's death, the Bishop of Exeter, Henry Phillpotts, issued his licence to the chapter for the election of a dean on 9 January 1839, and the contest was scheduled for 24 January. When the Great Chapter[20] convened, letters patent from Queen Victoria were read in which she purported to grant the deanery to Lord Wriothesley Russell[21] (a half-brother of the Home Secretary, Lord John Russell) as a prerogative act and commanded the chapter to install him accordingly.[22]

However, the meeting was prorogued, and the President of the Chapter wrote to the Prime Minister, Viscount Melbourne, to explain that it was impossible for them to elect Russell as he was not a canon residentiary, and it had long been the custom at Exeter that only canons residentiary were eligible for election as dean.[23] Moreover, the chapter was unable to circumvent that difficulty by making him a canon as there was a statutory prohibition on such appointments. In 1836, the Ecclesiastical Commissioners had recommended that most cathedral chapters in England and Wales should be reduced to a dean and four canons[24] and proposed that no new appointments should be made to those bodies until they had reached the desired size.[25] The Commissioners hoped that these reductions would free up money that could then be used to augment the incomes of poorer clergymen. Parliament

[17] The charter is printed in R Barnes, *Report of the Case of the Queen v The President and Chapter of the Cathedral Church of St Peter in Exeter* (London, 1841), I–II. Its subsequent confirmation by Archbishop Langton of Canterbury can be found at II–III.

[18] This was recounted in an instrument issued by the chapter which is printed in Barnes (note 17), VI.

[19] Briwere's decree is printed in Barnes (note 17), VII.

[20] The Greater Chapter consisted of all Canons Residentiary and Prebendaries.

[21] Russell would go on to become a Canon of Windsor, Deputy Clerk of the Closet, and Chaplain to the Prince Consort.

[22] The letters patent can be found in Barnes (note 17), XLIV–XLV.

[23] Barnes (note 17), iii.

[24] This recommendation was made in the Commissioners' second report, which can be found in Ecclesiastical Commissioners, *The First and Second Reports from His Majesty's Commissioners Appointed to Consider the State of the Established Church* (London, 1836), 45–88.

[25] This was proposed in the Commissioners' fourth report, which can be found in *The British Magazine and Monthly Register*, vol 10 (London, 1836), 199–209.

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acted on their recommendations by passing the statute 6 & 7 Will. 4 c. 67 which prohibited most capitular appointments for one year. The ban would be extended several times, with the most recent extension being implemented by the statute 1 & 2 Vict. c. 108.[26]

The Chapter of Exeter was unhappy with the suspension 'and had remonstrated against it at every renewal'.[27] Their resentment towards what they saw as Parliament's interference in their affairs would be a running theme throughout the dispute. They were not alone: the Dean and Chapter of Canterbury and the Dean and Chapter of Chichester had also petitioned against the latest extension of the prohibition.[28]

The government responds

Lord Melbourne decided to seek advice from the law officers and asked the chapter to provide evidence for their position. The chapter provided him with a copy of their Charter of Foundation, while also noting that the cathedral's statutes and customs had long distinguished between canons residentiary and prebendaries. In 1560, the Bishop of Exeter, William Alley, had made a statute which limited the number of canons residentiary to nine, and from that point onward, no one had been elected dean without first being a canon residentiary.[29]

Meanwhile, the government sought a legislative solution. The Ecclesiastical Appointments Suspension Act-in-part-Repeal Bill was currently in the Commons after having been passed by the Lords. The original purpose of the bill was to repeal provisions of the statute 1 & 2 Vict. c. 108 relating to episcopal visitations, but on 25 March, Lord John Russell tabled an amendment declaring that the Act 'should not prevent the collation or appointment of a canon or prebendary to any canonry or prebend which shall become vacant by reason of the vacancy of any deanery in any cathedral or collegiate church'.[30] He denied that the purpose of the legislation was to facilitate nepotism; instead, he argued that it was meant to rectify an oversight on the part of the Ecclesiastical Commissioners.[31] However, Lord John admitted that he had suggested Lord Wriothesley's candidacy to the Prime Minister, but said 'he knew he was recommending a person who was an ornament to the Church'.[32] The amendment was ultimately adopted, but it was later tweaked to make it retrospective instead of prospective before the bill returned to the House of Lords.[33]

[26] For an overview of the Commissioners' approach to capitular dignities, see G Best, *Temporal Pillars: Queen Anne's Bounty, the Ecclesiastical Commissioners, and the Church of England* (Cambridge, 1964), 331–347. See also O Chadwick, *The Victorian Church*, part 1 (New York, 1966), 126–142.

[27] Barnes (note 17), iv.

[28] J Barrow (ed), *The Mirror of Parliament: First Session of the Thirteenth Parliament of Great Britain and Ireland*, vol 7 (London, 1838), 5719, 5767.

[29] Barnes (note 17), iv.

[30] HC Deb, 25 March 1839, vol 46, col 1180.

[31] HC Deb, 25 March 1839, vol 46, cols 1179–1180.

[32] HC Deb, 25 March 1839, vol 46, col 1180.

[33] HC Deb, 9 April 1839, vol 46, cols 1303–1304.

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The Crown nominates Thomas Grylls

The Chapter of Exeter reconvened for an election on 4 April. The government abandoned its efforts to secure the deanery for Russell, and new letters patent were issued which purported to appoint the Thomas Grylls, one of the cathedral's prebendaries.[34] Once again, the chapter balked, pointing out that Grylls was not a canon residentiary (as a prebendary, Grylls was a member of the Lesser Chapter but not the Great Chapter). After more discussion, they resolved on 10 April that they would elect the dean from among the canons residentiary.[35]

A legislative solution?

When the Ecclesiastical Appointments Suspension Act-in-part-Repeal Bill returned to the Lords, the Commons' amendment met with opposition. Bishop Phillpotts of Exeter pointed out that the clause had nothing to do with the rest of the bill and suggested it belonged in a separate piece of legislation.[36] He also argued that the amendment was being used to effectively steamroller over the chapter, and he protested that the government had not informed them that they would be moving forward with legislation.

Viscount Melbourne defended the amendment, arguing that, as he understood it, the chapter was willing to choose the Crown's nominee provided they could make Grylls a canon residentiary, but if the chapter were against the clause, he would not persist with it.[37] Phillpotts asked Lord Melbourne if he realised that the chapter would be all too happy to elect the Crown's nominee, provided that person was suitably qualified.[38] A number of peers made it clear that they also felt that the matter should be included in separate legislation. Faced with this opposition, Viscount Melbourne relented, and the clause was ultimately dropped from the bill.[39]

The day after the contretemps over the Commons' amendment (19 April), the Government introduced a standalone bill in the House of Lords 'for removing doubts as to the appointment of a Dean of Exeter or of any other Cathedral Church'.[40] The second reading debate began on 22 April. Viscount Melbourne noted that it would facilitate the appointment of cathedral deans by allowing them to be made canons residentiary or prebendaries.[41]

Bishop Phillpotts prodded Melbourne to share correspondence between his administration and the Chapter of Exeter regarding the deanery, but the Prime Minister refused, saying the correspondence was confidential.[42]

[34] Barnes (note 17), v. The letters patent were in the same form as Lord Wriothesly Russell's.
[35] Barnes (note 17), v.
[36] HL Deb, 18 April 1839, vol 47, cols 227–228.
[37] HL Deb, 18 April 1839, vol 47, cols 228–229.
[38] HL Deb, 18 April 1839, vol 47, col 229.
[39] HL Deb, 18 April 1839, vol 47, col 230. For further proceedings on the bill, see J Barrow (ed), *The Mirror of Parliament: Session of 1839*, vol 3 (London, 1839), 2264, 2331, and 2418.
[40] Barrow (note 39), 1891.
[41] HL Deb, 22 April 1839, vol 47, col 457.
[42] HL Deb, 22 April 1839, vol 47, col 458.

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The next day, Phillpotts sought to defend himself against accusations that he had encouraged the chapter to take a confrontational stance. He read extracts from a letter he had written to the chapter on 10 April in which he noted that, while he was sworn to defend the rights and liberties of the Church,[43] he was not completely convinced that the chapter possessed the right of free election. But if they did, he urged the chapter to figure out a way to admit the Crown's nominee.[44] Phillpotts also pointed out that, when an Irish peer wrote to Lord Melbourne to recommend a candidate for the Deanery of Exeter, he responded by saying that the deanery was *not* in the Crown's gift.

When Phillpotts asked Viscount Melbourne to confirm whether he had written such a letter, the Prime Minister said it was 'very likely that he had'. The bishop's response was extraordinary:

> The occurrence was not only likely, but had actually taken place. He was ready to mention names and dates. The clergyman who had been so recommended lived in the capital town of the county in which the noble Viscount from whom the application proceeded resided, and so delighted was that rev. person with being made the subject of correspondence between the first Minister of the Crown and the noble Lord in his neighbourhood, that he went about the streets of the town, showing the letter of the noble Viscount on the Treasury Bench in which there was an excuse offered for refusal on the ground that the appointment was not in the Crown.[45]

'Was it after that to be supposed, that the chapter would take it as a matter of course, that they were bound to appoint the individual whom the Crown recommended?' Phillpotts continued. He also cited a statement from the Precentor of Exeter Cathedral arguing that '[t]he Law Officers of the Crown and Sir William Follett[46] have given their joint opinion that, "according to the usage and the charter, the dean must necessarily be elected from the body of prebendaries".'[47]

Bishop Phillpotts also read from a letter that an emissary of Exeter's Greater Chapter had delivered to Viscount Melbourne in which the Prime Minister was told that the chapter was opposed to any legislative interference: 'They desired to abide by the law as it stood, thinking it unfair that the restrictions which the Ecclesiastical Appointments Suspension Act imposed on all parties should be partially removed'.[48] Consequently, chapter was unlikely to make Grylls a prebendary.

[43] Diocesan bishops often take an oath or make a declaration to uphold the laws and customs of their cathedral church at their installation, although this is a matter of custom rather than law. For similar oaths taken by other bishops in the nineteenth century, see *The Report of the Select Committee of the House of Lords Appointed to Inquire Into the Expediency of Substituting Declarations in lieu of Oaths in Certain Cases* (London, 1837), 31.

[44] HL Deb, 23 April 1839, vol 47, cols 464–465.

[45] HL Deb, 23 April 1839, vol 47, cols 465–466.

[46] MP for Exeter and a former Solicitor General.

[47] HL Deb, 23 April 1839, vol 47, col 466.

[48] HL Deb, 23 April 1839, vol 47, col 467.

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The House then went into Committee on the bill. The Duke of Wellington suggested that the bill went beyond the clause that had been removed from the Ecclesiastical Appointments Suspension Act-in-part-Repeal Bill. Phillpotts suggested that it be amended to make it generally applicable instead of focusing on Exeter.[49] Lord Brougham in turn proposed that the words 'nominated by the Crown' might be left out along with 'for the purpose of qualifying such person to be elected to the office of dean'.[50] But the Lord Chancellor, Lord Cottenham, argued that such a change would alter the entire purpose of the bill. The bishop agreed to withdraw his amendment, and Lord Brougham's amendment was adopted without a division.[51]

The bill was supposed to receive a third reading on 26 April, but Viscount Melbourne postponed the debate until after the Chapter of Exeter had had a chance to meet. Phillpotts took this opportunity to note that the Crown's claim to appoint the dean by letters patent 'had no higher origin than the time of the Stuarts – a period generally considered the worst with regard to all precedents relating to extension of the prerogative'.[52] In the end, the bill was sent to the Commons and received royal assent on 4 June as the statute 2 & 3 Victoria c. 14.

However, the story did not end there. Although the Act stated that a person *could* be made a canon or a prebendary in order to make them eligible for a deanery, the chapter interpreted this provision as permissive rather than mandatory.[53] As there would not have been an issue if the Crown had recommended a canon residentiary, its insistence on giving the deanery to a prebendary in defiance of local custom antagonised the chapter. They decided to stand behind their resolution of 10 April and only elect a canon residentiary as dean. As the chapter also resented Parliament's interference with their affairs, they would not use the statutory 'escape hatch' to make Grylls eligible.[54]

The deanery is filled

On 14 June, the chapter attempted another election. The Crown once again nominated Thomas Grylls, although this time the nomination was signified by 'letters recommendatory' modelled on Stuart-era instruments.[55] The chapter adjourned until 27 June, and when they reconvened, they unanimously elected the Thomas Lowe, Precentor and Canon Residentiary, as dean. On 1 August, Bishop Phillpotts formally confirmed the election,[56] and Lowe was installed as dean the next day.

[49] HL Deb, 23 April 1839, vol 47, col 469.

[50] *The Times*, 'Parliamentary Intelligence: House of Lords', 24 April 1839. The *Official Report* gives a slightly different version of the second set of words to be omitted: 'for the purpose of qualifying to be appointed by the Crown'. See HL Deb, 23 April 1839, vol 47, col 469.

[51] *The Times*, 'Parliamentary Intelligence: House of Lords', 24 April 1839.

[52] HL Deb, 26 April 1839, vol 47, col 563.

[53] Barnes (note 17), v–vi.

[54] Barnes (note 17), vi.

[55] Barnes (note 17), XLV.

[56] Phillpotts' decree of confirmation is printed in Barnes (note 17), XLV–XLVI.

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The government's quest for a *mandamus*

The government was unbowed. In April 1840, the Attorney General, Sir John Campbell, began mandamus proceedings in the Court of Queen's Bench with the aim of compelling the Chapter of Exeter to elect Grylls as dean. There was some procedural wrangling over whether mandamus was the proper remedy, but the court ultimately granted the rule and substantive arguments began on 11 June.

Sir William Follett argued the case on behalf of the chapter. He noted Bishop Briwere's foundation of the deanery in 1225 with the stipulation that the chapter would have the right of free election subject to episcopal confirmation. Sir William argued that this meant the Bishop of Exeter was the deanery's patron. Since then, deans had invariably been elected by the chapter and confirmed by the bishop.[57]

The Crown did not officially intervene in the process until 1553 when Edward VI attempted to appoint James Haddon to the deanery by letters patent. However, Sir William argued that the letters patent were not actually acted upon, observing that there was a notation in the Chapter Act Book stating that the deanery was not in the King's gift.[58]

The Crown attempted to intervene again in 1560 when Elizabeth I recommended Gregory Dodds for election as dean, but the chapter demurred because he was not a canon or a prebendary.[59] They asked the Queen to either make him a member of the chapter or dispense with the requirement.[60] Canonries and prebends of Exeter were normally in the bishop's gift, but the see happened to be vacant at that moment due to the deprivation of James Turberville.[61] The Crown had a prerogative right to take custody of a vacant bishopric's temporalities, so the Queen resolved the matter by presenting Dodds to a prebend.[62] While it was true that Grylls was also a prebendary, the chapter insisted that the dean had only been elected from among the canons residentiary since Bishop Alley's statute of 1560.

Sir William claimed that subsequent decanal elections proceeded without the Crown's involvement until 1629 when Charles I recommended William Peterson to the chapter.[63] However, Peterson was already a canon of Exeter, so the chapter was content to accept the King's recommendation. Royal intervention

[57] In 1274 and 1366, the chapter did not hold an election so the bishop appointed the dean directly. It is not clear why the chapter failed to elect anyone. Barnes (note 17), 24.

[58] Barnes (note 17), 26. However, the Clergy of the Church of England Database lists Haddon as Dean of Exeter.

[59] Documents relating to Dodds' election are printed in D Wilkins, *Concilia Magnae Britanniae et Hiberniae*, vol 4 (London, 1737), 202–204.

[60] It is not clear how the Queen could have dispensed with the requirements. While the statutes of New Foundation cathedrals gave the Crown the power to dispense from their statutes, this was not the case for Old Foundation establishments such as Exeter. Perhaps the chapter thought it could be done under the Act of Supremacy 1559 (1 Eliz. 1 c. 1).

[61] Turberville was a Catholic who refused to take the oath of supremacy.

[62] Because of the vacancy, the Archbishop of Canterbury issued the mandate for Dodds' institution in his capacity as guardian of Exeter's spiritualities. See W Frere (ed), *Registrum Matthei Parker Diocesis Cantuariensis AD 1559–1575*, vol 1 (Oxford, 1928), 216.

[63] His letter to the chapter is printed in Barnes (note 17), XLI–XLII.

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continued after the Restoration, although the Crown's approach changed under Charles II. In 1661, 1662 and 1663, he continued the practice of recommending candidates to the chapter, and his nominees were all canons of Exeter.[64] But in 1681, he purported to grant the deanery of Exeter outright to Richard Annesley, who was neither a canon nor a prebendary.[65] Despite the tenor of the royal mandate, the chapter insisted on following its traditional practice. The bishop appointed Annesley as a prebend, then the chapter made him a canon residentiary. Once he was suitably qualified, the bishop issued a licence for Annesley's election, whereupon the chapter chose him as their dean.[66]

From that point onward, the Crown treated the deanery of Exeter as a donative and made appointments by letters patent each time it fell vacant.[67] Nevertheless, the chapter continued observing the traditional forms. Sir William argued that the chapter's compliance with the Crown's wishes was strictly voluntarily, and they were not legally obliged to choose the person named in the letters patent as the Crown was not the deanery's patron.[68]

To solidify his argument, Sir William had to address the fact that authorities such as Sir Edward Coke and Francis Hargrave seemed to suggest that the King's right to choose a dean was as solid as his right to choose a bishop.[69] He characterised Coke's statement as overbroad, noting that, with deans, the licence for the election came from the bishop rather than the monarch. While the Crown had to give its assent to the result of each episcopal election, this was not the case for decanal elections.[70] Indeed, the deanery of Exeter's founding charter contained no such requirement. Although Hargrave maintained that King John's Charter of Free Election[71] obliged chapters to present deans-elect to the Crown for royal assent, Sir William argued that this was a misinterpretation of the law. He noted that the Statute of Provisors (25 Edw. 3. Stat. 4) declared that 'the free elections of archbishops, bishops, and all other dignities and benefices elective in England, shall hold from henceforth in the manner as they were granted by the king's progenitors, and the ancestors of other lords, founders of the said dignities and other benefices'.[72] In Sir William's view, this recognised a distinction between royal foundations (such as bishoprics) and private foundations (such as the deanery of Exeter).[73] The Crown could require its licence and assent for the election of bishops because their sees were royal foundations, but it could not impose this requirement on private foundations such as the deanery of Exeter.[74]

[64] These letters are printed in Barnes (note 17), XLII–XLIII.
[65] His mandate is printed in Barnes (note 17), XLIII–XLIV.
[66] Barnes (note 17), 48.
[67] Barnes (note 17), 49–50.
[68] Barnes (note 17), 51.
[69] See, for example, Co. Lit. 95 and Hargrave's note on the same.
[70] Barnes (note 17), 57–58.
[71] The charter is printed in Barnes (note 17), VIII–X.
[72] The statute is printed in *The Statutes: Revised Edition*, vol 1 (London, 1870), 177–184.
[73] Barnes (note 17), 62.
[74] Barnes (note 17), 63.

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Sir William also noted that, if Hargrave was correct, the Crown had no way to enforce its supposed right if the chapter declined to elect the Crown's nominee.[75] The Crown had a statutory power to appoint a diocesan bishop by letters patent if the chapter failed to elect its nominee, but there was no such provision for deans. Sir William also noted that the Chapter of St Patrick's Cathedral in Dublin had successfully asserted its right to a free election of its dean on the grounds that it had been founded by the Archbishop of Dublin rather than the Crown.[76]

In response, the Attorney General emphasised the fact that the Chapter of Exeter had been content to select the person nominated by the Crown for three centuries. He noted that, under the ecclesiastical law, 40 years established a custom, while under secular law, 60 years bound the rights of the Crown.[77] Sir John Campbell said that it was not necessary to show that the Crown had *always* enjoyed the right to appoint the dean; he only needed to show that the Crown *presently* enjoyed that right. He also argued that the major lacuna in the chapter's records undermined their claim that the Crown had not interfered in the selection of a dean for long periods of time.[78] Sir John conceded that the Crown could not appoint the dean outright, but the chapter was nevertheless obliged to elect its nominee.[79] He noted that the only explicit requirement under Exeter's statutes was that the dean had to be chosen from among the canons. He submitted that Grylls did, in fact, meet this requirement as the distinction between canons residentiary and prebendaries post-dated the charter. At the same time, the chapter had the power to make Grylls a canon residentiary if they wished to be punctilious.[80]

Sir John emphasised the fact that authorities such Coke claimed that deans were chosen just like bishops, with chapters acting under the authority of a *congé d'elire*. When Sir William Follett intervened to say that the chapter of Exeter received its licences from the bishop rather than the Crown, Sir John attempted to counter this point by arguing that Coke's use of the term '*congé d'elire*' had a broader meaning: '[W]hat I conceive he means here is, the leave of the Crown to proceed to the election of a Dean, and that leave is given impliedly by the Crown sending a recommendation or letters missive'.[81]

Of course, Sir John recognised that Parliament did not formally give the Crown authority over the election of deans like it did with the election of bishops; but he maintained that the method of choosing deans could have nevertheless been altered by a private agreement between Crown, chapter, and bishop.[82]

Sir John reiterated that the chapter had accepted the Crown's recommendations without protest for centuries. This was the core of his argument. He noted that, in cases of longstanding usage, there should be a strong presumption of legality, with some judges even presuming the existence of an Act of Parliament to

[75] Barnes (note 17), 61.
[76] Barnes (note 17), 68–69.
[77] Barnes (note 17), 109.
[78] The records covering the period from 1559 to 1621 were lost. Barnes (note 17), 110.
[79] Barnes (note 17), 111.
[80] Barnes (note 17), 112.
[81] Barnes (note 17), 115.
[82] Barnes (note 17), 117.

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support an ancient usage.[83] He also sought to distinguish Exeter's situation from that of the Chapter of St Patrick's, noting that while they had a long and unbroken history of electing their dean without the Crown's interference, the Chapter of Exeter had chosen the Crown's nominee for centuries. Any right they may have had to free election had long since been extinguished.

The judgment

The court handed down its judgment on 24 June. The Chief Justice, Lord Denman, was plainly troubled by the lack of statutory authority for the Crown's purported right to choose the Dean of Exeter. Although the Attorney General had invited the court to presume the existence of an Act of Parliament in support of an ancient usage, Lord Denman was unconvinced:

> No Judge would venture to direct a Jury that they could affirm the passing of an Act of Parliament within the last 250 years, on an important subject of the most general interest, of which no vestige can now be found in the journals of Parliament, in the courts of law, in the numerous treatises of enlightened authors … and indeed no presumption could in this case be made, because all the facts are perfectly reconcilable with the legal rights shown to exist without any presumption whatever.[84]

He also rejected the Attorney General's contention that a change of this magnitude could have been implemented by a private arrangement between the bishop, the chapter, and the Crown: 'But without inquiring into the difficult question, how far and by what means such power of change may be lawfully exercised, we do not believe that it ever was so exercised – we have no doubt that it was not, because it is as sure to have been well known and recorded as even an Act of Parliament'.[85]

Although the chapter had for many years elected the person nominated by the Crown, Lord Denman agreed that this did not prove that they were legally obliged to do so; they could simply have chosen to do so. Parliament had not seen fit to give the Crown a way to make the appointment even if a chapter refused to elect its nominee.[86]

Lord Denman noted that the Crown did not claim to have the right to nominate or present a candidate in the legal sense of those terms. Instead, it asserted a right to recommend a person to the chapter, who the chapter would then be obliged to elect. However, he took a dim view of this argument:

> We have not been referred to any authority shewing that such power of recommending is a legal right. It is in contravention of that right originally belonging to the founder of the Deanery in question, which is a private foundation, of which the Crown is not patron or founder, and

[83] Barnes (note 17), 116–117.
[84] Barnes (note 17), 136.
[85] Barnes (note 17), 137.
[86] Barnes (note 17), 137.

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cannot furnish any ground on which the court can be warranted in issuing their writ of mandamus.[87]

Parliament intervenes

While the chapter prevailed in the courts, their victory was short-lived. In February 1840, the government introduced a bill to give effect to the fourth report of the Ecclesiastical Commissioners which, among other provisions, allowed the Crown to directly appoint deans of the Old Foundations by letters patent.

During the bill's report stage in the House of Lords on 6 August, Bishop Phillpotts tabled an amendment to exempt Exeter from this provision. He argued that, as the court ruled that their deanery was a private foundation of which the Crown had no right of patronage, the Crown should not be able to make appointments in the future.[88] Viscount Melbourne replied by observing that the Crown had nevertheless nominated deans for many years and, '[u]pon the grounds, then, of ancient usage … upon the ground of public policy that these high dignities should be in the gift of the Crown – he thought that Parliament ought to continue in the Crown that which had been attached to it so long'.[89] Phillpotts pressed his amendment to a vote and was defeated 21 to 31. The bill received royal assent when Parliament was prorogued on 11 August, becoming the statute 3 & 4 Victoria c. 113.[90] Cathedral deaneries of the Old Foundation have remained in the Crown's gift ever since.

Today, the deans of 28 cathedrals are appointed by the sovereign.[91] The current law is set out in section 5(9) of the Cathedrals Measure 2021 (2021 No. 2), which states that '[w]here the constitution provided, immediately before the commencement of this section, for the appointment of the dean to be made by Her Majesty, the constitution must continue so to provide'. The monarch acts on the advice of the Prime Minister, although the Church now has more control over the appointment process.[92]

By repeatedly refusing to elect the Crown's nominee and ultimately giving the deanery to a candidate of their own choosing, the Chapter of Exeter showed how

[87] Barnes (note 17), 138.

[88] HL Deb, 6 August 1840, vol 55, cols 1358–1359.

[89] HL Deb, 6 August 1840, vol 55, col 1359.

[90] The Act is printed in N Simons (ed), *The Statutes of the United Kingdom of Great Britain and Ireland*, vol 15 (London, 1841), 685–699. Section 2 of the Act also limited most English cathedral chapters to four canons as the Commissioners had suggested back in 1836: 'Subject to the provisions herein-after [sic] contained, the number of canons in the several cathedral and collegiate churches of the new foundation, and in the cathedral churches of Saint David and Llandaff, and in the Queen's free chapel of Saint George within the castle of Windsor, and of canons residentiary in the several cathedral churches of the old foundation in England, shall be the number respectively specified in the schedule hereto annexed'. Under this provision, Canterbury, Durham, Ely, Westminster, Winchester, and Exeter were the only foundations allowed to have more than four canons.

[91] Among the remaining English cathedral deaneries, 12 are in the gift of the diocesan bishop while the deaneries of Bradford and Sheffield are appointed by independent trustees.

[92] An overview of the process can be found at 'Overview of appointments process for Deans,' available at <https://www.churchofengland.org/sites/default/files/2017-11/overview-of-appointment-process-for-deans.pdf>, accessed 29 April 2024.

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the Church's traditional liberties could be used to take back a measure of autonomy. This approach became increasingly popular as more and more Anglicans realised that the interests of church and state were becoming more and more divergent. Exeter's embrace of free elections did not last, but other efforts to breathe new life into old forms and institutions, such as the revival of the provincial Convocations, would prove far more durable. The end result was a Church that was far more confident in its identity and increasingly eager to revise its relationship with the state.

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