Jersey & Guernsey Law Review – October 2012

SHORTER ARTICLES

1623 REVISITED

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1 At the Royal Palace at Greenwich, on 21 June 1623, George Abbott, Archbishop of Canterbury, Lancelot Andrews, Bishop of Winchester, and John Williams, Bishop of Lincoln, signed an Order in Council given by King James I, addressed to the Bishop of Winchester, the Governor, Sir John Peyton, the Bailiff and Jurats and to all ministers, officers and inhabitants of the island, ratifying and approving the Canons and ecclesiastical constitutions of the Church of England in Jersey. They had been drawn up on the admission of the new Dean because it was thought necessary to settle the regular government of the Island in ecclesiastical causes, and conform it to that which applied in the realm of England, as near as might be convenient. Indeed, the King had persuaded the Convocations of Canterbury and York (see below) to adopt the Canons of the Church of England in 1603–1606 respectively. They are generally referred to as "the 1604 Canons"

2 The 1604 Canons in England covered a variety of subjects, some trivial and some important. Some repeated pieces of general law of the Church. Others dealt with the Reformation changes. Some went into extraordinary detail such as Canon 74 which prescribed the dress of clergymen in and out of church, and even in their beds (at least in their own houses). It is interesting that even as long ago as 1623 there was no assumption that a piece of English church legislation would be repeated word for word in Jersey because the 1623 Canons definitely do not attempt that.

3 Some of the history has been referred to in Advocate Kelleher's article concerning the Poingdestre commentaries on the Canons.[1] Reading between the lines of the Order in Council, one suspects that there had been the usual jockeying for position amongst the Dean, the

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[1] *Jean Poingdestre's Commentaires sur les Canons de James 1* (2006) 10 JL Rev 205.

Governor and the Bailiff. The Order does make it clear that the Dean and the Ministers prepared the draft of the Canons, which they presented to the King, but the Bailiff and Jurats took exception to them and three Jurats—all de Carterets—made personal representations to the three signatories of the Order. We do not have the first draft unfortunately, but it was "read, examined, corrected and amended" so that it was by consent of those Jurats and the Dean that the Canons were settled. They were ordered to be "duly observed . . . for the perpetual government of the said Isle in Causes Ecclesiastical"; but interestingly, the order made provision that the Canons could be amended by mutual consent of the Bishop of Winchester, the Governor, the Bailiff, Jurats, Dean and Ministers and other royal officers of the Island—an early recognition of the possible exercise of a power of amendment by the Island authorities of a legislative Act of the Sovereign, qualified only by the need to have the Bishop of Winchester's consent.

4 The original Canons were drawn up in French of course, but by the time of the publication of the 2nd edition of Falle's *Caesarea*, published in 1734, there was an English translation in the opposite column. They contain much that is of historical interest to those with that turn of mind. The first Canon is unsurprisingly about the supremacy of the King. But why does it contain this language—

> ". . . no manner of obedience or subjection is due, within the Kingdoms and Dominions of his Majesty to any [foreign] Power; but that the King's Power within the Kingdoms of England, Scotland and Ireland and other his Dominions and Countries, is the highest Power under God . . ."?

5 One can understand why in those days the King might not pay too much attention to the relatively newly acquired colonies such as Virginia. But what happened to Wales? It would have been enough to get the Welsh Nationalists moving if they had been able to understand French! No—the clue lies in the fact that the Church of England then included the two provinces of Canterbury and York, which consisted of 35 dioceses and which matched the 52 counties of England and Wales, supplemented by the Channel Islands and the Isle of Man. The Welsh church was not disestablished until the Welsh Church Act 1914.

6 Today it would be unusual—and contrary to the European Convention on Human Rights—to contemplate legislating for the required behaviour of the people on a Sunday. But then, all persons were enjoined to submit to divine service on the Lord's Day, which was to be hallowed by exercises of public prayer and the hearing of God's Word. Divine service would also be read on Wednesday and Friday mornings; and if the Dean and his Ministers could secure the

consent of the Governor and the Civil Magistrate (the Bailiff), extraordinary days of fasting could be celebrated when an urgent occasion warranted it. This, the 6th Canon, is an example, even in those days, of a compromise between the Church and the secular authority.

7 By Canon 7, godfathers could only be admitted to that role if they were communicants,[2] and in Falle's day this was still strictly observed so that a godfather from another parish would only be allowed if he brought with him a certificate from his Minister to that effect. Women of course could not act as godmothers on their own.

8 Fathers and masters of a family were exhorted to ensure that their children and domestic servants be instructed in the knowledge of God and that they went to church.

9 The Canons contained many other provisions and there is no need to repeat all of them here. They established, however, that the Dean in 1623 was a good negotiator, because the jurisdiction to issue probate of wills and letters of administration (which continued until the Probate (Jersey) Law 1949) was conferred upon him. The Canons also contained detailed provision for the offices of church wardens and almoners. The wardens had a tough job—not just the ordinary tasks of keeping the church in good repair and keeping the books, but also searching places suspected of being gambling dens during divine service and also, with the assistance of the Connétable, searching taverns and tippling houses to round up the recalcitrants to attend church and to hear the homilies of the minister.

10 Although there had been some small changes to these Canons in the mid-1900s, these 1623 Canons remained largely intact until 2012; this is not really a complete insular disgrace as the 1604 Canons in England were not repealed and replaced until 1964 and 1969, and we are familiar with the concept of seeing how English legislation works before we adopt it! By an Order in Council on 14 March 2012, Her Majesty in Council ordered the registration of new canons—the Canons of the Church of England in Jersey. The title to the new Canons is of interest in itself—they are not the Canons of the Church of Jersey, but it is recognised that there are differences between the Island and the kingdom of England—hence the canons of the Church of England in Jersey. Similarly, it has always been the view that the church in Jersey is attached to, but not part of the diocese of Winchester.

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[2] See Appendix to Falle's *Caesarea*, 1734 edition, at 393.

11 But what are the Canons?[3] The sources of canon law—as distinguished from the Canons—are really these:

1. Theology, to be garnered from the usual sources, primarily the Bible, but also the patristic writings, the pronouncements of the Lambeth conferences, the liturgical formularies such as the 39 Articles and the Book of Common Prayer, and much else besides. It is curious that theology, often said to be the queen of sciences, is so imprecise in its sources.
2. The whole body of pre-Reformation law save that of course that has been changed by the Reformation, such as the doctrine of papal supremacy or of transubstantiation.
3. The common law of England.
4. Ecclesiastical legislation. This comes in three forms—Acts of Parliament, Measures and Canons.

12 This list prompts many questions. What is sometimes forgotten today is that the idea of the church being one body and the state another is, compared with the time the church has existed, of relatively recent origin. Those who were members of the Church of England were members of the Commonwealth of England. It was only the Reformation that saw the introduction of the practice of calling the clergy by the name of the church, as in the Act of Appeals, which describes the "spirituality now being usually called the English Church".[4] It is interesting that although it has become common practice today to talk about the church of England as the "Established Church", there has never been any formal Act of Parliament which sets this out as the legislature's choice of the preferred or official religion (unlike the express legislation which established the Presbyterian church in Scotland). Until the days of Henry VIII it would not have occurred to anyone that there could be a hard and fast dividing line between church and state. There were temporal and spiritual courts and both were the King's courts. The judgments of both were effectively enforced.[5] Thus the old common law of the church and

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[3] The *Shorter Oxford English Dictionary* defines the word in its first meaning as "an ecclesiastical law or decree, esp. a rule laid down by an ecclesiastical council."

[4] 24 Hen VIII ch 12 AD 1532.

[5] It is noteworthy that the Royal Commissioners appointed in 1860 to examine, *inter alia*, the ecclesiastical laws of Jersey, reported at lxxv that the Ecclesiastical Court did not have "any other mode of enforcing obedience to its summons or process than by having recourse to the assistance of the Royal Court."

state made "heresy" a penal offence, where that term was interpreted as dissent from the church. The Acts of Uniformity, passed in the period from Edward VI to Charles II, imposed serious penalties on those dissenting from the doctrines established. Later, these were supplanted by the various Toleration Acts,[6] and of course more recently, the Human Rights Act 1998 giving effect to art 9 of the European Convention and ensuring that freedom of religious belief is enshrined in the law.

13 The development of the difference between church and state was emphasised by the emerging strength of parliamentary democracy. It was obvious that the imperial parliament was composed of some people who were members of the Church of England and some who were not. In the 16th and 17th centuries, parliament recognised that the body of church law was best left to the church. The Convocations of Canterbury and York, the historic church parliaments, were left to make Canons, which still required royal assent. But these were of limited effect—they could not overrule the law of the land, whether statutory or the common law, and they only affected the ecclesiastical personae such as the clergy, churchwardens and chancellors. The duty of parliament to the community at large was not always easily reconciled with its duty to the church. Thus arrived the Church of England Assembly (Powers) Act 1919, which gave statutory recognition to the National Assembly of the Church of England and conferred on that Assembly, consisting of the Convocations of Canterbury and York, legislative authority for Measures which would now carry the authority equivalent to an Act of Parliament, and indeed can repeal Acts of Parliament. Nonetheless, Parliament has not surrendered its powers—although it does not create church legislation, that legislation needs royal assent and this cannot be given unless both Houses of Parliament have adopted a resolution that the Measure be submitted to the Queen for assent.

14 In 1970, the Church Assembly was renamed the General Synod of the Church of England as part of a new and reorganised scheme of church government which had been adopted in the Synodical Government Measure 1969. This Measure was extended to Jersey by Order in Council in 1970 by the Synodical Government (Channel Islands) Order 1970. As a result, there is a Deanery Synod in Jersey, which sends its messages (by resolutions) to and receives messages from the Diocesan Synod in Winchester, which similarly gathers in the views of the other deaneries in the diocese for transmission to the General Synod. In each synod, there are separate houses of clergy and

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[6] See *eg* 23 and 24 Vict ch 32.

laity, and in the General Synod there is also the house of bishops. Jersey sends one lay representative to the General Synod and there is a place also for the Deans of Jersey and Guernsey alternately every five years. Jersey and Guernsey each sends a number of representatives to the Diocesan Synod. Elections to the Deanery Synod in Jersey take place every three years. Each parish has lay representatives and a clergy representative as well.

15 Ecclesiastical legislation thus comes in the form of Measures and Canons, the former being the superior in the sense that they have the effect of a statute of Parliament, the latter being probably the more ancient form of legislation.

16 Measures, like Acts of Parliament, were generally thought not to apply in Jersey. This was potentially inconvenient. Thus, the Channel Islands (Church Legislation) Measures of 1931 and 1957[7] set out the arrangements for the extension of Measures to the Channel Islands. The process is this. The Bishop of Winchester draws up a scheme for extending a measure to one or both Bailiwicks and submits it to the General Synod. There it can be either adopted or rejected but not amended. If adopted, it is presented to the Queen for extension to the relevant Bailiwick by Order in Council. The Measure requires the Bishop to have consulted the Decanal Conference in the Island, now the Deanery Synod, and transmitted the scheme to the Home Secretary, now the Justice Secretary, so that it is considered by the States. In Jersey, this is of course now a necessary precondition of registration of the Order in Council by reason of art 31 of the States of Jersey Law 2005. Thus for example, the legislation for the ordination of women arrived in Jersey by the Women Priests (Channel Islands) Order 1999, applying with some amendments the Priests (Ordination of Women) Measure 1993 and the Ordination of Women (Financial Provisions) Measure 1993 to the Channel Islands, after the Scheme prepared by the Bishop of Winchester had been considered by the States and adopted by the General Synod.

17 Work on revising the 1623 Canons started in Jersey in the early 1990s. The Legislation Committee of the Deanery Synod, consisting of lay and clergy representatives, decided to start with the then current English canons, and revise them for use in the Island. It soon became apparent that the new Canons would cover much material that was suitable for Measures as well as Canons, because in Jersey there remains the crossover between the church and the parochial authorities as a matter of civil law, such as in, for example, the *Loi (1804) sur les assemblées paroissiales*. The new Canons therefore provided the

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[7] Rev ed 09.090 and 09.135.

structural arrangements for the church in the Island as well as providing the formal direction for the Island clergy which the late Canon Lawrence Hibbs, erstwhile member of the Deanery Legislation Committee, in an article in the Bulletin of the *Société Jersiaise*[8] emphasised as the driving reason for updating from 1623, for without it reliance would have to be placed on those historical arrangements which could not be expected to cut the mustard in the twentieth century.

18 In an article of this kind one can only dip into the detail—it may be of contemporary interest to note that Canon B30—

> "affirms according to our Lord's teaching, that marriage is in its nature a union permanent and life-long, for better for worse, till death them do part of one man and one woman to the exclusion of all others on either side . . .",

which would prohibit gay marriage; or Canon C2.5 which says firmly that "Nothing in these Canons shall make it lawful for a woman to be consecrated to the office of bishop", another hot topic for the General Synod at its last session. It may be thought surprising that it was thought necessary to include this Canon because, apart from anything else, it would seem unlikely in the extreme that any bishop would be consecrated—by an archbishop—in Jersey, which has no diocese of its own.

19 The position of the Dean is explained in more detail. Of course in 1623 the Dean was expected to act as the Bishop, because communication and transport links were then such that the Bishop of Winchester had a relatively small part to play in Island church life. Indeed it was really only from the time of Bishop Colin James in the 1980s that the Bishop of Winchester commenced regular visits to the Island. Even so, while Canon C16 provides that the Bishop of Winchester is the chief pastor of all that are in the Island, both laity and clergy, it also goes on to set out that the Dean is his Commissary General and can exercise all the Bishop's jurisdiction in accordance with his Letters Patent and the Bishop's own commission. Flesh is put on these bones by the detail of Canon C17—such as the requirement for the Dean or his vice Dean to visit every parish in person every three years for the purpose of ensuring that everything is being satisfactorily provided by the Church wardens, who are the Dean's wardens, and that any problems are brought to his attention.

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[8] *Jersey Canon Law—its "peculiar" history* Bull. Ann. Soc. Jersiaise 1998, Vol. 27, 257.

20 The big stumbling block in taking the revised Canons forward was the question of clergy discipline. The previous arrangements had matters of discipline brought before the Dean who would have the advice of the Ecclesiastical court, with an appeal from the Dean's order to the Bishop. This was structurally hopeless in the late 1990s and the coming into force of the Human Rights Law made things worse, assuming one took the view that the Dean was a "public authority" for these purposes. Even without such considerations, the fact was that the Dean could not at the same time be the provider of advice to one of his clergy colleagues who was facing problems, and at the same time have all that knowledge available to him for the purposes of applying some disciplinary sanction at a later date. In addition, the ministers who formed the ecclesiastical court would not want to be sitting in judgment on one of their colleagues. Before this became politically popular, the new Canons came up with the idea of sharing the resources of Guernsey and Jersey, although securing agreement to follow a different disciplinary arrangement from that which existed in England took some negotiation. The Canons establish created a new disciplinary panel, comprising clergy and lay members, presided over by the Vice President of the Clergy Disciplinary division of the ecclesiastical court who is to be a Royal Court Commissioner or an advocate or solicitor of at least 10 years' standing. The clergy members of the panel would be drawn from the Guernsey clergy, while there would be a sufficiency of lay members who did not know the clergy member faced with disciplinary proceedings to ensure a fair hearing. Arrangements of this kind were intended to ensure that the disciplinary tribunal would have a good handle on insular life in a way that might not be guaranteed if the hearing had been conducted in England, and yet would also be a human rights compliant tribunal able to deliver justice in the cases before it.

21 Once the new Canons were ready for adoption, the remaining issue was how to bring them into force. The options were a Scheme drawn up by the Bishop and put to the General Synod for extension to the Island under the Church Legislation (Channel Islands) Measures of 1931 and 1957, or an Order in Council from Her Majesty. The former suffered the disadvantage that the General Synod would still be faced with a document that did not quite look like its own Canons and there was a risk of uninformed debate on why peculiarly Jersey provisions had been included. The latter was something of an oddity for 2012 in that the Crown has not legislated directly for Jersey without the authority of parliament in any matter for quite some time. In the event, the problem was overcome by the States approving the draft of the Canons so that they might be submitted to the Crown with a request for the issue of an Order in Council, a not too dissimilar process than that which applied in 1623, but perhaps one which is rather more

democratic. The States were advised that the draft had been approved by the Bishop of Winchester, the Bailiff and the Lieutenant Governor (for consistency with the provisions of the 1623 Order in Council), by the Ecclesiastical Court and the Deanery Synod. All bases covered. Praise the Lord!

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