

PARISH LAW,

&c. &c.

CHAP. I.—PARISHES.

- SECTION I. *Origin of Parishes.*
 II. *Boundaries of Parishes.*
 III. *Division of Parishes.*
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SECTION I.—ORIGIN OF PARISHES.

Their History Uncertain.] As the ecclesiastical division of the kingdom was not commenced till a long time after the introduction of Christianity, and as those who were most active and most immediately interested in its establishment, were also the historians of the times, it seems a little singular that the information respecting the infancy and extension of religious institutions, in this country, should be so scanty and uncertain.

It is agreed among ecclesiastical writers, that dioceses (*dioichia*) existed anterior to parishes, and that it was only when the number of converts within the district over which the bishop exercised his functions, became too large for him, even with the aid of his presbyters, to minister to their spiritual wants, that parishes were instituted. Besides, the erection of churches in different parts of the country as the religion spread among the people, would afford an additional reason, as a matter of convenience, for the division into smaller portions, of the districts over which the bishop still maintained a general controul and superintendence.

Limits how Determined.] Thus in process of time the presbyters and priests, who were little more than the curates or messengers to the higher dignitaries, became settled in the towns and villages, distant from the cathedral churches, (in which the bishops themselves

officiated,) and the limits of their spiritual superintendence being co-extensive with the habitations of the persons who resorted to their churches, those districts were eventually marked out and determined, which were afterwards called and known by the distinctive appellation of parishes; though in the more early times, it is probable that *dioichia* and *paroichia* were terms applied to either division indiscriminately. (Com. Dig. Parish, 3 Burn. Ec. L. 61.)

Protestant Hierarchy.] It will not be considered very much out of place to state, in general terms, the orders and degrees of the hierarchy of the Protestant church, as it exists at the present day. The ecclesiastical division of the kingdom is primarily into two provinces, those of Canterbury and York. A *province* is the circuit of an archbishop's jurisdiction. Each province contains divers dioceses, or sees of suffragan bishops; they are styled suffragans in respect of their relation to the archbishop of their province; but formerly each archbishop and bishop had also his suffragan to assist him in conferring orders, and in other spiritual parts of his office within his diocese. These, in our ecclesiastical law, are called suffragan bishops, and resemble the *chorepiscopi* or *bishops of the country*, in the early times of the Christian church. How this *inferior* order of bishops *may* be elected and consecrated, is regulated by the 26 Hen. VIII. c. 14.; but it is not usual to appoint them. They should not be confounded with the *coadjutors* of a bishop, who are appointed in case of the bishop's infirmity to superintend his *jurisdiction* and *temporalities*, neither of which was within the interference of the former. (1 Gibs. Cod. 1st ed. 155.) The province of Canterbury includes twenty-one dioceses, viz. of ancient foundations,—Rochester his principal chaplain, London his dean, Winchester his chancellor, Norwich, Lincoln, Ely, Chichester, Salisbury, Exeter, Bath and Wells, Worcester, Coventry and Litchfield, Hereford, Llandaff, St. David, Bangor and St. Asaph, with four founded by Hen. VIII. erected from the ruins of dissolved monasteries, viz. Gloucester, Bristol, Peterborough, and Oxford. The province of York has four only, though anciently more: they are Chester, Durham, Carlisle, and the Isle of Man, which was annexed to the province of York by king Henry VIII. Every diocese is divided into archdeaconries, whereof there are sixty in all; each archdeaconry into rural deaneries, which are the circuit of the archdeacon's and rural dean's jurisdiction; and every deanery is divided into two parishes.

Parish Defined.] A parish is that circuit of ground which is committed to the charge of one parson or vicar, or other minister having cure of souls therein. These districts are computed to be near ten thousand in number. (Camden's Britannia.)

Date of Parishes.] Mr. Camden (in his *Britannia*) says, England was divided into parishes by Archbishop Honorius about the year 630. Sir Henry Hobart, (*Hob.* 296,) lays it down, that parishes were first erected by the council of Lateran, which was held A. D. 1179. Each widely differing from the other, and both of them perhaps from the truth; which will probably be found in the medium between the two extremes. For Mr. Selden has clearly shewn, (*Of Tithes.* c. 9,) that the clergy lived in common without any division of parishes, long after the time mentioned by Camden. And it appears from the Saxon laws, that parishes were in being long before the date of that council of Lateran, to which they are ascribed by Hobart.

Extent of Parishes.] It seems to be tolerably certain, that the boundaries of parishes were originally ascertained by those of a manor or manors: since it very seldom happens that a manor extends itself over more parishes than one, though there are often many manors in one parish. The lords, as Christianity spread itself, began to build churches upon their own demesnes, or wastes, to accommodate their tenants in one or two adjoining lordships; and, in order to have divine service regularly performed therein, obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general; and this tract of land, the tithes whereof were so appropriated, formed a distinct parish. Which will well enough account for the frequent intermixture of parishes one with another. For if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself, it was natural for him to endow his newly erected church with the tithes of those disjointed lands; especially if no church was then built in any lordship adjoining to those out-lying parcels. (*1 Bla. Com.* 113.)

How Number Increased.] Thus parishes were originally formed; and parish churches endowed with tithes that arose within the circuit assigned. Their number has been added to, by some of the most extensive ones, being divided into two or more, when a greatly increased population rendered such a measure highly expedient for the spiritual welfare of the people. As will readily be presumed, this has been the case in London and Westminster, and several other towns, which from their magnitude, and advancement in civilization, were the chief objects of ecclesiastical watchfulness and regard.

The churches in these new divisions were sometimes of considerable antiquity, and by this means acquired the distinctive appellation of

the parish church, whilst others were erected, as the number of communicants increased, subordinate, and in some respects tributary to the former.

Bishop defined Limits.] This gradual reduction of the whole kingdom into definite portions, is corroborated by the testimony of Bishop Kennet, in his *Parochial Antiquities* (see p. 585 et seq.) upon whose authority it may be stated, that in the earlier periods of our ecclesiastical history, the limits of these new parishes were always appointed by the bishop, who was guided probably in settling the boundaries, by the extent of the founders lands, when the church was built by a layman, or by some cogent reasons arising from individual interests or public convenience.

Tithes Assigned.] If the bishop gave the new church a right of burial, the lord of the manor might (with his approbation and not otherwise) give some part of the tithes to that church, which before were due to the mother church; but if this right were not conceded, then the edifice remained a chapel; and if the lord of the manor would have a curate, he was to maintain him at his own charge. However, in some instances, one third of the tithes, were by authority of the bishop, allowed to the newly erected church, and the remainder was reserved to the old one, which was standing before this smaller parish was carved out of the larger district; and hence it was, that when a question arose whether a foundation of this kind were a parish church, or merely a chapel, it was to be decided by the bishop's certificate. But the dominion of the church was preserved in all cases, unless it was clearly made out that it had been duly surrendered, and upon an adequate consideration. Thus upon a question whether the inhabitants of a chapelry ought to contribute to the repairs of the mother church, it was held that a chapelry may be exempt by prescription, where it buries and christens within itself, and has never contributed to the mother church; for in that case, it shall be intended coeval, and not a later erection, but if it appears that the chapel could only be an erection in *ease* and favour of those of the chapelry, and that when they prevailed upon the bishop to consecrate them a burial-place, they in consideration thereof agreed to pay towards the reparation of the mother church, they remain liable. (*Ball v. Cross*, Holt, R. 138. 1 Salk. 164.)

Parish in separate Parts.] In some few instances, parishes seem to interfere with each other, that is, when a place or district in the middle of another parish, belongs to a parish that is distant; but that hath generally happened by an unity of possession, when the lord of a

manor was at the charge to erect a new church, and make a distinct parish of his own demesnes, some of which lay in the compass of another parish. (1 Still. 244.)

SECTION II.—BOUNDARIES OF PARISHES.

Boundaries Traditional.] The boundaries of parishes in most instances depend upon ancient and immemorial custom, having been originally established according to the particular circumstances of the times or districts. (Still. 243.) They were settled long after the foundation of churches, and were afterwards much varied, and in many cases abridged and narrowed, as new churches were built. (Lousley v. Hayward, 1 Younge & J. 586.)

Motives to define Bounds.] For a long period, a sufficient inducement to define the boundaries of parishes accurately, did not present itself; but when it became part of the law, to require the attendance of the people upon the services of religion at the *parish* church, and numerous civil duties were conferred upon them as *parishioners*, it then was felt to be of consequence to have the limits of each parish ascertained and settled. For this purpose, perambulations were made, and are, in many places, still continued.

Perambulations.] These perambulations, though of evident utility, were in the times of popery accompanied with great abuses. They were usually performed in rogation week, whence the rogation days were anciently called *gange days*, from the Saxon *gan* or *gangen*, to go.

The processions upon these occasions were accompanied with many ceremonials of popish superstition; with banners flying, which, according to a constitution of Archbishop Winchelsey, the parishioners were to find at their own charge, (Lind. 252,) and hand-bells, lights, and other pageantry. When they arrived at a spot upon which a cross was erected, the procession halted, and certain rites were performed, but their resting-places were chiefly selected for the purposes of feasting and revelry; and in process of time, they came to demand as a right, what was dispensed originally from the hospitality of some of the wealthier yeomen, or lords of the manors residing upon or near to the boundary. However, though repeated attempts were made to establish this right by legal proceedings, the custom was not sanctioned by any public tribunal, but on the contrary, was declared to be against

law and reason. (Gibs, 213. 2 Roll's Rep. 259. Moor, 916. 2 Lev. 163.)

Ceremonies Abridged.] At length the irregularities and excesses committed on these occasions, attracted the reprehension of the sovereign, for we find that processions in the manner they had been performed, were forbidden by injunctions from Queen Elizabeth, though it was at the same time required, that for the retaining of the perambulations of the circuits of parishes, the people should, once in the year, at the time accustomed, with the curate and the substantial men of the parish, walk about the parishes as they were accustomed, and at their return to the church, make their common prayers. And the curate attending such perambulations, was at certain convenient places to admonish the people to give thanks to God, (in the beholding of his benefits,) and for the increase and abundance of his fruits upon the face of the earth; with the saying of the 103d Psalm. At which time he was also to inculcate these or such like sentences:—*Cursed be he which translateth the bounds and dolles of his neighbour*, or such other order of prayers as should be lawfully appointed. (Gibs. 213.)

Perambulate over Private Lands.] It is said in the case of *Goodday v. Michell*, reported in *Cro. Eliz.* 441. *Owen.* 72, that it is not to be doubted that parishioners may well justify the going over any man's lands in their perambulations, according to their *usage* or custom; and to abate all nuisances in their way. (See *F. N. B.* 185. *B. Ent.* 158. See also *Vin. Ab. Perambulation.*)

Bounds settled by Law.] When from the neglect to perambulate, or from other causes, the bounds of parishes have become confused and difficult to determine, the proper mode to have them ascertained is by an action at law. And the books of common law agree in the maxim, that the bounds of parishes, though coming in question in a spiritual matter, shall be tried in the temporal court, (*Transam's case*, *Cro. Eliz.* 178, 228.) though the provincial constitutions mention the bounds of parishes amongst the matters which belong to the ecclesiastical court, and say they cannot belong to any other. (Gibs. 212.) The superior authority of the common law cannot however be disputed, though the rule seems to be, that the spiritual courts having jurisdiction in other matters, wherein the question of boundary may arise collaterally, are still at liberty to proceed. Thus, if the question of boundary arises incidentally, and the ecclesiastical court has jurisdiction in the *principal* point, the Court of K. B. will not grant a prohibition to stay trial. (*Full v. Hutchins*, *Cowp.* 424.) But there are few instances in which the ecclesiastical courts are per-

mitted to proceed, where a question of this nature is involved, if a prohibition is sued out in due time, that is before trial. (*Banister v. Hop-ton*, 10 Mod. 12. *Paxton v. Knight*, 1 Burr. 314.)

Between Spiritual Persons.] If the suit is between a rector and vicar, though the former is an impropiator, it shall be tried in the spiritual court, and no prohibition shall go. If it be a proceeding to determine a case of tithes, the right to which depends on the lands lying in a vill *within* the parish, or in the other part of the parish, in such case, the Court of King's Bench declared that the question was triable in the ecclesiastical court. (2 Rolls. Abr. 312.)

Thus in a suit between the parson impropriate and the vicar of the same parish, wherein the vicar claimed all the tithes of the village of D. within the parish, and the question between them was whether certain lands, whereof the vicar claimed the tithes, were within the village of D. or not; yet, inasmuch as the suit was between spiritual persons, viz. the parson and vicar, although the parson was a layman, and the parsonage appropriate a lay fee, it was held to be triable in the same court. (*Ibid.*)

Between Parson and Layman.] But in a case between a clergyman and a layman, where a vicar sued for tithes, arising *inter loca decimabilia* of such a parish and the defendant suggested that the lands were in another parish, and that he had paid tithes to the parson there, this shall be tried at law. (*Stransham v. Cullington*, Cro. Eliz. 228.) So, if it be disputed, between the parties whether certain lands for which tithes are demanded be in one parish or another, the question is triable at common law. (*Transam's case*, Cro. Eliz. 178. 1 Keb. 369.) Because, though the bounds of vills may be triable by the ecclesiastical courts, those of parishes are not. (*Petler v. Yalaman*, 1 Lev. 78. 1 Sid. 89.)

Commission to settle Bounds.] It is laid down in the books, that the boundaries of counties, of towns, and of manors may, by the *assent* of the parties, be ascertained and settled by a commission *de perambulatione faciendâ*, issued to the sheriff or to other persons. (Vin. Ab. tit. Perambulation.) And where the lands of private individuals have become confused from having been for a long period in the same occupation, the Court of Chancery, without such assent, will grant a *commission* for this purpose, if it is shown that the confusion has arisen from the misconduct of the defendant or of those under whom he claims. (*Speer v. Crawter*, 2 Meriv. 410.) Still upon these occasions the granting the commission is not of course as respects *legal* estates: there must be some *equitable* circumstances. (*Wake v. Conyers*, 1

Edin. Rep. 331. 2 Cox. 360. *Willis v. Parkinson*, 2 Meriv. 507.) There seems no reason why the boundaries of parishes should not be settled in the same way as those of counties and towns, where they are in dispute, but it is said that a bill will not lie for an issue or commission for this purpose; except, perhaps, all parties concerned, or who have a probable interest, are before the court. (*St. Luke's v. St. Leonard's*, 1 Bro. C. C. 40; *Atkyns v. Hatton*, 2 Anstr. 386.)

Bounds now known.] The necessity for a commission or any other legal proceeding for the purpose of ascertaining the boundaries of parishes must be daily diminishing; as in those places where perambulations are neglected, the limits of parishes are known either from the municipal records or by other means equally satisfactory. And in those cases where the lines of demarcation traverse extensive wastes or commons, the legislature has provided the means, when it becomes important, by such lands being brought into cultivation, of determining with exactness their parochial locality.

Wastes near Parish.] By the 17 Geo. 2. c. 37, it is enacted, that where there shall be any dispute, in what *parish* or place, improved wastes, and drained and improved marsh-lands lie, and ought to be rated, the occupiers of such lands, or houses built thereon, tithes arising therefrom, mines therein, and saleable underwoods, shall be rated to the relief of the poor, and to all other parish rates within such parish or place which lies nearest to such lands; and if, on application to the officers of such parish or place to have the same assessed, any dispute shall arise, the justices of the peace at the next sessions after such application made, and after notice given to the officers of the several parishes and places adjoining to such lands, and to all others interested therein, may hear and determine the same on the appeal of any person interested, and may cause the same to be equally assessed, whose determination therein shall be final. But this shall not determine the boundary of any parish or place, other than for the purpose of rating such lands to the relief of the poor, and other parochial rates. (s. 1, 2.) And by the 2. and 3. Ed. 6. c. 13. s. 3, every person who shall have any beasts or other cattle titheable, depasturing on any waste or common whereof the parish is not certainly known, shall pay the tithes thereof where the owner of the cattle dwells.

By Inclosure Acts.] And by the 41 Geo. 3. c. 109. s. 3, commissioners appointed in or by virtue of inclosure acts, are authorised and required by examination of witnesses upon oath or affirmation, which any one of such commissioners is empowered to administer,

and by such other legal ways and means as he or they shall think proper, to inquire into the boundaries of such several parishes, manors, hamlets, or districts; and in case it shall appear to such commissioners, that the boundaries of the same respectively are not then sufficiently ascertained and distinguished, such commissioners shall ascertain, set out, determine, and fix the same respectively; and after the said boundaries shall be so ascertained, &c. the same shall be the boundaries of such parishes, manors, hamlets, or districts.

Notice of fixing Bounds.] Provided always, that such commissioners, before they proceed to ascertain and set out the boundaries of such parishes, manors, hamlets, or districts, shall give public notice, by writing, under their hands, to be affixed on the most public doors of the churches of such parishes, and also by advertisement, and also by writing to be delivered to, or left at the last or usual places of abode of the respective lords, or stewards of the lords of the manors, in which the lands to be inclosed shall be situate, and of such adjoining manors, ten days at least before the time of setting out such boundaries, of their intention to set out and determine the same respectively.

Publishing Bounds.] And such commissioners shall, within one month after their ascertaining, &c. the same boundaries, cause a description thereof, in writing, to be delivered to, or left at, the places of abode of one of the churchwardens or overseers of the poor of the respective parishes, and also of such respective lords or stewards.

Appeal against Bounds.] “ Provided, that if any persons interested in the said determination of the said commissioners shall be dissatisfied therewith, such persons may appeal to the justices for the county, at any general quarter-sessions held within four calendar months after the aforesaid publication of the said boundaries; the appellants giving eight days’ notice of such appeal, and of the matter thereof in writing to the commissioners; and the decision of the said justices therein, shall be final, and not removable by *certiorari*, or any other process whatsoever into any of his Majesty’s Courts of Record, at Westminster or elsewhere.”

Error of Commissioners.] But unless the commissioners appointed by any such act pursue the authority given them, strictly, their proceedings may be invalidated. Thus, where they duly fixed and settled the boundaries, and published them accordingly, but the boundaries mentioned in their *award* varied from those *advertised*, it was held, that their award was not binding as to the boundaries of the parish. (*R. v. Washbrook*, 4 Barn. and Cres. 732; 7 Dowl. and Ryl. 221.)

Incompetent Witnesses.] The parson cannot give evidence on a question relating to the bounds of his parish, for he is interested to enlarge them, and, consequently, his tithes. (*Wharton v. Robinson*, 7 Mod. 63.) Nor a parishioner *actually* rated, though, if he be merely liable to be rated, his evidence is admissible. (*Deacon v. Cook*, 2 East. 562.)

SECTION III.—DIVISION OF PARISHES.

Expediency thereof.] The increase of population, and a becoming zeal for the character and influence of the Protestant establishment, which were in some measure impaired by the unwearied and extended labours of sectarianism, induced the legislature, towards the close of the late reign, to appropriate large sums of money for the erection of new churches. It was an important part of the general scheme, to give to the churches so to be established a peculiar district, in the nature of a separate parish, wherever it might be found expedient.

Power to divide Parishes.] Accordingly the statutes passed on the subject provide, that if the commissioners, appointed to carry this object into effect, shall think it expedient to divide any parish into two or more *separate parishes, for all ecclesiastical purposes*, they may, with the consent of the bishop of the diocese, under his hand and seal, apply to the patron of the parish church for his consent, and upon his signifying it under his hand and seal, the commissioners shall represent the whole matter to the King in council, stating the proposed bounds of such division, with the relative proportions of glebe lands, tithes, moduses, and other endowments, and the estimated amount of fees, oblations, or other ecclesiastical dues or profits within each division; upon which his Majesty in Council may direct such division to be made. Provided that it shall not completely take effect till after the death, resignation, or avoidance of the existing incumbent. (58 Geo. 3. c. 45. s. 16.)

Tithes assigned.] Incumbents of the churches of each division of the parish are empowered to recover the tithes, &c. assigned to them, in like manner as the incumbent of the original parish. (s. 17.)

Existing Incumbencies.] New churches of such divided parishes shall, during the existing incumbency, remain chapels of ease, and be served by a curate nominated by the incumbent, and licensed by the bishop, and paid as after directed. (s. 18.)

New Parish a Rectory, &c.] Every separate parish, when the division shall become complete, shall be a rectory, vicarage, donative,