

In the Consistory Court of the Diocese of Leeds

In the matter of All Saints, Pontefract

Between:

The Reverend Canon June Lawson

Petitioner

and

Pontefract and District Archaeological Society

Additional Party

JUDGMENT

182837-0061 (22-16C)

- 1) This case concerns the extent to which burials may take place in a churchyard that has been closed by Order in Council. It is hoped it will prove useful for those who have the care and control of such closed churchyards, as well as for those to whom the state entrusts the weighty obligation of securing the lawful reburial of human remains that have been exhumed for scientific research or other purpose.

I should also state from the outset that a significant amount of the work in preparing this judgment, especially as regards the background in fact and in law, was carried out by the Chancellor of the Diocese, who is regrettably unavailable to make judgment on this matter,

- 2) In this matter the Incumbent of All Saints and St Giles with St Mary, Pontefract, has sought assistance with a troubling situation that arose before she was collated as incumbent (in February 2019). Her written enquiry has been deemed to amount to a petition seeking a confirmatory faculty in respect of a burial in 2015 of certain human remains which were unearthed during archaeological excavations nearby. The burial in question does not even appear

in the record of burials for the Church nor upon the burial plan. Canon Lawson only became aware of the re-interment in January 2022 when she received a letter from Dr Janet McNaught seeking permission to install a stone plaque to commemorate the re-interment. The plaque has already been carved - which it should not have been without consulting the incumbent about wording - and reads as follows: “*Near This Place Lie the mortal remains of our forebears, excavated from St. Richards Dominican Friary in 2011 Originally laid to rest in the early 14th Century*” [sic]. Canon June Lawson promptly made enquiries and sought assistance from the Diocesan Registry. [I should add that the Pontefract and District Archaeological Society (hereafter PDAS) have thus far declined to formally seek a faculty for installation of the memorial stone, so the Chancellor has deemed that no such permission is being sought in these proceedings - it is of note that the inscription appears to be inaccurate in any event as the original date of burial of the bodies seems to have been in the late C14th not the early C14th].

- 3) The principal complication of this case is that the churchyard in question, at All Saints, Pontefract, was closed for burials by Order in Council a long time prior to this burial, in fact as long ago as 1857. A Deacon of the Church (since deceased) allegedly volunteered that the human remains could be buried in the closed churchyard, and also participated in a service of re-interment, apparently conducted by or at least involving a significant contribution from a Roman Catholic priest from a nearby Church. That is not as surprising as it may seem for the human remains are likely of C14th residents of a former Dominican friary which lay beneath the area excavated. (Also it is averred that All Saints Church was built upon the remains of a Norman Priory Church, which was why its churchyard was considered particularly suitable). It appears that the Deacon did not discuss the interment of these human remains with the then incumbent. There is no evidence to suggest that a faculty (or any other permission) was ever granted for the interment. The then Incumbent of the parish and the then suffragan Bishop of Pontefract in the former Diocese of Wakefield have each

stated that he was unaware of the re-interment and did not purport to provide any form of consent.

- 4) For the sake of clarity it is perhaps appropriate to here recite exactly what Section 3 of the Burial Act 1853 provides:

3 Burial not to take place after Order in Council for discontinuance.

It shall not be lawful, after the time mentioned in any such Order in Council for the discontinuance of burials, to bury the dead in any church, chapel, churchyard, or burial place, or elsewhere, within the parts to which such Order extends, or in the burial grounds or places of burial (as the case may be) in which burials have by any such Order been ordered to be discontinued, except as in this Act or in such Order excepted; and every person who shall, after such time as aforesaid, bury any body, or in anywise act or assist in the burial of any body contrary to this enactment, shall be guilty of a misdemeanour.

The penalty for breach of the above statutory section is a fine of level 1 (the lowest level of fine in the jurisdiction of the Magistrates' Court - see s46 Criminal Justice Act 1982). In other words it needs to be acknowledged that no matter what good intentions may have existed at the time, the interment with which this case is concerned was illegal and could be subject to penalty under the criminal law.

- 5) No hearing has taken place in this matter. There is no real dispute of fact between the parties and the proceedings are not adversarial. In furtherance of the overriding objective the Court has had in mind (a) saving expense; (b) dealing with the case in ways that are proportionate to the importance of the case and the complexity of the issues; and (c) ensuring that it is dealt with expeditiously and fairly. The Chancellor issued a series of directions made to interrogate those who may have had direct knowledge of relevant facts and to establish the relevant principles. The Chancellor has asked me to express gratitude on his behalf to everyone concerned for responding with expedition

and candour in giving the Court the assistance it needs. Whilst this may have resulted in additional court fees, it has obviated the need for a hearing thus reducing the cost of the proceedings overall. The Court is particularly grateful to Canon Lawson and to Mr Philip Jones, secretary and field director of the PDAS.

Background

- 6) On 15 July 2011 a licence was issued in the name of the Secretary of State for Justice, pursuant to section 25 of the Burial Act 1857. The Licence permitted the removal of human remains of persons unknown from their place of interment at the site of Pontefract General Infirmary, then in the ownership of the Mid-Yorkshire NHS Trust. This written authority has often been referred to as the Home Office Licence by people concerned in this case.
- 7) Various conditions were attached to the licence, of which condition 2(d) is material for the current proceedings (emphasis added) :

2(d) The remains shall, no later than 31 December 2013, either be reinterred in a burial ground in which interments may legally take place or else be retained in accordance with the requirements of the Wakefield County Archaeologist, and in the meantime, shall be kept safely, privately and decently by Dr Janet McNaught and David Wandless, Pontefract and District Archaeological Society.
- 8) The licence was expressed to expire on 30th November 2013. By letter dated 27th May 2014, the Secretary of State amended the licence by substituting the expiry dated with 31st December 2014. It is likely the licence was again extended, but that has not been confirmed to the Court
- 9) The Ministry of Justice licence (MOJ Licence hereafter) was required in order that the PDAS could undertake archaeological excavations at the location in question to try and locate any upstanding walls of the friary church below the surface and any other buildings which had formed part of the Dominican friary

of Our Lady, Saint Dominic and Saint Richard. The friary was apparently founded in 1256 and surrendered to the King's Commissioners on 26th November 1538.

- 10) The Pontefract Friary Action Group was formed in 2011 by those concerned to safeguard the site while the hospital authority reviewed its future property needs. The members of the Action Group requested the PDAS to undertake the excavation, which proceeded with input from the West Yorkshire Archaeological Advisory Service, Balfour Beatty and Consort Health. As appears from her witness statement, Dr Janet McNaught, at that time Finds Officer of the PDAS, undertook to oversee the care of, exhumation of, research upon, and re-interment of, any articulated remains or bones discovered under the MOJ licence. Her name appears specifically in condition 2(d) (quoted above) together with that of David Wandless. Mr Wandless has taken no part in these proceedings. A radiographer by training, Dr McNaught has had a long interest in archaeology and applies her medical knowledge in the study of human skeletal remains. For this she was awarded a PhD from the University of Durham in 2007.

- 11) The Court has not been informed of the overall outcome of the excavation, but it has been told that two partial skeletons, one male and one female, were discovered and Carbon14 dated to the second half of the fourteenth century. These two skeletal remains, in biodegradable paper bags, were interred in All Saints churchyard on 27th March 2015. It would appear that Dr McNaught was involved in choosing the precise location: Her email of 13th March 2015 recommended 'trench 4' of an excavation of 2006 concerning the Norman foundations of the church. The low key ceremony comprised a single prayer from a pre-1962 Roman Catholic rite, and a recital of the Our Father (or the Lord's Prayer, as it would be known by many Anglicans) in Latin, a Hail Mary and a Glory Be, the whole ceremony lasting but a matter of minutes. It has

been suggested by the Catholic priest who conducted the short liturgy that Dr McNaught specifically asked for a Catholic priest to conduct the service because she wished to honour the religion of the deceased. The Chancellor has opined that this seems to reflect a misconception as to the nature of the ecclesiological and doctrinal understandings of the sixteenth-century Reformation and their impact on *ecclesia anglicana*.

- 12) The fact that a Roman Catholic Priest in-effect presided over the re-interment should not cause any great issue as under section 6 of the Burial Laws Amendment Act 1880 a burial may take place either without any religious service or with such Christian and orderly service at the graveside as seems appropriate. The words, “Christian service” include every religious service used by any trinitarian church, denomination or person professing to be Christian. In fact, since the interment took place the Code of Practice on Co-operation by the Church of England with Other Churches (February 2019) has confirmed that a Roman Catholic Priest could preside over a special service in this Churchyard, although the consent of the incumbent and Parochial Church Council should be sought in advance.

The circumstances of the interment

- 13) The circumstances that led to the interment are not entirely certain. Although Dr McNaught appears to have acted with good faith throughout it must be acknowledged that the obligation placed upon her (or upon Mr Wandless) under the MOJ Licence was to ensure that the remains were re-buried in a burial ground in which interments may legally take place. This did not occur.
- 14) The evidence suggests that there was considerable local interest in the excavations from both Roman Catholic and Anglican clergy, especially via Pontefract Churches Together, particularly as to where the remains would finally be laid to rest. At first, with the support of the Reverend Simon Lodge, a Roman Catholic cleric, a location in St Joseph’s Roman Catholic Church near a

statue of Our Lady was proposed. However, this did not proceed. Writing on behalf of the Roman Catholic Diocese of Leeds, Kevin Anderson stated:

Having given due consideration to the request, the directors felt that the diocesan policy of not providing burial space in the grounds of our churches should be [up]held and the request be refused. The directors added that [as] there is no designated catholic graveyard or cemetery in the area then the local authority multi denominational provision used by the catholic families of Pontefract should be appropriate for these matters.

- 15) It appears that at about this time the Reverend Harry Merrick suggested All Saints as a possible burial place. Revd Merrick has since died. Accordingly, the court has not had the benefit of his recollection. Revd Merrick was an ordained permanent deacon assigned to All Saints at the material time. The priest-in-charge from 2003 to 2016 was the Reverend Victor Iwanuschak, who has helpfully responded to certain queries from the court. He stated that it was well known that the churchyard had been long closed and burials and cremations took place at Pontefract cemetery and Pontefract crematorium respectively. He said he would have been very surprised if Revd Merrick was not also aware that the churchyard was closed for burials and, had he been consulted, he would have told him emphatically that the burial of human remains was not allowed. Of course, it should also have been apparent to members of PDAS that local burials usually took place at the municipal cemetery.

- 16) Dr McNaught and Mr Jones exhibited to their respective witness statements a time line carefully prepared, so it is understood, by Dr McNaught's husband, Robert, who had served as secretary to the PDAS. The timeline shows that the Chairman's Report for the PDAS Annual General Meeting in 2015 included the following: *'After discussions with Harry Merrick from All Saints Church and with the approval of Bishop Tony Robinson, an agreement was reached to*

have the remains reburied in consecrated ground at All Saints'. No other evidence supporting this assertion has been heard and it appears that the statement included in the minutes cannot be correct in fact, or what was actually said has been misinterpreted and/or incorrectly recorded by the minute taker. There is no suggestion of a written agreement, nor has any documentation been produced which indicates the bishop's consent. Somewhat to the contrary, there is a complaint earlier in the timeline of '*no response from Anglican diocese*' in PDAS committee meeting minutes. Mr Jones very fairly, in his representations, conceded that the source of the statement concerning the bishop's approval cannot be confirmed. There is a group photograph which establishes that the bishop attended an open day at the excavation on 23rd September 2011, but this does not constitute approval – express or implied – for an interment three and a half years later. In answer to an inquiry from this court, Bishop Tony stated that he was certain that he never gave permission for the burial of the bones. There seems no reason to question that assertion.

- 17) Without the opportunity to test evidence at a hearing the Court must proceed with some caution, but it seems on the material available, and based on the inquiries which the Chancellor made, that Dr McNaught arranged for the interment of the human remains in the churchyard at All Saints in the mistaken, belief that it was lawful. In her mind, she believed she was properly discharging the condition on the MOJ licence by reintering the remains 'in a burial ground' but she appears not to have had specific regard to the rider 'in which interments may legally take place'. However, Dr McNaught accepted that she made no enquiries of her own and apparently took everything Revd Merrick told her at face value. As she conceded, time was pressing because the licence was due to expire: she then sought permission by telephone from the Ministry of Justice to extend the validity of the licence.
- 18) Mr Jones, on behalf of the PDAS, stated,

‘we acted in good faith on the guidance of Rev Merrick, who[m] we trusted had taken primary responsibility for complying with any Church regulations and had the authority to permit and arrange the burial of the ancient bones at All Saints Church Pontefract.’

That trust was evidently misplaced and may well be considered misguided as no-one actually asked whether it was lawful to bury human remains in the Churchyard, which quite clearly had not been used for burials for over 150 years. Whatever Revd Merrick may have claimed at the time (as to which no findings of fact will be made), he had the authority of neither the bishop, nor the priest-in-charge nor, so it would appear, the Parochial Church Council. Canon Lawson has investigated and there are no references to these events in the PCC minutes of the time. Further, as mentioned before, there is no entry in the Register of Burials relating to this re-burial. Doubtless with the best possible motivations, Revd Merrick, assisted in this ecumenical venture by Fr Simon Lodge, undertook an interment for which they had no authority. What is more, had Revd Merrick or Dr McNaught sought authority prospectively (as Canon Lawson now seeks to do retrospectively), it could never have been granted. Save for certain narrowly drawn exceptions (see below) the interment of human remains in a closed churchyard is unlawful, and carries criminal sanctions (see paragraph 4 above).

- 19) In his witness statement Mr Jones made the point that after the doubt as to legality concerning the interment arose, Dr McNaught sought the opinions of her personal contacts. It is asserted that the county archaeologist and the English Heritage Senior archaeologist assured her that a Faculty would not be required. It can only be assumed that those persons had not been apprised of the fact that this was a churchyard that had been closed by Order in Council, because what was allegedly stated was wrong in the circumstances of this matter.

Order in Council – closure of churchyard

- 20) It is not disputed that the churchyard of All Saints, Pontefract was closed to burials by Order in Council made by Her Majesty Queen Victoria on 20th March 1857. The Order proved difficult to locate, which can provide a salutary lesson for PCCs and diocesan registries of the importance of carefully retaining such documents. Eventually a pair of photographs of the original Privy Council minutes book were obtained. Similarly the documentation that transferred legal responsibility for the maintenance of the churchyard to Wakefield Council, pursuant to section 215 of the Local Government Act 1972, has not been located. A letter from Sarah Bartle, on behalf of the Chief Legal Officer at Wakefield Council, regretted that the Council holds no relevant paperwork in its records, accepted that the Council has maintained the churchyard for some years, and did not dispute the existence of the Order in Council or the transfer of responsibility. The Council officers were also unaware of the re-burial in 2015.

Burial in closed churchyards – the law

- 21) The Chancellor requested assistance from a number of sources in relation presenting the issue of the relevant legal and other principles applicable to the interment of human remains (as opposed to cremated remains) in a churchyard that has been closed by Order in Council.

Advisory Panel on the Archaeology of Burials in England

Dr Louise Humphrey of the Natural History Museum and Chair of the Advisory Panel on the Archaeology of Burials in England asked for the Court's request to be reformulated as a series of questions. The advice of the Panel was solicited at the suggestion of Mr Jones. The panel is not a statutory consultee within the faculty jurisdiction, and so the Court is particularly grateful for the advice that Dr Humphrey has generously volunteered. Putting that advice into narrative form, Dr Humphrey stated:

“It is not lawful to bury human remains (as opposed to cremated remains) in a Church of England burial ground that has been closed by Order in Council. A Consistory Court does not have power to grant a faculty for the burial of human remains (as opposed to cremated remains) in a churchyard that has been closed by Order in Council. The Consistory Court could apply to the Privy Council for a variation. The application would be made, in the first instance, through the Ministry of Justice.

The Privy Council can, exceptionally, grant permission for burial in a closed churchyard. This happened in March 1982 when permission was given for the remains of R.A. ‘Rab’ Butler MP to be buried in the closed churchyard at Saffron Walden, Essex. We cannot however anticipate the decision of the Privy Council. The actual application itself would need to be made by the Parochial Church Council, although the Diocese would, I expect, be able to offer support. In the first instance contact Duncan Turton [at the Ministry of Justice, see below]. If the remains are to be exhumed, it will be necessary to apply for a new licence from the Home Office Ministry of Justice to exhume the remains and re-bury them in another churchyard. Again, in the first instance contact Duncan Turton.”

With respect that last assertion is not quite correct. The remains are now interred in ground consecrated according to the rites of the Church of England, and therefore subject to the jurisdiction of the Consistory Court. Therefore a further MOJ licence would not be required (nor could it be granted): a faculty alone would suffice. The previous overlapping jurisdiction in this regard was removed as a consequence of a statutory amendment effected by the Church of England (Miscellaneous Provisions) Measure 2014. See now section 25 of the Burial Act 1857 (as amended) which provides as follows:

25 Offence of removal of body from burial ground

(1) It is an offence for a body or any human remains which have been interred in a place of burial to be removed unless one of the conditions listed in subsection (2) is complied with.

(2) The conditions referred to in subsection (1) are—

(a) the body or remains is or are removed in accordance with a faculty granted by the court;

(b) the body or remains is or are removed in accordance with the approval of a proposal under the Care of Cathedrals Measure 2011 (No. 1) by the Cathedrals Fabric Commission for England or a fabric advisory committee;

(c) unless the body or remains is or are interred in land which is subject to the jurisdiction of the court or its or their removal requires or require the approval of a proposal under the Care of Cathedrals Measure 2011, the body or remains is or are removed under a licence from the Secretary of State and in accordance with any conditions attached to the licence.

See also *R (on the application of HM Coroner for the Eastern District of London v (1) Secretary of State for Justice and (2) Susan Sutovic and others [2009] EWHC 1947 (Admin)*.

Church Buildings Council

In an email of 28th April 2022, Dr David Knight, Senior Church Buildings Officer at the Cathedral and Church Buildings Division of the Archbishops' Council, replied as follows:

The Council understands that burial in a closed churchyard is not allowed unless the Privy Council Order that closed it makes specific exceptions. For this reason the situation is sufficiently uncommon for the Council not to have general advice in this area, nor to have any specific advice on this occasion.

The Council is interested in the discussion of the law that this case will require and in any recommendations that might come from it. The Council would particularly want to be involved should a proposal for a change in the law arise from this case.

Historic England

By letter dated 1 April 2022, Ms Wendy, appointed as Business Officer, stated that Historic England had no comments or observations to make in this matter.

Secretary of State for Justice

Writing on behalf of the Secretary of State for Justice on 20th May 2022, Mr Duncan Turton (senior caseworker on Death management, miscarriages of justice and Inquiries) stated:

“The general position is that once a churchyard is closed by an order in council then no further burials can take place unless there is an exception within the order. A ruling by a consistory court would not have any effect as it would be outweighed by the closure order.

You will understand that it would not be appropriate for me to comment on the specifics of this case, rather this is a matter on which you might wish to seek independent legal advice. If after considering all the facts of the case it is determined that a confirmatory faculty cannot be issued, the Pontefract and District Archaeological Society could apply for a fresh archaeological exhumation licence to remove the remains from where they currently are and re-inter them in an open churchyard. [...] If the remains are buried in consecrated ground, then a faculty would also likely be required and the Society would need to check with the Diocese about that process.

Alternatively, there is the possibility for the parochial church council to make an application to the Ministry of Justice seeking a variation from the Privy Council to the closure order to legitimise this burial. However,

we cannot guarantee that such an application would be successful. The Privy Council would make the final decision.”

With due respect to Mr Turton, he is wrong on one point. A faculty alone would suffice for exhumation from consecrated ground; a MOJ licence would not be required in addition: see s25 Burial Act 1857 (as amended), as stated above.

- 22) There is an unsurprising consensus that burial in a closed churchyard is unlawful. As is made clear by section 3 of the Burial Act 1853, it is not merely unlawful it is criminal (see paragraph 4 above)

- 23) Paragraph 1084 of *Halsbury's Laws of England* Vol 34, *Ecclesiastical Law* indicates that a faculty might be granted to inter cremated remains in a churchyard closed by Order in Council, citing *Re St Mary's Barnes [1982] 1 All ER 456*. This is a simple matter of statutory interpretation. What is outlawed is the burial of the dead – not the interment of cremated remains – and the criminal offence attaches to those who bury ‘any body’ or assist in the same. It might be argued that the interment of human remains, especially two partial skeletons of persons living in the *fourteenth* century, does not amount to burial of ‘the dead’ and therefore fall outside the scope of the statutory provision. Such an argument does not appear to be tenable. ‘The dead’ means those who have died, whether recently or many centuries ago. The absence of flesh from the bones does not detract from the fact that what is being buried is ‘the dead’. There is a subtle but clear distinction between the wording of the first part of the statutory section (that establishes a statutory prohibition) and the second part (that creates a criminal offence). In the latter reference is made to the burial of ‘any body’ and it must be conceded that it could be open to argument that that a skeleton is not a body for those purposes. Fortunately, for present purposes, the court is only required to interpret the first part of the statutory section, which clearly renders unlawful what has happened here.

Reference is also made to what is now Vol 24A *Cremation and Burial*, particularly paragraphs 611 and 615, and to the judgment in *Seaton Delaval Churchyard* (1998).

Disposal of the present proceedings

- 24) A faculty is ineffective, and ought not to be issued, where the proposal for which permission is sought is contrary to English law. Such a proposition may seem banal and obvious, but it took two outings to the Court of Arches to establish and declare it in *Re Christ Church, Spitalfields*: the first appeal on abuse of process is unreported but noted at (2016) 18 Ecc LJ 128, and the second, substantive appeal, is reported at [2019] EACC 1. If a faculty, sought prospectively, could not have been granted as a matter of law, then nor can a confirmatory faculty.
- 25) As a result of the forgoing it is necessary, in this matter, to examine the circumstances in which, exceptionally, an interment may take place in a churchyard which has been closed by Order in Council, notwithstanding the statutory prohibition. As none of the parties was legally represented, and the Chancellor did not consider it proportionate to appoint an *amicus curiae*, the Court has been reliant on the Chancellor's own researches in this regard (although it is acknowledged that Mr Jones sought to proffer some ingenious suggestions in his written representations). The Chancellor identified the following:-

Burials permitted under the original Order in Council

Individual Orders in Council can and often do make provision for future burials notwithstanding the closure. This may be named individuals or members of particular families, those to be interred in family vaults or family graves, or otherwise. There is no standard form, and such orders have been variously expressed over past centuries. It would therefore seem essential that the

original Order is obtained for each closed churchyard and its precise terms read and understood.

Burials under an amended Order in Council

As pointed out on behalf of both the Secretary of State for Justice and the Advisory Panel on the Archaeology of Burials in England, the Privy Council has power to vary an Order in Council either to allow a particular burial or class of burials. The example that has been given in correspondence is in respect of the Conservative politician ‘Rab’ Butler. A similar variation was given in the case of the remains of the navigator and cartographer, Captain Matthew Flinders, in *Re St Mary and the Holy Rood Donington [2020] ECC Lin 1*. Although there is no certainty, it would be surprising if the Privy Council would ever make such an order to act retrospectively, having regard to the general legal presumption against retroactivity.

Reburials of human remains disturbed in the same cemetery

In *Re St Mary’s Barnes [1982] 1 WLR 531*, Southwark Consistory Court, Garth Moore Ch, addressed the question whether the statutory prohibition on burials in closed churchyards in section 3 of the Burial Act 1853 precluded an order for the re-interment of human remains that had been disturbed. At 534D-E it was stated :-

The Act is silent on this point and, so far as I know, no judicial decision has been given. But I am persuaded [...] that the Act was aimed at fresh burials and not the replacement of remains already interred in the same location. Force is given to this argument by the fact that the Act is, and is expressed to be, for the protection of public health and that cannot be adversely affected by mere re-interment. I, therefore, hold that the Act has, in this case, no application.

That same passage was approved *obiter* by the Court of Arches In *Re St Michael and All Angels, Tettenhall Regis* [1996] Fam 44, where it was stated at 47E-F:

Although the matter is not directly in issue before us, we have considered the decision of Garth Moore Ch in In re St Mary's, Barnes [...] We agree for the reasons there stated that the prohibition placed on burials in closed burial grounds by section 3 of the Burial Act 1853 does not apply to the replacement of human remains already interred in the same burial ground. Therefore, if a faculty had been granted in the present case, any human remains disturbed pursuant thereto could have been reinterred elsewhere in the burial ground, subject only to such conditions as the faculty might itself have imposed.

Both of these passages were cited by the Court of Arches, without adverse comment, in the second *Spitalfields* judgment, and therefore there seems no reason to question its accuracy as a correct expression of the law.

The interment of cremated remains

Section 88 of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (a consolidating measure largely restating existing ecclesiastical law) provides as follows:

88 Burials in parish burial ground

(1) A person who, but for this subsection, would have no right of burial in the churchyard or other burial ground of a parish has that right if, at the date of the person's death, his or her name is entered on the church electoral roll of the parish.

(2) A person who has a right of burial in the churchyard or other burial ground of a parish has a right to have his or her cremated remains buried there.

(3) But subsection (2) does not give a person a right to have his or her cremated remains buried in a churchyard or burial ground in which

burials have been discontinued by an Order in Council under the Burial Act 1853 or 1855 except—

- (a) in accordance with a faculty authorising the burial, or*
- (b) in an area which has been set aside by a faculty for the burial of cremated remains generally.*

The significance of this provision is the power to grant a faculty to permit the burial of cremated remains in a closed churchyard. It may be that Canon Lawson's application was motivated by a hope that the skeletons unearthed in the archaeological excavation could be treated in the same way as cremated remains. Unfortunately that cannot be a correct interpretation of the law. Section 88 cannot be construed in that way. The expression '*cremated remains*' must be given their ordinary and natural meaning. This is not an exception to the statutory prohibition, but a recognition of its scope. Section 3 of the Burial Act 1853 makes it unlawful '*to bury the dead*' in a closed churchyard, and the interment of cremated remains does not amount to the burial of the dead as intended by that statutory section. Furthermore the criminal offence created by section 3 is committed by the burial of 'a body' and makes no reference to cremated remains.

- 26) At the time of the petition what occurred in the instant case did not come within any of the four exceptions mentioned above. In those circumstances this petition would have to be dismissed. It does seem appropriate to consider what action the Court could, and should, take in respect of the unlawful burial of human remains in 2015:

The apparent breach of condition 2(d) of the exhumation licence is a matter for the Secretary of State and not the Consistory Court;

The investigation and prosecution of criminal activity is a matter for the relevant police force and Crown Prosecution Service. They are no matters upon which this Court should express a view.

The members of PDAS do not wish to seek an exhumation. However, that would seem one of only two options open to the Court in the circumstances as they stood at the time of the petition being made by Canon Lawson, those being (a) grant a faculty for an exhumation, so that the terms of paragraph 2(d) of the MOJ licence could be complied with (*vis* return the human remains to the safe custody of Dr Janet McNaught and Mr David Wandless so that they could either be reinterred in a burial ground in which interments may legally take place or else be retained in accordance with the requirements of the Wakefield County Archaeologist) or (b) leaving the matter to lie as an irregularity and take no action.

Mr Richard Findlay, on behalf of the Ministry of Justice, indicated the following : “*We do not feel that it would be correct for us to agree to the suggested option of “leave the matter to lie as an irregularity” as we feel that this matter cannot be left to lie given that the burial is illegal*”

- 27) Any application for a faculty for exhumation (in the circumstances as they stood when Canon Lawson made her petition) would almost certainly have been granted because the burial in 2015 was conducted owing to a mistake, in this case a mistaken belief that the burial was permitted in law. That would be a good reason for rebutting the presumption of permanence of Christian burial following the well known principles set out by the Court of Arches in the case of *In Re Blagdon Cemetery [2002] Fam 299*. A refusal to grant a faculty for exhumation would be to condone an unlawful act. Of course, in the absence of an application, should the Court consider directing an exhumation of its own motion? The answer is probably yes, but fortunately circumstances in this case took a different course so a finding in law on that issue is not required.
- 28) Rather than exhuming the remains and returning them to the care of Janet McNaught and David Wandless, as per the terms of the expired MOJ licence, it was proposed by the Ministry of Justice that petition be made to HM The Queen (now sadly deceased) to vary the order in council so as to permit burial

of these remains. Accordingly on 12th October 2022 HM The King and members of the Privy Council directed “*Notwithstanding anything in the Order in Council made under the Burial Act 1853 on 20th March 1857, directing the discontinuance of burials in All Saints Churchyard, Pontefract, West Yorkshire (referred to in the 1857 Order as “the old parish churchyard”), the burial may be allowed of the unknown human remains from the 1340's to 1390's exhumed from the former St Richard's Dominican Friary in the then disused site of Pontefract General Infirmary, within the burial ground of All Saints Churchyard, Pontefract, West Yorkshire*”

That amendment to the Order in Council is not, of course, retrospective, but the solution appears to satisfy both the Local Authority and the relevant government department. In a letter from the MOJ it was stated “*obviously this [variation to the Order in Council] would not be backdated but it would mean that the error is corrected*”.

- 29) Given the above I cannot grant a retrospective faculty, but I do grant a confirmatory faculty for the burial of these human remains. It would seem ludicrous just for forms sake to require exhumation and then immediate reburial of the remains, and that would be contrary to the principles of permanence of Christian burial espoused in *Re Blagdon Cemetery*. That means that for a period of over seven years the remains were unlawfully buried. I shall direct that both the burials register of the Church and the log book of the Church be endorsed that the human remains were unlawfully buried on 27th March 2015 but that illegality was corrected by a variation of the Order in Council closing the churchyard to permit burial of these human remains, and by a confirmatory faculty. The burial plan of the Churchyard should also be amended to show the site of this reburial.
- 30) The difficult issue of costs arises. The Petitioner is not at fault in this matter and it very much appears that Revd Harry Merrick cannot be said to have been acting on behalf of ‘the Church’ in what he said or did, for the evidence

suggests he did not involve the Parochial Church Council or the Incumbent in what occurred. I cannot make a costs order against Revd Harry Merrick as he is now deceased. The Pontefract and District Archaeological Society were made an additional party at a very early stage in these proceedings. The MOJ licence was issued to two members of PDAS and placed upon them obligations in law concerning the human remains found. There was at least borderline recklessness in breaching the terms of the Licence. They should have taken legal advice before the interment or at least to have simply asked ‘is this a burial ground in which interments may lawfully take place?’, since that was a condition of the MOJ licence. It would be wrong to rely upon a junior clergyman for legal advice on that issue. Several sets of directions have been issued, some arising at the behest of those representing the PDAS. In those circumstances it seems appropriate for the PDAS to be ordered to pay 50% of the Court costs arising in this matter. In accordance with paragraphs 19.1 and 19.2 of the current Faculty Jurisdiction Rules, as amended, I will make a provisional order that the PDAS, being a party to the proceedings, pays 50% of the Court costs as assessed by the Registrar, to come into effect as a costs order at 35 days after the Registrar has made his assessment. I invite the Registrar to keep the costs to the minimum possible. I waive any Chancellors fee for preparation of this judgment.

Let a Faculty be issued confirming the burial in the Churchyard of All Saints in Pontefract of the unknown human remains of two people, one male and one female, originally interred at the former friary of Our Lady, St Dominic and St Richard, Pontefract, in or around the 1340s to the 1390s.

Conditions

- (1) The burial plan of the church shall be endorsed within one calendar month to show the location of the burial site;

- (2) The (a) burial register and (b) log book of the church shall be endorsed within one calendar month to show the details of the burial. The endorsement in the registrar and logbook must show that the human remains were unlawfully buried on 27th March 2015 but that illegality was corrected by a variation of the Order in Council closing the churchyard to permit burial of these particular human remains, and by a confirmatory faculty.

Glyn Samuel
Deputy Chancellor
28th October 2022.