

## RECENT COURT CASES

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**Re: St. Mary the Virgin, Cottingham**  
(York Consistory Court; Coningsby Ch. 17 February 1994)

When attempting to introduce a statue of the Virgin Mary and Child into the church in an attempt not only to aid worship but to make a statement about the theological position of the church, the petitioners (incumbent, churchwarden and the PCC) had not acted wisely in not having a general meeting or some other arrangement whereby the whole congregation could have been consulted. Whilst in law a congregation did not have to be consulted if the PCC itself had properly considered the proposal and properly voted upon it, some method of ascertaining the wishes of the congregation as a whole would have been wiser for there were at least thirty-five parties opponent to the petition who complained of lack of consultation with them. An important visual change was proposed and the congregation should have been given an opportunity to express its views. Consultation was inadequate not only with the congregation and parish as a whole but with the PCC itself. The wording of paragraph rule 6 of Appendix II to the Church Representation Rules is mandatory and, where the proposal for the statue had been raised at the PCC meeting under 'any other business' with no preliminary vote upon the question whether that business ought to be taken at that meeting and a vote upon the proposal then failing to achieve the necessary three-quarters majority, the resolution to support the petition was in breach of paragraph 6 and was invalid. There had to be a principle that the more conspicuous a statue was to be in the church the higher had to be the degree of consensus within the congregation for its introduction. Further, in order to introduce a controversial item such as a statue a high degree of support for the proposal needed to be established; such a development should not take place if there was substantial opposition to it. The proposal did not relate to some structural change in the church which was required to maintain the mission of the church; it was not an essential item. The petitioners had failed to discharge the onus upon them that it was right to introduce the statue and the court concluded that the proposal had become so much a matter of controversy that if the statue was introduced it would cause offence. The ongoing life and ministry of the church, particularly in terms of unanimity within the congregation, would be best served by not allowing the statue to be there. Faculty refused.

**Re: All Hallows, South Cerney**  
(Gloucester Consistory Court; Rodgers Ch. 7 March 1994)

In 1913 or 1915 two wooden crucifix remains, described as 'unique survivals . . . of national importance' from the twelfth century wooden rood were found by a local stone mason carrying out some repairs to the masonry of the church. For some time the remains (the head and foot of a half-lifesize Christ figure) were displayed beneath a metal framed glass door and in 1954 the British Museum carried out some cleaning and conservation work upon them. Apparently without a faculty they were sent on exhibition to Barcelona but had, upon their return, to be treated for mould growth. In 1983 the Arts Council of Great Britain applied for a faculty for the loan and removal of the fragments for an exhibition in the Hayward Gallery in London and for conservation treatment at the British Museum. The fragments were duly removed and had never

returned to the church. Following concern about the deterioration of the fragments, the PCC in 1984 resolved that the fragments should be loaned for ten years to the British Museum and, by the terms of the faculty granted for that resolution to take effect, the vicar undertook on behalf of himself and the churchwardens to seek further directions of the consistory court when the ten years had expired. By a petition the vicar and churchwardens now sought a faculty to sell the remains to the Museum. There were no objections and, upon request by the court, the Council for the Care of Churches gave its support. The proposed sale was unusual, for it was not in order to raise money but to ensure the survival of the fragments. The Museum would best conserve them and the price agreed (£60,000) was sensible. A good and substantial case had been made out, namely the parish's inability to give proper care and maintenance to the conservation of the head and foot to preserve them as a national treasure.

**Re: St. Stephen, Acomb**

(York Consistory Court; Coningsby Ch. 22 March 1994)

A serious fire in 1982 considerably damaged the east end of the church and other areas of the church, notably the pipe organ, were damaged beyond repair by smoke and heat. The vicar and churchwardens sought permission to install a computer organ in place of the damaged pipe organ and for it then to be resituated, as the original site of the organ, in a gallery above the nave, was considered to be unsatisfactory. A substantial part of the insurance money already obtained for the irreparable pipe organ was proposed to be put towards the general costs of the reordering of the church, leaving a smaller amount for the cost of the replacement computer organ. In deciding whether there were circumstances in which the need for re-ordering and improvements in a church might become a factor as to the grant or not of a faculty for the replacement of a pipe organ, or whether the actual receipt of insurance money precluded such an argument, the court said that financial considerations ought not to be a ground for allowing a computer organ to replace an existing pipe organ. The policy in the diocese, unless a church fell into the rare category of an exception, was that parish churches were expected to retain existing pipe organs and had to make the necessary financial plans to enable them to do so. A lack of financial resources was not a reason for not doing what was right for a church in terms of its major musical instrument. It was the responsibility and should be the privilege of the PCC to raise the necessary money, at least over a period of time. If the PCC wishes to have a reordering of the nave and chancel and new parish rooms in the gallery, those were items which should be paid for out of new money while compensation money for the organ should be spent on the organ. An exception was to be made in the present case for the court found that the church did not lend itself at all to the installation of a new pipe organ. The option of a replacement computer organ had very great advantages in respect of both architectural and feasibility aspects of the case and a faculty was accordingly granted.

**Re: Thomas Tyler**

(European Commission of Human Rights; April 1994)

A beneficed clergyman of the Church of England was (on a retrial) found guilty of adultery in the Consistory Court and deprived of his living. His appeal to the Court of Arches was dismissed. He applied to the Commission alleging a violation of the Convention for the Protection of Human Rights and

Fundamental Freedoms, contending that he was not heard by an independent and impartial tribunal (as required by Article 6 of the Convention) in that the ecclesiastical courts dealing with his case operated within the Church of England. In dismissing his application the Commission concluded that the diocesan chancellor and the Dean of the Arches were qualified lawyers who held permanent appointments and took oaths of independence; in the absence of any allegation of actual bias their impartiality could not be impugned simply because they were appointed by an executive organ. The assessors in the Consistory Court had a role similar to that of a jury, and there was no specific reason to assume that they were partial or lacked independence. The clerical and lay members of the Court of Arches were in a similar position, and had taken an oath of independence. Accordingly the application was declared inadmissible.

**Re: All Saints, Salterhebble**

(Wakefield Consistory Court, Collier Ch. 12 April 1994)

The petitioners sought a faculty to carry out various works of reordering to the interior of the church which included screening off the west end and constructing therein two-tier amenities, the removal of the choir stalls and communion rails and the bringing forwards of the altar 'to accord with modern liturgical needs'. One notice of objection was lodged when citation of the petition was made. The court must, by section 1 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991, which came into force on 1 March 1993, have due regard to the local needs of the church as a centre of worship and mission. In accordance with the guidelines set out in *In re: St. Mary's, Banbury* [1987] Fam 136, the Chancellor concluded that the removal of the furniture and fittings had to occur if a sensible reordering was to take place and their value, aside from being attached to particular memories of the parishioners, was not of the order that should hinder the implementation of the reordering. No suggestion was made that the stone pulpit and the pews, which were proposed to be removed, were of any great historical, aesthetic, architectural or communal interest and as to the doctrine of reversibility, no structural changes were being made that would prevent future parishioners reverting to an older form of liturgical layout if that should be required. By stating that the exterior of the church would be unaltered and that the structure of the interior, including stained glass windows and the reredos, was to remain so that the church witnessed strongly to continuity with the past whilst being relevant to the present and being handed on to future generations for worship and community service, the petitioners had a proper regard to their responsible role in relation to the building handed down to them. A conditional faculty was granted.

**Re: St. Edward, King and Confessor, Castle Donington**

(Leicester Consistory Court; Seed Ch. 18 May 1994)

A votive candle stand could be seen in many Church of England cathedrals and parish churches and the fact there might be none in a particular geographical area was not a reason for not allowing the introduction of one such into one of the churches in that area. Traditions within a particular church change as congregations and their attitudes change and provided there was sufficient support for such a change after consultation, the introduction of the votive stand, which a majority of the worshipping congregation supported, and which the DAC approved, was to be allowed. It was unlikely to be a short lived fashion and what

appeared to be the orchestrated opposition by one churchwarden and a few members of the congregation should not hinder its introduction. Whilst churchwardens were quite right to have a proprietorial air about church property, ownership of chattels, of course, being vested in them, their property was on behalf of the parishioners and as officers of the ordinary; it was not personal proprietorship and certainly not hereditary. A faculty was granted.

**Re: St. Andrew, Congresbury**

(Bath and Wells Consistory Court; Briden Ch. June 1994)

It was unwise for the incumbent and churchwardens to delay their petition for a faculty for nearly four months after the expiry of the archdeacon's licence permitting the temporary removal of choir pews and an experimental reordering of the chancel. Intending petitioners who acted without such lawful authority would find themselves at the mercy of whoever might take exception to what they were doing. On the evidence before the court proper use of the chancel in its present form was being made which would only be frustrated if the pews were to be replaced. A faculty would be granted but upon the condition that the choir pews be safely stored for their future restoration, should it be desired to do so. The court had a duty to look to the future as well as to the present and to protect a parish church from what could prove, in time, to have been a passing fashion.

**Re: St. Luke's Whaley Thorns**

(Derby Consistory Court; Bullimore Ch. June 1994)

A husband was stabbed to death by his wife; the wife (who was subsequently convicted of manslaughter and received a suspended sentence of imprisonment) as the deceased's next of kin selected the churchyard in which he was to be buried. After the burial the deceased's parents sought a faculty for his exhumation and re-burial in Edwinstowe, the village where they lived. The Chancellor held that he had jurisdiction to permit exhumation. He concluded that because the existing grave was a constant reminder of the manner of the deceased's death; the widow had moved away from the district and would not be buried in the same grave; the widow bore some degree of guilt for the death; the family would grieve more easily; and the deceased had expressed no wishes as to his place of burial, it was right to grant the faculty. Conditions were imposed as to the manner and time of exhumation, and reburial in a single plot was stipulated as nothing but trouble would arise were that not to be done. *Re Church Norton* [1989] 3 WLR 272; *re St. Peter's Churchyard, Oughtrington* [1993] 1 WLR 1440 considered.

**Re: Holy Trinity, Freckleton**

(Blackburn Consistory Court; Bullimore Ch. 16 July 1994)

The petitioners sought permission to erect a dark grey headstone in the churchyard with a memorial inscription that concluded with the words 'a devoted and much loved husband, dad and grandad'. The incumbent objected to those words and, upon presentation of the petition, and with two members of his parochial church council, he formally objected to their sanction. In a consecrated churchyard, parishioners and those persons who died within the parish boundaries were entitled to be buried there without the incumbent's permission, although that right did not include the right to erect a memorial to the deceased. The incumbent could allow others to be buried there in certain circumstances and he had the general right to determine the position where a body or ashes were to be interred within the churchyard. General regulations issued by the chancellor of most dioceses, *inter alia*, defined what memorials an incumbent could himself

authorise. The present decision, despite media speculation, had a limited scope, for the chancellor's jurisdiction was limited to his diocese and the instant decision bound only the petitioners and the incumbent (though it could be of persuasive authority elsewhere). A balancing exercise had to be undertaken by the court in weighing the arguments for allowing a particular departure from the regulations against any arguments the other way. What was inappropriate in one location, for example highly polished black granite, which all or nearly all diocesan regulations prohibited, could be allowed in one churchyard if over the years a considerable number had been introduced there. That would not make it acceptable in the churchyard of the next parish. Any objection to the nature and the colour of the proposed stone disappeared, for in general it conformed with the diocesan directive in the relevant regulations; but the inscription could not be allowed, for it would destroy the policy the incumbent had followed and would prevent him drawing a line in the future. If the argument was: we want to remember whoever it was by the word used in the family to describe them, then it was impossible to allow 'dad/grandad' or 'mum/grandma' without equally allowing all those other words still frequently used, with regional variations, like 'mom' or 'mam' or 'da', 'grandpa' or 'nana'. The petition was accordingly dismissed.

**Re: Holy Trinity, Bath**

(Bath and Wells Consistory Court; Briden Ch. 29 July 1994)

A gift of an electric organ by parishioners to enhance the musical quality of worship in that church prevented them having any legitimate claim for its repossession. They had clearly expressed their intention to give the organ to the church as a gift and it had duly been delivered and installed. Title did not then vest in the donors, who had done everything in their power to transfer title. The chancellor adopted the proposition contained in paragraph 24 at page 377 of Burn's *Ecclesiastical Law*, 6th edition (1797), as adopted by Calcutt Ch. in *re Escot Church* [1979] Fam 125 at 127, that 'A person may give or dedicate goods to God's service in such a church, and deliver them into the custody of the churchwardens, and thereby the property is immediately changed. And if a man erect a pew in the church, or hang up a bell in the steeple, they do thereby become church goods (though they are not expressly given to the church), and he may not afterwards remove them; if he does, the churchwardens may sue him.' The application for the return of the organ console was dismissed.

**Re: St. Luke the Evangelist, Maidstone**

(The Court of Arches; the Dean of the Arches, Goodman Ch and Cameron Ch 8 August 1994)

Reforms recommended earlier by the Dean had been effected by paragraph 8 of Schedule 4 to the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 which provided that, rather than the Dean sitting alone, the Court of Arches become a three member court when it sat to hear faculty cases. Chancellors would be selected from the whole range of diocesan chancellors to sit with the Dean, or with the Auditor in the Chancery Court of York. By its approval of the 1991 Measure Parliament had affirmed as the appropriate system of control over unwarranted alterations the ancient but ever evolving faculty jurisdiction, exercised by the chancellor as judge in the consistory court. In the absence of any words expressly limiting the wide jurisdiction long enjoyed by

chancellors, section 1 of the Measure did not affect or change the correct approach by Chancellors. Section 1 could not be said to apply to chancellors who were not persons 'carrying out functions of care and conservation' but were rather to hear and determine a cause of faculty in carrying out their functions under the faculty jurisdiction. Every DAC and the Council for the Care of Churches fell within the former category, to which section 1 applied. But section 1 did not impose upon those bodies to whom the section applied a duty to treat 'the role of the church as a local centre of worship and mission' as the paramount consideration. It required those bodies not simply to concentrate upon the effect of proposed works upon the fabric or appearance of the church in isolation but to consider the proposals in the context of and taking full account of the role of the church as a local centre of worship and mission. A distinction had to be drawn between works which followed a particular liturgical fashion, such as the introduction of a nave altar, which might be acceptable in conservation terms, and works which would adversely affect the character of the building. Such works would have to meet the test of necessity that with evidence of sufficient weight there was compelling reason to rebut the strong presumption against change. Such a compelling reason could include the pastoral well-being of the church. No such compelling reason or necessity had been made out for the proposed liturgical reorientation from the east to the south of the church and that part of the faculty sought would be refused. But, for the pastoral well-being of the worshipping congregation of the church, the faculty sought for the removal of the pews and their replacement by wooden chairs would be granted for it would not adversely affect the character of this church as a building of special architectural and historic interest.

**Re: Sydney Wilson Marks, deceased**  
(Chester Consistory Court; Lomas Ch. 31 August 1994)

The sister of the deceased, who had died and been cremated eight years previously, wanted to have the cremated remains of her brother exhumed and reinterred in another part of the churchyard. The decision as to the precise place of burial or interment was vested in the incumbent, who in the exercise of his discretion could select the particular place of burial. The court had to consider whether there were any grounds for it to interfere with the exercise of that discretion by the rector in deciding where the cremated remains of the deceased were to be placed. A court would only so interfere if it was satisfied that that discretion had been exercised in some improper way or in a way which had disregarded relevant or material circumstances. As there were no factors which suggested that the rector had exercised his discretion in any manner otherwise than a perfectly normal and reasonable manner, the application was refused. Although the wishes of a personal representative or next of kin of the deceased to move the body or the cremated remains from one part of the churchyard to another part, or from one churchyard to another, were a ground for the grant by the court of a faculty, those wishes had to be for reasons which appeared to the court to be well-founded and sufficient. The site selected by the rector for the interment of the deceased was appropriate and the petition for a faculty would be refused.

**Re: St. George with St. Anne and St. Mark, Brighton**  
(Chichester Consistory Court; Edwards Ch. October 1994)

A petition for the introduction of a work of art into a parish church should be granted provided the following conditions are satisfied:

- (i) the work is aesthetically pleasing and congruous with the church as a whole;
- (ii) there is nothing in the work inconsistent with the doctrines of the Church of England;
- (iii) the installation of the work will not adversely affect the structure of the church or make necessary any permanent alteration of the fabric or furnishings of the church; and
- (iv) the cost of the work can be met without adversely affecting the finances of the parish.

Conditions (i) and (ii) must be satisfied. As to (iii), the petitioner may prove to the satisfaction of the court that although structural or permanent alterations will have to be made they may properly be authorised. Condition (iv) should be satisfied unless some exceptional reason for waiving it is shown.

The Chancellor applied these conditions in granting a faculty for the introduction of a large cruciform painting, patterned on a Tuscan design of the early Renaissance and 10 feet in height, into an austere George IV building of classical design. On the aesthetic issue, the recommendation of the DAC was favourable, and the parochial church council (reflecting the opinions of the parishioners) supported the project without dissent. No issue arose under condition (ii). Under condition (iii), the arch at which the picture was to hang had been found to be structurally weak. The petitioners sought to overcome this difficulty by supporting the picture on a fabrication of steel tubing. Condition (iv) was satisfied by the setting up of a fund made up of donations in support of the project. The faculty was not, however, to issue until either the repair and strengthening of the arch had been completed or the design of the steel fabrication had been approved by the Chancellor.

**Re: All Saints, Loughborough**  
(Leicester Consistory Court; Seed Ch. April 1994)

A Confirmatory faculty was granted in respect of restoration works and the rehangng of bells. There had been a resolution of the parochial church council for the work to be done, but the incumbent had failed to petition for a faculty or (in 1991) to seek an archdeacon's certificate for the work. He wrongly thought that no faculty was necessary because the work was carried out after the quinquennial survey. The Chancellor held that although there was a serious failure to comply with legal requirements and the expenditure of £46,000 on the part of the parochial church council had never been the subject of a resolution, a confirmatory faculty should issue because work had been carried out to a proper standard. The faculty was, however, ordered not to issue until the expenditure had been properly authorised by a resolution of the parochial church council, who were also ordered to pay the costs of the proceedings.