

## RECENT ECCLESIASTICAL CASES

edited by

JUSTIN GAU

*Barrister, Deputy Chancellor of the Diocese of Lincoln*

*Free Church of Scotland (Continuing) v General Assembly of the Free Church of Scotland*  
(Outer House: Lady Paton, March 2005)

*Scotland—church property—schism—constitution—jurisdiction*

In January 2000, the Commission of Assembly of the Free Church suspended 22 dissident ministers pending a decision by the General Assembly about their conduct. They then withdrew from the Free Church and constituted themselves as the Free Church of Scotland (Continuing), whereupon the General Assembly endorsed the Commission of Assembly's actions and declared the dissidents' charges vacant. The pursuers sought declarator that they were entitled to all the property and assets held in trust for the Free Church or, alternatively, that they were entitled to the property and assets 'in such proportion and upon such conditions as the court shall determine'. They averred that the right of continued protest was fundamental to the nature and constitution of the Free Church and that the defenders had abandoned that principle in 1995 and had thereby broken their ordination vows.

The Lord Ordinary ruled that she had only limited jurisdiction, quoting with approval Lord President Cooper's *dictum* in *Mackay v MacLeod* 10 January 1952 (First Division, unreported) that the court should be concerned with matters of belief and doctrine 'only for the purpose of informing themselves as to the essential and distinguishing tenets of the church in question, and of discovering the differences, if any, which can be detected in the principles to which the competing claimants respectively profess adherence'. She concluded that the supposed right of continued Protest did not constitute a fundamental constitutional principle of the Free Church—but that even if it *were* a fundamental principle it had been satisfied in the circumstances of the case. She therefore held that the defenders had not departed from the fundamental tenets of the Free Church and that they were entitled to the assets and property held in trust for the Church. However, she also held that the pursuers had not departed from any fundamental tenet of the Church and had not, therefore, forfeited any entitlement to the assets and property held in trust for the Church. But because there were at least *prima facie* grounds for concluding that at least some of the pursuers had failed to comply with the discipline and

government of the Church, she concluded that it would be inappropriate to rule on any possible apportionment of property between the parties.

*Case summary provided by Frank Cranmer. The Opinion is available at [www.scotcourts.gov.uk/opinions/2005csoh46.html](http://www.scotcourts.gov.uk/opinions/2005csoh46.html). At the time of writing an appeal is pending.*

*Re Johnson*

(Birmingham Consistory Court: Cardinal Ch, May 2005)

*Exhumation—lapse of time*

The petitioner sought a faculty to exhume the ashes of his late wife's parents, interred at St Paul's, Blackheath, and to scatter them in the Garden of Remembrance in Lodge Hill crematorium, where the ashes of his own parents are scattered. This was in accordance with his late wife's wishes. The chancellor considered *Re Church Norton Churchyard* [1989] Fam 37, *sub nom Re Atkins* [1989] 1 All ER 14, Chichester Cons Ct, and *Re Christ Church Alsager* [1999] Fam 142, [1999] 1 All ER 117, Ch Ct of York, and concluded there was no good or proper reason to grant the petition as it related to individuals who had died 40 and 27 years ago respectively; it would cause distress; and a late change of mind by a relative was insufficient reason. [JG]

*Re St Catherine, Littleton*

(Winchester Consistory Court: Clark Ch, June 2005)

*Altar—material—DAC objection*

A faculty was sought to replace the altar, which had woodworm and was 'heavy and cumbersome', with a smaller altar table in Parana wood (to match woodwork installed as a result of a faculty granted in 1992 to increase the size of the church). The proposed altar was of modern design with a central plinth. A mock up of the altar attracted almost unanimous approval from the congregation and PCC. The DAC objected (in ambiguous terms) initially about the design and the wood chosen, and then (after a visit to the church) solely about the design stating that they were unhappy with an altar where wood seemed to imitate stone and felt that an altar with legs would be more appropriate. The petitioners petitioned for a faculty for the original design and materials pointing out that the wood chosen now seemed to be unobjectionable and that there are many church furnishing catalogues that displayed wooden altars with central plinths. The chancellor granted the faculty as prayed being satisfied that the petitioners had proved a necessity for it and that the altar would enhance the character of the church. [JG]

*Re St Mary, Grafton Regis*

(Peterborough Consistory Court: Coningsby Ch, June 2005)

*Painting—sale—necessity*

A faculty was sought to sell a fifteenth century painting showing the betrayal of our Lord in the garden of Gethsemane. In June 2004 the painting had been valued at £100,000 to £150,000. The DAC and CCC opposed the sale. The PCC had undertaken to replace the picture with a replica costing £9,750. The rest of the proceeds of sale were to be used to conserve and re-order the church. The chancellor considered *Re St Gregory, Tredington* [1972] Fam 236, [1971] 3 All ER 269, Ct of Arches. The chancellor considered at length all the evidence about the painting's connection with the church, and concluded that the painting had not come into the church until the early twentieth century. He concluded that the painting was not significant in terms of the mission and ministry of the church and that the church itself was not a suitable place for the public to access the painting as it was only used for worship once a month for a handful of people. The petitioners further argued that there were problems with security, problems with insurance and a serious financial position in relation to meeting the expense of maintaining the church building over the next few years. In all material particulars the chancellor preferred the petitioners' arguments to those of the DAC and CCC. The faculty was granted subject to the painting remaining in England and being available to be viewed by members of the public. The reserve price for any sale was to be £160,000. The sale was to be completed within 12 months. There should be a copy made, with an explanation plainly displayed as to the historical background including how the original came to be sold. [JG]

*Copsey v WWB Devon Clays Ltd*

(Court of Appeal: Mummery, Rix and Neuberger LJJ, July 2005)

*Employment—Sunday working—religious objection—human rights*

A summary and brief analysis of this case appears at page 333 of this Issue. [Editor]

*Re St Andrew (Old Church), Hove*

(Chichester Consistory Court: Hill Ch, July 2005)

*Exhumation*

The petitioners sought a faculty for the exhumation of the cremated remains of their father, interred in 1976, to be reburied in Hove Cemetery in the same grave as his widow, interred in 2001. The reasons given were that the churchyard had deteriorated and vagrants were frequently present making the area dangerous and unpleasant (the late widow of the deceased

had been mugged on one occasion whilst visiting the grave), and that, as the churchyard had been closed for burials, the late widow could not be buried alongside her late husband. The incumbent had no objections to the petition. The chancellor reviewed the relevant law, acknowledging that the churchyard had been in poor condition, although it had recently been improved. The chancellor could find no special circumstances to justify granting the petition. If the state of a churchyard or the clientele it attracted were a special circumstance, then the concept of portable remains would gain considerable currency and the permanence of Christian burial would be compromised. The chancellor also gave weight to the fact that there had been a considerable lapse of time since 1976, and that the proposed re-interment would not be in consecrated ground. Whilst balancing against these matters the fact that the petition was supported by the incumbent and that it would create a family grave in circumstances where land was scarce, the petition was nonetheless refused. [JG]

*Re Holy Cross, Greenford Magna*  
(London Consistory: Seed Ch, September 2005)

*Memorial—legality*

The petitioner sought to replace an existing memorial in the churchyard by the church door with one of identical size and shape reading ‘In everlasting loving memory of my dear parents, Eva Mary Molloy and William John Molloy, The Rt Hon Lord Molloy of Ealing. Parted April 12 1980 reunited May 26 2001’. The PCC objected. They pointed out that Eva Molloy’s ashes were interred in the garden of remembrance, and that Lord Molloy’s ashes were scattered in Wales. The chancellor observed in passing that the petitioner’s mother had in fact predeceased her late husband’s elevation to the peerage and that he had spent his last years with another lady who might have been an interested party to this application. The chancellor did not make his judgment based on those matters of accuracy, however, but on the basis that a signed statement from the previous incumbent indicated that he had never given oral or written permission for the original memorial to be erected. It was erected without authority after the previous incumbent had ceased to be rector. The chancellor concluded that the original memorial was erected without authority, not in a part of the churchyard where the commemorated remains were interred and where there were no other recent memorials. The incumbent and the PCC were unanimously opposed to the proposal. The chancellor dismissed both the petition and the return of the original memorial stone which had been removed prior to the issue of the petition. [JG]