

Neutral Citation Number: [2021] ECC S&N 2

IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWELL AND NOTTINGHAM

Before: the Chancellor

IN THE MATTER OF BLIDWORTH CHURCHYARD

and

IN THE MATTER OF PETITIONS FOR THE BURIAL OF THE CREMATED REMAINS OF

(1) DOREEN ANNABEL

(2) DAVID DRAYCOTT

(3) RONA EDWARDS

(4) MARY MARTIN

JUDGMENT

Introduction: the church and the churchyard

1. The church of St Mary of the Purification, Blidworth, sits on an eminence at the western edge of the settlement. It has medieval origins and a tower dating largely from the 15<sup>th</sup> century. The rest of the building was the subject of rebuildings in classical style in the mid-18<sup>th</sup> century and in early gothic revival style in the 1840s. There are interesting fittings, some relocated from Southwell Minster in 1897 or thereabouts. The church community preserves the ancient custom of 'rocking', at the Feast of the Purification, the baby born nearest to the previous Christmas day.
2. There is a large churchyard. The church itself is set back from the road, leaving an area of ground adjacent to the north side of the building; there is a little land to the east of the building, partly occupied by the path around the chancel to the south door of the church. At the west end, the wall of the tower is close to the boundary of the neighbouring property, but again there is a little land. South of the church building is the remainder of the ancient churchyard, a plot of moderate size where there are memorials marking graves from the 18<sup>th</sup> and 19<sup>th</sup> century and what appears to be a collection of relocated headstones, as well as numerous modern burials, probably mostly of cremated remains. This area is now called 'the Rose Garden' and it is convenient to refer to it by that not entirely appropriate name.
3. Towards the south-west corner of that plot there is access to a very large churchyard extension, spreading down the hill to the south and west (but not including the land to the immediate south of the Rose Garden because that is part of the private grounds of the former Vicarage). The part nearest to the church is overgrown and houses an assembly of parts of the original building removed in the restorations to which I have already referred; the main part of the extension then opens out into a graveyard extending to over two acres,

apparently the result of at least three acquisitions of land. The churchyard was closed in 2000 by Order in Council because it was full.

### Problems

4. Blidworth churchyard appears, I am sorry to say, to have been managed for many years with scant regard to the law. Despite the closure of the churchyard, which, broadly speaking, made further burials in it unlawful and imposed a requirement of a faculty for burials of cremated remains, the use of the churchyard for burials of bodies and of cremated remains continued, apparently wholly unabated. Since the closure there have been nearly ninety burials of bodies, apparently all or nearly all unlawful, and hundreds of burials of cremated remains. What makes it worse is that no proper records have been kept of the place of burials of bodies or of cremated remains. There are no location details recorded at all for about a dozen of the coffin burials. For the burials of cremated remains, there are again some with no details, and rather more with very vague locations, such as 'down churchyard', or 'in front of tree'. Sometimes where locations are given they are accompanied by an indication of doubt. In addition, there are memorials, decorations and mementoes not permitted by law on a large number of graves.
5. There can be no doubt that the responsibility for this sorry state of affairs lies fairly and squarely with each of the incumbents of Blidworth between 2000 and 2018. It is said that there was always a doubt about how much of the churchyard was closed: that might provide some sort of partial condonation for the burial of cremated remains only: all the burials of bodies are in the part that is universally agreed to have been closed. Even taking that into account, the position apparent to each of the incumbents must have been that on the face of the documents the entire churchyard was closed, that burials of bodies were prohibited and that burials of ashes required a faculty in each case; further, that the burial of the remains of a person who had no right of burial in the churchyard required the consent of the minister, and that the incumbent had an obligation to ensure that the churchyard was maintained in accordance with the powers delegated by the Churchyard Regulations. Turning a blind eye to the requirements of the law is not an option: it is a breach of the incumbent's duty to the church, the worshipping community, to the parish, to the diocese and to the wider community. The consequences of the numerous breaches of the law, criminal, civil and ecclesiastical, will need to be dealt with in due course, as noted in the final paragraph of this judgment.
6. At some point in early 2019 the parish belatedly appreciated the difficulty of its position and that burials of bodies or ashes could not be permitted without proper authority. It required those who sought to bury the ashes of their relatives to seek a faculty for the purpose. It also obtained modifications to the closure order, as detailed below. There are four petitions before me now, which I treat as test cases to enable the whole situation to be settled, which requires review of the position as a whole, including deciding the effect of the 2000 Closure Order. Dealing with them has required laborious work in the parish records, the registry, and the records held by the Ministry of Justice, which is still not complete because the parish has not been able to produce some of the material that would enable a comprehensive review of the position in relation to burials in Blidworth now. I am very grateful to the Secretary to the PCC, on whom has fallen much of the trouble of investigating the record-keeping failures of her predecessors: her best efforts have in many cases simply revealed the

lack of proper records, as indicated above. It would be wrong to wait for any further information: the remaining uncertainty is indicated below.

7. Inevitably, there have been delays in the burial of parishioners and others. In correspondence I have seen, there have been suggestions that the diocesan authorities are responsible for the delay; and the secretary of the PCC has been under considerable pressure. In fact, as I show below, none of the burials that are the subject of the petitions can or could have taken place because the requisite consents have not yet been obtained. In the mean time, however, it is right to make it clear that it is not the PCC or the Diocesan authorities that have been at fault.
8. In what follows I begin by attempting to decide, and set out, the law as it relates to burials of bodies and of cremated remains in churchyards open, closed, and partly closed. There are some surprising uncertainties, which I attempt to resolve. I then look in detail at the closure of Blidworth churchyard and its effect. I summarise the petitions and decide them. I conclude with an indication of how future applications for burial should be dealt with by the parish.

#### The law

##### Churchyards and the right of burial

9. The law relating to who may be buried in a churchyard derives partly from the common law and partly from statute, in particular s 6 of the Church of England (Miscellaneous Provisions) Measure 1976. There were provisions about the right of burial in s 3 of the Church of England (Miscellaneous Provisions) Measure 1992, which I consider below. The statutory provisions were consolidated in s 88 of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018.
10. The common-law right to be buried in the churchyard of the parish church extends to those who die in the parish and those who at the time of their death were resident in the parish. These rights are irrespective of the deceased's faith or membership of any worshipping community. The right was enlarged by the 1976 Measure to include also those who at the time of their death were on the parish electoral roll (that is to say the church's electoral roll, not the register of electors compiled under the Representation of the People Acts): see now s 88(1) of the 2018 Measure.
11. The bodies of persons not falling within any of these categories may be buried in the churchyard if (but only if) the 'minister' gives his consent. This common-law rule, originally part of the rights of the incumbent as freeholder, is now found in s 88(4) of the 2018 Measure, and by subsection (5) the minister is required to take into account any guidance issued by the Parochial Church Council. Subsection (7) defines 'minister' for these purposes as (a) the incumbent of the benefice; (b) during a vacancy, the priest-in-charge or licensed curate; (c) failing which, the rural dean.
12. The permission of the incumbent does not create a right. It may be reviewed if there is opposition on the part of those having the right of burial. The incumbent's refusal of permission is not reviewable, unless the petitioner can bring a claim within the ambit of

equitable estoppel by showing that he has acted to his detriment on a promise made by the incumbent or one of the incumbent's predecessors. These propositions are derived from the judgment of Aglionby Ch, who reviewed the scant previous authorities in Re St Nicholas Baddesley Ensor [1983] Fam 1. In short, the absence of the incumbent's consent operates as a veto, as Newsom QC Ch put it in Re West Pennard Churchyard [1992] 1 WLR 32, 34, deriving that principle from the words of Dr Tristram KC Ch in De Romana v Roberts [1906] P 332, 336.

13. There are some other small classes of people who have the right of burial. Only one needs mention here. The reservation of a gravespace by faculty gives the exclusive right of burial while the faculty is current to those in whose favour the faculty is issued.
14. It is important to add that the right of burial does not include the right to be buried in any particular grave or in any particular place in the churchyard. The only way that a particular gravespace can be secured is by reservation of it, which requires a faculty. In every other case the place of burial is determined by the incumbent.

#### Closed churchyards

15. The Burial Act 1853, under which the Orders in Council relating to Blidworth were made, is part of a raft of mid-19<sup>th</sup> century statutes relating to public health. The increase in population, unaccompanied by any increase in space available for burials, led to grossly over-used and overcrowded burial grounds. Provisions were therefore made to close churchyards that had no more space for burials, and there were associated arrangements for the opening and maintenance of municipal burial grounds. The 1853 Act, as amended, remains in force today. The process of closure is by Order of the Queen in Council
16. The consequences of the closure of a burial ground are as provided by the 1853 Act and subsequent legislation. First, no burial in a coffin may take place there except as provided in the Closure Order. Secondly, any person who 'shall knowingly and wilfully bury any body or in anywise act or assist in the burial of any body' in a closed burial ground is guilty of a criminal offence, albeit one subject to a low maximum penalty of a fine at level one on the standard scale: this is the effect of s 2 of the Burial Act 1855 as amended. Thirdly, the responsibility for maintenance of the burial ground may be passed by the PCC to the local authority by notice under s 215 of the Local Government Act 1972. Unless and until such notice is given, the PCC is required despite the closure to 'maintain it by keeping it in decent order and its walls and fences in good repair' (s 215(1)).
17. In Re St Oswald Filey Closed Churchyard [2019] ECC Yor 8 at [57]-[59] Collier QC Ch considered whether there was any means of interpreting s 88 of the 2018 Measure in order to allow the retrospective authorisation by faculty of an unlawful burial of a body in a closed churchyard. He concluded that no such remedy was available. He had been in contact with the Ministry of Justice to see whether an unlawful burial could be made lawful by a retrospective Order in Council but had been told that such an Order would not and perhaps could not be made. He therefore concluded at [60] as follows:

I am then left with the position that the body has been buried unlawfully; and that unlawful position cannot be made lawful by any subsequent action of the Privy Council nor by any faculty granted by this court.

18. I agree entirely.

Burial of cremated remains in general

19. Cremation as an alternative to burying the body of the deceased has a relatively short history in the Christian church in these islands. It was promoted by Sir Henry Thompson FRCs, surgeon to Queen Victoria, from 1874 and developed a certain following, including well-known figures. The Cremation Society was founded in the same year, and steps were taken towards the founding of the Woking Crematorium. There were three cremations privately performed in 1882-3, apparently without objection from the authorities, but in 1884 criminal proceedings were brought against William Price, a person of esoteric religious views, who had cremated the body of his five-month old son. In his charge to the jury, Stephen J directed them that ‘a person who burns instead of burying a dead body does not commit a criminal act, unless he does it in such a manner as to amount to a nuisance at common law’: R v Price (1884) 12 QBD 247 at 254-5. That ruling was sufficient to show that cremation would not be unlawful, and the Woking Crematorium commenced business in 1885. Cremation was regulated by Act of Parliament from 1902.
20. Although the practice was thus both legal and available, it was slow to gain full acceptance by churchpeople. Westminster Abbey began a practice of requiring cremation of those distinguished persons proposed for burial there in 1910, and the practice of cremation had the approval of numerous bishops. It was, however, perhaps not until the cremation of the body of William Temple, Archbishop of Canterbury, in 1944, that opinion moved firmly in favour of cremation.
21. So far as the church’s own legislation is concerned, s 88(2)-(4) of the 2018 Measure reads as follows:
  - (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.
  - (4) A person who does not have a right of burial in the churchyard or other burial ground of a parish may not be buried there, or have his or her cremated remains buried there, without the consent of the minister of the parish.
22. This provision, replacing similar provisions in the 1992 Measure and amendments of the same date to the 1976 Measure, is sometimes cited as the authority for, and the source of, both a principle of treating cremated remains in the same way as bodies, and the restrictions applying to closed churchyards. On its face, however, it cannot be comprehensive, because although subsection (4) envisages the burial of cremated remains

of a person without the right of burial, there is no provision for equating cremated remains with a body in general, but only where there is a right of burial. It is also noticeable that s 88(3) does not purport to restrict any existing rights, but only to limit any rights given by s 88(2). The position is more complex than a casual reading of these provisions suggests.

23. The first question is whether there is any right to bury cremated remains, and even so far as concerns the relatively recent past that is somewhat obscure. If that right exists apart from statute, s 88(2) and its predecessors are merely declaratory, with the result that the reservation in s 88(3) is also declaratory, but necessary for the avoidance of doubt because of the statutory force of subsection (2). In that case, the preserved possibility of burial in the proviso to the closure order carries the possibility of burial of ashes under the same conditions. If the right derives from the statute, then the right is probably subject to the reservations in s 88(3) in all cases.
24. Uncertainty about whether the right to burial carries a right to the burial of cremated remains is apparent from the sources I have been able to consult. On the one hand, Canon B38(2) requires clergy to bury 'the corpse or ashes of any person deceased within his cure'. The introduction of the reference to ashes was new in the Revised Canons, but in 1965 (by which time Canon B38 had already been promulgated in the Province of Canterbury) the Church Information Office asserted in its pamphlet '*The Disposal of Cremated Remains*' that there is no right to the burial of cremated remains and that 'in strict law a faculty is required for the burial of cremated remains in a churchyard [that is, a churchyard that remains open for burial]'. Again, except where there was a clearly established and reasonable local custom, no fee has traditionally been payable solely for the burial of a person with the right of burial and burial could not be made conditional on the payment of a fee (Archbishop Langton's Constitutions, 1222, c 26, *Firmiter inhibemus*, adopted in the Northern Province by the Synod of Archbishop Booth in 1462 and reflected in numerous subsequent authorities). As a result, until changes made in 1976 there was no statutory fee simply for the burial of a body of a person with the right of burial (although there were fees if there was or had been a service in church). For the burial of cremated remains, however, there was a fee in any event. This distinction last appeared in the Parochial Fees Order 1972 (SI 1972/177) and would appear to be based on a view that a right to burial does not extend to a right to the burial of cremated remains.
25. It is not easy to find other support for that proposition, which, apart from the incidence of fees appears to run counter to the practice of the Church in the period between the introduction of cremation in the nineteenth century and the passing of the Church of England (Miscellaneous Provisions) Measure 1992, whose s 3 is the origin of what is now s 88(2) of the 2018 Measure. In particular, support for the proposition that a faculty is or ever was in general required for the burial of cremated remains is very sparse indeed. To cite Dr Tristram again in a case in which he refused a faculty for the exhumation of a long-buried corpse to enable its cremation,

"The Burial Service does not contemplate cremation. But where a body has been consumed in a fire, it has been customary to collect the ashes and to bury them in a churchyard, accompanied with the use of the Order for the Burial of the Dead, and there does not appear to the Court to be any legal objection to the same course being followed where there has been a previous cremation in pursuance of directions left by the deceased." (Re Dixon [1892] P 386, 394).

26. The comparison with death by, or preceded by fire, though not exact, is compelling; and it is in my view inconceivable that he would not have referred to the need for a faculty if he thought one was required. The formally expressed opinion of the Legal Board of the Church Assembly, cited above, was that 'for deposit [of cremated remains] in open churchyards no faculty is required'. The Charge to Churchwardens by Errington Ch appended to that volume indicates at p 190 that a faculty is required for the deposit of cremated remains in a church: this exactly reflects the decision of Tristram Ch in Re Kerr [1894] P 284 (see below) and specifically does not suggest that a faculty is required for burial of cremated remains in a churchyard. And, so far as I am aware, neither parochial records nor the records of Consistory Courts reflect the vast number of faculties that would have been sought, and issued, in the period in question, more than a century, if a faculty had been required.
27. I conclude that contrary to the views expressed or implied in some of the materials, no faculty was, before 1992, required for the burial of cremated remains in a churchyard not closed for burials. The fact that a burial of cremated remains could take place lawfully without a faculty necessarily means that the only requirements could have been either the right of burial or the permission of the incumbent (or perhaps the PCC), or both. Whatever may have been the position before 1969, the promulgation of the revised Canons in the Province of York in that year removed any question relating to permission in either Province. The obligation of the parish priest to bury the body of a person with the right of burial extends, by Canon 38(2), to the obligation to bury cremated remains.
28. It therefore follows that the right to have cremated remains buried is not a creature of the 1992 Measure. It existed previously; and s 88(2) is declaratory. That means, as indicated above, that s 88(3) should not be read as setting out comprehensively and exclusively the conditions under which a burial of ashes may take place in a closed churchyard: rather, it indicates that s 88(2) does not confer a right that did not otherwise exist. In other words, a fair summary of ss 88(2)-(4) is: cremating a body does not remove the right to burial, but it does not give any additional right either.

#### Burial of cremated remains in closed churchyards

29. As we have now seen, s 88(3) does not of itself impose any restriction on the burial of cremated remains in closed churchyards: it simply means that s 88(2) does not confer such a right.
30. The statutory prohibition on further burials in a closed churchyard for public health reasons does not apply to burials of cremated remains. In Re Kerr, another decision by Dr Tristram, the court had to consider whether to grant a petition for the immurement of the deceased's cremated ashes in a niche in the church wall. It indicated that it would not allow that, but on proper application would grant a faculty for the burial of the remains under the floor of a church whose burial ground had been closed under the 1853 Act. The proposal for burial within the church itself made this particular case an exceptional one; but in considering the matter the learned Chancellor reviewed the inhibitions on burials contained in the nineteenth-century legislation, including the 1853 Act. The evidence before him was that although a body had been cremated in 1769, the next known cremations were those of the 1880s to which reference is made in paragraph [19] above. Cremation is not

therefore a means of disposal of the dead that the legislators would have had in mind in 1818, 1848, 1853, 1855 or 1875, the dates of the statutes he was considering. It is therefore not surprising that each of them in making provisions about burial uses language appropriate to burial of corpses. The consequence of that is that none of them contains any provision prohibiting the burial of ashes, and, there being no objection on sanitary or public health grounds to the burial of ashes, there was no reason to suppose that any of them was intended to extend to a prohibition or inhibition on burials of cremated remains.

31. In Re Kerr itself, a faculty was required because the burial was to be within the church: nothing was (or perhaps could be) said specifically about whether a faculty would have been needed for burying the ashes in the closed churchyard itself. As noted above, s 88(2) of the 2018 Measure does not give, and only partially declares, the right of burial of cremated remains. Section 88(3) envisages the need for a faculty where cremated remains are buried in a closed churchyard, but as a rider to a provision relating specifically and only to those with the right of burial.
32. This provision does not make any reference to the possibility of the burial of the ashes of a person without the right of burial. So is a faculty needed for that? The view has been held for many years, apparently without direct authority, that no burial of ashes in a closed churchyard should take place without a faculty: see, for example, *Opinions of the Legal Board* [of the Church Assembly], 3<sup>rd</sup> edition 1932, opinion No 105. Section 88(3) is certainly consistent with that view where the deceased had the right of burial. Section 88(3)(b) allows for a faculty to be issued in general terms, that is to say in relation to an area of ground rather than in relation to individual remains. If such an area is set up by faculty, the provisions of subsection (4), requiring the consent of the minister if the deceased did not have the right of burial, clearly apply to it.
33. In that context it would be very odd if the ashes of a person without the right of burial could be buried in a closed churchyard, outside an area so reserved, merely by the consent of the minister. In my judgment the position is that the burial of ashes in a closed churchyard always requires a faculty subject only to what is said below in relation to a Closure Order with restricted ambit; and in the case of a person without the right of burial it also requires the consent of the minister.

#### The effect of provisos to the Closure Order or of partial closure

34. In the whole of the preceding discussion, the reference to a closed churchyard is a reference to such part of the churchyard as is closed, and subject to any provisos or exceptions in the closure order itself. The effect of any such provisos or exceptions will depend on their precise wording. Clearly, if there is an identifiable part of the churchyard that is not closed, none of the restrictions applying to closed churchyards will apply to that part. But what is the position if a particular activity (for example a burial in a grave space already reserved by faculty) is allowed by a proviso in the Closure Order?
35. The starting point might be that despite the proviso the whole of the area that is closed counts as a closed churchyard. That view reflects the wording of a Closure Order, and is obviously necessary in view of the prospect of maintenance by the local authority, which

could not (for example) be expected to exclude certain graves from grass-cutting. Nevertheless, the provisos clearly do restrict the ambit of the Order. For that reason, it seems to me that an activity which would have been lawful but for the closure, and is permitted by the Closure Order to continue, is excluded from the effect of the Order and falls to be considered without regard to the Order or the fact that the churchyard is closed. In other words, the general law, not that relating to closed churchyards, applies to that activity. That is the view I should have reached on principle: the Legal Advisory Commission of the General Synod expresses the same view in *Legal Opinions* (9<sup>th</sup> edition 2020), page 253 (= *Burial and Cremation: further burials in existing graves and in land already used for burials*, para 6, May 2000, revised 2006). With the greatest respect I differ on this point from the view expressed by Collier Ch in In Re St Oswald Filey Closed Churchyard at [63] that a faculty is required for an act excluded by a proviso from the ambit of the closure order.

36. This leaves a further question unanswered. If by the terms of the Order a ‘burial’ is permitted in certain circumstances (for example again a plot reserved by faculty for the deceased) in a closed churchyard, what is the position in relation to the burial of the same person’s cremated remains in that plot? Does it require a faculty because it is a burial of cremated remains in a closed churchyard, or can it be undertaken without a faculty because it falls within the proviso to the closure? The requirement for a faculty would fit both the wording of s 88(3)(a) (for certain in cases where the deceased had the right of burial) and would accord with the construction of the word ‘burial’ and its cognates in Re Kerr. But it would produce the result that there would be an inhibition (because of the need for a faculty) on the burial of cremated remains in circumstances where the burial of the body could take place as of right. But for the closure, the burial of cremated remains could have taken place without a faculty; and by the converse of the reasoning in paragraph [33] above, there is no good reason to suppose that a faculty ought to be required for cremated remains where it would not be required for burial of the body. In my judgment, the exemption of certain burials of bodies from the closure by provisos to the closure order should be treated as having the same effect on the cremated remains of the same person.
37. The outcome of this lengthy discussion is that where under the terms of a closure order certain burials remain permissible, the permission extends also to the burial of cremated remains. Burial of cremated remains in these conditions remains governed by the same principles as if the closure order had not been made, in the same way that burial of a body does. If the person had the right of burial no further permission or authorisation is needed, subject only to the incumbent’s general power and duty in relation to the churchyard. It is for the minister to decide, for example, if the grave is too full to allow a further burial, whether of a body or of ashes. If the person did not have the right of burial, the consent of the minister (as defined in s 88(7)) is required.
38. It may of course be suggested that it would be better if all burials within the area of a closed churchyard required faculties, because that would enable the court to control them. I express no view on whether that would be desirable. It would, however, for the reasons I have given, amount to a change in the law. It would mean introducing a requirement where there is none at present, and that requirement would be, in some cases, a clog on the common-law right of burial. In addition, it would make it necessary, or certainly highly desirable, to set out in legislation what is the position in a churchyard that is closed in part. There is, however, no obvious reason why the general law applicable to a churchyard should

not be allowed to apply in relation to matters outside the ambit of a Closure Order and for that reason I see no need to try to read the law as presumptively requiring a faculty.

#### Summary of the law

39. The position in summary, in all cases where the deceased does not have a gravespace reserved by faculty is, then, as follows:
  1. In a churchyard that is open, the burial may take place, without a faculty, of the body or ashes of any person who had a right of burial there.
  2. In a churchyard that is open, the burial may take place, without a faculty, of the body or ashes of a person who did not have the right of burial there, but only if the minister, as defined in s 88(7) of the 2018 Measure, consents.
  3. In a churchyard that has been closed under the 1853 Act, in the circumstances covered by an exception or proviso to the Closure Order, the law as to both burials and cremations is the same as if the churchyard had not been closed; and the same applies to any part of the churchyard not affected by the Closure Order
  4. In a churchyard that has been closed under the 1853 Act, no body may be buried except where 3 above applies.
  5. In a churchyard that has been closed under the 1853 Act, unless 3 above applies, the ashes of a person who had the right of burial there may be buried only if a faculty is obtained, either specifically for the burial or generally for burial of ashes in an area set aside for the purpose.
  6. In a churchyard that has been closed under the 1853 Act, unless 3 above applies, the ashes of a person who did not have the right of burial there may be buried only (a) if a faculty is obtained either specifically for the burial or generally for burial of ashes in an area set aside for the purpose, and (b) if in addition the minister consents.
40. Reservation of a gravespace by faculty gives the right of burial in that space for those named in the faculty; but if the gravespace is in a churchyard or part of a churchyard that has been closed, burial of a body or of cremated remains may take place in the gravespace only if the terms of the Closure Order permit the burial of the body there; if they do, the burial of a body must be in accordance with the terms of the Closure Order as to depth.

#### The Blidworth Closure Order and its modification

41. Following an application made by the parish on the ground that the churchyard was full, it was closed by Order in Council made under s 1 of the Burial Act 1853 and dated 11 October 2000. Three other churchyards were closed by the same Order, the terms of which are, so far as relevant, that 'burials shall be discontinued forthwith' in 'St Mary's Churchyard, Blidworth, Nottinghamshire', subject only to the following proviso:

"burial may be allowed ... in any grave space therein in which no interment has heretofore taken place, of the body of any person for whom or of any member of a family for which such grave space has been reserved or appropriated as a burial place, with the exclusive right of burial therein; subject, as regards all [such] burials ... to the condition that no part of the coffin containing the body shall be at a depth less than one metre below the level of the surface of the ground adjoining the grave".

42. Again following an application by the parish, and under the same statutory authority, the 2000 Order was modified by a further Order in Council dated 12 June 2019. That Order provides that notwithstanding anything in the earlier Order, burials in St Mary's Churchyard, Blidworth, Nottinghamshire, may be allowed as follows:

"(b) in any vault or walled grave in the churchyard, burial may be allowed but every such coffin in such vault or grave must be separately enclosed by stonework or brickwork properly cemented;

(c) in any existing earthen grave in the churchyard, the burial may be allowed of the body of any member of the family of the person or persons previously buried in that grave, but no part of the coffin containing the body shall be less than one metre below the level of the surface of the ground adjoining the grave".

(There is no paragraph (a) in the 2019 Order: I take it that the proviso in the 2000 Order is to be taken as paragraph (a), although it was in fact lettered (c) in the Order itself.) I do not know why the parish sought those particular amendments. In particular the only vault of which I have any knowledge is one under the church, whose opening is said to have resulted in a collapse that necessitated the rebuilding of the nave. Nevertheless, it seems to me that these newly-inserted provisos must be regarded as embodying the parish's current wishes on the limitations on further use of the closed churchyard).

#### The ambit of the Closure Order

43. I have seen some correspondence related to the closure in 2000. The application for closure was made to the Coroners Section of the Home Office, which then dealt with such matters. It was accompanied by a map, showing the church surrounded by land on all four sides, and the churchyard extension as I have described it above. On the map, the two parts were connected by a path with no gate or other closure indicated. The part to the north, around the church and including the 'Rose Garden', was hatched in blue. The whole of the extension to the south-west and south was hatched in red.

44. On 20 July 1999 Mr B Hinds wrote to the then PCC Secretary, Mrs Brown, as follows:

"Thank you for your completed application form and highlighted map in respect of the proposed closure of the above named churchyard.

I attach a copy of your original map highlighting the area to be closed in red. I should be grateful to learn what purpose the area shaded in blue serves. If both parts are used for burials then will [sic] need to know whether there is internal access between the two parts, if there is then the application could be viewed as a part closure. It is not Home Office policy to consider applications relating to parts of churchyards unless there are sufficiently exceptional circumstances to warrant that part being treated as a separate burial ground for the purposes of a closure order.

I would be grateful for your comments on the points raised in this letter."

45. Mrs Brown replied as follows on 26 July:

"Thank you for your letter dated 20 July 1999 and further explanation of Home Office Closure Policy regarding our application for closure of St Mary's Churchyard.

With reference to the blue area shaded on your attached copy of the original map, the area in question is the Church Garden.

I hope this information is satisfactory to your requirements".

46. The Order followed, as I have said, and was made in respect of simply 'St Mary's Churchyard, Blidworth'.

How much of the churchyard is closed, and with what exceptions?

47. The letter from the Home Office and the terms of the Closure Order both suggest that the latter relates to the whole of the churchyard. It is, however, clear that despite the obvious presence of burials in the Rose Garden, the letter from Mrs Brown was intended to be taken, in the context in which it was written, as an assertion that the Rose Garden and the other parts hatched in blue did not form part of the churchyard. I do not know any more of the background, but given the clear visual evidence, and the terms of the letter from the Home Office, it is difficult to escape the suspicion that in 1999 the parish sought to obtain something that they had been told was unavailable, that is to say a closure of part of the churchyard. The question now is whether that was obtained, or whether the Order operated to close the whole churchyard. The question is of some importance, because of the numerous subsequent burials (probably all of cremated remains) in the Rose Garden. If the Rose Garden was encompassed in the Order, all those burials are unlawful: if not, only the burials in the churchyard extension are unlawful.
48. The administration of Orders of this sort has now passed to the relevant section of the Ministry of Justice, and I am grateful for the help I have received from Mr Richard Finlay, who is mentioned in a number of other judgments by Chancellors as having been able to offer assistance to them too. He has confirmed that the Home Office would not intentionally have represented to the Queen in Council that a churchyard should be closed in part, save where a case was made out on an exceptional basis as indicated in Mr Hinds' letter. He has also told me that the Ministry of Justice has a policy which is somewhat different, and that partial closures are now sometimes permitted in less restricted circumstances.
49. In relation to Blidworth, and the effect of the Order in question, he has considered the correspondence to which I have referred above, and has written to me as follows:

"[A]fter looking at the information that you have kindly provided, the documents imply that the area that would have been closed by the Privy Council on the 11th of October 2000 would have been the area on the map highlighted in red, and this would not have included the area marked in blue as this was only referred to in the PCC Secretary's response as simply the church garden, and no reference was made in the correspondence to burials occurring in this area of the churchyard.

This would however be impossible to guarantee as those involved at the time cannot be contacted and we do not know if there were any further communications between the Home Office and the PCC Secretary so I can only base my decision on the available information."

50. In those circumstances I am content to decide that, as a result of Mrs Brown's letter, the area closed by the Order was the churchyard extension only. That is the result intended by the applicants, supported by the documents and now envisaged as a possibility by the Ministry of Justice. If the Secretary of State had been asked what land was meant by 'the churchyard' in the case of Blidworth, he would have pointed to the area hatched in red; even though the words themselves would not have conveyed that special meaning to Her Majesty in Council. Although, as Mr Finlay observes, the matter is not free from doubt, his email indicates the present attitude of the relevant government department. In those circumstances no useful purpose can be served by taking any other view.
51. I have to say, however, that although that view is the one also apparently taken at present by the parish, there is no basis on which it could properly have been taken by anybody there without the study of the correspondence and the reference to the Ministry of Justice that I have undertaken. To all appearances the whole of the churchyard was closed for burials after the 2000 Order. That is the position that must have been apparent to anybody, ordained or lay, asked to allow or to undertake any burial in the churchyard as a whole.
52. I referred above to the fact that some of the material I sought has still not been provided. I do not know the exact extent of the consecrated area of land around the church. I note, however, that a number of recent burials of cremated remains are said to be to the north of the church and some others are located by reference to paths. There is a presumption that an area around a church that has been or is used for burial constitutes land consecrated for burial unless the contrary appears by evidence. I therefore conclude that all the area hatched blue on the plan is part of Blidworth churchyard, consecrated for use as such, and was not closed.
53. The consequence is that it remains open. Those with a right of burial are entitled to be buried in that area: they are not restricted to the burial of cremated remains. The only limitation is that no burial can take place if there is not room for it: but the church's position is that they have never said or implied that any area other than the extension is full.

#### The provisos

54. As has been seen, there are now three provisos, but between 11 October 2000 and 12 June 2019 there was only one. It permitted a single body to be buried in a space that had been reserved by faculty before the closure. It specifically did not permit a body to be added to a grave that already had been used for the burial of a body, even if there had been a reservation. It follows that during that period any burials in an existing grave was unlawful, and any burial in an unused space that had not been reserved by faculty was unlawful.
55. The addition of further provisos does not have retrospective effect, but after 12 June 2019 proviso (c) allows the addition of the body of a family member in any grave, as long as the burial will be deep enough to meet the requirements set out. Clearly the regime after that date is much more relaxed. There are limits, however: no new grave may be dug except under the first proviso, and once a grave space is too full to allow a further coffin whose top is at least a metre below the ground level, no further burial of a body is possible.

56. As indicated above, burials within the terms of the provisos, whether of bodies or of cremated remains (which have no coffin and are not governed by the spatial provisions of the provisos) do not require a faculty. No faculty can permit the burial of a body other than in accordance with the terms of the provisos. If there should be any difficulty or dispute, the representatives of a person claiming to have the right of burial in an existing grave in accordance with the proviso would need to seek their remedy elsewhere. In such a case it is perhaps unlikely that the consent of the minister would be given if the deceased did not have the right of burial.

#### The Pastoral Scheme

57. The benefices of Blidworth and Rainworth were united by a Pastoral Scheme made by Order in Council on 15 March 2002. Under paragraph 1 of that scheme, the two parishes remain distinct. Parishioners of one parish did not therefore become parishioners of the other, and rights of burial in Blidworth churchyard are not extended to those with the relevant connexion to Rainworth.

#### The Petitions

58. As I have said, the parish decided to require those seeking burial to put their cases before the court by way of a petition for a faculty. That may well have been the right thing to do in starting to sort out all the difficulties: but the process does not give the court jurisdiction to grant a faculty in circumstances where a faculty is not required. The right of burial, and the possibility of burial with the consent of the incumbent, are not matters over which the court has control. This is not an area of law like that covered by the Churchyard Regulations, which delegate certain of the powers of the court to incumbents, nevertheless reserving to incumbents the option of declining to exercise the delegated power but instead to require the applicant to submit a petition for a faculty. Instead, the common-law and statutory rights of burial belong to the parishioners; and the right to allow the burial of a person who had no right of burial belongs to the minister. The Court has no role in permitting or restricting the exercise of those rights. There are circumstances in which burials require a faculty: a burial of cremated remains in a closed churchyard except as permitted by the Closure Order requires one, as does a burial within a church building; and a reservation of a grave space requires a faculty. But a faculty cannot be granted to permit the doing of something that is permitted without a faculty; and in any event the granting of a faculty does not by itself allow an act to be done which is otherwise unlawful, or which requires the consent of some authority other than this court.

59. There are four petitions before me. Each of them is supported by a vote of the standing committee of the PCC. None of the petitions is supported by any indication that the minister consents to it or has yet been asked to consent, although one (in respect of Rona Edwards) was lodged when there was an incumbent in post following an interregnum. Each of the petitions is suitable for determination without a hearing and no party has sought a hearing. I proceed to determine the petitions on the basis of the written submissions.

60. Doreen Annabel had lived in the parish of Blidworth, but at her death in 2019 her house was in the parish of Ravenshead following the creation of that parish in 1987. The Registrar's enquiries have not led to any assertion that she died in the parish of Blidworth, but I am told

that ‘she assumed that she had reserved a grave space at St Mary’s churchyard’. I am not aware of any faculty reserving such a space. She was not on the church electoral roll. Her sons seek the burial of her ashes in the grave of her husband, Arthur Annabel, Section H, Row 6, plot 11 of the churchyard extension. There is space in the grave for one further coffin burial. The petition is dated 20 May 2020.

61. David Draycott lived and died, on 18 January 2019, at Rainworth. He was not on the church electoral roll. His parents seek the burial of his ashes in the grave of his twin sister, Jane Yvonne Draycott, Section H, Row 5, plot 10 of the churchyard extension. The Petition states that ‘the grave concerned was bought as a 3 person burial plot when Jane passed away [1992] ... David’s brother Nigel has the plot next to this one reserved under a faculty’. Further enquiries from the parish have led to a statement that the statement that the grave was bought as a 3 person burial plot is incorrect. There was no reservation. There is, however, room for two further coffin burials in the plot. The petition is dated 15 February 2020.
62. Rona Edwards died on 31 August 2019 at Rainworth, where she lived before her death. She was not on the church electoral roll. Her sons seek the burial of her ashes in the grave of her parents, John and Louie Billam, Section B, Row 1, plot 11 of the churchyard extension. There is no indication of how much room there is in the grave. The petition is dated 23 June 2020.
63. Mary Martin lived in Rainworth and died on 20 January 2019 at King’s Mill Hospital, Sutton-in-Ashfield. She was not on the church electoral roll. Her daughter seeks the burial of her ashes in the grave of her son, Andrew Thomas Martin, Section C, Row 11, plot 1 of the churchyard extension. The petition states that ‘the family plot was bought as a 3 person burial plot in 1984, however we were unable to bury Mrs Martin in 2019 due to issues with the Closure Order’. Again, as in the case of David Draycott, there was no reservation, but there is room for two burials in coffins in the grave. In this case the funeral and interment had been arranged to take place before the parish appreciated that it would be unlawful (the words used in the parish’s most recent communication, dated 15 March, is “we were given a total ban on anyone going into the grave”), and so cancelled the arrangements that had been made. The petition is dated 11 March 2020.

#### Response to the Petitions

64. None of the petitions relates to a person who had the right of burial, because none of them at the time of death came within any of the categories of person who have a right of burial. Each of the proposed burials therefore requires the consent of the ‘minister’ as defined by s 84(7). The PCC has no role except in the giving of guidance, which the minister must take into account. Because none of the proposed burials yet has the consent of the minister, none of them can yet take place in any event.
65. Each of the proposed burials is to be within a grave in the closed part of the churchyard. In each case the next question is therefore whether the proposed burial is within the terms of one of the provisos to the Closure Order. In each case it is: the burial will come within proviso (c) because it is the burial, in an existing grave, of a member of the family of a person already buried there. In no case is there any doubt that the person whose remains are to be

buried comes clearly within the meaning of a “member of the family” of the previously deceased. The ordinary law, unaffected by the closure, applies. No faculty is required.

66. It is for the incumbent as part of the general management of the churchyard to decide whether there is sufficient room in the plots in question, although I note that the facts I have been given show that in the case of all the petitions except that relating to Rona Edwards there clearly is: in Rona Edwards’ case nothing is said about sufficient space for a further coffin burial in the grave, but there may well be room for a burial of cremated remains. The position in each case is that if there is room in the grave, the burial may proceed without a faculty, but only when the minister has given consent. If the minister’s consent is not given, the burial cannot take place. If in any of the cases the minister’s consent is given but there is no room in the specified grave, a faculty will be needed for burial of the cremated remains elsewhere in the closed part of the churchyard (except in the grave of another relative), but that will be based on a different petition from the one presently under consideration.
67. I therefore refuse faculties in all four cases, because it is not for the Court to purport to authorise an act which can lawfully take place without the court’s authority.

#### The future

68. I have attempted, in dealing with the petitions before me, to set out the law in such a way that the parish can apply it in future. The role of the minister, and the very limited role of the PCC, in relation to burials of those without the right of burial, are as set out in s 88 of the 2018 Measure, and above in paragraphs [11] and [39]. The law relating to whether a faculty is needed for the burial of cremated remains is as set out in paragraphs [33] and [39]: a faculty is not required for burial in the open part of the churchyard, nor in the circumstances envisaged in the provisos to the Closure Order; but a faculty is required for all other burials of ashes in the closed part of the churchyard. Bodies can be buried in the open part of the churchyard; and bodies can be buried in the closed part of the churchyard but only in the circumstances, and under the conditions, specified in the provisos to the Closure Order.
69. The part of the churchyard that is not closed by the Closure Order remains an open churchyard and while there is room in it anybody with the right of burial can exercise that right by burial of a corpse or of cremated remains.
70. The incumbent has a constant and important role. It is the incumbent’s task to assign the place for the burial of any corpse or any cremated remains in the open part of the churchyard. It is also the incumbent’s task to manage the churchyard in such a way that the space is properly and efficiently used: that is likely to mean maintaining a proper detailed account of all the graves and places where cremated remains are buried. In the case of burials (even of cremated remains) proposed in existing graves in the closed part of the churchyard it is for the minister to decide whether it is right for the deceased to be buried there or whether the burial should be somewhere else. It has been known for there to be family disputes about burying family members in the same grave. If the incumbent decides that the remains should not be buried in the existing grave, there will need to be a faculty for burial somewhere else in the closed part of the churchyard, if there is room.

71. It is also the incumbent's task to ensure that the whole churchyard, both open and closed, is at all times maintained in accordance with the delegated powers in the churchyard regulations, that no monument or memento is introduced other than in accordance with those regulations unless a faculty has been obtained, and that proceedings are taken for the removal of any monuments or other things whose presence in the churchyard is not permitted by the churchyard regulations.
72. The parish has suggested that it might seek to have an area of the open churchyard, perhaps the whole of the Rose Garden, set aside for the burial of cremated remains only. A reservation of this sort requires a faculty (because it interferes with what would otherwise be the community's right to burial in a coffin in the plot so set aside). It is perhaps unlikely that a petition of that sort would be granted if the effect would be to prevent the burial of bodies in an open churchyard; but that will be a matter to be considered in due course.
73. The priorities now are to get the process of burials going again in accordance with the law as set out in this judgment, to take whatever steps are necessary to regularise the unlawful burials so far as that can be done and to seek advice on the position where no regularisation is possible, and to bring the management of the churchyard in line with the Churchyard Regulations.

The Worshipful C M G Ockelton MA BD  
Chancellor  
8 April 2021