

*Testimony
Coningsby, Ch.*

(18)

20.4.95
Sale of Plate

IN THE CONSISTORY COURT OF THE DIOCESE OF PETERBOROUGH

PARISH OF ST. MARY THE VIRGIN
Burton Latimer

In the matter of a Petition for Leave to sell items of plate
and other articles

Hearing held in the church on 8th April 1995

JUDGMENT OF CHANCELLOR T.A.C. CONINGSBY Q.C.

1. The Incumbent and Churchwardens of St. Mary the Virgin, Burton Latimer have applied for permission to sell a Georgian silver flagon and matching alms dish dated 1774, a silver chalice and pat~~en~~en dated 1570 and the surviving part of an illuminated medieval missal. The Schedule to the Petition does not mention the alms dish but this was included in the items displayed at the hearing as being the subject matter of the application and I therefore give leave to amend the Schedule to include it. The Council for the Care of Churches (CCC), after being given notice under Rule 14, have suggested that ^{the} missal pages should be deposited at the County Records Office where they will be available to members of the public wishing to have access to them. The Petitioners have agreed to this course and the Court will direct that a faculty shall issue for this purpose. There should be a consequential amendment to the Petition to show deposit of the missal pages rather than sale. The Registrar is authorised to make both amendments.

2. The Petitioners wish to have the proceeds of sale of the

Communion vessels to go towards a fund for the construction of an extension to the church. Messrs. Christies have valued the chalice and cover at £5,000 to £7,000 and the flagon and alms dish at £2,500 to £3,500. The total cost of the extension including architects and other specialists' fees will be of the order of £300,000. The parish is able to borrow approximately £100,000 from two trust funds, but the capital of the funds thus borrowed will have to be replaced by the PCC over a period of thirty to forty years.

3. The vessels have not been used in church for some years and on 13 July 1972 they were removed to a bank. Since 1982 they have been on loan to the Cathedral Treasury of Peterborough. Between 1982 and 1994 they could be seen by members of the public on request in the old treasury over the west door. Since 1994 they have been more accessible to view in the new treasury. On rare occasions the chalice has been used at large services in the cathedral. The chalice was used regularly at the eucharist in Burton Latimer church until 1971. All the items would now be far too expensive to keep insured for use in the parish and the flagon would be too large and too heavy for normal use.

4. As a result of general citation 31 persons lodged notices (and particulars) of objection and thus became parties opponent. Shortly before the hearing five of these persons wished to withdraw and were given leave to do so. Three others (Mr. and Mrs. R.L. Harpur and Mr. C.J. Pykett) wished to withdraw but were not given leave because the Petitioners wished to preserve their right to seek costs against these

parties opponent as they had taken a more active part than others and had retained solicitors to support their objection in correspondence. Approximately forty other persons wrote to the Petitioners expressing opposition to the sale of the communion vessels but these persons did not become parties opponent in the proceedings. Some of them are not resident in the parish.

5. As a result of its consideration of the matter the Diocesan Advisory Committee (DAC) advised the Court that it did not put forward any objection but it did not actively "recommend" the proposals. The CCC advised against the sale of the vessels. Initially the CCC did not ask to give oral evidence at a hearing but subsequently it indicated that it would like an opportunity for its witness Mr. Claude Blair to attend. Due to organisational difficulties it was not possible to hold the hearing on a date which he could manage. The Court has of course given weight to the written report of the CCC dated 18th November 1994. This takes two main points. The first is that the funding of an extension project may not be a "special reason" within the principles set out in the decision of the Appellate Court in RE: St. Gregory's Tredington 1972 Fam.236. The second is that the Petition is premature because planning permission has not yet been obtained.

6. These are the same two points which are taken by most of the parties opponent. The case that the petition was premature was in the forefront of the objections of the Harpurs and Mr. Pykett.

7. The Court must deal first with the case that the Petition is

premature since if the decision upon this is adverse to the Petitioners it may not be necessary or desirable to go on to consider other matters. The headnote in the official report of the Tredington case correctly summarises the decision as follows: "The court had jurisdiction to grant the faculty sought and, the flagons being redundant and there being an emergency in the finances of the church council, the faculty would be granted". At Tredington the PCC had an urgent need for substantial funds to repair the church which had been neglected in previous years. The church had small attendances. The Deputy Dean of the Arches found that a state of financial crisis existed. He clearly exercised his discretion on the basis of that finding.

8. In the present case there is currently no financial crisis. I heard evidence that the church has had no significant difficulty in the last twelve months in raising an additional £6,000 for unexpected repairs to the fabric. It is a well-attended church. Its need does not arise in relation to any of the normal expenses of running the church, or the payment of quota, or the repair of the existing building. The reason for the petition is the plan to build an extension (in part as a replacement for a former church hall which was on a different site and which fell into bad order and was sold in 1986). Although there is no crisis at present the Petitioners know that if they proceed with the extension proposals a large sum of money will need to be collected and they wish to have money in hand towards an appeal to the parish for funds which will be mounted as soon as planning permission and a faculty for the extension have been obtained. The question is how does this state of affairs fit into the Tredington principle.

9. Certain matters can be conceded in favour of the Petitioners:-
- (1) The proposal for an extension is basically a sound one. The DAC has given preliminary consideration to it and favours it. English Heritage and CCC have also provisionally approved it. Able architects have been engaged and have prepared suitable plans and drawings.
 - (2) The proposal for the extension has a large measure of support in the parish, in the PCC and among the congregation. Most of those who object to the sale of the vessels do not object to the extension, indeed they support the extension. Burton Latimer Town Council supports the extension.
 - (3) The vessels cannot be used in church for the purposes intended and are therefore "redundant" within the special meaning of that word as used in the Tredington case and other ecclesiastical cases. If they were in use or even capable of use it is most unlikely that there would be a petition to sell them and still less likely that the Court would consider that it had jurisdiction to permit sale. But in the present case that hurdle is surmounted.
 - (4) The Incumbent churchwardens and PCC are proceeding in a positive and responsible manner in their proposal for an extension. They have received encouragement in this from the Archdeacon, and in the Court's view they should continue to be encouraged and should not be deterred if the present petition does not succeed.

10. Returning to the question of prematurity, it is useful to look at the case of Re. St. Mary of Charity, Faversham (1986) Fam. 143 a decision of the Commissary General in the diocese of Canterbury. The Petition was

for the sale of a pair of flagons which had been in the church since 1643. They were not in use in the church and the Cathedral Treasury was willing to have them on display. The PCC needed £305,000 for major restoration work to the church. An appeal had been launched and £63,000 was raised to date. Further steps in the appeal were about to be taken (approaches to individual householders and to commercial bodies). The petitioners said that they did not really wish to sell the flagons and would not do so if enough money came from the appeal. The town council, Faversham Society and Kent Archaeological Society were all confident that the appeal could be made to succeed. The town was "not endowed with great wealth" but had been able by corporate action to make improvements in the town centre in recent years. The Commissary General refused the petition because "since it is by no means certain that the appeal will fail the parish has not proved good and sufficient grounds to warrant my granting a faculty". He went on to say that, if after a year or more it should become clear that the appeal had failed or would inevitably fail to bring in enough money, the parish could lodge a fresh petition.

11. I consider that a good deal of the reasoning in that case must apply also to the present case. It would be good if the vessels could be retained. They are part of the heritage and history of the church. They can be enjoyed by many people who visit the Cathedral Treasury. They are the heritage of all the people of Burton Latimer and not just those who attend church regularly. They are part of the heritage of those not yet born who in later generations will live in the town and attend the church and be able to see the vessels in Peterborough if they so wish. The vessels may be redundant for church use but they are not in all senses

redundant. Against that the law allows such items to be sold but only if the Tredington criteria are made out. These require that there should be some existing or imminent financial crisis in the funds of the church. This must be established and clear, and not a mere possibility or likelihood. I agree with the late Commissary-General that where there is a reasonable chance that the funds can be obtained by other means the case for sale has not been made out. I believe that to be the position at present at Burton Latimer. The appeal for funds has not commenced (and cannot reasonably commence until planning permission has been obtained). It is impossible to know whether the required £200,000 can be raised by the appeal. It is a large sum but not necessarily beyond the reach of a church and town which has a good deal of success and tradition behind it and where residents and businesses include some who are prospering. The Commissary General considered that the petition in his case was premature and I take the same view of the present petition. The case for "financial crisis" or "urgent need" has not been made out.

12. There is a second reason why the petition is premature and that is the absence of planning permission and the fact that the planning application which was made in 1993 was turned down. If there had been no refusal and if the Court now had evidence that the planning authority had given its informal encouragement to a first planning application the position might perhaps be different. But here the 1993 application was refused and not appealed and there have been no approaches to the authority since then of any significance which could lead the Court to take an optimistic view of the chances of success when a fresh application is made to the authority. The authority rejected the application on stated grounds to do with the absence of on-site car parking, the size of the

extension, the closeness to the church, interference with trees and graves, the need to enclose a thirteenth century door and failure to use traditional materials and design in keeping with the church. Very few if any of these points have been conceded by the Petitioners and their architect so that it seems likely that a fresh planning application will again be rejected. It is conceded by the Petitioners that they will probably have to go on appeal to the Secretary of State. There the Court was told by Counsel representing the Petitioners that there would be a 41% chance of success. The corollary of course is a 59% chance of failure. The broad picture is that the Petitioners are faced with a major hurdle over the question of planning consent. The hard fact is that they may never obtain it. If they do they may have to materially alter the design of the building and the information the Court is now given as to costings may change. Without planning consent having already been obtained the Court is left in a position of uncertainty as to what ^{the} future financial needs of the church will be and it is simply not proved that the church has at present an urgent need for funds for a purpose within the Tredington principle. The Petitioners' case is insufficiently formed.

13. It is fair to say that the Petitioners will have major expense even if they fail to obtain planning permission. The Court accepts the evidence that architects and other experts fees and legal fees up to the point of obtaining planning permission will be £30,000 to £40,000 of which some £9,000 has already been paid, ie a balance of some £20,000 to £30,000. If there has to be an appeal to the Secretary of State these figures will increase. Accordingly there may well be an urgent need for funds for these fees and to some extent the Court can view the need as a present one.

But here the difficulty is that there is no precedent for allowing the sale of ancient communion vessels in order to pay professional fees which may not lead to any work being done to any building. It is at this point that the obtaining of planning permission is so important, for once that has been obtained the Court is able to be satisfied that actual work to the buildings will occur. The Petitioners would also be in difficulty in proving that they were unable to raise these preliminary fees by other methods.

14. The Court has reached the conclusion therefore that the Tredington threshold has not been passed in this case. This is for two separate reasons:-

- (1) Planning permission remains a major hurdle and there is a serious risk of it never being obtained for an extension on the church site.
- (2) There is a real possibility that if planning permission is obtained and an appeal is launched all the money needed for the extension may be raised in the appeal leaving no need to sell the vessels.

15. As in the Faversham case it is not impossible that the present impediments to granting a faculty for sale may be removed. Planning permission may be obtained by fresh application or on appeal in spite of the difficulties. A funding appeal may be launched and after every effort may not reach the full amount required. A shortfall in the sum needed for the extension coupled perhaps with a need for money for other works might justify lodging a fresh petition for sale of the vessels. It is impossible to say how the balance of considerations would then fall.

16. The Court will dismiss this Petition for the above reasons, which can be summarised as "prematurity". Many other matters were dealt with at the hearing and have been argued in the party opponents' pleadings and the Petitioners' Answer. The Court does not propose to make decisions on these matters because it is unnecessary to do so. It would also be unwise to do so because views expressed on these matters might be considered to prejudice any later Petition. Also, if there is such a Petition, it is highly likely that some of the major factors will have altered by then. The design for the extension may be different, the costings may be different, the degree of opposition from the CCC and objectors may be different, the amount of money needing to be raised (after an appeal) may be different.

17. The Court wishes to add some thoughts about how the Petitioners may have come to apply prematurely and to offer some guidance in other cases. When the Petition was lodged in August 1994 the Planning Application had already been rejected and the Petitioners were faced with rising professional fees and a lengthy process before they could overcome the difficulty over planning permission. The Court thinks it likely that at that stage the Petitioners were not sufficiently mindful of the Tredington criteria and may have believed that, despite the absence of planning permission and despite not being in a position to run an appeal for funds, they could obtain a faculty for sale. Furthermore it seems likely that they wanted the sale proceeds expressly for the funding of the process of obtaining planning permission, in other words substantially for professional fees. By their answer to paragraph 13 of the Petition they indicated that as soon as a faculty was granted they would instruct Messrs Christies to go ahead with the sale. The Court considers that the Petitioners were in error if

they thought that the Consistory Court would authorise sale of communion vessels to meet professional fees at this stage as this would fall outside the Tredington principle.

18. At a later stage when many parties opponent objected to a sale before the obtaining of Planning Permission the Petitioners informed the Court that they would submit to a condition within the faculty that sale should not take place before the Petitioners should obtain planning permission (and a faculty) for the extension and should be in a position to enter into a contract with a builder for the construction of the extension. That concession was made in the hope of meeting one of the objectors' major points. The Court sees why that concession had to be made. But the concession does not alter the basic intent of the Petition which is still to obtain funds to meet professional fees. It is true that the effect of the condition would be that the proceeds of sale of the vessels could not be used until a later stage but they could still be used in the same way, ie for the same fees. This could come about either because the payment of professional fees would be delayed by agreement until that stage or because other temporary funding might become available in the meantime on the strength of the faculty to sell being operable later. Thus the condition does not alter the basis of the Petition.

19. Another aspect of the offering of this condition is to consider whether it goes in any way to meet either of the grounds on which the Court holds the Petition to be premature. The condition does not touch in any way on the ground relating to the absence at this stage of any appeal for funds and consequent absence of evidence of a shortfall in funds. Only a condition that the vessels would only be sold if an appeal fails to produce

the needed funds would suffice to meet that ground. Such a condition would not be appropriate because it would be obvious that, instead of having a faculty now subject to a condition to come into effect so far in the future, the proper procedure would be no petition now but a petition at the appropriate time if and when needed.

20. The condition does not go far enough to repair the defect arising from the absence of planning permission. To grant a faculty now subject to the condition would be to assume that planning permission will be granted whereas that is not an assumption which can be made. If one assumes the contrary it becomes inappropriate to grant a faculty which is unlikely to come into effect. In any event the Court does not consider that the procedure of attaching a condition to a faculty for sale should be used in the way proposed by the Petitioners. It is true that conditions can be, and often are, attached to faculties but these are directions and controls designed to ensure that what is permitted is done in a responsible way. Such conditions basically run in the same direction as the subject matter of the faculty and not in a contrary direction. In the present case the faculty would grant a permission and the condition would then take it away again. That is a state of affairs which strongly suggests that the petition should be withdrawn and ^{be} represented when the right time comes to do so. The Court considers it very doubtful whether in principle it would be a proper exercise of the faculty jurisdiction to grant a premature faculty and then direct that it not come into force. There would be no good reason for doing this when the alternative procedure is available of the petition not being presented until a faculty could be granted without condition precedent (or, in the case of a premature petition, of it being

withdrawn). Furthermore if in the present case a conditional faculty, which might not come into operation for two or three years (if a planning appeal took a long time to be completed), were granted there would be a risk of the factual basis altering over that period of time. There would be a risk that the factors which led the Court to exercise its discretion now in favour of sale might alter over the intervening time to such a point that the scales might come down differently. That would lead to the possibility of considerable argument. The Court might want to call in its faculty and revoke the order for sale. The Petitioners would want to resist that. They would have a strong argument on their side namely that the Court had granted the faculty in 1995 knowing that factors might change and that the Petitioners had been led to believe that they would be able to sell. The Court is not willing to run the risk of such a situation arising. This consideration means that the Court is likely to look unfavourably on any proposal, in this type of case or any other, for a condition which would significantly delay the execution of the faculty.

21. There is some guidance which the Court can give to Incumbents, churchwardens and PCCs facing a major extension scheme and having little or no existing funds. The essence is that funds must be raised for the design work, professional advice, plans, obtaining of planning permission, faculty and other consents as a separate and preliminary exercise to the major appeal for the construction works. In the present case the Petitioners should not be looking to the sale of communion vessels in relation to this first phase of expenditure. The church members should have been told at an early stage that £30,000 to £40,000 would be needed to get to the stage when building work could commence and they should have been asked to provide

it or pledge it. On the assumption that the extension is needed and that church people are convinced of this and support the project the Court would expect that in a church such as Burton Latimer this initial appeal would succeed. The target of getting the scheme to the stage where all consents have been obtained and where the people are committed to go forward is in itself a valuable target to be arrived at and paid ^{for} as a preliminary achievement. The Court feels that in the present case the Petitioners and PCC may have made a mistake in not realising the need for such a two-stage process of fund raising. If so they may have been over-anxious because they did not have funds in hand to meet the planning stage and they may have been rushed into this insufficiently considered and possibly unnecessary petition for the sale of valuables. Then faced with opposition, most of which was taking good points, they did not agree to withdraw the petition as cogent arguments indicated that they should. There is no doubt that they were being invited to do this by the solicitors who acted for the Harpurs and Mr. Pykett and this Court considers that those solicitors had correctly isolated the points about prematurity which have now convinced the Court. The Petitioners had the opportunity then (in the Autumn of 1994) to concede these points but decided instead to take up a firm stance and to drive the case through to a hearing.

22. For the reasons which I have given I must dismiss this Petition. The decision does not in any way reflect adversely on the wider plans and work of the Petitioners in relation to the scheme for the extension. That should go forward. If planning permission can be obtained and a faculty obtained and if the appeal for funds is a success it may never be necessary to give further consideration to a sale of the vessels. If on the other hand the funding runs into grave difficulties the Court has not ruled out

a fresh petition.

23. Coming now to costs, these are of two types: the costs between parties and the Court (and Registry) costs. As to the latter these must clearly be paid by the Petitioners, backed as these are by the PCC. The Registrar will draw up a costs order in due course after he has calculated them and submitted them to me for approval. As to party costs the individual parties opponent have incurred little or no costs and do not ask for any order. Mr. Pykett does not ask although he could have done so on the basis of the result, as the stance which he took has been fully vindicated. I found him a most objective and reasonable person and was helped at the hearing by his evidence and his ^{Petitioners' witnesses.} questions to the Mr. and Mrs. Harpur ask for their costs to be paid by the Petitioners (again backed by the PCC) and the Court grants their application. Like Mr. Pykett, Mr. Harpur correctly isolated at an early stage what was wrong with the Petition. He said in terms in his Particulars of Objection "It is premature to raise funds for the proposed church extension until the LPA has granted a planning consent". When the condition was offered by the Petitioners he still considered that the Petitioners should agree to the Petition being adjourned and there was correspondence between solicitors. Eventually he and Mr. Pykett decided not to pursue their objections to the point of coming to the hearing but they had to remain parties because of the Petitioners' claim for costs against them. Hence they both attended the hearing and both took part in it. When he was in the witness box Mr. Harpur was cross-examined for the Petitioners on the basis that he had an improper private motive for opposing the Petition and a particular allegation was put to him about his business affairs. He denied the allegation and it was put to him that his denial was false. The Court

finds that it was wrong for the allegation to have been made to him and wrong that his denial was challenged. The Petitioners chose not to give evidence in support of the allegation and there never was in the whole case any evidence to support it. Mr. Harpur demonstrated certain indignation when the allegation and the challenge to his integrity were made. The Court is fully satisfied that his indignation was righteous and fully justified. The Court proposes to order the Petitioners to pay his costs and in view of the offensive cross-examination these must be on the indemnity rather than the standard basis. As far as his (and his wife's) solicitor's costs are concerned the Court considers that half these costs are the responsibility of Mr. Pykett and half the responsibility of Mr. Harpur. Thus on taxation of costs by the Registrar the Petitioners should pay half the solicitor's costs, plus any other recoverable costs of Mr. and Mrs. Harpur. It seems unlikely that the Petitioners will want to argue against these orders for costs but they shall have 14 days in which to submit written representation if they wish.

24. Apart from that part of the cross-examination of Mr. Harpur to which I have referred, the hearing was generally conducted with charity and the Court detected among those present and in the parish as a whole a great deal of support for the Incumbent and for what he is doing. The Court does not wish its decision in this matter to be regarded as any discouragement in relation to the extension scheme which the diocesan authorities consider to be basically sound. This is a lively church with a good spirit among its people and there is every reason to expect good things ahead.

Thomas Gwinny
Chancellor of the Diocese of Peterborough

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