IN THE ARCHES COURT OF CANTERBURY

ON APPEAL FROM THE CONSISTORY COURT OF THE DIOCESE OF PETERBOROUGH

Parish of St. Mary the Virgin, Burton Latimer

IN THE MATTER OF a petition for a faculty to authorise the sale of certain articles:

Quorum: **Dean of the Arches.**
Chancellor Judge Quentin Edwards QC
Chancellor Jonathan Henty.

JUDGMENT

This is an appeal by the Rector and the Churchwardens (one of whom has been appointed since the petition) of St. Mary the Virgin, Burton Latimer, against the decision of Chancellor Judge T.A.C. Coningsby QC. That decision was given on the 20th April 1995. There had been a hearing on the 8th April 1995. The decision was to reject the petition for two separate reasons:

> "(I) 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."

Essentially, and so far as this Court is concerned, the petitioners had sought a faculty to sell a silver flagon and matching alms dish dated 1774 and a silver chalice and paten dated 1570. Messrs. Christie have valued the chalice and cover at £5,000 to £7,000 and the flagon and alms dish at £2,500 to £3,500. Although, in argument, suggestions were made that the amount realised might be more than the estimate, so also it might be less and on the evidence it is not possible to accept any total value other than £7,500 to £10,500.

Save that they have been with the church at Burton Latimer for centuries, the early history of the silver is not known. It seems that the vessels were in use until 1972. The chalice was in regular use until 1971. In 1972 all the vessels were removed to the Bank the church continuing to use a faithful copy of the chalice. Since 1982 the vessels have been on loan to the Cathedral Treasury of Peterborough where they have from time to time been displayed. The Chancellor found that "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." We are not aware of the evidence on which he came to this conclusion.

The reason for the application and for this appeal is that the appellants, unanimously backed by the P.C.C. with the D.A.C. not objecting or commending, wish to sell the silver on the open market so that the proceeds may be used to "kickstart" or "prime the pump of" - both phrases have been used - a campaign to raise the monies necessary for an extension to the church. As to this there is at present no planning permission, that having been refused by Kettering Borough Council, the planning authority, in August 1993 and no further application having been made. We have not seen the existing outline plans, let alone any costings for these works, but for the purposes of this appeal only we see no reason to reject and we accept the following assertions made on behalf of the appellants:

l. That the proposal for building, to which there is very limited opposition, is imaginative and is in response to an unsatisfied need for such building;

2. That there are reasons to hope that if the planning authority cannot be persuaded to change its mind an appeal to the Secretary of State would have some reasonable chances of success.

However, we do not dispute the Chancellor's finding that 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.

3. That the total costs of the work, excluding the costs of an appeal, but including all professional fees otherwise (they are estimated to be 10 to 12 percent of the total) , would be about £300,000.

4. That the parish will need to raise some considerable part of this - £100,000 according to Mr. Payton who appears for the appellants; £200,000 according to the Chancellor. The balance is available from trust and other funds. The parish has so far raised £209000 according to Mr. Payton and £3,600 according to the twelfth answer to the statements of objection.

5. That the public appeal for funds for building cannot sensibly take place until planning permission has been obtained and, Burton Latimer Church being a grade 1 listed building, planning permission will not be obtained until full plans have been obtained and submitted.

6. That the appellants have sought and seek a conditional faculty, i.e., a faculty which will ensure that there can be no sale unless a planning permission and a faculty have been obtained and the church is proceeding to erection of the new building. We agree with the Chancellor that to grant a faculty subject to such a condition would be inappropriate when the future is so doubtful and do so for the reasons stated by him.

7. As a result of general citation 31 persons lodged notices and became parties opponent. Of these five withdrew before the hearing before the Chancellor. Three others, for whom Mr. Briden appears today (Mr. & Mrs. M. Harpur and Mr. Pykett) at that time wished to withdraw but they were not given leave since the petitioners wished to preserve their rights to seek costs against them. About 40 others wrote to the petitioners expressing opposition to the sale. They did not become parties opponent. Some of these did not reside in the parish.

8. At present at Burton Latimer there is no financial crisis.

9. It having been conceded that the vessels were redundant the Chancellor rightly concluded that they were indeed redundant. The Chancellor did not examine the issue whether the four pieces were redundant because of the concession by the opposing parties. However, as the jurisdiction to grant or refuse faculties is a voluntary jurisdiction a concession by a party does not limit or otherwise fetter the exercise of that jurisdiction. An assertion that any particular piece of communion plate is redundant must be established to the satisfaction of the Chancellor, whatever the submissions or concessions of the objectors. In this case, as a true copy of the chalice is in use in the church and there was evidence before the Chancellor that the flagon had been used on great Festivals within living memory, it is doubtful whether the argument that the plate was redundant would, if fully examined, have prevailed. As already mentioned there was no evidence, other than speculation and estimation, of the cost of insuring the pieces had they been brought back into use in the parish church and, in particular, the cost of insuring them were special precautions to be taken for their safe keeping.

The Chancellor, in his judgment, relied on the principles carefully and clearly enunciated by George Newsom QC, Deputy Dean, in the well known case of In re St. Gregory's Tredington [1972] Fam.R.236. Mr. Blair, who addressed us on behalf of the C.C.C. told us - as we know to be the case - that the principles there stated have in general been accepted and followed to the general satisfaction of all parties. Mr. Payton did not in any way criticize either the decision or the principles.

We heartily endorse each. Mr. Payton does, however, say that the Chancellor was unduly restrictive in applying those principles.

We must now consider that case the facts of which differed from this in various obvious ways, and the principles which the judgment enunciated. Those principles, two in number, with some glosses, are:

A. A faculty may be granted to sell ornaments or utensils found to be unnecessary, if there is good and sufficient reason for sale.

Whilst church goods are not in the ordinary way available for sale and purchase, yet the churchwardens, with the consent of the vestry (now the parochial church council) and the authority of a faculty, may sell them or even give them away. Without such consent and authority the churchwardens cannot pass the legal interest which is vested in them. To obtain a faculty some good and sufficient ground must be proved. In the case of a sale, one of the grounds suggested by Sir Robert Phillimore in his great work on ecclesiastical law is redundancy. However, that is not an essential ground or the only possible ground. Some special reason is required if goods which were given to be used in specie are to be converted into money. This is not a jurisdiction to authorise changes of investment. Like all faculties, this kind is a matter for the chancellor's judicial discretion.

Accordingly, it will be seen that before granting a faculty the chancellor will need to be satisfied:

1. That the necessary consents have been given;
2. That the articles are unnecessary;
3. That some good and sufficient reason for sale has been proved.

Redundancy may be such a reason although this is unlikely in the case of parish silver. Changes of investment - such as the appellants have suggested - are likely not to be such a reason. Financial emergency may well be such a reason. A relevant factor, indicating that there should be no faculty, may be that the articles are a part of the heritage and history not only of the church but also of all the people, present and future, of the parish. The jurisdiction should be exercised sparingly.

B. Although it will be slow to dissent from the Chancellor this court has power to substitute its own discretion for that of the Chancellor if it is satisfied that the discretion of the Chancellor was based on an erroneous evaluation of the facts taken as a whole.

We now turn to the Grounds of Appeal. We will deal with each Ground after reading the written statement.

GROUND 1. "That the worshipful chancellor erred in law by holding that he was bound by the judgment of the Arches Court in re: St. Gregory's, Tredington [1973] Fam.R.236 and that the items may be sold 'only if the Tredington criteria are made out' (judgment p.7); i.e. that there is some existing or imminent financial crisis in the funds of the church or an urgent need."

It is true that at p.7 the chancellor says:

"The law allows such items '(i.e. redundant items)' to be sold 'if' but only 'if' the Tredington criteria are made out. These require that there should be some existing or imminent or financial crisis in the funds of the church."

However, seen in context and in the light of the Chancellor's statement that "if the funding runs into grave difficulties the court has not ruled out a further petition" - see paragraph 22 - it is clear that the Chancellor was not so restricting his discretion". The point he was making was that the application was premature. With the Chancellor's evaluation of prematurity we agree.

GROUND 2. "The Worshipful Chancellor failed to distinguish that in Tredington the proceeds of sale were to be used to pay for current works of repair amounting to quasi waste whereas the present proposal is for the substitution of one capital asset for another, namely the construction of a permanent extension to the church. It is the case for the appellants that the court should have followed the general principles of the Law of Trusts as applied to life interests and to accept that the proposed sale would have saved the capital assets of the parish.

There is no reason to think that the Chancellor failed in the manner alleged. We accept the Deputy Dean's statement in the Tredington case that "this is not a jurisdiction to authorise changes of investment".

The questions for the Chancellor were (1) were the articles unnecessary? and (2) was there good and sufficient reason for sale?

GROUND 3. That the Worshipful Chancellor erred in law by applying the principles decided by the Commissary Court of Canterbury in St. Mary of Charity, Faversham [1986] Fam.R.143 in holding that the petition was premature.

It is not necessary to set out the particulars to this paragraph. The Chancellor was not in error in finding prematurity. He would have been in error had he found otherwise.

GROUND 4. That the Worshipful Chancellor was wrong to adjudge that the purpose of early presentation of the petition was for the purpose of meeting professional fees. On the contrary, it was the unchallenged and unquestioned evidence by and for the petitioners that unless and until the parochial church council judged that the full cost of the scheme could be achieved it would be wrong to incur the heavy cost of preparing plans in such detail as are required for the purpose of pursuing an application for planning permission for a grade l listed building and possible appeal to the Secretary of State in the event of the local planning authority declined or refused consent.

It would seem from paragraph 13 of the judgment that the Chancellor was dealing with an argument which had not been presented to him. That argument was that "there may well be an urgent need for funds for fees necessary for the application for planning permission." Assuming that such a liability would be a present liability and that it might not be possible to pay those fees, the Chancellor went on to say:

"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."

If, and it is not clear, the Chancellor was in error as alleged it was an immaterial error since, in our judgment, the decision to which the Chancellor came was inevitable.

We have come to the clear and unanimous conclusion that the petition with which we are concerned was premature. At present there is no good or sufficient reason for a faculty for sale.

This conclusion was suggested before the hearing before the Chancellor. However, the petitioners continued to a contested hearing. Whilst appreciating the value of enthusiasm this hearing before the Chancellor could and should, we believe, have been avoided. Before the Chancellor the petitioners lost. They were ordered to pay costs; firstly, they were ordered to pay the court costs and secondly, they were ordered to pay some part of the opposing party's costs. They have not paid the court costs. They should have done so. They were ordered to pay a proportion of Mr. & Mrs. Harpur's costs. Generously, Mr. & Mrs. Harpur indicated that they would not press this order. Mr. Pyckett had already indicated that he would not seek an order.

Now there have been more costs. We consider that this appeal should not have been presented. Mr. Payton's argument to us was that those who will have to raise the very considerable amount of

money which is necessary for the building and raise it from the public believe that they will be encouraged by a conditional faculty such as is sought. If so the position has not been properly explained to them.

As it happens, and it will not always be so, the three judges sitting here will not seek a fee for their attendance. Nevertheless the court costs are substantial and must be paid. There is no reason why they should fall on the church at large. There is no reason why they should fall on the successful respondents. Those who are considering the possibility of an appeal to the Arches Court must realise that litigation may be costly. Here the very limited costs which are sought as court costs together with the costs which are to be awarded to Mr. Briden's clients may well exceed the value of the silver. That will not be a special reason for granting a faculty. There will be an order that the appellants should pay the court costs below and here and that they should pay, in addition, the costs here of Mr. Briden's clients. Those costs are to be taxed by the Registrar failing agreement between the parties.

(31)

26/10/95

IN THE ARCHES COURT OF CANTERBURY

ON APPEAL FROM the Consistory Court of the Diocese of Peterborough

PARISH OF ST MARY THE VIRGIN, BURTON LATIMER

IN THE MATTER OF a petition for a faculty to authorise the sale of certain articles.

BEFORE:

Sir John Owen, The Dean of the Arches, The Worshipful Chancellor Judge Quentin Edwards QC and The Worshipful Chancellor Jonathan Henty QC

TO:

The Reverend John Simmons, Brian Arthur Mutlow and Margaret MacAdam Gibson

WHEREAS:

(1) A petition for a faculty to authorise the sale of certain articles of silver presented to the Consistory Court of the Diocese of Peterborough by you the said Reverend John Simmons, you the said Brian Arthur Mutlow and Ailsa Kathleen Loake being the then incumbent and churchwardens of the parish of St Mary the Virgin, Burton Latimer was refused by The Worshipful Chancellor Judge T A C Coningsby QC on 20 April 1995.

(2) By Notice dated 5 June 1995 you applied for leave to appeal to this Court to allow your petition which leave was duly given.

(3) Ailsa Kathleen Loake is no longer a churchwarden of the parish and Margaret MacAdam Gibson has been appointed churchwarden in her place.

(4) After hearing the argument of Counsel on your behalf and on behalf of Christopher James Pykett, Richard Latimer Harpur, Janet Dorothy Harpur, John Nicholas Loake and Gillian Karen Loake ("Parties Opponent") and on hearing evidence by Mr Claude Blair on behalf of The Council for the Care of Churches before this Court on 21st August 1995 the Court dismissed your appeal for reasons which are contained in its written Judgement which is annexed to this Order.

IT IS HEREBY ORDERED:

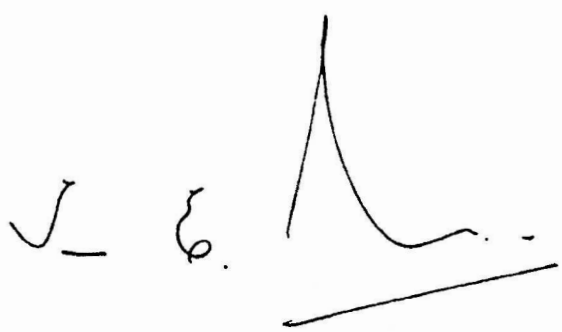
1. That your appeal be dismissed and is refused.

2. That you comply forthwith with the Order as to costs issued by the Registrar of the Consistory Court of the Diocese of Peterborough dated 25 April 1995.

3. That you do pay the fees and expenses of this Court including a fee for the Provincial Registrar, for preparatory and ancillary work and correspondence to be agreed by the Court.

4. That you do pay to Christopher James Pykett, Richard Latimer Harpur, Janet Dorothy Harpur, John Nicholas Loake and Gillian Karen Loake their legal costs in connection with the appeal, such costs to be taxed by the Provincial Registrar in default of agreement.

Dated this Twenty sixth day of October 1995



FRANK E ROBSON
Provincial Registrar