

SAME AS LAND

G. H. Newson

1780

- Sale of
Land

Can
Land Notes.

IN THE CONSISTORY COURT OF THE DIOCESE OF LONDON

RE: St. Mary Magdalene Church, Paddington

JUDGMENT

This case concerns a strip of land, immediately adjacent to the church on its north side, which was conveyed in 1868 to the then Ecclesiastical Commissioners along with the land which became the site of the church itself. The church was consecrated; the strip was not. On the consecration of the church both church site and strip became vested in the Incumbent as a corporation sole under the legislation then in force. The strip was thus unconsecrated churchyard. Moreover, it was so close to the church as necessarily to be curtilage of the church within Section 7 of the Faculty Jurisdiction Measure 1964, however the word curtilage is to be construed. The strip is now wanted by the Westminster City Council, to become part of their canal-side walk and to be held by them as a public open space under the Open Spaces Act 1906. The purpose is laudable, the terms are in my opinion satisfactory, and I propose to authorise the strip to be conveyed to the Council.

However questions arise as to the form of, and the parties to, the proposed conveyance, and as to the disposition of the proceeds of sale. There is some apparent conflict between the recent reported authorities, and I therefore said at the hearing in Chambers that I should put my judgement on these points into writing for the guidance of those who are concerned in the Diocese of London with cases of this sort, which are not by any means infrequent.

There is, in my opinion, no doubt that unconsecrated churchyard has always been within the jurisdiction of the Consistory Court.

Section 7 of the Measure of 1964 uses the word "curtilage" and is declaratory. But "curtilage" may well be smaller than "churchyard" and the greater includes the less. When it comes to making a conveyance of the strip, whether it be designated as curtilage or as unconsecrated churchyard, the first possibility, and much the simplest, is that the Incumbent, who has the freehold, should convey it to the Council under the authority of a faculty. The other, and more complicated, possibility is that a faculty should authorise title to be made under Section 17 of the New Parishes Measure 1943, as enacted by Section 6 of the Church Property (Miscellaneous Provisions) Measure 1960. Under this latter provision the Incumbent (with the authority of a faculty, since sub-section (5) says that nothing shall affect the jurisdiction of the Consistory Court, which undoubtedly has jurisdiction over the strip) can sell it, but only with the consent of the Church Commissioners and of the Bishop (see the proviso to sub-section (1)). The proceeds of sale have to be paid to the Commissioners and applied for the benefit of the benefice or other charitable purposes of the district as may be agreed between the Commissioners and the Bishop after consultation with the Incumbent (sub-section (4)). The Commissioners were represented before me and I was informed that they do not particularly welcome being invited to act in such a case as this, which makes work for them which would not otherwise come their way and takes up their time. Nor, so far as I can see, would there be any advantage to the Bishop in being brought in if the work can be done by his Court.

In Re St. George's Oakdale [1976] Fam: 210, a case in the Diocese of Salisbury, Ellis Ch. held that the procedure under the New Parishes Measure was the only possible one. The basis of his decision was that at common law an incumbent had no power to convey away unconsecrated churchyard which was not needed as such. Admittedly,

various Union of Benefices Acts and Measures conferred specific powers of disposition; but the provision of the New Parishes Measure 1943 which corresponded to the present Section 17, was, he said, the first general power for an incumbent to convey such land. Hence, said the Chancellor, the Court could confer no other power on him. Further, he held that the provision of the present Section 17 (5), which apparently saves the existing jurisdiction of the Consistory Court, amounts only to a recognition that the Court has jurisdiction over the user of unconsecrated churchyard, and it does not mean that the Court can authorise the ultimate disposal of such land (see at page 218F). He also observed that he had heard no less an authority than my predecessor, the late Dr. Wigglesworth Q.C., voice anxiety about the uncertain meaning of Section 17 (5). This last statement is a little surprising in view of the part played by Dr. Wigglesworth in the Hatfield case to which I refer later.

The major premise on which the reasoning of Ellison Ch. rests is that at common law the incumbent had no power, even under a faculty, to dispose of pieces of unconsecrated and unwanted churchyard or curtilage (at page 215D to G). But my attention has been drawn to a decision of Dr. Tristram, sitting as the Commissary General of the City and Diocese of Canterbury, in 1897, where he authorised precisely that thing to be done. The case is referred to briefly in the judgment of Goodman Ch. in Re Christ Church, Chislehurst [1973] 1 W.L.R. 1317, at pages 1319 F to H and 1321H, a later case about the same churchyard, but in the Consistory Court of the Diocese of Rochester, the parish having in the meantime been transferred from the Diocese of Canterbury to that of Rochester. The decision of Dr. Tristram authorised an unwanted part of the unconsecrated churchyard of Christ Church to be conveyed by the incumbent to a Miss Quincey, subject to certain restrictive covenants, for the sum of £150 and he directed that the purchase money should be applied first in payment of the costs of the proceedings and then in reduction of a

debt to Martins Bank for money which the Bank had lent towards the purchase of the Parsonage House. Here then, we find, in 1897, long before the New Parishes Measure 1943, that the Consistory Court was treating itself as entitled to authorise the incumbent to make a conveyance of the kind in question and to direct what was to be done with the proceeds of sale. Goodman Ch. has supplied me with a photostatic copy of what appears to be the actual Order of Dr. Tristram, or perhaps a final draft of it, which he has obtained from the Canterbury Registry. It is added to this present judgment by way of appendix. I cannot think that the existence of this Order was known to my Brother Ellison; for it is not mentioned in his judgment in the Oakdale case and it is fundamentally inconsistent with his decision there. I should mention that nothing on the face of the Order indicates that the case was contested or argued. But, if there had been any doubt about the jurisdiction (and at this date if there was no power of sale of common law the sale could not be made ^{at} at all), Dr Tristram would surely have set the case down for hearing. It is, in my judgment, much more likely that he was exercising ^{ecclesiastical} an acquired or familiar jurisdiction.

Dr Tristram was Chancellor of several Dioceses and by 1897 had already been Chancellor of the Diocese of London for well over 20 years. I should be slow indeed to say that he acted without jurisdiction. Of course, a decision of his in the Canterbury Diocese is not strictly binding on me in London. But it is a great persuasive authority and I propose respectfully to follow it in the present case. I shall therefore authorise the Incumbent to convey the land to the Council and at the request of the Incumbent I shall direct that the purchase money and interest (for this completion has been long delayed) shall be paid to the Parochial Church Council to be held as part of the Fabric Fund for the charitable purpose of the upkeep of the church

building itself.

Though that disposes of this case, it may be as well that I should put on record certain matters relating to two decisions of my own as Chancellor of the Diocese of St. Albans and one decision of Goodman Ch. in the recent case of Re Christ Church, Chislehurst since they are criticised in the Oakdale judgment. The first of my decisions, Re St. John's Church, Bishop's Hatfield [1977] P.113, was a case where a piece of unconsecrated churchyard or curtilage, belonging to a very new church, was needed for a secular building. The problem was to get rid of the jurisdiction of the Court. Dr Wigglesworth appeared before me as Counsel for the petitioners and he did not suggest that I had no jurisdiction. On the contrary, at his express instance, I destroyed my jurisdiction by granting a faculty authorising the secular building to be put up, that being a building whose existence was wholly inconsistent with the concept that its site would continue to be church curtilage or indeed churchyard. Having destroyed the jurisdiction, there was no room for the application of the power exercised by Dr. Tristram in 1897, and the conveyancing was dealt with, out of Court, under the supervision of Dr. Wigglesworth himself, by means of the New Parishes Measure 1943 as altered in 1960. The only present relevance of that case is that the proceedings were founded on the proposition that the Court had jurisdiction and that it was Dr. Wigglesworth who proceeded on that footing, notwithstanding what was later said about him in the Oakdale case.

The next case was Re St. Peter's Bushey Heath [1971] 1 W.L.R. 357; but in that case I merely authorised the grant of right of way over a piece of unconsecrated churchyard or curtilage; thus there was no question of my allowing a conveyance which would terminate the jurisdiction of the Court over the area in question. So this case too does not bear on the present problem. In the recent Chislehurst

case, the Court, having adopted my reasoning about "curtilage", and distinguishing the Bushey Heath case on the facts, authorised the sale of the land and referred the actual conveyancing to be considered in Chambers (page 1327). It appears however from the remarks of Goodman Ch. at page 1323 that he considered that the conveyance would be made under the New Parishes Measure and that he would therefore have no control over the proceeds of sale. He has informed me that the documents had already been prepared on that basis and that the faculty transfer authorised the sale to proceed in that manner.

There are two possible procedures and in my judgment they are alternatives, since there was a power at common law and the New Parishes Measure give an extra power; it is not designed to abridge existing powers. Subject always to the jurisdiction of the Consistory Court, each power exists side by side with the other. If, as in the recent Chislehurst case, the Court chooses to authorise the incumbent to use the power given by the New Parishes Measure, it follows that the consents required by that Measure are necessary as well as a faculty and that the proceeds of sale must be dealt with as the Measure provides. But if, as in the present case, the Court chooses to use the method employed by Dr. Tristram, then, like him, the Court can direct the application of the proceeds of sale. The powers are alternative, and each is independent of the other. The Court must not blur the distinction. But the authority of the Court is necessary whichever way the conveyancing is to be done.

I hope that this Judgment will serve to clear up some of the misunderstandings which appear to have existed at the time of the Oakdale case.

To conclude, I propose in this case, and whenever it is convenient to do so, to exercise the jurisdiction that was exercised by Dr. Tristram in the Chislehurst case of 1897. It seems altogether easier and shorter than to authorise a sale under the New Parishes Measure, since it involves only the parties directly concerned with the transaction and the Court itself.

APPENDIX

1897

IN THE COMMISSORY COURT OF THE CITY AND DIOCESE OF CANTERBURY

IN THE MATTER of a Petition for a faculty for the sale of a plot of unconsecrated land being part of other land surrounding enclosing and belonging to the consecrated church of Christ Church, Chislehurst in the County of Kent and the Diocese of Canterbury

The Reverend William Fleming (Incumbent)
and
James Battens Esq., J P and Robert Whyte Esq., J.P.
(the Churchwardens of Christ Church)

-v-

The Parishioners of the Parish of Chislehurst

The Judge having considered the same decreed a faculty to issue sanctioning the sale of a plot of land measuring 17 perches and marked with the letter Z on the plan annexed to the petition and forming part of a larger plot of land conveyed to the Ecclesiastical Commissioners for England on the 29th day of November 1871 by the late Nathaniel William John Strode of Camden Place Chislehurst Esquire as a free gift for the erection of a church thereon to Miss Harriet Quincey of the "Arab's Tent" immediately adjoining but henceforth to be called Stowcroft for the sum of £150. The Judge being satisfied upon the evidence that the said plot of land had not been consecrated and that from its position it was of no available use for the extension of the church and that its retention would not be for the benefit of the parishioners directed that the said William Fleming should as incumbent execute a Deed of Conveyance of the said Plot of land to the said Harriet Quincey containing a covenant by the purchaser for herself her heirs and assigns that she would not at any time hereafter erect on any part of the said plot of land any erection or building whatsoever or use or permit the same or any part thereof to be used in such a manner as to be a nuisance or annoyance to the owners or occupiers of adjoining property. The Judge also directed that the purchase money should be paid to an account on behalf of the Incumbent and Churchwardens of the said church to be applied in payment in the first place of the costs incident to the obtaining of the faculty hereby decreed and in the next place the balance to be applied in diminution of a subsisting debt of about £500, due to Martins Bank Limited of Lombard Street in the City of London for money advanced by them for the purchase of the Parsonage House belonging to the said church. The Judge further decreed that on the Deed of Conveyance being produced to the Registrar of the Court the faculty should issue to the said Harriet Quincey granting to her her heirs and assigns the free and undisturbed use of the said plot of land in consideration of the payment of the said sum of £150 for all time to come. Subject nevertheless to the covenant hereinbefore mentioned and to the further covenant by the said Harriet Quincey that she would forever after maintain along the present boundary on the church side of the said plot of land a suitable fence or wall of not less than the height of 5'6".

Henry Fielding
(Registrar)