No:

IN THE CONSISTORY COURT OF THE DIOCESE OF GUILDFORD

Hearing: 28 September 2011

IN THE PARISH OF THORPE
THE CHURCH OF St MARY

In the matter of the Faculty Jurisdiction (Injunctions and Restoration Orders) Rules 1992
And in the matter of an application for a restoration order by the Archdeacon of Dorking

Between

The Venerable Julian Tudor Henderson,
Archdeacon of Dorking

Applicant

and

The Revd Canon Dr Michael Hereward-Rothwell

Respondent

JUDGMENT

The application

1. This is an application made by the Archdeacon of Dorking following a reference by him to the Consistory Court by way of an application for a restoration order. Section 13(5) of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 provides:

> Where at any time (whether before or after faculty proceedings have been instituted) it appears to the consistory court of the diocese that the person has committed, or caused or permitted the commission of any act in relation to a church or churchyard in the diocese or any article pertaining to a church and in the diocese which was unlawful under ecclesiastical law, the court may make a restoration order, within such time as the court may specify, for the purpose of restoring the position so far as possible to that which existed immediately before the act was committed.

2. Pursuant to section 13(6) a restoration order under subsection (5) may be made on an application by the Archdeacon concerned or of its own motion.

3. The Archdeacon's application has followed the procedure laid down in the Faculty Jurisdiction (Injunctions and Restoration Orders) Rules 1992.

4. The respondent, the Revd Canon Dr Michael Hereward-Rothwell ("Canon Hereward-Rothwell") was formerly the incumbent of St Mary's, Thorpe, retiring on the grounds of ill-health in September 2009. Within the last six years he has caused to be constructed in part of the churchyard of the Church of St Mary a brick vault. The vault, covered above ground by a substantial marble slab, is intended as a burial place for himself and his mother. The proceedings assert that the place in question is subject to a closure order rendering future burials unlawful, that the construction of the vault was in contravention of the Disused Burial Grounds Act 1884 and that the placing of the memorial was performed without the sanction of a faculty. In these circumstances, the application seeks an order requiring the respondent to take such steps as may be necessary to restore the position as far as possible to that which existed immediately before the vault was constructed.

5. The respondent resists the restoration order. Whilst accepting that the placement of the memorial slab was done without a faculty, he asserts that the construction of the vault was lawful and so, too, his right of burial.

The 1914 conveyance of the Leigh-Bennett burial ground, its consecration and the 1915 faculty

6. By a grant under seal made on 8 December 1914, Henry Wolley Leigh-Bennett ("Henry Leigh-Bennett") conveyed a parcel of land measuring 22' x 26' to the body in whom the churchyard was vested to be held as part of the churchyard "*and all right title and interest in the same*". There was no reservation of any rights or interests expressed in the grant. The parties agree that in the various documents to which reference is made to a parcel of land measuring 22' x 26', the same parcel of land is being described. The parcel is clearly delineated on the land and no issue arises either as to its identity or its location. It is sometimes referred to as the Leigh-Bennett burial ground.

7. The grant was expressed to be made under the authority of the Consecration of Churchyards Act 1867 as amended by the Consecration of Churchyards Act 1868 (c. 47), s. 1). The 1867 Act provides:

9 Exclusive right of burial in a portion of the land added to a churchyard may be secured to the giver thereof.

Whenever any land shall be so added to a consecrated churchyard, and such land shall have been the gift of any person, whether resident or not in the parish or ecclesiastical district in which such churchyard is situated, it shall be lawful for the giver of such land to reserve the exclusive right in perpetuity of burial and of placing monuments and gravestones in a part of the land so added, not exceeding one sixth part of the whole of the said land; and the part in which such exclusive right is reserved shall be shown and coloured on the plan endorsed on the instrument declaring or recording the consecration of the land added to the churchyard; and a memorandum in the form following shall be written on the said instrument, and signed by the incumbent and churchwardens of the parish or ecclesiastical district in which the same is situated:

We, *A.B.*, [Rector, Vicar, *or* Incumbent,] and *C.D.* and *E.F.* Churchwardens, of , declare the piece of land [*here insert the description and measurement*], and coloured on this plan, to be the burial place of *G.H.*, the giver of the land added to the churchyard of , his heirs and assigns.

And the memorandum so signed shall, after such land shall have been declared to have been consecrated, operate as an exclusive right in perpetuity in the land therein referred to; and the expenses of preparing and executing such memorandum shall be borne by the person by whom the reservation is made.

10 Conditions attending such grant of exclusive right of burial.

The exclusive right of burial and of placing monuments and gravestones as aforesaid shall be considered to be the real estate of the giver, his heirs and assigns, and no body shall be buried or monument or gravestone placed in the land in which such rights have been granted except by consent of the owner thereof for the time being; but no such reservation shall give the right to bury the body of any person not entitled to be buried in consecrated ground; and the bishop of the diocese, and all persons acting under his authority, shall have the same right and powers to object to the placing and to procure the removal of any monumental inscription within the ground so reserved as he has to object to or procure the removal of any monumental inscription in any consecrated ground: Provided always, that the consent of the owner for the time being shall not be required for the burial of a deceased owner, or of a wife or widow of any deceased owner who has been buried or shall be about to be buried in such ground.

11 As to closing of reserved portions.

> Such reserved portion shall not be included in any Order in Council under the Burial Acts for closing the churchyard to which it belongs, but it may be closed under a separate Order founded on a special report that the ground is in such a state as to render any further interments therein prejudicial to the public.

8. On 10 March 1915 the Suffragan Bishop of Guildford (as he then was) declared by an Instrument of Consecration that the plot conveyed in the grant of 8 December 1914 was consecrated ground and part of the churchyard. Since 10 March 1915, the Leigh-Bennett burial ground has fallen within the jurisdiction of the Consistory Court and now falls within the jurisdiction of the Consistory Court of the Diocese of Guildford.

9. On 15 March 1915, Henry Leigh-Bennett petitioned for a faculty as he was "*desirous of having the exclusive right of Burial for himself and his Family and Successors*" in the plot of ground then described as the "proposed Family Burial Ground".

10. The faculty was duly granted on 9 April 1915 in these terms:

> "do hereby given grant our LICENCE or FACULTY to the said Henry Leigh-Bennett reserving the said piece of ground as a place of Burial for him his Family and Successors exclusive of all others..."

The closure order

11. On 10 May 1916 the churchyard was subject to a closure order made by Order in Council made under section 1 the Burial Act 1853 to the effect that burials in the churchyard attached to St Mary's Thorpe were *"to cease forthwith and entirely"* but subject to a proviso:

> "Provided that burials may be allowed in that portion of the Churchyard reserved to Henry Leigh-Bennett which is situated on the south side of the Churchyard and measures, on the north and south sides thereof 26 feet, and, on the east and west sides thereof, 22 feet"

12. Although the original disposal was said to be made under the Consecration of Churchyards Act 1867, no reservation was made as to one sixth of the land thereby conveyed. Indeed, it would have made little sense had it done so since the plot of land was barely able to contain six burial plots in total and the reservation of one-sixth part would have done no more than create a single reserved plot. The intention of the 1914 transfer was to transfer the entire land into the churchyard, in contemplation of its becoming consecrated land and the

entire portion being subject to the faculty permitted it to be used exclusively as a private burial ground for Henry Leigh-Bennett his family and successors.

13. No memorandum pursuant to the 1867 Act has been executed. The provisions of the Act do not apply and, in particular, no area one-sixth of the whole or less having been reserved under which that portion was capable of devolution by the giver to his heirs and assigns.

14. The Leigh-Bennett burial ground is apparently unregistered land. Although in the course of the hearing I was shown photocopies of the filed plans in relation to adjoining properties which are registered land, these were only submitted in order to provide accurate plans of the burial ground.

15. The Leigh-Bennett burial ground was included in the parcel of land made the subject of the closure order albeit that it was itself subject to the proviso I have set out above. It was not argued before me that the effect of the closure order was to exclude the Leigh Bennett burial ground from the Order in Council.

16. The expression "*that portion of the Churchyard reserved to Henry Leigh-Bennett*" is not defined. It is not an expression whose meaning is derived from the 1914 Conveyance which contains no reservation. The faculty granted to Henry Leigh-Bennett, however, reserved the land as a burial ground to him, his family and successors, exclusive of all others. This is the reservation that is there referred to.

17. The proviso imports a discretion permitting burial but the closure order does not expressly identify the person in whom the discretion is vested. When I issued a memorandum and directions on 27 May 2011 in an effort to identify the issues raised in this application, I suggested that it was possible the discretion vested in the person who would have had the right to give permission were it not for the closure order or it may have been Henry Leigh-Bennett or it may be his successors. As consecrated land, the Consistory Court maintained its jurisdiction over the land. In the course of argument, the person in whom the discretion was vested was further narrowed. The respondent contends that interest vested in Henry Leigh-Bennett, then on his death, to members of his family and subsequently to the respondent himself. The applicant argues a more restricted class which, in any event, excludes the respondent.

The 1991 deed

18. On 20 November 1991, Barbara Carew, Julia Croft and E.A. Berthon wrote to Canon Hereward-Rothwell:

> "It is the family's wish to deed to you personally the Leigh-Bennett private burial site in a separate walled enclosure at St Mary's Thorpe. It is the separate freehold possession of the family which freehold we now deed to you for all time and freehold with the benefit of the vacant grave spaces for your personal use."

19. The deed is witnessed and signed by Barbara Carew, Judith Croft and E.A. Berthon describing themselves as "*the three surviving members of the Leigh-Bennett family*". In the case of each of the signatories, an heir or heirs is identified whose signatures also appear to the intent that they renounce their rights over the land.

20. Canon Hereward-Rothwell describes this in his affidavit as a Deed of Gift of "*the burial rights to the Leigh-Bennett Land*". In paragraph 5 of his affidavit he describes himself as the successor to Henry Leigh-Bennett and asserts he does not require a faculty for the construction of the vault and cannot lawfully be asked to remove it and fill the void.

21. It is not contended by the respondent that this document was a disposal of the freehold of the Leigh-Bennett burial ground to Canon Hereward-Rothwell. The freehold of the land had been disposed of by the grant made by Henry Leigh-Bennett of 8 December 1914. The surviving members of the Leigh-Bennett family retained no legal interest in the freehold.

22. In the course of the hearing, I was provided with a family tree in which the descendants of Henry Leigh-Bennett were identified. The respondent contended that Carew/Croft/Berthon are his surviving descendants and that those who countersigned the document are their children and none has been omitted. I do not know whether, at the time, there were any grandchildren. The document of 20 November 1991 expresses itself as being a deed and is in writing and signed by the surviving family members of Henry Leigh-Bennett. Having been executed, it was handed over to Canon Hereward-Rothwell in circumstances where it was intended to be acted upon by him and I consider this to be an act of delivery. I am prepared, therefore, to accept that such rights as the signatories held and which were capable of transfer to Canon Hereward-Rothwell, if any, were transferred to him by the operation of this Deed. Pursuant to the Law of Property (Miscellaneous Provisions) Act 1989, the deed was not required to be executed under seal.

23. After the conclusion of the hearing, I received an unsolicited letter dated 18 October 2011 from Charles Russell LLP, the applicant's

solicitors, commenting on points that had only been raised at the hearing and upon which the applicant had not yet been provided with a full opportunity to comment. As the respondent has not himself had an opportunity to respond, I intend to make no findings in relation to these matters which will prejudice him. I shall confine myself to outlining the respective contentions.

24. The respondent's solicitors had contended that the Carew/Croft/Berthon families were the sole surviving descendants of Henry Leigh-Bennett. The production of the family tree was effected too late for detailed comment. However, it is now said by the applicant:

    a. There was at least one of Henry Leigh-Bennett's children who had survived him but died before the 1991 dead was executed. Her child did not participate in the deed.
    b. Some of Henry Leigh-Bennett's grandchildren survived him but died before the 1991 deed. Their issue did not participate in the 1991 deed.

    I make no findings on these matters. However, for the reasons that follow, I am not satisfied that they are material to the resolution of the issues in the application. I shall approach the matter on the basis contended for by the respondent that the Carew/Croft/Berthon families are the sole survivors of Henry Leigh-Bennett.

The nature of the right

25. It is of crucial importance to ascertain the nature of the right that Henry Leigh-Bennett held during his lifetime and whether it was capable of devolution upon his death. Whilst I am satisfied that Carew/Croft/Berthon are Henry Leigh-Bennett's three surviving descendants, there is no evidence that, by operation of will or intestacy, such interest or property as Henry Leigh-Bennett held in the Leigh-Bennett burial ground was devolved to his surviving family members. Unlike a reservation under the 1867 Act, the one-sixth portion of the gifted land was not capable of statutory assignment. If it was a property right, and fell into the residuary estate, there is no evidence that they derive title through the residuary legatees. Accordingly, the respondent cannot pursue a claim on the basis that, at the time of the grant in 1991, they were the current legal holders of any property rights granted to them by the rules of devolution of Henry Leigh-Bennett's estate.

26. It follows that if the three surviving family members were able to transfer any rights over the Leigh-Bennett burial ground to Canon

Hereward-Rothwell, they were only able to do so because they were directly able to benefit from the faculty that was granted in the 1915. In other words, if the faculty had the effect of not only granting to the petitioner the exclusive right of burial but also identified a class of other persons who should benefit from it, presumably in perpetuity, they held an interest.

27. Whether that interest was capable of alienation by way of a deed or grant is a discreet issue. In order for Canon Hereward-Rothwell to benefit from it, it would be necessary for him to establish that such rights as were created by the faculty of 1915 were capable of transmission to him and that the deed of 1991 permitted him to fall within the category of persons described as successors so that, without the grant of a fresh faculty, he falls into the class of persons able to derive an exclusive right of burial in the Leigh-Bennett burial ground.

28. A faculty is a grant of permission to do something in relation to consecrated land which, were there to be no permission, would be unlawful. The licence is sought by a petitioner and there will be many cases where the permission granted is personal to the petitioner, thereby permitting him but no other to carry out the work for which permission is sought. When a petitioner now seeks a faculty for a grave reservation space, it is clear from the nature of the application that the right of burial in the space reserved is a permission granted to him and him alone. There would be little point in asking questions about his links with the parish, whether he has relatives buried in the churchyard and whether he is on the electoral roll if, once granted, he had the right to dispose of the permission granted to him to another, free of any restraint by the Consistory Court.

29. Where, however, the incumbent and churchwardens petition for a faculty to carry out works upon the Church, it will usually be on behalf of the PCC and it will usually be persons acting on the PCC's behalf who will perform the works. In other words, it is the works to be carried out on the consecrated land that are the subject matter of the license contained in the faculty although the terms of the faculty may require the works to be carried out by a named individual. I would not, therefore, restrict the right or licence granted by a faculty to no more than a right personal to the petitioner. The persons who are entitled to benefit from the permission granted are not limited except by the terms of the grant, express or implied.

30. I therefore see no objection in principle to a faculty permitting the petitioner to be buried in a grave-space reserved for him or anybody he chooses to name if that is the intention of the Consistory Court when the faculty is granted. It is essentially a matter of construction as to

who has the benefit of the permission that is the principal subject matter of the faculty. If a faculty, on its true construction, intended to grant permission to the petitioner and his direct descendants I see no reason why a direct descendant should not be able in his own right to claim the benefit of the faculty and, if necessary, prevent others from infringing his right.

31. Rights of sepulture are rights of property, in some ways analogous to easements, see Newsom, *Faculty Jurisdiction of the Church of England* (2nd edition), p.171. Dr Smith, on behalf of the respondent, relies upon this passage in paragraph 9 of his skeleton argument as establishing that a right to a grave space is capable of assignment but I would not derive such a principle from this passage. An easement is a right over land belonging to another and adverse to the owner's unrestricted enjoyment of his own property. A right of way, for example, over neighbouring land may be acquired by the owner of adjoining property but the benefit of a right of way may also be enjoyed by persons with no interest in the surrounding land. Whilst the purchaser of the dominant land will acquire the benefit of the easement, the benefits of which are to this extent assigned on transferred, I would not regard it as possible that the benefit of the easement could be severed from the dominant land and sold as a separate right of property.

32. As, however, it is a right to use property belonging to another; it is apparent that, if there were no such right, the use would be unlawful. The similarity between a faculty and an easement is, to this extent, accurate but it is not otherwise helpful. I would not regard Newsom's assertion that a right of sepulture as being analogous to an easement as shedding any definite light on whether a grave-space is capable of assignment. The issue is not determined by the nature of the right of sepulture; rather, it is determined by the grant from which that right is derived.

33. It is in this context that cases such as the Perivale Faculty and the Hendon churchyard case should be understood. In Perivale - De Romana v Roberts [1906] P 332 (Ch. Tristram), a non-parishioner sought a confirmatory faculty for the exclusive grant of the reservation for herself, her executors, administrators and assigns of a portion of ground in the parish churchyard as a place of burial. The petitioner had paid to the incumbent a monetary consideration for the reservation. The effect of the reservation was not seriously to diminish the space for burial of parishioners who might wish to make use of their own right of burial. The Consistory Court granted the faculty but made an order that no such further grants should be made.

34. There are several principles that can be derived from this case. First, the right of burial did not arise from the transaction which took place between the incumbent and the non-parishioner. It arose as a result of the grant of the confirmatory faculty thereby rendering lawful what might otherwise have been unlawful. The discretionary power of the Consistory Court is not limited and where the incumbent has acted in a way which might not otherwise have been in accordance with ecclesiastical law, the decision of the Chancellor to sanction the arrangement struck a balance between the limited effect the arrangement had upon the burial rights of parishioners who might otherwise have been jeopardised by grants in favour of non-parishioners and seeking to honour an arrangement that the incumbent and the grantee had entered into in all innocence. However, the order that there should be no further similar arrangements, indicates that it was a practice the Consistory Court did not wish to perpetuate or encourage. Accordingly, the Perivale case does little to illuminate the rights of grantor and grantee inter se but illustrates the scope of the Chancellor's jurisdiction in granting a faculty.

35. In the Perivale case, a significant feature is that the arrangement the Consistory Court was asked to sanction (and which was part of the agreement reached between the rector and the grantee) was that the space reserved for the petitioner was for the benefit of

> " ...her, her executors, administrators and assigns in perpetuity"

36. It is clear that the right of burial vested in the grantee and upon her death to her personal representatives though not of course for their personal use. Inferentially, the right was to devolve according to the will or the law of intestacy and this would be affected by an assignment. It is also apparent that there was no express limitation upon those who might be an assignee. As a matter of construction, there was no restriction upon an assignment conferring the benefit upon a third-party. Consequently, whilst the nature of the faculty was very wide, its scope had already been determined by the arrangement made between the incumbent and the petitioner and somewhat grudgingly sanctioned by the Consistory Court as an arrangement that should not be repeated. It demonstrates little more than the wide discretion vested in the Chancellor.

37. Furthermore, it is apparent that the grant was construed by the Consistory Court as requiring each of the individual grantees to seek a confirmatory faculty to make good their individual right to the grave space. Whilst the faculty permitted an assignment, it was not one that could be affected without, in each case, the sanction of the Court. It is not altogether clear to me on what basis the Consistory Court decided,

having conceded the petitioner's right to assign part of his interest to others, that an assignee required a faculty. Nor is it clear whether the right to assign was vested in the petitioner and her personal representatives or whether her assignees themselves had a right of assignment. The arrangement between the incumbent and the petitioner is silent on this.

38. The Hendon churchyard case (1910) 27 TLR 1 concerns the purchase from an incumbent and churchwardens of a plot in the churchyard on payment of a premium in favour of a husband. Once again, the arrangement was subject to a faculty being granted. It is apparent that the faculty was sought at the request of the petitioner's wife. The husband then purported to transfer his right in the grave spaces to his wife. The Consistory Court decided that the wife was entitled to have the transfer in her favour confirmed by faculty. Consequently, the wife's right to the burial space was derived from the grant of the faculty and not the arrangement made between the vicar and the husband or the subsequent arrangement made between the husband and his wife. It is possible to infer from the limited report that although the husband was the purchaser, it was a purchase for the benefit of himself and his wife. Hence the incumbent and churchwardens were not in a position to dispute the wife's right to the transfer; indeed, they may have consented to it. Similarly, the transfer of the benefit of the arrangement was made with the husband's consent. The entire arrangement, however, was subject to the Chancellor's granting the faculty.

39. In the present case, we are not concerned with the power of the Consistory Court to sanction the arrangement that has been made between members of the Leigh-Bennet family and the respondent because no confirmatory faculty has been sought. In contrast, the respondent argues that his rights have already been determined by the faculty granted in 1915 and that no further faculty is necessary.

40. Thus, neither the Perivale case nor the Hendon churchyard case are directly on point. Both determined that, provided the Consistory Court acts within the lawful scope of its jurisdiction, the Chancellor is able to direct that the benefit of a faculty may be held by any person identified as being its beneficiary.

41. Both support the view I have taken that the issue in this petition focuses upon whether, on its true construction, the faculty granted on 9 April 1915 reserving to Henry Leigh-Bennett "for him and his family and successors exclusive of all others" permits Canon Hereward-Rothwell to enjoy the benefit of the reservation as being a successor to Henry Leigh-Bennett and his family within the meaning of the faculty.

42. There are, however, ordinary rules that have to be applied in construing the nature, scope and extent of the permission granted by a faculty. There has to be certainty as to those who are entitled to enjoy the benefits granted by the faculty. Whilst this may be seen as a legal principle in its own right, it is also a matter of practicality. If a person asserts that he has a legal right of burial in a particular place, the burden rests upon him to establish it on balance of probabilities and if he fails to do so, he will have no such right.

43. There are a number of uncertainties built into the class of persons who are expressed as having the right of burial by virtue of the 1915 faculty. Whilst there is no restriction in principle upon a faculty granting the right of burial to the petitioner and members of his family, there is no definition of who falls into the category of a member of his family. I would have no difficulty in finding that Henry Leigh-Bennett established the right for his remains to be buried in the Leigh-Bennett burial ground and that his wife, as a member of his family although only related to him by marriage had a similar right. So, too, his children as members of his family in the descending line.

44. As a simple matter of construction, I would also include the parents of Mr Henry Leigh-Bennett as members of his family in the ascending line. So too, perhaps the parents of his wife. There are, however, degrees of relationship which would not fall within the grant. During the lifetime of Henry Leigh-Bennett, the difficulty may be averted by the fact that the discretion to choose was vested in him.

45. There are greater difficulties as to who is permitted to benefit from the grant at the death of Henry Leigh-Bennett. Although the faculty makes reference to Henry and his family, I would not regard it is likely that his family would include his descendants whom he did not know and who had not been born at the time of his death. Whilst Queen Elizabeth II is the direct descendant of Queen Victoria, it would not accord with ordinary language to claim that she is a member of Queen Victoria's family, although successor she is. If, after his death, Henry Leigh-Bennett's son had married, I would not regard the new wife as a member of Henry's family, far less her parents. Such persons more readily fall within the definition of his successors.

46. There is therefore a class of persons who would not readily be described as a member of Henry Leigh-Bennett's family but are nonetheless his successors. They may be described as successors of the body. They become successors by birth or marriage and their rights are not derived from title. They do not need to establish their right by

documentary evidence showing the devolution of property rights to them.

47. I would not regard it as remotely likely that, as a matter of construction, successors would include beneficiaries under the appellant's will or his intestacy although they may be successors in the sense of succeeding to his estate. I would discount the possibility that Henry Leigh-Bennett disposed of his interest in the Leigh-Bennett Burial Ground by will, absent production of the will to that effect. If the right fell into his residuary estate, it would be impossible that the right devolved upon a legal entity other than a person. It could not, for example, become the property of a charity or a limited company. More importantly, Carew/Croft/Berthon have failed to establish that they - and they alone - are the legatees of Henry Leigh-Bennett, that is, the sole persons to hold title to the proprietary interest in the right of burial granted to Henry Leigh-Bennett.

48. Herein lies the respondent's difficulty: he cannot claim to be a successor of Henry Leigh-Bennett's body in the sense I have identified above; nor can he claim to succeed to the title of this part of Henry Leigh-Bennett's estate. This is the anomaly at the heart of the 1991 conveyance. It confuses the devolution of the benefit of the faculty through successors of the body and successors of his estate. It purports to be a hybrid process of devolution. Carew/Croft/Berthon establish their right as successors of the body but that right is independent of the devolution of proprietory rights. Although they seek to alienate the right of burial by deed, the right devolves upon the successors of Henry Leigh-Bennett. A successor of Henry Leigh-Bennett has the benefit of the faculty and they are powerless to prevent a successor enjoying that benefit. They have no power of alienation. The deed is ineffective to do this. Those who purported to transfer the right of burial in the 1991 deed claim to have the right to do so as descendants but effect the transfer as proprietors. The two roles are distinct and cannot be conflated in the way suggested.

49. Even if I were wrong, I am satisfied that the right of burial, although a specie of property, was not directed to be a right enjoyed by Henry Leigh-Bennett, his executors and/or administrators and assigns and capable of devolution by will or intestacy or transfer. Rather it was a personal right of enjoyment to Henry Leigh-Bennett, his family and successors as I have identified them to be and the faculty does not permit those outside the circle of beneficiaries to enjoy the right of burial. Indeed, it would be curious if the Leigh Bennett Burial Ground was intended to be enjoyed by those with no link with the family, save in contract.

50. In paragraph 6 of his affidavit, Canon Hereward-Rothwell relies upon burials taking place between 1925 and 1969 and the placing of the memorials over the graves as an acknowledgment of the right of burial.

51. I am uncertain as to the evidential value of burials that have taken place between 1925 and 1969. It seems fairly clear that, following the closure order, neither the incumbent nor the PCC would have considered themselves in a position to regulate those who were to be buried in the Leigh-Bennett burial ground. If the state of knowledge of the surviving members of the family is anything to go by, they were suffering from a profound misunderstanding of the nature of the family's interest in the Leigh-Bennett burial ground. I would not regard it is likely that the incumbent or a member of the PCC would have questioned a burial taking place even as recently as 1969 in the Leigh-Bennett burial ground. There is no evidence that the incumbent or members of the PCC were conversant with the contents of the grant of 1914 and the grant of the faculty in 1915. Indeed, for the purposes of this litigation, considerable efforts have been made to search the archives to find documents which were not readily to hand.

52. Even if recent burials were of evidential value in establishing a right of burial beyond that of Henry Leigh-Bennett and his immediate family, they do not establish that those buried were not his successors. Mr Fookes, on behalf of the Archdeacon, has described the burials occurring between 1915 and 1969. Henry Leigh-Bennett died on 17 June 1951 and, prior to his death, his brother, son and his parents-in-law were buried in the Leigh-Bennett burial ground. Thereafter, his wife and sister were buried in 1969 and 1967 respectively. I would regard them all as members of his family but if his death in 1951 marked a turning-point, they are capable, without linguistic distortion as being described as his successors. They do not, therefore, advance the respondent's case that he, too, may be classified as a successor.

The Archdeacon's letter of 23 September 2008

53. In a letter of 23 September 2008, the Archdeacon of Dorking wrote to Canon Hereward-Rothwell:

> "We also talked around the sensitive subject of your earthly resting place, in due course and we pray not too soon. I conveyed to you two views on the subject. First, the DAC seem to be concerned about precedent and implications for your successors. Secondly, the Registry stated that the interment of your remains beneath the church floor would have to be at the request of your executors hence after your death, with the agreement of the incumbent at the time, and at the discretion of the Chancellor. We also realised as we talked that it will be most unlikely that

> permission would be granted for your wish that you and your mother's remains should be interred in the same place, if that was to be within St Mary's. Michael, we seemed to come to the conclusion that the earlier idea of a grave in the private space next to the churchyard, already consecrated, that you as incumbent own, is the best of all the options."

54. In paragraph 7 of his affidavit, Canon Hereward-Rothwell relies upon this letter as acknowledging his ownership of the land and his right of burial, although he also now acknowledges a faculty should have been obtained for the marble memorial and proposes applying for a confirmatory faculty.

55. I do not regard this letter as creating rights that did not otherwise exist, nor of preventing the Archdeacon from pursuing this application. If the Archdeacon misunderstood the legal or factual position it was only because he had not the material now before me to describe it accurately. If he was labouring under a misapprehension, it was fuelled in part by what Canon Hereward-Rothwell had told him. I see no basis upon which the legal rights arise either by estoppel or by operation of any legitimate expectation engendered by the letter. The statements made appear to be statements of fact and not law. It contained no representation as to the law on which the respondent relied. It neither purports to grant the respondent a faculty, nor was it capable of doing so without compliance with the requirements for the granting of one.

56. In these circumstances, I have reached the conclusion that the respondent does not fall within the class of persons referred to the 1915 faculty as a successor of Henry Leigh-Bennett and takes no benefit under it.

The role of a confirmatory faculty

57. The next issue to determine is whether the construction of the vault and the slab above it is capable of being permitted by faculty notwithstanding the closure order to the effect that burials in the churchyard attached to St Mary's Thorpe were *"to cease forthwith and entirely"*. The entire churchyard including the Leigh-Bennett burial ground is subject to the closure order but certain burials are excluded from the Order in Council:

> "Provided that burials may be allowed in that portion of the Churchyard reserved to Henry Leigh-Bennett..."

58. The burial of the respondent will take place in that portion of the Churchyard not *reserved to* Henry Leigh-Bennett but subject to the

grant of faculty in favour of him his family and successors. Yet the respondent does not fall within the category of those permitted burial there. It would have been an easy matter to exclude the Leigh-Bennett burial ground from the closure order but this was not done. The churchyard including the Leigh-Bennett burial ground is subject to the general prohibition preventing burials. Certain burials are exempt from the general prohibition but not the future burial of the remains of Canon Hereward-Rothwell. The proviso is not effective to include burials within the Leigh-Bennett burial ground which are not permitted by the grant of the faculty to Henry Leigh-Bennett. The effect is that the future burial of the respondent's remains is prohibited by the closure order. A faculty cannot, therefore, permit what the Order in Council has rendered unlawful.

59. In these circumstances a petition for a confirmatory faculty is bound to fail. It follows that the applicant is entitled to a declaration that the works carried out by Canon Hereward-Rothwell are unlawful. Were I to be wrong, the grant of a confirmatory faculty would require the petition to be treated in a normal manner and I would benefit from the advice of the DAC. I am in no position to express an opinion as to the likely outcome of such a petition and it would be wrong for me to do so.

The Disused Burial Grounds Act 1884

60. Mr Fookes also submitted that the construction of a brick vault, albeit subterranean, is prohibited by the Disused Burial Grounds Act 1884. He referred me to In re St Peter the Great, Chichester Con Ct [1961] 1 WLR 907, as establishing as I accept, that the creation of a brick built vault and the placing upon it of a marble slab amounts to the construction of a building and therefore capable of falling within the prohibition contained in the Act of 1884.

61. Section 3 of the 1884 Act, as substituted by paragraph 17 of Schedule 2 to the Statute Law (Repeals) Act 1993 prohibits the construction of a building which is not a church or an extension to it in a disused burial ground. 'Disused burial ground' means a burial ground which is no longer used for interments, whether or not the ground has been partially or wholly closed for burials under the provisions of a statute or Order in Council. As originally enacted, the Disused Burial Grounds Act 1884 only applied to burial grounds which had been closed by Order in Council although this was extended in 1887 to include burial grounds no longer used for interments whether or not closed by Order in Council.

62. In this regard, the Archdeacon seeks to distinguish between the right of sepulture and the construction a substantial subterranean chamber upon which is placed a covering marble slab. Mr Fookes submits that it is the construction of the vault itself which is prohibited by the 1884 Act whereas it is the burial that is prevented by the Order in Council.

63. There is, I find, a certain circularity in the applicant's argument to the extent that if, pursuant to the faculty granted in 1915 and the proviso to the Order in Council, a particular burial is permitted in the Leigh-Bennett burial ground, the effect of the closure order is suspended in relation to that burial and with it the prohibition contained within the 1884 Act against the creation of a brick vault. Once, however, the closure order prevents the burial of the future remains of Canon Hereward-Rothwell, the vault itself created in contemplation of it falls within the prohibition set out in the 1884 Act.

64. The decision of Petchey Ch in the St Dunstan's Church, Cheam [2011] PTSR 146 whilst assisting in setting out the relationship that exists between the Burial Act 1853 and the Disused Burial Act 1884, as amended, was concerned with a churchyard that was not subject to a Closure Order under the 1853 Act and the issue was whether the churchyard in question was closed in the sense that it was no longer used for the purpose of interment when it was used for the burial of cremated remains. The Chancellor found that the 1884 Act did not apply. In the case before me, were it not been for the Order in Council, I would not have found that the Leigh-Bennett burial ground was no longer used for interments, notwithstanding the fact that the last had taken place as long ago as 1969. This is a case of a right of burial, created by faculty, and without limitation in time, and where there is no evidence of any intention on the part of those who have the benefit of it to surrender their rights. The deed of 1991 was a reassertion of that right, however ineffective I may have found it to be in its principal purpose. Since there is space in the burial ground for future family burials, I would require much more positive evidence that it is no longer used for interments before finding that the Disused Burial Grounds Act 1884 prevented any future ones.

65. In view of the findings that I have made, this submission does not materially advance the matter.

The making of an order

66. Having made these findings, it remains for me to determine how the application should be reflected in an order. The Archdeacon seeks a restoration order for the removal of the brick vault and filling in the void and the removal of the memorial erected over the vault. There is

no evidence that the construction of the vault was carried out in bad faith. I am satisfied that it was done in the genuine belief that it was lawful although the respondent accepts that the memorial slab placed over it required a faculty. I do not have it in mind to require the respondent to carry out unnecessary work in removing the brick vault. Its removal is likely to be costly and, apart from benefiting the *amour propre* of guardians of the Disused Burial Grounds Act 1884, will serve no proper purpose. The void must, of course, be in-filled with soil, if only to avoid a safety hazard. Once the ground is turfed over, there should be no visible impact.

67. Subject to argument, I see no alternative but to direct that the memorial slab is removed but I wish to ensure that this is carried out in a manner that is as inexpensive and as convenient as it may be to the respondent. I propose to permit the parties an opportunity to consider how best this be done. At this stage, I withhold exercising my powers under section 13 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 for the making of a restoration order or the imposition of an injunction pending proposals from the respondent. If these can be done with the consent of the Archdeacon, so much the better. I direct that the respondent makes proposals to put this judgment into effect in the way that I have indicated. The proposals should be served and filed within 28 days and the applicant provide a response within 21 days thereafter. If there is no need to conduct a further hearing, I will make such a further order as appears necessary. Otherwise, I propose a hearing in chambers to determine the appropriate form of the order.

Costs

68. Under Rule 11 of the 1992 Injunctions and Restoration Orders Rules, the Consistory Court has the power to make a costs order in respect of any application for an injunction or restoration order. In view of the findings that I have made, the respondent is to show cause why he should not bear the costs of these proceedings. This should be done in writing within 28 days. Liberty to re-new the consideration of an order for costs to a date to be fixed in chambers.

ANDREW JORDAN
CHANCELLOR
01 November 2011