

**IN THE CONSISTORY COURT OF THE DIOCESE OF LINCOLN  
PARISH OF LINCOLN ST GILES  
CHURCH OF LINCOLN ST GILES**

**IN THE MATTER of a Petition to sell the Vincenzo Damini oil study painting of the Ascension, formerly from the City Corporation Church, St Peter-at-Arches, Lincoln (demolished), then located within the parish church of St Giles, Lincoln but currently displayed in the Lincoln Cathedral Library**

**JUDGMENT**

1. The painting with which I am concerned measures 3' by 2' 9". It is an oil painting. The subject of the painting is the Ascension. Apparently it is described on the back of the canvas as "a cartoon, being a design for an altar piece for the Church of St Peter-at-Arches, painted in 1728 for the approbation of the Mayor and Corporation of Lincoln".
2. When the Church of St Peter-at-Arches was demolished the scheme provided that the font communion table, sacramental plate, bells, organ and other furniture and fittings from the church, or such of them as the Bishop should select were to be transferred to one or other of the parish churches of the new united benefice at the discretion of the Bishop, or be transferred to any other church within the Diocese that the Bishop might select and that any articles, not so transferred or appropriated (apart from certain sacred items) should be sold and the proceeds added to the fund arising from the sale of the site and materials of the said church.
3. There is no evidence to suggest other than that the picture was transferred from St Peter-at-Arches into storage and thence to the new church of St Giles when it had been built. It is said to have been in the possession of St Giles since its opening. I have been provided with a statement by Mrs Dorothy Parker a member of the PCC of St Giles from 1937 for many years, and its

secretary for over 27 years which describes the church receiving this painting along with other items before its opening in April 1936. On the balance of probabilities I am quite satisfied that this painting was transferred there at the discretion of the Bishop and in accordance with the scheme. Legal title therefore vests in the Churchwardens of the Parish of St Giles. They of course hold the painting on trust for the parish.

4. This is not the first time that a petition has been presented to the court to seek a faculty for the sale of the painting. In 1991 a petition was presented by the then Vicar the Revd Edward Burnley Barlow and his churchwardens. The painting had then been valued at £20,000 by Henry Spencer & Sons, Valuers of 42 Silver Street, Lincoln.
5. The then DAC were of the view that as the picture had been in St Giles and its predecessor St Peter-at-Arches for some 260 years and that the picture was paid for, or partly paid for, by the Lincoln City Corporation, it should remain in the City of Lincoln, if possible in the church, and not be sold on the open market.
6. The then Chancellor, sought the views of the Council for the Care of Churches. Dr Thomas Cocke reported on their behalf on 13<sup>th</sup> November 1991.
7. He gave a history of the painting, which he described as a “modello” (c1728) by Vincenzo Damini of the scheme of the chancel of the demolished church of St Peter-at-Arches.
8. The important features of that history as described by him were that in the 1720s Lincoln began to emerge from a long period of decline and commissioned various important ecclesiastical works. One was the erection of the west screen wall in the Cathedral by Gibbs. Another was the painting of four monumental figures of mediaeval bishops in the north east transept of the Cathedral, where their tombs had lain before destruction in the Civil War. The artist of those pictures was Vincenzo Damini, one of a number of itinerant Venetian artists in England at that time. Whilst in Lincoln Damini was chosen

to paint the apse of a new church, St Peter-at-Arches. His “modello” was, apparently unusually, preserved in the church. There it remained until the 1930s when the church was demolished and its materials were in part re-used to build the new church of St Giles which served a suburban housing estate. Damini’s “modello” also survived and was transferred to St Giles.

9. In Dr. Cocke’s opinion it would have been a great loss if the picture left Lincoln. He wondered whether the painting could be permanently loaned to the Lincoln Art Gallery.
10. The PCC received that report and made enquiries of the Art Gallery and the City Council as to whether they would be able to receive the painting for display in return for some contribution towards the needs of the parish. The Art Gallery replied that they would accept the painting as an outright gift “but due to the nature of the subject it seems improbable that that the work would appear on public display other than for a temporary exhibition”. The Chief Executive of the City Council replied that a grant in token of sale would be unlikely to be forthcoming “in view of the substantial cut-backs”. The PCC also enquired whether the Council for the Care of Churches would make a substantial grant towards providing for the protection of the picture if it were to remain in the church and/or make a substantial grant towards the repair of the church in lieu of them selling it.
11. The Parish was not prepared to take this matter to a Consistory Court hearing which would undoubtedly have been required at that time and so withdrew the petition.
12. In 1996 a further petition was presented. This time the petitioners sought a faculty to deposit the picture in Lincoln Cathedral Library on temporary extended loan. The reasons for the petition were:
  - \* For the better protection and security of the painting;
  - \* Accessibility for viewing;

- \* The PCC of St Giles wished to be relieved of the responsibility for the preservation and safe keeping of the picture.
- 13. The Council for the Care of Churches were consulted and stated that they were happy for the painting to be deposited in the Medieval Library of the Cathedral on temporary extended loan.
- 14. The DAC recommended the proposed course of action subject to a properly drawn legal agreement being entered into to cover various issues they set out in their Certificate. Interestingly they added a rider expressing their concern that “the Citation should not be displayed for all to know where a valuable item (a) was, and (b) was going to be subsequently”.
- 15. An Agreement was drawn up and the faculty was granted.
- 16. In 1997 a further petition was presented “to undertake conservation work on the Damini oil sketch”. The proposed work was set out in a report from Pauline Plummer. The Council for the Care of Churches considered the proposals acceptable and made a grant of £1000 towards the cost of the work. A faculty was granted and I assume that the grant was paid and the work was done.
- 17. A further petition has now been presented once again seeking a faculty to sell the painting. The painting has been valued by Christie’s at £15-25,000. In the absence of many sales of Damini’s work, they base their valuation on prices obtained from sales of works by Damini’s master - Giovanni Antonio Pellegrini. Christie’s have said that in any sale they would make every effort to find a buyer with connections to the city of Lincoln in the hope that the sketch might be loaned or ultimately bequeathed back to Lincoln.
- 18. The DAC oppose the sale. They say in their Form 1 Certificate that they are mindful of the *Tredington* judgment which established the presumption against removing / selling objects from a church unless there was a very convincing argument in favour. They say that a sale to boost parish funds is

not a sufficient argument. They add that they have seen no Statement of Significance or of Need. They noted that the painting was thought to be the only record of the interior decoration of the apse and ceiling of the now demolished church of St Peter-at-Arches. I have also seen the minutes of the DAC discussion that led to them making that decision.

19. The Council for the Care of Churches, at my request, have again been consulted. Their report comes from Jude Johncock. Having described the history, she reverts to the issue of ownership. She draws to my attention that the 1931 scheme provided as set out above for the transfer of furnishings and fittings to be dealt with as I have set out above, but goes on to say that “the directions also record that ‘register books of baptisms marriages and burials and other records and muniments’ should be transferred to Lincoln St Martin. As the “modello” was not recorded in the inventory of furnishings from St Peter-at-Arches and could more accurately be described as a record than a furnishing, there may therefore be continuing difficulties over ownership”.
20. I must say that I am unimpressed by that argument. I have already stated that I accept the evidence set out in the statement of Mrs Parker. On the basis of her evidence that this item was transferred to the church prior to its opening I conclude that the view that was then taken was that this picture was a furnishing, perhaps of some value, rather than a ‘record or muniment’. I do not believe that there is any issue about ownership and I consider arguments to the contrary are specious.
21. Mrs. Johncock advises me on behalf of the Council that the painting was of considerable historic and artistic interest. She says that the Council repeats its previous advice that the “modello” is a significant and unusual part of the local church history of Lincoln as well as of church art nationally.
22. She also states that whilst the Council appreciates the needs of the parish it did not think that the current circumstances constituted a financial emergency. However if I were minded to grant a faculty then a restricted sale to a public institution in Lincoln would be appropriate.

23. The “current circumstances” to which Mrs. Johncock alludes and which form the background to and basis for the petition are as follows.
24. St Giles is a very impoverished estate and the parish is a UPA Parish. The area has a notorious reputation for crime and drugs. The church has many needs including a number of immediate demands upon its very limited resources. A letter from the vicar informs me of the £25,000 required to renovate “sagging windows”, £2,000 to sort out gutters and downpipes, and £1,500 to repair their historic organ (1724, enlarged by Father Willis). They also have commitments to pay their parish share in the region of £8000 p.a. It is worthy of noting that although they have struggled they have paid their share in recent years. Finally they would like to develop their plant in partnership with the Community Foundation so that they can better serve the local community.
25. In considering this matter both the DAC and the Council for the Care of Churches had in mind the decision of the Court of Arches in *re St Gregory's Tredington* [1972] Fam 236. The DAC observed on the Form 1 that “The committee was mindful of the Tredington judgment which established the presumption against removing / selling objects from a church unless there was a very convincing argument in favour.” The minute of the meeting records more detail about what was said by whom but adds little to the statement of principle endorsed by the Committee and recorded on the Form 1.
26. The Council for the Care of Churches do not specifically refer to *Tredington* but use the language of financial emergency which they do not think the present circumstances constitute.
27. I considered *Tredington* in *re St John the Baptist, Halifax* (19<sup>th</sup> December 2000). In that case I said that:

“It is widely accepted that in *re St Gregory's Tredington* [1972] Fam 236, the Deputy Dean of the Arches, Chancellor G. H. Newsom QC, set out the principles upon which a court should approach the question as to whether to grant a faculty for the sale of communion vessels.

Those principles have since been applied not only to communion vessels but to any item which has an historical or artistic value.

The headnote states:

“Held, allowing the appeal, (1) that the consistory court had jurisdiction to grant the faculty sought and, the flagons being redundant and there being an emergency in the finances of the parochial church council, the faculty would be granted.”

In a recent case, *in re St Matthew, Hutton Buscel* [2000] 5 ELJ 486 Chancellor T H Conningsby QC, when considering a petition for a faculty to sell a silver cup formerly used as a communion cup, said, referring to the *Tredington* case (and citing the All England Law Report B [1971] 3 AER 269.)

“The Deputy Dean said that in order to obtain a faculty in such a case ‘some good and sufficient ground must be proved’. He referred to a statement of the law by the 19th-century ecclesiastical jurist Sir Robert Phillimore that “one good and sufficient ground would be that the item is redundant”, i.e. that it is no longer capable of being used for its intended purpose. In the *Tredington* case the flagons were redundant because the intended use was to provide large quantities of wine for the occasional administrations of holy communion which occurred in the 17th century, whereas by the 19th-century only small quantities of wine were needed.

On the basis of redundancy alone (if that were legally sufficient) it would appear that there was a proper basis for allowing the appeal in the *Tredington* case without any further requirement. But the Deputy Dean went on to suggest that it is also necessary to prove that a financial emergency exists in the petitioning church (see p.273C of the judgment). He found that there was an immediate need for £3,150 to pay for repairs and took that finding into account in allowing the appeal. Today the equivalent sum would be about £20,000. Mr Mackrell argued that the Deputy Dean may have gone further than was necessary in requiring both redundancy and a financial emergency as in all the reported cases prior to 1971 the test was merely a ‘good and sufficient reason’ and Sir Robert Phillimore said that redundancy was enough. But I will apply the full criteria as stated in the *Tredington* judgment.”

In the *Tredington* case the Deputy Dean said that there were four questions that he had to answer. Firstly whether the Chancellor had jurisdiction to grant a faculty for a sale; secondly whether the Court of Arches, on appeal, has power to substitute its own discretion for that of the Chancellor; thirdly whether the court is required to protect communion vessels from profane or secular use; fourthly whether in that case the Chancellor had been right in the exercise of his discretion or not.

In relation to the first question he began with a matter that has been raised by the PCC in this case. They have on more than one occasion written to the Diocesan Registrar, questioning

why it is necessary to obtain a faculty, stating their belief that the churchwardens are trustees of the cups and therefore have an absolute right to deal with them as they see fit. The Deputy Dean at page 240, having cited Sir William Blackstone (1778) and Sir Robert Phillimore (1873), said:

“These passages recognise that while church goods are not in the ordinary way in commerce or 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”.

There has never been any doubt that church property, the legal title of which is vested in the churchwardens, cannot be disposed of without the authority of the Bishop granted through his Ordinary, the Chancellor, by means of a faculty issued through the consistory court.

The Deputy Dean then went on to deal with what must be established if a faculty is to be granted, he said:

“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 is redundancy. It is not an essential ground or the only possible ground. But some special reason is required if goods which were given to be used in specie are to be converted into money. Like all faculties, of course, this kind is a matter for the Chancellor's judicial discretion, and the evidence will mainly be directed to helping him with its exercise.”

In that case as far as the facts were concerned the Deputy Dean said (pages 241-242)

“It is clear that the flagons are unnecessary, the Church having other sufficient plate. Besides, they are too valuable to be brought to the Church at all. The question is whether there is a financial emergency.”

In relation to that last matter the Deputy Dean found that there was a financial emergency. However he found that the Chancellor's conclusions in relation to several of the circumstances surrounding that emergency were flawed and could not stand. He then said at page 244

“but I must still consider whether I now ought to exercise my own discretion differently”.

He then went on to consider the advice he had received from the DAC and the CCC. Having weighed that advice and found it wanting he concluded (page 245)

“They (ie the cups) are in my judgment unnecessary and the law allows for sale, subject to conditions which I have described.”



The principles which underlie the judgment of the Deputy Dean in *Tredington* appear to me to be as follows

- (i) Goods belonging to a church, the legal title of which is vested in the churchwardens, cannot be sold by them, except with the consent of the PCC and with the authority of a faculty.
- (ii) To obtain a faculty some good and sufficient ground must be proved.
- (iii) There are a number of grounds which might amount to “good” grounds, ie amounting to “some special reason”. An example is redundancy, but that is not an essential ground nor is it the only possible ground.
- (iv) The ground must not only be good but it must also be sufficient. That means that when considered against all the other material before the court, it is of sufficient weight to persuade the Chancellor that a faculty should issue.

This means that the Chancellor will consider all the evidence surrounding the proposed sale, he will consider the reason for the sale, the proposed use of the money to be raised, the historical or artistic significance of the item, and then exercise his discretion in deciding whether a good and sufficient reason has been proved. He will not be fettered in the exercise of that discretion by requiring in addition to redundancy, evidence of “dire financial need in connexion with the repair of the church building which could only be resolved by the sale of the plate” (CCC letter of 17th November 1999), but will consider all the evidence and then exercise his discretion. Very often, he will be considering questions of financial need, since parishes do not usually consider selling historical items unless they are in need of cash. In those cases he will have to weigh the need of the parish against the loss measured in terms of historic, artistic or cultural value.

In the course of his judgment, the Deputy Dean illustrated how the balance differs in different cases. At page 243, when considering disposal by way of gift, he described how he had granted a faculty for “modern and only fairly valuable communion plate, proved to be unnecessary, to be given to an overseas bishop for use in his diocese”. He then contemplated (page 244) the possibility of unnecessary plate being sold “so that the proceeds may be given to some charitable and religious object” adding that “such a case must be considered when it arises”.

Quite clearly, the more valuable the plate, particularly having regard to its artistic and historic value, the weightier will need to be the reason, before the court in its discretion concludes that it is a sufficient reason in all the circumstances to allow a sale.

These are never easy matters to decide. They fall to be decided according to the Chancellor's discretion, judicially exercised.”

28. That was how I understood the *Tredington* judgment then and that is how I still understand it.
29. I said that “Those principles have since been applied not only to communion vessels but to any item which has an historical or artistic value”. Of course in this case I am not dealing with a communion cup but with a painting which came into the possession of the church in the circumstances which I have described above. This was not an item that was given for a particular regular usage in the way that was intended with a communion cup. The painting was given no doubt for an historical reason – it was the “modello” of the apse of the church whose death had given birth to St Giles, and so it would be a reminder, as would be any other artefacts that came from St Giles of the origins of the church. It was no doubt also given in part for decorative purposes.
30. I need to consider whether this is a matter that I can deal with without holding a Consistory Court. I have seen the painting in situ in the Cathedral Library. Nothing turns upon a physical examination or viewing. The arguments having been rehearsed now on several occasions in print are well formulated on each side and will not change nor in my judgment will they improve by being presented orally. The law is in my view clear and I have set it out above. I am therefore satisfied that I can deal with this matter without holding a Consistory Court, the cost of which would inevitably fall on the Petitioners.
31. I shall therefore rehearse the arguments, although to an extent I have already done so. I shall then attempt to balance the arguments and come to a decision.

**The reasons that are now given as justifying a sale are:**

32. There is no further purpose served in keeping this painting; the church cannot afford to display it as it will require enhanced security; that is beyond the current budget of the church and others have not in the past felt able to contribute to this cost in order to keep the painting in the church.
33. Consequently the painting is no longer available for public viewing; although it is available for those who know of its existence and location, it is no longer readily available to the people of Lincoln let alone the wider community.
34. There is no likelihood that it will be displayed in a more accessible way in the foreseeable future.
35. As a record it can be reproduced digitally and in other ways and thereby it can be made more available; the original, unlike the church it was in part a “modello” for will not be destroyed, but kept safe and secure even though elsewhere.

**The reasons why it is said that it should not be sold:**

36. The historic connexion is to Lincoln, and to the no longer existing church. One of the difficulties about this is that on previous occasions the people of Lincoln through the City Council and the Art Gallery did not have the will and/or the wherewithal to preserve this connexion. In these days when everyone’s resources are extremely stretched I shall have to consider whether it is just and fair to require that this connexion is kept alive by the body with what may be argued to be the least resources available to do so.
37. It is said to be the only record of this earlier church. That appears to be true. However the record will not be lost. It may be that as a record it can be faithfully copied and made more available. I shall have to consider how far it is right to require that the church maintains that record.

38. It is said that there is no urgent financial need. That is a matter of dispute and I must deal with that as a separate issue.

**The balancing exercise.**

- 39 The review of these counter-balanced arguments reminds me that I am considering a painting that came into the possession of this church some 70 or so years ago. It was in my judgment given to the church because of an indirect link to the church of St Peter-at-Arches which at that time had recently been demolished. It is therefore a reminder of that link. For a number of years now it has not been possible for the church to display this painting and so it has been kept by and displayed in the Cathedral Library. In that place it has no obvious link to St Giles.
40. Therefore the connexion between St Giles and the painting (apart from the legal connexion of ownership) is now and for some time has been effectively meaningless. If it were an item such as a piece of silver plate it would be redundant. It is a work of art and I am not sure that it is apposite to use the term redundant about a work of art. However the effect is the same given the circumstances that currently exist whereby it is not foreseeable that the painting will ever again be hung in St Giles church.
41. In those circumstances is there any justification for my preventing the church from selling the painting?
42. It does seem to me that the fact that in the past it has not been possible to persuade the City Council or the Art Gallery to provide only some financial contribution to the parish in return for a permanent loan of the painting is indicative of the financial realities of the present day. Such would appear to be the value placed upon the maintaining of this historic link by those who might be expected from two different perspectives to be prepared to put a monetary value on it.

43. It also seems to me that once the argument for maintaining the local connexion has been lost then the argument that the record should be preserved must fail too. The record will not be lost, it will be maintained. It is just that it may not be maintained in Lincoln, which was the first argument. One dares to hope that it will be maintained and displayed in a place where it will be given some better prominence than now, whether that be in the context of Lincoln, Damini, or otherwise.
44. In those circumstances it is hardly necessary for me to deal with the financial arguments. However I am quite satisfied that the matters I have referred to at paragraph 24 above show a great financial need in what I judge to be a poor church. Mrs. Johncock refers in her report to the hope of joining in a community project to which I have also referred above. That however would be after they have carried out the repairs and other works to which I have referred and of which he may not have been aware. I am very aware that this church being only Grade II listed and dating from 1934 will not be at the forefront when it comes to handing out grant money. I am satisfied that there is a real financial need.
45. For the reasons I have set out above I do not consider that it is necessary to show that there is a “very convincing argument” that rebuts the presumption against sale nor to show that there is a “financial emergency” before I can grant a faculty. In order for me to grant a faculty the Petitioners must persuade me on the balance of probabilities that some good and sufficient ground has been proved. A good ground is a “special reason”. I am satisfied that the special reason here is the fact that there is no longer a meaningful relationship between the church of St Giles and the painting. I am also satisfied that in the present financial circumstances of this church, that ground is a sufficient ground, notwithstanding that the painting may be lost to Lincoln.
46. For these reasons I shall direct that a faculty pass the seal permitting the Petitioners to sell the painting.
47. I shall however impose conditions on the faculty:

48. Firstly, in any sale every effort shall be made to find a buyer with connections to the city of Lincoln in the hope that the sketch might be loaned or ultimately bequeathed back to Lincoln.
49. Secondly, that before the painting is sold a digital image shall be made of it and deposited with the parish records, a copy also being provided to the Lincoln Cathedral Library, should they wish for a copy.
50. Thirdly, that a copy of the digital image with a brief description of the history of the painting shall be displayed in the Church of St Giles.
51. Fourthly, that the proceeds of sale after paying the costs thereof shall be applied by the church of St Giles to its general funds.

Peter Collier QC  
Chancellor

12<sup>th</sup> April 2006