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Raising the Dead: Exhumation and the Faculty Jurisdiction: Should We Presume To Exhume?

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Do you know why we are more fair and just towards the dead? We are not obliged to them, we can take our time, we can fit in the paying of respects between a cocktail party and an affectionate mistress- in our spare time

(*Albert Camus*, The Fall)

Summary

Traditionally the legalities of burial and subsequent care for the dead came within the jurisdiction of the ecclesiastical courts of the Church of England, the 'faculty' jurisdiction. The seventeenth century jurist Coke justified the Church's jurisdiction by default: '… burial of the Cadaver (that is, *caro data vermibus*) is *nullius in bonis* and belongs to Ecclesiastical cognisance…' The cadaver was 'flesh for worms' and, as it was to the benefit of no man, the Church would protect it. [1]

The common law presumed that burial anywhere was forever, or at least until the remains had reduced and become part of the surrounding earth. Any interference with buried human remains was an offence at common law subject to two notable exceptions: exhumation from any ground under the ancient powers of the coroner for the investigation of suspicious death; and, exhumation from consecrated ground under the faculty (licensing) jurisdiction of the ecclesiastical courts of the Church of England. This latter jurisdiction was also subject to the presumption that burial was permanent, thus the Church would only permit exhumation in certain extraordinary circumstances and only if the remains were to be reinterred in consecrated ground. This remained the situation until the reform of the burial laws in the mid-19th century,

[1] 3 Co. Inst. 203 considered in Mathews, P. 'Whose Body? People as Property', [1983] *Current Legal Problems* 193 fn 34. Mathews states that Coke was presumably being serious when he states that the word cadaver derives from the Latin phrase *CAro DAta VERmibus*, although Coke gives no authority. See also Smith, *Stealing the Body and its Parts* (1976) Crim. Law Rev. 623.

when the Burial Act 1857 provided a parallel jurisdiction for the relevant secretary of state to licence exhumation from graves not consecrated by the Church of England.

This article discusses the legal exhumation of human remains, the common law, the faculty jurisdiction to permit exhumation of human remains from consecrated ground, the secular licensing of exhumation from unconsecrated graves, the ecclesiastical jurisdiction's presumption against exhumation, exceptions to the ecclesiastical presumption against exhumation that have developed since 1857, and the guidance of the ecclesiastical appellate courts for the application of the discretion to grant faculty for exhumation.

Contents

The Common Law and Exhumation

At common law, every parishioner has a 'right of burial', which is the right to be buried at the churchyard of his or her parish. This right will only vest on death (*Re West Pennard Churchyard* [1992] 1 WLR 32, 33*).* This is a right to decent burial; to be decently covered when carried to the grave and lowered into the grave, covered and allowed to dissolve; fees may be payable (*Gilbert* v *Buzzard* (1821) 2 Hag Con 333). Although the corpse may be left to dissolve, it is accepted that the right does not include, 'a right to perpetual or exclusive appropriation of a burial spot.' (Nwabueze 2007, p 521; see also Sparkes 1991). Thus, a parish could bury other bodies in the same spot after dissolution of the corpse, or after exhumation of the corpse, but the latter would be subject to the grant of an ecclesiastical faculty for the exhumation of the corpse.

In *R v Stewart* (1840) 12 Ad & El 773, 778, it was stated that every person dying in Great Britain had the right to a Christian burial, 'the feelings and the interests of the

living require this, and create the duty'. Thus the right of decent disposal of the dead was not a right of the deceased but the right of the living to have their feelings and interests protected. In protecting the feelings and interests of the living duties arise. The right to decent burial carries with it a corollary duty. The duty to dispose of a dead body lies first with the executors of the deceased if there are sufficient assets available, the parents of a deceased child if they have sufficient means (*R* v *Vann* (1851) 2 Den 325), the householder on whose premises the body lies (*R* v *Stewart* (1840) 12 Ad & El 773), and hospitals where the body lies. The parish also had a duty to dispose of the body of any person who died in their area where there appeared to be no other arrangement made, this duty has now been passed to the local authority (Public Health (Control of Diseases) Act 1984, s.46(1)).

The duty of executors, administrators or the state to decently inter the body gives rise to an exception to the dubiously authenticated but now judicially accepted principle that the common law recognises no property in a corpse (Mathews 1983), as those with the duty to dispose of the corpse gives rise to the right to possession of the corpse for the purpose of decent disposal (*Williams* v *Williams* (1882) 20 Ch D 659). (There is also an exception for human remains that have been subjected to care and skill in their preservation, for example mounted scientific specimens: *R* v *Kelly and Another* [1999] Q.B. 621). The right to possession of the corpse for decent disposal is recognised at common law but only enforceable in equity.

Although the deceased had no rights, and no one could have a property right in the interred corpse, society would still protect the corpse, again for society's own interests. Thus there were, and may still be, prosecutions for common law offences of preventing the lawful and decent disposal of a corpse (Hirst 1996), unlawful interference with a corpse, or outraging public decency (Childs 1991). (For the lack of an offence of desecration of a corpse see Spencer 2004). In 1788, in *R v Lynn* 2 Term Rep 733, it was held that the removal of a body from any burial ground without lawful authority was a common law misdemeanour. Lynn had disinterred the corpse for the purpose of dissection. This was held to be '*contra bones mores'*, however the no-property rule meant that it could not be construed as theft. This offence still exists at common law (Archbold 2006, pp.31-57; referring to *R* v *Sharpe* (1857) Dears & B 160, where it was held that it is no defence that the motives of the defendant were pious and laudable).

Until 1857 there were two exceptions at common law to the prohibition on disturbance of the corpse: the jurisdictions of the coroner and the Church of England.

The coroner is an ancient royal servant whose office existed at least from the beginning of the thirteenth century, although there is questionable authority (Coke's Institutes citing the Mirror of Justice) dating it to the time of the Anglo-Saxon kings, perhaps the time of Alfred (Halsbury's, Volume 9(2), p. 903). The coroner had, and still has, the power to order a body to be disinterred within a reasonable time after death either for the purpose of taking an original inquisition where none had been taken, or a further inquisition where the first was insufficient. [2] In fact there is

[2] Stanforde's *Les Pleas del Coron* 51; Hale's Summary 170; 2 Hawk PC c 9 s 23. Now a statutory power, the Coroners Act 1988, s.23. Applications may now also be made to exhume a body to aid investigation of suspected international crimes under ss 33 & 35 of the International Criminal Court Act 2001, Commencement 1st September 2001, implemented to fulfill the United Kingdom's obligations as a party to the Rome Statute of the International Criminal Court, ratified by the UK on 4th October 2001.

considerable authority to suggest that in antiquity it was accepted that the coroner had a duty to view the body if he held an inquest and therefore should order an exhumation (see Anon (1627) Poph 209; *R* v *Parker* (1675) 3 Keb 489, 2 Lev 140, Freem KB 522; *Anon sub nom R* v *Clerk* (1702) 7 Mod Rep 10, 7 Mod Rep 16).

The ordinary of a dioscese of the Church of England also had the power to grant the exhumation of a corpse from a grave in consecrated ground under the faculty jurisdiction.

Faculty Jurisdiction- the Church of England, consistory court and consecration

Under ecclesiastical law, it seems that a faculty has always been required before a body could be removed from consecrated ground. Gibson, in his *Codex Iuris Ecclesiastici Anglicani* , wrote that, 'a corpse, once buried, cannot be taken up, or removed, without licence from the Ordinary.' (Gibson 1713; see also Bursell 1998, p 18). Gibson notes three such licences dating from before the Reformation and two thereafter (Bursell 1998).

A faculty is 'a privilege of special dispensation, granted to a person by favour and indulgence to do that which by the Common Law he could not do.' (Penner 2001). Recently, in the Arches Court, Cameron QC, the Dean of the Arches, stated, *In Re St Peter and St Paul's Church, Chingford* [2007] Fam 67, 76:

> A faculty grants permission for something to be done; it does not compel that thing to be done. Moreover it can only be granted for a purpose which is consistent with, and within the bounds of the existing law.

Early records of the grant of faculty for exhumation of human remains include Sir William Wynne, in June 1775, granting a faculty for the exhumation of the remains of Elizabeth Raiss, who had been interred in August 1774 in a brick grave in the churchyard of Staines. The faculty allowed for the removal of her remains to a brick grave in the churchyard of St Mary, Lambeth, to comply with her wishes discovered after her burial (discussed by the distinguished Chancellor Dr Tristram in *Re Dixon* [1892] P. 386, 391).

The ecclesiastical courts have had to deal with many petitions for faculty to allow exhumation of human remains but few cases can have been as strange as that before Sir Robert Phillimore Q.C. in the Court of Arches in 1867, replacing the recently deceased Dr Lushington, when he refused to grant a faculty based upon the unusual circumstances in *Adlam v Colthurst* (1867) L.R. 2 A. &E 30. Sir Robert held that:

> To remove the bones of parishioners from the churchyard into a field where they are to serve the purposes of manure, is a great affront to the feelings of Christian men: a grave violation of the rights of parishioners, as well as plainly contrary to the law of this land. The act is not less liable to this censure, if it be done by a churchwarden, and, as in this case, after he has been apprised of the unlawfulness of such conduct…

Sir Robert concluded that the churchwarden's submission that this was done to construct a better path through the churchyard could not justify this violation, and his attempt to divest himself of the field in which the remains had been deposited, by

transferring legal title to his son-in-law, did not remove his, or his son-in-law's, duty to return the remains and reinter them.

Generally a faculty is granted by the Ordinary, usually the bishop of the diocese exercising the ecclesiastical jurisdiction annexed to his office (Penner 2001), and is therefore the granting of diocesan authority to do something (Hill 2001, ch.7). In *London County Council v Dundas and Others* [1904] P. 1, it was confirmed that, after citation and unappealed, a faculty cannot, in the absence of the consent of all the parties interested, be revoked for any cause other than fraud. Where a faculty is obtained by misrepresentation or the authority conferred is exceeded then the perpetrators must restore the situation. Thus, in the case of *St Pancras Vestry v St Martin-in-the-Fields (Vicar and Churchwardens)* (1860) 6 Jur N.S. 540, it was held that when the Vicar and Churchwardens had removed four to five hundred coffins and remains, although they had only been granted a faculty for the removal of a maximum of twenty, they had exceeded the powers confided in them by the faculty and so had to return the faculty to the Diocesan Registry, decently reinter all the remains in their original position, at their cost, and pay the costs of the proceedings.

Anyone seeking to bury human remains in a manner contrary to the policy of the diocese and the parochial church council must also seek a faculty (*In Re St James the Great, Birstall* (2006) *The Times*, 14 August).

As most consecrated ground is under the jurisdiction of the Diocesan Bishop, appeals for or against the grant of a faculty will be decided by the Consistory Courts, held by the diocesan bishops within their several cathedrals for the trial of ecclesiastical causes arising within their respective dioceses (Ecclesiastical Jurisdiction Measure 1963; *De Romana* v *Roberts* [1906] P. 332; Sparkes 1991, 136). The Consistory Court is the court of first instance of the Church of England; its judge is called Chancellor and is usually a judge or barrister. Appeal is to the Chancery Court of York, presided over by the Auditor, in the Northern Province, and the Court of Arches, belonging to the Archbishop of Canterbury and presided over by the Dean of Arches, in the Southern Province. Final appeal lies to the Judicial Committee of the Privy Council (Ecclesiastical Jurisdiction Measure 1963; Sparkes 1991, p136), as, although separate eccelesiastical courts have existed since a Royal decree of 1072 (Faculty Commission 1984; Garbett 1950, ch.12), the Church of England is an established church (*Re Caister-on-Sea Parish, Norfolk County Council* v *Knights and Caister-on-Sea Joint Burial Committee* [1958] 1 All ER 394, 396), and, therefore, the consistory court is one of the Queen's courts and thus a court of the realm. The sovereign is supreme governor and Parliament legislates on matters concerning the Church, such legislation takes the form of Measures: proposals drawn up by the General Synod and debated and approved by Parliament. Ecclesiastical jurisdiction is thus derived from the Crown, for, as Dr Tristram stated, in *St Michael's Bassishaw* [1893] P. 233, 239, quoting Sir Mathew Hale's '*History of the Common Law of England*':

> … there is no external jurisdiction, whether ecclesiastical or civil, within this realm, but what is derived from the Crown. It is true, both anciently and at this day, the process of Ecclesiastical Courts runs in the name, and issues under the seal, of the bishop; and that practice stands so at this day by virtue of several Acts of Parliament, too long here to recount. But that is no impediment of their deriving their jurisdictions from the Crown.

The faculty jurisdiction to exhume human remains extends only to ground consecrated by the Church of England: consecration being the separation of a thing

from the common and profane to a sacred use. In *Re Blagdon Cemetery* [2002] Fam 299, 303, the Dean of Arches, Cameron QC, explained that:

> Land becomes consecrated when the bishop of a diocese signs a document, called a sentence, by which he separates and sets apart an area of land and dedicates the service of the land to the service of Almighty God. The effect of this sentence where the land is to be used for the interment of the remains of the dead, whether the land consists of churchyard around a church or an identified area of land in a cemetery, is to set apart the land as being held for sacred uses and to bring it within the jurisdiction of the consistory court.

The act of consecration is permanent although the specific effects can be revoked. Therefore, the theological status remains even when the legal effects are removed. In *Re Caister-on-Sea Parish, Norfolk County Council v Knights and Caister-on-Sea Joint Burial Committee* [1958] 1 All ER 394, Chancellor Ellison stated that:

> Consecration has of course a spiritual significance but the act of consecration is essentially judicial and becomes manifest when, pursuant to a petition to consecrate and after due consideration, the ordinary pronounces a sentence dedicating and setting apart lands from all common and profane uses. Once consecrated the land falls within the jurisdiction of the ordinary exercised through the medium of the consistory court. Subsequently, consecration can only be rendered nugatory or its effect taken away by legislative means such as an Act of Parliament.

Thus disused monastic burial grounds and most disused churchyards do not remain under ecclesiastical (faculty) jurisdiction as the legal effects are removed but they remain consecrated ground.

Therefore, prior to the Burial Act 1857, buried human remains could not be exhumed unless by authority of the coroner or by faculty from the Church of England. Any other interference with buried human remains was an offence at common law. The enacting of the Burial Act 1857 changed this by providing a further secular authority for exhumation.

The Burial Act 1857, section 25

In 1857, a statutory secular authority to exhume buried human remains was introduced. If there is no specific provision in other legislation covering a particular proposal to exhume human remains then the relevant statutory provision is the Burial Act 1857, s.25, which states:

> Except in the cases where a body is removed from one consecrated place of burial to another by faculty granted by the ordinary for that purpose, it shall not be lawful to remove any body, or the remains of any body, which may have been interred in any place of burial, without licence under the hand of one of Her Majesty's Principal Secretaries of State, and with such precautions as such Secretary of State may prescribe as the condition of such licence; and any person who shall remove any such body or remains, contrary to this enactment, or who shall neglect to observe the precautions prescribed as the condition of the licence for removal, shall, on summary conviction before any two justices of the peace, forfeit and pay for every such offence a sum not exceeding [level 1 on the standard scale].

At present exhumation may be covered by many different statutory provisions,[3] including Acts governing major projects, for example the Channel Tunnel Rail Link Act 1996. However, section 25 is the default provision if no other provision applies. Traditionally the Home Office was the relevant government department, however the Ministry of Justice has now taken over this duty. The offence of exhumation without a licence is a summary one only, committed on each occasion that a body, or its remains, are removed. It is an offence of strict liability.

The Church in Wales cannot authorise exhumation by faculty: a section 25 licence is required. Similarly, when referring to a consecrated place the section applies only to places consecrated by the Church of England, thus exhumations from ground consecrated to other denominations will require section 25 licences. For example, a Ministry of Justice licence was required to exhume the remains of Cardinal Newman on 2 October 2008 from the cemetery in Rednal, Worcestershire, where it had lain in ground consecrated by the Roman Catholic Church since 1890, to be moved to a special resting place of honour at Birmingham Oratory prior to his beatification; although on exhumation and opening of the coffin no physical remains were discovered (Jennings 2008).

Thus to remove a body buried in ground not consecrated by the Church of England requires a Secretary of State's licence; anyone seeking the exhumation of human remains from consecrated ground must apply for a faculty, which will be determined by the ordinary of the relevant diocese. If a body is to be removed from consecrated ground for a purpose not involving re-interment in consecrated ground then a faculty and Secretary of State's licence are both necessary. A fee is charged whether the application for faculty is successful or not and, because of the nature of the petition, the process may take some time to be decided.

Why provide a secular authority?

The Burial Act 1857 was one of a series of burial acts enacted during the mid-19th century, a time of general social and legislative reform which extended to areas that had previously been under ecclesiastical jurisdiction, such as marriage and divorce (Stone 1992). Reform of the ecclesiastical jurisdiction was subject to the two great mid-19th century legislative imperatives: general calls for secularisation at a time when it was recognised that not all of the population were practising members of the Church of England (Robbins 2005, p 129); and reformist zeal to protect public health. The major outbreaks of diseases such as cholera in the mid-19th century were likened at the time to biblical plagues (Davies 2005, p 138). The calls to reform to protect public health were fuelled by the growing understanding of the causes, spread and control of disease, and increased recognition that, with the growth of conurbations and cities, graveyards were not being adequately maintained, corpses not properly

[3] The Disused Burial Grounds (Amendment) Act 1981, Pastoral Measure 1983, Care of Churches and Ecclesiastical Jurisdiction Measure 1991, Care of Cathedrals Measure 1990, Ancient Monuments and Archaeological Areas Act 1979, Welsh Church Act 1914, Town and Country Planning (Churches, Places of Religious Worship and Burial Grounds) Regulations 1950, Care of Churches and Ecclesiastical Jurisdiction Measure 1991. Human remains may also be protected from interference by statute such as the Protection of Military Remains Act 1986. For consideration of the engagement of this protection see R (on the application of Fogg and another) v Secretary of State for Defence [2005] EWHC 2888 (Admin), examined in Williams, M. (2007) "Merchantman or quasi-warship? *R v Fogg and Secretary of State for Defence and Short". The Journal of International Maritime* Law 13(2).

disposed of, and, in interesting parallel to today, graveyards were running out of room for burials. The movement of the population into the towns and cities during the continuing industrial revolution had not only resulted in overcrowding and lack of housing for the living, it had filled the churchyards in the towns and cities (see *Gilbert* v *Buzzard* (1821) 2 Hag Con 333, 355 *(the Iron Coffin Case)*). To ease this overcrowding new cemeteries were designated, such as the Liverpool Necropolis in 1825 and statutory permission granted for the Kensal Green Cemetery, London, in 1832, and, in recognition of the increasing diversity of faiths, these new cemeteries included unconsecrated areas and areas consecrated to denominations other than the Church of England. Furthermore, other methods of efficiently and safely disposing of the dead were being proposed, such as cremation, although it was only towards the end of the 19th century, after the case of *Reg.* v *Price* (1884) 12 QBD 247, and judicial recognition that it was lawful to dispose of the dead in this way, that this become an accepted practice (White 1990).

A further reason for the drafting of the burial acts was the concern that the Church of England and the common law had not adequately protected the dead. Indeed there was fear of interference with the buried corpse by those stealing the articles associated with the dead, such as the shroud (*Hayne's Case,* 1613), or the hair, teeth and fat to make the wigs, false teeth and candles required by the wealthy (Bailey 1896, pp 45 & 88). There was also fear of "resurrection men", who would steal the corpse for dissection (Hay 1975; Ross & Urquhart Ross 1979; MacDonald 2006); a fate popularly associated with poverty (Gallagher 2008). Unfortunately the practice of grave robbing is not unknown today. For example, in *R* v *Lichfield Justices ex parte Coyle (also Subnom Coyle* v *DPP)* 19th July 1988**,** although the appellant had his original conviction for aiding, abetting, counselling and procuring the commission of the offence of the removal of the remains of part of a body from a consecrated place of burial without a licence contrary to section 25 of the Burial Act 1857 quashed, the five men he had been accused of aiding and abetting had already been convicted of the offence, which involved removing bones, notably a skull, from Christ Church Churchyard, Lichfield, and selling them. Similarly, in 1981 Stephen Pearson failed in his appeal against sentence of 12 months imprisonment for removing a body from a grave contrary to common law, this had been done after he had been drinking and for a 'dare' (*R* v *Stephen Pearson* (1981) 3 Cr. App. R. (S.) 5). The more recent case of the animal rights activists who dug up the body of the mother-in-law of a guinea pig breeder resulted in prosecution for what may be regarded as the more serious offence of blackmail and three sentences of 12 years and one of four years for the perpetrators (*The Guardian*, June 1, 2006).

In the second quarter of the nineteenth century the perceived failure of the Church and common law to deal with concerns about the safe interment of the dead encouraged the State to take an active part in managing the care of the dead. However, although this was a time when the power of ecclesiastical courts was being severely restricted in other matters, the Church could not be removed completely from its position as protector of the dead, as the Church owned the property in which the dead were interred, thus to wrest exhumation from the Church completely would infringe the Church's property rights. Indeed Dr Tristram remarked, in *St Michael, Bassishaw* [1893] P. 233, 244, that the five Burial Acts of the 1850s contained no indication that they were intended to interfere with the jurisdiction of the Church's courts or property rights.

The Burial Act 1857 also provided protection for corpses buried in unconsecrated ground beyond that of the common law, which had been shown to be deficient in the recent case of *Reg. v Sharpe* (1857) Dears. & Bell 160: Sharpe had disinterred his mother's body from its grave in unconsecrated ground to bury his father with her; Sharpe removed the remains of his mother and took both bodies to be buried in a consecrated churchyard. He had to disturb the coffins of his stepmother and two children to do this. Sharpe was convicted and fined a nominal one shilling as the Court accepted that, '…the defendant acted throughout without intentional disrespect to any one, being actuated by motives of affection to his mother and of religious duty'. Thus, section 25 provided a licensing scheme for exhumation from unconsecrated ground.

What were the effects of section 25?

The immediate and obvious effect of section 25 was to allow for exhumation of a corpse buried in consecrated ground and its reinterment in unconsecrated ground, subject to the grant of a faculty and licence. Dr Tristram, in *Re Talbot* [1901] P. 1, 5, granted a faculty for this purpose, subject to a licence being obtained from the Home Secretary, stating how important the legislation was, because,

> I have not been able to find any precedent prior to the date of the passing of the Burial Act, 1857, of any Ecclesiastical Court having granted a faculty for the removal of remains from consecrated to unconsecrated ground, although it is clear that up to the date of that Act the Ecclesiastical Courts were not precluded from granting such a faculty either by canon or by statute law. The practice of the Ecclesiastical Courts, however, previous to the passing of this Act, was to decline to grant a faculty authorizing remains buried in consecrated ground to be reinterred in unconsecrated ground, as by so doing they would be sanctioning the removal of remains from a place of burial under the special protection of the Ecclesiastical Courts to a place of interment under the protection of no Court...

Dr Tristram was quoted in *Re Blagdon Cemetery* [2002] Fam 299, 303, by the Dean of Arches, Cameron QC, as authority that prior to the Burial Act 1857 the consistory courts had, 'as a matter of practice, declined to grant a faculty authorising remains buried in consecrated ground to be reinterred in unconsecrated ground.' Cameron QC continued that section 25 of the 1857 Act was:

> …a new system of protection for remains in unconsecrated ground, which provided that remains could not be removed without permission from the Secretary of State. Thus remains in unconsecrated ground became protected just as remains in consecrated ground had been, and continue to be, under the protection of the consistory court and removable only under faculty, that is by permission of the court.

However, although the Dean states that remains in unconsecrated ground became protected just as those in consecrated ground, the factors considered cogent by the relevant secretary of state when an application is made for a licence and those considered by the consistory courts when a petition is made for an ecclesiastical faculty have shown a marked divergence since the implementation of the 1857 Act. Secular law has its emphasis on regulating exhumation rather than preventing or restricting it, whereas the Church began with a restrictive approach to exhumation

which has developed into a presumption against disturbance only rebutted by exceptional circumstances.

Grounds for the granting of faculty

The ecclesiastical courts have consistently promulgated that the only certain guidance when considering petitions for faculty for exhumation is to start from a presumption that burial of human remains is permanent. This section will consider the Church's presumption of permanence of burial, the different approach of the secular licensing scheme, and the general guidance that the appellate ecclesiastical courts have indicated would be sufficient to rebut the presumption.

The presumption against exhumation

Respect for the dead is a feature of most world religions and the disturbance of interred human remains is often considered a taboo. However, historians have long doubted the common conception that we have buried our dead to protect them out of a sense of reverence. Indeed the historian Philippe Ariès stated, 'One of the aims of the ancient funerary cults was to prevent the deceased from returning to disturb the living.' (Ariès, 1994, p14). This is confirmed by modern archaeological and anthropological interpretation of the first funerary practices as cannibalistic, evolving into disposal of the deceased, whether by burial or in some other way, to protect the living from the dead (Taylor 2002, p28).

However, the Church of England, in common with most major world religions has adopted the position that the dead should be respected and protected, and that any interment should be permanent. Thus, Sir William Scott, in the Iron Coffins case, (*Gilbert* v *Buzzard* (1821) 2 Hag Con 333), stated that the practice of the Patriarchs of the Church was the 'anxious acquirement' of places of sepulchre, and, more recently, in *Re Blagdon Cemetery* [2002] Fam 299, 304, the Dean of Arches, Cameron QC, commented that:

> During the period of human history respect for the dead and the recognition of the inevitable process of decay have led to different cultural practices and laws about disposal of the dead. Whether such disposal has been by way of burial or cremation it has been a feature of such cultures that the disposal has had an aura of permanence about it…The general concept of permanence is reflected in the fact that it is a criminal offence to disturb a dead body without lawful permission.

Jewish traditions associated with death and burial asserted that the body and soul were forever linked however the body may have corrupted, thus great care was taken of a corpse and cremation of the body considered a punishment inflicted only on criminals (Genesis: 38:24). In fact the protection of the remains of the dead is undertaken to such an extent in Israel that archaeologists have been forbidden to dig if the remains they exhume may be those of Jews (www.jlaw.com/Articles/heritage.html 23/1/08). However, although it may be expected that Jesus Christ was educated in these matters his teachings and attitude to the dead seem to have little regard for the physical body. When a disciple said to him, 'Lord, let me first go and bury my father.' He replied, 'follow me, and leave the dead to bury their own dead.' (Matthew: 22:32). Indeed, when considering the Christian status of human remains, the Church Archaeology Human Remains Working Group Report concluded that:

> [T]here is little in the Bible to suggest that Jesus had great concern for the human body and its remains after physical death…The view of St Paul and later theologians appears to be at the resurrection there is no literal reconstitution of the physical body.
> This also appears to be the understanding offered by the modern church. (English Heritage & Church of England, 2004, p.8).

Thus Jesus and later Christian theologians concentrated on the resurrection of the soul of the deceased not the physical remains. No link was espoused between the two. Similarly, the attitude of the modern Church of England cannot be said to place any particular value on physical remains otherwise the Church would not embrace cremation as it has in contrast to other major religions, such as Judaism and Islam. (Church of England 2000, B38). Similarly, the Church accepts the disturbance of human remains during grave digging as a 'natural consequence of the use of churchyards for their intended purpose'; this therefore does not require special permission. Neither does the addition of the cremated remains of close family members to old graves, which often occurs without any criticism, being seen as *de minimis* interference in line with the Church's encouragement of family burial. Indeed, when such a disturbance was questioned recently, in *All Saints, Beckley, Re* (2007) *Ecc. L.J.* 9(2), 241, Chichester Consistory Court granted a retrospective faculty to allow exhumation when a gravedigger had moved the ashes of a father and son in preparation to bury the mother in the grave with them. The faculty was granted because a mistake must have taken place in the placement of the ashes when they were buried. This was said to be an exceptional case as it was *de minimis* disturbance and favoured the emphasis of the ecclesiastical courts on family graves.

Of course, protection for the dead usually depended on wealth and social standing and the modern presumption on the permanence of burial for all by the ecclesiastical courts does not reflect previous Christian burial customs. Indeed the Christian practice has never been as restrictive as the Jewish and Muslim one body per grave plot policy. Thus, the great Cemetery of the Innocents in fifteenth century Paris contained houses or '*charniers',* in which the dead were piled up or 'artistically arranged' in galleries (Ariès 1994, p20). Similarly, in eighteenth century London a particularly noisesome problem was the 'poor's holes', which were 'large, deep, open pits in which were laid the bodies of the poor, side by side, row upon row. Only when the pit was filled with bodies was it finally covered over with earth.' (Stone 1990, p 63). Today, in many European countries the practice of burial and consequent exhumation when the skeleton is defleshed to allow the bones to be placed in an ossuary is still prevalent, for example in parts of Italy and Greece (Robben 2004, chapter 14).

Therefore, although there is evidence that early Christians were concerned that bodies not properly buried or whose graves were violated might not rise on Judgment Day (Ariès 1981, p 32), as burial would be 'mirroring the "burial"' of Christ, even though his was a tomb burial (Davies 2005, p 55), and the phrase 'laid to rest' would imply that remains should not be disturbed, this is not supported in the Gospels, by the Church's acceptance of cremation, and the pragmatic approach of society which permits the disturbance of many thousands of burials annually to make way for further burials, buildings and other development. Similarly museums and other institutions hold thousands of exhumed burials in their collections (See, for example, Fforde 2004; Fforde et al 2002; Gabrielle & Dahl 2008). However, whether or not the presumption of permanence of burial is a reversion to Jewish or pagan practices (Taylor 2002, p 14), and, although in *In Re Church Norton Churchyard* [1989] Fam.

37, 39), Chancellor Edwards QC, in the Chichester Consistory Court, noted that, 'In English canon law, burial is not absolutely final…' the practice of the ecclesiastical courts has been and is to presume that burial is permanent. Thus, Chancellor Edwards continued (at p 43):

> the court then should begin with the presumption that, since the body or ashes have been interred in consecrated ground and are therefore in the court's protection or, in Wheatley's words, "safe custody", there should be no disturbance of that ground except for good reason. There is a burden on the petitioner to show that the presumed intention of those who committed the body or ashes to a last resting place is to be disregarded or overborne. The finality of Christian burial must be respected even though it may not be absolutely maintained in all cases.

Contrasting secular and ecclesiastical justification for exhumation

Today's ecclesiastical courts have developed quite narrow exceptions to rebut the presumption of the permanence of burial. This seems to be in contrast to their 19th century forebears, when applications for faculty for exhumation seem to have been common and often granted (Bursell 1998, p 18). Indeed Dr Lushington, the distinguished Victorian ecclesiastical jurist, said, in *Re Pope* (1857) 15 Jur. 614, 'Faculties for the removal of bodies are of very frequent occurrence, and are decreed to gratify the wishes of relations.' Although it should be noted that successful petitions would often be based upon proposals to retrieve articles from coffins, move remains between graves in the same churchyard or, at the least, for reinterment in consecrated ground. Similarly, as previously remarked, the grounds considered necessary to allow a regulated exhumation with the granting of a secular licence are often quite different to those considered necessary to displace the presumption against exhumation required for the grant of a faculty. The secular authorities often merely concerned with surviving relatives' agreement, or the agreement of landowners if the remains are ancient. Therefore, in the majority of circumstances the ecclesiastical court is far less likely to grant a faculty than the relevant Secretary of State to grant a licence. Thus, in *Re Christ Church, Alsager* [1999] Fam 142**,** it was stated by Sir John Owen that:

> The attitude of the Home Office will not be that of the chancellor. It is understood by this court that the Home Office will normally grant a licence for exhumation. The chancellor, however, must follow ecclesiastical law and, acting within that law, must make a judgment. It should be emphasised that his decision must be reached in a judicial way.' (p 145)

However, there are two notable instances when it appears easier to obtain a faculty for exhumation than a similar secular licence: ecclesiastical courts may grant faculties for exhumation of old burials when graveyards become overcrowded, and when a burial has taken place by mistake in a space reserved for another.

There is a lack of provision in secular law for the disturbance of old burials to enable new burials to be carried out, a common church practice until the mid-19th century and theoretically still capable of forming a successful faculty petition today. This may be of considerable importance in dealing with overcrowded cemeteries and churchyards in the future, although it is submitted that the ecclesiastical court's

attitude to exhumation has changed considerably since the 19th century and this practice may not be so readily accepted as grounds for the grant of a faculty today.

There is also a seeming readiness of the ecclesiastical courts to grant a faculty for exhumation if human remains have been buried in spaces reserved for others. Petitions based on such circumstances have generally resulted in the grant of a faculty to exhume the mistakenly interred remains despite opposition from the family of the wrongly interred person. Thus, in *Re St. Luke's, Holbeach Hurn Watson* v *Howard and another* [1991] 1 WLR 16, a faculty was granted by Chancellor Goodman, in the Lincoln Consistory Court, for the removal of a body buried by mistake in a gravespace reserved for another, even though the relatives of the deceased who had been mistakenly buried in the plot objected. Similarly, in *Re Jean Gardiner, deceased*, (2003) *Ecc Rep* (May), Chancellor Tattersall, in the Carlisle Consistory Court, applying *Re St Luke's*, granted a faculty for exhumation of the deceased's remains, which had been buried in the wrong space because of an error in numbering graves. The family of the interred objected, submitting that this would affect the widower's health and infringe their human rights under Article 8 of the European Convention on Human Rights and Freedoms, and Article 1 of the First Protocol. However, the Chancellor rejected the family's submissions. He concluded, on the basis of *Re St Luke's*, that where a mistake had been made in effecting the burial a faculty would be more readily granted. He rejected the arguments on Article 8 and Article 1 of the First Protocol on the grounds, *inter alia*, that there was no property in human remains.

In contrast similar applications to the secular Court for injunctions for the perpetrators of mistakes, usually cemetery managers or undertakers, to obtain a Secretary of State's licence for exhumation are generally refused, as such applications have been considered impractical and unenforceable. Such applications have usually resulted in the award of damages instead (Smale 1994, p 201). Thus, in *Reed* v *Madon* [1989] Ch 408, in the Chancery Division of the High Court, three Turkish Muslim sisters applied for an injunction ordering the defendants, who owned the burial ground and had caused the burial of a body in a plot reserved by the sisters and allowed the erection of a memorial which encroached on their reserved plots, to secure a secretary of state's licence under the Burial Act 1857, section 25, for the exhumation of the body. The injunction ordering the securing of a licence was refused as unlikely to have any practical effect as, 'such a licence would only be granted in exceptional circumstances and would not be granted against the wishes of the nearest living relative' (p 432). The Court ordered damages to be paid instead.

The advent of the Human Rights Act 1998 may mean that applications for a licence for exhumation to the Ministry of Justice based upon the grounds that the wrong body has been placed in a grave may now be considered more favourably, especially if an application is based on the burial being in a family plot or an area reserved for a particular religious denomination: application thus being founded upon infringement or upholding of the rights guaranteed in articles 8 and 9 of the European Convention on Human Rights. These rights will be discussed below with regard to the faculty jurisdiction.

The ecclesiastical courts' willingness to accept mistake as to burial plot as a 'good and proper' or 'exceptional' reason may be linked to the Church's respect for property interests, notably its own, although, as previously stated, the ecclesiastical courts have refused to recognise a proprietary interest in the burial plot (Nwabueze 2007, p 521; Sparkes, 1991).

Therefore, subject to these two exceptions, it is submitted that it is considerably easier to get a licence to exhume buried human remains than to obtain a faculty for exhumation. For example, whereas archaeological interest has consistently been considered a good and proper reason to grant a licence for exhumation, it was, and is, unlikely to form the grounds of a successful petition for a faculty, as in *Re Saint Nicholas's, Sevenoaks* [2005] 1 WLR 1011, and *Re Holy Trinity Bosham* [2004] Fam 125 (both discussed below).

To reaffirm the exceptionality of the grant of faculty for exhumation, and to contrast with secular grant, in *Re Smith* [1994] 1 All ER 90, 91, it was stated:

> It is not the case that provided a petitioner complies with certain formalities the grant of a faculty seeking the exhumation of human remains for their reinterment elsewhere is something to which he is entitled as a matter of course.

Thus the basic ecclesiastical premise regarding exhumation is that human remains are sacred whenever they are interred, and that graves and tombs are not to be disturbed.

The guidelines for the granting of a faculty for exhumation

Chancellor Edwards, in *Re Atkins* [1989] 1 All ER 14**,** stated that it was 'impossible' to give a list of classes that would be acceptable grounds for exhumation as the faculty jurisdiction is a discretionary jurisdiction. Therefore, the ecclesiastical courts when exercising this discretion should do so reasonably,

> according to the circumstances of each case, taking into account changes in human affairs and ways of thought but always mindful that consecrated ground and human remains committed to it should, in principle, remain undisturbed.'(p 19)

In *Re Christ Church, Alsager* [1999] Fam 142, Sir John Owen stated that, although ecclesiastical law is discretionary, 'the discretion referred to is a legal discretion which must be applied judicially and is not a discretion in the sense that the word is frequently given in common speech.' (p 148). Therefore, although each petition must be judged on its merits the principles of the appellate courts should be considered when applying this discretion. Chancellor Edwards, in *Re Atkins*, also considered the question of whether the type of buried remains should be a cogent factor in the decision to grant a faculty for exhumation:

> The court should make no distinction in this between a body and ashes and should be careful not to give undue weight to the undoubted fact that where ashes have been buried in a casket their disinterment and removal is simpler and less expensive than the disinterment of a body and is unlikely to give any rise to a health risk.' (p 19)

Despite Chancellor Edwards comment that it was impossible to give a list of classes that would give rise to an exception to the presumption against exhumation, there have been two important ecclesiastical decisions that have considered circumstances that might rebut the presumption of permanence and have tried to give general guidance. The first was by the Chancery Court of York in *Re Christ Church, Alsager* [1999] Fam 142, and the second by the Arches Court of Canterbury, in *Re Blagdon Cemetery* [2002] Fam 299, the latter containing a consideration of the earlier judgment. In *Re Christ Church***,** an undertaker had given mistaken advice that a faculty would easily be obtained for exhumation at some future date. The Chancery

Court of York formulated the question a chancellor should ask when considering a petition for faculty to exhume:

> Is there a good and proper reason for exhumation that reason being likely to be regarded as acceptable by right thinking members of the Church at large? If there is he should grant a faculty. If not he should not.' (p 149)

Sir John Owen giving the judgment of the Court stated that the question should be decided on the balance of probabilities and identified factors to aid the chancellor in his decision. Factors that might be considered persuasive included: a mistake by the applicant or a third party as to locality of the burial; medical reasons relating to the applicant; that all close relatives are in agreement; that the incumbent, the Parochial Church Council and any nearby residents agree, and; that there is little risk of affecting the sensibilities of congregations or neighbours. Factors that might go against grant included: the passage of a substantial period of time; public health factors; if the removal would be contrary to the intentions and wishes of the deceased; if there were reasonable opposition from members of the family; if there were a risk of affecting the sensibilities of the congregation or the neighbourhood; if the remains were to be reinterred in unconsecrated ground; improper motives, and here Sir John cited unreasonableness or serious family feuds; and, the grounds that the applicant had moved to a new area and wished the remains moved: the 'portable' cases (p 149).

The Court, considering these factors and applying its test to the case before it, refused the faculty on the grounds that 17 years had passed since interment and the graves between which the remains were to be removed were not separated by a great distance anyway, being within the same curtilage. The reasoning of the Court seems to have been particularly focussed on the fear that a culture of portability was developing. Sir John Owen stressed that Chancellor Lomas, at first instance in the present case, had been 'faced with one variation of a problem which is becoming increasingly frequent.' (p 146). Sir John continued, quoting Chancellor Lomas:

> It is particularly important …that I should emphasise that applications of this kind are never a formality and that the primary duty of this court is to safeguard the remains…once interred in consecrated ground and that there should be no disturbance of such remains save for good and sufficient reason. It is of the gravest importance that a situation should not arise where it is thought that provided the mechanical forms of application are complied with, remains may be transported from one place to another at the wish of those surviving the deceased.' (p 146)

Philip Petchey criticised the test formulated in *Re Christ Church* as 'unhelpful' and some of the guidance as 'questionable', noting that the case was decided on written representations and that the judgment 'would have been fuller if it had had the benefit of oral argument.' (Petchey 2001, p 122). In *Re Blagdon Cemetery*, the Arches Court of Canterbury took note of Petchey's comments when he acted as *amicus curiae*. The Arches Court considered the test in *Re Christ Church*, when it allowed the appeal against Chancellor Briden's refusal of faculty, in the Consistory Court, to exhume the remains of a 21-year-old, killed in an industrial accident and buried in 1978. Chancellor Briden had based his judgment on the test in *Re Christ Church*, that there was no good and proper reason for exhumation that was likely to be regarded as acceptable by right thinking members of the Church at large. The Arches Court's judgment took note of the points Petchey had raised including the problem of deciding what is a good and proper reason, and suggestions that, although it was

surely correct that a petition based on mistake should be brought promptly, passage of time should not always militate against the grant of a faculty for exhumation. As Petchey had said, 'in some ways it is no doubt more distressing if exhumation takes place shortly after the original interment' (Petchey 2001, p 126). The Court, in *Re Blagdon*, when considering guidance for the grant of faculty for exhumation, directed that the court should begin from the presumption of permanence of interment but that this might be rebutted in exceptional circumstances with good and proper reason. The Court stated that:

> there is much to be said for reverting to the straightforward principle that a faculty for exhumation will only be exceptionally granted. Exceptional means "forming an exception" (Concise Oxford Dictionary, 8th ed (1990)) and guidelines can assist in identifying various categories of exception. Whether the facts in a particular case warrant a finding that the case is to be treated as an exception is for the chancellor to determine on the balance of probabilities. (p 306)

The court then considered issues that might be relevant:

(i) medical reasons relied upon by a petitioner would 'have to be very powerful indeed to create an exception to the norm of permanence, for example, serious psychiatric or psychological problems where medical evidence demonstrates a link between that medical condition and the question of the location of the grave of a deceased person to whom the petitioner had a special attachment.' (p 307). This would not generally include 'advancing years and deteriorating health and change of place of residence';
(ii) lapse of time will not in itself be determinative of the petition. The existence of a credible explanation for the delay is relevant;
(iii) a mistake as to the location of a grave can be a ground for the granting of a faculty for an exhumation;
(iv) a change of mind as to the location of the grave should not be a ground for the granting of a faculty for an exhumation;
(v) the views of close relatives of the deceased are very significant;
(vi) the support of the wider community, including the incumbent, the PCC and parishioners will normally be irrelevant;
(vii) it was appropriate for a chancellor to have regard to the effect of setting a precedent when determining such petitions (contradicting the Court in *Re Christ Church* which had stated such a consideration 'irrelevant' (at p 150));
(viii) family graves are to be encouraged as an expression of family unity and as an economical use of land for burials.

In the considered case the exceptional circumstances had been met because of the sudden and unnatural death at a young age of the petitioners' son, the lack of any attachment of the deceased to the community, the petitioners' lack of any permanent home at the time of their son's burial, the early enquiries of the petitioners' solicitor as to exhumation when they had acquired a permanent home, and their purchase of a triple burial site at their new church, although the Court stated, 'it should not be assumed that whenever the possibility of a family grave is raised a petition for a faculty for exhumation will automatically be granted.' (p 310). The Arches Court also stated that there had been no interference with the petitioners' Article 8 rights under the European Convention on Human Rights, and that, as the remains were to be

reinterred in unconsecrated ground, this would require a licence from the Secretary of State and would not have been possible before the 1857 Act (p 304).

Of course this was a decision of the Arches Court and so may be thought only of interest to the Southern Province. However, the issue of the twin appellate Courts and their decisions was addressed in *Re Mary Wood, deceased* (2002) *Ecc Rep* (June), when Chancellor McClean, in the Sheffield Consistory Court, considered the Court of Arches judgment in *Re Blagdon* as not departing from the guidance in *Re Christ Church, Alsager*, that a good and proper reason needed to be shown. Concluding that a change of mind by relatives was not a good and proper reason he therefore refused a faculty to exhume the deceased for reburial in Scotland, although this was her wish whilst alive and her family were now moving there. Similarly, in *Re St John the Divine, Pemberton and Others* (2003) *Ecc Rep* (Nov), Chancellor Collier, in the Wakefield Consistory Court, acknowledged that he was strictly bound by the *Re Christ Church* decision in the Northern Province but found it 'wholly unreal' to ignore the *Blagdon* decision of the Southern Province, stating that he saw nothing of much substance between the decisions. The Chancellor observed that both cases agreed on the basic principle that burial in consecrated ground is final, and that each case must be decided on its own facts. Chancellor Collier also commented on the increased number of petitions for faculty for exhumation indicating that this was because of lack of understanding of the permanence of burial in the Christian theology of burial.

The Arches Court of Canterbury addressed the issue of which appellate court should be followed, in *Re Saint Nicholas's, Sevenoaks* [2005] 1 WLR 1011 (*sub nom Re Locock*), when it stated that consistory courts in each province should have regard to decisions of the appellate court, whether or not given in their province, and a later decision should prevail if it differs from an earlier decision irrespective of the province concerned. The Arches Court stated, *per curiam*, that:

> having regard to the fact that all chancellors are judges of each court and the offices of the Dean of the Arches and the Auditor are by statute held by the same person, it is realistic to treat the Court of Arches of Canterbury and the Chancery Court of York as being, for he purposes of the doctrine of precedent, two divisions of a single court.' (p 1011)

Thus the test for rebutting the presumption of permanence has reverted to the exceptionality principle and, although the Chancellors in *Re St John the Divine* and *Re St Mary Wood* have stated this is not a major change, it is submitted that this is significant, representing a movement away from the artificial consideration of the minds of right minded members of the Church in the *Re Christ Church* test.

Recent decisions: what may be 'exceptional'?

Recent decisions of the ecclesiastical courts have considered what constitutes exceptional circumstances to rebut the presumption of permanence. These are discussed under six headings: archaeological or scientific interest; the return or repatriation of human remains; the passage of time; the benefit of family burials; the fear of a culture of portability; and the impact of human rights legislation.

Archaeological or scientific interest

The Church courts have traditionally not considered archaeological, historical or scientific interest to be exceptional reason to rebut the presumption against exhumation. Thus, in *Re Saint Nicholas's, Sevenoaks* [2005] 1 WLR 1011 (*sub nom Re Lucas* and *Re Locock*), the Arches Court of Canterbury confirmed Chancellor Goodman's decision to refuse a faculty to exhume the remains of the petitioner's paternal grandfather. The petitioner had wanted DNA testing of a bone fragment for comparison with the DNA of the murdered Tsarina Alexandra, whose remains were found in Russia in 1991, to ascertain if family legend were correct that the deceased was the illegitimate son of the daughter of Queen Victoria. Applying *Re Blagdon*, the Chancellor had stated family curiosity and historical interest were insufficient reasons to rebut the presumption. The Arches Court stated that 'pure speculation' and satisfying family curiosity was not enough to rebut the presumption of interment (p 1026). Similarly, in *Re Holy Trinity Bosham* [2004] Fam 125, Chancellor Hill, in the Chichester Consistory Court, refused a petition to exhume the remains in two grave sites in the nave of the church for archaeological investigation and DNA testing to confirm if they were, as according to local legend, those of King Harold. Applying *Re Blagdon*, the Chancellor held that the preponderance of academic opinion was that the King was buried elsewhere, that the likelihood of usuable material for DNA analysis was 10-30 per cent, that there was no common chromosome comparator avaialable, and that the margin of error in such testing could only produce an inconclusive result. Although the Chancellor stated that the presumption against exhumation could be rebutted by a cogent and compelling case based on a matter of great national, historic or other importance, or the value of some particular research or scientific experimentation (p 137).

The latter exception was applied subsequently in *Re St Mary, Sledmere* [2007] 1 WLR 1538, when the York Consistory Court granted a faculty for the exhumation of the remains of Sir Mark and Lady Edith Sykes in order that scientific tests could be carried out on the remains of Sir Mark, which had been sealed in a lead-lined coffin after his death in the Spanish influenza pandemic in 1919. The petitioner was Professor John Oxford, who is researching into the avian influenza H5N1 virus and the use of immune suppressive drugs. The Professor had traced and received written consent for the proposed tests from all living immediate descendants of Sir Mark. The Court held it was entitled to have regard to the significance of the public benefit that might ensue from the proposed research. It also distinguished the petitions that had been refused in *Re Holy Trinity, Bosham*, and in *Re St Nicholas, Sevenoaks*. The court held that the greater the public benefit the less weighty the ground that was required to permit exhumation, thus in cases involving only increased historical knowledge, the grounds would have to be very weighty and there would have to be a great likelihood of success:

> whereas if the public benefit was in terms of possibly providing answers about and advances in the treatment of dangerous diseases, then grounds of less weight and perhaps an uncertain chance of success might suffice. In the instant case…there was a real prospect that the research they wished to carry out would advance the capability of others to combat the H5N1 virus. In those circumstances the instant case was an exceptional case, and the exceptionality displaced the presumption against permitting exhumations.' (p 75)

Thus the presumption against exhumation would seem to be rebutted only when scientific research might aid in the combat of disease but not for archaeological or historical interest.

Return or repatriation of human remains

Although the return or repatriation of human remains has been a development of the late twentieth century in secular policy and law (Fforde et al, 2002), the concept of returning human remains to a place or people who had a greater link with the deceased than the place of interment had been practised by the Church courts at least once in the 19th century. Thus, in *Re Talbot* [1901] P. 1, a faculty was granted to exhume the body of the former superior of a Roman Catholic Theological College, buried in 1790, from a churchyard to be reburied in ground under the College Chapel, where three other former superiors were buried. The faculty was granted subject to a Secretary of State's licence, as the reinterment would be in grounds not consecrated to the Church of England but a Catholic consecrated vault. The Petitioner had obtained consent from the nearest next of kin and referred to the long passage of time since interment as a factor militating for exhumation. The Church courts have also considered this issue more recently, **i**n *Re St Mary the Virgin, Hurley* [2001] 1 WLR 831, when Chancellor Boydell granted a faculty for the exhumation of the remains of a Brazilian national hero, Hipólito José Da Costa, for repatriation and reinterment stating that the principle of comity of nations and the lack of opposition satisfied the test in *Re Christ Church, Alsager*.

Not all petitions for the exhumation and return of human remains from consecrated burials are succesful. A recent petition by an Irish historian to exhume the cremated remains of fifteen Fenians, the "Manchester Martyrs", executed in the 19th century was refused. The Martyrs' remains had been amongst those previously exhumed and reinterred in Blackley Cemetery. The Chancellor refused the petition as it was impossible to know the identity of specific remains, or the wishes of the deceased, or to contact the deceaseds' nearest relatives. (2008 *Ecc L.J.* 2008, 10(2), 251). The guide, in *Re Blagdon*, that chancellors could be mindful of setting a precedent should be considered here, as there are notable burials of historical figures from First Nations in English consecrated graveyards that may form the basis of future petitions for faculty for exhumation and repatriation. For example the remains of Pocahontas, the daughter of the Native American Indian Chief Powahatan, were buried in the graveyard of St George's Church, Gravesend, in 1617. However, the remains of Pocahontas remain in the churchyard although the exact location of her grave is unknown and this might prove fatal if any application for a faculty for her exhumation and repatriation were to be made.

Passage of time

Even though Petchey has drawn attention to the illogical link between length of time interred and the presumption against exhumation, length of time of burial has continued to be considered one of the important factors militating against the grant of a faculty for exhumation, as in *Re Mangotsfield Cemetery* [2005] All ER (D) 43 (May); (2005) *The Times*, 26 April. Petchey had stated that the existing guideline that exhumation should not be granted after passage of time was the most difficult, as it has been stated in many cases and was taken as something of a given. He argued, it is submitted convincingly, that, although in cases of mistake prompt application from the time of discovery would be persuasive of grant, and delay and consequent decay

could be seen to presume against grant, in some circumstances the passage of time should be seen as persuasive of grant and passage of time should not be seen *per se* to make it less appropriate to grant a faculty for exhumation. Petchey justified these comments by citing the previously mentioned cases of *Re Talbot* and *Re St Mary the Virgin* (Petchey 2001, p 126). In *Re Talbot* a faculty had been granted to exhume remains 110 years after burial and in *Re St Mary* a petition was granted to exhume although burial had been over a century before.

The benefit of joint family graves

A factor that seems to be positive when a petition is made for a faculty for exhumation is the principle that the exhumed remains are to be reburied in a family plot. This factor was mentioned in *Re Christ Church* although stated not to be conclusive in *Re Blagdon*. More recently, in the previously mentioned *Re Strood Cemetery* [2005] All ER (D) 24 (May**)**, Chancellor Goodman, in the Rochester Consistory Court, granted a faculty allowing the exhumation of the cremated remains of the petitioner's husband and two sons-in-law from a family plot when the petitioner herself was interred. The Chancellor stated that enabling family remains to be kept together was sufficient reason to rebut the presumption against exhumation. It had originally been the petitioner's plan to be cremated and interred in the plot but she had subsequently decided to be buried in her coffin in the plot with the cremated remains of her family. Chancellor Goodman stated that had this been a simple burial then the process would have necessitated the removal of the caskets and this was looked on as *de minimis* interference and not requiring a faculty. However, the deterioration in the caskets might make the transferring of remains to new caskets necessary, and the digging of the grave the day previous to burial might also require the storage of the caskets in the chapel overnight, both of these factors necessitated a faculty.

Reuniting family remains will not always be sufficient reason to rebut the presumption, in *Re St Andrew (Old Church), Hove* (2005) *Ecc CR* (July), Chancellor Hill, in the Chichester Consistory Court, refused a faculty for the petitioners to exhume the cremated remains of the petitioners' father, interred in 1976, for reburial in the same grave as the petitioners' mother in Hove Cemetery. The petitioner, also in support of the petition, had submitted that the churchyard had deteriorated and vagrants were using it. Even though the late widow of the deceased had been mugged on one visit to the churchyard the Chancellor stated that the granting of faculties in such circumstances might be seen as imparting a degree of portability to remains that the law and the presumption against exhumation did not recognise.

Although family joint burial may be regarded as a positive factor and Chancellor Edwards had stated, in the previously mentioned *Re Atkins*, that the type of remains, whether corpse or cremated remains (sometimes referred to as 'cremains'), should be of no consequence to the decision to grant a faculty, petitions based on exhumation of cremated remains for scattering, even if with the ashes of other family members, will usually fail. In *Re Stocks, deceased* (1995) 4 *Ecc LJ* 527, Chacellor McClean QC dismissed the petition for faculty to exhume the petitioner's father's ashes for scattering in accordance with his father's known wishes, as:

> It is appropriate in certain cases to exercise discretion so as to permit the removal of human remains to another secure place, there to be re-interred. It is not essential that this new place of interment be consecrated ground, though that is certainly desirable. To allow disinterment in order that the ashes be

> scattered would, however, strike at the root of the principles of security and safe custody.

Thus, in *Re Johnson* (2005) *Ecc Rep* (May), the petitioner sought faculty to exhume the ashes of his late wife's parents, in accordance with her wishes, and scatter them in a garden of remembrance where his own parents' ashes were scattered. Chancellor Cardinal in the Birmingham Consistory Court considered *Re Atkins* and *Re Christ Church* and held that there was no good or proper reason to grant the faculty particularly because of the lapse of time, the individuals had died 40 and 27 years before respectively. This would cause distress and a late change of mind by a relative was insufficient reason to rebut the presumption against exhumation. Subsequently the same Chancellor, in *Re Robin Hood Cemetery, Solihull* [2006] All ER (D) 68 (Oct); (2007) *The Times* 10 January, refused a petition from the executor of Florence Mary Pearson based on a request in her will. She wished her husband's ashes to be exhumed and scattered with hers on a plot where her parents were buried. The Chancellor applied *Re Blagdon* and held the petitioner had failed to demonstrate any excepional circumstances. He also noted that the remains had been interred for over 17 years.

Whereas petitions based upon the reunification of families in family plots may be looked upon favourably, petitions based upon family differences and intended to remove family members from family plots will usually fail. The ecclesiastical court is unlikely to allow family disputes to continue beyond the grave. Thus, in *Re Mangotsfield Cemetery* [2005] All ER (D) 43 (May), the ex-husband of the deceased claimed that a mistake had been made by the council in allowing his ex-wife's ashes to be buried in a plot he had bought. Their seven-year-old son had been buried in the plot in 1975. The deceased had lived abroad and remarried but when she died in 1995 her new husband had followed her wishes and interred her ashes with her son. The ex-husband only discovered this in 2002 when he visited the grave and saw the altered gravestone (he had not visited his son's grave since 1986). He wanted the remains of his ex-wife removed from the grave and the gravestone returned to its previous state. The council and Home Office offered to pay for this but the ex-wife's family objected. Chancellor Behrens, in the Bristol Consistory Court, held that the general presumption against exhumation had not been rebutted and noted the length of time since interment, the opposition of the family and the ex-husband's callous behaviour as militating against grant. However, in *Re St Mark, Worsley* (2007) *Ecc. L.J.* 9(1), 147-148, the Manchester Consistory Court granted a petition for exhumation of the deceased from a family grave. Subsequent to interment the deceased's wife had discovered that he had been conducting an extra-marital affair and had diverted funds inherited by her into his business without her knowledge. The wife stated that her memories and the grave were defiled. The Chancellor stated that the grave was not defiled only her memories and granted a faculty on general principles but not as retrospective punishment for the deceased, 'leaving his eternal fate to God'.

In *Re X, deceased* (2001) *Ecc Rep* (Oct), the extreme facts of the case rebutted the presumption against exhumation. X had been interred with his wife and daughter. Another daughter petitioned for the exhumation of X's remains as he had sexually abused the daughter interred with him and his wife. The faculty was granted subject to X's remains being reinterred with a simple headstone. The existing headstone would have its inscription altered.

Thus, generally, subsequent joint family burial is considered a positive factor in petitions for exhumation, although not for the purpose of cremation or the scattering of cremated remains.

Portability of human remains

As the reuniting of family after death may be seen as a positive factor at times in rebutting the presumption against exhumation, it is submitted the refusal of petitions which include this factor as grounds for petition usually reflect the courts' fear of the development of an attitude of 'portability' to interred human remains: that remains may be exhumed whenever the family move around the country to be reinterred locally to their new home. This 'fear' seems to have developed throughout the late 20th century, reflecting the ecclesiastical court's reluctance to accept changing attitudes to death and burial as important factors in the decision to grant a petition for faculty. Thus, in *Re Atkins*, Chancellor Edwards, when considering a petition for faculty to exhume, stated:

> There has in my experience, and, I understand, in the experiences of other chancellors, been an increase in the number of petitions of this nature in recent years…for the disinterment of bodies and of cremated remains and their reinterment in other places, whether near to, or far from the first place of sepulchre. I have in this diocese and in the diocese of Blackburn, of which I am also chancellor, refused to grant the faculties sought under some of the petitions of this nature which have been presented to me. I have learnt that these refusals have caused distress, not only because of the frustration of sincerely held hopes, but also because, in some instances, the petitioners have been led to believe, wittingly or unwittingly, that the grant is no more than a formality, that the faculty is, if all is in order, a licence to which a petitioner is entitled as a matter of right.'(p 15)

Chancellor Edwards granted the faculty in the considered case, for exhumation of the petitioner's husband's remains and their reinterment in the churchyard where her family were interred and she intended to be buried, although he had first considered refusing it, citing as the main reason for the grant the likelihood that the graveyard would fall into disuse shortly. In *Re Smith* [1994] 1 All ER 90, Chancellor Lomas, in the Chester Consistory Court, refused a husband's petition for exhumation of his wife's remains and reburial in her preferred Bolton churchyard, based on the unavailability of plots in the churchyard when she was buried some 8 years before. The Chancellor reaffirmed the permanence of interment, the presumption against exhumation and that the church's primary duty was to protect remains. It was stated *per curiam*, the grant of faculties based upon the relocation of the living or unavailability of plots in the desired churchyard at the time of interment:

> … would lead to an unseemly procession of disintegrating corpses and ashes between burial grounds if whenever a petitioner moved from place to place the court were to grant him as a matter of course a faculty for the exhumation of his relatives remains and their reinterment elsewhere.'(p 91)

The issue is still of great concern to the ecclesiastical courts and was addressed directly in *Re Blagdon Cemetery,* when it was stated that,

> permanence of burial is the norm in relation to consecrated land, so that remains are not to be regarded as "portable" at a later date, because relatives move elsewhere and have difficulty in visiting graves. (p 305).

Thus, in the previously mentioned *Re Mary Wood, deceased* (2002) *Ecc Rep* (June), Chancellor McClean, in the Sheffield Consistory Court, considered that the guidance in *Re Christ Church* and *Re Blagdon* meant that a change of mind by relatives was not a good and proper reason for the grant of a faculty for exhumation and reburial of the deceased in Scotland, her wish whilst alive and where her family were now moving. Similarly, in *Re St John the Divine, Pemberton and ors* (2003) *Ecc Rep* (November), Chancellor Collier stated, in the Wakefield Consistory Court, that the increasing number of petitions was due to a lack of understanding of the Christian theology of burial and urged efforts by the diocese, clergy, funeral directors and cemetery managers to ensure that the bereaved were made aware of the issues arising from the decision to inter. In the recent case of *Re St Dunstan's, Whiston* [2007] All ER (D) 17 (Apr), the Deputy Chancellor Phillip Petchey, in the Southwark Consistory Court, dismissed a mother's petition based on grounds that she had been mistaken to inter her son in this churchyard as he was young, had no connection with the church, except through his mother, and would have preferred to have had his ashes scattered at sea. The Chancellor held that, applying *Re Blagdon Cemetery*, there were no special circumstances that justified making an exception from the norm. He also noted that even if the petitioner's Article 8 rights had been interfered with, that interference was justified (*Poluhas Dodsbo v Sweden (App no 61564/00)* [2006] ECHR 61564/00 considered).

However, there have been decisions, which, although claiming not to support a portable attitude towards buried remains, seem to recognise changes in the modern geographic mobility of the family and consequential attitudes to buried human remains. Thus, in *Re Atkins*, Chancellor Edwards, whilst stressing that there was a presumption of permanence of burial and thus against exhumation, and that his decision should not be seen as supporting an argument for considering remains as portable, granted the faculty for exhumation. The petitioner had cited the dual reasons of the deteriorating state of the churchyard and the fact that it was harder for her to visit and care for the grave. She also wished to return to her family's home. The Chancellor stated that the passage of time would usually militate against grant. However, he still granted the faculty to exhume the remains 11 years after burial. Similarly in the more recent case of *Re Lambeth Cemetery, Re Streatham Park Cemetery* (2002) *Ecc Rep* (Oct), Chancellor George, applying *Re Blagdon*, granted a faculty for the exhumation of the cremated remains for transport to Ireland, where the family had moved, for reburial in a plot where the deceased's widow intended to be buried. The fact the family had not been made aware of the legal consequences of the burial of the remains was important, as they had always intended his burial to be temporary. This although it had been stated, in *Re Christ Church*, that mistaken advice by an undertaker or anyone else as to the likelihood of success of a petition was unlikely to carry much weight (p 117).

The same Chancellor, in *Re Miresse, deceased* (2003) *Ecc Rep* (July), once more applying *Re Blagdon*, granted a faculty on the grounds that the family had never intended the deceased, who died suddenly at a young age, to be permanently interred in their original grave and had been under a mistaken belief. The daughter died unexpectedly at the young age of 16 and the family, Italian Roman Catholics, had buried her in the consecrated part of Lambeth cemetery. The Chancellor accepted the family had always intended to return to Italy and take the daughter's remains with them. However, in 1998 a new mausoleum was opened at Streatham Park Cemetery

and the family had secured the right of burial there at great expense. The Chancellor was assured this reburial would be final.

Thus the ecclesiastical courts are keen to decry any suggestion that a successful petition for a faculty for exhumation may be based on 'portability' or the relocation of the surviving family. However, it is submitted that some decisions have been inconsistent with this expressed view and may reflect a more pragmatic and sympathetic acceptance that families are no longer as attached to an area, particularly a parish, as they were, and many, although professing to follow the teachings of the Church when seeking consecrated burial, consider that when they do relocate they should be able to take their dead with them.

Human rights: the rights of the dead and the bereaved

With the advent of the Human Rights Act 1998 and the incorporation of the European Convention on Human Rights and Freedoms as a reference for all decisions by public bodies in the United Kingdom, petitions for faculties based upon the Convention have been promulgated upon three distinct rights guaranteed: Article 8, respect for private and family life; Article 9, freedom of thought, conscience and religion; and, Article 1 of the First Protocol, peaceful enjoyment of possessions.

In the 19th century the courts were keen to establish that the dead had no rights. Stephen J stated, in *Reg. v Price* (1884) 12 QBD 247, that, although in *R v Vann* (1851) 2 Den 325, and *R v Stewart* (1840) 12 Ad & El 773, 'the Court speaks of the "rights" of a dead body,' this was 'obviously a popular form of expression- a corpse not being capable of rights.' (p 253). This general principle, that a corpse has no rights, and more appropriately today, no human rights, was confirmed in *Re Crawley Green Road Cemetery, Luton* [2001] Fam 308, where a faculty was granted for a widow to disinter the cremated remains of her husband from a Christian cemetery as they were both humanists. Chancellor Bursell considered this necessary in acting in accordance with the Human Rights Act 1998, as an ecclesiastical court was a public authority satisfying s.6 (3) of the Human Rights Act and thus must act in accordance with the Act. The deceased had no rights under the European Convention on Human Rights but the widow had rights under Article 9 and

> it would be incompatible with the petitioner's Convention rights to refuse to allow her to remove her husband's ashes from a place where burial was, in her eyes, hypocritical and contrary to her humanist beliefs. (p 308)

The Chancellor had dismissed the petitioner's medical condition as a relevant factor. Subsequently, in *Re Blagdon*, guidance was given that medical reasons would not usually be exceptional grounds for rebutting the presumption against exhumation. The general deterioration of health, mobility and ability of relatives may thus be seen as unexceptional and tending towards portability.

The impact of the European Convention on the faculty jurisdiction was apparent even before the Human Rights Act commenced. Thus, in *Re Durrington Cemetery* [2001] Fam 33, the relatives of a Jewish man buried in consecrated ground were granted a faculty for exhumation even though he had been interred for eighteen years. The time lapse was acceptable, as the family had not wanted to disturb the widow who had visited the grave till she died. Although the Human Rights Act 1998 was not yet in force the Chancellor took account of it in considering that section 6(1) imposed on all courts a duty to act in a manner compatible with the European Convention on Human Rights. Therefore, there would be a risk the Court was acting contrary to Article 9 of

the Convention were it to deny the freedom of the orthodox Jewish relatives of the deceased to manifest their religion in practice and observance by securing the reinterment of his cremated remains in a Jewish cemetery in accordance with Jewish law. Applying *Re Christ Church*, there was a good and proper reason for exhumation likely to be thought acceptable by right thinking members of the Church at large.

It seems that petitions that establish the possibility of infringement of the petitioner's Article 9 rights will rebut the presumption against exhumation. However, petitions based on possible infringements of the petitioner's Article 8 rights have proved unlikely to rebut the presumption. Thus, in *Elli Poluhas Dodsbo* v *Sweden* (2004) *Ecc CR* (Aug) (and subsequently *Poluhas Dodsbo* v *Sweden (App no 61564/00)* [2006] ECHR 61564/00), the applicant complained that her Article 8 rights had been infringed as her domestic court had refused permission to exhume and move the urn containing her husband's ashes to Stockholm, where she now lived. The domestic court had refused permission considering that the deceased had no known wishes and had no connections with Stockholm. The European Court of Human Rights rejected her application by a bare majority, finding the restriction was in accordance with domestic legislation and served legitimate aims, *inter alia*, the sanctity of the grave. The Deputy Chancellor Phillip Petchey, considered *Poluhas Dodsbo* v *Sweden*, when dismissing a petition, in the previously mentioned *Re St Dunstan's, Whiston* [2007] All ER (D) 17 (Apr), based on the petitioner mother's argument that not to grant a faculty to exhume her young sons' ashes and scatter them at sea, as she now believed he would have wished, infringed her Article 8 Convention rights. The Chancellor held that, applying *Re Blagdon*, there were no special circumstances that justified making an exception from the norm and that even if the petitioner's Article 8 rights had been interfered with, that interference was justified.

Similarly petitions based upon possible infringement of the petitioner's rights under Article 1 of the First Protocol, usually claims to property interests in the grave plot and, of course, not in the corpse, are also seemingly doomed to fail. Thus, in *Re West Norwood Cemetery* [2005] 1 WLR 2176 (*sub nom Re Swaden* (2005) *Ecc CR* (Feb)), Chancellor George, in the Southwark Consistory Court, considered whether Article 1 of the First Protocol had been engaged and thus whether the petitioner's property interests had been alienated when a forged signature had been used to procure the burial of his father's cremated remains in the family plot. Half of Sylvia Swaden's ashes had been interred in 1922 in West Norwood Cemetery and half scattered at Clacton-on-Sea. Her second son, the petitioner, Paul, claimed that there had been a rift between his father and mother, and that, consequently, his father should not be buried in the same plot. To this end he made an entry in the cemetery register that the plot was not to be opened without his permission. In 2003 the father died and his ashes were interred in the plot. Chancellor George concluded that it was likely the required documents had been signed with a forged signature. There was considerable bad feeling between family members, which spilled over at the graveside. Paul petitioned to have the ashes of his father exhumed and removed. The Chancellor considered the European Convention on Human Rights and in particular Article 1 of the First Protocol and the alienation of Paul's property rights. The Chancellor did state if the petitioner did have a proprietary right in the grave then Article 1 of the First Protocol might be engaged and the court would have to consider that its refusal of the petition would interfere with these rights. However, the Chancellor concluded that the applicant did not have an exclusive property right in the plot, as many family members, including his deceased father, had contributed to the cost of the plot. The

Chancellor held that a constructive trust had been formed with Paul as the legal trustee for the family as the father and other family members had contributed to the grave costs. Therefore Paul had no right to refuse consent to his father's interment as his father's executor could enforce this. The Chancellor held that Paul would similarly have been precluded from refusing his father's interment on the grounds of proprietary estoppel. The petition was therefore refused as the falsity of the burial form was of no account.

It is submitted that these authorities exemplify that the general attitude of chancellors to petitions based on human rights arguments is to grant those based on Article 9, the right to manifest the petitioners' religious beliefs, and to refuse those based on Article 8, the right to family life. This may have more to do with social and political realism than sound interpretation of the Convention rights and their application within the faculty jurisdiction. Petitions based upon Article 1 of the First Protocol and the alienation of property interests have usually failed because of uncertainty about the ownership of graves (Nwabueze 2007).

Conclusions

The Church of England has been the traditional protector of the dead, the common law affording basic protection for those not buried in consecrated ground. With the advent of the Burial Act 1857, section 25, the State confirmed the Church's role for consecrated ground and undertook to protect those buried in unconsecrated ground beyond the protection of the common law. This secular/temporal protection has been administered less restrictively than the faculty jurisdiction.

The ecclesiastical courts begin any consideration of a petition for a faculty for exhumation with the presumption that burial of the corpse or cremated remains in consecrated ground is permanent. Therefore, there is a presumption against exhumation. Following *Re Blagdon*, the ecclesiastical courts are once again guided by the principle that the presumption can only be rebutted, and a faculty granted for exhumation, if exceptional reasons are established to support the petition. Recent decisions seem to evince a line of judicial reasoning restricting the grant of faculty for exhumation, perhaps to combat fears that modern consideration of the burial of the dead does not encompass the ecclesiastical court's presumption of the permanence of burial, although there have been notable exceptions. Thus petitions will generally not be granted if they are based upon archaeological or scientific grounds unless it can be shown there is a high likelihood of success in the proposed research and that this will be of public benefit. General archaeological or scientific interest will not be an exception to the presumption of permanence. Furthermore, passage of time, stated not to be automatically fatal to a petition in *Re Blagdon*, still seemingly militates against grant. Therefore petitions have continued to fail if a long period has passed between burial and petition.

There are, however, grounds that are likely to find favour with chancellors. Thus the current popularity of return or repatriation of human remains had been anticipated by the ecclesiastical courts, and seems likely to continue to constitute an exceptional reason to rebut the presumption if the identity of the buried remains can be ascertained with a degree of certainty. Similarly, family joint burial is recognised as a positive factor in seeking a faculty for exhumation and reburial with others from the family. However, it is not seen as conclusive on its own and any disagreement within the family will usually prove fatal to the petition. Petitions based upon exhumation of

cremated remains, or the buried corpse for cremation and subsequent scattering with the cremated remains of other family members are also unlikely to rebut the presumption. Any indication that family reburial is being used to cloak a petition which might be categorised as 'portable' will also militate against grant as there has been continued criticism of the concept of portable remains. However, it is submitted that some recent decisions, although strenuously claimed not be based upon relocation, seem to accept that families have not understood the Church's teaching on the permanence of burial and have allowed a degree of portability, usually masked by other reasons.

The ecclesiastical courts have confirmed that the corpse cannot benefit directly from the European Convention on Human Rights, but petitioners may cite protection of their Article 9 rights as exceptional reason to grant a faculty. However, petitions based upon Article 8 and Article 1 of the First Protocol have been rejected or decided on other grounds.

During the research for this article the premise was developed that the faculty jurisdiction is unnecessarily restrictive compared to the secular licensing scheme and that, therefore, there is a need to bring the ecclesiastical and secular jurisdictions into line, bringing certainty to an emotive area of law. It was to be submitted that this might be affected by removing exhumation from the ecclesiastical jurisdiction altogether. It was also to be submitted that this difference in the ability to obtain permission for exhumation might be grounds for human rights challenges to the ecclesiastical jurisdiction if it were not brought into line with the secular scheme. However, since the initial research for this article secular exhumation authority has been brought under the auspices of the newly constituted Ministry of Justice and this has resulted in a reinterpretation of the relevant legislation by the Ministry in apparent disregard of 150 years of jurisprudence (Cosgrove-Gibson & Gallagher 2008; Gallagher 2008). This reinterpretation resulted in the Ministry of Justice advising archaeologists and property developers that they did not need a licence to exhume human remains in certain circumstances (Ministry of Justice 2007). After receiving concerns from archaeologists and others, that those concerned with such exhumations might find themselves open to prosecution for common law offences if they exhumed human remains without a licence, the Ministry have once more reinterpreted the provision and issued new guidance. However, this is not a return to the licensing scheme as existed under the Home Office, because, although stating that section 25 licences are required for all exhumations not covered by other legislation or under the faculty jurisdiction, the Ministry is still unsure of its ability to attach 'precautions' or conditions to section 25 licences. The Ministry has proposed a consultation to be carried out shortly.

Consideration of this confusion regarding its regulatory responsibility by the Ministry of Justice has encouraged the author to consider that the faculty jurisdiction is in fact well administered by the ecclesiastical courts and, although the living may find the Church's presumption against exhumation an inconvenience in the modern world, a scheme which overprotects the remains of the dead is to be preferred to one which neglects protection.

The author's concerns that the ecclesiastical courts were unduly restrictive were based upon the animosity of the Church to the concept of portable remains, which seems to neglect to consider modern attitudes to the geographical mobility and displacement of families. The problem is exacerbated by the relative lack of knowledge of Christian

theology of those seeking Christian burial for themselves or their family compared to their 19th century forebears. It is respectfully submitted that, as chancellors have noted that the number of petitions based on portability is rising, few of those deceased and their families who desire traditional Church burial and cremation services, and the funeral professionals who advise them, are aware of the presumption of permanence arising from Christian burial. In fact there is no requirement for the deceased or their family seeking Christian burial to have, or have had, a depth of knowledge of the Church's teachings. Indeed those arranging funerals are now encouraged to include non-biblical readings (Davies 2005, p 58), and no evidence is required that the deceased or their relatives were churchgoers. It is interesting that less evidence is required of the commitment of the deceased and their family to the Church for a cremation or burial than for those involved in a wedding or Christening, generally less enduring arrangements. If the Church is to continue to conduct funerals, which do not require the deceased or those arranging the funeral to have had an understanding of Christian theology, then perhaps the Church should ensure that the deceased was, and their family are, informed of the presumption of permanence arising from burial in consecrated ground. Similarly, although those involved in funerals may have knowledge that exhumation is possible, they cannot be expected to know how difficult it is to secure, and, even if there are doubts about interment at the time of the burial, the very existence of a possible remedy in the future may encourage those grieving executors to bury today thinking that they may exhume tomorrow. It is submitted that, although "an unseemly procession of disintegrating corpses and ashes between burial grounds" *(Re Smith*, p 91) should be avoided, a limited concept of portability might not be inconsistent with the protection of the dead, as it would encourage families to take their dead with them, if they move, and continue caring for graves.

Although attendance at religious services has declined steadily throughout the twentieth century it is still expected that our remains will be treated respectfully after we die. This is reflected in the law and the law's requirement for respect for dead bodies, which has been described as 'remembering as moral practice' (Lambek 1996). Perhaps this reflects the ultimate of Durkheim's piacular rites, expressing community solidarity through religious or ritual respect for the dead. Thus the Church's continued protection of the dead should be encouraged, perhaps tempered with recognition that even those members of society who claim to be Christian have different concerns and expectations than their great-grandparents.

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