

---

# The Treatment of Human Remains under the Ecclesiastical Law of England

IAN BLANEY

Partner, Lee Bolton Monier-Williams

---

*Human remains interred in parish churchyards or in consecrated portions of local authority cemeteries are within the faculty jurisdiction of the consistory courts of the Church of England. A faculty is required for the disturbance of human remains lying within the faculty jurisdiction. This article will examine the law surrounding consecrated burial grounds in England and the disinterment of human remains therefrom and what this demonstrates about the principles of the ecclesiastical law of England relating to their protection. If ecclesiastical law provides for the protection of human remains, what is the justification for that and how adequate is the protection? The article will compare the consistory courts' treatment of human remains with the regulation of remains outside the faculty jurisdiction, and attempt to relate canonical principles towards human remains with the legal character of consecrated ground. It will investigate whether the modern treatment of human remains is different from the treatment of remains in the past. By these comparisons I hope to better explore what justifications exist for the approach the consistory courts have taken in regulating disturbance of human remains.*

**Keywords:** human remains, Church of England, consistory court, exhumation, consecrated ground

## THE CONSECRATED CHARACTER OF BURIAL GROUNDS

In this article I wish to describe and typify the characteristics of consecrated burial grounds which exist in ecclesiastical law. I am mainly concerned with written authorities for the legal principles which apply to consecrated ground, while recognising that burial culture and the practice of churchyard management may diverge from that. In Julie Rugg's excellent survey of burial practices and burial grounds in rural North Yorkshire over the nineteenth and twentieth centuries, she illustrated how a theoretical dichotomy between the 'parish churchyard' and 'municipal cemetery', and between the religious and the secular in burial practices, was more illusory than real.<sup>1</sup> I recognise that a study of the law alone will have its limits, although case law itself embodies a dialogue between the law and the facts of individual cases. Most commentary on the law of consecrated land over the past two decades has tended to consecrate on the principles which apply to the exhumation of human remains, as those are the cases that most commonly come before the ecclesiastical

<sup>1</sup> J Rugg, *Churchyard and Cemetery: tradition and modernity in rural North Yorkshire* (Manchester, 2013).

courts.<sup>2</sup> Those cases, some of which I shall touch upon below, have tended to concern whether a request for exhumation of human remains falls within certain parameters that the ecclesiastical courts have deemed to form an exception to, or a good reason to depart from, the general rule that exhumation will not be allowed. However, it is worthwhile stepping back from the rights and wrongs of individual cases in order to see whether the principles around the regulation of consecrated ground and of burials in that ground form part of a unified body of law. I also want to collate the various sources that give rise to the legal principles of consecrated ground as a place of repose for human remains to assist with future commentary on the subject.

I will begin by describing the legal character of the place of custody of human remains, the consecrated parish churchyard or consecrated portion of a municipal cemetery. It is thought that Christians have buried their dead in English churchyards since at least AD 752. This is the year in which Archbishop Cuthbert is supposed to have obtained papal permission to make cemeteries within city walls and thus contiguous to urban churches:

When Cuthbert, the eleventh Archbishop of Canterbury, saw in Rome that many people were interred within the cities, he asked the Pope to allow him to establish cemeteries. The Pope agreed. When [Cuthbert] returned, he therefore decided to have cemeteries established throughout England.<sup>3</sup>

Since at least that time the English Church has consecrated the ground intended for burials, as it had before been consecrating churches.<sup>4</sup> From early times the consecration of a burial ground was reserved to the bishop and the purpose was to set aside the land for burial. A licence of the Archbishop of York from 1349 for a burial ground at Newark recites that the archbishop was petitioned to permit the burial ground on the basis that the mortality of plague had caused too great a burden on the existing burial ground and that ‘we should deign to grant a licence

- 2 The ecclesiastical case law on exhumation from consecrated ground has been extensively surveyed by Dr Bursell and Mr Petchey in this journal: R Bursell, ‘Digging up exhumation’, (1998) 5 *Ecc LJ* 18–33; P Petchey, ‘Exhumation reconsidered’, (2001) 6 *Ecc LJ* 122–134; R Bursell, ‘Aspects of burial and exhumation’ (2017) 19 *Ecc LJ* 169–192.
- 3 ‘CUTHBERTUS archiepiscopus Cant. xi. ab. Augustino cum Romæ videret plures intra Civitates sepeliri, rogavit papam ut sibi liceret coemiteria facere, quod papa annuit, reversus itaque coemiteria ubique in Anglia fieri constituit’. These words were in the appendix to ‘the booke of Rochester a MSS’ in Sir Robert Cotton’s library, according to J Weever, *Antient Funeral Monuments, of Great-Britain, Ireland, and the Islands Adjacent, With the Dissolved Monasteries Therein Contained* (London, 1631), pp 8–9. I cannot corroborate the record any further and the apparent historical event has been repeated in numerous works since then.
- 4 See the brief history of the consecration of churches in K Homfray, ‘Sir Edward Coke gets it wrong? A brief history of consecration’, (2009) 11 *Ecc LJ* 36–50, and the response by A McGregor, ‘The legal effect of consecration of land “not belonging to the Church of England”’, (2009) 11 *Ecc LJ* 194–205.

and give our authority for the burial of the bodies of the dead there'.<sup>5</sup> Modern legal deeds of consecration contain the clear intent to consecrate the land 'as and for a burial ground for the interment of the remains of inhabitants of or persons dying within the parish of . . . and others who might be lawfully interred there'.<sup>6</sup>

Other requirements such as for the land to be walled or fenced, and vested in an appropriate body, are consistently found.<sup>7</sup> Once consecrated, churchyards were subject to a high degree of regulation. Some of the regulation was from statutes prohibiting fairs in churchyards and brawling.<sup>8</sup> An order by the Bishop of Winchester at the Synod of Woodloke in 1308 forbade 'ballad-singing, the exhibition of shows, and other profanations in the church-yard, on pain of excommunication'.<sup>9</sup> Canon 19 of 1603 ordered churchwardens not to suffer idle persons in the churchyard during the time of divine service, and Canon 88 forbade such profane activities as plays in the churchyard.

A modern form for the consecration of a new burial ground involves the bishop invoking 'the most high God of heaven and earth, Father, Son and Holy Ghost, for a blessing' for the purpose of separating and setting apart the land 'from all common and profane uses' as and for a burial ground and with particular reference to a plan of the land which is declared so set apart 'by this our sentence and final decree which we have been caused to be read'.<sup>10</sup> The reading of the sentence forms part of the liturgy, which includes physical acts of the bishop that may involve perambulation around the boundaries being consecrated. By at least 1620 and probably some centuries before, the physical presence of the bishop was required or had become customary, although burials may have been permitted by bishop's licence in advance.<sup>11</sup>

5 R Horrox, *The Black Death* (Manchester, 1994), p 269, citing Borthwick Institute of Historical Research, York, Reg. 10, fo. 127v.

6 LexisNexis, *Encyclopaedia of Forms and Precedents*, vol 6(1) (2002), form 29.

7 The Archbishop of York's commission for consecration of the churchyard of the chapel of St Thomas Beverley in 1349 (see Horrox, *Black Death*, p 270) stipulates that 'the burial ground of the chapel should be walled and kept for ever from any defilement'. Canon F 13(2) requires churchyards to be fenced.

8 13 Edw I cap 6(2): 'And the King commandeth and forbiddeth that from henceforth neither fairs nor markets be kept in churchyards for the honour of the Holy Church'; 27 Hen VI cap 5 decreed that no fairs or markets were to be allowed in churchyards. 1551 5 Ed VI cap 4 banned brawling on pain of excommunication.

9 (1796) 12 *Archaeologia* 20n, cited in R Muncey, *A History of the Consecration of Churches and Churchyards* (Cambridge, 1930), p 128.

10 LexisNexis, *Encyclopaedia of Forms and Precedents*, vol 6(1) (2002), form 29. The plan is subsequently deposited in the diocesan registry. The post-Reformation form of consecration of churches relies much on that formulated by Bishop Andrewes in 1620. The rite of consecration could be controversial to those who considered the ceremony superstitious. Archbishop Laud's consecration of St Katharine Cree in 1631, which was noted as being particularly elaborate, was met with approbation: see Muncey, *History of the Consecration of Churches and Churchyards*, p 60.

11 This is my supposition as, in times of plague or other high mortality, the timely presence of a bishop to consecrate a new burial ground could not be guaranteed.

The Consecration of Churchyards Act 1867 simplified the procedure for extensions to existing churchyards, specifically providing that the consecration could occur without the presence of ecclesiastical legal officers (and thus dispense with their legal fees), but with the bishop signing a short instrument at the churchyard or in the church to which it belonged. No previous legislation had sought to specify what was required for consecration to occur. No perambulation or ceremonies were mentioned in the Act. The passing of the 1867 Act was met with some debate in the House of Lords over whether it was necessary for the bishop to attend the churchyard at all. There were those who tended to see the consecration as an act of grace, brought down by the physical actions of the bishop (or who were at least wary of breaking with tradition), while there were others who saw the requirement for the physical presence as suggestive of superstition.<sup>12</sup>

However, the liturgical practice has always indicated that consecration has both a legal and a spiritual effect or significance.<sup>13</sup> This is denoted by the use of the legal deed and the liturgical context in which it is read, with blessings invoked from heaven. The result is twofold: investing the land with a sacred character to dedicate it for the purpose for which it has been intended, and bringing the land under the control of the ordinary (namely the diocesan bishop, acting through his or her consistory court). In addition, the legal and canonical principle is that consecrated land cannot be deconsecrated, although the legal effects can be removed.<sup>14</sup> The longevity and permanence of the protective character of consecration is enhanced by these various facts. The usual requirements as to vesting the land in an ecclesiastical corporation, the enclosure of churchyards in walls or fences, and the dedication for ever within the regulation of the bishop's court indicate an intention under ecclesiastical law that a place of burial is more than temporary or circumstantial.

12 The common view being that, as an extension to an existing consecrated churchyard, the physical act had already been done. There was no more need for the bishop's presence than there would be for the consecration of a church extension. See the debate in the House of Lords, HL Deb 24 May 1867, vol 187, cols 1016–1020; HL Deb 6 June 1867, vol 187, cols 1649–1651; HL Deb 8 July 1867, vol 188, cols 1163–1167. The provision in the Consecration of Churchyards Act 1867 is now contained in section 89 of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 ('EJCCM 2018'). If the consecration is taking place otherwise than under the EJCCM 2018 (and formerly the Consecration of Churchyards Act 1867), ie does not pertain to an extension of an existing consecrated churchyard, the diocesan registrar (acting as an ecclesiastical notary) or his or her deputy or some notary public must still be present. The role performed is that of a notary, by recording and verifying the consecration.

13 As opposed to dedication, which does not have a legal effect.

14 Either under s 74 of the Mission and Pastoral Measure 2011 pursuant to pastoral scheme, or according to s 92 of the EJCCM 2018 (only applying to land not held by an ecclesiastical corporation or a diocesan board of finance, ie rare cases). The old law from *Campbell v Paddington Parishioners* (1852) 2 Rob Ecc 558 that nothing save an Act of Parliament can divest consecrated ground of its character has been superseded by this legislation. Consecrated land can be appropriated under the law of adverse possession, but this does not divest the land of its consecrated status or oust the jurisdiction of the consistory court.

## THE CONSISTORY COURT'S CUSTODY OF HUMAN REMAINS

In English law it is more helpful to describe the legal rights over human remains as custody rather than ownership. There is no property in a dead body, except in specified cases where human skill has invested it with the quality of property.<sup>15</sup> There is a common law duty to dispose (normally bury) human remains, which normally falls upon the personal representatives of the deceased, or statute may make it fall upon the local authority.<sup>16</sup> The duty to bury does not apply to remains which are classified as necessary for medical research. These were regulated first under the Anatomy Acts of 1832 and 1984 and latterly under the Human Tissue Act 2004. In ecclesiastical law there is a duty on the minister to bury those who have the right to be interred in the churchyard or consecrated portion of the cemetery.<sup>17</sup> Once a dead body is buried, it is a common law misdemeanour to disinter it without lawful authority.<sup>18</sup> The common law will therefore interpose for the protection of remains which cannot be defended by the laws of property. Ecclesiastical law also protects graves, by requiring a faculty from the consistory court for disinterment from a burial ground within its jurisdiction. Common law has not interfered with this principle.<sup>19</sup> The Burial Act 1857 buttressed the principle by making it a statutory offence to disinter remains from the jurisdiction of the consistory court without a faculty.<sup>20</sup> The Government has confirmed that there is no real demand for this to be altered.<sup>21</sup> By this legal framework the Church courts act as the custodians of human remains lying in their jurisdiction and regulate interference.

### What principles have been relied upon by the consistory courts in exercising their discretion in granting faculties for exhumation?

Requests for disinterment are occasionally made: either from family members wishing to dispose of the body in a different way from the one that initially took place (because of mistake or change of mind or circumstances), or because of other public and private needs such as to use the land in a different

15 *Handyside's Case* (1749) 2 East PC 652; *R v Sharpe* (1857) 26 LJMC 47 at 48 per Erle J. *R v Kelly* [1998] 3 All ER 741; *AB v Leeds Teaching Hospital NHS Trust* [2004] EWHC 644 (QB).

16 2 Bl Com 508; *Williams v Williams* (1882) 20 Ch D 659; *Rees v Hughes* [1946] KB 517 at 524. Public Health (Control of Disease) Act 1984 s 46(1).

17 Canon B 38(2).

18 *Foster v Dodd* (1867) LR 3 QB 67.

19 Coke (3 Co. Inst. 203): 'burial of the Cadaver (that is, *caro data vermibus*) is *nullius in bonis* and belongs to Ecclesiastical cognisance', cited in S Gallagher, 'Protecting the dead: exhumation and the Ministry of Justice', (2008) *Web Journal of Current Legal Issues* issue 5, <<http://www.bailii.org/uk/other/journals/WebJCLI/2008/issue5/gallagher5.html>>, accessed 9 October 2020.

20 At the same time the Act made it a requirement to obtain a licence from the secretary of state for disinterment in other burial grounds: Burial Act 1857, s 25.

21 Ministry of Justice, 'Burial law and policy in the 21st Century: the way forward—Government response to consultation', June 2007, <[https://www.iccm-uk.com/iccm/wp-content/uploads/2020/09/iccm\\_burial-law-policy-Moj-2.pdf](https://www.iccm-uk.com/iccm/wp-content/uploads/2020/09/iccm_burial-law-policy-Moj-2.pdf)>, accessed 9 October 2020.

way for building or road widening, or for reasons of archaeological study or public health. The present canons offer little guidance as to what principles the consistory courts are to rely upon when determining requests for disinterment.<sup>22</sup> The duty to bury is codified but not what protection should be afforded to buried remains. The modern approach to exhumation is exemplified by Chancellor Edwards in *Re Atkins*.<sup>23</sup> Here, the court relied on the liturgy of the burial rite from the *Book of Common Prayer* to establish the canonical intention in burial. The chancellor referred to Wheatly's analysis of the Prayer Book to establish the canonical intention to commit the dead body into the safe custody of the Church:

The court should, then, approach the exercise of its discretion in the knowledge that the canonical intention of those who committed the body or ashes of the deceased to the ground was committed into the safe custody of the Church.<sup>24</sup>

The presumption therefore would be no disturbance, although changes and chances in society may make such a disturbance necessary or expedient. Following the approach of the chancellor in *Re Matheson*, the discretion of the court is unfettered, but should be exercised reasonably.<sup>25</sup> An inexhaustive list of possible justifications was given, including error, the wishes of family members and public need. This approach was confirmed by the Court of Arches in *Re Blagdon*, which cautioned that the exercise of discretion in rebutting the presumption of safe custody must remain unfettered.<sup>26</sup> The court utilised a theological submission by the then Bishop of Stafford, Christopher Hill. The bishop's theology made the committal of a body to the ground an enduring symbol of the entrusting of a person to God for resurrection. This notion was not consistent with the idea of 'portable remains', which suggested a continuing human possessiveness over the body, an act of reclaiming and restlessness. This theological position emphasised the intention to withhold remains entirely from human control, whereas Wheatly concentrated on respect and honour for the remains, so that they had significance in their own right.

22 Revised Canons Ecclesiastical, seventh edition, <<https://www.churchofengland.org/more/policy-and-thinking/canons-church-england/canons-7th-edition>>, accessed 9 October 2020.

23 *Re Atkins* [1989] 1 All ER 14.

24 *Ibid*, at para 17, quoting C Wheatly *A Rational Illustration of the Book of Common Prayer* (Cambridge, 1858), p 586: 'The phrase of *commit his body to the ground* implies that we deliver it into safe custody and into such hands as will safely restore it again. We do not cast it away as a lost and perished carcass; but carefully lay it in the ground, as having in it a seed of eternity *and in sure and certain hope of the resurrection to eternal life*' (emphasis in original).

25 *Re Matheson* [1958] 1 WLR 1246.

26 *Re Blagdon Cemetery* [2002] Fam 299.

In *Re Blagdon*, the Court of Arches considered possible justifications for disinterment, including mistake (including when the deceased transpired to be a member of a different religion) and the wishes of family members to unite the deceased with a family grave. But it discounted the reasons of immobility of family members and of local support. Lapse of time since burial would not be considered conclusive, and precedent would play a role. While these cases provide us with the main principles of the law on exhumation, other cases have added to the list of possible justifications for the exercise of the chancellor's discretion. These justifications can be categorised in a threefold manner: as the private need of family members; as public need associated with the remains; or as public need relating to planning development.

Mistake is the most common justification for private need. This has included 'mistake' where the moral character of the deceased had not been discovered prior to burial in a family grave,<sup>27</sup> as well as mistake as to location and as to the wishes of the deceased and his or her family. Public need associated with the remains themselves has extended to research purposes where a faculty was granted for the exhumation of the remains of a person who had died in 1919 in the Spanish flu pandemic, and where the comity of nations would be furthered by repatriating the remains of a Brazilian national hero.<sup>28</sup> The consistory courts have rejected more speculative enquiries where the purpose has been to identify remains of historical importance with uncertain result: these include the Manchester Martyrs case; *Re St Nicholas Sevenoaks* (DNA testing to ascertain whether the deceased was the illegitimate son of one of Queen Victoria's daughters); and *Re Holy Trinity Bosham*, another speculative case, where the aim was to discover the remains of King Harold beneath the church nave.<sup>29</sup> Although in the *Re Holy Trinity Bosham* case Chancellor Hill said that an exhumation for great national or historical purpose could be admitted as a sufficient justification, such a petition would have to be based on clear scientific evidence. This precludes the experimental or speculative aspects of archaeological discovery. Building on consecrated ground within the faculty jurisdiction is nearly always for ecclesiastical purposes such as the building of church extensions, and the refurbishments of crypts. Therefore, provided that the building is seen as a benefit for mission, this normally affords a sufficient public need.

It can be seen that the response of the consistory court to requests for disinterment is protective of the finality of burial. The burden of proof is on the petitioner to provide reasons of exceptionality, although there are numerous justifications. The cases demonstrate the extent to which the courts have had

27 *Re St Mark Worsley* (2007) 9 Ecc LJ 147–148.

28 *Re St Mary Sledmere* (2007) 9 Ecc LJ 343; *Re St Mary the Virgin Hurley* [2001] 1 WLR 831.

29 *Re Blackley Cemetery* (2008) 10 Ecc LJ 251; *Re St Nicholas Sevenoaks* [2005] 1 WLR 1011; *Re Holy Trinity Bosham* [2004] 1 WLR 833.

to grapple with the interface between the ecclesiastical law principles relating to burial and the pastoral situation involving grieving relatives. When faculties are granted for disinterment, they are usually conditional on the remains being reburied, and normally (although not exclusively) in consecrated ground.<sup>30</sup> If the exhumation is effected without a faculty but according to a pastoral measure scheme, it is provided that the bishop may impose reasonable conditions with respect to the manner of removal and the place and manner of reinterment or cremation of any human remains. Under the secular equivalent in the Town and Country Planning Act 1990 and under various infrastructure statutes, there are bespoke regimes.<sup>31</sup> These tend, either on the face of the Act or under undertakings, to give the diocesan bishop a role in determining the place of reburial. Therefore, although the remains are interfered with, the canonical intention to bury is not reversed, and possession is not reclaimed over remains in such a way as would be inconsistent with Christian theology as stated in *Re Blagdon*.

Although nowhere is there clear authority that cremated remains, once disinterred, may not then be scattered, many diocesan churchyard regulations direct that cremated remains may not be scattered as part of the Church burial service.<sup>32</sup> It is to be remembered that the canonical duty on clergy is ‘to bury’ and not, by implication, to do otherwise. Although Canon B 38(4)(b) requires only that cremated remains be ‘reverently disposed of’ in a burial ground or at a place at sea designated by the bishop (thereby querying whether scattering can amount to reverent disposal), the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 specifies that the right of disposal in churchyards is by *burial*.<sup>33</sup> The burial service provides for an immediate deposit of remains, and the action of putting remains out of sight rather than dispersing them on the same plane as the funeral party is more consistent with the idea of giving over custody of the remains. Burial in crypts and mausoleums are deemed to be burials, and most are built to be subterranean. Columbaria are at least sealed or capable of being sealed. Burial at sea is canonically acceptable, and

30 The Court of Arches were prepared to permit burial in the unconsecrated land at a local authority cemetery in *Re Blagdon Cemetery* and it is not unusual for an ecclesiastical court to permit this. In that case the court commented that, while reburial in unconsecrated ground had in former times been refused by the ecclesiastical courts, the particular objection was removed when unconsecrated land became subject to statutory control on the introduction of a licensing system under s 25 of the Burial Act 1857: see *Re Blagdon Cemetery* [2002] Fam 299 at paras 13–14.

31 Town and Country Planning Act 1990, ss 239–240; Town and Country Planning (Churches, Places of Religious Worship and Burial Grounds) Regulations 1950, SI 1950/792. Infrastructure statutes include, eg, the High Speed Rail (London–West Midlands) Act 2017, ss 27–28 and Sch 20.

32 Eg Diocese of Norwich Churchyard Regulations 2016, para 12(1).

33 EJJCM 2018, s 88(2), deriving from the Church of England (Miscellaneous Provisions) Measure 1976, s 6(1) (now repealed). For a discussion on the legality of scattering ashes, see R Bursell, ‘Digging up exhumation’ (1998) 5 Ecc LJ 18–33; *Re John Stocks deceased* (1996) 4 Ecc LJ 697.



would, if accomplished, properly prevent the human interference which, I have suggested, would be inconsistent with the canonical intention in burial.<sup>34</sup>

### The approach of the ecclesiastical courts: a comparative perspective

The principles relating to disinterment applied currently by consistory courts have become more elaborate than those applied in the nineteenth century. In *Re Atkins*, Chancellor Edwards pointed to the previous practice of granting faculties at the behest of family members or executors, or when building works required. In *Re Pope*, Chancellor Lushington said that ‘Faculties for the removal of bodies are of very frequent occurrence, and are decreed to gratify the wishes of relations.’<sup>35</sup> In England, the presumption raised against disinterment has become harder to rebut and much of this is accountable to the public policy reasons which were barely disguised by the Court of Arches in *Re Blagdon* that, in an increasingly mobile society, a system operating at the behest of family members would open the floodgates to frequent repossession and translation of remains. Thus it can be argued that the courts have developed novel interpretations of ecclesiastical law and that the law in this area is judged, albeit drawing on liturgical norms (the burial rite) and theology, rather than legislation or canon.

Despite increased mobility not being particular to England, the codified Roman Catholic canon law does not appear to have been exercised by the question of disinterment. As a result, cemetery rules in the Roman Catholic dioceses of the USA demonstrate a variety of formulas. While emphasising the sacred character of the consecrated grave and the presumption of the quiet repose of the body, they usually require only the consent of kin and the burial management authority, and rarely explicit diocesan approval.<sup>36</sup> This difference may

34 The disposal of remains at sea is also regulated by the Food and Environment Protection Act 1985, by which the executors of the deceased must obtain a licence.

35 *Re Pope* (1851) 15 Jur 614, quoted in *Re Atkins*, para 17.

36 Cemeteries in the Roman Catholic Diocese of Brooklyn require that ‘(1) No disinterment or removal within the cemetery shall be allowed except for good reason and then with the written approval of the Cemetery Authorities, in their sole and absolute discretion, and the written authorization of the plotholder(s) or any other necessary person all in accordance with any civil and Church laws. (2) No disinterment or removal from the cemetery shall be allowed except for good reason and then upon order of a court of competent jurisdiction in accordance with applicable civil and Church laws’, but there is no further elaboration on what those church or civil laws might be. See ‘General rules and regulations’, s 5, <<http://www.ccbklyn.org/information-news/general-rules-and-regulations>>, accessed 10 April 2020. The Associated Catholic Cemeteries of the Archdiocese of Seattle require permission of the management and written authority of the ‘(plot) holder and nearest of kin’; and the management may at its discretion request the consent of the ordinary. See Rules and Regulations of Associated Catholic Cemeteries, 1 January 1999, para 5(60), <<http://www.mycatholiccemetery.org/wp-content/uploads/2018/10/Rules-Regulations.pdf>>, accessed 10 April 2020. St Joseph Cemetery, Inez, Texas, requires the permission of the management, plot holder, next of kin and obedience to the ‘proper legal procedure’: ‘St. Joseph Church Cemetery Rules & Regulations’, s 5E, <[d2y1pzy63o3o8.cloudfront.net/6756/documents/2017/5/St.%20Josephs%20Cemetery%20Rules%20%20Regulations-%20Inez%20TX.pdf](https://d2y1pzy63o3o8.cloudfront.net/6756/documents/2017/5/St.%20Josephs%20Cemetery%20Rules%20%20Regulations-%20Inez%20TX.pdf)>, accessed 10 April 2020.

largely be due to the uniformity of English Church government over burials and the sophistication and reach of the consistory courts, where the consistory courts have been able to adapt their principles to compensate for demographic and cultural changes, whereas no such uniformity exists across Roman Catholic provinces. It may indicate the more extensive regulation that applies to Church of England burial grounds than to those in other churches. The root cause may be something particular to English cultural and historical reasons, perhaps emanating from the Victorian period, when a combination of overfull churchyards, scandal around the protection of human remains and a rapid increase in building (including over burial grounds) may have given rise to an English preoccupation with the protection of human remains. In at least one other place where a national church continues to operate a jurisdiction over burial grounds (Sweden), there is a similar legal presumption against disinterment (in the Funeral Act 1990).<sup>37</sup> Nevertheless it can be queried whether it was inevitable that English ecclesiastical law developed in the way in which it did to make it comparatively strict in comparison with other jurisdictions.

#### IS THE PROTECTION OF HUMAN REMAINS A DISTINCTLY CANONICAL APPROACH?

The Burial Act of 1857 provided equivalent protection of human remains by making disinterment illegal except in cases of a licence from the secretary of state. This equivalence of protection was sufficient to assure the Chancellor of London in *Re Talbot* in 1901 that there was no danger in permitting the exhumation of remains from consecrated ground for interment in non-consecrated ground.<sup>38</sup> This approach was followed by the Court of Arches in *Re Blagdon*. Additionally, where the law prohibits disturbances in churchyards, an equivalent protection is afforded to cemeteries. The Burial Laws Amendment Act 1880 provides that:

All powers and authorities now existing for the preservation of order, and for the preservation and punishment of disorderly behaviour in any churchyard or graveyard, may be exercised in any case of burial under this Act in the same manner and by the same persons as if the same had been according to the rites of the Church of England.<sup>39</sup>

The Local Authorities' Cemeteries Order 1977 makes it an offence to wilfully create any disturbance in a cemetery; interfere with any burial taking place in

<sup>37</sup> See *Dödsbo v Sweden* (2007) 45 EHRR 22.

<sup>38</sup> *Re Talbot* [1901] P 1.

<sup>39</sup> Burial Laws Amendment Act 1880, s 8.

a cemetery; interfere with any grave or vault, any tombstone or other memorial, or any flowers or plants on any such matter; or play any game or sport in a cemetery. On the face of it, there is equivalence in the licensing system for disinterment; the regulation against disturbance in the burial ground; and the duty placed on managers of burial grounds to maintain them in good order. When human remains must make way for building development, the Town and Country Planning Act 1990 requires re-interment.<sup>40</sup> Other miscellaneous provisions guard other burials, such as military remains (Protection of Military Remains Act 1984).

Secular and ecclesiastical burial grounds clearly share common characteristics. It is perhaps not surprising that the Victorian legislators and their successors sought to draw upon pre-existing practices for their burial legislation, whether or not these were distinctive of Christian ethics or not. To reflect this equivalence, legislation and canon has further helped blur the distinction between secular and ecclesiastical burial ground. The Burial Laws Amendment Act 1880 gave the right of burial to parishioners in a churchyard or cemetery with or without a Church of England service, and liberty to use the Church of England service in a non-consecrated burial ground.<sup>41</sup> The modern canons provide no objection to burial outside consecrated ground. Canon B 38(5) requires that burial in non-consecrated ground should be blessed prior to burial.

However, the appearance of equivalence in protection is illusory. Licences for disinterment under section 25 of the Burial Act 1857 are granted by the secretary of state under criteria very much removed from the jurisprudence of the ecclesiastical courts. Criteria published by what was then the Department for Constitutional Affairs (functions now transferred to the Ministry of Justice) stated that the licence will be granted for a disinterment less than 100 years old if:

- i. Consent has been obtained from the burial ground manager, the grave owner, and the next of kin (normally interpreted for probate purposes);
- ii. There are no known legitimate objections; and
- iii. The application is for personal family reasons.<sup>42</sup>

The present guidance notes to the application form state

40 Town and Country Planning Act 1990, ss 238–240; Town and Country Planning (Churches, Places of Religious Worship and Burial Grounds) Regulations 1950, SI 1950/792.

41 Burial Laws Amendment Act 1880, ss 1, 6 and 12.

42 Department for Constitutional Affairs, *Guide for Burial Ground Managers*, November 2005, <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/326370/burial-ground-managers.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/326370/burial-ground-managers.pdf)>, accessed 9 October 2020.

The MoJ receives over 1000 licence applications a year. Each will be considered on its merits, but applications made for private family reasons on behalf of the next of kin will, subject to any other necessary consents, normally be considered sympathetically.

There are no express restrictions on what those family reasons might be. The doctrine against ‘portable remains’ is not followed by the secretary of state.

### Implications for burials outside of ecclesiastical control

The distinction in the exercise of the section 25 jurisdiction becomes even greater in the case of ancient remains (meaning remains over 100 years old). Gallagher reported that licences have been granted for ancient remains purely with the consent of the landowner, and application can be made by fax, with a decision within the hour, with the resulting licence carrying standard conditions as to the method of disinterment and treatment of remains; alternatively, a licence can be issued within ten days with no fee charged.<sup>43</sup> This may partly reflect the public attitude towards the excavation of human remains for purposes of archaeological research, which is one of unworried interest, provided that the archaeological record is undamaged.

Conversely, public attitudes to ancient remains were not cited as an important factor in cases such as *Re Atkins* and *Re Blagdon*, and the theology of burial and the idea of the sacred trust of the ecclesiastical authority as custodian for remains applies as firmly to ancient burials as to recent ones.<sup>44</sup> Hence, the decisions in *Re St Nicholas Sevenoaks* and *Re Holy Trinity Bosham* were not to engage in disinterment for purposes of speculative research. The distinction is relevant because it does mean that human remains are treated differently depending on which jurisdiction has the control, hence the Court of Arches’ instruction to cemetery managers and funeral directors in the *Blagdon* case that they must give a simple explanation to the bereaved about the difference between

43 Gallagher, ‘Protecting the dead’. Gallagher was writing in 2008; email would now be a more conventional way of communicating quickly.

44 *Re St Nicholas, Sevenoaks* at para 24: ‘In theological terms “there may be every justification arguing that a corpse has no more eternal significance than an empty shell, but it continues to be the vestiges of a once loved and loving human being”, citing the Church Archaeology Human Remains Working Group report (produced jointly by English Heritage and the Church of England and released for consultation in April 2004), para 153, now revised as Advisory Panel on the Archaeology of Burials in England, *Guidance for Best Practice for the Treatment of Human Remains Excavated from Christian Burial Grounds in England*, second edition, 2017, para 151, <[https://www.archaeologyuk.org/apabe/pdf/APABE\\_ToHREFCBG\\_FINAL\\_WEB.pdf](https://www.archaeologyuk.org/apabe/pdf/APABE_ToHREFCBG_FINAL_WEB.pdf)>, accessed 9 October 2020. The court then proceeded to comment that ‘Consistent with this approach is the essential requirement that skeletons made available for investigation are treated with respect and reburied in a dignified manner at the conclusion the investigation. It has been said that “A society that cares for the dead demonstrates that it values life”: see report, para 153.’

consecrated land, to which the theology of burial has application, and unconsecrated land.<sup>45</sup>

Perhaps more important is the treatment of Christian remains in monastic burial grounds, many of which were alienated from ecclesiastical ownership at the Reformation and fall outside the faculty jurisdiction. The same is true for disused burial grounds generally. Christians who were committed to the safe custody of the consecrated monastic burial ground or a long abandoned parish churchyard are now liable to be exhumed as part of a historical investigation and even put on display in museums or exposed to destructive analysis in the laboratory. In light of this distinction, Historic England and the Archbishops' Council have published joint guidance on the ethical treatment of ancient remains which seeks to influence the practice of such excavations, including advice to re-inter in consecrated ground whenever possible, and the novel idea of a consecrated holding area for retaining remains for later scientific research in church crypts and redundant churches.<sup>46</sup>

## CANONICAL STEWARDSHIP OF THE CHURCHYARD

I have discussed above how the ecclesiastical protection of human remains guards against a human possessiveness of human remains committed to sacred custody. But what form does this custody take? I have already contended that the canonical duty is to preserve remains from the realm of human interference rather than to guarantee to maintain them in quiet repose forever. Prior to the eighteenth-century practice of commemorating individuals with gravestones, which came to occupy space in the churchyard, the re-use of graves was much more frequent. New interments would inadvertently interfere with old remains which had begun to decay and the churchyard would have a capacity for renewal.<sup>47</sup> The impression gained from the historical Church is that natural decay and inadvertent disturbance were accepted as normal processes of churchyard use.

The churchyard as a common resource was discussed in *Gilbert v Buzzard*.<sup>48</sup> These were proceedings by a parishioner against the churchwardens of St

<sup>45</sup> *Re Blagdon Cemetery* [2002] Fam 299 at paras 26 and 27.

<sup>46</sup> Advisory Panel on the Archaeology of Burials in England, *Guidance for Best Practice for Treatment of Human Remains*, para 80. These holdings areas are termed 'church archives of human remains', which, in the words of the report, 'would simultaneously satisfy desires for remains to be returned to consecrated ground but at the same time would, if suitable environmental controls were in place, ensure their physical integrity and continued availability to legitimate researchers'.

<sup>47</sup> The Legal Advisory Commission of the General Synod of the Church of England has issued best practice guidance that parishes should consider the sustainable use of churchyards, normally by the use of the practice known as 'lift-and-deepen', whereby old remains are disinterred under faculty and buried at a lower depth. Allied to this are the use of areas for the interment of cremated remains, where the best practice is to inter remains in a biodegradable container or straight into the ground, and the use of commemorative tablets as a matter for the faculty to determine.

<sup>48</sup> *Gilbert v Buzzard* (1820) 3 Phill Ecc 335.

Andrew Holborn for refusing to permit the burial of his wife in an iron coffin in the parish churchyard. The churchwardens argued that the pressure on the churchyard was so great as to prohibit any contrivance that occupied too much space for too great a time. The slowness of decay of iron would introduce an additional burden on a parish resource. The chancellor described the churchyard in terms of a common resource for the purpose of burial:

the legal doctrine is, and remains unaffected, that the common cemetery is not *res unius aetatis*, the exclusive property of one generation now departed; but likewise the common property of the living, and of generations yet unborn, and subject only to temporary appropriation. There exists a right of succession in the whole, a right which can only be lawfully obstructed in a portion of it by public authority, that of the ecclesiastical magistrate, who gives occasionally an exclusive title in part of the public cemetery to the succession of a single family, or to an individual who has a claim to such a distinction: but he does not do that without just consideration of the expediency, and due attention to the objections of those who oppose such an alienation from the common use. Even a brick grave without such authority is an aggression upon the common freehold interest, and carries the pretensions of the dead to an extent that violates the just rights of the living.

## THE FUTURE: OTHER METHODS OF DISPOSAL

While burial and cremation remain the most common methods of disposing of human remains, other methods are not necessarily illegal. One novel method is alkaline hydrolysis (sometimes called oxymoronically ‘water cremation’), under which the body is placed in a pressure vessel that is then filled with a mixture of water and potassium hydroxide which breaks down the fats and tissues of the body to their chemical constituents. What results is a green-brown tinted liquid, which can be disposed of as waste, and soft, porous white bone remains which can be crushed (using a cremulator) to form a white-coloured dust and handed to the family. Its promoters argue that it is a process which is less environmentally damaging than disposal by fire cremation. While offered in parts of the United States and Canada, the practice is not available in the United Kingdom at present. Sandwell Borough Council in the West Midlands was granted planning permission to offer an alkaline hydrolysis facility but the project was put on hold when Severn Trent Water refused the council a ‘trade effluent’ permit in March 2017 because there was no water industry standard regulating the disposal of liquified human remains into sewers.<sup>49</sup>

49 Planning Permission of Sandwell Metropolitan Borough Council, ref DC/16/60149, 6 March 2017. Resomation, an alkaline hydrolysis business, announced on 24 March 2020 that it had obtained from Yorkshire Water a consent to discharge liquid waste from alkaline hydrolysis (but not for an

Another novel practice which has yet to take root in the United Kingdom is cryonic preservation, the freezing of a dead body in the hope that resurrection and cure may be possible in the future. There are no facilities for freezing dead bodies currently within the UK, although the human remains of UK nationals have been frozen overseas.<sup>50</sup>

I do not expect the cultural practices of England concerning the burial of the dead to change quickly. While the cremation of the dead became popularised in the nineteenth and twentieth centuries, this was a slow process. Nonetheless, the pressures on burial space and spikes in mortality and pestilence such as have been seen with the COVID-19 pandemic may give local and national government cause to promote other methods of disposal than burial and fire cremation, which may in turn alter the custom and practice in England. Alkaline hydrolysis still leaves a powder which could be subject to interment according to the burial rite. The liquid product has been treated as human waste and this has been one of the reasons why hydrolysis has been opposed by the Roman Catholic Church within the United States on the basis that insufficient respect is being shown to the bodily remains. A practice such as cryonics, which presumes that the human body may one day be re-animated by a future medical science is probably antithetical to Christian theology and requires the preservation of the body rather than its relinquishment. If either method of disposal were to gain more currency within England, the Church of England would need to develop a theological, legal and pastoral response to the demand, and determine whether such practices were to be acceptable and desirable. There are also the psychological issues which relate to grief. Any workable response needs to balance the need for grieving relatives to 'let go' of the human remains in hope of eternal life, with their tendency to want to remember, memorialise and pay homage to the deceased in a physical manner, such as might be manifested in the erection of a headstone and visiting the graveside.

## CONCLUDING REMARKS

I have shown that an instrument of consecration dedicates the land for the burial of the dead. It also places the land under the jurisdiction of the consistory court. Beyond the respect that the Church will pay to the dignity of the grave and the sensitivities of the relatives, the protection afforded by ecclesiastical law does not make the remains inviolable in a way which would give credence to the pretensions of the dead and impair the primary purpose of the burial ground. The

existing facility). See <[resomation.com/news/successful-study-of-water-cremation-completed-for-yorkshire-water](https://resomation.com/news/successful-study-of-water-cremation-completed-for-yorkshire-water)>, accessed 10 April 2020.

50 See the commentary on this in *Re JS (Disposal of a Body)* [2016] EWHC 2859 (Fam), which dealt with a 14-year-old girl who was mortally ill from a rare form of cancer.

churchyard is primarily a place of sepulture (burial) before it is a place of sepulchre (monuments), although conservation reasons may mitigate against disturbing older memorials and burials. The approach of the consistory courts, while maintaining the presumption of the finality of burial in accordance with the canonical intention, itself adduced from the burial rite, is pragmatic, responding to a variety of factors.<sup>51</sup> Principles of ecclesiastical law have been developed to guard against the potential for 'portable remains' in a way that contrasts with the exercise of secular jurisdiction, which otherwise echoes the ecclesiastical concern for regulation against disturbance and interference. The Church of England system of protection of and interference with human remains is highly regulated and provides significant protection to human remains. It remains to be seen whether the system, as determined by legislation, liturgy, canon or the judge-led law of the consistory courts will be pressed to adapt, should there be a change in burial practices as a result of new methods of disposal and scarcity of burial space. A severe spike in mortality could bring about such pressures, but from the historical record it would seem to be the case that the Church of England would respond very conservatively.

51 Namely the pastoral needs of relatives and the potential for Church development of the churchyard.