been practiced for two hundred years by common consent', Justice Holmes once wrote, 'it will take a strong case for the [Constitution] to affect it'.[3] Over time, religious symbols become embedded in the culture and tradition of a community and harder to remove. And, over time, the right to challenge them diminishes in strength and becomes harder to press.

The law recognises the power of time in its historical preservation and zoning rules that 'grandfather' various old (religious) uses of property that do not comport with current preferred uses. It also recognises this in private property laws of 'adverse possession': an open, continuous and notorious use of a property will eventually vest in the user. Those legal ideas should have a bearing on these religious symbolism cases, leaving older displays more secure but new displays more vulnerable.

The law further recognises the pressure of time in its rules of pleading and procedure. It sets statutes of limitations on many claims and penalises parties for sitting too long on their rights. These legal ideas, too, should have a bearing in these religious symbolism cases. Challenges to older government actions concerning religious symbols should be harder to win than challenges to new government initiatives. The law does not set statutes of limitations on constitutional cases, of course; once a public religious display has reached its proverbial 'forty years', however, surely we would do best to leave it alone.

doi:10.1017/S0956618X0999007X

The Maintenance of Closed Anglican Churchyards

Stephen White
Visiting lecturer, Cardiff Law School

In 2004, this *Journal* published a case note of a decision by District Judge Thomas in the Gloucester County Court.[1] At issue was the leeway permitted a District or Parish Council in discharging its obligation of maintaining a closed Anglican churchyard 'by keeping it in decent order and its walls and fences in good repair'.[2] The Parochial Church Council had passed responsibility for maintaining the churchyard to the Parish Council,[3] which, in turn, had

3 *Jackman v Rosenbaum* (1922) 260 US 22, 31.
1 *Lydbrook Parochial Church Council v Forest of Dean District Council* (2004) 7 Ecc LJ 494.
2 Local Government Act 1972, s 215(1).
3 Ibid, s 215(2).

passed it to the District Council.[4] The obligation was (and still is) no more and no less than that of the Parochial Church Council before the transfer. It is, said the note, 'one of substantive maintenance and not merely management of decline (note the relief granted at first instance in *R v Burial Board of Bishopwearmouth* (1879) 5 QBD 67 at 68)'.

In February 2007, the General Synod's Legal Advisory Commission issued an Opinion on 'The maintenance of monuments in closed churchyards'.[5] This stated that

> the recent decision in *Lydbrook Parochial Church Council v Forest of Dean District Council* . . . reinforces the legal position that the duty is one of substantive maintenance and not merely management of decline (see generally *R v Burial Board of Bishopwearmouth* (1879) 5 QBD 67 at 68).

Shortly before, the Diocese of Rochester had declined a request from Tunbridge Wells Borough Council to contribute to 'reconstruction and engineering work' (for which a faculty had been granted) in a closed churchyard 'which goes beyond mere repair'. Its letter enclosed a copy of the note from this *Journal*.[6]

'Substantive maintenance and not merely management of decline' trips off the tongue lightly, and it may well summarise Judge Thomas's view and the legal position accurately. If the note is read carefully, however, it will be seen that it does not put these actual words into the mouth of the Judge, nor does the reporter suggest that this is a paraphrase of what he said. The phrase certainly does not appear in his judgment,[7] although the consent order approved by him does appear to have required the District Council to do more than merely manage the decline of the churchyard.[8] Moreover, *Bishopwearmouth* is not mentioned in his judgment. This is not entirely surprising, since the case was not about the standard of maintenance of a closed churchyard, as the Court of Arches has recently pointed out.[9]

The point at issue in *Bishopwearmouth* was not what had to be done to a closed churchyard but who had to pay for it. Section 18 of the Burial Act of 1855 provided that

4 Ibid, s 215(3).
5 Available at <http://www.cofe.anglican.org/about/churchlawlegis/guidance/monumentmaintenance.rtf>, accessed 15 June 2009.
6 See the minutes of Bidborough Parish Council Meeting on 29 January 2007, available at <http://www.bidborough-pc.gov.uk/parish_council/2007docs/Jan07Min.html>, accessed 15 June 2009.
7 I am indebted to the Forest of Dean District Council for supplying me with a copy of the judgment, as I am to the Clerk of Bidborough Parish Council for information about Bidborough parish churchyard.
8 The Order can be found at <http://www.fdean.gov.uk/kudos/documents/ld27c.pdf>, accessed 15 June 2009.
9 *Re Hutton Churchyard*, (2009) 11 Ecc LJ 236, Ct of Arches.

> In every case in which any Order in Council has been or shall hereafter be issued for the discontinuance of Burials in any Church Yard or Burial Ground the Burial Board or Churchwardens as the Case may be shall maintain such Church Yard or Burial Ground of any Parish in decent order, and also do the necessary repair of the Walls, and other Fences thereof, and the Costs and Expenses shall be repaid by the Overseers upon the Certificate of the Burial Board or Churchwardens, as the Case may be, out of the rate made for the relief of the Poor of the Parish or place in which such Church Yard or Burial Ground is situate unless there shall be some other fund legally chargeable with such Costs and Expenses.[10]

In *R v St John, Westgate, and Elswick Burial Board*,[11] it was decided that section 18 was confined to parochial churchyards and burial grounds. Despite this, the law officers argued in *Bishopwearmouth* that section 18 applied to all burial grounds and that the churchwardens had to care for the grounds unless there was a burial board, in which case the board was to care for them. In *Bishopwearmouth*, the Court of Appeal affirmed *R v St John, Westgate, and Elswick Burial Board* and held that churchwardens were to care for closed churchyards, whether or not there was a burial board, and burial boards were to care for closed burial grounds provided by them. It went on to hold that a poor rate authority could be made liable to defray the expenses of maintaining closed parish burial grounds in its district, even if the district had no connection whatsoever with the parishes whose grounds they were.

As for the significance of 'the relief given at first instance', what is presumably being referred to is the making absolute of a rule nisi for a mandamus 'commanding the burial board to put the Gill Cemetery in repair, and maintain it in repair'.[12] There is a short report of the proceedings at first instance in *The Times*, which shows that the Queen's Bench made the rule absolute against its better judgment. The Lord Chief Justice said

> We are disposed to think the contention of the defendants is well founded . . . (but) we think it would be better that the facts should be put upon record by a

10 In 1857, the law officers gave an opinion that section 18 was to be construed '*redenddi singula singulis*' and required the churchwardens to care for closed churchyards, and burial boards to care for all other closed burial grounds, including private grounds belonging, for example, to Dissenters. In 1860, the Home Secretary observed that, if the section really was to be construed '*reddendi singula singulis*', burial boards would have to care for churchyards and churchwardens for all other burial grounds. Thereupon the law officers (the Attorney-General being the same but the Solicitor-General different) gave their opinion: first, that the obligation fell on the burial board, if there was one, and only fell on the churchwardens if there was not; and second, that the section applied only to parochial churchyards and burial grounds and not to private ones. See the National Archives TS25/1117, 'Burials Act 1855: construction of section 18, 1857–60'.

11 (1861) 1 B & S 679; and (1862) 2 B & S 703.

12 *R v Burial Board of Bishop Wearmouth* (1879) 5 QB 67 at 68.

https://doi.org/10.1017/S0956618X09990081 Published online by Cambridge University Press

return to the mandamus in case the litigation should be carried to a higher tribunal.[13]

The issue before the Court of Arches in *Re Hutton Churchyard* was not so much the standard of obligatory maintenance imposed by section 215 of the Local Government Act 1972 (though it certainly was concerned with that) but whether the obligation extends to memorials in a closed churchyard and, if it does, the extent to which the burden it imposes (in respect of memorials) is mitigated by the fact that the primary responsibility for keeping the memorials in good shape is that of their owners, who cannot always be traced. The Court referred to *Lydbrook* in endorsing Judge Thomas's rejection of the District Council's submission in that case that the Council was not obliged to comply with section 215 if it could not afford to do so: the Judge did, indeed, discuss the weight that could or could not be given to finance by a District Council deciding how to discharge its statutory obligation.[14] He would permit the Council to give it some weight, while not allowing it to be determinative. Perhaps the way it might be put, although neither he nor the Court of Arches put it this way, is that finance may be taken into account in determining the means but not the end. As to what becomes of the phrase 'substantive maintenance and not merely management of decline', only further litigation and commentary will tell.

doi:10.1017/S0956618X09990081

Human Sexuality and the Church of Scotland: *Aitken et al v Presbytery of Aberdeen*

Frank Cranmer
Fellow, St Chad's College, Durham
Honorary Research Fellow, Centre for Law and Religion, Cardiff Law School

Although much of the business of the General Assembly of the Church of Scotland relates to legislation and debates of reports from committees, unlike

13 *R v Burial Board of Bishop Wearmouth* 12 June 1879, 6a. See, too, the remarks of Brett and Cotton LJJ in the Court of Appeal at pp 73 and 74 respectively.

14 Although the judge appears to have thought that, before the 1972 Act, parochial church councils (and before them churchwardens) were obliged to maintain closed churchyards in decent order – and here he quoted from an uncited source – 'so far as they had funds to do so'. There is no warrant for this limitation.