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# Shared Burial Grounds

David McClean
Sometime Chancellor of the Dioceses of Newcastle and of Sheffield

Penny McClean
Sometime Chair of the Cambridge Parochial Burial Grounds Committee

*Despite the widespread use of cremation, there is once again a shortage of burial space in some parts of the country. Chancellors dealing with petitions for faculties reserving grave spaces are finding that more and more parochial church councils are opposing reservation as they see that the available space is running out. In rural areas it may be possible to persuade a farmer or landowner to part with some land to form a new burial ground, perhaps serving a number of adjacent parishes. Section 35 of the Church Property Measure 2018 sets out the law relating to shared burial grounds, developed in a series of nineteenth-century Acts which a modern reader would find both prolix and overcomplicated. This article explores the history and practical workings of the law, illustrating these by reference to a prime example of a shared burial ground, the Mill Road Cemetery (more formally the Parochial Burial Grounds) in Cambridge.*[1] *The law as to rights in graves and the memorials placed on them causes much misunderstanding. Our account will show that the same may be true with regard to the burial ground as a whole.*

**Keywords:** shared burial ground, section 35 Church Property Measure 2018

## THE BACKGROUND

During the first half of the nineteenth century the population of England doubled. Inevitably, this led to an increase in the number of deaths and in the need for burial space. Even in relatively small towns, the graveyards surrounding the various parish churchyards became full. Cambridge was no exception. Figures for the year 1842 provided by the mayor to a Commons Select Committee show that, of the 14 parishes, 9 had no 'unoccupied space' and a tenth reported 'a few yards'. Yet 491 burials took place, in seven parishes at an average annual rate of 186 per acre.[2] Burials were necessarily in 'occupied spaces', with the churchyard sometimes having a new layer of soil in which

1 We are not concerned with municipal cemeteries, the legal regime of which is to be found in the Local Authorities Cemeteries Order 1977, SI 1977/204, as amended (to enable burial records to be held electronically) by SI 1986/1782.

2 See J Rigg, 'The rise of cemetery companies in Great Britain 1820–53', unpublished PhD thesis, University of Stirling (1992), p 33, available at <http://hdl.handle.net/1893/2017>, accessed 6 June 2022.

shallow graves could be placed above the earlier burials. In the debate on what became the Burial Act 1852, the Earl of Hardwicke could speak of 'the crowded state of the metropolitan burial grounds, and the revolting scenes constantly occurring in them'.[3] The unsanitary state of parish graveyards contributed to the cholera epidemics that killed many thousands.

In many towns and cities, leading citizens took steps to establish new burial grounds. This involved the formation of companies to purchase suitable land and manage the new cemetery. Dr Julie Rigg has identified 111 such companies in the period 1820 to 1853.[4] The largest number were founded primarily to address public health concerns; a smaller number to seize a commercial opportunity; and others to meet the wish of the non-conformist churches to have burial facilities which were not under the control of the Established Church. Where the company promoters needed compulsory purchase powers, an Act of Parliament was sought.[5] The Cemetery Clauses Act 1847[6] was passed 'consolidating in One Act certain Provisions usually contained in Acts authorizing the making of Cemeteries'; its provisions could be incorporated by reference in the Acts dealing with particular cemeteries. It would be up to the promoters of the company to define, if they so wished, the area a cemetery was to serve; it is unlikely that the parish from which a body was brought for burial would determine the location of a grave.

The problem of inadequate and dangerous burial grounds was most acute in London, and the Metropolitan Interments Act 1850[7] sought to deal with its problems. It proved, if we may use the phrase, a dead letter. It would have given power to the Board of Health to close all the burial grounds in London and to compel all burials to take place beyond its limits. This would have entailed the creation of burial grounds sufficient for 51,000 funerals a year, and the board found it impossible to borrow the necessary funds.[8] The Burial Act 1852, which remained substantially in force until the Local Government Act 1972, provided instead that Orders-in-Council could close particular burial yards in the metropolis on the ground of public health or decency. The dead of that parish could not, with certain exceptions, be buried in any other burial ground in the metropolis.[9] Any ten ratepayers could requisition a vestry meeting to decide whether to establish a new burial ground for the parish. If it was so decided, a burial board was appointed which could borrow money on the security of the poor rates for the

3 HL Deb 28 June 1852, vol 122, col 348.
4 Rigg, 'Rise of cemetery companies', does not deal with the legislative background.
5 This was not the case with the cemetery set up in Cambridge by the Cambridge General Cemetery Company, now known as the Histon Road Cemetery.
6 10 & 11 Vict c 65.
7 13 & 14 Vict c 52.
8 This explanation was given by the Earl of Hardwicke during proceedings on the Burial Act 1852, which replaced the 1850 Act: see HL Deb 28 June 1852, vol 122, cols 1348–50.
9 Burial Act 1852, ss 2–8. For the immediate future needs of parishes now without a burial ground, the Crown had purchased the Brompton Cemetery, which would be available for all such parishes.

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purpose of providing a cemetery; the capital and interest had to be repaid within 20 years (as was the case with money borrowed to erect union workhouses).[10] Section 23 provided that two or more vestries could agree on the provision of one burial ground for the common use of their parishes. There was no suggestion that the parishes be allocated separate areas within the joint burial ground.

Outside London, an inspection of burial grounds under section 8 of the Public Health Act 1848 could lead to an order forbidding further burials in the burial grounds identified as constituting a danger to health.[11] The Burial Act 1853 created a general power (not limited to cases involving a danger to health) to close burial grounds by Order in Council.[12] Neither Act made provision for the establishment of replacement burial grounds; that was left for local action.

The Burial Act 1855 applied to parishes outside London a system of burial boards appointed by the vestry, similar to that already available in the metropolis. Section 3 provided that the churchwardens of any parish in which no burial board had been appointed might convene a meeting of the vestry to determine whether a burial ground should be provided for the parish; and that they must do so 'with all convenient speed' when an Order in Council closing the existing parish burial ground had been made or they had notice that one was to be made.[13] There were elaborate provisions dealing with the provision of a burial ground for the common use of parishes united 'for all or any Ecclesiastical Purposes'.[14]

## THE CHURCH BUILDING ACTS

We have thus far been dealing with burial grounds provided by cemetery companies and by the then system of local government, which supplemented the historic role of the Church in the burial of the dead. For centuries, the parish church had been surrounded by the graveyard, the freehold of which was vested in the incumbent. It was the duty of the churchwardens of the parish to keep the churchyard properly fenced and the paths in proper order, and therefore to clear away any grass on or overhanging paths.[15] The churchwardens could

10 Burial Act 1852, ss 10–22.

11 An example is the order made in 1854 forbidding burials in any of the parish graveyards in Norwich prompting the establishment of a Norwich Burial Board which established the Earlham Cemetery; see J Bartlett, 'A Short History of Earlham Cemetery', 2015, <https://www.friendsofearlhamcemetery.co.uk>, accessed 6 June 2022.

12 An Act to amend the Laws concerning the Burial of the Dead in England beyond the Limits of the Metropolis, 16 & 17 Vict c 134.

13 Burial Act 1855, s 14 contains a remarkable provision that, if three-quarters of those voting at a vestry meeting resolved that the building of a chapel for non-Anglicans was 'undesirable or unnecessary', the Home Secretary could rule that the burial board was under no obligation to provide such a chapel.

14 Burial Act 1855, s 11, amended in detail by the Burial Act 1857 (c 81), s 9.

15 See Legal Advisory Commission, *Legal Opinions Concerning the Church of England*, part 8, <https://www.churchofengland.org/about/leadership-and-governance/legal-services/legal-opinions-and-other-guidance/legal-opinions#calibre_link-162>, accessed 6 June 2022.

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recover their expenses from the church rate, although the compulsory church rate was abolished in 1868. The powers, duties and liabilities of the churchwardens relating to the care and maintenance of the churchyard are now those of the parochial church council (PCC).[16]

The need to build more churches in 'populous areas' led to the enactment of the Church Building Act 1818, which set up the Church Building Commissioners and enabled the 'million pound churches' to be built.[17] In the following year the powers of the Commissioners were extended by the Church Building Act 1819 to cover land needed for additional burial space.[18] Section 38 of the 1819 Act provided that, on the consecration of an additional graveyard or burial ground, the freehold vested 'in the Person or Persons in whom the Freehold of the ancient Churchyard or Burial Ground of any such Parish or Chapelry where the same may be situated shall from time to time be vested'. Nothing was said in the legislation about the maintenance aspects but the churchwardens would have that obligation as with the 'ancient Churchyard'.

The 1819 Act assumed that the newly acquired land would be in the same parish as the original graveyard or burial ground. However, this might well not be the case, especially in towns. That possibility was addressed in the Church Building Act 1822.[19] Section 26 of that Act allowed, with the consent of the Commissioners, the purchase of land outside the parish, with an important consequence:

> When any Land or Ground so purchased shall be situate out of the Bounds of the Parish or Place for which the same is intended, the same shall after Consecration become and be deemed Part of such Parish or Place; any thing in any Act, Law or Custom notwithstanding.

It followed that, if a new burial ground in the geographical area of Parish A were purchased for the use of Parish B, it would form an exclave of Parish B, the incumbent of Parish B would have freehold title to it and the burial rights would be those of the parishioners of Parish B. The incumbent and churchwardens of Parish B would be the proper petitioners for any faculty affecting the burial ground and not those of the geographical parish. The churchwardens of Parish B would have to maintain it in good order and the sexton of Parish

16 Parochial Church Councils (Powers) Measure 1956, s 4(1)(ii)(c).

17 58 Geo 3 c 45. All the powers of the Church Building Commissioners were transferred to the Ecclesiastical Commissioners by the Church Building Commissioners (Transfer of Powers) Act 1855 (19 & 20 Vict c 55). The property of the Ecclesiastical Commissioners was transferred to the Church Commissioners by the Church Commissioners Measure 1947, but powers in respect of new burial grounds had by then been vested in the diocesan boards of finance.

18 59 Geo 3 c 134, s 37.

19 3 Geo 4 c 72.

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B would have day-to-day responsibility. Any policies about the arrangement of graves or the size and design of monuments would, subject to the chancellor's regulations, be those of Parish B.

The matter was more complicated where land was purchased for the use of two or more parishes.[20] Section 14 of the Church Building Act 1845[21] gave the Commissioners power to declare that the land was part of the parish concerned, so applying the 1822 concept but as a discretionary power rather than a mandatory rule. This power was exercised in the case of Mill Road Cemetery in Cambridge, which had 13 parish plots. One plot was allocated to the parish of St Paul, within which the cemetery lay. So the whole cemetery was an enclave within St Paul's, made up of 13 exclaves. The parish plot of St Paul's, if not contiguous with the rest of that parish, would form a second-order enclave (or counter-enclave) within the cemetery.[22]

Other aspects of the position where the burial ground was shared were dealt with by a further Act, which was later to be given the rather misleading short title 'The Church Building (Burial Service in Chapels) Act 1846'.[23] Section 1 declared that land could be acquired on such terms and provided that it was lawful for the Commissioners to order and direct that any chapel erected on the land for the performance of the burial service and any lodge or other building and also any access or approach to and from such chapel, lodge or other building was to be for the use of all the parishes for which the land was purchased.[24] Although it did not strictly require the Commissioners to make such an order in every case, the effect was that what we might describe as 'the common parts' were available for use by all the parishes. This did not affect the freehold of those parts which, not having been included in any parish plot, would seem at this stage to have remained with the Church Building Commissioners.

Section 3 contained detailed provisions as to the delineation and fencing of the burial ground. There had to be a boundary fence (and 'fence' seems to include 'wall' throughout this legislation) around the whole. The bishop might declare that to be sufficient without any additional fences around the individual parish plots, but he might require the placing of 'bound stones' to mark the boundaries of those plots. A decision by the bishop that bound stones were not required could not override the statutory provision in section 14 of the 1845 Act that each distinct parish plot was deemed to be an exclave of the parish

20 St George's Gardens in Camden is claimed to be the first burial ground bought to serve two parishes; it dates from 1713.

21 8 & 9 Vict 70.

22 An exclave is a piece of land which is a detached portion of the main holding. For example, Lindisfarne and neighbouring parishes, geographically in Northumberland, were for many years an exclave of the County Palatine of Durham. That area was an enclave in Northumberland, just as the Vatican City is an enclave in Italy.

23 9 & 10 Vict c 68.

24 Section 2 enabled the bishop to make similar provision in any sentence of consecration of the chapel.

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concerned. It might be, of course, that a path or other feature would adequately mark the boundary.

The question of the duty to maintain the cemetery was also dealt with in the 1846 Act. It would not be appropriate for the churchwardens of any one parish to have this responsibility, so some special provision was needed. Section 4 provided that no church rate could be levied for the repair of the chapel, lodge or fences, but that a sum considered sufficient by the Commissioners was to be set aside and invested in government securities in the names of trustees appointed by the Commissioners. Casual vacancies could be filled by the bishop. Later legislation, mentioned below, refers to this sum as the 'repair fund'.

The issues about the ownership and care of the chapel, lodge and paths within the cemetery were dealt with in the Church Building Act 1851.[25] Section 28 provided that the freehold of any chapel, lodge, walks or gates was to vest in the bishop.[26] Their 'preservation and custody' was the responsibility of the trustees of the repair fund, who were given power to make such orders and regulations they thought fit. The context makes it clear that the power to make orders and regulations extended only to the chapel, lodge and walks and not to the whole burial ground.

The relevant law was not further amended until it was modernised and consolidated in sections 20 and 21 of the New Parishes Measure 1943. The nineteenth-century statutes were all repealed. There is no longer any reference to the trustees of the repair fund, and the repeal of the 1846 Act would seem to have extinguished the power of the bishop to appoint replacement trustees of any repair fund that still existed.

## MILL ROAD CEMETERY

How this all worked, and works, in practice is illustrated by the history of Mill Road Cemetery in Cambridge. The idea of such a cemetery was considered at a meeting in the home of one of the incumbents of the Cambridge parishes on 18 March 1844.[27] It noted the outcome of a similar meeting in Oxford the previous year which had set in hand the provision of three new burial grounds there, the Holywell, Osney and St Sepulchre's Jericho burial grounds; the first two were to serve six parishes each, the last three. The printed paper prepared after the Cambridge meeting urging action to provide additional burial

25 14 & 15 Vict c 97.
26 The notion of the freehold of a gate is strange; 'gate' means an access road (such as exists in Mill Road Cemetery), as opposed to purely internal paths.
27 See Cambridge City Council, Open Spaces department, Mill Road Cemetery Conservation Plan 2004, p 60.

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grounds in Cambridge canvassed the use of the 1819 Act;[28] like their Oxford colleagues the Cambridge clergy saw this option as greatly preferable to a cemetery set up by a cemetery company. This led to a public meeting convened by the archdeacon on 6 November 1844, in which it was resolved to set up a General Committee for the Extension of the Parish Burial Grounds. The committee consisted of some 75 persons – all the clergy and churchwardens of the relevant parishes, 5 masters of colleges and 24 named persons, both clergy and laity – with power to add to their number. The committee was presumably to act on behalf of the incumbents and churchwardens. Not surprisingly, it in turn set up a subcommittee, which met frequently to do the detailed work.

A site was found just off Mill Road. It was some 9 acres, almost three times the size of all the existing parish graveyards. An access drive of about 300 yards north from Mill Road led to what became the site of the lodge, the rest of the land lying beyond to the north and east. A proposed division of the land between the various parishes was agreed in June 1846. The size of the parish plots seems to have been based on the population of each parish. It is likely that the cemetery serves more parishes than any other shared burial ground and the plan of the parish plots is reminiscent of maps of the Holy Roman Empire.[29] After the Church Building Commissioners had consented to the purchase and expressed their 'cordial approval' of a plan submitted to them on vellum, and agreed the arrangements for the repair fund and its trustees, the burial ground was consecrated on 7 November 1848. On the consecration of the land, the parish plots vested in the incumbents of each parish.[30] It seems, from much more recent correspondence, that the legal records of the consecration are incomplete, and the sentence of consecration which survives is regrettably unclear as to quite how much of the land was consecrated.[31]

The result of all this seems to be that 15 different persons or bodies were freeholders of parcels of land within the 9 acres comprising Mill Road Cemetery. The 13 'parish plots' were in effect extensions to the churchyards of each relevant parish. Each incumbent would have the freehold title to the relevant parish plot, following the general law, and the churchwardens of each parish (and later its PCC) would have the duty to maintain their plot in good order. This division of responsibility had disadvantages. In 1932, the state of the cemetery was causing some concern; it was said that its unsatisfactory state was due to

28 Reproduced in ibid, p 54; it bears no date.

29 The map can be viewed at <http://millroadcemetery.org.uk/mrc2015/wp-content/uploads/2015/06/the-13-parish-areas.jpg>, accessed 6 June 2022. Bound stones were put in place; some still exist.

30 See *Re St Gabriel, Fenchurch Street* [1896] P 95, 101; *Re St Mary Magdalene, Paddington* [1980] Fam. 99.

31 In 1977, the Church Commissioners ruled that the site of the lodge was not consecrated; they based their ruling on a reference in the sentence of consecration to the use of a room in the lodge as a temporary chapel, concluding that the lodge must have been built before the rest of the land was consecrated. It is not entirely clear that that conclusion was correct, but the lodge was later sold in reliance on it.

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there being 'too many masters' and that uniformity would only be achieved if all parishes appointed the same sexton.

The freehold of the lodge and the walks was vested in the Bishop of Ely, and the site of the chapel in the Church Building Commissioners and eventually the Church Commissioners. The chapel, designed by Sir George Gilbert Scott and opened in May 1858, was not consecrated, as the land on which it stood had been consecrated along with the rest of the cemetery in 1848. The dedication of the chapel would not vest the chapel in the bishop, as consecration would have done, and the land seems not to have been allocated to any parish. The maintenance of the chapel and the walks was the responsibility of the trustees of the repair fund.

## PRACTICAL ISSUES

The governance of the cemetery was always problematic; no one body could speak for all the various interested parties. The whole cemetery was subject to the faculty jurisdiction. The incumbent and churchwardens of the relevant parish would be the appropriate petitioners if a matter concerned only one parish plot, but matters might, did and still do arise that affected the cemetery as a whole.[32] Over the years there were a number of attempts to find a satisfactory way of dealing with this problem, made more difficult by repeated legal misunderstandings and by the reluctance of incumbents and churchwardens to attend meetings to deal with matters that seemed of low priority. The incumbents and churchwardens of the parishes were the major players and assumed the role of ultimate governing body, at various times setting up committees to act on their behalf. The original General Committee for the Extension of the Parish Burial Grounds and its subcommittee were dissolved in 1869; the incumbents and churchwardens set up a new Committee for the Improvement and Supervision of the Mill Road Cemetery, with named members, which operated for the next decade.

The 1846 Act required the appointment of trustees of the repair fund, a statutory body to which the bishop could make appointments. As early as 1871, the fund was said to be 'in arrear' and it was the committee rather than the trustees that was authorised to raise additional funds to pay for the removal of the hedges, for erecting iron fences and for planting an avenue of trees.[33] A meeting of clergy and churchwardens in that year agreed the names of three

32 Examples in recent years include a scheme under which sculptures were installed at a number of points within the cemetery; a misunderstanding by officers of the City Council, who purported to make an order about dogs on the basis that the cemetery was the property of the Council; and issues around the use by the local community of the access road for a Christmas market.

33 See a printed paper recording this, reproduced in the Mill Road Cemetery Conservation Plan 2004, p 57.

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new trustees of the repair fund. Their appointment was a matter for the bishop, but that seems not to have been noticed, and there was a confused discussion about the need for and probable expense of a new trust deed. It was suggested that a cheaper procedure would be to hand over the fund to the Ecclesiastical Commissioners, who would be expected to remit the interest to the committee. The Commissioners replied, entirely correctly, that they had no powers to do any such thing.

Appointments of trustees continued to be made (from 1879 by the board that replaced the committee); a surviving Minute Book contains a list of trustees as at 1949. The appointments, not being made by the bishop, had no legal validity and it gradually became unclear what the trustees were meant to do. In 1881 the trustees were authorised (though it is not clear what authorisation was needed) to make a public appeal for funds to repair the chapel and lodge after recent storm damage. But a fund-raising initiative in 1935 by the incumbents and representatives of the parishes seems not to have involved the trustees as such. Their repair fund no longer featured. In effect, as the churchwardens ceased to attend, the named trustees were co-opted lay members of a management group otherwise made up of incumbents.

That group was a new Parochial Burial Grounds Board, which in 1879 replaced the committee. It consisted of the incumbents, churchwardens and trustees. It was to meet at least twice a year; there was be an executive committee of seven members, at least one a trustee, to meet monthly and to be appointed by the board each year. At the same time the meeting adopted a remarkable document headed 'Regulations'. Although the trustees had power under section 28 of the 1851 Act to make orders and regulations as to the common parts, those vested in the bishop, the meeting had no statutory authority to make regulations for the cemetery. The 'Regulations' were in fact merely resolutions of the meeting, but they seem to have been followed, as amended from time to time, for many years and certainly until the Second World War. The regulations regulated the post of custodian, who was to be sworn as a special constable and live in the lodge. It was agreed 'that the care of each Parochial Plot be left to the Parish or District to which it belongs'; this was underlined by the fact that no worker in stone, brick, metal or wood could do work without a written permit from the relevant incumbent. The minutes of the executive committee have not survived but it is difficult to believe that the management of the cemetery required monthly meetings. The board did meet, usually only once a year. It approved accounts (the expenses of the cemetery being met by an occasional levy on the parishes), tinkered with the regulations and continued to appoint new trustees.

Almost from the start, the legal structure was found to be irksome. In 1872, a group was appointed to examine the possibility of ending the division of the cemetery between the various parishes, but it reported that to do so would

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require a special Act of Parliament. The idea was promptly dropped. The idea was floated again in 1911 and again rejected. The incumbents actually agreed at a meeting in September 1991 that a pastoral scheme should transfer ownership of all sections of the cemetery to one incumbent, that of St Andrew the Less; the lodge and access road would be transferred to the Diocesan Board of Finance (DBF). But nothing was done to implement this set of ideas, principally because the PCC of St Andrew the Less was unhappy at the possible liability – or at least responsibility – which would pass to the parish. There was no detailed consideration whether a pastoral order could overcome the clear provisions in the legislation and, in particular, deal with the freehold vested in the bishop.

The number of burials in certain parishes did not accord with expectations when the original allocation of land to the parish plots was made. How could adjustments be made? In November 1872, the clergy and churchwardens had agreed that the unallocated ground to the north and south of the chapel be assigned to St Botolph and St Mary the Less, both urgently in need of more space, and that the sanction of Ecclesiastical Commissioners be sought. The Commissioners replied that, as the law ensured that the access and approach to the chapel was for the use of all the parishes, they doubted if they had power to sanction the allocation. The next meeting of clergy and churchwardens decided that, although the Commissioners had not been able to allow the allocation of the land, they had not forbidden it; it could therefore be done by agreement between those present. That seems a distinctly unsound argument; certainly it could not change the parish boundaries. Years later, when a similar issue arose in 1889, it was reported that the chancellor of the diocese had expressed doubt as to the possibility of a faculty for transferring ground from one parish to another. The legislation was proving very inflexible.

In 1902, a new local authority cemetery was opened in Newmarket Road, and three Mill Road plots were closed by Order in Council in December 1904. Some of the other parishes agreed to let their plots be used for burials from those parishes, at an additional fee of 12s 6d for each burial. The board meetings became infrequent, largely ceased during the Second World War and were not resumed until 1946. The main business then was that of securing the closure of the remaining parish plots, with a view to their maintenance becoming the responsibility of the Town Council. An Order in Council, published as the Burial Grounds (Cambridge) Order 1949,[34] closed the remaining parts of the cemetery. In 1990, the Town Council for some reason questioned whether it had the legal responsibility to maintain the cemetery. The existence of the two Orders in Council had been forgotten. They were rediscovered and the Council accepted that it had the legal duty to do what it had been doing in

34 SI 1949 no 1848.

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practice for 40 years. No distinction was drawn between the parish plots, to which the law as to closed churchyards applied, and the paths and the site of the chapel, which were not strictly parts of closed churchyards.

On the church side, there were repeated misunderstandings of the legal position. In 1950, the lodge was let to the Town Council for the use of the new custodian, now a Council employee. The relevant document has not been seen, but references in later correspondence suggest that the lease was granted by the board and not by the bishop, who had title to the lodge. For some years, the rental income was divided between the parishes, but later it was put into a single account for the upkeep of the cemetery.

In 1965, a faculty was obtained for the grant of an easement of air and light to the adjacent College of Arts and Technology (now Anglia Ruskin University). The solicitor handling the matter was advised to post citation on the door of the chapel and was taken aback to discover that it had been demolished some years previously, having fallen into disrepair and become unsafe after fire damage. The petition and the eventual grant were signed by all the incumbents, but the records of their meeting describe the board, seemingly for the first time, as 'the Trustees'. This suggests that the solicitors had assumed that the incumbents were trustees of the cemetery and entitled to act as such.

The status of the board arose repeatedly in connection with the lodge. In 1977, the Church Commissioners clearly recognised that the lodge was vested in the bishop but thought it possible that 'the Trustees' might have acquired a possessory title as a result of collecting rent for 26 years. (In fact, although the Commissioners made it clear that they assumed that these were the trustees of the statutory repair fund, there were no surviving trustees of the now non-existent fund.) That letter should have prompted some questions as to the status of the incumbents as a board and their assumed succession to the statutory trustees. It did not, and the notion that the incumbents were trustees took root. The board granted another lease of the lodge in 1983, again relying on its role as trustees.

In the following year, the tenant sought to buy the lodge. This prompted a slow and very confused attempt to sort out who had the right to sell. As the trustees claimed ownership, they received advice on the basis of the general law as to charity trustees, but the Charity Commission knew nothing of a relevant charity and no one could find the trust deed (for the very good reason that none existed). It had been suggested to the trustees that they should consult Lee Bolton and Lee, well-known ecclesiastical lawyers, but they preferred to use local, less expensive–and understandably inexpert–firms. Eventually in August 1989 the trustees acted on the advice to consult the experts and were supplied with detailed

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information about the nineteenth-century legislation, which made it clear that the trustees had no title and so could not sell the lodge.[35]

It is remarkable that in December 1997, when the lessee made a renewed offer to buy the lodge, the trustees again thought that they could effect the sale. Once again they had to be put right by Lee Bolton and Lee and the lodge was finally sold by the bishop to the lessee only some 15 years after he made his first offer. When the sale proceeds were paid to the bishop, he agreed to transfer them to the parishes and a formula was agreed. Lee Bolton and Lee advised that no trust should be created to administer the fund. It could be kept in the hands of the incumbents as 'a completely *ad hoc* arrangement'. There was talk of reviving the pastoral order idea, of transferring the cemetery to its geographical parish (by then that of St Matthew) and of 'regularising the trust fund'. Nothing was done.

The board was replaced in 2012 with the agreement of the bishop by a new Parochial Burial Grounds Committee with a small membership, authorised by the incumbents and the bishop to handle practical issues as they arose. It represents the church interest, which does not always coincide with that of the Friends of the Cemetery or of the City Council; on the whole, the three bodies work well together.

## THE MODERN LAW

Although shortly expressed in the Church Property Measure 2018, the law remains complicated and inflexible, and its effect (and even existence) may escape the lawyers asked to deal with burial ground issues. Anyone thinking of creating a new burial ground for the use of a number of parishes should be aware that all is not straightforward.

Section 35(1) provides that, where land is acquired by a DBF (which replaces the Commissioners in the relevant legislation) for the provision of a burial ground for two or more parishes, the DBF may direct that each parish is entitled to use any chapel, lodge or other building and any access to or from the chapel, lodge or other building concerned. Although this is expressed as discretionary, it is difficult to imagine circumstances in which it would not be made. Even if no such direction is given, the incumbent of each parish is entitled to use the chapel for the performance of the burial service, subject to any regulations made by the bishop (section 35(2)). If additional land is acquired 'adjoining or near' the burial ground for any parish in the diocese (whether or not it was one of the parishes for which the original land was acquired), the chapel, lodge or other building or any access to or from the chapel, lodge or other building may be used in

35 It was this that led the board to make the abortive suggestion of the transfer of the whole cemetery to one parish.

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connection with a burial in the additional land (section 35(4)); it is immaterial whether or not a direction has been given under section 35(1).

The division of title to the land follows the nineteenth-century pattern. The freehold of the chapel vests in the bishop on its consecration; likewise the freehold of a lodge, other building or means of access built on the land concerned vests in the bishop on the completion of its construction (section 35(5)). 'Other building' is an entirely general term, so if it was decided to place in the burial ground a small hut to house the tools needed to dig graves and mow the grass (much more likely in modern conditions than a lodge), it would vest in the bishop; the policy behind such a rule is difficult to discern.[36] As in the earlier law, the vesting in the bishop of the chapel or of a lodge, other building or means of access does not impose any liability on the bishop to maintain it (section 35(6)). Were a pothole in one of the paths to cause a visitor to fall and be injured, nice questions as to liability would arise.[37] The DBF may apportion the burial ground (excluding the chapel and any lodge, other building or means of access) between the several parishes; and the DBF *must* do so if different parts of the land were acquired by it for the use of the several parishes (section 35(7)).[38] The latter mandatory provision is not in the earlier Church Building Acts but reflects what must have been the practice.

Section 35(8) provides that the DBF may, in certain circumstances, declare that the burial ground is to be treated for ecclesiastical purposes, including determination of the right of burial, as part of the parish or parishes for which it was acquired. The first thing to notice is that this is discretionary; the DBF is not obliged to make such a declaration. If it does not, the freehold title, the duty to maintain and any possible liability remain with the geographical parish in which the burial ground is situated, and rights of burial are limited to the parishioners of (and those with a right of burial in) that parish.[39] The history of the Mill Road Cemetery shows that the liability is not necessarily acceptable to the PCC of that parish. Furthermore, from the point of view of the other parishes, inaction by the DBF would deny burial rights to parishioners of the parishes for whose benefit the land was acquired and so largely defeat the object of the exercise.

The circumstances in which the DBF may make the declaration are those where the burial ground is not in the parish or any of the parishes for which it was acquired. In the case of shared burial grounds that is a notable limitation,

36 If the hut were to be destroyed by fire (a fate similar to that of the chapel in the Mill Road Cemetery), its site would presumably remain vested in the bishop.

37 In 2001 a person was injured in the Mill Road Cemetery and solicitors acting on his behalf indicated that they claimed damages from the 'Trustees'. They were told that the maintenance responsibility was that of the City Council, which settled the claim.

38 This is to be distinguished from the exclave provision in s 35(8).

39 See A Burrell, 'And who is my parishioner? Residency, human rights and the right to burial in the parish churchyard', (2022) 24 EccLJ 58–67.

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one very difficult to justify. Suppose that a new burial ground is acquired for the use of parishes in a multi-parish benefice. It is quite likely that the land will be in one of the parishes and be allocated for the use of all the parishes in the benefice, including that geographical parish. In such a case, no declaration can be made. Mill Road Cemetery was located in the parish of St Paul and that parish had one of the parish plots, appropriately enough the one closest to the access road. So the cemetery was in one of the parishes for which it was acquired and, had section 35(8) represented the law in 1846, it would have had to remain a part of the parish of St Paul, even though most of it was reserved for the use of other parishes.

Experience in Mill Road Cemetery showed that the initial allocation of space as between the different parishes may come to prove unsatisfactory, perhaps because of a major new housing development in one parish. There is no express power to change the allocation made by the DBF. If the DBF had made the 'exclave' declaration under section 35(8), a pastoral order altering the parish boundaries would seem to suffice, but the point is not entirely clear.

## CONCLUSION

In many respects the nineteenth-century shared burial grounds were a success. They solved the problem of overcrowded and insanitary graveyards. They were under church control and so protected by the faculty jurisdiction. In many cases, even if now closed to new burials, they are valued by the local community. Mill Road Cemetery, since 2001 a Grade II listed site, contains memorials (some individually listed) to many prominent members of the university and city, with an active group of Friends interested in that history. It is also a City Wildlife Site, with many species of flora and fauna. For Anglia Ruskin University it is a site for teaching and research over a range of disciplines. And it is enjoyed by local residents as a place to walk their dogs or take their small children, stroll reflectively or access the pubs or the coffee shop in Gwydir Street. But its legal history warns of the problems that await those who seek to use a similar remedy to the renewed shortage of burial space.

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