(2018) 20 Ecc LJ 16–50 © Ecclesiastical Law Society
doi:10.1017/S0956618X17000874

Hidden Treasure: The Church of England's Stewardship of Its Silver Plate

Philip Petchey
Chancellor of the Diocese of Southwark

This article examines the Church of England's stewardship of its silver plate. It explains the way in which the use of chalices, patens and flagons changed over time and considers the legal basis on which church plate is held by churchwardens. It explains how, having initially discountenanced all sales of redundant church plate, consistory courts came to authorise sales to museums. It also explains how, following a series of judgments by George Newsom QC, acting first as Chancellor of both London and St Albans dioceses and later as Deputy Dean of the Court of Arches, sales on the open market were more frequently allowed and then how, following the judgment of the Court of Arches in re St Lawrence, Wootton, *a more restrictive approach was re-imposed. It considers the practical and legal issues arising out of that judgment. Finally, it considers the role of the Court of Arches as a maker of policy.*

Keywords: silver, faculty, sale, *Tredington*, *Wootton*

THE CASE OF ST JAMES, WELLAND

In 1735 Penelope Taylor gave to her parish church at Welland in Worcestershire a fine silver cup, with a distinctive spire-like cover. It had been made in 1613 and bore the arms of her family.[1] She also gave the church a fine silver and glass flagon dating from 1582.[2] Penelope Taylor was the wife of Ralph Welland, a wealthy landowner in Welland. Before her marriage she had been a Lechmere. The Lechmeres have lived at Hanley Castle nearby since the eleventh century. The church did not use the cup and flagon and they were kept in a bank vault.[3] They were worth in the order of £30,000. The recent history of the church had been a success story. Congregations had been declining. The decline had been reversed and the parochial church council (PCC) were pursuing a re-ordering scheme. The cost of the scheme was about £150,000. Funds committed or likely to be raised were of the order of £100,000. The PCC felt

1 This 'steeple cup' was included in the exhibition held at the Goldsmiths' Company in 2008, *Sacred Gold and Silver 800–2000*. Somewhat poignantly it had been sold by the church in 1845 and repurchased in 1882.

2 The mount dated from 1582, although the glass vessel was a nineteenth-century replacement. It was sufficiently fine to be displayed at an exhibition at Christie's in 1955, *Silver Treasures from English Churches*.

3 Remarkably, the chalice which they did use dated from 1571.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

that the congregation might raise another £20,000. The proceeds of a proposed sale of the flagon and cup were viewed as crucial to the scheme. These were the facts of *re St James, Welland*.[4]

There was a simple argument in favour of the sale of the silver. It was that the items were redundant. The church had no use for them and they were of no benefit to anyone in a bank vault. The argument derived particular force from the fact that the church is a charity and has therefore a duty to use its assets for its charitable objects. However, by keeping the silver in the bank, its position was like the servant who buried his talent in the ground (Matthew 25:14–30; Luke 19:11–27).[5] That position could also be likened to that of the rich young man who declined to sell all that he had and give all his goods to the poor (Matthew 19:16–30; Mark 10:17–31; Luke 18:18–30). Mynors Ch decided that the simple argument was correct and approved the sale.[6] Somewhat cryptically, he said 'the Church was not founded to perform the role of guardian of art treasures for its own sake; nor is there any rule of law that it should fulfil such a role now'.

We can see from the subsequent decision of the Court of Arches in *re St Lawrence, Wootton* that he adopted the wrong approach. The Court of Arches expressly disapproved the dictum set out above[7] and it is obvious that, if the chancellor had adopted the right approach, the sale of the silver would not have been ordered. But there will be many who sympathise with Mynors Ch's decision (as well as many who will not).

THE CUSTODY AND USE OF CHURCH SILVER IN THE CHURCH OF ENGLAND

Before the Reformation, at the celebration of mass only the priest would receive the wine. Moreover, even in one kind the congregation would only occasionally receive Communion. Chalices and patens were small. Thus after the Reformation, new vessels and plate were required. This re-provision largely happened in the archiepiscopate of Matthew Parker (1559–1575), although, surprisingly, no written document issued by him requiring it has been found.[8] According to many churchwardens' accounts from the period, some 2,000

4 [2013] PTSR 91.

5 This was an analogy drawn by Newsom Ch in the *Sacombe* case (see below). The position at law is that the cup was vested in the churchwardens, who, it has been held, are not charitable trustees (see *re St Lawrence, Wootton* [2015] Fam 27 (Court of Arches) at para 39), but whether they are or are not does not affect the merits of the argument from scripture.

6 The cup was subsequently sold at Bonhams for £23,750. Its present whereabouts are unknown.

7 *Re St Lawrence, Wootton* at para 35: 'We consider that the dictum . . . adopted too narrow a role for the church as a guardian of art treasures.'

8 In 1565, Bishop Guest of Rochester issued an injunction that 'the chalice of every church be altered into a decent communion cup to therewith to minister the Holy Communion, taking away no more thereof but only so much as shall pay for the altering of the same into a cup'.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

surviving communion cups date from this period, the old chalices being melted down and refashioned.

Population growth meant that in large parishes there could be more than 1,000 communicants. Canon 20 of the Canons of 1603 required the communion wine to be brought to the Holy Table 'in a clean and sweet standing pot or stoop of pewter, if not of purer metal'. Many examples of such flagons survive from the seventeenth and eighteenth centuries, although purpose-made pewter flagons are rare. The rubric to the *Book of Common Prayer* requires of the Priest, 'And here to lay his hand upon every vessel (be it Chalice or Flagon) in which there is any wine to be consecrated.' The wine was consecrated in a flagon or flagons and replenished as required during the administration.[9] In the twentieth century, there were to be arguments about the consecration of wine in flagons.

The growth in population in the eighteenth and nineteenth centuries led to the building of many new churches. The influence of the Oxford Movement and the Gothic Revival led a new fashion in chalices, which now came to resemble their pre-Reformation predecessors. Such chalices were furnished for use in the new churches but the existing churches also often acquired such new-style chalices. Flagons fell out of use, with the use of multiple chalices instead.[10]

Canon 20 of the Canons of 1603 provided that:

> The church-wardens of every parish, against the time of every communion, shall at the charge of the parish, with the advice and direction of the minister, provide a sufficient quantity of fine white bread, and of good and wholesome wine, for the number of communicants that shall from time to time receive there; which wine we require to be brought to the communion table in a clean and sweet standing pot or stoop of pewter, if not of purer metal.

Thus, although the canon required the provision of a flagon, it was silent about the duty to provide a chalice and paten, perhaps because it assumed their existence.[11]

However this may be, reference to churchwardens' accounts show that the churchwardens did assume this responsibility. The general law is that the

9 See *re St Mary, Gilston* [1967] Fam 125 at pp 128–129. A visitation of Archbishop Abbot refers to 'a flagon of silver, tinne or pewter to put wine in, whereby it may be set upon the communion table, at the time of the blessing thereof', confirming the consecration of the wine for communion in the flagon. Churchwardens' accounts for the eighteenth century show large quantities of wine being consumed: in Beoley in Worcestershire, five quarts were required for the Easter communion.

10 For an account of the use and design of communion plate from the Reformation to 1830, see C Oman, *English Church Plate 597–1830* (London, 1957), pp 191–234; see also, generally, R Emmerson, *Church Plate* (London, 1991).

11 This deficiency is remedied in Canon F1 of the Canons of 1964 and 1969.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

goods relating to a parish church vest in the churchwardens and there is no reason why communion vessels should be an exception.[12] Archdeacon Prideaux in his *Directions to Churchwardens* (1716) stated that the consent of the ordinary was needed to dispose of those goods:

> For otherwise the Parishioners may combine, for saving their purses to the church rates, to sell all the church goods and materials to bear the parish charges (as we find sometimes done) and so leave the church without that, which is necessary for the performing of the Divine Offices, which the ordinary is bound to prevent.[13]

An early reference to the requirement of the ordinary's consent with reference to church plate is in Charles Prideaux's *Practical Guide to the Duties of Churchwardens*, which dates from 1843 and went through many editions. Prideaux wrote:

> As the churchwardens are a corporate body,[14] and for the benefit of the parish, and not to the prejudice of it, they cannot dispose of any of the church goods without the consent of the parish and the licence of the ordinary, because they appertain to holy things, of which he hath the care and ordering; and therefore if the churchwardens would sell an old bell towards other repairs, or put off old communion plate to buy new, or dispose of any other goods of the parish, they cannot do it without the consent of the parish and the licence of the ordinary as aforesaid; and the disposal of any of the said goods without the consent of the parish is void in law.[15]

Sir Robert Phillimore, when Dean of the Arches, wrote to similar effect in *The Ecclesiastical Law of the Church of England*:

> by the laws of England, the goods belonging to a church may be aliened; yet the churchwardens alone cannot dispose of them, without the consent of the parish: and a gift of such goods by them without the consent of the

12 See W Blackstone, *Commentaries on the Laws of England* (London, 1765), vol 1, p 382.

13 H Prideaux, *Directions to churchwardens in the faithful discharge of their office* (London, 1713), p 94.

14 In C Prideaux, *Practical Guide to the Duties of Churchwardens*, twelfth edition (London, 1871), p 366, a footnote was added referring back to the text (which was unchanged from earlier editions) making clear that the churchwardens were a corporation for the purpose of holding the goods of the church. The authority for holding them to be a corporation for these purposes is *Attorney-General v Ruper* (1722) P Wms 125 and *Liddell v Beal* (1860) 14 Moo PC 1. See also L Shelford, *A Practical Treatise on the Law of Mortmain* (London, 1836), p 28; R Burn, *Ecclesiastical Law*, ninth edition (London, 1842), vol 1, p 408a.

15 See Prideaux, *Practical Guide*, pp 184–185.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

> sidemen or vestry is void. There have been cases in which a faculty has been obtained for selling certain goods, such as pictures, belonging to the church.[16]

Of the faculty jurisdiction, he observed: 'A faculty may be granted to sell ornaments or utensils found to be unnecessary, as in the case of old bells when a new peal is set up, and the like.'[17]

When Dr Tristram came to write the first edition of Halsbury's Laws in 1910 he summarised the status of the churchwardens as 'a quasi-corporation for the purposes of holding in perpetual succession the goods of the church'.[18] This text has survived into the latest edition.[19] Whatever the precise nature of their legal personality, it will be seen that the churchwardens hold the goods of a church essentially as charitable trustees, with the added requirement that the consent of the vestry and the ordinary is required before they can dispose of those goods. Such consents are evidently all that is required in respect of goods which the churchwardens have themselves acquired or which have been given for the purposes of the church; it is less clear that this is so regarding goods which are given by a benefactor with the intention that they should continue to be held for the charitable purposes of the church forever. It does not, however, seem to have been suggested in any of the cases that there was no power to sell redundant plate which had been given on the latter basis – and, in particular, that the order of the court to sell and apply the proceeds *cy-pres* was necessary.

Occasionally it will be found that a gift of plate was made subject to a gift over or that the gift was by way of determinable fee.[20] Thus, for example, in 1655, Duchess Dudley gave communion plate to the parish of Bidford in Worcestershire:

> upon this condition that the said Plate shall for ever solely remain for the use aforesaid and not be diverted imployed or disposed of to any other use and upon this further condition that if at any time hereafter the Vicar Churchwardens or other Officer or Inhabitant of the said parish of Bidford for the time being shall presume or endeavour to alienate sell embessell or otherwise dispose of the plate aforesaid or any part thereof from the use aforesaid that then the gift above mentioned to become void and frustrate and that then and from thenceforth the propriety and property in and of the plate aforesaid shall revert and be vested in the

16 R Phillimore, *The Ecclesiastical Law of the Church of England* (London, 1873–1876), p 1797.
17 Ibid, p 1792.
18 11 *Halsbury's Laws of England*, first edition (London, 1910), p 465, para 906.
19 34 *Halsbury's Laws of England*, fifth edition (London, 2011), p 224, para 278.
20 As to which, see O Tudor, *Charities*, tenth edition (London, 2015), p 313, para 6–031.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

> said Duchess her heirs and assigns who shall and may have lawful right to demand sue for and recover the same or the value thereof from the parties so alienating selling embesselling or otherwise disposing of the plate aforesaid.[21]

So far as this author is aware, such a provision has not been the subject of litigation. As has been noted, the finding in *re St Lawrence, Wootton* that churchwardens are not charitable trustees appears dubious but there has been no recent litigation on the subject.[22]

EARLIER FACULTIES FOR THE SALE OF SILVER

Whatever the theory, the application of the faculty system in the nineteenth century was not always rigorous, and it is apparent that many items of silver were disposed of without the grant of a faculty. Complaints about this became frequent as clergy of an antiquarian bent set about cataloguing the plate of their deanery or diocese. The earliest expression of concern that the writer has discovered dates from 1870.[23] However, towards the end of the nineteenth century, chancellors began to enforce the system. This coincided with and no doubt in part reflected antiquarian concern both with alterations to churches and with the disposal of church plate.[24]

The first case of which the writer is aware concerned a steeple-topped chalice dating from 1612 which had been presented to St Michael Bongate, Appleby, by Dr William Nicolson, Bishop of Carlisle (1702–18). A terrier of 1730 recorded that the bishop

> was pleased to testify his satisfaction in so laudable a work [the improvement of the Vicarage] by presenting the Vicar and his Church for ever with a large silver chalice and spiral cover and committed to his Lordship's disposal by the Worshipful Gilfrid Lawson Esq.[25]

21 See W Lea, *Church Plate in the Archdeaconry of Worcester* (Worcester, 1884), p 22.

22 It is accepted that churchwardens are not charity trustees within the special meaning of that term in the Charities Act 2011, but this is not determinative of whether a person or a body holds property on charitable trusts.

23 It was by Octavius Morgan: 'On a chalice and paten belonging to the parish church of Nettlecombe, in the county of Somerset, with remarks on early English chalices' (1870) 42.2 *Archaeologia* 405–416 at 411–412.

24 In cases concerning the sale of church silver it is very often the case that the silver has been stored in a bank for many years. However, no cases have been found where this has been authorised by faculty. This has no doubt been because it was seen as being a temporary arrangement (albeit one that might continue indefinitely). Until recently, loans to museums were not in practice authorised by faculty.

25 Quoted in J Evans, *The Church Plate of Gloucestershire* (Stow on the Wold, 1906), pp xxi–xxii, where the account of this case is set out. See also R Ferguson (ed), *Old Church Plate in the Diocese of Carlisle* (Carlisle, 1882), p 178.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

In 1905 the chalice was worth about £1,000 and it was proposed to sell it and devote the money to the provision of a parish room, the removal of debt on the vicarage and the augmentation of the living. The vicar pointed out that it was not an ancient or pre-Reformation cup and, as far as he was concerned, was redundant since it could not have been used for Holy Communion on account of the awkwardness of its size and shape. The redoubtable Canon Rawnsley wrote to *The Times* to object.[26]

On 13 October 1905, Chancellor Prescott refused to grant a faculty for the sale of the chalice. He said that

> 'this no doubt was a very utilitarian age but we still had some respect for the dead hand and the vessels which had been associated more or less with the most solemn services of the Church, and most of them shrank from the probability, or even the possibility, of there being applied to any profane use.' He emphasised the fact that the cup had been presented to the church 'for ever', and although it had been made for secular purposes he had no doubt it had been used for Holy Communion.[27]

As it happened, on 20 December 1905, a similar application for sale came before CEH Chadwyck-Healey, Chancellor of the Diocese of Exeter.[28] This concerned a chalice dating from 1660 belonging to the church of St Peter and St Paul, Churchstanton. It had 'Churchstanton 1660' inscribed on it. The vicar said that it had never been used during his 25 years in the parish, and he and the churchwardens wanted to sell it to fund repairs to the church.

Refusing a faculty for sale, the chancellor stated:

> it would be painfully repugnant to the feelings of many Churchmen that it would be possible that a vessel dedicated to the most sacred service of the Church should figure, say, upon the dinner table of a collector. There had been a case in which a chalice had disappeared from a church and had been found afterwards with an inscription showing that it had been awarded as a prize at athletic sports. Money ought to be forthcoming for the repair of the parish church without resort to the sale of this chalice, which the donor certainly did not intend to be used to relieve the pockets of the people of the present day. He thought it a great pity that there was not in the Diocese of Exeter a museum to which objects like

26 *The Times*, 5 January 1905, p 9. Hardwicke Rawnsley was Rector of Crosthwaite in the Diocese of Carlisle. He is now remembered as a pioneer of the conservation movement and a founder of the National Trust.

27 See Evans, *Church Plate of Gloucestershire*, p xxii.

28 In the light of subsequent discussion, it may be noted that Chancellor Chadwyck-Healey was a Fellow of the Society of Antiquaries.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

> that might be sent by the county parishes possessing them on being assured they would be in safe custody.[29]

He thus, in a few sentences, flagged many of the issues that remain pertinent today.

Despite the refusal of sales in the Appleby and Churchstanton cases, the Society of Antiquaries remained concerned. No doubt prompted by Canon Rawnsley, who was a Fellow of the Society, on 28 February 1906 it resolved to send a memorandum to all bishops, archdeacons and chancellors. It recorded its concern as to 'the increasing frequency of sale, under faculty, of old or obsolete church plate under conditions that the Council can scarcely consider dignified'.[30]

The Society was not in fact able to cite any example of such sales; the one case to which it did refer was of a proposed sale of a communion cup given to a church by Archbishop Laud. This must be a reference to the cup in the possession of Holy Trinity, Prince Consort Road, which the church had loaned to the Victoria and Albert Museum. The Society urged

> that all such pieces of church plate, useless from being either obsolete or worn out, should be placed for preservation in the nearest public museum, either on loan or by purchase. The difficulty of the latter course is that few museums have any funds for purchases except of the most trifling kind. But it is not always the case that money need enter into the transaction. Obsolete plate can well be deposited as a kind of permanent loan in the local or central museum, assuming the institution to have the means of keeping the plate safe from destruction by theft or fire . . .[31]
>
> It must not be forgotten that although the Vicar and Churchwardens are for the time being trustees of the church plate and furniture, yet the property is really vested in the parishioners.[32]

As the Society may have feared, the cases kept coming, although the general atmosphere of hostility is likely to have discouraged petitions.[33]

29 See *The Times*, 21 December 1905, p 7. The civil parish had been transferred to Somerset in 1896, but at the time the ecclesiastical parish was still in the Diocese of Exeter. If the chalice survives at the church, it was not noted in Pevsner *South and West Somerset* (1958).

30 A copy of this circular is held in the papers of Archbishop Davidson (Lambeth Palace Library).

31 The Society commended the loan to the British Museum of a German amber tankard dating from 1659 which had been bequeathed to St Mary, North Mymms in 1751. The donor, Dame Lydia Mews, was the widow of Sir Peter Mews, sometime Chancellor of the Diocese of Winchester.

32 Lambeth Palace Library, papers of Archbishop Davidson, circular from the Society of Antiquaries, 28 February 1906.

33 The Bishop of St Albans had opposed the sale of the North Mymms tankard. The sale by Holy Trinity, Prince Consort Road did not go ahead.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

In 1912, the vicar and churchwardens of the church in Tong, Staffordshire petitioned to sell the Tong Cup. This remarkable crystal and silver object, dating from the beginning of the seventeenth century, was given to the church by Lady Harries in 1625. It had been kept in a bank in Shifnal for 16 years after the vicar had been told by the police that it would be unsafe to keep it in the church or vicarage. The church was in difficult financial straits, the churchwardens not having sufficient funds to keep in order the fences of the churchyard, into which cattle constantly strayed. The sale would release funds to assist the sick and poor. A meeting of parishioners had agreed to the sale. An anonymous donor had offered £3,500 for the cup on the basis that he would deposit it for the time being in the British Museum (but without undertaking to do so permanently). After a hearing the chancellor, GJ Talbot KC, dismissed the petition. In his judgment, the chancellor expressed the view that

> The cup had been used in the service of God and the church and anyone must feel that it was repulsive to their feelings that an article of that kind should be alienated to a chance purchaser. There was another aspect which would appeal to persons who might not be affected by the first consideration and that was that the cup was a beautiful thing of antiquity. If a faculty was granted in the form asked for there would be no security that it would be taken care of so that it would not go out of the country.

He did, however, make it clear that he was prepared to contemplate a gift or sale to the British Museum or similar institution. In the event, for whatever reason, this did not take place and in due course the cup was placed in the Diocesan Treasury at Lichfield, where it may still be seen.

Coincidentally there were at this time three Ancient Monuments Bills before Parliament, which were considered by a Joint Committee of both Houses. In its report the Committee said that they were

> strongly of opinion that although chattels do not come under the definition of 'ancient monuments' set out [in the Bill] yet such moveable property as plate and other articles of historic and artistic interest as belong either to a municipal corporation or to the Established Church, should be subject to protection similar to that extended by this Bill to fixed objects.[34]

As enacted, however, the Ancient Monuments Consolidation and Amendment Act 1913 only applied to ancient monuments.

34 Report from the Joint Select Committee of the House of Lords and the House of Commons on the Ancient Monuments Consolidation and Amendment Bill (London, 1912), p vii, para 13.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

There was one more *cause célèbre* before the First World War. This was the somewhat bizarre case of the sale of the Studley Bowl in 1913. This outstanding piece of silver, of unknown provenance, dates from about 1400 and seems originally to have been designed for a child. It was apparently given by the Marchioness of Ripon to the church at Studley as an alms dish. The Nottingham philanthropist Harvey Hadden was prepared to pay £3,000 for it and Lord Ripon agreed that the proceeds of sale could go to the church. The vicar objected, however, on the seemingly misguided basis that it was a sacred vessel. The chancellor (P V Smith) permitted the sale on the basis that the sale was to the South Kensington Museum,[35] observing that 'he should have hesitated to grant the faculty had it been a paten or chalice, but it was evidently a child's porringer with letters of the alphabet on it'.[36] This case thus becomes the first in which a chancellor permitted by faculty the sale of church silver.

THE CASE OF ST GEORGE-IN-THE-EAST

Immediately after the First World War, another case arose at St George-in-the-East in Stepney, an outstanding Hawksmoor church, completed in 1729. In 1919 the financial affairs of the parish were in a bad way:

> The financial position of the parish is as bad as it could be. It is in the neighbourhood of the London Docks, and there has been in recent years a very large encroachment of the Jewish population and of Irish Roman Catholics. The only ordinary English residents are those who could not get away. The direct result is that the actual expenses of maintaining the church cannot be met by collections and the deficit on the churchwardens' accounts for the last year has been £230.[37]

Although the church itself needed urgent repairs, the most immediate needs evidently related to three mission churches, all of which were in bad repair: water was coming through the roof of one, and another was flooded by sewage. The church owned some very fine plate: two flagons, two chalices and two patens of silver dating from 1729.[38] They were valued by Christie's at £165. The plate had not been used for a generation and was now kept in a bank. In 1919, the newly instituted rector, JC Pringle, wrote to Bishop

35 This had become the Victoria and Albert Museum in 1899.
36 Reported in the *Teesdale Mercury*, 5 February 1913.
37 *Re St George-in-the-East, Stepney* [1920] P 97 at p 101. The case was heard together with *re St Mary, Northolt*, with which it is reported.
38 Each item had engraved on it 'St George's in the East, Mr Joseph Crowcher, Churchwarden'. There was some other (Sheffield) plate but it seems that it was not very valuable: see ibid, p 101. In the judgment 'Stafford' appears to be a misprint for 'Sheffield'.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

Winnington-Ingram of London about the position and he in turn consulted Sir Lewis Dibdin, Dean of the Arches, albeit in a personal capacity. Dibdin responded as follows:

> I have no doubt that under present circumstances valuable communion plate which is not used and not needed for use can and in such a [pressing] case as this ought to be sold. But it can only be properly done by faculty not by your personal consent and your chancellor authorising sale will lay down the conditions that he requires as necessary (e.g. no auction) and on him will be the responsibility.[39]

With this encouragement, the rector applied for a faculty for the sale of the plate. Phillimore's point that the sale required the consent of the parish was addressed by the parishioners, in vestry, resolving to sell the plate if permitted to do so by faculty.[40]

The petition for sale of the silver of St George-in-the-East was heard together with a petition to sell silver owned by St Mary, Northolt. This was a silver chalice and paten dating from 1702, which the vicar described as 'in the rather big cumbrous style of Queen Anne'.[41] It had recently been replaced in use by a new silver-gilt chalice and paten. It was proposed to put the proceeds of sale into an endowment fund for the repair of the church. There was no urgent need for repairs.

Citing Prideaux and Phillimore, Chancellor Kempe had no doubt as to his authority to authorise a sale; the issue was as to the circumstances in which he should do so.[42] He said:

> it is a jurisdiction which clearly ought not to be exercised without the greatest hesitation and caution. In the first place the Court should be satisfied that if the sale takes place the sacred vessels will be protected from profane or secular use. The principle that ornaments of the Church devoted to sacred uses should not be applied to other purposes is stated in a Constitution of Archbishop Edmund Rich made in the year 1236 which is to be found in Lyndwood's Provinciale at pp 33, 34: … 'Let the Chrysoms be made use of, for the ornaments of the Church only: let the

39 Letter from Dibdin to Winnington-Ingram, 23 December 1919, available at <http://www.stgitehistory.org.uk/library/faculty1920dibdinletter.jpg>, accessed 13 October 2017.

40 The parishioners were named as respondents to the petition but, in the light of their resolution, did not enter an appearance.

41 Ibid, p 104.

42 He referred to, but did not expressly address, the passage in Prideaux's *Practical Guide* referring to the need for the consent of the parishioners. The explanation may be that the actions took the form of proceedings by the incumbent and churchwardens against the parishioners, who did not enter an appearance. The grant of a faculty may be seen as dispensing with the consent of the parishioners.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

other ornaments of the Church which have been blest by the Bishop be applied to no common use.' Modern religious feeling does not sanction a departure from this principle. The vessels which have been made use of for the administration of the Holy Communion should not be sold so that, for instance, they may become merely the ornament of a rich man's sideboard or table; and I am as at present advised not able to see any circumstances under which the Court would be justified in permitting the sale of such vessels without restrictions and could allow them to pass into the hands of a dealer for resale to an unknown purchaser. But even if there be no danger of the vessels being applied to secular uses, for example if they are to be sold for use in another church or for preservation in a museum, the fact, if it be so, that they have for a long period been associated with the worship of the Church or have been the gift of a pious donor who could not have wished that his offering should be alienated from the church with which he desired to associate it can obviously not be ignored. Objects thus intimately connected with the history of a church clearly ought, if possible, to remain among its cherished possessions.

Such considerations would seem to afford reasons against the sale of Communion plate even in cases where owing to its circumstances, character or its great value and the difficulty of properly guarding it it has ceased to be used and is for safety locked away in a bank and has been replaced by more modern vessels. There would however in such a case be no reason why the objects should not be deposited on loan in a museum so that they still remain part of the property of the church. One might venture to suggest that the creation of a treasury or a museum in connection with the Cathedral of the diocese, where such unused and valuable ornaments should be open to inspection and properly guarded in a way they could not be if kept in the churches to which they belong, might be a desideratum.

Cases may no doubt arise where urgent necessity compels the parishioners to part with their property in such ornaments, and for this purpose to seek the leave of the Court to sell. In such cases the Ordinary, if satisfied that the necessity for the sale arises owing to some need directly connected with the church in which the vessels were used, and that the use of them for secular purposes is guarded against, may feel constrained to accept the plea of necessity as overriding the considerations which stand in the way of alienation. The question is whether such necessity exists in the cases now before me.[43]

43 *Re St George-in-the-East, Stepney*, pp 99–101.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

The rector argued for an unrestricted sale, contending that no-one would be likely to buy the silver who would not be interested in it as church silver and respect it as such. The chancellor rejected this argument because he was not prepared to countenance the possibility of secular use.[44]

Unsurprisingly, the chancellor found the requisite degree of necessity established in the case of St George-in-the-East but not in the case of St Mary, Northolt. To ensure a sale to a museum in the former case he imposed a condition that the sale should be to an identified institution approved by the chancellor. It may be noted that he downplayed the redundancy of the silver in the case of St Mary, Northolt, suggesting that in the future it might be brought back into use. Thus the silver of St George-in-the-East was deposited in the London Museum (now incorporated in the Museum of London). The silver of St Mary, Northolt may well still in the bank.[45]

If the law as stated in these two cases was correct, sales would have taken place only in case of necessity and then only to a museum. It looks as if the judgment was a severe discouragement to further sales of church silver. There are certainly no other cases included in the Law Reports in the period between the wars.

SALES OF CHURCH SILVER AFTER THE SECOND WORLD WAR

It emerges from the *Sacombe* case in 1964 (see below)[46] that in the period immediately after the war there were a number of sales to museums: the Thirkelby flagons, dating from 1646 (one of which went to the Victoria and Albert Museum and one to Temple Newsam House); the Stapleford gold cup, dating from 1610[47] (to the British Museum); and the communion plate from St Peter, Vere Street (which had become redundant) (to the London Museum). There were also sales of two Charles II flagons from Kenn in Devon and a flagon of 1690 from Westerleigh in Somerset. The whereabouts of these are unknown.[48]

In 1949, Archbishop Geoffrey Fisher gave the following guidance in the Diocese of Canterbury, reiterating the guidance given in *re St George-in-the-East*:

> I always deeply regret it when a church parts with such a possession alienating it from the House of God to which it was given ... Sometimes such

44 Ibid, p 102.
45 It was recorded as still being held by the church in N Pevsner, *Middlesex* (Harmondsworth, 1951), p 126.
46 *Re St Catherine, Sacombe*, 23 June 1964 (unreported).
47 This is the oldest surviving piece of secular gold plate.
48 The judgment itself only identifies the Thirkleby and Kenn cases. See also a letter written by a partner in Christie's to the churchwarden who was the petitioner in *Sacombe*, the firm having acted in these cases. The letter is found in the file of the case held by the Hertfordshire Record Office (DP/89/6/4). There was also the sale of a tazza/alms dish from Arlington in Devon to the Goldsmiths' Company in 1953: See C Blair in *Country Life*, 18 June 1970.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

> alienation is reasonable, however unwelcome, especially if the piece of plate is in effect already alienated by the fact that it cannot be used and is kept permanently in a bank's strong room or a church safe … If it must be sold one would wish that it should either go to another church where it can be used or should go to a national collection so that it is free from all risk of coming into private hands.[49]

In March 1962, the President of the Royal Academy announced that it was going to sell by auction a cartoon by Leonardo da Vinci of the Virgin and Child with St John the Baptist and St Anne. In due course the auction was avoided. Following substantial contributions from the public the Government paid the balance of the £800,000 asking price. The Academy's approach raised considerable concern and a Committee of Enquiry into the Sale of Works of Art by Public Bodies was established. This potentially affected the church, and Seiriol Evans, Dean of Gloucester, was appointed to serve on the Committee.

The Committee recommended that the position with regard to cathedrals needed tightening, which subsequently happened, but considered that:

> although there have been cases in the past of incumbents and churchwardens selling church property without a faculty, we are advised that this is now most unusual. While some Chancellors undoubtedly are more willing to allow the disposal of valuables than others we consider that the safeguards for parish churches are in general satisfactory.[50]

Thus matters stood in 1963, when the vicar and churchwardens of Sacombe presented a petition to the Consistory Court of St Albans. The chancellor was George Newsom QC, later also chancellor of the dioceses of London and Bath and Wells. He was the author of textbooks on limitation, restrictive covenants and the faculty jurisdiction.

Re St Catherine, Sacombe[51]

Sacombe is the smallest parish in the Diocese of St Albans and its church is Grade I listed. The roof of the church needed extensive repair, for which the PCC did not have the money. However, it possessed a flagon dating from 1656 (the Commonwealth period) which had been kept in the bank for many years. The circumstances in which it came into the possession of the church

49 Guidance quoted in *re St Mary, Westwell* [1968] 1 WLR 513.
50 Report of the Committee of Enquiry into the Sale of Works of Art by Public Bodies (London, 1964), para 44.
51 *Re St Catherine, Sacombe*, 23 June 1964 (unreported).

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

were unknown but the name of the church was engraved on the base in eighteenth-century script, so it was a reasonable assumption that it was acquired at that time. There was no reasonable prospect of it being used again in the church, not least because to insure it was very expensive. Chancellor Newsom expressed in trenchant terms the view that the flagon was redundant, stating 'I am of the opinion that this flagon is as useless in its present state as the talent wrapped in a napkin and buried in the ground in the parable'. This led him to conclude 'I am therefore disposed, if I properly can do so, to allow this piece of valuable church property to be converted into a form it will be of some use to the church to which it belongs'.

However, the difficulty in Newsom's path, at least as regards an unrestricted sale, was *re St George-in the-East*, which, as we have seen, only envisaged sale of a communion vessel to another church or a museum. Newsom did not refer to the case in his judgment but in an interim judgment he recognised this difficulty, expressing the view that

> Unless it is established that the flagon was never for use in the service of the church (and I am bound to say that I do not think that likely) I shall authorise its sale only to another church or possibly to a public art collection.

When he came to deliver his judgment, he rowed back from this preliminary view, stating

> it is suggested by the Central Council for the Care of Churches, whose advice I have sought, and by Mr Oman[52] (called at the Council's instance as a judge's witness) that this flagon has been a communion vessel, that is, one in which wine has been consecrated in the communion service. I desire to make it clear that it is no part of my decision in this case that the Court ought not in general to allow the sale in the open market of a communion vessel. But I understand that some of my brethren do not in practice allow it. All I now decide is that different considerations apply to communion vessels and to secular vessels respectively, and obviously it is easier to allow the sale of a secular vessel.

He then went on to hold that it had not been shown that it was a communion vessel, and on this basis authorised its sale. This is surely implausible. A church is unlikely to have been given a flagon in the eighteenth century for secular use; it is likely to have been given one as a communion vessel.

52 Keeper of the Department of Metalwork at the Victoria and Albert Museum and author of *English Church Plate* (see n 10).

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

It is appropriate to note one factor which led Newsom to this surprising conclusion. Having been referred by the petitioners to the cases of *Kenn* and *Thirkleby*, he examined the papers in those cases, both of which had been decided by Walter Wigglesworth – the first in his capacity as Chancellor of Exeter and the second in his capacity as Chancellor of York. Newsom observed that the items were described as secular plate and that in neither case did Wigglesworth consider it necessary to consider the possibility that the flagons were used as communion vessels, even though the rubric in the Prayer Book raised that possibility. Although not binding upon him, he gratefully accepted the decisions as persuasive authority that a flagon should not be treated as a communion vessel unless the contrary were shown. This looks to be a somewhat tenuous basis on which to have proceeded, particularly as it is likely that both cases involved sales with museums as an end destination. However, whatever view one takes of the merits of the approach taken by Newsom, it does appear that he was very deliberately seeking to develop the law along lines which he knew some of his colleagues disapproved of, and was taking some care to find as much support for that approach as he was able.[53]

The judgment in *Sacombe* was delivered on 23 June 1964. In the same month the Council for the Care of Churches approved a memorandum articulating its strong opposition to the sale of church silver.[54] In practical terms, it does not seem that this saw the light of day: it may indeed have been intended to inform those who gave advice and/or evidence on behalf of the Council, rather to be a free-standing document.

Re St Mary, Gilston

Another case was not long in coming and the facts of *re St Mary, Gilston*[55] were apparently indistinguishable from those of *Sacombe*. The flagon dated from 1639 and had the word 'Gilston' engraved on it but the circumstances of its acquisition were unknown. It had been in a bank since 1941. Chancellor Newsom considered it redundant, at one point in his judgment referring to it as 'this useless vessel'.[56] The Council for the Care of Churches argued once again that it was a communion vessel. On this occasion, however, Newsom accepted the argument. The evidence which he heard on this occasion was not materially different from that which he had heard in *Sacombe*. Thus if he were to authorise an unrestricted sale he would have to deal head on with *St George-in-the-East*.

53 In a letter dated 8 November 1965 to the Secretary of the Council for the Care of Churches, the vice-chairman (William Croome) commented on Newsom Ch's argument: 'What a curse is "Wiggy"! Granting those two without a hearing, "valuable guidance" says Newsom' (Council for the Care of Churches, file 32/066).

54 See files of the Council for the Care of Churches: CARE/FAC.

55 [1967] P 125.

56 See ibid, p 131C. At p 128D, he refers to it as 'superfluous'.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

Newsom held that Chancellor Kempe had misinterpreted the constitution of Archbishop Rich. However, the point that Kempe was making with reference to this ancient document was surely not a narrowly legal one but an articulation of a general approach which had been taken since at least the thirteenth century (and had commended itself to the Archbishop of Canterbury in 1949).[57] It is submitted that Newsom was on stronger ground in saying that it was wrong to consider something once consecrated as always being consecrated,[58] although this still does not address the view that something that once was consecrated should not be made available for (perhaps inappropriate) secular use.

However this may be, having to his own satisfaction disposed of the objection based on the effects of consecration, Newsom found that the question arose as to whether there was any further requirement that a sale should only be to another church or to a museum. Were the effects of consecration the only reason for the view that a sale should be to another church or to a museum or was there a free-standing objection on this ground? It is clear that he took the view that there was no further requirement:

> Nor do I think that it would be useful to attempt to control the destination of a vessel. The burden of a restrictive covenant cannot be made to run with a chattel, and the only practicable means of effecting such control would be to forbid a sale except to a buyer in whose hands the vessel would still be subject to the control of this, or some other, consistory court. Such a sale might well be the best use of the asset in some cases. But in this case, according to the evidence, it would be very difficult, if not impossible, to arrange. The price would of course be far below the market price. To insist on it in the present circumstances would not, in my opinion, be requiring the asset to be put to the most beneficial use.[59]

He did not otherwise deal with the express submission of the Council for the Care of Churches that only a sale to a museum should be sanctioned.

In *Gilston* Newsom said that the jurisdiction to permit sale should be exercised 'with great care in regard to church treasures' and that such orders 'must never be made lightly'.[60] This did not mean that other churches

57 Newsom's criticism of Kempe interpretation of Archbishop Rich was itself criticised by Lord Dunboyne, Commissary General, in *re St Mary's Westwell* [1968] 1 WLR 513.

58 See the approach of the Court of Arches to a proposed sale of a font in *re St Peter, Draycott* [2009] Fam 93 (esp paras 37–57).

59 *Re St Mary, Gilston*, p 132G. It is fair to record that in *Sacombe* Newsom did observe 'In some cases, no doubt, the connexion of a particular piece of silver, or other treasure, with a particular church is of historical importance. In such a case there might well be cogent reasons why the Court should refuse to facilitate the breaking of that connexion.' However, when a strong historical link arose in *re St Gregory, Tredington* it did not prevail against the argument for an unrestricted sale.

60 *Re St Mary, Gilston*, p 126F and p 133B.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

holding redundant silver would not be able to sell them if they were able to argue that the facts of their case squared with those of *Gilston*. In *Westwell*, the name of the donor of two fine late sixteenth-century flagons was known, as was the approximate date of the donation (early seventeenth century). Otherwise the facts were the same, and Seiriol Evans, Dean of Gloucester, appeared on behalf of the Council for the Care of Churches to oppose the sale. Lord Dunboyne, Commissary General, followed Newsom in *Gilston* in ordering an unrestricted sale:

> There are two reasons for not restricting the market. First, the restriction will not necessarily achieve its object of safeguarding the article from improper use. As Newsom Ch. observed in the *Gilston* case, the burden of a restrictive covenant cannot be made to run with a chattel; upon its sale the vendor loses control on its destination. Secondly, the restriction will usually reduce the obtainable price. Mr Came said in evidence that the difference in the present case might be £10,000. I cannot believe it would accord with the wishes of the donor or the interests of the church he cherished to rob its funds of so much, for the sake of a restriction of such dubious effect. I am therefore driven to the conclusion that if these flagons must be sold, the sale should be on the open market.[61]

There were two more flagon cases in 1967. In one, the Chancellor of the Diocese of Oxford, presented with the conflicting views of Kempe and Newsom, did not decide between them but ordered a restricted sale.[62] In *re St Mary, Woodleigh*, Wigglesworth Ch declined to authorise a sale where he was satisfied that the donor had given the flagon for sacred use, despite a pressing bill for repairs. (He also said that the flagon might be used for sacred purposes in the future, which seems unrealistic.)

Re St Gregory, Tredington

Thus was the stage set for an appeal to the Court of Arches. At that time, the Dean of the Arches heard cases sitting alone. The unsatisfactory nature of such an arrangement would be highlighted if the dean had, as a chancellor, given a judgment on the point in issue.

The case that went to appeal was *re St Gregory, Tredington*.[63] This was a case in the Consistory Court of Coventry in which Gage Ch[64] had given judgment on 22

61 *Re St Mary, Westwell* [1968] 1 WLR 513.
62 This case is referred to in the judgment of Wigglesworth Ch in *In re St Mary Woodleigh* (unreported, 16 August 1967) 1 CCCC 6 (Consistory Court of the Diocese of Exeter).
63 [1972] Fam 236.
64 Judge Conolly Gage, the father of Sir William Gage (subsequently also Chancellor of the Diocese of Coventry, as well as of Ely).

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

February 1970. By the time that the appeal was lodged, the Dean of the Arches (Sir Henry Willink) had resigned. The archbishops accordingly had to appoint a deputy to hear the case. They chose George Newsom, who was thus invited to rule on arguments by the Council for the Care of Churches which he had rejected in *Sacombe* and *Gilston*. It is interesting to reflect that, if Wigglesworth, who was appointed dean in 1971, had been in place a few months earlier, the law might have developed in a different way.[65]

Re St Gregory, Tredington concerned two silver flagons. These had been made in 1591 and given to the church in 1638 by the then rector. Although their intrinsic quality is not described in the judgment, they were extremely valuable (£35,000, nearly £500,000 in today's terms). They were redundant because the church had sufficient other plate and they were considered too valuable to bring to the church at all. They were on loan to the Warwickshire County Museum and on display.[66] Tredington was a small parish with 573 people on the register of electors. Of these, 67 were on the church electoral roll. The church fabric immediately needed £3,150 to be spent on it, in order to make the church watertight, which the PCC had no way of finding at that time.[67]

The chancellor refused to permit the sale, and the deputy dean had little difficulty in satisfying himself that he had exercised his discretion on a wrong basis.[68] Exercising that discretion afresh, Newsom permitted the sale because he held that the flagons were redundant and there was an emergency which required the sale. It should be noted that the emergency was the interpretation by the deputy dean of the architect's evidence. The case was not put on the basis of emergency by the petitioners, who had said in documents supporting their petition:

> If we do get permission to sell, then the proceeds after deducting selling costs will be invested in the Unit Trust controlled by the Church of England Board of Finance. This capital sum will be invested in a trust ... The interest will be paid to the PCC for the benefit of Tredington Church and will be used for church repair work or re-invested as circumstances require.

65 However, see Wigglesworth Ch's decision in *In re St Nicholas, Wickham* (below). There is no material about the appointment of George Newsom in Archbishop Ramsey's papers.

66 *Re St Gregory, Tredington*, p 244B (which speaks of them potentially being retained by the County Museum) and p 245A (which speaks of them being held in a bank or museum). Gage Ch's judgment makes it clear that they had been displayed in the County Museum for seven years until the parish took them back with a view for sale. As the deputy dean would have appreciated from Gage Ch's notes of the evidence (which were before him), this fact was part of the evidence before the consistory court of Miss Jocelyn Morris, the Curator of the County Museum (see Court of Arches, file M/40).

67 The purpose of the expenditure is set out in the transcript of the judgment, which is omitted from the Law Report.

68 Although not reported, the text of Gage Ch's judgment exists and is held in the records of the Court of Arches. It is a robust, common-sense judgment which sounds as if it were delivered extempore. It refers to no authority.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

After the judgment, concern was expressed that the Friends of Tredington Church held £3,000 which could have met any immediate need for repairs, but this may not have been in evidence before Gage Ch.[69] The flagons were in due course bought by the Goldsmiths Company.

In the course of his judgment Newsom said:

> There may well be cases in which churchwardens, with the consent of the parochial church council, ask for a faculty to enable vessels to be sold in order to put the proceeds to a different charitable and religious use, inside the parish or beyond its boundaries or to use the proceeds for such a gift and for work to the fabric. If the vessels were proved to be unnecessary there would be jurisdiction to grant such a faculty, since Sir Robert Phillimore recognised in the passage quoted above that the goods of the Church may be the subject of a gift.[70]

This explains the context of what he said in conclusion:

> I have granted it in this present case because the flagons are redundant and because there is an emergency in the finances of the parochial church council, due to the state of the fabric and the small congregation of the church. I have also stated that faculties can be granted to enable churchwardens to make a gift to religious and charitable purposes. I must not be understood to say that those are the only grounds for exercising the discretion in favour of a sale; other kinds of cases must be considered as and when they arise, but the jurisdiction should be sparingly exercised.

The deputy dean was thus making it clear that, in his judgment, the proper exercise of the jurisdiction was not limited to emergencies. Evidently redundant plate might be put to good use more generally. The view that the jurisdiction should be exercised sparingly is at odds with what he had previously said. Newsom did indeed identify a concern that the market might be flooded with redundant church silver but this would not appear to be sufficient justification for the use of the word 'sparingly'. If this is the justification, it will be seen that it is only pragmatic concerns which preclude the widespread sale of church silver. Thus, the use of the word 'sparingly' and the fact that the judgment itself permitted sale in circumstances of an identified emergency serve to mask the radical nature of the Newsom's judgment.

69 From Newsom's order it appears that he only had before him Gage Ch's judgment and his notes of the evidence. In fact it appears from the judgment that he had some of the documentation before the Consistory Court, but not all of it. Subsequent to Newsom's judgment, the Council for the Care of Churches recorded in a formal minute its dissatisfaction with the Consistory Court processes.

70 *Re St Gregory, Tredington*, p 243G.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

In his judgment, the deputy dean addressed the question of the chancellor's jurisdiction to grant a faculty for sale. Following the passage concerning Phillimore set out above, Newsom held that he did. He continued:

> These passages recognise that while church goods are not in the ordinary way in commerce or available for sale and purchase, yet the churchwardens with the consent of the vestry (now the parochial church council) and the authority of a faculty may sell them or even give them away. Without such consent and authority the churchwardens cannot pass the legal interest which is vested in them. To obtain a faculty some good and sufficient ground must be proved. In the case of a sale, one of the grounds suggested by Sir Robert Phillimore is redundancy. It is not an essential ground or the only possible ground. *But some special reason is required if goods which were given to be used in specie are to be converted into money. This is not a jurisdiction to authorise changes of investment*. Like all faculties, of course, this kind is a matter for the chancellor's judicial discretion, and the evidence will mainly be directed to helping him with its exercise.[71]

The deputy dean's judgment may at first reading seem opaque. What he was saying is that the churchwardens need the authority of a faculty to sell any item of church plate and that to do so there must be a 'good and sufficient ground'. Thus if they propose to sell a chalice and replace it with a new one, they need to show a good and sufficient ground. But if they propose to sell a chalice and not replace it – converting it into money to be used for some other purpose – in addition to the good and sufficient ground, there has to be a 'special reason'. That this is the correct interpretation becomes clear from a passage in the judgment in *Gilston*:

> In each case the burden of satisfying the court that a sale of a church treasure should be allowed lies on the petitioners. To discharge this burden they must show, by reference to the finances and needs of their church and the usefulness and value of the object concerned, that there is a proper case for allowing the treasure to be disposed of. If they wish to use any of the proceeds (which are in the nature of capital) otherwise than by way of reinvestment in securities producing income, the burden is also on them to establish this further point.[72]

Although what Newsom said may, on examination, become clear, it does produce a distinction which is complicated and hard to apply in practice. One

71 Ibid, emphasis added.
72 *Re St Mary, Gilston*, p 126G.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

can see that if the proceeds of sale are to be applied for some other purpose, that purpose may require *particular* justification (it may not, after all, be a sensible proposal). However, by use of the word 'special', the deputy dean suggested something out of the ordinary. Cases where the churchwardens might want to sell to re-invest in church plate or hold the proceeds of a sale on essentially the same trusts as hitherto will be rare and there seem to have been none since *Tredington*.[73] Thus, in all the subsequent cases, the courts had to look for a special reason justifying the new purpose for which the proceeds of sale were to be put. In practice, the distinction between the need to show a 'good and sufficient ground' for the disposal and a 'special reason' for the application of the proceeds was lost sight of.

The requirement for 'deconsecration' that was a condition of sale in *Gilston* is not referred to. It is possible that this was a condition left to be settled by the registrar, but one might have expected some reference to be made by the Court of Arches to this issue, which had played an important part in earlier refusals of the consistory court to permit the sale of church silver. By the time of *re St James, Welland* in 2011, Mynors Ch thought deconsecration unnecessary.[74] From the point of view of this author, the objection to secular use is not overcome by any service of deconsecration. It is unhappy to envisage a chalice being used in secular context. This is not because of the fact that it was ever formally consecrated (if it was) but because of its former sacred use. It may be illogical but it is less unhappy to envisage a flagon being used in a secular context, even when it is understood that historically wine was consecrated in the flagon. This all said, it is unlikely that church silver – bought at a cost which will always be measured in thousands of pounds – will be put to secular use. Unless the original devotion of church silver to sacred purposes were to be regarded as an absolute bar to any purchaser save a museum – a limitation which the Court of Arches has not upheld – it is necessary to accept that the possibility exists that a sacred vessel could be put to inappropriate use.

The position of the Diocesan Advisory Committee (DAC) in *Tredington*, supported by the Council for the Care Churches, was that, if the flagons were not to be retained by the church, they should be lent, given or sold to a museum – in the last case (to facilitate the transaction) at an undervalue. The deputy dean rejected this argument:

> the committee says that the flagons are part of the history of the Church in Warwickshire and that they can safely be retained by the county museum

73 In *re St Cyriac, Lacock* (2012) 15 Ecc LJ 250 (where there was not a financial emergency), the sale proceeds were to be held in a trust fund for the repair of the church but were not re-invested in church plate (save that a replica cup was provided).

74 [2013] PTSR 91, p 116.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

> without risk or cost to the parish. I agree. But in the museum they will not be used for their original purpose and their presence there will not help with the problem of keeping the weather out of the church. Of course, if this case was an application for leave to give or lend the flagons to the museum, or to sell them to it at an undervalue, that would be a matter for sympathetic consideration. But that is not what I have now to decide.[75]

It is clear from the context that the deputy dean was not rejecting the argument of the DAC and the Church Buildings Council (CBC) on the technical ground that there was no petition for a loan or sale at an undervalue before him, indicating that, if it had been before him, he would have granted such an application in preference to sale on the open market. Rather what he was doing was rejecting in principle an argument that there should have been a restricted disposition.

CATHEDRAL TREASURIES

Nonetheless, there will have been many parish churches which did not want to sell their silver and in any event had no justification for doing so, except that it was redundant and in a bank. They would have wished it possible to display the silver. It was at this time that the Council for the Care of Churches approached the Goldsmiths' Company with a suggestion for the establishment of cathedral treasuries. Together they promoted this idea and the Company donated £300,000 for the purpose. The Treasury at Lincoln was the first, being opened in 1960. It was followed by Winchester (1969), York (1972), Norwich (1973), Chichester, Durham, Oxford and Ripon (1976), Gloucester (1977), Canterbury, Hereford and Lichfield (1980), London and Peterborough (1981), Salisbury (1983) and Guildford (1995).[76]

The establishment of cathedral treasuries may have drawn the sting of criticism of the judgment in *Tredington*. It is remarkable that there was so little criticism of it, either at the time or as sales of silver became more common. Many in the church would have supported it and even the 'heritage lobby' was torn because funds realised by the sale of silver were often used to maintain the historic fabric of the building. The evidently pragmatic nature of the judgment in *Tredington*, with its emphasis on emergency and a jurisdiction to be sparingly exercised, masked the radical nature of the change of policy which it was endorsing. There would surely have been many more petitions for sale of church silver but for this emphasis. It should be noted that in 1973 a Working Party of the

75 *Re St Gregory, Tredington*, p 244F.

76 There is also a treasury in the church of St Mary Magdalene, Newark. The treasuries at Hereford and London have closed, and that at Oxford shares its space with the gift shop.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

Council for Places of Worship, under the chairmanship of Antony Bridge, Dean of Guildford, produced a thoughtful and intelligent report entitled *Treasures on Earth*.[77] This wished to see efforts made for redundant silver to be loaned to an appropriate institution before it was sold. The working party also thought that it was unfair that sales of silver should benefit simply the church which owned them. It proposed an elaborate scheme whereby plate that had not been used for ten years should be transferred to the diocese, which would seek to find an appropriate home for it or to sell it if it could not. Following sale, one-third of the net proceeds was to go to the parish and two-thirds to the Diocesan Building Fund for fabric repairs in the diocese as a whole. This idea received a hostile response in Synod, partly because parishes would only receive a proportion of the value of their silver and partly because of the cost to the dioceses.[78] It did not go further.

THE APPLICATION OF *TREDINGTON*

There were six other cases pending in consistory courts at the time of the judgment in *Tredington*. In only one of them was sale not permitted: this was the case of *re St Peter, Barnstable* (Exeter, Calcutt Ch, 8 December 1971).[79] Of the remaining four, two proceeded on the basis of emergency: *re All Saints', Deane* (Winchester, Phillips Ch, 2 December 1970)[80] and *re the Assumption and St Nicholas, Etchingham* (Chichester, Buckle Ch, 30 December 1970).[81] In *In re St Nicholas, Wickham* (Portsmouth, 21 September 1970), Wigglesworth Ch stated:

> In the present case there is no emergency in the sense that there was at Tredington. The parish is not saying that they cannot maintain their church without the sale money. What they are saying is that they cannot maintain a church room without it and that the church room is necessary for the expansion of the work in this parish ... If this is not an emergency in the strict sense there would, in my view, be one if they built the church room without the sale money.[82]

77 GS 132.
78 See Proc GS, 4 July 1973, pp 423–427.
79 Unreported. The items included: Mary I silver-gilt cup and cover; Elizabeth I silver-gilt communion cup and cover; pair of Charles II flagons; pair of Charles II patens.
80 Unreported. The item, an outstanding tazza (1591), was bought by the Basingstoke Museum, but the chancellor did not require a restricted sale. Before sale it was displayed in the Winchester Diocesan Treasury.
81 Unreported. The item was a pewter flagon (1635).
82 Unreported. It concerned a silver flagon (1646).

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

Finally, there was the interesting case of *re St Martin in the Fields*.[83] George Newsom became Chancellor of London 1971, in succession to Walter Wigglesworth when the latter became Dean of the Arches. The sale was proposed in order to fund necessary repairs to the crypt and alterations to the adjoining vestry hall to provide 'on-site' accommodation for the curates and vergers. The chancellor was prepared to order the sale of some of the silver, holding that there was an emergency in relation to the vestry hall, but declined to do so in respect of repairs to the crypt. The case went on appeal to the Court of Arches. At the date of the hearing, the scheme in respect of the vestry hall had been abandoned, but Sir Harold Kent (who had succeeded Walter Wigglesworth as Dean) allowed the sale in respect of repairs to the crypt on the basis that the situation constituted an emergency.

From these early cases it will readily be seen that the injunction to exercise the jurisdiction sparingly was being flexibly interpreted. In *re St Mary, Rickmansworth*[84] Elphinstone Dep Ch accepted the following as the basis for sale:

> The Parochial Church Council has for many years devoted a considerable part of its income to missionary and other causes outside the parish ... It wishes very much to continue to do so but heavy expenditure on the repairs of the tower ... and future maintenance problems have stretched resources to the extent that there is currently an annual deficit which income from the proceeds of sale would cover and enable the outward looking attitude of the parish to continue.

In short, anything could be a special reason permitting sale if it were regarded as important enough.

Sales were permitted in the following cases: *Re St Michael and St Mary Magdalene, Easthampsted* (Oxford, Boydell QC Ch, 22 July 1971);[85] *re St Mary Newington* (Southwark, Bishop sitting in his own court, 1972);[86] *re St Benet Fink* (London, Newsom QC Ch, 4 December 1975);[87] *re St Andrew, Heddington* (Oxford, 1975);[88] *re St Mary le Bow* (London, Newsom QC Ch, 4 January 1984);[89] *re St James the Great, Gretton* (Peterborough, Coningsby QC Ch, 18

83 Unreported, 1972. It concerned a silver dish and ewer (1720), a pair of silver-gilt flagons (1746), a chalice and paten (1746) and a pair of silver -gilt chalices (1649).
84 Unreported, 26 October 1971. It concerned a silver-gilt cup and paten (*c*1620), a communion cup and cover (1579), a cup (1628), a flagon (1636) and a standing paten (1692).
85 Unreported; two silver flagons *c*1700.
86 Unreported; two cups and paten (1675), paten (1680), flagon (1680), two alms dishes (1680).
87 Unreported; two silver flagons and chalices (1638), silver dish (1695).
88 Unreported; silver-gilt tankard (1602).
89 [1984] 1 WLR 1363. The sale was authorised to fund a verger, a requirement which was held by the Chancellor to be a financial emergency (p 1365D). Much of the silver, which was not listed in the judgment, was on public display. Two flagons dating from 1610 were acquired by Sir Arthur

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

May 1990);[90] *re St Paul, Bristol* (Bristol, Calcutt QC, 24 March 1993 and March 1995);[91] *re St John w Holy Trinity, Deptford* (Southwark, Gray QC Ch, 2 March 1995);[92] *re St John the Baptist, Halifax* (Wakefield, Collier QC Ch, 19 December 2000);[93] *re St James, Louth* (Lincoln, Collier QC Ch, 27 November 2002);[94] *re St Mary, Eaton Constantine* (Lichfield, Shand Ch, 28 March 2003);[95] *re St John the Baptist, Stainton by Langworth* (Lincoln, Collier QC Ch, 13 April 2006);[96] *re St James, Welland* (Worcester, Mynors Ch, 2 July 2011); *re St Cyriac, Lacock* (Bristol, Gau Ch, 4 December 2012).

Further, examination of the records of the National Art Collections Fund shows the following additional cases of sales to museums in respect of which judgments are not available in the collection of the Middle Temple: from redundant churches in Chester (1989); from St Paul, Bristol (1994); from St John the Baptist, Instow (2011); and from St Petrock, Exeter (2012). Finally, the writer is aware of a sale to the Birmingham Museum of silver from St Mary and St Margaret, Castle Bromwich (2010).

Of these cases *In re St Cyriac, Lacock* should be especially noted. In this case the consistory court had to consider a petition whose background, as it rightly observed, was highly unusual. It concerned an outstandingly beautiful domestic cup (although having the form of a chalice) dating from the middle of the fifteenth century. This was given to the church in the seventeenth century and then used until 1962, when it was loaned to the British Museum. The British Museum, concerned that an item so valuable might be the subject of an application for sale by the parish, of its own initiative proposed to buy the cup for £1.3 million pounds. The court authorised the sale on the basis that the cup was practically redundant (it was too valuable to be used on a regular basis) and the cost of returning it to the parish and displaying it there was prohibitive.

Sales were not permitted in the following cases: *Re All Saints', Norton Fitzwarren* (Bath and Wells, Newsom QC Ch, 30 October 1971);[97] *re St Mary, Watford* (St Albans, Newsom QC Ch, 28 July 1976); *re St Peter Ash* (Guildford, Goodman Ch, 29 July 1976);[98] *re St Alkeda, Giggleswick* (Bradford, Savill QC

Gilbert and in 1996 given to the British nation. There are now held by the Victoria and Albert Museum. As far as I am aware, this is the last case on the sale of church plate decided by George Newsom.

90 (1990) 2 Ecc LJ 227; two silver-gilt flagons (1638).

91 Unreported; silver-gilt flagon (1620), tazza (1619), ewer (1619).

92 Unreported; flagon (1839), two chalices and paten (c1883), flagon, chalice and three patens of uncertain date.

93 (2006) 6 Ecc LJ 167.

94 Unreported; Elizabethan flagon.

95 Unreported; flagon, cup and paten (1835), nineteenth-century paten, two pewter collecting plates.

96 Unreported; two-handled cup and stand (1679), two silver cruets (dates not given).

97 Unreported; silver-gilt flagon and paten (1712).

98 Unreported; silver chalice (1575).

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

Ch, 19 September 1983);[99] *re St Mary of Charity, Faversham* (Canterbury, 8 June 1985);[100] *re St John the Baptist, Sutton-at-Hone* (Rochester, Goodman QC, 5 December 1988);[101] *re St Mary the Virgin, Burton Latimer* (Peterborough, Coningsby QC Ch, 20 April 1995);[102] *re St Mary and St Hugh, Old Harlow* (Chelmsford, Pulman QC Ch, 22 March 2005).[103]

In *In re St Lawrence, Wootton*, the Court of Arches summarised all the cases as follows: 'Despite reiteration by this court that the jurisdiction should be "sparingly exercised", the consistory court judgments show a growing readiness to sanction sales, including sales not to museums but on the open market.'[104]

THE CASE OF ST LAWRENCE, WOOTTON

This article is concerned with the disposal of church plate, rather than encompassing the disposal of church treasures generally. Nonetheless it should be noted both that there are such cases and that the issues arising in such cases share common features with cases about the disposal of church plate. Significant cases involved the sale of paintings,[105] armour[106] and furniture and fittings.[107] After its judgment in *Tredington* the Court of Arches sought to apply the principles enunciated in that case to cases concerning the disposal of other treasures; in the absence of any modification of that case by the Court of Arches, consistory courts (in the Province of Canterbury at the very least) are bound to apply it. Against this background, we turn to consider *re St Lawrence, Wootton*. This case concerned not church plate but a valuable and beautiful Flemish armet or helmet that dated from about 1500. In this case, the Court of Arches rewrote the approach it required consistory courts to take towards the sale of all church treasures, including church plate.

From the end of the seventeenth century the armet had hung above the effigy of Sir Thomas Hooke. In 1969 it was taken down and stored in a bank for reasons of security. In 1974 the then chancellor authorised its indefinite loan to the Royal Armouries in the Tower of London;[108] in 1996, it was transferred to Leeds when much of the Tower's collection was transferred to a new museum there, although it was not then on display. In 2010, the minister and churchwardens petitioned to sell it. The chancellor granted a faculty. He held

99 Unreported; pewter flagon (1766).
100 Unreported; two pairs of silver flagons (1643).
101 (1998) 1 Ecc LJ 5; silver chalice and paten (1621), tankard (1724).
102 Unreported; silver flagon and alms dish (1774), silver chalice and paten (1570).
103 Unreported; two silver flagons (1640).
104 *Re St Lawrence, Wootton* at para 3.
105 *Re St Helen, Brant Broughton* [1974] Fam 16 (Court of Arches); *re St Michael and all Angels, Withyham* [2011] PTSR 1446.
106 *Re St Bartholomew, Aldbrough* [1990] 3 All ER 440.
107 *Re St Nicholas, Porton* (unreported); *re St Peter, Draycott* [2009] Fam 93 (Court of Arches).
108 The collection of armour at the Tower of London may be the oldest museum in England.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

that the connection between the armet and the church had been severed and was unlikely to be restored, and that, although the petitioners had not shown an emergency, they had demonstrated good financial reasons for seeking the sale. The Court of Arches set aside this decision on the basis that the chancellor had erred in his approach to separation, and also that his approach to the financial evidence was flawed. The latter point, which was case-specific, does not need to be considered further.

In its judgment, the Court of Arches set out what it said was the correct approach, which differed from that of the chancellor.[109] The court then remade the decision, and dismissed the petition. As to the general approach, there are three aspects which need to be identified. First, as regards the test to be applied, the Court of Arches held, following (as it considered) the *Tredington* case, that the petitioners had to show 'special grounds' for granting the faculty prayed, which was synonymous with 'good and sufficient' grounds.[110] Rather, however, than being a simple balancing exercise, the starting point was 'a strong presumption' against sale.[111] In that balancing exercise, the court approved the statement of Collier Ch in *re Stainton by Langworth*:

> Quite clearly the more valuable the plate, particularly having regard to its artistic and historic value the weightier will need to be the reason before the court in its discretion concludes that it is a sufficient reason in all the circumstances to allow a sale.[112]

On the other side, there was no requirement to show a financial emergency; the extent of the financial need was a matter going to weight:

> Financial need falling short of financial emergency will seldom on its own outweigh the strong presumption against sale; but it can and must be weighed with any other factors favouring such sale. It follows that a critical or emergency situation will carry more weight than more normal pressures on parish finances, but it is neither possible nor desirable to develop criteria for an emergency situation that would put a case into a distinct category.[113]

109 [2014] WLR (D) 176. The Dean (Charles George QC) sat with McClean QC Ch and Briden Ch.

110 Ibid at para 44. In equating 'special grounds' with 'good and sufficient grounds' the court misread *Tredington*. The court also relied upon its judgments in *re St Mary the Virgin, Burton Latimer* and *re St Peter's, Draycott* [2009] Fam 93 (a case concerning a Victorian font). It is fair to say that in these cases the two requirements were equated.

111 Ibid at para 51 (where the test is articulated) and para 90 (where it is applied).

112 Unreported (1994) at para 16, cited in *re St Lawrence, Wootton* at para 53.

113 *Re St Lawrence, Wootton* at para 52.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

Accordingly, 'special grounds' may now appropriately be defined as grounds which are sufficiently strong to outweigh the strong presumption against sale; they have no intrinsic quality.[114]

Second, the court explained its view about separation. (Note that, in the context of cases about treasures other than church plate, arguments about separation are substituted for those about redundancy. It did not make any sense to speak of the armet in *In re St Lawrence, Wootton* being redundant. However separation becomes relevant in the church silver cases because what has happened is that, being redundant, the item has been separated from the church, either being deposited in a museum or a bank vault.) For Clark QC Ch the severance of the connection between the armet and the church was a weighty matter. The Court of Arches disagreed. It said:

> In the *Burton Latimer* case ... this court, in upholding the refusal to permit the sale of antique silver, emphasised the importance of the history of an object as part of the local heritage. The court said, at p 7: 'A relevant factor, indicating that there should be no faculty, may be that the articles are part of the heritage and history not only of the church but also of all the people, present and future, of the parish'. In our view, in the case of historic articles with a significant past connection with a church or parish, this factor will commonly outweigh any possible argument based on 'separation'. For the future we consider that little weight should normally attach to 'separation' as a reason for disposal by sale, and we doubt that 'separation' would ever, on its own, have sufficient strength to justify sale of a church treasure.[115]

Third, the court required a sequential test to be applied to the disposal of church treasures. It identified three sorts of disposal:

i. Disposal by loan, where the item is placed on long loan to a museum, art gallery or diocesan treasury;
ii. Disposal by limited sale, where the item is to be sold to a museum, art gallery or (more rarely) diocesan treasury;
iii. Disposal by outright sale, where the item is to be sold, regardless of who the purchaser is, to whoever will pay the highest price.

114 The Court of Arches specifically disapproved of the adoption of a two-stage approach to special grounds, ie first asking whether the grounds were special and then whether, in the circumstances of the case, they justified the sale.

115 *Re St Lawrence, Wootton* at para 59. In *Burton Latimer* the silver which was the subject of the proceedings had been deposited in the Cathedral Treasury at Peterborough.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

Having observed that

> Disposal by loan and disposal by limited sale both safeguard the security and, to some extent, visibility of the article. The former has the advantage of retaining control (and usually ownership – the exception being where the church does not have ownership, as here), whereas ownership and any form of control are lost entirely in both forms of disposal by sale[116]

the court went on to say:

> where disposal of church treasures is contemplated, then would-be petitioners and chancellors should apply a sequential approach, considering first disposal by loan, and only where that is inapposite, disposal by limited sale; and only where that is inapposite, disposal by outright sale.[117]

The Court rejected an argument that churchwardens were bound to seek to achieve the best price for goods which they owned:

> In *re St Michael and All Angels, Withyham* [2011] PTSR 1446. There the chancellor permitted the sale of a set of four 14th century Italian paintings, which had been on loan to the Leeds Castle Foundation since 1997. He considered, and rejected, a representation by the CBC that the sale should be restricted to a public institution in Great Britain. The chancellor said, at para 39: 'I am satisfied, for the reasons given by Sotheby's, that this might well result in the paintings not achieving the best price possible. As charity trustees, the parochial church council are obliged to realise the full value of any assets to be sold.'
>
> We invited submissions from counsel in relation to the proposition in the second sentence, which is inconsistent with the dictum in the Tredington case about possible sale to a museum at an undervalue. Both counsel drew attention to the inherent misconception in the Withyham case that the court was concerned with the powers of the PCC. It is the churchwardens who have the legal title to the goods of the church. The

116 Ibid at para 35.

117 Ibid at para 36. The Court of Arches was concerned to suggest that its approach was not novel (ibid at paras 34–39), and in doing so considered cases involving the disposition of church treasures other than silver, with which this paper is not directly concerned. Whatever its novelty or otherwise, the sequential approach now represents the law. It should, however, be noted that the court stated that in *re St Gregory, Tredington* a limited sale was not being advanced by the advisory bodies nor was it a viable prospect (ibid at para 38), implying that a limited sale did not occur in that case for this reason. As explained above, this is not the analysis of the present writer. The fact that a sequential test was not established explains how it was that so many sales were sanctioned after the decision in *Tredington*.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

> churchwardens, however, are not charity trustees. Counsel were agreed that if the faculty authorised a sale only to a museum for the best price that could be obtained from such a museum, that lawfully limited the duty of churchwardens. We agree, and would only add that were it otherwise churchwardens would not be able, pursuant to faculty, to give or sell at an undervalue articles to other churches.[118]

This requires some unpicking. As discussed above, it is not clear that churchwardens are not charitable trustees. However, if they are not charitable trustees, their position is analogous to that of charity trustees; and the submission of counsel for the petitioners in *In re St Lawrence, Wootton* that they nonetheless had a fiduciary duty generally to obtain the best possible price for chattels which they own has considerable force. Nonetheless, just as in appropriate circumstances charity trustees may be dispensed from that duty, it is surely correct that, in appropriate cases, the consistory court should have power to dispense churchwardens from an equivalent duty.

It is appropriate to consider the practical consequences of *Wootton*. It may be argued that the establishment (or re-establishment) of a strong presumption against a sale is not altogether helpful because it is difficult to know what weight properly attaches to such a presumption. Perhaps the best way of appreciating the weight is that it is intended that sales will rarely be permitted.[119] On this basis, it may be that the strength of the presumption is made clear enough. The fact that sales will rarely be permitted is likely to operate as a strong disincentive to a parish seeking to sell any silver it may possess. Moreover, although financial emergency is only one example of a set of facts which might justify a sale, if there is a strong presumption against sale, generally one may think that it will in fact only be a financial emergency that will be capable of overcoming the strong presumption. The encouragement of limited sales also acts as a strong disincentive: a church will be encouraged to defer attempting to sell its silver until a very rainy day in order to avoid selling at a discount. This is in the context where the prices achieved on the sale of old silver are generally low. Accordingly the number of future cases is likely to be limited. I am aware of no case having been brought since *Wootton*.

The judgment evidently encourages the loan of church silver to a cathedral treasury or to a museum rather than keeping it in the bank. However, there is nothing new about this. What in the view of the present writer does represent a change is the explicit encouragement in appropriate circumstances of limited sales. It is worth considering how this will work. Evidently there are

118 Ibid at para 39.

119 Ibid at para 51. See also the strong presumption against works that adversely affect a listed building (see *In re St Alkmund's, Duffield* [2013] Fam 158 at para 87). Such works are often permitted.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

some items that are so outstanding that a museum will want to buy them. The Lacock Cup is one example. However, if the facts of that case were to arise today, one would expect the British Museum to save the purchase price and be content with a loan. Nonetheless (in contrast to the situation in *Lacock*), there might be a financial emergency in the parish, perhaps arising after the item has been loaned to a museum. In these circumstances an interested museum will be expected to come up with an offer that addresses the financial emergency, even if it does not address it as adequately as a sale on the open market. If there are two competing museums (for example one in England and one in the USA), it would presumably be appropriate to select the one with the closest links to the parish, even though its bid might not be the higher. It is likely of course that there will be cases where the silver is not so fine or important as to be of interest to a museum. These items will be at risk of sale in a financial emergency, although, given that they will not be especially valuable, one may doubt their relevance to any emergency that might arise.

Although the judgment in *Wootton* does not put emergency in a special category, it evidently will be emergency that best justifies a sale. One can understand this: the family silver should not be sold unless it is absolutely essential. It may, however, be doubted whether this sort of emergency will ever truly exist. When Chancellor Newsom was developing the law, evidently there was genuine concern that, absent the sorts of sale that were being authorised, historic churches would fall down. But in today's different climate, involving, among other things, grants by the Heritage Lottery Fund, does this still apply?[120] If it does, is not the response to say that the church in question should be closed and left to heritage bodies to look after? More specifically, does anyone really think that St Catherine, Sacombe, St Mary, Gilston and St Gregory, Tredington would have fallen down if the sales of their silver had not been authorised?

On the other hand, if the Court of Arches had been prepared to authorise the sale of silver in appropriate cases to further the mission of the Church, it would be using the Church's assets to do something central to the function of the Church which otherwise would not have been done.

The requirement for a hearing

At paragraph 18 of its judgment in *Wootton,* the Court of Arches set out paragraphs 35 and 36 of its judgment in *re St Peter, Draycott*:

> 35. . . .Whilst the [written representations] procedure has the advantage of limiting the costs of contested faculty proceedings, this should not be the

120 Note that if church silver were ever viewed by the Heritage Lottery Fund as a saleable asset, it would form part of its assessment of eligibility for funding.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

> sole criterion for using the procedure . . . The circumstances of each case will differ, and the chancellor will have to consider all relevant factors in deciding whether or not to use the written representations procedure instead of an oral hearing;
>
> 36. In this case we think it would have been better if the chancellor had not offered to use the written representations procedure in view of the serious issues which arose and those canvassed in this appeal. In our judgment this was a case more suitable for hearing in court. However, we recognise that it is easier for this court, with the benefit of hindsight, to reach such a conclusion.

It went on to say:

> The same is true of the present case. The lesson of these two cases is that the dictum in *In re St Gregory, Tredington* that 'Faculties of this kind should seldom if ever be granted without a hearing in open court',[121] perhaps modified to omit the words 'if ever', should be borne in mind by chancellors in disposal cases, whether or not the petition is formally opposed.[122]

A chancellor will risk severe subsequent criticism if he or she disregards this very strong language. Nonetheless, if a chancellor were to grant a faculty on the basis of written representations in circumstances where no-one had become a party opponent, there could be no possible appeal to the Court of Arches – because there would be no party that could appeal. This was the position in *In re St James, Welland*. And the guidance is in any event surely pragmatic rather than principled, designed to impress everybody concerned with a possible sale with the significance of the proceedings and acting as a deterrent to bringing petitions save in strong cases.[123]

There is, however, what may be viewed as a lacuna in the rules, which the requirement for a hearing (with its attendant publicity) goes some way to address. Under rule 9(6)(1)(a) of the Faculty Jurisdiction Rules 2015,[124] there is a requirement to consult with the CBC in respect of the sale of church silver. This duty does not extend to, for example, the Goldsmiths' Company or the Society of Antiquaries, which bodies have a particular interest in such sales.

121 See *re St Gregory's, Tredington* at p 246F.
122 *Re St Lawrence, Wootton* at para 19.
123 It may be noted that in *re St Peter, Draycott* at para 34 (not quoted in *Wootton*), the Court of Arches had observed 'the dictum of the deputy dean in *In re St Gregory's, Tredington* that "Faculties of this kind should seldom if ever be granted without a hearing in open court" no longer carries the weight which it did in past'.
124 SI 2015 No 1568.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

CONCLUSION

It is appropriate to return to considering the *Welland* case. Given that the chancellor adopted the wrong approach, what should have happened? There is no cathedral treasury in Worcester, but there is a county museum. It may be guessed that the items in that case were of sufficient quality and interest for the museum to have wished to have their custody, all other things being equal; failing such an arrangement, one might hope that the diocesan treasury at either Gloucester or Hereford could have accommodated them. But if a loan were not possible for whatever reason, it is surely the case that a chancellor loyally applying the approach required by *re St Lawrence, Wootton* could not have held that the need authorised a sale. But other than returning the items to a bank, pending a stronger case for sale, what were the options open to the parish? Display in a secure case in the church would surely have been worth considering, particularly as St James is a church which is not generally open to the public.[125] Even if this did not happen, it would surely have been realistic to bring the silver out on special occasions, taking special care of it. The writer considers that, in a case where the historical link to intrinsically interesting silver was so strong and the money secured by the sale of it was so small, the sale that was permitted in *Welland* was particularly sad.

Looking at matters more broadly, however, it does appear that there is quite a lot of fine church silver which is kept in bank vaults and never sees the light of day. There might be some scope for some of it to go on display, but the cathedral treasuries do not generally need any more silver (those familiar with such treasuries will appreciate that this is a case where more can readily become less). Against this background, there will be those who say that *Wootton* is wrong and that the Church's 'surplus' silver should be sold. From a strictly utilitarian point of view, the argument is unanswerable. However, utility is not the sole test of value. In the view of the writer, the loss of the inheritance represented by the Church's silver would be hugely regrettable.

The Court of Arches as policy-maker

The sale of church silver does involve what may be identified as purely legal issues, such as the power to permit sale for secular use of what were once vessels used in the service of Holy Communion, or whether churchwardens are under any duty to realise the best possible price for any article which they dispose of. Nonetheless, the strong presumption against outright sale of an article and the requirement for the application of a sequential test in considering the sale of an article are not matters of law as such but are the application of

125 The CBC in its guidance *Church Treasures* gives the example of the silver displayed in St Mary's, Woodbridge (protected by alarm, bullet proof glass and CCTV). A heavy duty chest permits the display in St Helen's, Ranworth of the very precious fifteenth century Ranworth Antiphoner.

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press

policy by the Court of Arches. The decision in *Welland* could equally well have been adopted by the court as embodying the right approach. For the court so to have decided might have been wrong as a matter of policy, but it could not properly be described as wrong as a matter of law. There is nothing new about this. The requirement to apply the *Duffield* guidelines (with their in-built presumptions) when considering a proposed alteration to a listed church is likewise the application by the Court of Arches of policy. However, the policy thus enunciated has the effect of law because, if it is not loyally applied by a consistory court, the decision of that court will be reversed on appeal.

It is somewhat odd for matters to have ended up in this way. As often in the Church of England, there is an issue as to where authority resides, but the CBC has been set up by virtue of a Measure and on the face of it is the sort of body that might formulate authoritative policy. And, of course, it *has* formulated policy on church treasures, albeit not in such specific terms as the Court of Arches.[126]

There would be a certain irony in such an approach in relation to church silver, since the difficulties in this area have all arisen since Chancellor Newsom began rejecting the advice of the Council for the Care of Churches in *Sacombe* and succeeding cases; and then the Court of Arches in *Wootton* returned to a position closer to what the Council would have desired in the first place.[127] There may be those who would say that policy – whatever it is – ought to be made by Synod and not the Court of Arches. There is some logic to this position. Nonetheless, while a system of independent consistory courts supervised by an independent Court of Arches remains the mechanism for resolving disputed issues, for the guidance of (say) the CBC to be given an enhanced role would add an undesirable layer of complexity and lead to uncertainty. In the view of the writer, the Court of Arches has proved responsive over the years to varying needs of the churches which it supervises. For his part, he would not wish to seek to fetter or regulate its ability to articulate policy through its judgments.

126 Note that by s 55(1)(d) of the Dioceses, Pastoral and Mission Measure 2007 the CBC has a duty to 'promote ... by means of guidance or otherwise, standards of good practice in relation to the use, care, conservation, repair, planning, design and development of churches', which would not expressly extend to guidance about its stewardship of plate. Guidance given under more general powers would seem to have less authority. The CBC's present guidance in respect of church plate contained in *Church Treasures* does not grapple with the issue of redundancy. It proceeds by way of endorsement of the judgment in *In re St Lawrence, Wootton*, albeit the authority of the CBC powerfully reinforces it.

127 It will also be noted that the approach of the Court of Arches in *Wootton* draws upon the suggestions in the report by the Council for Places of Worship mentioned above (see note 77 and associated text).

https://doi.org/10.1017/S0956618X17000874 Published online by Cambridge University Press