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Protecting the Dead: Exhumation and the Ministry of Justice.

Steven Gallagher
University of Wolverhampton

Steve.Gallaher@wlv.ac.uk

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Summary

Unless another statutory provision applies, the Burial Act 1857, section 25, regulates the exhumation of human remains interred in England and Wales. Section 25 provides that, if human remains are to be exhumed from consecrated ground, that is ground consecrated by the Church of England, and are to be reinterred in consecrated ground then a faculty, an ecclesiastical licence, must be obtained from the Chancellor of the Consistory Court, the ecclesiastical court of the diocese. If the remains are not in consecrated ground, or are not to be reinterred in consecrated ground, then a licence from the secretary of state of the relevant government department, formerly the Home Office presently the Ministry of Justice, must be obtained.

For almost 150 years archaeologists and developers discovering human remains in unconsecrated ground would apply to the relevant ministerial department for a licence to exhume the remains. The licence became almost a formality and could have precautions, or conditions, attached, which permitted scientific study, retention and/or disposal. However, in recent years archaeologists had commented that the system was too restrictive and asked for lighter regulation. In 2007, the Ministry of Justice notified developers and archaeological groups that they were concerned about the previous interpretation and application of s.25. The Ministry announced that s.25 did not apply to burial grounds not apparent on the surface of land and that precautions could not be attached allowing retention and study of remains. This reinterpretation effectively removed statutory regulation of exhumation for many "finds" of human remains by archaeologists and developers. Far from being pleased by this statutory reinterpretation archaeologists became concerned, as they no longer had the statutory protection of a licence when they exhumed human remains. If no statutory provision applied then these exhumations would be governed by the common law under which indignities to a corpse are an offence. After representations from archaeological

groups and counsel's opinion the Ministry has recently reversed its advice and announced it will be addressing the changing needs of archaeologists in this area by legislation. This article considers why s. 25 of the Burial Act 1857 was introduced, its effects, subsequent interpretation and application, the concerns of the Ministry of Justice, the common law, the concerns of archaeologists, and the possible legislative changes to the law of exhumation.

Contents

Section 25 of the Burial Act 1857

Traditionally the Home Office regulated the exhumation of human remains; however the recently created Ministry of Justice has now taken over this duty. If there is no specific legislative provision covering a particular proposal, for example the Disused Burial Grounds (Amendment) Act 1981, then the default provision is the Burial Act 1857, s.25, which states:

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

The offence is a summary one only, committed on each occasion that a body or parts of a body are removed. It is an offence of strict liability. Thus if a body is buried in unconsecrated ground it may be exhumed under the authority of a licence and retained, studied or reinterred subject to the attached precautions. If a body is buried in consecrated ground then a faculty from the ecclesiastical court is required. If the remains are to be reinterred in consecrated ground the faculty will suffice but if they are not to be reinterred in consecrated ground then a licence is also required. Christian burial grounds began to be consecrated in England in the 8th century. Consecration is the separation of a thing from the common and profane to a sacred

use and is permanent, although the specific effects can be revoked. Therefore, the theological status remains even when the legal effects are removed. Disused monastic burial grounds and most disused churchyards do not remain under ecclesiastical (faculty) jurisdiction as the legal effects are removed but they remain consecrated ground. The reference in the provision to consecrated ground applies only to ground consecrated by the Church of England, covered by the faculty jurisdiction; all other religiously reserved ground requires a licence under s.25 for exhumation (this includes the Church in Wales, which cannot authorise exhumation by faculty).

The Reformation of Burial Law in the Mid-Nineteenth Century

Although some exceptions are now recognised, and the authorities for the principle may be questionable, there has been a tradition that the common law refuses to recognise property in the corpse (for a detailed consideration of the authorities for the "no-property" rule see Mathews, 1983). This has developed from the principle that the burial and care of human remains was traditionally within the jurisdiction of the ecclesiastical courts:

> "…as late as the sixteenth and seventeenth centuries the exact destination of one's bones was of little concern so long as they remained near the saints, or in the church, near the altar of the Virgin or of the Holy Sacrament. Thus the body was entrusted to the Church." (Ariès, 1994, 22)

Coke explained the jurisdiction of the Church (3 Co. Inst. 203): "… burial of the Cadaver (that is, *caro data vermibus*) is *nullius in bonis* and belongs to Ecclesiastical cognisance…" The cadaver was "flesh for worms" and, as it belonged to no one, the Church would protect it. Thus, until the mid-nineteenth century the Church was responsible for the dead and anyone seeking to exhume a corpse from consecrated ground required a faculty from the Church courts to do so. If the corpse were not in consecrated ground then the common law would apply and prevent exhumation, unless under the ancient authority of the coroner.

The reform of the burial laws in the mid-nineteenth century occurred at a time of general social and legislative reform. When considering the reform of the burial laws it is interesting to compare and contrast the reform of the law regulating divorce. The historian Lawrence Stone stated that the contemporaneous Divorce Reform Act 1857 was introduced because of three, "…quite different forces at work in early nineteenth-century England: the secularisation of society, the demand for law reform in the 1840s and 1850s, and the concurrent idealization of middle-class morality and the domestic hearth." (Stone, 1992, 133). The reform of the law of burial was also in response to three quite different forces, the general calls for secularisation and the reformist zeal identified by Stone, but to these can be added the peculiarity of the great fear of "resurrection men" and dissection, popularly associated with poverty.

Calls for reform of the established Church reflected what is often considered an age of increasing religious toleration and recognition. This was a time when people were moving away from the established church and could practise other religions or no religion at all. "The 'confessional state' was crumbling fast…" and, in the 1851 census, the established church, "attracted just under a quarter of the population, while the remainder worshipped elsewhere" (Robbins, 2005, 129). However, calls for reform were not without opposition. In October 1850, newly appointed Cardinal

Nicholas Wiseman left Rome to take up his position as archbishop of Westminster on the restoration of the Catholic hierarchy in England and Wales. *The Times* described this as, "one of the grossest acts of folly and impertinence which the Court of Rome had ventured to commit since the Crown and people of England threw off its yoke…" and both the Pope and Wiseman were, "burned in effigy in some places as Protestant pulpits fulminated against 'papal aggression.'" (Robbins, 2005, 127-128).

Therefore, although there was recognition of a need for reform of the regulation of burial and care for the dead to reflect the increasing popularity of other religious groups, there was also resistance to the complete removal of the Church from its position as protector of the dead. Thus new cemeteries were designated with unconsecrated areas and areas consecrated to other denominations subject to the s.25 licensing scheme, as, of course, these latter parts would not be consecrated for the purposes of s.25, but the Church continued to regulate its burial grounds and the Church of England consecrated areas of cemeteries.

Reform of the burial laws was also driven by concern for health and sanitation. In *Foster* v *Dodd*, (1867) L.R. 3 Q.B. 67, Brown Q.C., for the defendants, said (at p 69), "…the object of the legislature in passing the burial acts has been the protection of the public." The concern to protect public health was fuelled by the growing understanding of the causes, spread and control of disease, and increased recognition that, with the growth of conurbations, graveyards were not being adequately maintained, corpses not properly disposed of, and, in interesting parallel to today, graveyards were running out of room for burials. The movement of the population into the towns and cities during the continuing industrial revolution had not only resulted in overcrowding and lack of housing for the living, it had filled the churchyards in the towns and cities. Sir William Scott in 1820, in the *Iron Coffin's case*, *Gilbert* v *Buzzard* [1814-23] All ER Rep 416, 421 stated (at p 421) that, in the parish concerned, "three additional burial grounds are alleged to have been purchased and to be now nearly filled," and therefore allowed that the parish could charge more for the burial of an iron coffin than a wooden coffin as this would last longer. Recently Deputy Chancellor Petchey, in *St Peter's Church, Limpsfield* [2004] 3 All ER 978, refused a petition for a faculty to erect a personal memorial in the churchyard to Lt. Col. Morris whose ashes had been scattered elsewhere, stating that the proposed memorial "would use up space in consecrated ground which might otherwise be used for burial and burial space was at a premium both in the instant churchyard and nationally." The Deputy Chancellor did distinguish between personal memorials and war memorials.

In the mid-nineteenth century these concerns fired calls for the more efficient and sanitary disposal of the dead by cremation. The issue was highly controversial and engendered heated debate, being perceived as, "…a pagan practice and as a punishment that was reserved for heretics, witches and women convicted of petit treason, it was regarded with revulsion by many and many more doubted its legality" (White, 1990, 1145). Cremation was not an accepted practice until late in the nineteenth century, when Mr Justice Stephen, in *Reg*. v *Price* (1884) 12 QBD 247, held that to burn a body was legal if not done in such a manner as to amount to a public nuisance, when finding that 83 year old William Price could not be guilty of the common law offence of burning instead of burying the body of his five month old son in a barrel of petrol as the offence did not exist. Subsequently it was also held that

cremation would be legal if not for the purpose of obstructing the course of justice, *Reg*. v *Stephenson* (1884) 13 QBD 331.

However, long after the burial acts of the 1850s health concerns linked with the dead, the maintenance of churchyards and churches continued, for example in *Rector, etc, of St Helen's, Bishopsgate, with St. Mary, Outwich* v *Parishioners* [1892] P.259, Dr Tristram granted a faculty for exhumation of human remains from the Church crypt and reburial in another churchyard on health grounds as parishioners, "had complained of effluvia from the remains having penetrated the Church" (at p. 260).

Finally, the introduction of the burial acts must be considered against the realities of an age where, as Sir William Scott said in the *Iron Coffin's Case* (at p 418), the care afforded the remains of all but those "who had filled the loftier stations of life" was, until relatively recently, minimal. Indeed the practice of re-using Christian burial grounds was common throughout Europe until the 18th century when personal memorials became more widespread (Ariès, 1994, 49), and continues in some European countries today. With the marking of graves it has been suggested that a feeling of "ownership" of the burial place developed and a culture of protecting buried remains developed (English Heritage, p 37). For those rich enough to afford interment the main concern was grave robbing for the goods associated with death (for consideration of this ancient practice see Prott & O'Keefe, 1984, vol 1 p 32), for example the winding sheet or shroud in *Haynes's Case* (1613) 12 Co Rep 113, and the body itself. Burials would be made in iron coffins, as in the *Iron Coffin's Case*, to prevent disturbance, and the holding of the wake is linked to protecting the dead from interference. Although contemporary newspapers reported that the dead were being robbed of their hair, teeth and fat to make the wigs, false teeth and candles required by the wealthy (Bailey, 1896, pp 45 & 88), most people were afraid of "resurrection men" and theft of the corpse for dissection.

"Resurrection men" were criminals who stole bodies for the growing interest in dissection and anatomy studies. At this time the law only allowed the use of the bodies of executed criminals for autopsy purposes, thus the ever-growing popularity of anatomy studies and the laws of supply and demand made grave robbing for the corpse a relatively common and lucrative practice. There was a deep seated fear of dissection and there were violent confrontations between surgeons trying to assert their right to the felon's corpse and the relatives trying to prevent dissection, which culminated in riots at Tyburn, and the surgeons' agents masquerading as the parents of the dead to obtain the body rather than asserting their prerogative by force of arms (Hay, ed., 1975, p 80). The fear of "anatomists" and "resurrectionists" and the celebrated case of William Burke and William Hare, who, contrary to popular belief, were convicted of murder and were not resurrection men, helped the passing of the Act for Regulating Schools of Anatomy, known as the Anatomy Act 1832, which allowed the "use of bodies of deceased persons, and parts of such bodies for anatomical examination" which had remained unclaimed for 48 hours after death. The Act abolished the requirement that the body of every murderer should, after execution, be dissected if it were not hung in chains or buried within the precincts of the prison, and introduced a system of licensing for those who could perform "anatomical examinations" and the places where these could be carried out. Perhaps tellingly for its age the Act specifically referred to the corpses of the poor and destitute and provided those in charge of hospitals and workhouses could make

available the dead for examination unless they had left instructions to the contrary or relatives objected. At the time it was common practice for aspiring surgeons to donate their time to one of the poor hospitals where, *quid pro quo*, they would be allowed access to the hospital's dead room for dissection of those bodies not claimed by friends (MacDonald, 2006). Of course, relatives or friends objecting and claiming a body would become liable for the costs of the funeral. Thus the links in the public consciousness between poverty, death and dissection were probably encouraged rather than discouraged by the Anatomy Act and the Amendment to the Poor Laws following shortly after in 1834.

Therefore, the Burial Act 1857 was enacted against Stone's general backdrop of secularisation and reformist zeal in the mid-nineteenth century. However, unlike the Divorce Reform Act of the same year, this was not just in recognition of the growing secularisation of society, or separation of Church and State. There was also a philanthropic and health conscious recognition that towns and cities were growing at an alarming rate, with consequent fear of overcrowding for both living and dead causing health problems. The genuine fear of resurrection men and the perceived prevalence of the theft of corpses signalled a failure of the Church and common law to protect the dead. Thus the State had to take an active part in managing the care of the dead, in addition to, and above, the common law. However, although this was a time when the power of ecclesiastical courts was being severely restricted, the Church could not be removed completely from its position as protector of the dead, mainly because the Church owned the property in which the dead were interred and to wrest exhumation from the Church completely would infringe the Church's property rights.

Indeed Dr Tristram remarked, in *St Michael, Bassishaw* [1893] P.233, 244, referring to the 1857 Act and the four previous Burial Acts:

> "It is further to be observed, that the four actual Burial Acts recited in the preamble [to the 1857 Act] indicate no intention of interfering with the ancient jurisdiction of the Ecclesiastical Courts over churches, churchyards, and consecrated burial-grounds. On the contrary, the bishop's jurisdiction is carefully preserved in all matters with which it is concerned. Had such an important invasion of the bishop's rights and the rights of the subject been contemplated, some mention of it would have been expected to have been found in the preamble to the Act of 1857."

Thus, the secularisation of control over matrimonial affairs, beginning with the Marriage Act 1753 and culminating with the Divorce Reform Act 1857, can be compared with the secularisation of burial effected by the burial acts of the 1850s, but also contrasted with this process as the Church retained a parallel jurisdiction: the control of exhumation from consecrated ground.

The Application of Section 25

The Burial Act 1857 was intended to protect human remains wherever interred in addition to the ecclesiastical faculty protection. It also delineated the jurisdiction of the Church and State. Thus, in *R* v *Tristram* (1867) L.R. 3 Q.B. 67, the Divisional Court of the Queen's Bench interpreted the section (at p 77) as meaning that except where the remains are under faculty jurisdiction, "…no body shall be removed from the ground without the licence of the Secretary of State." Similarly, in *Re Talbot*

[1901] P. 1, Dr Tristram, the celebrated Chancellor of the Ecclesiastical Court, stated that, "…the object of the 25th section of the Act of 1857 being merely to afford protection to remains buried in unconsecrated ground." Thus both ecclesiastical and secular courts were in agreement as to the effect and jurisdiction of the provision. The obvious innovative effects of s.25 were twofold: first, to licence the exhumation of human remains from unconsecrated ground, and, second, to allow for exhumation from consecrated ground and reinterment in unconsecrated ground subject to the grant of a faculty and licence. In *Re Talbot* [1901] P.1., Dr Tristram granted a faculty for this latter purpose, subject to a licence being obtained from the Home Secretary, stating (at p 5) how important the legislation was as:

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

This was quoted recently in *Re Blagdon Cemetery* [2002] Fam 299 (at p 303, para 13), by the Dean of Arches, Cameron QC, as authority that prior to the Burial Act 1857 the consistory courts had, "as a matter of practice, declined to grant a faculty authorising remains buried in consecrated ground to be reinterred in unconsecrated ground." Cameron QC stated the 1857 Act, s.25, was:

> "…a new system of protection for remains in unconsecrated ground, which provided that remains could not be removed without permission from the Secretary of State. Thus remains in unconsecrated ground became protected just as remains in consecrated ground had been, and continue to be…" (at p 303, para 14)

The factors considered cogent by the relevant Secretary of State when an application is made for a licence and those considered by the consistory courts when a petition is made for an ecclesiastical faculty have shown a marked divergence. Secular law emphasises the regulation of exhumation rather than preventing or restricting it. Home Office practice was to grant licences for burials within the last 100 years provided:

i. consent has been obtained from the burial ground manager, the grave owner, and the next of kin (normally interpreted as for probate purposes);
ii. there are no known legitimate objections; and
iii. the application is for personal family reasons.

However, there are no statutory restrictions on the Secretary of State's discretion and licences may be issued in circumstances where not all the consents are available. Before the Ministry of Justice's reinterpretation the procedure was that if the remains were more than 100 years old then the consent of the next of kin was usually

dispensed with, in fact, licences for archaeological reasons were usually granted with just the consent of the landowner. Such applications could be made by fax and a decision made within the hour with precautions, that is conditions and guidance, attached (English Heritage, p 22). Alternatively a licence could usually be issued in 10 days and no fee charged (provision to do so was repealed in 1992).

Thus licences for archaeological exhumation were seen as almost a formality. This is in sharp contrast to the attitude of the ecclesiastical courts and the granting of a faculty for exhumation.

The Faculty Jurisdiction

A faculty is "a privilege of special dispensation, granted to a person by favour and indulgence to do that which by the Common Law he could not do" (Penner, 2001). An ecclesiastical faculty is granted by the diocese and is therefore the granting of diocesan authority to do something. Anyone seeking the exhumation of human remains from consecrated land must apply for a faculty, which will be determined by the Consistory Court of the relevant diocese, the court of first instance of the Church of England; its judge is called Chancellor. It has also been held, in *Re St James the Great, Birstall* (2006) *Times*, 14 August, that anyone seeking to bury human remains in a manner contrary to the policy of the diocese and the parochial church council must also seek a faculty from the Consistory Court. A fee is charged whether the petition for faculty is successful or not and, because of the nature of the petition, the process may take some time to be decided. Appeal from a decision of the chancellor is to the Chancery Court of York, presided over by the Auditor, for the Northern Province, and the Court of Arches, presided over by the Dean of Arches, a court of appeal belonging to the Archbishop of Canterbury, in the Southern Province. Final appeal lies to the Judicial Committee of the Privy Council. There has been debate over whether consistory courts may follow decisions of the appellate court of the other Province. However, in *Re St Nicholas, Sevenoaks*, [2005] 1 WLR 1011, the Arches Court stated *per curiam* that as the Dean of Arches and the Auditor are by statute the same person the courts might be regarded as divisions of a single court.

The contrast in attitude to petition for a faculty as against application for a licence is exemplified in *Re Smith* [1994] 1 All ER 90 (at p 91):

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

Faculties have traditionally been granted when there has been a fundamental mistake in the interment whether due to errors involving plot reservation or a failure to take account of the wishes of the deceased and the family, but other grounds have led to the granting of a faculty, for example to obtain important papers buried in a deceased's coffin. Where a faculty is obtained by misrepresentation or the authority conferred is exceeded then the perpetrators must restore the situation. Therefore, in *St Pancras Vestry* v *St Martin-in-the-Fields (Vicar and Churchwardens)*, (1860) 6 Jur N.S. 540, the Vicar and Churchwardens of the parish had removed four to five hundred coffins and remains although they had only been granted a faculty for the removal of a maximum of twenty. They had therefore exceeded the powers confided

in them by the faculty and so had to return the faculty to the Diocesan Registry, decently reinter all the remains in their original position, at their cost, and pay the costs of the proceedings.

The general principle that has been consistently promulgated by the ecclesiastical courts was clearly set out by Chancellor Edwards QC, in *Re Atkins* [1989] 1 All ER 14, in the Chichester Consistory Court, when he stated that:

> "…the court then should begin with the presumption that, since the body or ashes have been interred in consecrated ground and are therefore in the court's protection or, in Wheatley's words, 'safe custody', there should be no disturbance of that ground except for good reason. There is a burden on the petitioner to show that the presumed intention of those who committed the body or ashes to a last resting place is to be disregarded or overborne. The finality of Christian burial must be respected even though it may not be absolutely maintained in all cases." (at p 19).

Recently there has been consideration by both ecclesiastical appellate courts of the test to be applied by the chancellor when considering a petition for a faculty to exhume human remains. In *Re Christ Church, Alsager* [1999] Fam 142, the Chancery Court of York formulated the question the chancellor should ask himself when considering petitions for exhumation (at p 149): "Is there a good and proper reason for exhumation that reason being likely to be regarded as acceptable by right thinking members of the Church at large?" The Court also stated that, contrary to the licensing scheme, the passage of time militated against the grant of a faculty.

The Arches Court of Canterbury, in *Re Blagdon Cemetery* [2002] Fam 299, considered the test in *Alsager*, and held that there was a presumption of permanence arising from the initial act of interment but that this might be rebutted in exceptional circumstances with good and proper reason. The Court stated that:

> "…there is much to be said for reverting to the straightforward principle that a faculty for exhumation will only be exceptionally granted. Exceptional means, 'forming an exception' (Concise Oxford Dictionary, 8th ed (1990)) and guidelines can assist in identifying various categories of exception. Whether the facts in a particular case warrant a finding that the case is to be treated as an exception is for the chancellor to determine on the balance of probabilities." (at p 306, para. 33)

The Church courts have traditionally not considered archaeological, historical or scientific interest to be reason to rebut the presumption against exhumation.

In *Re Saint Nicholas's, Sevenoaks* [2005] 1 WLR 1011, the Arches Court of Canterbury confirmed Chancellor Goodman's decision to refuse a faculty to exhume the remains of the applicant's paternal grandfather for DNA testing of a bone fragment and comparison with the DNA of the murdered Tsarina Alexandra, whose remains were found in Russia in 1991. This was to establish if family legend were correct that the deceased was the illegitimate son of the daughter of Queen Victoria. Applying *Re Blagdon*, the Chancellor had stated family curiosity and historical interest were insufficient reasons to rebut the presumption. The Arches Court stated

(at p 1026) that "pure speculation" and satisfying family curiosity was not enough to rebut the presumption of interment.

In *Re Holy Trinity Bosham* [2004] Fam 125, Chancellor Hill, in the Chichester Consistory Court, refused a petition to exhume for archaeological investigation and DNA testing to confirm if the remains in two grave sites in the nave of the church were, as according to local legend, those of King Harold. Applying *Re Blagdon*, the Chancellor held that the preponderance of academic opinion was that the King was buried elsewhere, that the likelihood of usuable material for DNA analysis was 10-30%, that there was no common chromosome comparator available and that the margin of error in such testing could only produce an inconclusive result. The Chancellor stated that the presumption against exhumation could be justified by (i) a matter of great national, historic or other importance, or ; (ii) the value of some particular research or scientific experimentation. He stated:

> "…only if the combined effect of evidence under… [(i) and (ii)]…proves a cogent and compelling case for the legitimacy of the proposed research will special circumstances be made out such as to justify a departure from the presumption against exhumation." (at p 137)

Recently, in *Re St Mary, Sledmere* [2007] 3 All ER 75, the York Consistory Court granted a faculty for the exhumation of the remains of Sir Mark and Lady Edith Sykes in order that scientific tests could be carried out on the remains of Sir Mark, as they had been sealed in a lead-lined coffin after his death in the Spanish influenza pandemic in 1919. The petitioner was Professor John Oxford, who is researching into the avian influenza H5N1 virus and the use of immune suppressive drugs. The Professor had traced and received written consent for the proposed tests from all living immediate descendants of Sir Mark. The Court held it was entitled to have regard to the significance of the public benefit that might ensue from the proposed research. It also distinguished the petitions that had been refused in *Re Holy Trinity, Bosham*, and in *Re St Nicholas, Sevenoaks*. The court held that the greater the public benefit the less weighty the ground that was required to permit exhumation, thus in cases involving only increased historical knowledge, the grounds would have to be very weighty and there would have to be a great likelihood of success;

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

Thus, traditionally, section 25 licences have been more readily available for archaeologists than a faculty to exhume, as the Church has not recognised archaeological study and interest to be of sufficient value to society to rebut the presumption against exhumation, especially as long interment militates against disturbance. However, this readiness to grant s.25 licences was still considered restrictive by archaeologists and the Ministry of Justice, and in need of reinterpretation.

The Ministry of Justice's Reinterpretation of Section 25

In July 2007 the Coroners Unit of the Ministry of Justice provided guidelines for exhumation in its document, "Excavation Of Buried Human Remains: Interim Guidance And Procedures For Archaeologists And Developers". These guidelines stated that no licence was needed for exhumation in certain circumstances despite the Ministry of Justice's published response, "*Burial Law And Policy In The 21st Century The Way Forward*" (MoJ, 2007), to the consultation carried out by the Home Office/Department of Constitutional Affairs, "*Burial law and policy in the 21st century: the need for a sustainable and sensitive approach*" (HO/DCA, 2004), concluding at page 11 question 15 that most groups consulted and the government itself supported, "the existing approach to the authorisation of single exhumations with most in favour of the central licensing of arrangements." This response had continued, "there would seem to be general agreement that the current grounds for disturbing buried remains are widely accepted and that there is no strong argument to make major changes." One of the accepted grounds identified was, "for scientific purposes (e.g. for archaeological research)…" However, it did respond to question 17, that, "Separate arrangements are proposed for the regulation of the excavation of human remains for archaeological purposes." In its response to question 19 it was stated that, "Other than in the case of remains of archaeological interest, the Government does not propose to relax the way in which the exhumation of human remains is regulated…" No reasons were given, although, as previously stated, it seems some archaeological groups had commented that the existing scheme was too restrictive.

The government's relaxation, communicated in the Ministry's guidelines for archaeologists, was the reinterpretation of the highlighted parts of section 25 above. The words "any place of burial" which, for 150 years, had been interpreted, literally, as "any place of burial" were interpreted by the Ministry of Justice as meaning: "'places of burial' which are recognisable as such on the surface of the land, and where the 'place' in question has not passed, in surface terms, into other use." Therefore, the Ministry had concluded that s.25 was not engaged unless the remains were in a place of burial recognisable as such on the surface and which had not passed into other use. Similarly, the Ministry of Justice's interpretation of the highlighted phrase regarding "precautions" and "conditions" was that it did not give them the power to attach conditions allowing or regulating scientific study. Again this was contrary to previous interpretation and practice.

The Ministry based its reinterpretation on the authority of *Foster* v *Dodd* (1867) L.R. 3 Q.B. 67. In this case an order in council was made, under the Burial Act 1857, s.23, which provided for the Queen in council to order such acts:

> "…by and under the directions of the churchwardens, or such other persons as may have the care of any vaults or places of burial, for preventing them from becoming or continuing dangerous to the public health."

The land in question had been used between 1644 and 1844 as a burial ground but by order in council in 1854, under 15 & 16 Vict. C. 85, s.2, burials were discontinued. The land was then demised and used for rubbish and then sub-demised to the plaintiff, who was served with the order. The plaintiff ignored the order and churchwardens

then entered the land in pursuance of the order. The plaintiff brought an action in trespass and to declare the order invalid. Kelly C.B., giving the judgment of the Court, declared that:

> "We are of opinion that where land, in which burials may have taken place, but which has long ceased to be applied to such a purpose, has changed its character, and been treated by the owner or occupier in all respects as private property, it is not within the operation of these acts of parliament at all." (at p 74)

The learned judge then considered whether the land was ever consecrated and thus would be under the faculty jurisdiction. His conclusions being that the presumption of consecration was rebutted by,

> "…the facts of the particular case…looking to the class of persons, who are described as rogues and vagabonds, and others of bad character, that were buried in this ground (with some exceptions which do not materially affect the question), we are warranted that no consecration ever took place, and that burials in this ground having ceased for a great number of years, and the land having, as before mentioned, been applied to other purposes, it had ceased to retain, if indeed it had ever possessed, the character of a burial ground within the meaning of the act of parliament in question….the authority of her Majesty in council can be exercised only where an existing burial ground is under the care of churchwardens, or other persons who have charge of it, for the purpose of the burial of the dead." (at p 74)

The immediate effect of this judgment seems to be to restrict the jurisdiction of the Burial Acts to burial grounds under the control of churchwardens or others for the purpose of burial. However, it should be noted that this was in consideration of the Crown's powers in council and public health not disturbance of the dead. When Byles, J. asked Mellish Q.C., for the plaintiff, whether a freeholder may dig up bodies on his land, he replied (at p 71) that would be a nuisance at common law. Further, although the judgment was unanimous, Byles, J. did conclude with the following:

> "I desire to add one observation, that the effect of our judgment may not be understood. The question before the Court is simply this, whether the churchwardens were acting under a valid order of the Secretary of State, and are therefore justified by the act of parliament in what they have done. We are not called upon to give any opinion as to the legality of any act which the freeholder, his lessee, or sub-lessee may have already done or may hereafter do. Nor will our decision encourage or justify any abuse by the freeholder, his lessee, or sub-lessee, or any person acting under them. A dead body by law belongs to no one, and is, therefore, under the protection of the public. If it lies in consecrated ground, the ecclesiastical law will interpose for its protection; but, whether in ground consecrated or unconsecrated, indignities offered to human remains in improperly and indecently disinterring them, are the ground of an indictment." (at pp 76 & 77)

Byles, J. was concerned that the judgment should not be used to defeat the object of the act, the protection of the dead. Similarly, the comments of Kelly C.B. that the

dead were "rogues and vagabonds, and others of bad character", would, hopefully, even if well founded not justify any lesser protection of the dead today.

The judgment in *Foster* must be considered in the context of the time. The Court was seeking to protect private property and property rights, which were very highly esteemed in the nineteenth century. Thus the secular Court narrowly interpreted "place of burial" for the purpose of protecting property rights and a dislike of asserting any jurisdiction over the dead.1 However, the ecclesiastical courts were, and are, very fond of asserting their jurisdiction over the dead, in contrast to the secular courts and the Ministry of Justice, and have commented on the jurisdiction of s.25. In doing so they have not restricted the application of the section to land which is in use as a burial ground but seem to have taken their lead from Byles, J. developing their interpretation in line with the original mischief. Therefore, as stated above, in *R* v *Tristram* (1867) L.R. 3 Q.B. 67, the section was interpreted (at p 77) as meaning that except where the remains are under faculty jurisdiction, "no body shall be removed from the ground without the licence of the Secretary of State." Similarly, in the recent case of *Re Blagdon Cemetery* [2002] Fam 299, the Dean of Arches, Cameron QC, stated that s25 of the 1857 Act had been, "…a new system of protection for remains in unconsecrated ground…. Thus remains in unconsecrated ground became protected just as remains in consecrated ground had been, and continue to be…" (at p 303).

It is submitted that the word "ground" is capable of a much wider interpretation than "place of burial", and no mention was made in these judgments of the continued use or not of the "place of burial". The ecclesiastical courts, although having very little reason to consider the matter outside consecrated ground, have interpreted "place of burial" very widely, as encompassing any place where a body is buried whether the place had been set aside for burial or not. Thus s.25 has been interpreted to cover human remains wherever they are buried if they are not subject to another statutory provision.

Problems with the Reinterpretation

If the Ministry of Justice's interpretation were correct then, applying *Foster*, any interference with buried human remains not authorised by faculty or s.25 licence would be under the jurisdiction of the common law (see p 77). Shortly before the enactment of the Burial Act 1857 the court, in *R* v *Sharpe* (1857) Dears & B. 160, confirmed that the common law would protect those buried outside ecclesiastical cognizance when it upheld the defendant's conviction for disinterring his mother's body. Having been permitted to open his mother's grave in unconsecrated ground to bury his father with her; Sharpe had removed the remains of his mother and taken both bodies to be buried in a consecrated churchyard. He had to disturb the coffins of his stepmother and two children to do this. Although it was accepted that "…the defendant acted throughout without intentional disrespect to any one, being actuated by motives of affection to his mother and of religious duty", the court held:

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[1] The author wishes to thank Philip Jones for emphasising the importance of concerns over property rights in the nineteenth century to the decision in *Foster* v *Dodd*, in communication with the author, April 2008.

> "We have been unwilling to affirm the conviction on account of our respect for the motives of the defendant, but we have felt it our duty to do so rather than lay down a rule which might lessen the only protection the law affords in respect of the burials of dissenters." (at p 163)

Sharpe's conviction for disinterring and taking away a body was upheld although the fine of one shilling expressed some sympathy for the circumstances. Similarly, in *R* v *Jacobsen* (1880) 14 Cox CC 522, it was accepted by the Court that the human remains were not disturbed in "an improper and indecent manner" but it was still held that the defendant was guilty of a misdemeanour at common law.

Therefore, any exhumation not authorised by statute or ecclesiastical faculty may be an offence at common law of removing a corpse from a grave without lawful authority and unlawful interference with a corpse. Of less relevance to the current discussion there is also a common law offence of preventing the lawful and decent disposal of a corpse, e.g. in *R* v *Skidmore* [2008] EWCA Crim 1539; [2008] All ER (D) 146 (Jul), the Court of Appeal refused the appeal against conviction for placing a child's body in the coffin of an elderly lady, which was then cremated against the wishes of his parents, because it had mistakenly not been placed in his own coffin.

The common law offences have a long tradition, for example in *R* v *Lynn* (1788) 2 T. R. 733, it was held that the removal of a body from any "burying ground" without lawful authority was a common law misdemeanour. Lynn had disinterred the corpse for the purpose of dissection. The court heard representation from Bond Serjt. that the judgment against Lynn should be arrested as "…the offence was not cognizable in any Court of Criminal Jurisdiction: if it be any crime, it is of ecclesiastical cognizance." The court however held:

> "…that common decency required that the practice should be put a stop to. That the offence was cognizable in a criminal court, as being highly indecent, and contra bonos mores; at the bare idea alone of which nature revolted…it had been the regular practice of the Old Bailey in modern times to try charges of this nature, many of which had induced punishment, the circumstance of no writ of error having been brought to reverse any of these judgments was a strong proof of the universal opinion of the profession upon this subject." (at p 734)

The court was willing to allow the ignorance of the defendant to mitigate his offence and so only fined him five marks.

More recently, in *R* v *Stephen Pearson* (1981) 3 Cr. App. R. (S.) 5, Stephen Pearson failed in his appeal against sentence of 12 months imprisonment for removing a body from a grave contrary to common law, this had been done after he had been drinking and for a "dare". The graves were in a cemetery still owned by the Church Commissioners but not used for 30 years. In *R* v *Lichfield Justices ex parte Coyle* (Subnom *Coyle* v *DPP*) 19th July 1988 Official Transcripts (1980-1989), in consideration of the protection of the statutory provision, the appellant had his original conviction for aiding, abetting, counselling and procuring the commission of the offence of the removal of the remains of part of a body from a consecrated place of burial without a licence contrary to section 25 of the Burial Act 1857 quashed on

the possibility of bias. The five men he had been accused of aiding and abetting had already been convicted of the offence, which involved removing bones, notably a skull, from Christ Church Churchyard, Lichfield, and selling them.

The recent case of the animal rights activists who dug up the body of the mother-in-law of a guinea-pig breeder resulted in three sentences of 12 years and one of four years for the perpetrators. However this was for blackmail (*The Guardian*, June 1, 2006).

The common law offence of disinterring and removing a corpse applies equally to corpses deposited in a vault, as does the protection of the Burial Act 1857, s.25, as "place of burial" includes vaults (Mathews, 1983, p 205). Thus, the basic premise of the common law is that human remains are sacred whenever they are interred, and that graves and tombs are not to be disturbed; therefore, if s.25 or the Church does not protect them, the common law will apply.

Reversal of the Ministry of Justice's Guidance

The Ministry of Justice has issued new guidance to archaeologists reversing the reinterpretation issued in July 2007. This guidance states that applications for licences will be considered:

> " …wherever human remains are buried in sites to which the Disused Burial Grounds (Amendment) Act 1981 or other burial ground legislation does not apply. This will reverse the current change of practice and is expected to apply to the majority of archaeological excavations."

The significant change is that licences will be issued which allow retention for "normally up to" two years. It also states that:

> "During the course of the year…consideration will be given to amending existing burial ground legislation so that it can be more responsive to 21st-century needs. The aim will be in particular to allow otherwise lawful and legitimate activities, such as the archaeological examination of human remains, to proceed without the constraints of legislation not designed to deal with such issues, and with retrospective effect as far as possible."

If remains have already been removed from the ground the Ministry states that there is no need to apply for a licence. However, it does not state the position of these remains at common law. The Ministry also advises that a firm date for re-interment is not required as the two-year time limit will usually be applied and that it will be possible to extend the time limit if research has not been completed, advising that the licence holder apply, "if possible before the expiry date on the licence (or directions)." The Ministry also states it is considering whether remains may be deposited in a museum or church at the end of the two year period so that they are accessible for future research. This was in response to suggestions by various groups, e.g. English Heritage, Church Archaeology Human Remains Working Group Report, p17 para 83.

The Institute of Field Archaeologists (IFA) has stated that, in its directions to archaeologists, the Ministry is aware this is "not an acceptable position and will seek reform of the legislation to allow for deposition in a suitable repository, and will be

sympathetic to granting extensions to licences and other variations." The IFA states that the two-year period is temporary and, "that by 2010 MoJ intends to have enacted secondary legislation to regularise these arrangements for archaeological work to take place."

Conclusion

After reinterpretation and reversal the law at present is, almost, as it was. If human remains are buried in unconsecrated ground, whether recognisable on the surface as a burial ground or not, a Burial Act 1857, s.25, licence is required to exhume them, otherwise a statutory offence is committed. If remains are exhumed from consecrated ground then a faculty is required, and if they are not to be reinterred in consecrated ground a licence is also required. Precautions can be attached allowing the retention and examination of the remains for up to two years, after which they should be reinterred, although exactly where has not yet been determined. The Ministry will look favourably on applications to extend these precautions.

Contemporary concern over the treatment of human remains may be evidenced by the current moves to repatriate the remains of indigenous people obtained in colonial times, and by the Alder Hey Hospital scandal in 1999, when *The Times* described the retention and storage of dead children's organs and body parts without parental permission as "a latter-day version of Burke and Hare's bodysnatching". This resulted in the enacting of the Human Tissue Act 2004 to regulate the retention and scientific study of human remains obtained within the 100 years preceding the Act.

The Burial Act 1857 licensing system had worked effectively for archaeologists for over 100 years, thus the remains exhumed at Rapparee Cove, although subject to dispute (Morris & Constable, 2007), are retained by the Museum of Barnstaple and North Devon subject to s.25 licence. It is interesting that, with more widespread public recognition of the inappropriateness of the retention and display of human remains, the Ministry of Justice took the decision to reinterpret s.25 in a way which they thought relaxed the constraints on archaeologists and developers in line with the published response (MoJ, 2007), but which effectively exposed those engaged in archaeological exhumation to prosecution at common law. It will be interesting to see what secondary legislation the Ministry of Justice envisages as addressing the changing needs of archaeologists in the 21st century and reassuring other groups that the dead are being respected. Archaeologists in conversation with the author have expressed no concerns over the existing legislation; indeed their concerns were only the Ministry's reinterpretation of the provision and the subsequent confusion over the legality of exhumation without a licence. The Burial Act 1857, section 25, was enacted to address concerns that the dead were not protected effectively by the previous regime of Church and the common law, different faiths needed recognition and protection for their dead, and concerns about space and health. The Ministry of Justice is contemplating changing a system that has worked effectively for 150 years at a time when all of these issues are again prevalent. It is to be hoped that the Ministry recognises changes to this emotive area of the law are potentially dangerous and that it must balance what may sometimes be competing interests and concerns.

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