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## **CHURCHYARDS: CLOSED**

### **Meaning of “closed churchyard”**

1 A “closed churchyard” is generally taken to mean a churchyard which has been closed for burials by an Order in Council under the Burial Acts, and the term is used in that sense in this opinion. A churchyard may have been entirely disused for many years but it would not on that account be described as a closed churchyard, nor would a churchyard where all further burials have been prohibited by a local Act of Parliament.

2 On the other hand the fact that a churchyard is a closed churchyard does not necessarily mean that no burials may legally take place there, as this will depend upon the exact terms of the Order (or Orders) in Council applicable to it. In some, all further burials are entirely prohibited; in others, the burial of relatives of those already buried in the churchyard may take place, subject to there being three, four or five feet of soil between the coffin lid and the surface of the ground: occasionally, with a tender regard for the individual, the Order provides that the burial of a named person shall be permitted. Burials in vaults are often excepted subject to special conditions. Sometimes part of a churchyard is closed.

3 The proviso to section 3(1) of the Church of England (Miscellaneous Provisions) Measure 1992 provides that a person shall not have a right of burial of his cremated remains in a closed churchyard in the absence of a particular or general faculty authorising such interment.

4 The Ministry of Health (as it then was) expressed the view many years ago that a churchyard which is closed with exceptions is nevertheless a “closed churchyard” for the purpose of recovery of expenses from a local authority.

### **Tracing Orders in Council**

5 If a PCC or a local authority is not sure whether a particular churchyard has been closed or not, or wishes to find the exact terms of the Order in Council, the following are the lines of enquiry which are suggested:

- (a) there will probably be a copy of the Order in Council, or of the issue of the London Gazette in which it appeared, in the church chest, or with the local authority's records;
- (b) the Index to the London Gazette 1839-1883 (available in the bigger reference libraries) will mention the Order if made before 1884;
- (c) if made between 1884 and 1891 it could be traced through the quarterly indices to the London Gazette;
- (d) if made after 1891, the Order will be listed at the end of the annual volumes of Statutory Rules and Orders or Statutory Instruments, but this involves a tiresome search unless the approximate year is known; and
- (e) in the last resort enquiries may be made from the Home Office, ABC Unit, Room 972, 50 Queen Anne's Gate, London SW1H 9AT (telephone 0207 273 2883).

### **New Orders in Council**

6 Most of the Orders in Council for the discontinuance of burials (with or without exceptions or qualifications) in churchyards were made in the middle of the 19<sup>th</sup> century for the protection of the public health at a time when open sewers and the absence of a piped water supply made it particularly important to prevent the seepage of offensive matter from decomposing bodies into wells or streams likely to be used for drinking water. But section 1 of the Burial Act 1853 does not in fact restrict the making of closing orders to cases where this is necessary for the protection of the public health. The legal advisers of the Ministry of Housing and Local Government (as it then was) agreed with this view of the law, but in practice the Minister will almost invariably only make representations to Her Majesty in Council for the making of a closure order where the Minister is satisfied that discontinuance of burials, with or without exceptions or qualifications, is necessary for reasons of public health, thus adhering to the practice of his predecessors, namely the Ministry of Health, the Local Government Board and the Home Secretary.

7 This does not mean that no closing orders are made today, but orders never have been made for the sole purpose of relieving the ecclesiastical authorities of the burden of maintaining a churchyard.

8 Notice of the representation which the Secretary of State proposes to make and of the date when it will be considered by the Privy Council must be given in the London Gazette and by notices affixed to the doors of the churches affected, and notice is also given to the

incumbent and to the local authority. This does not mean that the relevant Department seeks the consent of the local authority; the notice is sent to it because it has succeeded to the civil powers of the vestry to whose clerk notice had to be sent under section 1 of the Burial Act 1853. The Department often arranges for the churchyard to be visited by one of its civil engineering inspectors.

### **Restriction on the making of closing orders**

9 The former prohibition on making an Order in Council closing a burial ground which had been opened with the approval of the Secretary of State has been abolished for Greater London, but still applies to churchyards outside Greater London (Local Government Act 1972, Sch 26 para 15). Where an Order in Council provided that the opening of a new burial ground required the Secretary of State's approval it must be presumed in the absence of evidence to the contrary that the law was complied with and that the required approval was sought and granted. But if there is any evidence to prove that approval to the opening of the churchyard extension or a new churchyard was not given, the relevant Department may consider the possibility of a closing order being made.

### **Revocation and variation of closing orders**

10 The Secretary of State has received advice from the Law Officers of the Crown to the effect that it is not possible to revoke an Order in Council closing a churchyard. The Law Officers' reasons are that there is no express statutory power to do so, and that the power under section 1 of the Burial Act 1855 to "vary" a previous Order in Council does not extend to revoking the Order altogether, although it can be used, for example, to redefine the boundaries of the churchyard where they have been inaccurately described, or to change the categories of burial which are still allowed.

11 In reliance on that opinion, the relevant Department is not willing to entertain applications to re-open a closed churchyard by revoking the Closing Order. In view of this, a parish thinking of applying for such an Order should be advised to consider carefully whether the churchyard or part of it may be needed for burials at some stage in the future. However, the Department has on occasion been willing to vary an Order to permit specific new burials or categories of burials.

### **Responsibility of local authorities for closed churchyards**

12 The justification for the provision of section 18 of the Burial Act 1855 and the way in which it has led to the transfer of the responsibility for closed churchyards to local authorities was not intended to confer any privilege upon the Church of England but was a

recognition of the fact that until the Burial Acts of 1852 and 1853 churchyards or additional churchyards were the only burial places available, apart from commercial cemeteries and a few denominational burial grounds belonging to trustees. More important, churchyards were (as they still are) the common burial places of the parishioners of any denomination and none. As the churchyard was available for the whole community, and in the first half of the 19<sup>th</sup> century had sometimes been provided, or extended, by means of a compulsory church rate, it was considered reasonable that when it was closed in the interest of the community, the expense of keeping it in decent order should be reimbursed to the churchwardens from what was then the poor rate.

13 Section 18 of the Burial Act 1855, which was slightly amended for Greater London, and which was repealed by the Local Government Act 1972, s272, Sch 30, except as to the City of London, provided as follows:

“In every case in which any Order in Council has been or shall hereafter be issued for the discontinuance of burials in any churchyard or burial ground, the burial board or churchwardens, as the case may be, shall maintain such churchyard or burial ground of any parish in decent order, and also do the necessary repair of the walls and other fences thereof; and the costs and expenses shall be repaid by the overseers, upon the certificate of the burial board or churchwardens, as the case may be, out of the rate made for the relief of the poor of the parish or place in which such churchyard or burial ground is situate, unless there shall be some other fund legally chargeable with such costs and expenses.”

14 On that basis it was for the local authority, which succeeded to the functions of the overseers, to reimburse the PCC, which succeeded the churchwardens in this regard.

### **Transferring responsibility for closed churchyards to a local authority**

15 From 1 April 1974 section 215 of the Local Government Act 1972 has provided a much simpler procedure for a PCC to request a local authority at three months' notice to take over the maintenance of a closed churchyard, and section 18 of the Burial Act 1855 (except in its application to the City of London) has been repealed from that date.

16 Where extensive repairs are required to the churchyard three months' notice is too short and can cause difficulties for the local authority's budget. It has been agreed with the Local Authorities Association that, in future, the practice should be to give twelve months' informal notice to the local authority of an intention to serve the three months' statutory notice under section 215 of the 1972 Act.

17 The effect of acting under section 215 is to transfer the functions and liabilities of the PCC with respect to the maintenance and repair of the churchyard to the local authority. This does not mean that the churchyard itself is transferred to the local authority nor are any functions or liabilities transferred except those of the PCC with respect to maintenance and repair. Other rights and powers remain unaffected and the churchyard remains under the control of the incumbent subject to the overriding control of the bishop's consistory court, and the incumbent with the concurrence of the PCC has as free a hand as was the case before the transfer except where questions of maintenance and repair are involved. For example, the local authority cannot restrict the parishioners' access to the churchyard at all reasonable times, this being a matter for the incumbent to decide.

18 A disused churchyard can only become an open space under the Open Spaces Act 1906 by mutual agreement between the incumbent and the PCC and the local authority and usually with the sanction of a faculty from the consistory court (see ss6, 9, 11). But the obtaining of a closing order and transfer of responsibility for maintenance to a local authority may well be the prelude to a subsequent agreement and faculty for its conversion into an open space.

19 Quite apart from conversion into an open space, neither the incumbent, nor the lay rector (if there is one, as happens in some ancient parishes), nor the PCC nor the local authority may alter the layout of a churchyard, whether it is closed or not, without a faculty. Where the responsibility for maintenance has been transferred to the local authority and the incumbent and churchwardens seek a faculty for some alteration to the churchyard which might result in an increase of expenditure to the local authority, the Legal Board (the predecessor of the Legal Advisory Commission) advised many years ago that the local authority should be given notice of the petition in accordance with current faculty procedure.

20 A local authority's responsibility for the maintenance and repair of a closed churchyard is unaffected by the grant of a faculty for the interment of cremated remains within part of the churchyard. The local authority cannot be relieved of its obligation for any part of the churchyard. The interment of ashes in a closed churchyard does not itself make the churchyard or that part of it open again for burials (see also Church of England (Miscellaneous Provisions) Measure 1992, s3).

21 The practical effect of the transfer of the functions and liabilities of the PCC with respect to the maintenance and repair of a closed churchyard to the local authority is that it is for the local authority to decide how and when and by whom the work shall be done. This of course does not preclude a mutual arrangement between the local authority and the PCC whereby the latter voluntarily undertakes some "extra" work in the churchyard such as the planting of bulbs or flowers, care of particular memorials etc.

## **What is involved in the maintenance and repair of closed churchyard by a local authority?**

22 From the preceding paragraph it will be appreciated that when the responsibility for a closed churchyard is transferred to a local authority it succeeds to the functions and liabilities of the PCC. Section 18 of the Burial Act 1855 (see paragraph 11) laid down that the churchwardens (now the PCC) “shall maintain such churchyard ... in decent order, and also do the necessary repair of the walls and other fences thereof”. It is generally relatively easy to determine what is involved in the necessary repair of walls and other fences, but it is sometimes hard to determine what is involved in maintaining the churchyard “in decent order”. According to Prideaux’s *Churchwardens Guide* (16<sup>th</sup> edn, 1895), p99, the duty of churchwardens (which would seem to apply to a PCC and a local authority) is:

“... to see that [the churchyard] be kept in a decent and fitting manner, that it be cleared of all rubbish, muck, thorns, briars, shrubs and anything else that may annoy parishioners when they come into it ...”.

23 Sometimes an incumbent and his PCC feel that the local authority ought to devote more labour or spend more money on a particular closed churchyard than it does, or, on the other hand, a local authority sometimes feels that the incumbent and PCC are expecting too much and assuming that maintenance in decent order necessarily involves the same standard which it would adopt where a churchyard has been transferred for use as an open space under the Open Spaces Act 1906. Also sometimes a local authority takes refuge in the fact that a neighbouring churchyard, whether closed or not, for which another PCC is responsible is in a worse state than the one about which complaint is made. But although many questions reach the Legal Advisory Commission about closed churchyards, it is significant that relatively few relate to serious disputes about the practical questions of maintenance, and tribute should be paid to the understanding way in which most local authorities see that this task is carried out, especially as it is often difficult and unrewarding.

24 The Legal Advisory Commission appreciates the difficulty of making any general application of opinions given on particular facts, but it may be of assistance to mention that in its view the duty of a local authority to maintain a churchyard in decent order includes the maintenance and repair of the paths and gates, and also the renewal of a gate when, according to the ordinary rules of good management, it should be replaced. On the other hand, if drains which run under the churchyard and whose sole function is to carry off water from the downspouts and gutterings of the church itself become obstructed, the removal of the obstruction is not, in the Legal Advisory Commission’s view, part of the duty of maintaining the churchyard in decent order and, therefore, is the responsibility of the PCC and not of the local authority.

25 Trees and herbage sometimes give rise to peculiar difficulties inherent in the freehold of a churchyard being vested in the incumbent (or lay rector if any). But generally speaking keeping the churchyard in decent order will involve dealing with saplings and bushes as coming within the “thorns and shrubs” mentioned in the quotation from Prideaux above, especially if their continued growth may cause damage to a memorial; it also involved dealing with long rank grass and weeds and brambles, particularly of course any grass overhanging the paths. Exceptionally in rural areas it may occasionally happen that the incumbent (or the lay rector if any) may wish to exercise his rights to have the herbage, and therefore there should be consultation before the grass is cut, to allow the owner of the herbage the opportunity to exercise that right.. No licence is required under the Forestry Act 1967 for felling trees in a churchyard (s9(2)(b)), and consent to felling etc by the Diocesan Parsonages Board is no longer required (Care of Churches and Ecclesiastical Jurisdiction Measure 1991, s6(4)); a faculty will, however, be required. If a tree has fallen by act of nature in a closed churchyard for which a local authority is responsible, the authority should remove it unless the owner of the tree (normally the incumbent or the lay rector, if there is one) wishes to do so. As regards trees, see also section 13 of the Church of England (Miscellaneous Provisions) Measure 1995.

26 The Legal Advisory Commission is of the opinion that the local authority’s responsibility to keep a churchyard in decent, and therefore safe, order can be no greater than that of the PCC. The obligation to maintain the churchyard extends to all things attached to the realty, which includes tombs, monuments, war memorials, churchyard crosses and walls and fences. Decent order will be a matter for the local authority to decide, but if the PCC considers that the authority's standard is too low, the incumbent and PCC may seek to enforce the local authority’s duty by proceedings in the county court.

#### **Petition for faculty for removal of dangerous item**

27 The PCC may petition for a faculty for the removal of a dangerous item from the churchyard. (This procedure is probably also available if the churchyard is closed.)

For tombs, monuments, and churchyard crosses *see also* CHURCHYARDS and CHURCHYARDS: OWNERSHIP OF MONUMENTS AND TREES.

(Revised 2003)