

IN THE CONSISTORY COURT AT LINCOLN

In the matter of St Mary and the Holy Rood, Donington

Judgment

1. By a Petition dated 24 February 2020, an application is made for a Faculty to create a grave in the east end of the north aisle of the parish church of St Mary and the Holy Rood, Donington for the reburial of the remains of Captain Matthew Flinders, the famous navigator and cartographer, with the installation of a new ledger stone above the grave.
2. The church is Grade I listed mainly Decorated and Perpendicular in style but with traces of Norman and Early English masonry in the walls. There is a fine 15th century window above the high altar filled with nineteenth century glass.
3. The background to this Petition is that in January 2019 HS2 Phase 1 works were being undertaken in an area which had been built over by the expansion of Euston Station in the 19th century. That area had included the former burial ground of St James' Church, Euston where Captain Flinders, had been buried in 1814. During the HS2 works his grave was identified by a lead breastplate bearing his name.
4. The Petitioners seek this Faculty because of the local links between Captain Flinders and Donington. He was born in the town where both his father and grandfather were surgeons. He attended schools in

Donington, and members of his family are buried in the churchyard. The church already commemorates his life and achievements in a stained glass window.

5. There are 3 issues that fall to be determined:

- (i) the effect of closure of the church and churchyard to new burials by Orders in Council in 1864 and 1865, and whether the proposed burial in the church is now lawfully permitted
- (ii) if it is, whether the proposed reburial within a church should be permitted applying an exceptionality test
- (iii) if it is, whether the exceptionality test is satisfied in respect of the memorial ledger stone that is proposed and whether the entire proposal satisfies the tests set out in Re St Alkmund, Duffield 2013 Fam 158.

The closure of the churchyard and church to new burials

6. In 28 July 1864 Queen Victoria by Order in Council, pursuant to the Burials Act 1853 and 1855, was pleased to order that all burials in the parish church shall be discontinued forthwith, and from 1 July 1865 in respect of the churchyard (save for existing family vaults and brick graves and reserved grave space). On 29 June 1865 a further Order in Council was made whereby the Order on 28 July 1864 to discontinue burials in the churchyard from 1 July 1865 was postponed to 1 August 1865.
7. The effect of these Orders is that the church was closed to new burials from 28 July 1864 and the churchyard from 1 August 1865.
8. However, on 3 April 2020 HM The Queen by Order in Council, pursuant to her powers under s 1 Burials Act 1855, ordered that an exception is to be added to the Orders made in Council by Queen Victoria in the following terms:

'the exception to be added in that the body of Captain Matthew Flinders be interred under the North Aisle of St Mary and Holy Rood Church, provided that no part of the coffin containing the body shall be at a depth less than one metre below the surface of the ground',

9. It is therefore lawfully permitted by the Order in Council of HM The Queen for the body of Captain Flinders to be interred in the North aisle of the parish church.

10. I am satisfied that the remains discovered on 19 January 2019 during the HS2 dig are those of Captain Flinders given the presence of the lead plate bearing his name on the remains of the coffin uncovered and that this was the former burial ground of St James' Euston where it is known that he was buried in 1814 following his death.

Does the re-interment of the body of Captain Flinders satisfy an exceptionality test?

11. Notwithstanding the 2020 Order in Council, a faculty is still required to permit the body of Captain Flinders to be re-interred within the church. As set out in *Halsbury's Laws of England, Ecclesiastical Law (Volume 34(2011)/8 at para 1080* the practice of granting a faculty for the interment of cremated remains under the floor of a church is 'sparingly granted' and 'usually only where the deceased had been the incumbent of the parish concerned'. However, as noted at *paragraph 13.7.6 of Mynors: Changing Churches (1st edition 2016)* a faculty is not always granted in these circumstances.

12. In Re Warner, Re All Saints, Stand MCC EccLJ 10 250 Tattershall Ch refused a Petition by a living former incumbent that his cremated

remains (and his wife's) should be interred beneath the sanctuary floor with a memorial plaque when the time came. There had been no previous burials within the church. The Chancellor identified the major point of principle as to whether he should '*authorise the interment of cremated remains for the first time in this church which will inevitably allow others to make similar applications in the future*'.

13. He also refused it on the grounds that although the priest's service may have qualified as so exceptional as to justify interment in the church, that could not be said of his wife. He also was not prepared to grant such a faculty prior to the death of the Petitioner and his wife. He considered Re St Peter, Folkestone 1982 1 WLR 1283 where a Petition to permit the cremated remains of a retired priest who had ministered at the church after retirement, but who had never been the vicar, was refused in the face of objection from members of congregation. The Commissary General (Judge Newey QC) held that there '*was no objection in principle to the interment of ashes in churches*', but he regarded '*the precedent point as being a very serious one indeed*'. In re St George's Chorley 2017 ECC Bla 12, a Petition to inter within the church the ashes of a vicar who had died suddenly and unexpectedly in office was granted. In that case the Deputy Chancellor was able to distinguish the case before him, from the 2 cases referred to above because the 'precedent point' had been met by the PCC's decision that they would only support future Petitions for incumbents who died in office. Additionally, there was no application for his wife's remains to be interred in the church. In re Christchurch Spitalfields 2004 23 CCCC 15 the immurement of the cremated remains of Sir James Stirling, the distinguished architect, was permitted in that Hawksmoor church which had been an influence on his work.

14. From these authorities it is clear that a faculty to permit the burial of cremated remains within a church will be exceptional and will never be lightly granted. Although every determination of what is exceptional will depend on the facts in the case, it is clear that Chancellors have been concerned with the issue of a precedent being set by the interment, particularly where no burials or interments in the church have occurred before. Additionally, they have had to be satisfied about the exceptionality of the life of the person whose remains are being interred and the ties that person had with that church.
15. I see no difference in the principles I must apply, and the approach I must take, between cremated remains (which were the subject matter of the Petitions in the case I have referred to), and the remains of Captain Flinders that were uncovered in 2019.
16. I am satisfied that no precedent is being set by this reburial because no other burials are permitted either in the church or in the churchyard. The fact of the 2020 Order in Council confirms the exceptional nature of this proposed burial. In any event the circumstances of the discovery of the remains of Captain Flinders 200 years after his burial are so exceptional that this also means that no precedent is set.
17. I also note from the photographs in my papers that there have been other burials in the church with ledger stones in the 18th and early 19th century between 1725-1811 commemorating persons and their families who lived locally. This is a period within which Captain Flinders and his immediate family lived. So this burial is not isolated: this church did receive burials around the time that he lived.

18. I am also satisfied that the life of Captain Flinders is exceptional. His achievements are well known, not least in Australia, where he is especially honoured for his work in circumnavigating that continent in 1802-1803 and the production of his great work 'A voyage to Terra Australis' which was published in 1814 shortly before his death.
19. Additionally, the ties between Captain Flinders and Donington set out at paragraph 4 of this judgment are clear: this church already commemorates his life.
20. In my judgement, his life's achievements can be regarded as so exceptional, and his ties to Donington so clear, that the faculty for his burial in the church can properly be granted.

The exceptionality test in respect of the memorial and whether the entire proposal satisfies the test in re Alkmund.

21. It is proposed that above the new grave in the north aisle there will be laid a new ledger stone bearing a specially commissioned design and recording the relevant details for Captain Flinders.
22. A memorial may be erected in a church as long as the test of 'exceptionality' of the person honoured is established. In re St Margaret Eartham 1981 1 WLR 1129 the Dean of the Arches held that a faculty for a memorial should be regarded as a special privilege reserved for very exceptional cases. The questions that I must answer are:
- (i) is the case so exceptional that the privilege of a faculty can properly be granted?
 - (ii) if so, are the circumstances such that a faculty should be granted?
23. I have already considered the exceptionality of the life of Captain Flinders as consistent with the grant of a faculty for his burial within

the church, and this also justifies a memorial above his grave. However, what are the circumstances of this application and in particular what is the proposed design of the stone and its location? The memorial will be in the north aisle above the interred remains some 6 feet from the eastern wall. This is close to a stained glass window which commemorates the life of Captain Flinders. The design of the memorial is 'Version 5' in my papers which bears the image of Australia, with Captain Flinders' cat above and his ship beneath, with the inscription

'Captain Matthew Flinders RN

Born in Donington

16th March 1774

Died in London

19th July 1814

Explorer of Australia

Reinterred at Donington

17th July 2020'

24. I note that the DAC recommend the design to me subject to some additional words which the Petitioners have added. The ledger stone will measure 79 inches by 39 inches.
25. The Heritage Impact Assessment by APS dated December 2019 recommends that when the original floor slabs are removed and the grave excavated, the work should be monitored by an archaeologist at all times. They advise that there may be deposits relating to the chapel

that was originally in this position and there may also have been burials in the same area. They assess the physical impact to these archaeological deposits as moderate to high. They assess that there is no physical impact on nearby heritage resources. The overall assessment of the proposal on the archaeological and historical resource of the church is assessed as low to moderate.

26. Proposed changes to a listed church building need to be addressed by a series of 5 questions. The first of those questions is whether, if these proposals were implemented, would real harm to the significance of the church as a building of special architectural or historic interest arise? If the answer to that question is 'no', the ordinary presumption in faculty proceedings in favour of things as they stand is applicable and can be rebutted more or less readily depending upon the nature of the proposals; and the other questions do not arise.
27. The DAC have advised me that neither the character of the church as a building of special architectural or historic interest, nor any archaeological importance of the church is likely to be affected by these proposals. I agree with that assessment. In my judgement the presence of the grave of Captain Flinders in the church will positively further enhance the church as a building of special historic interest. The DAC also advise me that part of the work is likely to affect archaeological remains existing within the church. I agree with that assessment too and have taken into account that advice and the Heritage Impact Assessment in the judgement I make.
28. I am satisfied that the design of the memorial and its location above the reburied remains of Captain Flinders are entirely

appropriate and the circumstances are such that a faculty for this petition should be granted. The In Re Alkmund test is satisfied.

29. However, it will be necessary to have an archaeological watching brief during the excavation of the site. There will also be the usual condition concerning the uncovering of other human remains.

30. The conditions are:

- (i) if during the works any disarticulated human remains are uncovered and it is necessary to move the same, they may be removed and reinterred elsewhere in consecrated ground under the supervision of a priest. If articulated human remains are uncovered and it is necessary to move the same, work is to stop to await further directions from this Court.
- (ii) the works are to be subject to an archaeological watching brief.
- (iii) no part of the coffin containing the body of Captain Flinders shall be at a depth less than 1 metre below the surface of the ground.

31. I congratulate the Petitioners on an exciting project which honours a distinguished Englishman in the place of his birth.

The Revd HH Judge Mark Bishop

Chancellor of the Diocese of Lincoln

25 April 2020