

CROSS BONES, SOUTHWARK, LONDON SE1 and OTHER DISUSED BURIAL GROUNDS

Some Past History about Cross Bones Burial Ground

In this Appendix I include copies of historic maps, a recent map and an image which appears to be a watercolour (see page 50), of the first school built on part of the Cross Bones burial ground bordered by Union Street and Redcross Street/Way, Borough, Southwark, London SE1. This was known by the name of St. Saviour Charity School. I refer to the school again below.

Before I turn to matters affecting the burial ground in the 21st Century, I provide some insight into the distant history of what had been St. Saviour's and is now known as Cross Bones.

The name of St. Saviours' Burying Ground can be seen on the bottom left of John Rocque's map of London dated 1746, (page 49) though I have not established exactly when the burial ground opened. Note that the street now known as Redcross Way was once called Red Cross Street.

It is my understanding that the total size of the land is 30,000 square feet. This includes what had been 17,000 square feet of stables and tumbledown cottages, [*MEATH. Opportunities For Millionaires. Times [London, England] 2 November 1892: 5. The Times Digital Archive. Web. 7 Jan. 2012*].

John Constable, who, together with local people, honours those buried in the graveyard, heavily relies on the works of John Stow who wrote a 'Survey of London' in 1598. Constable informs us that:

“From the 12th to the 17th century, the Bishop of Winchester was effectively the Lord of a semi-autonomous manor, the Liberty of the Clink, in Southwark. His London residence, Winchester Palace, stood between the church, now Southwark Cathedral, and the Clink Prison. Many activities that were forbidden within the City walls were permitted and regulated within the Liberty. In his 1598 Survey of London, the historian John Stow refers to a burial ground for 'single women' - a euphemism for the prostitutes who worked in Bankside's brothels or 'stews'. Stow writes: 'I have heard of ancient men, of good credit, report that these single women were forbidden the rites of the church, so long as they continued that sinful life, and were excluded from Christian burial, if they were not reconciled before their death. And therefore there was a plot of ground called the Single Woman's churchyard, appointed for them far from the parish church", [*Cross Bones Graveyard website (2011)*].

Note that "churchyard" implies that a church existed within the burial ground. By contrast, "graveyard" implies a Church of England (CoE) burial ground with no church on the site. The CoE was gradually established from 1559, so John Stow was writing after the religious reformation. He may have been the only writer to refer to the graveyard in question as a "churchyard", as all others appear to refer to Cross Bones as a graveyard or burial ground. It seems unlikely that the "single women" would have been barred from one churchyard, but not another. Consequently, it is much more likely that they were buried in a CoE graveyard. This is not forced to be what is now known as Cross Bones graveyard and once St. Saviours which is recorded on John Rocque's map, dated 1746. This map reveals another unnamed burial ground minus a church which is also "far from the parish church". This is shown just above the "tenter ground" on the left centre of the map that I have included with this report.

The 'Annals of St. Mary Overy' produced in 1833 suggest that:

"There is an unconsecrated burial ground known as the Cross Bones at the corner of Redcross Street, formerly called the Single Woman's burial ground", [*The Annals of St. Mary Overy. William Taylor (1833:141)*].

Other sources of information suggest that there is no absolute evidence of either (a) consecration or deconsecration or (b) that it is or isn't the site of the "Single Woman's" burial ground.

Author Gillian Tindall informs us that:

"John Stow was responsible for the belief that the 'single women' of the Bankside houses, being disbarred by their sinful profession from burial in consecrated ground, were given their own separate graveyard away from both St. Saviours and St. Margaret's churches. There is no evidence to corroborate this, but the idea has taken root in Southwark consciousness and is still current today", [*Gillian Tindall, 'The House by the Thames and the people who lived there' (2006:20)*].

"St. Saviour's" now Cross Bones is not shown as a burial ground on a map produced by William Morgan in 1682. However, that map does not show any burial grounds in an area where there is likely to have been at least a few at this time. Morgan has recorded "College Church Yard" but even that is not shown as a certain place of burial at that point in time. Despite my efforts I have not been able to reproduce a copy of that map with fine detail to include here, but a copy is accessible online at;
http://upload.wikimedia.org/wikipedia/commons/e/ec/London_actually_surveyed_by_Wm_Morgan_1682.jpg

Martha Carlin, associate professor at the University of Wisconsin-Milwaukee, made a study of the history of Southwark covering the period from the Roman foundation around AD 50 to 1550. She informed me that:

“...a burial ground known as St. Saviour’s or Cross Bones never existed before John Rocque produced his map in 1746. It first appears as a burial ground -- called "St Saviours Burying Ground"-- on Rocque's map where it is shown at the NE corner of Red Cross Street and Queen Street (modern Redcross Way and Union Street)”, [*pers. comm. email July 7, 2011*].

As it can be impossible to prove a negative ("never existed") it may be that professor Carlin is simply drawing attention to the fact, that the exact location is nowhere clearly identified, until 1746.

Professor Carlin brought my attention to the works of John Strype which was first published in 1720, [*pers. comm. email July 9, 2011*]. She suggests that:

“In Book IV of Strype's edition (1720) of John Stow's Survey of London, opposite page 26, there is a detailed map of this part of Southwark.... It shows that Red Cross Street was already in existence, but that Queen Street existed only to the WEST of Red Cross Street -- it did not yet cross Red Cross Street and extend eastwards (as it did by Rocque's day) to link up with a high street alley. The site of Rocque's "St Saviour's Burying Ground" is shown in Strype's map as a rectangle of open or garden ground, bordered on the west by Red Cross Street, on the east by the manor boundary ditch, and on the north and south by unlabelled properties (mostly open ground or garden, with small ranges of buildings, all but one of these ranges running along the Red Cross Street frontage)”, [*pers. comm. July 7, 2011*].

The burial ground may have been closed, if it existed before Morgan and Strype produced their maps in 1682 and 1720 respectively. The first recorded lease on the land was issued in approx. 1708 (see below), which might suggest that it was closed and reopened again.

St. Saviour’s Charity School for Boys was built on part of the Cross Bones burial ground in 1791. [*Brickley & Miles with Stainer 'The Cross Bones Burial Ground, Redcross Way, Southwark, London' (1999:8)*] Note that Richard Horwood’s map dated 1792-1799 (see page 51) shows a rectangular building in the southwest corner of the land, with no mention of it being a burial ground. The size, scale and position are the same as that shown on the Southwark Town map of 1872-1876 (see page 52) and in the undated image of the school (see page 50). Both the Southwark Town map and image appear to show the later girls school in the distance, in the same position as shown on the 1872-1876 map.

Writing before 1801, Matthew Concanen and Aaron Morgan reveal that a school for boys was built directly on the burial ground. They recorded:

“Upon the building of a school house that now covers part of it, in the year 1791, the disturbing of the ground for the purpose of a foundation was objected to by many

persons who had here deposited their friends; and it was considered by others of intelligence on such subjects, as likely to incur ecclesiastical censure; it seems however, that upon diligent investigation, it was found that this ground was never consecrated", [Concanen M & Morgan, A. (date unknown but pre 1801, page 261 'The history and antiquities of the parish of St. Saviour's, Southwark').

Although Rocque's map depicts the burial ground in Redcross Street to be that of St. Saviour's, it becomes obvious from Richard Horwood's map that its name appears to have changed by the late 1700's. I have no evidence which would indicate why the name was changed. Some authors suggest that it was changed at the time of the great plague in 1665-1666, presumably because a skull and cross bones had been displayed at sites of plague burials, during one or more outbreaks.

"All that we have to remind us of (the) last ... series of plagues is the old burial grounds, over the entrance to which (is the) skull and cross-bones distinguishing (those) sites (as) plague cemeteries", [Puckle, B. S., (1926:190) 'Funeral Customs: Their Origin & Development', Werner].

Rocque's map having been produced in 1746 either contradicts that theory or proves that two names were being used at the same time. I am of the view that the name may have been changed to Cross Bones when St. Saviour's Charity School for boys was built on the burial ground in 1791. Another possibility is in the name of Red Cross Street. The cross roads did not exist in 1702 but when built, bones may have been unearthed. The link between cross and bones might then have been made.

In 1819 the National Free School for girls opened on the burial ground, [op cit Brickley & Miles with Stainer (1999:8)]. The positions on the land of the boy's, and girl's schools, are mentioned above.

In 1845 Mariane Gwilt (see mention of George Gwilt, architect, below) complained to the Board of Health, painting an unsettling picture of the state of the ground, [Graveyard London and forgotten burial grounds. Robert Bard (2008:116)].

"From the windows of the room called the School room we have all this sickly Summer almost daily witnessed the most distressing sights; our remonstrances are vain – in the bone house with its open grating which is not more than eight or ten yards from five of our windows we have during these last fatal six weeks had sometimes as many as from three to nine bodies lying in their shells [coffins] at a time for days (as many as ten days) in the aforesaid one house close under our windows, - One of these shells contained the body of a woman who brought here supposed dead from Cholera, but actually broke a blood vessel, trying to get out, whilst being carried along she not being dead then – The saw dust and shavings saturated with blood which washed out the shell when the body was transferred into the permanent Coffin was spread under

our windows and is there now although this occurred three weeks ago. On another occasion three or four weeks since the body of a man who had drowned himself at Blackfriars Bridge was brought down here and allowed to lie in its shell ten days when the body was washed with a mop and pailsful of water and the shell again washes out and all the filthy liquid and shavings and grass thrown under our windows his clothes lie there at this time I am writing and whilst he lay'd there the bodies of two children who had died of the Cholera was left in this dead house...", [op cit Robert Bard (2008:116,117)].

This reveals that the "dead house" and the "bone house" is one in the same building. The Southwark Town map of 1872-1876 appears to show a number of buildings physically attached to the girls' school, but not so with the boys' school.

The burial ground was closed by Order in Council on October 31st 1853. The majority, if not all of these Orders were issued because of assumed disease risks, prior to our modern understanding of germs and how they are spread. Disease risks were assumed to come from bad smells or miasmas. However whilst there were cottages and later schools on this site, if disease risks had been a problem, sanitation officers would have intervened.

At this juncture, I concede that Strype's map produced in 1720 could lead many people to imagine that no burial ground existed in the vicinity. It appears that he did not make obvious a record of any burial place in Southwark. However Brabazon, together with Rocque's map produced in 1746 convince me that the burial ground more popularly known now as Cross Bones, was once St. Saviour's, and was not necessarily the "single women's" burial ground that Stow was referring to when he made his 'Survey of London'.

I am not convinced that Taylor conducted his own investigations to reveal the true identity of the burial ground when he wrote, *'The Annals of St. Mary Overy'*, but instead relied on Stow's work. What is apparent is that Parish registers for the 17th and 18th Centuries often do not identify specific burial grounds. Indeed records were poorly kept. In the second quarter of the 19th Century, it was estimated that almost a third of burials were unaccounted for because of poor record keeping, [Registrar General (1839) 1st Annual Report (187) XV11 pages 8 to 10]. As the registers are unlikely to reveal the information that I seek, I have not attempted to trace and examine them. I have been informed by an archivist at the London Metropolitan Archives (LMA) that parish registers which still exist for St. Saviour's would be archived there, and not at the London Diocese. This may be of relevance to anyone wishing to search the burial registers to check whether their ancestors are buried in Cross Bones. Visitors to the LMA can search for free any registers held there, or for a fee, can use Ancestry.co.uk. If the relevant registers are not held at the LMA, a thorough search of any buildings which had been owned by the former St. Saviour's parish or the diocesan for that parish, might prove worthwhile.

Consecration

"At common law a parish burial ground must be, or must be taken to be, consecrated ground. The Burial Act of 1852 (marked) a new departure in this matter", (*Preston Corporation -v- Pyke, (1929), 2 Ch 345*).

Referring to Cross Bones pre 1801, Matthew Concanen and Aaron Morgan inform us that:

"...for in earlier times the ceremony of consecration would certainly not have been omitted; and if it had been performed, it would doubtless have appeared by some register, either in the possession of the bishop of Winchester, or in the proper ecclesiastical court", [*op cit p.261*].

The authors of this work, being the "obedient servants" of the parish of St. Saviours, do not reveal that the 'Single Women' from the 'Stews' were licensed by the Bishop of Winchester. Indeed they wrote:

"Though some objections have been made to a publication of particulars relevant to the Stews which were anciently licensed on the Bankside, yet they do not seem to us sufficiently founded in propriety to warrant such an omission", [*op cit p.235*].

The authors appear to remove themselves from discussing the sensitive relationship between the Church and the prostitutes. In terms of revealing whether the burial ground was ever consecrated or deconsecrated, their record may conceal a judgmental and prejudicial attitude, with the possible selective reporting and rejection of facts, which misrepresent the full picture. For that reason their report may be misleading and unreliable.

Making reference to *The Annals of St. Mary Overy* and the land being unconsecrated, Brickley & Miles with Stainer inform us that:

"... the ground appears to have remained unconsecrated. This is probably due to the land being held on a lease from the Bishop of Winchester and it was customary only to consecrate freehold land. The St. Saviour's Workhouse burial ground was consecrated however and this was also held on lease from the Winchester Park estate", [*op cit Brickley & Miles with Stainer (1999:6)*].

This statement is incoherent. Unless the Bishop of Winchester acquired the land for burial of those forbidden the rites of the church at the outset of his acquisition, I struggle to imagine why "lease" of the land has any bearing on suggestions that "the ground appears to have remained unconsecrated". Land might well have been acquired for social outcasts and to emphasise their stigmatised status, and deliberately left unconsecrated.

Lord Reginald Brabazon, 12th Earl of Meath (1841-1929), and Chairman of what was once known as the Metropolitan Public Garden, Playground and Boulevard Association, (now known as the Metropolitan Public Gardens Association (MPGA)), wrote a letter to 'The Times' newspaper in December 1883. He claimed *prima facie* evidence that the burial ground, once known as St. Saviour's, was consecrated. He indicated that the first lease issued for the burial ground was issued in 1708, but had reverted back to the freeholder. Brabazon writes:

"...that whilst there is no proof that the land is consecrated there is 'prima facie' evidence to show that it is so, in which case the present action of the wardens of the parish would be illegal". He went on to say that "... the burial ground is shown on a map of London, 1789, as the "St. Saviour's" Burial-ground, Southwark. It formerly was part of the estate of the See of Winchester. The first lease of this ground, dated about 1708, was for three lives, from the Bishop of Winchester to the parish of St. Saviour's, granting it for purpose of burial. The next lease was dated the 9th June 1820, for three lives and 61 years, at a rental of £65 per annum. But before its expiration the ground was enfranchised by the wardens of the parish for £3,338. This occurred in the latter part of 1862, it being then the freehold of the parish of St. Saviour's, Borough, being paid out of the church-rate, which later was abolished in 1883. On October 31, 1853, the last two burials took place being those of Sarah Flemming, aged 36, St. Margaret's-court, Borough, and that of a child named Sawday, of Thompson's buildings, Red Cross-street, Borough, the service of the Church of England being performed by the Rev. Robert Bickerdyke, and the usual fees were paid as in the case of consecrated ground. If the ground had not been consecrated, this action would have been illegal; here is *prima facie* evidence in favour of its consecration. On November 8, 1854, the ground was leased by the wardens for 26 ½ years to a Mr. Stephen's, and afterwards transferred by him to Mr. Downs, who used it as a builders yard, paying £50 per annum, the Vestry consenting. It is shown by the records that many bodies were buried here during the time of the Great Plague, and that in one week upwards of 600 bodies were interred. There are no headstones to be seen, it having been used as a builder's yard, and is in a sad state of neglect. I may state that this association have decided to, in conjunction with the Commons Preservation Society and the City Church and Church-yard Protection Society, have brought in next Session and Act of Parliament which shall render it illegal to use any of these disused burial grounds for other purpose than as a public garden, ample provision for which is contained in the Open Spaces Act of 1881. This is strictly in accordance with the wish expressed by you in the latter part of your admirable article on this subject, and I trust that by so doing we may not only enlist the sympathies of the general public, but the advice and support of your journal",[BRABAZON. *A Curious Site For Industrial Dwellings*. *Times* [London, England] 22 December 1883; pg.10. *The Times Digital Archive*. Web. 7 Jan. 2012].

What becomes obvious from Brabazon's letter to The Times in 1883 (see above), is his confidence that St. Saviour's/Cross Bones burial ground was freehold land and must at one

time, have been consecrated. What else becomes apparent is that the burial ground was open during the time of the Great Plague in 1665-1666. That was before William Morgan produced his map in 1682 and did not record any burial sites in Southwark. However, the London Diocese was unable to confirm that Cross Bones was ever consecrated, [*pers. comm. Andrew Lane Diocese of Southwark. March 24, 2011*]. That must be proof that it has no record of it ever being deconsecrated.

Land Ownership and Building Demolition

In or around 1882 the wardens of the parish of St. Saviour's wanted to sell the land as a builder's yard. In her book, Gillian Tindall quotes from parish records that:

"The wardens [from the parish of St. Saviour's Newcomen charity] are quite prepared to let or sell this ground for this or any other purpose, so as to enable them to obtain funds for the payment of the stipend of the rector of this parish; and the Home Secretary, on the 30th of October 1882, granted a licence to assist this design. This would have been illegal he [presumably the rector?] went on to say, because the ground had almost certainly been consecrated", [op cit *Gillian Tindall (2006:114-115)*].

This statement is far from clear. If the charity wardens were recording the comments of the rector, then "he" must have said the 1882 exhumation licence "would have been illegal" if the land was legally consecrated. The rector and Brabazon (1883 above) may have compared notes on the fees for the last two burials. Brabazon said, "would have been illegal" and the rector may have said the same. One was referring to fees actually charged and the other the licence actually issued. The record of the charity wardens neither proves or disproves consecration. If the "he" in the quote refers to the rector, he may also have said the proposal to sell the land for a builder's yard "would have been illegal", i.e. consecrated land cannot prior to deconsecration, be used for secular purposes. The question of consecration must have been resolved in the minds of the charity wardens, as they put the land up for sale at auction in 1885 for building purposes. In the particulars and conditions of sale, they described the property as freehold building land, in Union-Street, Borough [*Re. St. Saviour's Rectory Trustees & Oyler (1886) 31 Ch. D412, 55 L J Ch. 269*]. This case involved a summons served on Oyler to pay the purchase price. It was determined that there was no exclusion from S.2 Disused Burial Grounds Act 1884 for land transferred by Private Act. The law report states that:

"The vendors cannot invite purchasers to buy as building land that which they know cannot be used for that purpose".

The sale was made null and void. The summons was dismissed and the trustees were ordered to pay costs. A similar predicament could arise in the future for landowner and buyer, if they fail to learn lessons from the past.

The 'Daily News' reported on the case in January 1886 which reveals that:

"This was a case of considerable public interest under the Disused Burial Grounds Act 1884", [*LAW INTELLIGENCE. Daily News (London, England), 16 January 1886. 19th Century Newspapers. Web. 7 Jan. 2012*].

Indeed it has been constantly referred to in Halsbury's laws of England right up until the present time. *Re. St. Saviour's Rectory Trustees & Oylor (1886)* is the only legal case which I have been able to locate about this specific piece of land. If, today, the current owner sells the land for building purposes, the contract could once again be invalidated, forcing the vendor to pay legal costs. Also the purchaser might sue for compensation running into some millions of pounds.

Despite the 1886 court decision, it would appear that the trustees of St. Saviour's still could not grasp the requirements of law. In July of 1886 'The Morning Post' reports that letters were read at a meeting of the St. Saviour trustees about a wall being built on the Union Street side of the burial ground. It was argued that:

"...the wall was virtually a building and as such, was being erected contrary to an Act of Parliament". "...a firm of solicitors should take proceedings which would lead to the demolition of the wall", [*THE CROSS-BONES BURIAL GROUND. The Morning Post (London, England) 29 July 1886 pg. 7. Part 11. 19th Century British Library Newspapers. Web. 7 Jan. 2012*].

I do not know if a wall was built on Cross Bones in 1886 and then demolished. In 1900 it was decided in *St. Botolph Aldersgate Without (Vicar) v. Parishioners (1900) P69* that building a wall was lawful. This case indicates that the construction of a wall in a disused burial ground is only lawful if it enhances or protects the land as public open space.

"The Times" newspaper published a letter to the editor from Brabazon/Meath on November 2nd 1892 which had an accompanying list of land for sale which included the Cross Bones Burial Ground. Brabazon was calling on millionaires to buy this land and gift the burial ground to the local authority to be used as public open space, [*op cit Nov 02, 1892; pg. 5*].

"The Standard" newspaper reveals that the District Railway Company (DRC) purchased the Cross Bones land at an auction in January 1892, [*THE PUBLIC HEALTH. The Standard (London, England), Friday, January 06, 1893; pg. 3. 19th Century Newspapers. Web. 7 Jan 2012*].

Later in the same month showmen were arrested, charged, and bound over to keep the peace for operating a fairground on the burial ground for a period of 5 years, [*County Of London Sessions. Times [London, England] Saturday, Jan 30, 1892; pg. 11. The Times Digital Archive. Web. 7 Jan. 2012*]. It is reported that:

"the fairground comprised of a site running shows, steam and hand organs shooting ranges and steam roundabouts a "razzle-dazzle" etc. on 'Open Space'", [*op cit Web. 7 Jan. 2012*].

I have estimated that pieces of such equipment would likely take up a large part or all of the area of a relatively small burial ground, which leads me to imagine that the schools that were

once erected on parts of the burial ground must have been demolished long before it was used as a fair ground. I have not found any specific dates for the demolition of the two schools. The foundations may have been unstable because of the typically deep burials of the time? The police may have intervened at the request of the DRC as the new landowner. However, it is not clear, what the DRC's intentions were for the land.

A year after the purchase was made, the DRC was willing to sell the land but not gift it to the local authority. A meeting of the MPGA in January 1893 reveals:

“that the owners named £6,000 as a price for the Cross Bones disused burial ground which the association wish to acquire and lay out, if funds were forthcoming”, *[OPEN SPACES - At the monthly meeting of the MPGA. Times [London, England], Friday, Jan 06, 1893; pg. 4. The Times Digital Archive. Web. 7 Jan. 2012.*

No funds were forthcoming. I have searched some archives without success, for information about what was done with the land after it was purchased by the DRC in 1892 and up until building works appear to have taken place in 1928/29.

Transport for London (TFL) now owns the land. As TFL failed to meet my requests for information about the acquisition of the land or what works had been conducted in the 1990's I wrote to request this information under the Freedom of Information Act. TFL's Knowledge Manager Shirley Xavier informs me that:

“London Regional Transport (LRT) acquired the land September 31st 1990 from City Gates Estates Limited PLC (CGE), and that TFL does not hold any information about how CGE came by the land or any other historical information about the land”, *[pers. comm. Shirley Xavier August 11th 2011]*.

On another occasion Shirley informed that:

“...demolition of three industrial buildings and structures in Redcross Way/Union Way (I believe she meant Street) were undertaken between 1991 to August 1992”, *[pers. comm. Shirley Xavier July 13, 2011]*.

Shirley mentioned a planning application dated 1st June 1994 for 20 Union Street which relates to the construction of electricity sub-station in Union Street:

“...but cannot be certain what year the sub-station was built and estimates this between 1997 and 1998”, *[pers. comm. Shirley Xavier July 13, 2011]*.

Beyond this I have no idea how City Gates Estates Ltd PLC came to own the land or if it was simply appointed by the landowner to sell the land. The property deeds should throw some light on the matter.

I made further attempts to establish what buildings were constructed in or around 1928/29. Karen Thomas a member of staff at the Museum of London informed me that she:

“ ... consulted with an archaeologist who worked on the site in the 1990’s. He said that they never really identified the foundations they uncovered as they were fairly recent, i.e. later than the school that was once on the site. The foundations could have been laid down for warehouses that remained up until the 1980’s”, [*pers. comm. July 7th 2011*].

It remains unknown what buildings were erected on the Cross Bones Burial Ground in or around 1928/29.

Information shown in a document from TFL’s archive and which is available online, led me to understand that the DRC and its assets were absorbed by the London and Passenger Transport Board (LPTB) in 1933 by the London Passenger Transport Act 1933, [*Transport for London Group Archive <http://www.tfl.gov.uk/assets/downloads/foi/Key-dates.pdf> (2011)*].

Paul Ansell an employee at the Ministry of Justice (MoJ) gave me to understand that:

“Planning permission to build in disused burial grounds can only be used without the need for other types of consent, if the land has been acquired through a Compulsory Purchase Order”, [*pers. comm. May 10, 2011*].

He suggested that:

“The landowner likely relied on the Town and Country (Churches, Places of Religious Worship and Burial Grounds) Regulations 1950 when building the sub-station on the land in the 1990’s”, [*op cit May 10 2011*].

As mentioned above, the land/burial ground was initially bought at auction by the DRC in 1892. It is my understanding that the land has never at any time been acquired with a Compulsory Purchase Order. If true and the 1950 Regulations only apply to land compulsorily purchased under Town & Country legislation, those Regulations cannot apply to Cross Bones.

I have examined the documented history in the book entitled ‘The Cross Bones Burial Ground Redcross Way, Southwark, London’ which does not afford any insight about ownership of the burial ground. I understand this project was paid for by London Underground Limited. This raises the question of whether or not the property deeds which span more than a century were examined for this project.

On behalf of TFL, Drivers Jonas Deloitte is currently marketing the entire site as ‘Landmark Court’ for potential commercial development in 2012. TFL claims that this land is surplus to

requirements and wants a preferred developer to have secured planning permission by the end of 2012. Evidence of this can be viewed online at Property Week.com, [<http://m.propertyweek.com/news/tfl-poised-to-sell-southwark%E2%80%99s-cross-bones-graveyard-site/5013152.article>].

The 1933 London Passenger Transport Act does not afford powers to construct buildings in a disused burial ground, [London Passenger Transport Act 1933 [http://www.legislation.gov.uk/ukpga/Geo5/23-24/14/contents\(2011\)](http://www.legislation.gov.uk/ukpga/Geo5/23-24/14/contents(2011))].

The London Passenger Transport Board was established by an Act of Parliament and was granted powers under the 1933 Act to take over and operate all roads and underground rail services in the 'LPT Special Area' (an area similar to 'Greater London') i.e. the nationalisation of London's transport, [*Transport for London Group Archive* <http://www.tfl.gov.uk/assets/downloads/foi/Key-dates.pdf> (2011)].

It is my understanding that if TFL sells the land to a developer that company would not meet the legal definition of a development corporation. Unless there has been a change in the law of which I am unaware, an ordinary developer does not have the same powers as that of a development corporation. It is also my understanding that an ordinary developer would have no more powers than if I were to apply for planning permission to destroy an area of public open space, protected as a disused burial ground.

Section 98(6) (a) of the Environmental Protection Act 1990 makes clear that a "Statutory Undertaker" means:

"Any person authorised by an enactment to carry on railway, light railway, tramway or road transport undertaking", [*The National Archives. Web. 7 Jan. 2012*].

As the sub-station was to serve an extension to the Jubilee Line project I imagine that the London Underground Limited drew on its legal powers as statutory undertaker to build the sub-station without any need for consents. It may have even relied on the case of *Re St. Peter the Great, Chichester (1961) 1WLR 907* where it was decided that an electricity sub-station was held not to be a building.

Exhumations - Common Law

As the only law which appears to apply to exhumations at Cross Bones is common law, the question arises as to whether it is possible to apply for a common law consent to exhume?

Prior to the Reformation, bones were constantly dug up, buried deeper in the same or other graves, stored in buildings or under floors or destroyed, so that most graves could remain in constant use. Exhumations from any land, whether consecrated or not, must have been lawful. Somewhere along the way, exhumations became unlawful. The Church switched from exhuming to giving what many assumed to be perpetual protection of graves, other than in exceptional circumstances. What though of land not under the control of what is now the Church of England? How could bodies be exhumed, if the Church had no control over the land, so could not give lawful consents? When and why did it become a common law offence to exhume bodies in the way which had been done for centuries? Could a magistrate or local court issue a common law consent to exhume?

Common law refers to decisions made by judges, based upon common customs and any related legal principles. The only way to discover whether common law decisions have been taken on any matter is to comb through court cases. By contrast, laws which come through Parliament are written down as Acts of Parliament and they often appear with fine detail, in what are known as statutory instruments. There are also local bye-laws.

At what point in time did it become a common law offence to exhume in the way which had been done for centuries? As the offence is now inextricably linked with indecency, did the law change in response to the outrage of mutilating and amputating bodies, to cram them into graves, from the surface of the ground down to considerable depths?

In just under 100 years, about 30,000 burials took place in a mere half acre of land, at the Tottenham Court Road burial ground of the Methodist or Nonconformist Chapel, set up by the celebrated preacher, the Rev. George Whitfield. That is the same site over which Nathan Wolf Jacobson was prosecuted (1880, 14 CCC 523) and where the burial rights and gravestone claims had already been protected, (*Moreland -v- Richardson* (1856) 52 ER 1238-124; 22 Beav 596-604).

Without exhumations, it is difficult to imagine how such a large number of burials could have taken place. In 1872 the Home Office recommended that graves be 9 x 4 feet, [*Little, J.B., (1902:703 & 725), 'The Law of Burial', Shaw & Sons/Butterworth*]. Allowing 36 square feet for each grave gives about 600 tightly packed graves, each with 50 burials. That seems impossible! If graves had been very deep near the chapel, other buildings and roads, the foundations would have been undermined. Bodies could not have been buried head-to-toe and shoulder-to-shoulder, as gravestones had been erected and burial rights purchased, (*Moreland -v- Richardson op cit*). However, with grave sizes 6 x 2 feet, there would have been about 1,815 graves, each with >16 bodies. If the graves were only 4 to 6 feet deep for 2 to 3

burials in each, exhumations between 1756 and 1853 must have taken place but with no common law prosecutions?

As mentioned below, it does seem that those running active burial grounds were able to exhume lawfully and it was others who were prosecuted under common law, e.g. resurrectionists (body snatchers) and builders.

Julian Litten is a former member of the Church of England General Synod and author of *'The English Way of Death - The Common Funeral Since 1450'*. He has advised, that prior to the start of exhumation licences in 1857, "no formal decisions were required", before exhumations took place in burial grounds not under the control of the Established Church, such as those operated by other Christian denominations, other religions and hospitals. That suggests that the courts were never asked, at least as a matter of routine, to give common law consents to go ahead with exhumations. Julian Litten stated that, the purpose of S.25 Burial Act 1857 was, "to allow metropolitan churches, particularly those in the City of London, to transfer their dead from the vaults beneath them to the new public cemeteries", [*pers. comm. Bradfield, J., 22 Jan 2012*]. Public cemeteries as we know them now, were new at that time.

Professor James Stevens Curl has advised that, "George Alfred Walker's horror-stories of the state of London bone yards in the 1840s" be read, to discover the "many references to unsavoury practices. It was Walker, more than anyone, who exposed the indecencies of such places", [*pers. comm. Bradfield, J., 23 Jan 2012*]. If "bone yards" means places where bones were still being exhumed, as part of the day to day activities in burial grounds, this suggests that landowners and managers had continued with exhumations, long after the Reformation. This also suggests that common law consents were not required.

In 1862 the Rev. J. Livesey was reported to have said, that an Act of Parliament in 1833 "imposed a severe penalty on disinterring the dead", [*The Extraordinary Doings In A Cemetery at Sheffield. The Standard. (London, England) 06 June 1862, p.5. 19th Century Newspapers. Web. 29 January 2012*]. I have not been able to trace an Act from 1833 which is "Chapter 75", to check if it is relevant to exhumations. He may have meant Chapter 75 from the previous year, i.e. the 1832 Anatomy Act. That did not impose a statutory penalty for exhuming.

It might be thought, that when on the 03 November 1841, the Queen's Bench issued a peremptory mandamus to force a public servant to "deliver" the body of Henry Foster to the executors responsible for his Will, the Court had in fact given a common law consent to exhume. The next day, his body was exhumed but the peremptory mandamus relied on, was not a consent to exhume – (see Appendix 4).

Did the change come about in the 18th or 19th century?

One of the earliest references to exhumations and indignity is *R -v- Lynn in 1788 (2 Term Rep 733, 1 Leach 497, 100 ER 394, 2 JR 783)*.

Although *R -v- Lynn* seems to be cited as a legal precedent, it refers to, "the regular practice of the Old Bailey in modern times to try charges of this nature". Thus if no previous precedent existed, it was created in the Old Bailey. Punishments handed down by the Old Bailey had not been challenged by "writ of error", so the Old Bailey prosecutions were regarded as sound law, applied in *R -v- Lynn* and subsequently. Note that Jacobson was prosecuted in the Old Bailey and the case was transferred to the Queen's Bench, (1880, 14 CCC 522 - 528).

Exhumations - Common Law Prosecutions & Unlawful Licences

Common law prosecutions seem to have been confined to individuals, who in effect were either trespassing or destroying graves in order to erect buildings. The trespassers ranged from those acting out of familial affection, through to body-snatchers, e.g. (*R -v- Lynn*). All the landowners cum builders seem to have been prosecuted before the 1884 Disused Burial Grounds Act, which put a stop to the financial exploitation of former burial places. By contrast, I cannot find any cases for common law prosecutions of those running active burial grounds, where the exhumations may have been with the tacit approval of all concerned.

Home Secretaries have issued licences since 1857 but they are only valid when the set of Burial Acts apply to the land in question. In 1863 Nathan Wolf Jacobson was convicted for not having a licence, when exhuming for building purposes, in what had been a Nonconformist burial ground. It appears that he did not challenge the conviction at that time. However, when the Home Office later issued Orders in connection with the same disused burial ground, he appealed to the High Court of Justice. The Master of the Rolls agreed that:

"the Burial Acts (do) not apply to grounds like this one (cf. Appendix 2) and that the Order in Council was therefore of no authority" and "The ground is simply Mr Jacobson's private freehold, to be used as he pleases, subject no doubt to the common law obligation ... to take care that no indignities are offered to the human remains in improperly and indecently disinterring them" (*14 CCC 524*).

The comment "to be used as he pleases", was qualified by the earlier decision of the Master of the Rolls, i.e. that all burial rights and gravestones had already been protected, (*Moreland -v- Richardson (1856) 52 ER 1238-124; 22 Beav 596-604*). That crucial point was reinforced by Judge Manisty in 1880 - see below.

Further exhumations took place but as Jacobson could not be prosecuted a second time for not having a licence, he was prosecuted under common law and found guilty, (*14 CCC 528*).

The common law prosecution started in the Central Criminal Court but was directed to be moved (by *certiorari*) to the higher Court of Queen's Bench and was considered by Lord Chief Justice Cockburn and a special jury at Westminster. Judge Field said that Jacobson:

"...might have supposed that the land which he had purchased was available for building purposes".

Judge Manisty agreed and emphasised that:

"...there is no doubt as to the question of law in this case".

When Jacobson purchased the property it was a burial ground and each successive owner was bound to protect it as such and ensure:

“...that the bodies of persons buried there should not be disturbed”, [14 CCC 527-528]).

That much was reported in 1994 when John Bradfield published his research on law. However, by 2004, Home Office staff had not only "declined to clarify their practice" in relation to that case but finally admitted that they knew nothing about it!, [*Alice Barker Trust, (2004), 'Response To The Government's Review Of Burial Law & Policy', para. 05.01, which was submitted to the Home Office in 2004*].

Home Office staff should have known even before 1880, (*R -v- Jacobson*), when the set of Burial Acts has no relevance, including when licences would be unlawful and invalid. In 1867, a court decided that the set of Burial Acts did not apply to private burial places, where there were no common law rights of burial and/or there was no legal or other requirement to maintain graves or vaults, [*Foster -v- Dodd and Another LR 3 QB 67-77 Ex. Ch*] and see elsewhere. However, it was made clear that the graves were protected by common law and that exhumations would be illegal. A distinction was made between a place which had been a burial ground and one which was still an active burial ground. That case law decision made clear, that exhumation licences could only be issued for some and not all places which were legally unconsecrated. This case was considered and in effect, elaborated in *Regina v Jacobson*.

If Home Office staff in the second half of the 19th, and virtually all of the 20th century, were entirely ignorant of relevant law, there was no excuse after 1994. The point was driven home, when the Home Office received the above report in 2004. That information will have been inherited by the Ministry of Justice but if not, 'ignorance of the law is no excuse'. Indeed, the courts would regard any continuing ignorance as grossly negligent and the consequences unlawful.

Were Exhumations Lawful at Cross Bones?

"There is ... so strong and natural a repugnance to having the bones of the dead dug up", [*Home Office, 'Suggestions to Burial Boards', November 1872, cited in Little. J.B. (1902:704), 'The Law of Burial', Shaw & Sons/Butterworth*].

Cross Bones is one of those places, for which lawful and valid exhumation licences cannot be issued. As explained elsewhere in this report, they were issued and those archaeologists, who relied upon those licences, could have been prosecuted in the Old Bailey or some other court, for the common law offence of exhuming. However, if the MoJ issues unlawful and invalid licences for Cross Bones or anywhere else, it is unlikely that the police and Crown Prosecution Service would have the resources to make sense of the law. Indeed they might not see the matter as a pressing priority. They would probably assume that staff at the MoJ must have a sound grasp of the subject, even if that is not so. A common law prosecution would probably have to follow a judicial review, initiated by a voluntary organisation. (See beginning of Appendix 2)

Under contract with the London Underground Limited (LUL) archaeologists from the Museum of London conducted exhumations within the Cross Bones burial ground in 1992 and removed the remains of 148 bodies in preparation for the sub-station. According to Karen Thomas:

"That is only a tiny fraction of those buried there", [*pers. comm. April 15, 2011*].

As mentioned above, Brabazon not only mentions the Great Plague in the year 1665-1666, when in one week, upwards of 600 bodies were interred in the burial ground, but that records existed of that fact, [*op cit pg.10. The Times Digital Archive. Web. 7 Jan. 2012*]. Brabazon's statement appears to prove that the burial ground was open during the time of the Great Plague, and long before the burial ground was recorded on John Rocque's map as St. Saviour's. It might also lend weight to the fact that many more bodies are buried here than some archaeologists may believe.

In a letter addressed to the Coroners Division at the Department of Constitutional Affairs from Mills Whipp Partnership Archaeological Consultancy (MWP) it is stated and I quote:

"...without disturbing the burials, which are about 6ft (2m) below current ground level...", [*Mills Whipp Partnership (MWP) Archaeological Consultancy to Coroner's Division, Department of Constitutional Affairs. October 3 2005*].

This depth is questionable for several reasons. Firstly, it was common to place many bodies in graves, which were dug more like wells. For such a small burial ground to hold the vast number of bodies which must have been buried there since at least the mid 1600's, they must have been buried very deep and/or new burials may have followed exhumations, e.g. bones may have been burnt or taken to a charnel house or "bone" or "dead" "house", on the site or

elsewhere. Indeed those attending a vestry meeting held on September 7th 1849 heard how the heads and legs of those recently interred were cut off to make room for bodies brought to the burial ground on a daily basis, [*op cit Daily News (London, England), Monday, September 10, 1849. 19th Century Newspapers. Web. 7 Jan. 2012*].

In April 1826 The Times newspaper reported on a coroner's inquest about the body of a man with a curious disfigurement. The man was known as the 'King of the Beggars'. It is reported that he was buried in St. Saviour's burial ground 14 feet deep over which were placed three other coffins in order to secure it against the resurrection men (grave robbers) who were anxious to have the corpse to dispose of, [*Coroner's Inquest. Times [London, England]. Monday, Apr 10, 1826; pg. 3. The Times Online. Web. 7 Jan. 2012*].

Though I heavily rely on historic newspaper reports for information I do not imagine that this beggar cum pauper was buried in St. Saviour's (which is now Southwark Cathedral and bestowed with this status in 1905) Church Yard. It seems more likely that he was buried in Cross Bones, which some local people may have referred to even then as St. Saviour's.

The archaeologists appear to have made assumptions which have not been tested. The credibility of other points in the MWP letter may be questionable. The archaeological report produced in 2005 for the London Borough of Southwark, does not appear to have accounted for the bodies buried over two or more centuries, [*Museum of London Archaeology Service 2005*]. Because the depth of one burial is known it may not give a clue to deeper burials. It appears that a more thorough analysis is required to determine just how many bodies are actually buried in the land and their exact positions and depths.

In light of the evidence produced by Brabazon and case law mentioned below, it seems impossible that any exhumations in Cross Bones could have been lawful. Licences appear to have been unlawful (*ultra vires*) and invalid, whether or not the land was ever legally consecrated.

Obviously in land that is unconsecrated an exhumation licence can only be issued under Section 25 of the Burial Act 1857. Less obvious is the fact that the 1857 Burial Act does not apply to all un-consecrated graves in all types of burial places. The first question is therefore to determine whether or not the 1857 Burial Act applies to the land in question. If it does not, then a valid exhumation licence cannot be issued. Indeed it would be unlawful to issue an invalid exhumation licence and anyone conducting exhumations with an invalid exhumation licence could be prosecuted for an offence under common law, [*R-v- Jacobson (1880) 14 CCC 552-528, decision made by the Master of the Rolls*].

When asked about issuing an exhumation licence, as opposed to 'directions' from the Secretary of State, Paul Ansell at the MoJ informed me that:

“The provisions of the DBGA Act 1981 comes into play when an extant former burial ground is to be built on. If the site has been put to other use, then section 25 of the 1857 Act would apply”, [op cit May 11th 2011].

No case law was cited to substantiate this conclusion and to prove that *Foster -v- Dodd (1867)* and *R -v- Jacobson (1880 and decided by the Master of the Rolls)* either have no relevance or had been overturned by later decisions. It seems to me that those cases are legally binding on the MoJ but are being unlawfully and carelessly overlooked or disregarded. This point was put to the Home Office on a number of occasions, before and after 2006, [pers. comm. Bradfield, J.B., December 19, 2012].

In 2006, Home Secretary John Reid, said the Home Office was "not fit for purpose". That may have been so before and after 2006.

The MoJ took responsibility from the Home Office (with a short gap when the Department for Constitutional Affairs dealt with exhumations). Paul Ansell's statement proves that the MoJ continues to issue any number of unlawful and invalid exhumations licences. It seems impossible to come to any other conclusion.

Acting for all the judges in the case of *Foster -v- Dodd and Another LR 3 QB 67-77 Ex. Ch.. (27 November 1867)* Kelly, CB delivered their conclusions:

“...if no vaults or places of burial are in active use, then the 1857 Act has no relevance”. (p.7)

This suggests that Section 25 was intended to ensure that exhumations can only take place within active burial grounds, e.g. moving bodies from one grave in an active burial ground to another. *Foster v Dodd* provides evidence to prove that Section 25 of the 1857 Act cannot be used to exhume bodies to allow the wholesale destruction of burial grounds or parts of burial grounds which are not active. Indeed this case suggests that the government cannot issue exhumation licences in non-active burial grounds full stop.

Kelly, CB. Said:

"...a *prima facie* presumption thus arises that the ground has at some former time been (legally) consecrated". A Church of England consecrated churchyard, "cannot after (burials have ceased) be lawfully (used for) secular purposes" unless authorised through a Church of England permission known as a "faculty".

This case was obviously about the Bridewell Hospital burial ground, but the judges are implying here that the burial ground would not have been used for any other purpose, had it been legally consecrated at any time.

The judges then "rebutted" the "*prima facie* presumption". They concluded based on:

"the facts of the particular case" that "no consecration ever took place", because those who had been buried were, "a class of person ... described as rogues, vagabonds and others of bad character". There were "some exceptions which do not materially affect the question" (p.74).

The discussion about the Bridewell burial ground is not too far removed from the history of Cross Bones (a) in the case of Bridewell burial ground the conclusion was that the land was never legally consecrated, (b) that burials had not taken place for "a great number of years" and (c) during that time had been used for other purposes, plus (d) the fact that the land no longer had "the character of a burial ground" and may never have had that character (which sounds bizarre and socially prejudiced). The judges decided it did not have:

"...the character of a burial ground within the meaning of the (1857) Act of Parliament".

In *Foster v Dodd* p.75 the judges decided that:

"...neither her Majesty nor the Secretary of State possesses any jurisdiction to determine that to be a burial ground which is not a burial ground".

This logic must apply to all laws including the DBG Act's and all other legislation dealt with by the MoJ. Her Majesty cannot issue an Order in Council on the basis of advice from the Secretary of State acting on recommendations from front line civil servants by deciding that a law is different to what it really is. All are stuck with the wording of all relevant primary and secondary legislation including legal definitions. Discretionary power cannot be exercised unless allowed for in primary or secondary legislation. Any exercise of discretion in the absence of a proper legal basis would be unlawful or ultra vires. Anyone who might wish to challenge the Secretary of State might look to rely on cases such as *Cobbett v Grey (1849)* as was raised in *Foster v Dodd (1867)*.

I discovered a report produced by the MPGA in 1898 which states that:

"...It was announced that in accordance with representations of the association and of the local authorities, the Home Secretary had declined to sanction the removal of human remains from the Cross Bones burial ground, Southwark, which cannot therefore be used as a building site...", [*OPEN SPACES IN LONDON.-At the monthly. Times [London, England] Friday, Apr 08, 1898; pg. 7. The Times Digital Archive. Web. 7 Jan. 2012*].

Given that the District Railway Company bought the land at auction in 1892, I believe that I can safely assume that this report, dated 1898, is about the District Railway Company seeking to exhume bodies buried in Cross Bones.

So far, I have not found any evidence of exhumation "directions" ever having been issued, under the Disused Burial Ground Act's in connection with Cross Bones. I have only traced what must be unlawful exhumation licences for Cross Bones, e.g. 1992 number 20062, 1995 number 22631, and again in 2005 number 29976. Those licences seem to have been issued unlawfully. If so, they were legally invalid and any subsequent exhumations could have resulted in prosecutions under common law, i.e. the archaeologists could have been prosecuted.

Archaeologists and Exhumations

The Romans are thought to have moved over to cremation at one stage, to avoid graves being dug up by their enemies.

"Sylla was the first of the patrician branch of the Gens Cornella, lest anyone should dig up his body and dissipate his remains, as he did those of the Marius. Pliny ascribes the first institution of burning among the Romans, to their having discovered that the bodies of those who fell in distant wars were dug up by the enemy", [*Tegg, W. (1876:47) 'The Last Act: Being the Funeral Rites of Nations & Individuals' Tegg. Republished by Gale 1973*]

Archaeologists were expressing concerns in 2010, about lack of clarity on law. The programme makers referred to the "Over-zealous application of rules" by the MoJ, which was said to be "stifling archaeological research", [Material World. BBC Radio 4, October 14, 2010 <http://www.bbc.co.uk/programmes/b00v730s#synopsis>]. One of those interviewed, Mike Pitts, refers to a "crisis" caused by "bureaucracy and the interpretation of law", [The human remains crisis, <http://www.britarch.ac.uk/ba/>]. The impression is given of arbitrary decisions. That conclusion reflects a lack of understanding about clear-cut case law, in that it is not open to interpretation or negotiation. If archaeologists, et al had been able to examine the law with great care, they would realise that they should not be applying for licences, in many circumstances. Those cannot be issued for any ancient archaeological sites, unless they are coincidentally active burial grounds and only then, when the set of Burial Acts apply. That seems virtually impossible!

Under the heading, "Exhuming Human Remains: Frequently Asked Questions" on the website of the MoJ, the question is asked:

"What authority is needed to exhume human remains for archaeological purposes?"

The answer given, is that a "licence is required" apart from "two exceptions". One is when, "the site is (sic) subject to burial ground legislation"!! That cannot be an exception!

This demonstrates confusion within the MoJ. The answer is the very opposite, in that a licence is a legal necessity, when very specific "burial ground legislation" applies to the land, i.e. the set of Burial Acts. However, it is highly unlikely that they would apply to ancient sites, unless, as I have stated elsewhere, they are also public burial grounds and in active use or where there is an on-going obligation to maintain graves and vaults. The answer given refers to "any directions" and by that the MoJ seems to be saying, that only the Disused Burial Grounds Acts apply. That also suggests confusion within the MoJ, in that the mechanism for issuing directions, only relates to S.2 and the schedule to the 1981 Amendment Act. Exhumations under the Disused Burial Grounds Acts cannot be for archaeological purposes. Under that "burial ground legislation", exhumations can only be for the purpose of erecting a legitimate

"building" (singular). If no legitimate "building" will be erected, (see elsewhere) then there can be no exhumations under that legislation, e.g. solely for archaeological investigations.

In short, lawful licences cannot be issued when the Burial Acts do not apply. That means licences cannot be issued for most if not all ancient sites. If they are unlawfully provided with licences archaeologists cannot not rely upon them, but if they do, they could face prosecutions for common law offences. Archaeologists cannot turn to the Disused Burial Grounds Acts, unless they are assisting prior to the construction of a legitimate "building" (singular) on the site and have been issued with appropriate "directions". Archaeologists et al cannot seek "directions" for merely exploratory, scientific, investigative or educational exhumations.

Disused Burial Grounds Acts and Planning Decisions at Cross Bones

If my understanding of the law is correct, a landowner cannot build anything on a disused burial ground unless it is to 'enlarge' or 'build' from scratch, a place of worship etc. (Disused Burial Grounds Act 1884 and Disused Burial Grounds (Amendment) Act 1981 respectively). Also, any exhumation licences would be invalid (*ultra vires* and see *Foster -v- Dodd and R -v- Jacobson*). Legitimate exhumation "directions" from the Secretary of State" (Section 2, Disused Burial Grounds (Amendment) Act 1981, schedule paragraph 7) are only possible, in connection with a place of worship.

It appears from case law, that other types of building are only lawful, if they enhance the public benefit of open space. "A wall to separate the (disused burial) ground from a street, the inner side built so that it formed an arcade or covered way for the protection of frescoes" was not prohibited [1900, *Vicar of St. Botolph, Aldersgate Without -v- Parishioners of St. Botolph*, cited in *Halsburys Laws of England 1975, Vol.10, para. 1221*], and see elsewhere.

Even a welfare centre would be unlawful and have to be pulled down. In 1928 the London County Council fought in the High Court, to stop the Borough of Greenwich, from continuing with its construction of a welfare centre, on a disused burial ground. In that case, one local authority was entitled to an injunction against the other, and awarded costs. The court also decided that there was an entitlement to a mandatory injunction, to force the Borough of Greenwich to pull down, what it had already built, [*High Court Of Justice. Times [London, England] 8 Dec. 1928 4. The Times Digital Archive. Web. 7 Jan. 2012*].

A building on adjacent land which partly overhangs a disused burial ground is prohibited, [*Re. St. Mark's Church, Lincoln, 1956, 2 All ER 579*].

Even before the Disused Burial Grounds Act (DBG Act) 1884 came into force, it would have been illegal to build on a disused burial ground, if the digging of foundations involved exhumations. As now, graves would have been protected by common law, if not protected by any statute. By 1928/29 the 1884 Act was in force, so it appears that buildings could not have been lawfully constructed.

Section 5 of the 1884 Act makes clear that a burial ground which has been sold or disposed of under the very specific authority of any Act of Parliament is excluded by the Act. To the best of my knowledge, no such exclusion has applied to the Cross Bones burial ground, before 1928/29 or since.

Section 3 of the Disused Burial Grounds (Amendment) Act 1981 'Rights, powers and duties of subsequent owners', states:

"Where a church or other religious body disposes of an interest in a disused burial ground, then the owner for the time being of that interest shall have the same rights

and powers and be subject to the same obligations, restrictions, duties and liabilities conferred or imposed by this Act on that church or other religious body, as if that interest had not been so disposed of”.

The key word is "disposes", meaning when the religious organisation disposes of the land after 1981. The Act does not say "has disposed of". I understand Section 3 to refer to land which has been acquired after the DBGA Act 1981 came into force, if so Section 3 cannot be applied to Cross Bones.

Unless some other relevant legislation was relied upon, any building which took place in 1928/29 appears to have been illegal. I suspect that the London Underground Limited in its capacity as statutory undertaker was considered exempt from the need for planning permission under Section 7 of the DBGAA 1981. As an electricity sub-station was erected I suspect that the London Underground Limited likely relied on the Town and Country Planning (General Permitted Development) Order, 1995, (Part 17, class A to J), but this is open to question, [*Town and Country Planning (General Permitted Development) Order 1995*].

This land/asset may have been ‘absorbed’ into the ownership of the government in 1933 under the London Passenger Transport Board Act 1933 (as above), but I have not been able to find legislation that gives powers under this Act to freely build on a disused burial ground with an exhumation licence in hand to remove the inhabitants, rebury them in a different borough and subsequently sell the land for commercial gain. As stated elsewhere in this submission, case law rules out any possibility of relying upon any exhumation licence at any time.

In 1883 Lord Mount Temple rose to move in the House of Lords on a second reading of the London and North Western Railway (Additional Powers) Bill. Lord Mount Temple stated:

“...That it be an instruction to the Committee to which the Bill is referred that the railway company shall not be empowered to appropriate a larger portion of the parochial burial ground of St. James’s than is proved to be absolutely required for the necessary convenience of the travelling public...”. He concluded that “...their Lordships ought not to allow any of these parochial burial grounds to be desecrated without proof of the clearest necessity”, [*House Of Lords. Times (London, England). Friday, Jun 01, 1883; pg. 5. The Times Digital Archive. Web. 7 Jan. 2012*].

Although this was about a different burial ground in a different part of London, the remainder of the speech made clear how the House of Lords regarded disused burial grounds, before the appearance of the Disused Burial Ground Act 1884. I am confident that if the issue of Cross Bones has to be challenged in the courts, that the Lords would take an even stronger stance, not least because of the stronger legal protection which now applies.

In *R -v- Kenyon (1901, 65 JP 730)*, Edwin Kenyon and Joseph Taylor were imprisoned, for exhuming in a disused burial ground, which had been used by Roman Catholics. The matter

had been referred by Dukinfield Urban District Council to the Home Office. It alerted the Director of Public Prosecutions and the prosecuting solicitors were instructed by the Solicitor to the Treasury.

It seems that the prosecutors were aware that a valid exhumation licence could not have been issued, as S.25 of the Burial Act 1857 is not mentioned in the report. The prosecution must have been for the common law offence of exhuming.

Three Kenyon brothers had also been charged with starting to build a warehouse and offices. They pleaded guilty and in mitigation, said they had not realised that the planning consent which had been granted, did not allow the buildings to be erected.

When passing sentence, the judge referred to the "aggravated nature of the offence". Edwin Kenyon and Joseph Taylor (builder) were imprisoned. A total of four individuals were each bound over in recognizances of what would now be the total equivalent of £114,120.00, to pull down the buildings and restore the ground in six months, [*National Archives. Currency Converter. Web. February 2012*].

TFL has since sought and obtained on appeal in 2003, planning permission for a type of commercial development unrelated to its function as a statutory undertaker. 'Landmark Court' is a speculative commercial venture, which would not appear to be covered by the same permitted development right, as that likely used to build the sub-station in the 1990's. I have read a Planning Inspectorate report which upheld the appeal made by TFL in 2003, subject to conditions on the height of the buildings not to affect an existing conservation area. The Inspector was of the view that as building had taken place long before and during the 1990's and exhumation licences had been issued in 1992 and 1995, further building could take place, [*Planning Inspectorate, Bristol. Reference no. APP/A5840/A/O2/1102402 decision issued 26 March 2003*].

This suggests to me that the Planning Inspector did nothing more than assume, that as buildings had previously been erected on the site, and exhumation licences had previously been issued, further building of any description could take place. To my knowledge the inspector was not asked to consider any evidence, that any or all of the previous buildings had been unlawfully constructed and that any further buildings would also be unlawful, unless they fall within the exception clearly specified in the Disused Burial Grounds Acts. No consideration was made as to whether all exhumation licences issued were unlawful and invalid.

To the best of my knowledge what can or cannot be done in this disused burial ground would be determined by the DBG Act 1884 and the DBG Amendment Act 1981, which must be read together as one Act. Section 1 (1) of the 1981 Act states:

“...section 3 of the principal Act (which prohibits the erection of buildings on disused burial grounds except in certain cases) but subject to section 2 of this Act a building...”.

Note, that the word 'buildings' is only mentioned once in the DBGA Act 1981. That one mention is in parenthesis. By contrast, the word 'building' arises in ten places.

There is a clear distinction between the words buildings and building. Consequently the Interpretation Act would not apply in terms of the plural including the singular and vice versa. The principal Act of 1884 only allowed the enlargement of a building for worship etc. The DBGA Act 1981 by referring to "a building" seems to anticipate the same function but allowing the construction of a whole new building for such a purpose and not merely an extension of an existing building. There is no clear right for a secular organisation to build for a secular purpose. In other words, the two Act's when read together, do not allow "buildings" (plural) for purposes not mentioned in the 1884 Act e.g. commercial offices, housing or retail outlets.

If this is an accurate understanding of the DBG Acts and case law relating to the set of Burial Acts, those responsible for having issued previous exhumation licences did not understand those laws. Also, they may have been misled as to whether or not buildings were lawfully constructed on the actual burial ground in or around 1928/29 which was before the DBG Amendment Act 1981 came into force.

Paul Ansell at the MoJ explained in some detail why for a number of years the burial's team would reject some types of application to build in a disused burial ground. He also explained and I quote:

"Some developers design their buildings in such a fashion as to minimise the disturbance of human remains. Indeed, it is now possible to erect buildings - mainly small houses -over a raft structure that sits on small 'piles'. Such 'piles' may be situated between known graves or in areas where there are no graves. Applicants would have to show us that such a development is feasible before we would agree to this type of building work being engaged. If the proposals were rejected it would then be for the developer to consider amending their designs or remove the remains where necessary", [*pers. comm. May 20, 2011*].

I cannot find any legal basis for the exercise of such controls. At face value S.2 (2) of the DBG Amendment Act 1981 might appear to provide such powers but I cannot see that it does so. Also, I find no evidence that the building of "houses" could be lawful.

To my knowledge the Cross Bones burial ground does not contain specifically marked out graves. There are so many, that it is unlikely that there are any clear boundaries between graves. The inhabitants that remain were buried in perpetuity, and that is respected in the Disused Burial Grounds Acts. Indeed there may be a public outcry if local people learn that "piles" are going to be driven through the inhabitants of the burial ground simply to erect a raft. A legal challenge might ensue over any intention to construct more than a "building" (singular) for a religious function.

I am not aware of any public legislation that TFL might now rely upon in order to avoid the controls imposed by the Disused Burial Grounds Act's. To my knowledge London Underground Limited had not sought any new private legislation before building the sub-station in the burial ground. Neither is it apparent that TFL has sought any new private legislation to commercially develop the burial ground in the future. On this basis I must conclude that TFL or any new land owner could not lawfully develop the burial ground in the future if it or they do not obtain new legislation that overrides the DBG's Act's.

Disused Burial Grounds Acts and Planning Decisions - Proof of Law Breaking at Bank Top Burial Ground

A former Methodist burial ground at Bank Top near Halifax, was destroyed by a builder in the early 1990s, using only an exhumation licence. Graves had been created within living memory and were still being visited by relatives (see Appendix 2). Misleading notices about seeking exhumation licences had been placed in a newspaper, stating that the land was needed for development and later a car park. Home Office staff should have known that (a) licences could not be issued for such a site and (b) even if a licence could have been lawfully issued, it could not be used for the purpose of development or a car park. The proper mechanism would have been the Disused Burial Grounds Acts and the builder may have realised, that if relatives were informed of that legal protection, they could not only have prevented the destruction but continued with further burials, to extend the time in which relatives could hold off any other threat of destruction.

The builder undoubtedly relied for some degree of protection, upon the unlawful guidance of the Home Office. If staff had applied the law correctly and lawfully, they would have rejected any application for an exhumation licence - even one from any relative who may have wanted to exhume for purely emotional or social reasons or simply to avoid the threat of destruction of all graves, (see press notices and comments in Appendix 2).

If the licences had been lawful and valid, they should have stipulated as a "condition" or "precaution", that they could not be used to end burial rights owned by relatives and could not give consent to remove or destroy gravestones. The Home Office churned out the same conditions or precautions in most if not all licences, without thinking about the specific circumstances of each case. That alone appears in breach of administration law. If it had thought more objectively and creatively, it might have stipulated, that a valid licence would be revoked immediately, if used to create any impression that it could be used to end burial, access and other rights which had been purchased. Bank Top was viewed as disused but perpetual burial rights had been purchased and spaces still existed within some graves. Consequently, further burials could have taken place at any time.

War veterans thought they had defended their country to protect democracy and basic human rights, which would include the protection of the graves which they had created. It was ironic that the burial ground was located in Trooper Lane. Frank Mitchell had been deeply passionate about his grandmother's grave. He had fought at Dunkirk and been mentioned in war-time despatches for bravery.

There is nothing in S.25 Burial Act 1857 to suggest that it was ever intended that it be used for the destruction of whole burial grounds. That one paragraph lacks the very detailed safeguards which are written into the Disused Burial Grounds Acts.

The legal definition of disused burial grounds can be found within Open Spaces legislation, because they are protected as public open spaces. According to the Earl of Halsbury LC what the Disused Burial Grounds Act 1884 intended was to prevent anything which would reduce

the amount of space available for "exercise, ventilation and recreation and what not - to prevent anything being done ... which would interfere with or restrict the free and open use of these spaces ...", [cited in *Re. St. Luke's* [1976] 1 ALL ER 621].

The 1884 Act prevented any "buildings" in disused burial grounds, other than to extend a place of worship. Cases were brought before the courts, to discover if certain structures could be built. "If (the) structure (being considered is) not a building, another similar one would also not be a building. If even half a dozen of them were put up ... the loss of open space would be serious". The courts "are concerned as Buckley J said, with structures which cover the ground and take up space ..."referring to a case which was upheld in the House of Lords. Referring to another case, "what their Lordships decided was that it made no difference that the space (taken up) was almost entirely below ... ground".

In *St. Botolph, Aldersgate Without (Vicar) -v- St. Botolph, Aldersgate Without (Parishioners)*, it was "held that the purpose of the legislation was to leave the parishioners as much space as before in which to walk about and that (the) structure (under consideration) would not be a building because they could walk about in the colonnade", (referred to in the judgement in *Re. St. Luke's* [1976] 1 ALL ER 623).

What was significant about the *St. Luke's* case, was that "there will be a loss of space to the public, even a small one ... Anything that (the landowner) does with reference to the open space must be calculated to further its enjoyment by the public as an open space ... (The) court's protection does serve a useful purpose and ... it would be unsafe to leave matters purely to the judgement of the local authority ..." (*Re. St. Luke's* [1976] 1 ALL ER 625).

A case upheld in the House of Lords, emphasised that the main purpose of the Disused Burial Grounds Acts, is to prevent anything which would "cover the ground" and stop anyone being able to walk in that area, however small the "building" may be. A car park as intended at one time at Bank Top, would cover the ground, stop visitors and completely change the use from public to private. For that reason, the Home Office should never have sanctioned the proposal, to destroy Bank Top.

Open Space and Public Benefit at Cross Bones

In August 1928 “The Times” reported on the Chapter of Southwark Cathedral (previously St. Saviour’s Church near Cross Bones) negotiating with the local borough council for the purpose of converting St. Saviour’s burial ground into a pleasure garden.

“SOUTHWARK CATHEDRAL; PLAN FOR CONVERSION INTO PLEASURE GARDEN

“The Chapter of Southwark Cathedral is negotiating with the local borough council for the purpose of converting St. Saviour’s burial ground into a pleasure garden. The Borough Council authorities have notified the Chapter of their approval of the scheme, and the details will be completed in due course of the next few weeks. The burial ground lies between the Cathedral and Borough Market and is in close proximity to the site of the “Clink”. Stones marking the burial places of prominent local citizens are now used for the footpath through the ground of London Bridge to Cathedral-street. In a corner near the Cathedral is the family vault of Mr. George Gwilt, an architect who was for many years a resident of the parish, and who was concerned in the restoration of the choir and tower of the Cathedral and of the Ladye Chapel. In another part of the graveyard is a stone pillar showing the jurisdiction of the City of London more than 100 years ago. These memorials it is understood will not be disturbed by the proposed improvements”, [*Southwark Cathedral Burial Ground. Times [London, England]. Wednesday, Aug. 08, 1928; pg. 9. The Times Digital Archive. Web. 7 Jan. 2012.*]

That and Cross Bones were, for the majority of recorded history, owned by the Church. Although the ownership of Cross Bones changed to a secular organisation (see DRC 1892 above) there would have been every justification for having enhanced the open space and public benefit of both properties at the same time in 1928. It did not happen then, but there is every reason why the same plan should now be implemented for Cross Bones.

Cross Bones is also in close proximity to the “Clink” which is now a museum. The newly restored community garden in Redcross Way, in which I played in as a young child, was originally laid out at the suggestion of social reformer Octavia Hill in 1887. It’s unlikely that even speculators would want to destroy Cross Bones if any prominent figures, such as Dickens and Shakespeare, who both had strong links with the area, were buried there. If they and others of equal status were buried in Cross Bones, there would likely be very loud cries to protect it as public open space, not least because of the inscription on Shakespeare's gravestone:

“Good frend for Iesvs sake forbear,
To digg the dvst enclosed heare.
Blest be ye man yt spares thes stones,
And cvrst be he yt moves my bones”.

Brickley & Miles with Stainer state, "A press cutting which must date around March 1929, probably from the South London Press, and now in the Southwark Local Studies Library, records a small part of the later history of the site:

"DISUSED BURIAL GROUND Union Street Site Formerly Used by Showmen IT'S HISTORY

An interesting side-light on the history of Southwark is provided by Mr J.J. Magenis, of 59, Nelson-square, who comments in a letter upon a statement published recently in the "South London Press" regarding the discovery of human bones on a site in Union Street.

Mr Magenis remarks that "any stranger would conclude that this discovery was a revelation and that the disturbance of the dead was an accident." The discovery was, indeed, a very big accident, for the contractors engaged in excavating the ground were under the impression that the human remains on the site, formerly used as a burial ground, were removed many years ago, and its referred to in the annual report of Dr Wilson, the Medical Officer of Health for Southwark. Mr Magenis mentions that this piece of ground, when he was a lad, was let as a fair ground, and continued so until an action was taken against the showmen for abatement of the nuisance caused by steam organs and noisy music. He read at the time (35 years ago), in the "South London Press," that the land could not be built upon because it was a disused burial ground. "Since then the land has been ingeniously concealed," complains Mr Magenis. "And now that the public memory has failed and its conscience stifled, building excavations are permitted, and local officials express surprise that human remains are recovered." Mr Magenis asks, "Where are the champions of open spaces? They have permitted a known disused burial ground to be built upon and exhumation permitted without an Home Office order", [*op cit* Brickley & Miles with Stainer (1999:19)].

Ministry of Justice & Unlawful Decision Making

As mentioned above, the Home Office and Department of Constitutional Affairs issued unlawful and invalid exhumation licences, for Cross Bones. It is highly probable that since 1857, thousands of unlawful licences have been issued, for places where the Burial Act's do not apply, e.g. former burial grounds of dissenters, Jews and Muslims and burials in gardens and orchards. Had the licences for Bank Top been lawful, it would have been vital, as I have stated elsewhere, to insert a "condition" or "precaution", which would have revoked the licence, if it might have been used for any unlawful or illegal purpose, e.g. to destroy graves without the consents of each and every owner of the burial rights, move, remove, damage or destroy gravestones without the consents of each and every owner or effectively steal any property buried in any grave.

Such important considerations mean having to consider each case on its own merits. That involves the exercise of discretion. As no criteria are set down in law, about when and when not to issue exhumation licences, discretion is always exercised by civil servants, on behalf of the Secretary of State. What then, are the legal principles which must be respected when exercising discretion in a way which cannot be unlawful?

I cannot give a complete answer but in view of the first paragraph under the above subheading, need to make clear the legal importance of considering each case on its own merits and having "conditions" and "precautions", which are relevant to each case and as required by S.25 Burial Act 1857. The same logic must apply to "directions" given under the DBG Amendment Act 1981.

“All who participate in a wrongful (administrative) act are jointly and equally liable. It is a fundamental rule that every minister, official or other agent who commits an actionable wrong is fully liable personally and that superior orders are no defence”, [Wade, H.W.R. (1988:34) *Administrative Law* 6th ed., OUP..].

“An authority can fail to give its mind to a case and thus fail to exercise its discretion lawfully, by blindly following a policy laid down in advance. (For a discussion see (1972) 18 McGill LJ 310 (HL Molot); (1976) PL 332 (DJ Galligan)). It is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case: each one must be considered on its own merits and decided as the public interest requires at the time”, (*ibid* p.370)

An administrative authority such as the Ministry of Justice “is not allowed to ‘pursue consistency at the expense of the merits of individual cases’, [Merchandise Transport Ltd -v- British Transport Commission (1962) 2 QB 173 at 193]. This doctrine is applied even to statutory tribunals, despite their resemblance to courts of law.” In a case where a LA said it “could make no exception even in the most deserving case”, “The court regarded that ‘not as the adoption of a policy in the exercise of a discretion but as a refusal to exercise any discretion’ (see *ibid* p.901) and granted mandamus to compel the Council to consider the application”, (*ibid* p.371).

The proper exercise of discretion means inserting into all decisions on exhumations, details which would inform anyone adversely affected. By reading the "conditions" and "precautions", they, their legal and political representatives such as MPs., would then get a quick understanding of the true legal position, of the relevant parties. The refusal of the Home Office in the Bank Top case (Appendix 2) to provide such information would now be unacceptable in view of the Freedom of Information Act. The Act has an implied assumption of openness, therefore, it seems contrary to the spirit of that Act, to conceal information until things go desperately wrong and have to be demanded, in order to try and put things right.

Conclusion

As the record shows, Lord Reginald Brabazon and the MPGA had campaigned vigorously for the protection of Cross Bones and other disused burial grounds to be converted into public gardens and playgrounds. I have not been able to discover whether the momentum of the MPGA was maintained over Cross Bones, after Lord Reginald Brabazon died in October 1929.

Sound information on the law came too late to prevent the destruction of Bank Top burial ground. Sound information on the law is immediately available in this report, to prevent the destruction of Cross Bones. This is our last opportunity, to save for the public benefit this very special site, with all its literal depth of social meaning and history, local lore and wonder. To that end, the MPGA and perhaps the Brabazon family will again pursue the protection of this site with the utmost vigour. The MPGA may once again express an interest in purchasing the land, [*op cit Times [London, England], Friday, Jan 06, 1893; pg. 4. The Times Digital Archive. Web. 7 Jan. 2012*].

When the Foundling Hospital disused burial ground was converted into a public garden, it was opened by Her Royal Highness Princess Louise (The Times 6 September 1884, - see further details in Appendix 5). The very survival of Cross Bones into our present age, by dint of the Disused Burial Grounds Acts, warrants its own special celebration.

In or around 1929, Mr Magenis stated in his letter (see above) that Cross Bones had, "been ingeniously concealed". That has been the case until the present day, when it now faces its most serious of all threats, and the possibility of being destroyed for an allegedly illegal purpose.

Bodies were not revealed in the negotiations between the Chapter of Southwark Cathedral and the local borough council in 1928 (see above). Archaeologists appear to have been surprised at the discovery made in 1992. Maybe they were not informed by the landowner of essential and well known information.

Whether prostitutes or paupers are buried in Cross Bones, these are the people that enabled others to become wealthy and retire from Bankside to their country dwellings. The Church was also a beneficiary of their labours and their deaths, and must now demonstrate a robust sense of ethical responsibility, whether or not the land was ever legally consecrated.

I am not an academic, but in just over a year I have committed many hours daily to conducting online research. I hope that others, who have lived in the area and those who live there today, will build on what I have discovered, in an attempt to prevent any more bodies from being exhumed for the purpose of a commercial and an allegedly illegal venture. Had I been aware of the exhumations made in my life time, I would have carried out this research many years ago.

Like Lord Brabazon, Octavia Hill and other prominent figures that once championed for open spaces in the 19th Century, I believe that the law requires that all of the burial ground must be preserved as a public open space.

Brabazon's said:

"It is a well-known fact that the natives of South Africa or China would never think of disturbing the burial place of their ancestors", [*BRABAZON. The Use And Abuse Of Disused Burial Grounds Within The Metropolis. Times [London, England] 10 Nov. 1883 pg.12. The Times Digital Archive. Web. 7 Jan. 2012*].

Referring to the Romans, William Tegg said:

"There was an action for violating the tombs of the dead. The punishment was a fine, the loss of a hand, working in the mines and banishment or death", [*The Last Act: Being The Funeral Rites Of Nations & Individuals'. Tegg, W. (1876) p.63, Tegg Pub.*].

The last interments in Cross Bones were 158 years ago but even now, no-one can categorically prove that the burial ground was ever consecrated, deconsecrated or unconsecrated. Neither can anyone make claim that this is definitely the "Single Women's" burial ground that John Stow referred to.

Whilst the DBG Amendment Act 1981 Schedule, paragraph (1), may allow for a church or other religious organisation to display a notice on the land or in a newspaper to remove those buried in the land, we are not discussing a landowner which had directly acquired, after 1981, the land from a religious organisation or a church. We are discussing TFL which is a public-private company that is disposing of land surplus to requirements. Also, the purpose of any further exhumations must be soundly based in law. That was not so in the past and exhumations to make way for secular buildings would be illegal, unless anyone can prove that my understanding of law is wrong or point to legislation of which I remain unaware.

The Friends of Cross Bones, which is a local Southwark action group, are content to campaign for a small section of the burial ground to be set aside for a memorial garden and open space. However, there is no evidence that they have even begun to get a firm grip, on what would and would not be lawful. They appear not to realise that the law requires that the whole site be kept as public open space. It is my understanding that architectural designs have already been drawn up and the architects have been commissioned to work with 4,173 square feet, which is a third of the total size of the burial ground, [*pers. comm. Simon Rochowski (2011)*]. It is my view that this does not meet the full requirements of law. All of the inhabitants of Cross Bones must remain legally protected so they can rest in peace and not be discarded in pieces. All public officials must by example to us all, demonstrate unwavering respect for the rule of law. It must not be breached yet again by civil servants acting for the relevant Secretary of State, i.e. it is certain that previous exhumation licences were unlawful and that directions

cannot be issued under the DBGs Acts for anything other than the type of buildings mentioned in the primary Act.

The Friends of Cross Bones with the support of Southwark Council have approached Mayor Boris Johnson, Chairman of TFL, to gift a small section of the burial ground. As mentioned above a similar request was once made in 1892, when representing the MPGA, Brabazon asked the landowner to gift all of the burial ground to the local authority to designate as an open space, [*op cit Times [London, England] 2 November 1892: 5. The Times Digital Archive. Web. 7 Jan. 2012*]. This request was obviously denied, so I am not hopeful for the Friends of Cross Bones.

Aside from making massive illegal and immoral profits by developing the land I see no necessity to desecrate this ancient burial ground once known as St. Saviours and now known as Cross Bones. I hope that what I have presented here is enough to convince decision makers that questions must be asked to establish whether it is, or was ever lawful to build on this land and whether it could possibly be lawful to issue exhumation licences for any reason, let alone to facilitate commercial development.

My reason for protecting the whole of this burial ground is emotive and not for profit. The land is coveted and the dead can raise no voice. The speculative builder is impressed by profits; to him sentiment and morality may be nothing. The Prime Minister has called for a revival of morality. How we treat the places of our dead, will reveal whether calls for morality are more than hollow and conceal deep-seated hypocrisy. Don't do as we do but do as we tell you, is not a way to build a Big Society, rooted in responsibility for each other and cohesion. That cannot be achieved by a continuing celebration of greed at any price.

Further Research

I had never before attempted to research the history of any place. I hope others with social roots in the area and little or no research experience will use my submission, to track down even more evidence. I hope they will be encouraged and supported by archaeologists, archivists, genealogists, historians and anyone else with relevant expertise. Brabazon mentions "records" of burials from the Great Plague and Brabazon family records may exist, about his involvement in Cross Bones. Property deeds and other sources of information are sure to exist.

Peter Thorsheim is an Associate Professor of History, at the University of North Carolina at Charlotte. He researched disused burial grounds in London. During 1875 to 1900, nearly a hundred were converted into public gardens or playgrounds, [*Thorsheim, P. (2011:38-68) 'The Corpse in the Garden: Burial, Health and the Environment in Nineteenth-Century London', Environmental History 2011, 16(1); first published online 01 April 2011*]. He said:

“It's quite likely that the cuttings collection at the Guildhall Library includes some articles on Cross Bones, and there may also be discussions of it in the early years of the MPGA's minutes, but my notes from my research don't contain any specific references to Cross Bones”, [*pers. comm. June 24, 2011*].

In the last quarter of the nineteenth century, Brabazon and the MPGA defended Cross Bones and played a key role in bringing about the Disused Burial Grounds Act 1884. Brabazon died on the 11 October 1929 and the MPGA's records may reveal what if any opposition it put up, when buildings of any type were erected in 1928/29.

Acknowledgements

I am grateful to all those who have responded to my questions. Any errors in the arguments, conclusions or presentation of assumed facts and any typing errors are my sole responsibility.

I would like to thank in particular: Paul Ansell at the MoJ for his patience with my numerous requests for information; law lecturer Stephen White, for making available a copy of the Oyler law report and indictment file details from the National Archives relating to *Regina v Scott 1842* (see Appendix 4 and full text of the 1842 Report on the Inspector of Prisons); and the Alice Barker Trust, for its considerable contribution to my understanding of relevant law. The Trust has assisted many thousands of individuals over questions of law, following many varied circumstances which have given rise to bereavements. It had advised on and contributed to a case which was won in the Court of Appeal. It is worth stating that John Bradfield, Honorary Advisor to the Trust, has worked full time without pay since 1990, as a researcher on applied law and crisis social worker. More than 70 MPs acknowledged his “unparalleled expertise on relevant law” and “free public service which no-one else is capable of providing”. I hope that it and other voluntary organisations will if necessary, precipitate the issue of Cross Bones into the courts, to prevent any further building on this site. Charities and other voluntary organisations with minimal funds can use the courts and minimise their legal and related costs, by applying for Protective Costs Orders. I also hope that the Trust will use the courts, if another invalid exhumation licence is issued, in an unlawful and invalid way.

First Comments

"Teresa has not only challenged us all to protect Cross Bones. She has also challenged us all to get a sound grip on relevant law. I share Professor Thorsheim's assessment, that her efforts are highly commendable. She has provided a firm base from which a broad and robust campaign can be built. Voluntary organisations with minimal funds will be keen to note their ability to apply for Protective Costs Orders, if the courts have to be used as a last resort. Her report demands that public servants in particular, now examine the law with more caution. If that is done, they will be left in no doubt that their predecessors and former colleagues have routinely broken burial laws since the 19th century, not least as binding legal precedents have been carelessly overlooked or disregarded. There is an urgent need for new legislation, to be written with long overdue coherence and clarity. There is nothing new about calls for plain and readily intelligible language. To cite Sir James Stephens from the 1891 case of *Re. Castioni* (1 QB 167) we need in our laws, "a degree of precision which a person reading in bad faith cannot misunderstand". To that I would add, we can never have perfection but we can settle for excellence", (*Bradfield, J.B., pers. comm. Jan 19, 2012*).

CROSS BONES BURIAL GROUND

CHRONOLOGY

1598 John Stow produced his 'Survey of London'. This discusses the 'Single Women' of the Bankside 'Stews' that were licensed by the Bishop of Winchester. Stow stated that they were buried far from St. Saviour's parish church, in the Single Woman's "churchyard" (more likely a graveyard without a church?). That may fit the location of Cross Bones.

1665-1666 Time of The Great Plague when hundreds of bodies were buried in the site. Brabazon (1883) referred to records of those burials, i.e. records of some description presumably existed between 1665 and 1883 and may still exist but if so where are they?

1682 William Morgan produced his map of London, which does not identify any burial grounds but burial grounds must have existed.

1708 Brabazon (1883) claimed, "The first lease of this ground, dated about 1708, was for three lives, from the Bishop of Winchester to the parish of St. Saviour's, granting it for purpose of burial". The burial ground is now known as Cross Bones.

1720 John Strype produced his 'Survey of London' which does not include a record of any burial ground in Southwark, but burial grounds must have existed.

1746 John Rocque produced his map of London, Westminster and Surrey showing the location of St. Saviour's Burying Ground now known as Cross Bones.

1746-1791 Between these dates the name of the burial ground changed. The cross roads are not shown on Strype's 1720 map, but are shown on John Rocque's map in 1746. The construction of the cross roads may be a clue to the change of name to Cross Bones.

1788 *R -v- Lynn in (1788) (2 Term Rep 733, 1 Leach 497, 100 ER 394, 2 JR 783)*, provides an early reference to exhumations and indignity.

1791 The Charity School for Boys was built on the burial ground [Brickley et al 1999] in the southwest corner of the site - see Horwood's map of 1792-1799 at the junction of Red Cross Street and Union Street near the top right corner of that map and bottom centre Southwark Town map 1872-1876.

1792-1799 Richard Horwood produced his Plan of the Cities of London and Westminster, the Borough of Southwark, and Parts Adjoining - see 1791 above.

1801 Pre this date Matthew Concanen and Aaron Morgan wrote the 'The history and antiquities of the parish of St. Saviour's, Southwark'. This discusses the 'Charity School for Boys', and the author's claim that 'diligent' investigations were conducted which revealed that the burial ground was never consecrated.

1819 The National Free School for Girls was built on the burial ground. [*Brickley et al 1999*]. For the location see bottom centre of Southwark Town map 1872-1876.

1820 Brabazon (1883) claimed the second lease for burials started in 1820 but see 1862.

1833 William Taylor produced 'The Annals of St. Mary Overy'. This states that the site was known as the Single Woman's Burial Ground before the change to Cross Bones. It is also asserted that the land was not consecrated.

1839 Registrar General's first annual report about deaths and poor records of burials (inter alia).

1849 'The Daily News', reported on bodies retained in dead house for days on end. This was a building used for the purpose of burying and there may have been others, e.g. a chapel. Those buildings may have been converted for secular uses at later dates.

1849 *Cobbett v Grey (1850)* relied on in *Foster v Dodd (1867)* (see below).

1853 Last burials in this year and closed by Order in Council on October 31st 1853.

1857 Exhumation licences, *ultra vires* to issue for Cross Bones under S.25, Burial Act 1857 (see 1867 & 1880).

1862 At this time, "the ground was enfranchised by the wardens of the parish", and it may or may not have been correct to say, that at the same time in 1862, that the freehold of the land was then owned by the, "parish of St. Saviours, Borough" (Brabazon 1883). In view of events before and after 1862 (e.g. 1708 See of Winchester and 1886 Rectory Trustees) it appears that in 1862, the land would still have been owned by the church and then leased, to the modern day equivalent of the secular parish council or local government. When local people refer to the "Borough", they mean an address, e.g. "St. Saviour's (Church in the area known as the) Borough".

1862 Private burial ground not a parish burial ground, so S.18 Burial Act 1855 does not apply, (*R -v- St. John Westgate & Elswick Burial Board, (1862) 121 RR 1232-1234; 2 B&S 703-707*. See also: 1867 *Foster -v- Dodd*; 1880 *R -v- Jacobson*). Cross Bones may have started as a parish burial ground in which all local residents could be buried. Its legal status appears to have changed in 1892 to a private burial ground or private disused burial ground.

1867 Exhumation licences, *ultra vires* for Cross Bones site because of (*Foster -v- Dodd and Another (1867) LR 3 QB 67- 77 Ex. Ch*). See also 1880 *R -v- Jacobson*.

1880 Exhumation licences, *ultra vires* for Cross Bones site because of *R -v- Jacobson (1880) 14 CC 552-528* decided by Master of the Rolls. See 1862 *R-v-St John*; 1867 *Foster -v-Dodd*.

1882 The wardens of the parish of St. Saviour's wanted to sell the land as a builder's yard. (*Tindall 2006:114-115*)

1883 Brabazon claimed in The Times prima facie evidence that the land is consecrated.

1884 Disused Burial Grounds Act came into force.

1885 St. Saviour's Rectory Trustees sold burial ground to Messrs. Oyler as building land.

1886 "Unlawful to sell as building land", sale made null and void and Trustees forced to pay costs. "The vendors cannot invite purchasers to buy as building land that which they know cannot be used for that purpose", (*Re St. Saviour's Rectory Trustees & Oyler (1886) 31 Ch. D 412; 55 L J Ch. 269*).

1886 Morning Post reports on a vestry meeting agreeing that a wall built on burial ground must be taken down (but see 1900 *Vicar –v- Parishioners*).

1892 Meath letter in The Times inviting millionaires to purchase land for the public good.

1892 The Standard reports that the District Railway Company purchased the burial ground at auction.

1892 The Times report on showmen arrested for operating a fairground on Cross Bones and bound over to keep the peace.

1893 Metropolitan Public Gardens Association issued a statement suggesting the land owner wanted to sell the land for £6000 and that the association would buy it if funds became available.

1898 Home Secretary refused to sanction the removal of human remains and pronounced that the Cross Bones Burial Ground could not be used as a building site.

1900 It was decided in *St. Botolph Aldersgate Without (Vicar) v. Parishioners (1900) P69* that building a wall was lawful providing it enhanced or protected a disused burial ground.

1928/29 Buildings of unknown type and positions erected.

1929 Newspaper appeal by Mr Magenis, possibly in the 'South London Press', to save Cross Bones, which may have continued being used as a fairground and open space. (See 1892)

1933 London Passenger Transport Act does not give powers to erect buildings in disused burial grounds.

1950 Town and Country (Churches, Places of Religious Worship and Burial Grounds) Regulations can be relied on if burial ground acquired by compulsory purchase order (for method of acquisition see 1892 District Railway Company).

1960's My father worked in 'Spicers Carpentry' which was situated on the Cross Bones land.

1961 *Re St. Peter the Great, Chichester (1961) 1WLR 907* determined that an electricity sub-station was not held to be a building.

1981 Disused Burial Grounds (Amendment) Act came into force which is to be read together with the Disused Burial Grounds Act 1884 which does not allow secular buildings.

1990 Environmental Protection Act outlines authority for 'statutory undertaker' which is authorised by an enactment to carry out railways, light railway, tramway or road transport undertakings. This may explain how the sub-station was built for extension to the Jubilee Line.

1990 London Regional Transport (LRT) acquired the land from City Gates Estates Limited PLC (CGE). I cannot discover when CGE acquired the land or why. The property deeds might reveal the dates on which various owners acquired the land).

1991/92 Demolition of three industrial buildings on the Cross Bones Burial Ground, [*pers. com. Shirley Xavier July 13th 2011*]

1992 Home Office issued exhumation licence but see 1857, 1862, 1867 and 1880.

1995 Town and Country Planning (General Permitted Development) Order. Order allows for Statutory Undertakers to build in a disused burial ground.

1995 Home Office issued exhumation licence but see 1857, 1862, 1867 and 1880.

1996 John Constable first takes an interest in Cross Bones.

1997/98 Estimated time London Underground Limited erected sub-station on Cross Bones to serve Jubilee Line (see 1961).

1999 Brickley & Miles with Stainer produced 'The Cross Bones Burial Ground, Redcross Way, Southwark, London'.

2003 Transport for London obtained through an appeal, planning permission to build but see 1855, 1856, 1857, 1862, 1867 and 1880 (planning permissions cannot be used as long as statutory prohibitions prevent the construction of the intended secular buildings).

2005 Department of Constitutional Affairs issued exhumation licence, but see 1857, 1862, 1867 and 1880.

2005 London Borough of Southwark archaeology report.

2006 Home Secretary John Reid says the Home Office is not fit for purpose.

2006 Gillian Tindall, 'The House by The Thames and the people who lived there'. "The burial ground made an impact on "Southwark consciousness (which) is still current today", showing its value in terms of history, culture, sense of place and social identity.

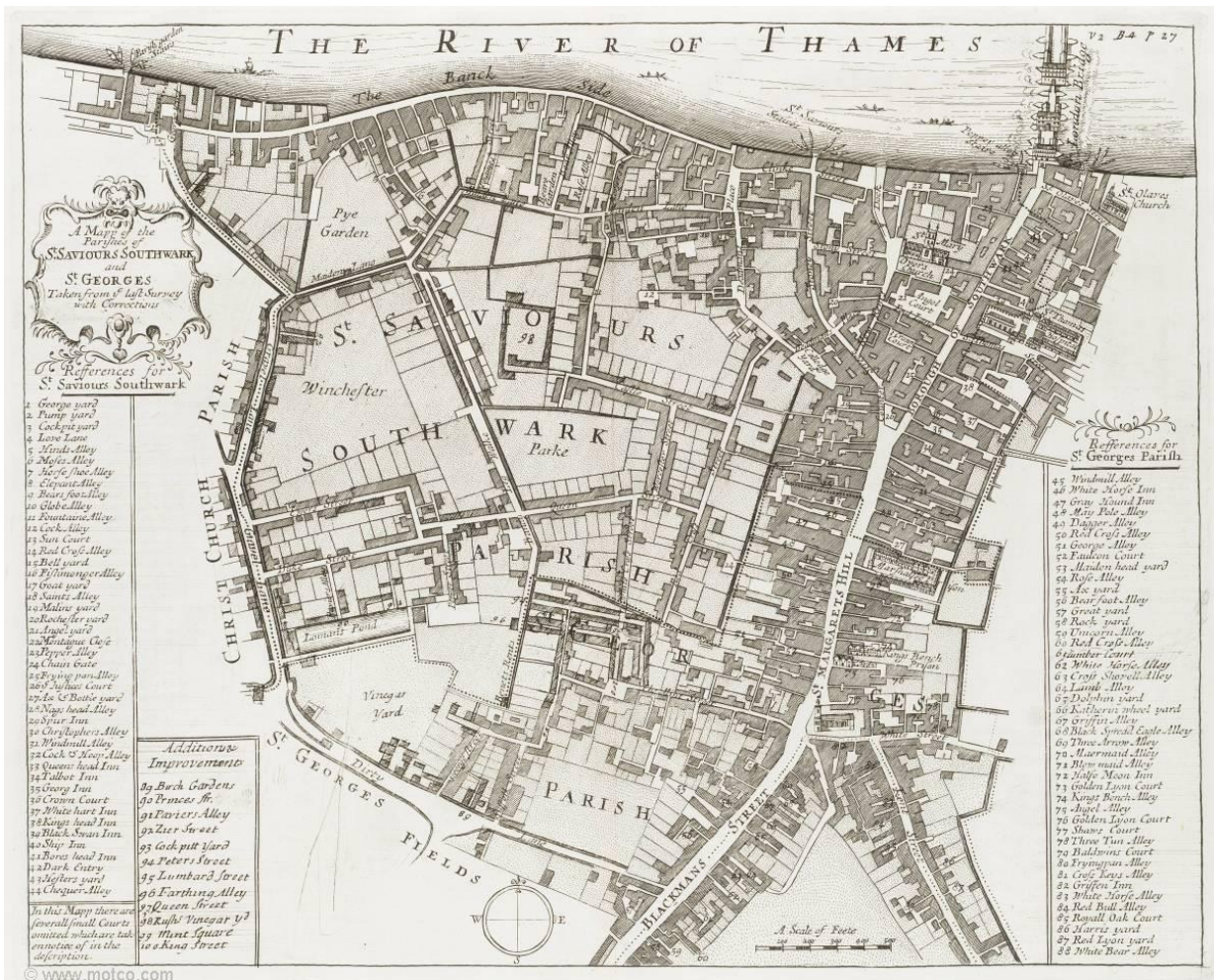
2011 Martha Carlin asserted that a burial ground never existed before John Rocque produced his map in 1746, but this conclusion is almost certainly wrong.

2011 May, Paul Ansell of the Ministry of Justice stated: (a) "planning permission to build in disused burials grounds can only be used without the need for other types of consent, if the land has been acquired through a Compulsory Purchase Order", (b) "The provisions of the DBGAA 1981 comes into play when an extant former burial ground is to be built on. If the site has been put to other use, then section 25 of the 1857 Act would apply" but that would

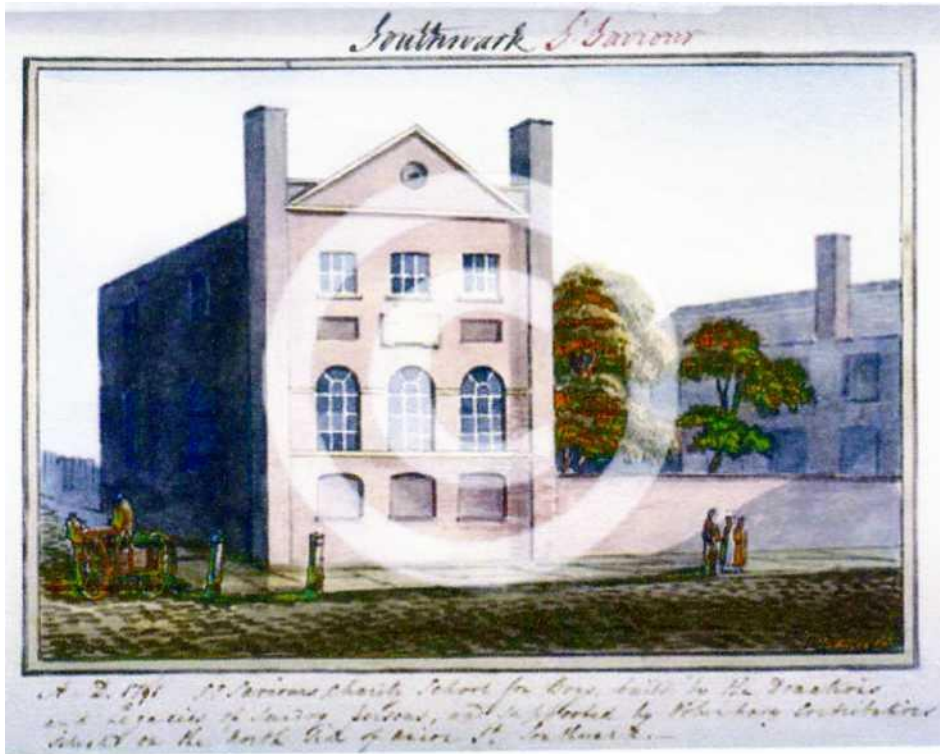
appear unlawful or *ultra vires* and the courts might have to step in, to stop the MoJ continuing with such unlawful practices over exhumation licences (see above 1862 *R -v- St. John Westgate & Elswick Burial Board*; 1867 *Foster -v- Dodd*; 1880 *R -v- Jacobson*) and (c) “the land owner likely relied on the Town and Country (Churches, Places of Religious Worship and Burial Grounds) Regulations 1950 when building the sub-station on the land in the 1990’s”.

2011 November Martyna Plewniak for Southwark Council confirms no planning records available for 1928/29.

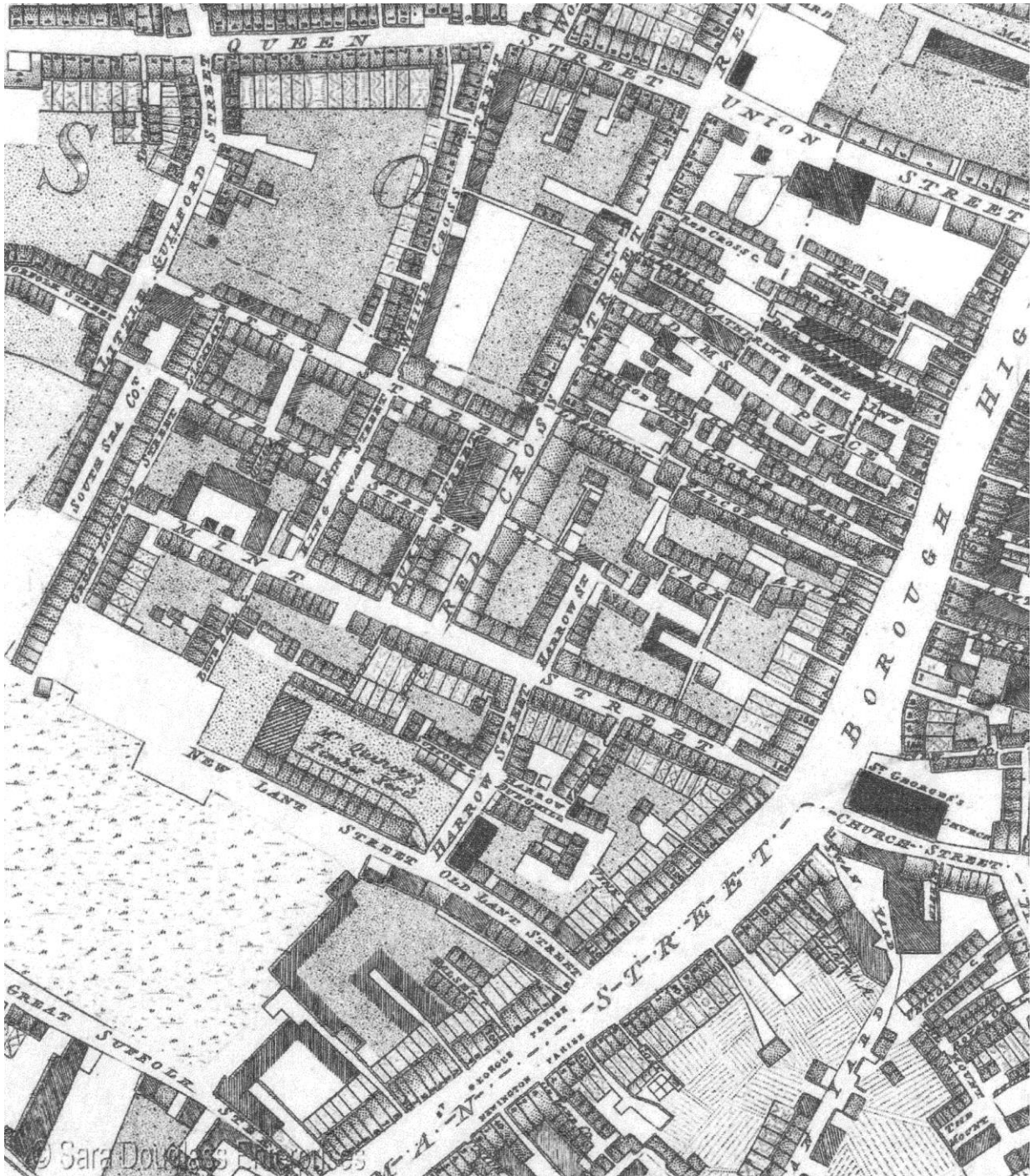
2011 The Prime Minister called for a revival of morality and that must include an end to unlawful decisions, which have destroyed and violated our burial places. Even graves created within living memory have been unlawfully destroyed, by unlawful and invalid exhumation licences. When young people vandalise our burial places, they never get close to the level of destruction perpetrated by politicians and civil servants. It is within their power to end the double standards, which are doomed to encourage more immorality and more vandalism. "Don't do as we do - do as we tell you" is a formula for immorality, depravity, mistrust and social division.



John Strype "A new Plan of the CITY of London, Westminster and Southwark" 1720



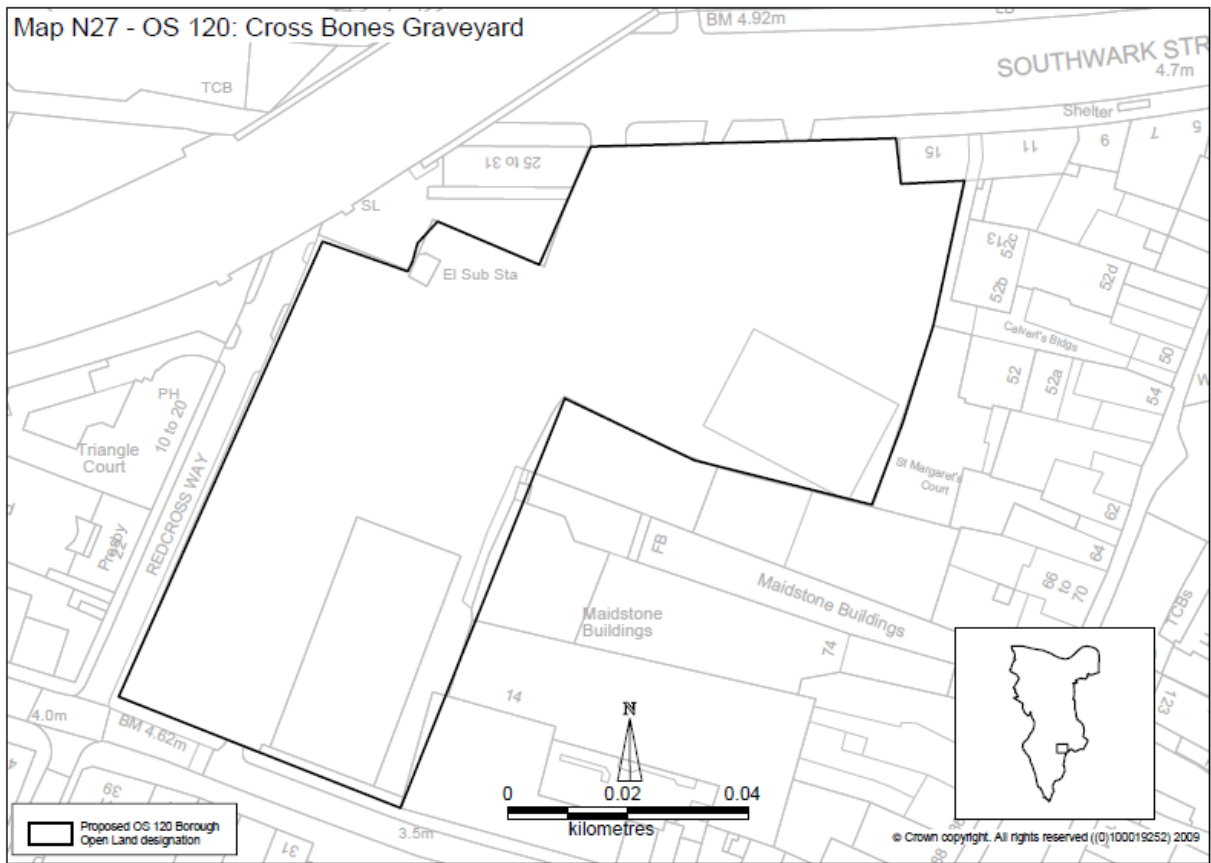
St. Saviour's Charity School for Boys 1791 (Ref. P5409739. Heritage Images.com. Web. (2011))



Richard Horwood's Plan of the Cities of London and Westminister, the Borough of Southwark, and Parts Adjoining. 1792 - 1799, [Old London Maps. Web. February 18 2012]



Southwark Town Ordnance Survey map 1872 - 1876



Map N27 – OS 120: Cross Bones Graveyard, October 2009

Appendix 2

UNLAWFUL DESTRUCTION OF BANK TOP BURIAL GROUND A FORMER METHODIST BURIAL GROUND & CHAPEL IN HALIFAX

Large files on this site are held by John Bradfield, who is grateful to the Methodists in Halifax for giving access to their records.

This Appendix can only illustrate a small fraction of that record.

This appendix had included names and dates from correspondence and other documents but because of uncertainty about questions on (a) the confidentiality of private papers and (b) data protection law, most names and dates have been removed. However, events are essentially presented in date order.

RELEVANT LAW

Details of Bank Top are provided as a case study for what can go wrong, if legal action is not taken within the prescribed time scales. The Alice Barker Trust was asked to help too late for the police to prosecute over Bank Top. The Trust was not alerted when houses started being built on the land, so could not start a judicial review within the prescribed three month period, e.g. to compel the enforcement authority to intervene. The lesson is that a close eye must be kept on Cross Bones, to precipitate the matter into the courts, within the prescribed time scales. Questions do need to be asked as to whether the houses must be demolished at Bank Top. To give the new house owners peace of mind, the MP for Halifax could be asked to raise questions in Parliament, to get definitive answers. Whichever local authority has the duty to enforce the controls within the Disused Burial Grounds Acts, could be asked whether it will prosecute but if not, to state whether the houses could possibly have been built lawfully. Without certainty one way or the other, future sales of those houses could prove difficult if not impossible, especially if the situation must be recorded in the Land Charges register.

Two of the four most relevant court cases, are about another Methodist or Nonconformist burial ground. The four cases below, set out the most basic legal principles, which should have been applied by the Home Office and solicitors for the Methodists and builder at Bank Top burial ground:-

1856, *Moreland -v- Richardson*, where the Master of the Rolls made a decision to safeguard the burial rights which relatives had purchased and the rights not to have the grave-stones moved, damaged or destroyed in a Methodist or Nonconformist burial ground. This was the same burial ground as that in the 1880 case below;

1867, *Foster -v- Dodd*, where it was decided that the Burial Acts do not apply, to burial grounds like those of Bank Top. That means that exhumation licences have no relevance so cannot be lawfully issued. If they are issued, they are unlawful and invalid;

1880, *R -v- Jacobson*, where the Master of the Rolls, 24 years after the above 1856 decision about the same site, found builder Nathan Wolf Jacobson guilty, of the common law offence of exhuming. The Master of the Rolls was aware of the 1856 decision and effectively reinforced that taken in 1867, i.e. the Burial Acts do not apply to such places therefore an exhumation licence could not be issued. That meant a prosecution for not having a licence made no sense. The only option was to prosecute for the common law offence of exhuming. This case proves that even when done with care, such exhumations are illegal;

1901, *R -v- Kenyon*, where Edwin Kenyon and Joseph Taylor (builder) were imprisoned, for exhuming and building in a disused burial ground, which had been a Roman Catholic place of burial. There was no mention of an exhumation licence, because, obviously, one could not have been issued. They had been given planning permission but were imprisoned for the

common law offence of exhuming. When passing sentence, the judge referred to the "aggravated nature of the offence". A total of four individuals were each bound over in recognisances of what would now be the total equivalent of £114,120 to pull down the buildings and restore the ground in six months, [*National Archives. Currency Converter. Web. Feb 2012*].

The Disused Burial Grounds Acts 1884 & 1981, applied to Bank Top before it was destroyed. Those Acts still apply, in that nothing could lawfully be built on the site, unless each and every one of the following were satisfied: (a) first and foremost, legal notices had been issued under those Acts, (b) secondly, if the proposed building was lawful, exhumations had to take place under the 1981 Act and no other type of exhumation law and (c) whatever building was intended, had to fall within a permitted exception. As those Acts were breached, the houses since built are unlawful and may have to be demolished.

SUMMARY

Between something like 1853 and 1973, Bank Top had been a Methodist burial ground with a chapel. At some stage a second burial ground was added on the opposite side of the main road.

Everything was sold to a builder and fits the circumstances in *R -v- Jacobson 1880*, i.e. Methodist or Nonconformist burial ground with a chapel bought by a builder. At an earlier date, Jacobson had been prosecuted and found guilty for failing to have an exhumation licence. However, that judgement was, in effect, overturned in 1880, when the Master of the Rolls decided the Burial Acts did not apply to the land. That much was already clear from *Foster -v- Dodd 1867*. Both the 1867 and 1880 judgements made clear, that the Home Office could not issue a lawful and valid exhumation licence to Jacobson. He carried on exhuming for building purposes and it was realised he could only be prosecuted for a common law offence. That is what happened and he was found guilty, even though it was accepted that he had done the work with care.

Despite this glaringly obvious legal position, the Home Office issued what must have been unlawful and invalid exhumation licences, to destroy Bank Top burial ground. About ten years after the destruction, a civil servant at the Home Office admitted that staff knew nothing of the Jacobson case!

The Alice Barker Trust warned the Home Office and Calderdale Council, that houses could not lawfully be built on the land, unless exhumations were conducted according to the requirements of the Disused Burial Grounds Amendment Act 1981. As those requirements were not complied with, the houses which have since been built may have to be demolished.

Had the Home Office forced the builder to comply with the Disused Burial Grounds Amendment Act, local residents could have prevented the destruction and continued with burials to the present day. The records of the Methodist Church prove that residents had purchased burial rights. The solicitors for the Methodists and the builder were aware of this fact but struggled to make sense of the full implications.

About two years after the destruction of one of the two burial grounds, the builder wrote to a Mrs J.N., stating that she could continue with burials in the remaining burial ground. It was made clear that there was no intention of destroying that burial ground.

Like it or not, the builder was bound to accept, that relatives had purchased "burial rights" and those rights could not be ended, without agreement with each and every "owner" of each grave. The word "owner" is taken from the land burial register, so there had always been proof, that relatives owned "burial rights", access rights and rights to have gravestones undisturbed and undamaged. That all meant that the builder could not lawfully destroy either

of the two burial grounds even, if it had been possible to obtain a lawful and valid licence. To reiterate, the licences which had been issued could not have been lawful or valid, because of the legal precedents cited in this report. Also, licences are not permissions to exhume and are not permissions to move, remove, damage or destroy gravestones.

Even if the exhumation licences had been lawful and valid, they would not have provided a lawful way in which to: (a) remove from relatives the burial rights which they or their predecessors had purchased; (b) remove their rights of access over the land; (c) remove their right to leave gravestones in situ; (d) remove, damage or destroy the gravestones which had been erected. That much was crystal clear from *Moreland -v- Richardson (1856)* which was also about the same burial ground as *R -v- Jacobson*, (see Appendix 3).

As the Home Office proved intransigent and secretive, (in a way which would no longer be possible thanks to the Freedom of Information Act), local resident Frank Mitchell, attempted to obtain compensation for his family gravestone, using the small claims procedure in his County Court. However, the judge declined to accept the lengthy report on burial and related law. He said he would need an expensive hearing to read such reports, even if at the end of the day, the law was as simple as had been claimed. Frank Mitchell could not afford an expensive court case. His application for Legal Aid had been rejected. The judge expressed concern about an injustice for the builder. No similar concern was expressed for hundreds of friends and families who had watched or heard of, "bodies being dragged from the earth by bulldozers", [*Yorkshire Post, 23 September 1994*].

The Alice Barker Trust is sure the builder should have been prosecuted for common law offences over the exhumations - as the licence was unlawful and invalid - and damage to and destruction of the gravestones.

Will anyone be held to account? Will the Ministry of Justice (MoJ), which now has responsibility for such matters continue with the unlawful practices consolidated and perpetuated by the Home Office? The Home Office did not act as a "public service" in that it did not help the public connected with the graves before or after destruction. It only helped the company posing as the destroyer of graves. Can Parliament be sure the MoJ will act as a public service in ways which are just?

Details on the website of the MoJ, prove, that its staff still do not understand the basics of law and are perpetuating unlawful decisions. For example, archaeologists are being placed at risk of being prosecuted over common law offences when exhuming, because the licences they are being given in many circumstances, are unlawful and invalid.

Perhaps it is time for the police and Crown Prosecution Service to admit, that they see no problem with some types of criminal activities?

RECORDS OF THE METHODIST CHURCH- START OF THE SAGA

The records of the Methodist Church clearly prove, that the Home Office advised that it would issue a licence, if the graves were more than 100 years old, failing to state as mentioned above, that even when a valid licence has been issued, it cannot be used by a landowner: (1) if they do not have the consent of the owner of the burial rights in the grave; (2) to end burial rights in graves of any age; (3) to remove or destroy gravestones; (4) to end access rights over the land. For the Home Office, these were such basic points of law, that not to have mentioned and stressed them at the very outset, can be nothing other than gross incompetence. Much later, Home Secretary John Reed said he found the Home Office, "unfit for purpose".

In one of the first letters from the Home Office, the builder's solicitors were advised, to publish the first if not the other press notices shown below. There seems no conclusion other than the Home Office being culpable, as the solicitors for both the Methodists and builder, were relying on the Home Office for sound information on relevant law. That is beyond any degree of doubt. Burial rights had been sold, the land burial register was proof of "owners" of graves and the solicitors for both the Methodists and the builder should have realised the true implications, i.e. the two burial grounds had to remain active, for as long as burial rights existed. Even now, anyone could ask for a burial to take place, if they own burial rights.

More than 20 years before one of the two burial grounds was destroyed, the builder was negotiating over the sale of the properties. The Methodists were saying, in writing, that the graves and gravestones would have to be protected. That was unacceptable to the builder, who made clear that he wanted to destroy the graves. The Methodists later agreed, on the strict understanding that there would be full communication with relatives or grave owners.

At this time, the Home Office advised on how to destroy the graves but the advice was contrary to sound law, i.e. unlawful and invalid. The Home Office should have said that an exhumation licence could not be issued in view of the case law mentioned at the start of this Appendix. It should also have said that the land must either be an active burial ground or a disused burial ground. If the latter, the Home Office should have said that building or "development" to cite from the press notice, would be illegal. That would have been so, because of the Disused Burial Grounds Act 1884, prevented anything other than the extension of a building used as a place of worship. The same law also protects disused burial grounds as public open spaces. Not a square inch could be built on in such a public open space and as mentioned, the case law cited at the start of this Appendix, prevented the Home Office from being able to issue an exhumation licence.

In short, the Home Office recommended a procedure which had no sound basis in law, for destroying one of the two burial grounds. That procedure was invalid and unlawful. Despite the true legal position, the Home Office advised that it would issue an exhumation licence, if

the graves were 100 or more years old but if not, it would issue a licence if details of the proposed destruction were given in public notices. Again, this was contrary to sound law, unlawful and invalid.

Despite the above communications, the Methodists saw a need to protect grave "owners", particularly those who had "recently" purchased burial rights. In law, what mattered was not whether those rights had "recently" been purchased but whether what had been purchased at any time in the past was still owned. On the one hand they referred to having to protect them and on the other, gave the impression that it was more of a moral duty, than one of clear law. In view of the large number of Methodist burial grounds which once existed, it is surprising that the central office of the Methodists Church, did not understand the law.

The solicitors for the builder did point out the contradiction, between having to protect those who had purchased burial rights and the assumption that the burial ground or grounds could be closed. It was also stated that further burials would be unacceptable in the one burial ground which was eventually destroyed. That also was a legal contradiction.

Curiously, the same solicitors acknowledged that the Home Office had no powers over decisions about the gravestones. They asked the Methodists for advice on what to do with those gravestones. That raises the question of why no solicitors advised on the case law, stated at the start of this Appendix.

Almost 15 years before one of the two burial grounds was destroyed, a question arose about Mrs L.J. who had died. Again the question of burial rights was discussed. Solicitors for the builder asked the Methodists, if they had details about the full extent of purchased rights. They added that it was unlikely that such rights could be ignored. Despite such questions, the destruction eventually went ahead, without certainty about relevant law.

It is most unlikely, that the Methodists had the power to stop further burials. They had sold burial rights and could not end those rights, without the agreement of all concerned. The solicitors were aware that when rights exist, they cannot be disregarded. However, as mentioned below, a year or two after the destruction took place, Frank Mitchell's attempt to use the County Court, to claim compensation for his destroyed gravestone, was obstructed by the solicitors for the builder. More than 20 years after negotiations started over destroying the land, the solicitors then acting for the builder, told the County Court that they did not know what burial laws and legal principles applied to the land!

Early in 1979, the Methodists wrote letters stating that all "books and documents" relating to burials, had been passed to the solicitors for the builder. The Methodists mentioned registers (plural) with details of the graves, a plan with the layout of the graves and a book of receipts. Mention was made of a receipt for a specific sum, for the purchased right to bury 4 bodies. The receipts plus the mention of "owner" in at least one burial register, was sufficient proof in

the early 1970s, that relatives could not be prevented from continuing to use graves or leaving gravestones where they were.

What the Methodists should have known and may have said, is that any alteration to or damage or destruction of a land burial register is a criminal matter, which carries a maximum penalty of life imprisonment. Those registers must be available for public inspection at all reasonable times, so local people could even now, ask to see those registers and if obstructed, refer the matter to the police. The landowner must by law have such a register. Apart from the possibility of being prosecuted for failing to have a burial register, the landowner would have to create a new one. For that to happen, there would need to be accurate details about each and every grave and the "owner" of each grave.

A few months later, the central office of the Methodist Church, when referring to objections to the proposed destruction, acknowledged that burial rights had been purchased by relatives and thought it regrettable that the burial ground had been sold. More to the point, were the legal implications of the sale, i.e. the solicitors for both the Methodists and builder should have understood the true legal position.

It may be, that whatever company built the houses which are now on the site, could be prosecuted, forced to demolish those houses and compensate the current owners, (see *R -v- Kenyon* above and the case in Appendix 1, where a welfare centre had to be demolished, because, the enforcement authority, London County Council, took legal action against another local authority, for building in a disused burial ground).

ILLEGITIMATE PRESS NOTICES

The notices below gave the false impression that the burial ground could be lawfully destroyed, if the Home Office agreed to issue an exhumation licence.

**NOTICE OF INTENDED REMOVAL OF
HUMAN REMAINS AND MONUMENTS OR TOMBSTONES
FROM THE BURIAL GROUND AT BANK TOP METHODIST CHURCH, SOUTHOWRAM, HALIFAX.**

WHEREAS FOR THE PURPOSE OF DEVELOPMENT it is necessary to remove certain human remains now interred in the Bank Top Methodist Church Burial Ground, adjoining the Church on the southwest side of Bank Top, Southowram and certain monuments or tombstones erected thereon.

NOTICE is hereby given that (name of building company) intend two months after the date of the first publication of this notice, to apply to the Secretary of State for the Home Department, Whitehall, London, for their licence for the removal of the remains and for their cremation at Park Wood Crematorium Elland West Yorkshire.

The names, so far as they can be ascertained, of the persons whose remains it is proposed to remove are now deposited at the offices of (name of solicitors acting for the building company) and may be inspected free of charge between the hours of 9.00am and 5.00pm on Monday to Friday of any week before the 31st January 1975.

At any time before 31st January 1975 any person being an heir, executor, administrator or relative of any deceased person whose remains it is proposed to remove MAY GIVE NOTICE IN WRITING to (name of solicitors acting for the building company) OF HIS INTENTION TO UNDERTAKE THE REMOVAL OF SUCH REMAINS and thereupon he will be at liberty, provided he applies for the Secretary of State's licence within one week after giving such notice and such licence is granted, to cause such remains to be removed and reinterred in any churchyard, burial ground or cemetery in which burials may legally take place or, if desired, cremated; the expense of such removal and interment or cremation (not exceeding in respect of remains removed from any one grave the sum of £50 which sum will be apportioned if necessary equally according to the number of remains in the grave) being defrayed by the said (building company).

If within the aforesaid period of two months no such notice as aforesaid shall have been given to them in respect of the remains in any grave, or if after such notice has been given the persons giving the same shall fail to remove the remains, the said (building company) WILL, provided the Secretary of State's licence as aforesaid is obtained, CAUSE ALL THE SAID HUMAN REMAINS TO BE REMOVED and to be cremated.

ALL MONUMENTS AND TOMBSTONES WHICH IT IS PROPOSED TO REMOVE will at the expense of the said (building company) be removed and DESTROYED OR OTHERWISE DEALT WITH IN SUCH MANNER AS THE SECRETARY OF STATE MAY APPROVE.

DATED this 14th day of November 1974.
(Solicitors for the building company)

Thoughts on the above public notice:

If my understanding is correct, others might claim that the above 1974 press notice was misleading if not fraudulent and the Home Office should have said so. Some might assert that the "intention" to damage or destroy private property, (gravestones), probably amounted to a notice of an intention to steal and/or cause criminal damage (see Appendix 3). If that is true, the Home Office should have alerted the police and warned the builder that a licence could not be issued for "development". The "notice" reads like a legal document, with jargon words such as, whereas, hereby, thereon, thereupon, aforesaid and very specific time limits in which to make decisions. It does not give any precise details of any law, for readers to check whether or not the proposals were fully lawful and beyond challenge.

No explicit aspect of law was being relied upon, which would have legitimised the "development" project. In the circumstances at the time, the notice had no basis in any legal procedure for removing or destroying graves and gravestones, or ending the burial rights which had been purchased, when the land was owned by the Methodist Church. The Home Secretary had no powers to decide the fate of the graves and no powers to issue an exhumation licence, either to the builder or any owner of any burial rights. Readers were not informed that, (a) they may own rights which could not be ended, other than with their prior consents or, (b) that their gravestones could not be moved, defaced or destroyed, without their prior consents. They were given the impression that the destruction was inevitable and that their only choice, was to decide what to do with skeletal remains and gravestones. Because burial rights had been purchased and the burial ground had never been closed by Order in Council, burials could have continued at any time.

Indeed, had an Order in Council been issued to close the burial ground, burials could have continued in existing graves, with the consent of the Secretary of State. Burials would have continued, had the public notice not misled families on relevant law.

In view of the failure of the Home Office, to comply with the case law in *Moreland -v- Richardson (1856)*, *Foster -v- Dodd (1867)* and *R -v- Jacobson (1880)*, the question arises, as to why staff did not react to the significance of the emphasised words, "FOR THE PURPOSE OF DEVELOPMENT"? Why didn't Home Office staff invoke the Disused Burial Grounds Act 1884, to protect the area as public open space? The Amendment Act came later. The Home Office should have informed relatives, that they could continue with burials, making it an active and not a disused burial ground.

Another question which needs to be asked is whether the building company and its solicitors realised that the Disused Burial Grounds Act was the appropriate legislation and that "development" would breach the law. If so, why wasn't that aspect of law followed with the 'second' notice?

Published in the Halifax Evening Courier 06 & 13 May 1988

**NOTICE OF INTENDED APPLICATION TO THE HOME SECRETARY FOR A LICENCE
FOR THE REMOVAL OF HUMAN REMAINS
FROM THE BURIAL GROUND AT THE FORMER BANK TOP METHODIST CHURCH,
SOUTHWRAM, HALIFAX, WEST YORKSHIRE**

1. For the purpose of creating a car park, it is necessary to remove certain human remains now interred in the above burial ground.
2. NOTICE is hereby given that (name of building company) intend two months after the date of the first publication of this Notice to apply to the Secretary of State for the Home

Department, 50 Queen Annes Gate, London, SW1H 9AT, for their licence for the removal of the remains and for their reinterment in Stoney Royd Cemetery, Halifax, West Yorkshire or cremation, of the persons whose names, so far as they can be ascertained are contained in a list now deposited at the offices of (the solicitors for the building company) and may be inspected free of charge between the hours of 9.00am and 4.30pm on Monday to Friday of any week before the 15th July 1988.

3. A plan of the present place of burial showing the positions of the graves and a statement containing details thereof, are also now deposited at such offices and may be similarly inspected.

4. Any person who is an heir, executor, administrator or relative of any deceased person whose remains it is proposed to remove MAY GIVE WRITTEN NOTICE before the 15th July 1988 OF HIS INTENTION TO UNDERTAKE THE REMOVAL OF SUCH REMAINS and thereupon he will be at liberty, provided he applies for the Secretary of State's licence within one week after giving such notice and such licence is granted, to cause such remains to be removed and reinterred in any churchyard, burial ground or cemetery in which burials may legally take place or, if desired, cremated. (Name of building company) will defray the expense of such removal and interment or cremation (not exceeding in respect of remains removed from any one grave the sum of £100 which sum will be apportioned if necessary equally according to the number of remains in the grave).

5. If no such notice has been given within the prescribed period, or if after such notice has been given, the persons giving notice have not removed the remains (the building company) shall fail to remove the remains, the said (building company), provided the Secretary of State's licence is obtained, CAUSE ALL THE HUMAN REMAINS TO BE REMOVED and reinterred in the Stoney Royd Cemetery, Halifax, West Yorkshire or cremated.

DATED this 6th day of May 1988.

Signed on behalf of (the building company)

Thoughts on the above public notice:

The essential differences between the first and this the second notice is that the first was for "development" and referred to gravestones and the second only refers to a licence for a "car park", with no mention of gravestones. Why were gravestones not mentioned in this press notice? The Home Office should have invoked the Disused Burial Grounds Acts, to protect the land as public open space. By 1988, the Disused Burial Grounds Amendment Act 1981 was in force. If the DBGs Acts did not prevent complete transformation, from public open space, to car park or anything else, those Acts would be completely and utterly pointless, serve no purpose whatsoever and have to be scrapped. Case law makes clear, that any form of construction is illegal, on any square inch of a disused burial ground, unless it either protects

or enhances the place as public open space or falls within an exception - essentially a place of worship. Neither the first nor the second notice could have altered property rights. They seem tantamount to saying, "If we get planning permission to build something else on your land and you don't knock down your own house and move away, we will be at liberty to knock it down, so you had better co-operate with us". A planning permission cannot be used without the consent of the landowner. Equally, an exhumation licence cannot be used without the consent of the person who owns the burial rights in any grave. An exhumation licence has no relevance to any gravestones, so cannot give any consents to do anything with any gravestones. It is worth stressing again, that a valid exhumation licence could not be issued for this land, because the set of Burial Acts has no relevance, as proven in the 1867 and 1880 courts cases mentioned at the start of this Appendix.

Published in the Halifax Evening Courier 06 & 13 May 1988 and March 1989

WHEREAS on November 1st 1988 (name of building company) of (address) obtained from the Home Office a licence under S.25 of the Burial Act 1857 for the removal of human remains to be reinterred at Stoney Royd Cemetery, Halifax. AND WHEREAS it is now proposed that the work should be carried out in accordance with the terms and conditions of the said licence, NOTICE IS HEREBY GIVEN that any person or persons having any claim to any headstones, monuments or memorial should communicate with (name of solicitors for the building company) NO LATER than (*presumably a May or June date in 1988 and following the February 1989 publication*) March 10th 1989.

Thoughts on the above public notice:

The impression is given that the builder obtained permission through this licence, to exhume and remove or destroy gravestones. A licence is not a permission to exhume. It is only a protection against prosecution under S.25 Burial Act 1857. If the licence really was unlawful and invalid, it could not have been a protection against a common law prosecution for one or more exhumations. The licence does state that it "does not in any way alter civil rights". It could be argued that the Home Office had a responsibility to be far more explicit. Had the licence stated that it could only be used, with the explicit consent of each and every person who owned the burial rights in each and every grave, the burial ground would never have been destroyed. Had it stated that it could not be used to move, remove, damage, deface or destroy gravestones, the burial ground would not have been destroyed. Had the Home Office informed objectors of such legal points at the outset, the burial ground would not have been destroyed. In that sense, the Home Office might be held complicit and legally culpable for the subsequent destruction. In response to the Notice the Halifax Evening Courier produced a report.

HALIFAX EVENING COURIER. 'GRAVEYARD TO BE MOVED'.

02 March 1989.

The idea in the title, that a burial ground can be moved, is bizarre to say the least. The article refers to moving human remains. The short article goes on to say that:

"...the former Bank Top Methodist Chapel ... is owned by (a named builder) and will be flattened to provide a car park for (their) offices on Trooper Lane. The chapel ... closed in 1972 and (the builder) bought the burial ground soon after but have only recently received planning permission to build a car park and a Home Office licence to remove the (human) remains ... Anyone who has a claim to any gravestones or memorials should contact (the builder's solicitors) before March 10".

Thoughts on report:

This reads like a *fait accompli* and gives a false impression of the law. Exhumation licences cannot end burial rights, access rights to a burial place or rights to leave gravestones in situ. This suggests that the solicitors might have a claim lodged against them, unless the owners of those rights have run out of time.

CORRESPONDENCE & NEWS AFTER THE DESTRUCTION IN LATE 1993

Note, the Alice Barker Trust was not contacted until about 9 months after the destruction.

HOME OFFICE LETTER TO ALICE MAHON MP..

14 September 1994

This letter said that staff in the Department of the Environment, (which was then responsible for advising local authorities on the management of public cemeteries), had advised that gravestones are private property and based on case law, could not be legally moved, without the prior consent of the owners. It added that interference with gravestones might incur civil and/or criminal actions, the latter under the Criminal Damage Act 1971. It was added that this information was given to anyone planning to destroy a burial ground.

Thoughts on law:

A question arises, as to why the Home Office did not refer the criminal damage or destruction question to the police? It also begs the question, of how on earth the Home Office thought 20 years earlier, the consent of each and every owner of every gravestone could be obtained. There is no legal procedure to forcibly remove ownership of gravestones under the exhumation licensing procedure. The public notices, issued on the advice of the Home Office, were as absurd as stating that those who have paid to park cars, can have those cars removed and destroyed by the owner of the car park. Families had purchased rights to use defined graves, rights of access to those graves and rights to leave gravestones in situ. Those rights had to be respected by all successive owners of the land. Arbitrary decisions to end those rights for financial gain have no basis in the law on exhumation licences. See Appendix 3.

HALIFAX EVENING COURIER. FRANK MITCHELL'S LETTER.

21 September 1994. 'The bones of our ancestors - dug up and dumped on a human tip'

This revealed that Frank Mitchell had read a newspaper report about children playing with human bones and was appalled to discover that his family's grave had been destroyed. He said that:

"The graves were bought by the families - bought not rented. How can they be sold? He contacted the builder and was told the place, "would be flattened (and) covered in gravel". He was unable to discover what had happened to his relatives, wondering if they had been dumped in a pit on the other side of the road. "The gravestones that remain ... are thrown in a pile, all smashed. It is there to see. It rests with the community to sort out this human tip".

YORKSHIRE POST.

23 September 1994.

"Residents told of bodies being dragged from the earth by bulldozers ... Many bones were left in the ground and parents told councillors that children brought bones home".

BBC RADIO 4, 'WHO IS TO BLAME FOR THE HALIFAX CEMETERY SCANDAL?'

05 October 1994, 'You & Yours'.

A radio presenter asked listeners "Who is to blame for the Halifax Cemetery scandal"? Fred Holdsworth, who was taking part in the broadcast, told the presenter that he:

"...was shocked when I saw how the exhumation work was being carried out. They had two tractors, one had a large ... bucket on and the other with a small bucket that dug into the ground. They dug down (and) when they came to the coffins, they broke (them) open, scooped the bones out, transferred them into the shovel in the other tractor and then transferred them (to a pit) across the road. I stood and watched them put the bones in this pit and they just simply shovelled earth over the bones and covered them over in that method, which was atrocious".

Rebecca Sutcliffe, then aged 12 and living adjacent to the burial ground, told the BBC:

"... my friend (found) some bones ... so we went to the burial ground and we found loads more. We got a box (and) put about 28 (bones) in altogether and we found big pelvis bones, little finger bones and everything ... my friend pointed out some teeth, false teeth ..."

The radio presenter said the BBC had:

“...contacted (the builder) several times. They refused to speak with us (BBC reporters) ... Calderdale's Chief Officer declined to be interviewed but sent us the following statement... “it's not our responsibility to ensure the work is carried out with due care and attention to decency. The police as agents of the Home Office are responsible for that” ...West Yorkshire Police said they hadn't been involved in the case, because they hadn't received any complaints, and the Home Office wouldn't comment on the licence given to (builder). The pensioners are left feeling angry and frustrated...”.

A participant in the broadcast said:

"It brings back all the memories of when I stood at my parents' grave, when they were being buried in the 50s and if (builder) has parents, I would hope he wouldn't treat his parents' remains like he has treated my parents' remains ...".

HALIFAX EVENING COURIER, 'MORE FAMILY GRIEF IN GRAVE CONTROVERSY'.

07 October 1994.

This article included a photograph of Raymond Priestley standing on a carpet of smashed gravestones. The article reads as follows:

“Protest to the builders.

Two families say the graves of their loved ones have vanished following exhumations at Bank Top burial ground, Southowram. Mr. Raymond Priestly, 70, and Mr. Frank Mitchell, 76, both of Pellon, Halifax, say they have no idea of the whereabouts of the graves and say the building company involved, (builder), has given them no information. The exhumations, which took place last year, have been the centre of a massive controversy from relatives who claimed the exhumations had been carried out insensitively and that gravestones had been smashed. In May it was revealed in the Evening Courier that children were collecting bones which were coming to the surface.

Mr. Priestly, whose mother, father and sister were buried at the site, said:

“...he was first made aware of the proposed exhumations in 1989 and went to (builder) with details of the grave. I didn't hear anything else until I read about it in the Courier earlier this year. I hadn't been told that it had actually gone ahead. When I went back to (builder) to ask them where the remains of my family were, I was told they didn't know but were probably (in one of two places) and that the headstone had probably been broken, stolen or was round the back somewhere. I haven't a clue where they are. My wife and I have been very distressed by the whole thing”.

Mr. Mitchell, whose aunt and grandmother were buried (there) said:

“... he had been told by the company that it did not know where their graves were. If you buy a grave, it belongs to the family. I have looked everywhere and the headstone is missing”.

Spokesman for (builder) said:

"I am not prepared to comment. If people want any information, all they have to do is contact the company”.

Thoughts on law:

The gravestones were the property of families and they had purchased legal rights to maintain those in situ. The police should have realised that property had in effect been stolen, damaged and/or destroyed and prosecuted accordingly. Presumably that did not happen, because the Home Office allowed the false belief to prevail, that it had given permission to destroy those gravestones and the graves. A photograph with this newspaper article shows smashed gravestones. What happened at this and presumably other sites, gives the green light for teenage vandalism. At least that does not destroy graves, so at the very least, vandals do not destroy the ability to identify the positions of graves.

YORKSHIRE ON SUNDAY. 'OLD SOLDIER'S GRAVES BATTLE'.

13 November 1994. Freelance reporter, Tony Harcup.

This report was published on Remembrance Sunday with a photograph of Frank Mitchell:

"Old soldier Frank Mitchell has chosen Remembrance Day to launch a new battle to stop burial grounds from being bulldozed against relatives' wishes.

It's a year since the Home Office issued a licence allowing the graves of 76-year-old Mr. Mitchell's grandfather, grandmother and two aunts to be dug up and flattened to make way for a car park.

"This isn't what we fought for", said Mr. Mitchell on the eleventh day of the eleventh month, as he surveyed the remains of Bank Top burial ground on a hillside near Halifax.

"Before this I had no idea that a developer could come along and buy a burial ground and dispose of the remains", said Mr. Mitchell.

"Although my grandmother died when I was 12, it was her who gave me a love of flowers". *(Right up until the destruction, he had told others he left flowers on her grave and said, "Have a look at these grandma - you will like them")*.

I can't do that now because it's been taken away. It's ridiculous and the law should be changed. We can't do anything about our own but we can stop it being done somewhere else.

Now the former army driver, who was mentioned in wartime despatches for bravery (and his mother said she thought he had won the war single handed when his certificate arrived!) has teamed up with two fellow soldiers to fight for a change in the law.

The last of 1,200 burials in the former Methodist burial ground took place in 1969. In November 1993 local development company was given a Home Office licence to remove the human remains, "with due care and attention to decency", to create a car park on the land. Villagers and those who had relatives buried (there) claim the operation to move the bodies to a mass grave across the road, was carried out extremely insensitively.

Eyewitness Fred Holdsworth, 79, a former Japanese prisoner of war, whose grandfather and great-grandfather were buried at Bank Top, said:

"They had two tractors, one with a big bucket on and the other with a small bucket that dug into the ground. They broke the graves open with the bucket and scooped the bodies out, transferred them in the shovel in the other tractor and then transferred them (to a pit) across the road".

Halifax MP Alice Mahon took the matter up with the Home Office after children ... began taking home parts of human skeletons. A Home Office spokesman said the (matter) was being given careful consideration".

FRANK MITCHELL TO THE CHIEF SUPERINTENDENT OF POLICE.

16 December 1994

In this letter, Frank Mitchell made a "formal request for (a police) investigation". He focused on breaches of the conditions in the exhumation licence. It was not pointed out, that the licence must have been unlawful and invalid. He said:

" ... I do not know if the police have responsibility for taking legal action or, if you would pass your evidence to the Home Office, for staff there to decide if they should begin legal action (over breaches of the conditions in the exhumation licence). To assist your staff, I have also enclosed: (1) a copy of the licence; (2) an extract from a Radio 4 programme; (3) press items of the 21.09.94, 23.09.94, 07.10.94 and 13.11.94; (4) a summary of the press items with comments ...I am aware that you cannot investigate damage to the gravestones or loss of rights of access and burials, in that these are civil matters and outside the scope of the conditions in the licence ...".

Thoughts on law:

The police may have thought that the usual notions of theft and destruction of private property did not apply, because the destruction of property appeared to have been authorised by the Home Office. That would have been a false understanding of relevant law. The Home Office had a responsibility for involving the police and explaining to them, that ordinary law was still valid, i.e. it is highly likely that prosecutions could have taken place for theft, damage and destruction of private property. The police decided a prosecution in connection with breaches of an exhumation licence would be time-barred.

ALICE BARKER TRUST TO THE BUILDER.

22 December 1994

This letter was on behalf of Frank Mitchell. It asked for the legal references, to support a claim by the company. In, "a letter to the local council on the 09 March 1989" the company had claimed that it had, "complied with all the legal requirements for the removal of the (gravestones)". There is no record of a reply, so it appears that the builder did not attempt to provide any legal references.

ALICE BARKER TRUST TO THE BUILDER.

07 January 1995

This letter refers to perpetual rights of burial and "funerals cannot be prevented in either (of the two burial grounds)". The letter states that Frank Mitchell "would like his gravestones put back in their original locations". The builder declined to respond to further correspondence.

ALICE BARKER TRUST TO SOLICITORS FOR THE BUILDER.

11 January 1995 - no reply on file.

Neither the solicitors for the Methodists nor for the builder, "made absolutely clear, the full implications of perpetual burial rights. Detailed questions are now opening up about liabilities and retained rights ... "

HALIFAX EVENING COURIER. ALICE BARKER TRUST'S LETTER.

25 January 1995

"To make sure others do not find their loved ones have been ripped out of graves by JCBs and bulldozers", the charity called for local people to search, "Drawers, attics, suitcases (and) boxes" for any documents relating to the ownership of gravestones and burial rights.

There is every reason to believe that all gravestones continue to belong to existing relatives or inheritors of property. It may be possible to sue when gravestones have been damaged or even removed from their original (positions)...

Halifax made legal history in 1841 when the High Court decided the local jailer was acting illegally by refusing to release the body of Henry Foster. This is still the best evidence to prove that friends and relatives can take full responsibility after a death...

Halifax could make legal history again", if what happened over the Bank Top burial ground is thoroughly examined. "Frank Mitchell and (other War Veterans) thought their worst torments ended with the last war ...".

POLICE LETTER TO FRANK MITCHELL.

07 February 1995. West Yorkshire Police, Calder Valley Division, Sowerby Bridge Police Station, Station Road, HX6 3AB. Ref. FAW/PAT/GG/8. Letter from FAW., Superintendent:

"I refer to previous written correspondence and personal visits to your home on the subject of the work undertaken at the burial ground at Southowram. I have spoken with my Inspector (and) am in receipt of the returned papers from the Crown Prosecution Service. They indicate that proceedings under the Burial Act of 1857 are indeed subject of a statutory time limit for prosecution. Unfortunately, this time limit has been exceeded and therefore no prosecution could take place on the breaches of the licence which you have earlier described....",

Thoughts on law:

The police may have thought that the usual notions of theft and destruction of private property did not apply, because the destruction of property appeared to have been authorised by the Home Office. That would have been a false understanding of relevant law. The Home Office had a responsibility for involving the police and explaining to them, that ordinary law was still valid, i.e. it is highly likely that prosecutions could have taken place for theft, damage and destruction of private property. The police decided a prosecution in connection with breaches of an exhumation licence were already time-barred., despite the Home Office having advised to refer the matter to the police, after the time in which to prosecute - evidence of more incompetence on the part of the Home Office. The Home Office did nothing to advise relatives on the true legal position.

ALICE BARKER TRUST TO SOLICITORS FOR THE BUILDER

29 March 1995.

This provided the text of the third press Notice above and asked if others had been published.

SOLICITORS FOR THE BUILDER TO ALICE BARKER TRUST

03 April 1995.

This provided the Notices shown above and apart from the first, gave some dates of publication. This firm of solicitors which had been involved from the outset was no longer acting for the builder.

LAND BURIAL REGISTER - PROOF OF BURIAL RIGHTS

08 November 1995

John Bradfield's files, show details about entries in a burial register. They were copied from microfilm in Halifax Archives, signed by the archivist, stamped and dated 08.11.1995. One heading in the register shows the "owner" of each grave. That burial register alone, therefore, may prove who owned the burial rights, in each and every grave. If they have since died, their heirs will now own those rights, (for details on relevant law see Appendix 3).

Note John Bradfield's files show that the solicitors for the builder had been asked to send one or more "certified copies" about one or more burials. It is a legal requirement that such requests be complied with. However, no certificates were ever received. If the request was adequately worded and not responded to, that would be yet another breach of relevant law. Land burial registers must exist and be available for public inspection at all reasonable times. If any register is altered, damaged or destroyed, the ultimate penalty is life imprisonment. Consequently, the registers for the two burial grounds must still exist and be available for local people to read. If they do not exist, the current landowner or owners have a legal duty to create such registers.

DAME VERA LYNN DBE., LLD., MMUS..

14 November 1995

Dame Vera sent her best wishes to the War Veterans for a successful outcome.

COUNTY COURT ACTION BY FRANK MITCHELL

27 November 1995. County Court Ref. HG504349 - see 03 June 1996.

As Frank Mitchell could not get help or advice from the Home Office or police, he tried to sue for damage to and/or destruction of his family's gravestone. As mentioned above, the solicitors for the builder had asked about, "the actual extent of ... rights, as one would think that if they have been paid for, they cannot just be ignored ..."

ALICE BARKER TRUST TO THE HOME OFFICE

10 December 1995

This refers to a Home Office letter to the local MP Alice Mahon dated 04 April 1995. There it was stated that the builder had not completed an application form for a licence and that the matter had been dealt with by correspondence. The Home Office declined to copy that information to those connected with the destroyed graves. The same Home Office letter had

asserted that objections previously made by the MP's constituents had all been withdrawn. That was blatantly untrue, which raises the question of why the Home Office did not check directly with those individuals? The Trust's letter ends, saying it would:

"...be most grateful for copies of all letters on this matter, to check exactly what was stated by (the landowner). This is a matter of great public concern and we cannot see any justification for confidentiality or other reason which might give cause for withholding any letter sent by any party".

However, in the above letter the Trust had cited from, *'Report Of The Committee Of The Justice - All Souls Review Of Administrative Law In The UK' OUP 1988:11:*

"Decisions must be taken by administrative authorities within a reasonable time. What constitutes a reasonable time varies with the circumstances, such as the complexity of the case, its urgency and the number of persons involved. Speed is highly desirable where the grant of an authorization or licence is in issue and where the administrative authority, by taking some step, creates uncertainty as regards the scope of the rights, liberties, or interests of persons affected".

ALICE BARKER TRUST TO A LOCAL COUNCILLOR

17 December 1995 - Abstract.

"Some frail people have struggled into the archives in the central building in Northgate but have had difficulty understanding what they have looked at on microfilm. We are dealing with people of some years of age and you may have seen a letter in the local press recently, about a lady who died still hoping that something could be done about her family grave. Someone who went into the archives very recently had a stroke (CVA) a few days earlier".

PARLIAMENTARY COMMISSIONER FOR ADMINISTRATION TO ALICE MAHON MP..

07 February 1996. Ref. 951017/LO/RH.

This states that Frank Mitchell (see newspaper articles) had complained that:

"in some cases the Home Office has issued (exhumation) licences when it is not lawful to do so or" other decisions would need to be taken to make certain exhumations lawful".

The letter states that other than in exceptional circumstances, S.6 (3) Parliamentary Commissioner Act 1967 prevented investigations after 12 months. The Commissioner continued:

"In so far as the basis for the complaint is that the Home Office has been acting unlawfully, as opposed to maladministratively, that is not a matter for me to decide. Only the courts can determine whether or not an action is unlawful ... (Where) no recourse has been had to legal proceedings, I have discretion (on whether or not) to conduct an investigation but (only) when it is not reasonable to expect the aggrieved person to have resorted to legal proceedings".

The Commissioner said a generalised complaint could not be investigated and that Frank Mitchell had provided insufficient information to justify an investigation (!!). It often seems that Ombudsmen and Ombudswomen first do everything possible to avoid investigating claims of injustice. If forced to investigate, it then seems their task is to defend the indefensible, using half-truths to present an official distortion of what those on the ground know really happened.

HOME OFFICE TO ALICE MAHON MP..

01 & 04 March 1996 - stamped with both posted and received dates?

Ref. BCR/94 1/1/3 PO 2112/96.

This letter declined to meet the request of the MP., to send copies of all correspondence applying for the exhumation licences, stating:

"...there is no one particular document which sets out the application. In any event, we take the view that the correspondence relating to an application which passes between this department and an applicant should generally be regarded as confidential ... copies of the licences were sent to you ...".

Regarding whether a licence was lawful and instead the Disused Burial Grounds Acts should have been invoked, it was argued that they only apply to, "the erection of buildings (and) the applicants have always stated that their intention was to use the site as a car park (and) not to erect a building". The letter then argues that S.25 Burial Act does apply because it is about, "bodies or remains interred in any place of burial". The letter added that what had been decided was, "entirely proper".

Thoughts on law:

The action of the Home Office and the decisions to issue exhumation licences were either in complete ignorance or defiance of the most fundamentals of law, in *Foster -v- Dodd* and *R -v- Jacobson* as mentioned elsewhere. The Home Office failed to acknowledge the legal requirement to protect disused burial grounds as public open space and the requirement to ensure that anything done enhances the public benefit. Destruction for a private car park could not possibly be acceptable to the courts. It must have failed to ask for copies of all public notices. Had it studied the first notice, it would have seen that the original intention was to use the land for "development". That is exactly what did happen, in or around 2006.

COUNTY COURT ACTION BY FRANK MITCHELL

03 June 1996 (see 27 November 1995). Court Ref: HG504349.

Legal Aid was refused. Presumably solicitors would have helped, if offered a blank cheque. On the 03 June 1996, the County Court ordered that:

"...this action be adjourned generally with liberty to restore".

In his submission to the Legal Aid Board, Frank Mitchell had stated that:

"...at the pre-trial review, the solicitors for the Defendant (the builder) had been unable to explain the legal position to the judge. I had given the information on a plate and not to have understood it, let alone argued against it, may be judged by the Law Society as, (a) irresponsible and (b) incompetent".

The solicitors had from circa 1972 to 1995 to make sense of relevant burial law but in court, still claimed not to understand the very basics of burial law which applied to the land. Frank Mitchell believed their claim was a ploy, to avoid what was undoubtedly a very simple matter for any competent solicitor, particularly if given sound information by the government in one initial letter or telephone call, [*Bradfield. J. February 16 2012, pers. comm*].

ALICE BARKER TRUST TO LOCAL PLANNING AUTHORITY

07.08.2004. LPA Ref. 02/01960/FUL

This faxed letter states:

"I refer to our conversation on Thursday 05 August 2004 and would be most grateful if you could pass a copy of this fax to the current owner of the property, in view of the national significance of the issues raised and the fact that it does still appear that a criminal prosecution could take place if buildings of any type are erected.

We have sent a report to the Government about the review of burial law and policy and have suggested that MPs should look very carefully at what happened at the above property. I have no doubt that the exhumation licences were invalid for (a) such a burial ground and (b) creating what was then a proposed car park and that the requirements in the Disused Burial Grounds Acts (DBGs) should have been followed. Indeed, I refer to a 1995 press notice under the DBGs Acts about proposals to build a car park in a burial ground near Bradford. It has recently come to light that staff in the Home Office have had a very poor understanding of some relevant law, ranging from a decision by the Master of the Rolls (the highest civil judge outside the House of Lords) about why exhumation licences do not apply to Nonconformist burial grounds ...

The method used to destroy this burial ground could be used by others to circumvent the DBGs Acts and would subvert both the will of Parliament and decisions taken by the courts. At the very least, I believe the landowner needs to obtain sound legal advice and not simply an "opinion" of a barrister unfamiliar with the issues raised. An alternative approach might be to follow the procedures set out in the DBGs Acts, as it may still be, that building can only take place after those procedures have been followed ...".

There is no record of a response on file.

ALICE BARKER TRUST TO CALDERDALE COUNCIL

09.08.2004 email to a named member of the Legal Team - there is no record of a response to this letter which states:

"As mentioned ... legal advisers to planning and other committees, may think there is no choice but to leave the area as public open space because it is still legally protected for that purpose? ... The Disused Burial Grounds (DBGs) Acts still appear to protect the land as public open space because (a) burials did take place (S.1(1)(a) 1981 Act) and (b) graves were not cleared under the procedures laid down in the 1981 Act. As far as I can see, what has actually happened is not addressed in the legislation because it presumes such a situation cannot arise or if it does, the land still remains protected as public open space. When the Acts are breached, public open space protection cannot cease. There seems no value in your Council making a legal agreement which is invalidated by the DBGs Acts. Better to have an agreement which would not be affected if the case I've presented turns out to be an accurate account of law. An agreement could simply ensure affordable homes are not built where there were graves ... and leave the former graves area as open space. That would enable your Council to side-step any later controversies.

The planning consent may be valid but the DBGs Acts seem to prevent it ever being implemented, in so far as it affects the area where graves had been? That area can be identified in the plan with the burial register, which must remain unaltered and undamaged. The maximum penalty connected with (the damage or destruction of) such registers is still life imprisonment!!

As the issues are of national importance, this could be used by the Attorney General to uphold the will of Parliament, to ensure no other landowners believe this case offers a ploy or loophole, to avoid the requirements in the Disused Burial Grounds Acts. I would be grateful if you or (the planning officer) could provide the following information, so I can pass it to the Attorney General:

1. The name of the legal officer who would deal with an enquiry from the Attorney General and any case reference number. I had a letter dated 19.10.1995 from (an

officer) in the Chief Executive's Department, Crossley House, HX1 1UG. The Chief Executive was (name) and Tel. No. 357257 and Fax. 393118. If those details remain valid for the latest development in the case, I would be grateful if you could let me know;

2. The name of (a) the current landowner and (b) if different the prospective developer, (c) the company registration number/s and address/s, telephone and fax numbers and (d) the names of the directors if known ... In the County Court, the solicitors told the judge that they still did not know which burial laws did and did not apply and therefore, the matter before the court was not simple as I had claimed. I insisted that the claim was simple, i.e. one person's right to seek compensation for the illegal removal and possible damage or destruction of one family gravestone. The judge said he did not understand this aspect of law and had to prevent an injustice for the landowner. The only way forward was to spend many thousands of pounds on legal costs. As that could not be done, many families suffered injustice and torment”.

HOUSES BUILT ON THE SITE

Planning permission was given for houses in 2005 and they appear to have been built in 2006. Using the reference number 02/01960/FUL, the details can be found on www.calderdale.gov.uk and matched with a satellite image. From that image it can be seen that the layout of the houses, is the same as that shown on the planning permission file. The site is bordered by Bank Top, Trooper lane and Battinson Street. The second burial ground can be seen on the same satellite image, on the north side of Bank Top. The question is, must those houses be demolished and if so, which organisations would have to pay compensation?

If the law had been followed by the Home Office and if it had explained basic legal principles to relatives, the local MP and police, there would have been no destruction. In one sense there is no need to change the law as that was not the problem. The real problem to cite former Home Secretary John Reed, was that the Home Office was, "Not fit for purpose". Is the Ministry of Justice any better equipped to provide a credible public service and protect other burial grounds such as Cross Bones?

GRAVESTONES & THE LAW

This Appendix also mentions burials and access rights.

Cross Bones appears to have no gravestones and relatives may not own burial rights. However, in many other disused burial grounds, as with Bank Top – see Appendix 2, relatives will own gravestones, burial rights and access rights. To assist them to ward off any threats, this Appendix gives details on relevant law.

Note that when gravestones are erected, the following rights invariably come as a set of rights and a threat to one may be a threat to them all:

- (a) burial rights for a stated number of years or an indefinite length of time;
- (b) the right not to have the grave destroyed during the time the rights will last;
- (c) a right of access over the land, to arrange one or more burials;
- (d) the right to erect a gravestone (sometimes with restrictions on the design and wording);
- (e) a right not to have the stone moved, removed, damaged or destroyed;
- (f) a right not to have the inscription erased, added to or changed in any other way;
- (g) a right to maintain the gravestone, which may include you taking it away and taking it back;
- (h) a right of the owner of the various rights and possibly anyone else, to visit the grave for a stated number of years or an indefinite length of time.

If it is necessary to sue for the obstruction of one right, it may prove possible to sue for the obstruction of the other rights.

R -v- Jacobson (1880) has been referred to extensively in this report. That prosecution was about a Nonconformist burial ground with a chapel in Tottenham Court Road. Between 1756 and 1853, 30,000 burials had taken place in half an acre of land, (*14 CCC 523*). The Master of the Rolls (MR) decided that a valid exhumation licence could not be lawfully issued, for such a property. Consequently, the owner was prosecuted for the common law offence of exhuming.

Earlier, in 1856, the Master of the Rolls had made a decision about the same burial ground, in connection with burial rights and gravestones. In *Moreland -v- Richardson (1856) 52 ER 1238-1241*, the five Plaintiffs had "purchased graves in perpetuity". They had been given nothing other than receipts for the sums paid for family graves. Those were produced for the court and the defence agreed that they had bought the "graves or right of burial".

The Master of the Rolls granted an injunction to protect the burial rights and gravestones. The injunction was:

"...to restrain the Defendants (minister of the chapel, builders et al) their workmen, servants and agents, from injuring, defacing and obliterating the graves in the burial ground of the Plaintiffs or any of them and from removing any of the gravestones ... The wording may be put in any form necessary to preserve them in their present state".

The burial ground had been closed by Order in Council but the MR pointed out that burial rights could still be used, if the Home Secretary were to give consent at a later date. A year later the matter was brought back to court and the MR did not alter the decision, (*Mooreland -v- Richardson (1856) 52 ER 1238-1241; 22 Beav. 596-605*).

Bank Top burial ground was also a nonconformist burial ground with a chapel. In both places burial rights had been sold and relatives had erected gravestones. The burial register for Bank Top has a heading for listing the "owner" of the burial rights in each grave. The only obvious difference between Tottenham Court Road and Bank Top burial grounds is that Bank Top had never been closed by Order in Council, i.e. never closed by statute law. Although the Trustees thought they could close and sell the property for building purposes, the records of the Methodists prove that they later recognised that their decision may have been flawed.

When the solicitor for the builders at Bank Top first consulted with the Home Office, staff should have provided details on *R -v- Jacobson, Mooreland -v- Richardson*, other relevant case law and the Disused Burial Grounds Acts. Not having done so, was at the very least grossly negligent, in that the Home Office had a responsibility to act lawfully, in every decision which it took about Bank Top. Instead, it advised on how to destroy the burial ground and the gravestones, in an illegal way, (see details under the subheading, 'RECORDS OF THE METHODIST CHURCH - START OF THE SAGA' in Appendix 2).

The records of the Methodists clearly prove, that the Home Office advised that it would issue a licence, if the graves were more than 100 years old, failing to state that the Home Office had no powers within the licensing procedure, to end burial rights in graves of any age, or end property rights in gravestones, or end rights to leave them in situ, or give implied consents to destroy those gravestones.

"A cemetery company sold an exclusive right of burial in perpetuity ... a body was buried there and the company erected a memorial stone, which was not paid for. The company (then) removed the stone and sold it: HELD, that an action of trespass lay against the company at the suit of the purchaser", presumably purchaser of the burial rights, (*Sims -v- The London Necropolis Co., (1885) 1 TLR 584*).

Although the freehold of the churchyard is in the parson, the property in the monuments and tombstones remains in the persons who erected them. Trespass will lie at the suit of the erector of a tombstone against the parson who wrongfully removes it from the churchyard and erases the inscription: [*Spooner -v- Brewster (1825) 3 Bing 136; 10 Moore 494; 2 C&P 34;*

3 LJCP (OS) 203 and referred to in Ashby -v- Harris, (1868) LR 3 CP 530; Keet -v- Smith (1875) LR 4 Ad & E 414; 1 PD 73; cf. Blackstone, W. (1830:428-429), 'Commentaries On The Laws Of England', Vol. 2, 17th Edition, Tegg].

The *Spooner -v- Brewster* case, about a churchyard gravestone in Bethnal Green, is interesting for an unusual reason. There were three parties: (1) the owner of the burial rights; (2) the owner of the gravestone (which is usually the same person); (3) stonemason.

The owner of the burial rights, a Mr Gravenor, buried his wife and two children in the grave. His mother-in-law, a Mrs Spooner, presumably Sara Spooner, erected the gravestone, with the inscription, "The family grave of John and Sara Spooner". Mr Gravenor wanted this inscription removed, although the stone did not belong to him. He gave instructions to a stonemason to remove the stone and alter the inscription. John Spooner had refused consent for the stone to be moved. After removal, John Spooner refused consent for the inscription to be altered. The stonemason agreed to leave it but later altered it without consent, so ended up being sued, by John Spooner. The verdict was in favour of John Spooner, even though he had no lawful right to erect the gravestone!

All judges agreed that the nature of the action was valid. Best C.J. said:

"There is no doubt that some action may be maintained for injury of which the plaintiff complains. Lord Coke says, the parson in such a case 'is subject to an action to the heir', (*Co. Litt. 18 b*) ... There are many authorities which show that the heir may maintain an action in cases of this kind ... It has been (argued) that the freehold of the churchyard is in the parson; that is undoubtedly true but even he has no right to remove tombstones, the property of which remains in the persons who erected them" and their heirs, (*3 Bing 138-139*).

It is unclear whether John Spooner was only successful, in terms of damage to his property, i.e. the altered inscription. It seems unlikely that a court would conclude that he had a right to leave his gravestone, on a grave where the burial rights had been purchased by someone else.

Although the case is about a single gravestone, the law report starts with a reference to more than one:

"Trespass for seizing, cutting, damaging and destroying (various) tombstones and gravestones of the Plaintiff and with chisels and other instruments cutting out and erasing (various) inscriptions, letters and figures of the Plaintiff and taking and carrying away the same stones and converting them to the Defendant's own use", (*3 Bing 136*).

Lord Coke said:

"Defacing of monuments is punishable by the common law, as it appears from the book of the 9 Edw.4 Ch.14 ... and so it was agreed by the whole court in *10 Jac. 1*, in the Common Pleas, in *Corren -v- Pym (circa 1614, 12 Co Rep 105)*. And for the defacing thereof they that built or erect the same shall have the action during their lives ... and after their deceases the heir of the deceased shall have the action", [*3 Inst 2002; Little, J.B., (1902:55-56), 'The Law of Burial', Shaw & Sons/Butterworth*].

In *Reed -v- Madon (1989, 2 ALL ER 431)* burial rights were equated with a right of property. It was held that anyone who infringes that right can be sued, including the landowner or anyone else. The purchased rights extend to the surface of the grave and prevent anyone else from erecting a gravestone on the same grave. Other acts of encroachment are also prevented by the ownership of burial rights. Sums can be claimed for both damages and distress (*ibid* p.432) and an award of £750 was made for each person affected (*ibid* p.442). Infringement of that right was held to be a sound reason for taking legal action. This case was about one of the few remaining commercial cemeteries, established in the 19th century. Some had their own Act of Parliament incorporating the Cemeteries Clauses Act 1847. It was under the terms of that Act that this case was decided. Although that Act would not apply to most burial grounds, the legal principles on the ownership of burial rights and associated rights in any circumstances will be the same, unless explicitly varied in some way. See *ibid* pp.432-433 for a total of 21 cases cited.

**A CASE WHICH MAY APPEAR TO SOME TO BE A COMMON LAW CONSENT TO EXHUME
(IT WAS NOT A CONSENT TO EXHUME)**

On the 04 November 1841, the executors of Henry Foster exhumed his body from the grounds of the combined debtor's prison cum pub in Halifax. They went armed with a peremptory mandamus, which had been issued the previous day, by the Queen's Bench in London, (*R -v- Fox*, 1841, 114 ER 95-96). That might appear, prima facie, to have been a common law consent to exhume. It provided no such authorisation.

The Solicitor General and four judges were aware that the jailer had "refused to deliver" the body to the executors, had "threatened to inter the body" and that he had "commenced digging the grave". There was no mention of whether the peremptory mandamus would be worthless if the body had been buried by the time the peremptory mandamus arrived in Halifax. It simply said the body was in the "custody" of the jailer or one of his superiors and that it should be "delivered to the executors", so that it "may be duly interred" (*ibid*).

In his affidavit, executor and solicitor William Sutcliffe had informed the Queen's Bench, that the jailer was threatening to bury the body and had started digging the grave. The full text of the affidavit is shown in the 1842 report of the Inspector of Prisons, which was presented to both Houses of Parliament.

Sutcliffe stated in his affidavit that the jailer had refused to, "deliver up" the body "for the purpose of ... being buried". He said, "unless prevented by this Honourable Court, (the jailer would) keep the said body unburied or inter the same within the walls or precincts of the said prison ..." (*ibid*). Thus the peremptory mandamus was to prevent the body being buried by the jailer and force him to give "lawful possession" of the body to the executors. It was not a common law authorisation to exhume. The fact that the executors carried out an exhumation may have meant that they could have faced a common law offence for having done so.

Before or after the jailer was prosecuted for refusing to give control over and possession of the body, immediately after the inquest, (*R -v- Scott*, 114 ER 97; National Archive indictment file ASSI 44), he told the Prison Inspector:

"I got a shell on the Sunday (30 November 1841) and a leaden coffin, into which (the prisoner's body) was placed and soldered up. Mr Sutcliffe came on the Monday and offered me £50 to let him have the body but I would not take it. On Wednesday I buried the body in the jail yard about 4 feet deep. On Thursday a mandamus came from the Court of Queen's Bench for the delivery of the body and they dug it up and took it out of the coffin" (1842 Prison Report).

No-one questioned whether the exhumation was lawful, despite press reports at the time. Court officials, the police et al may have assumed, that whatever was discussed and agreed in the Queen's Bench, must have authorised the exhumation, which was not so. If they

concluded that the exhumation was a breach of common law, they may have decided that it was not in the public interest to prosecute, in view of what had been agreed the previous day, by the Queen's Bench.

THE TIMES ARTICLE SOON AFTER THE PASSING OF THE DISUSED BURIAL GROUNDS ACT 1884

What follows in this Appendix are details of a September 6 1884 article from The Times of >1,200 words. It has been partially translated for effortless reading. It refers to Cross Bones and was published three weeks after the 14 August 1884, when the Disused Burial Grounds Act became law, following the success of a Private Member's Bill.

Cross Bones was "often" said to be in need of much "care and (promised) to be of great benefit to (its local) population", as disused burial grounds were valued, "as gardens and open spaces".

What reads like a short time before the passing of the 1884 Act, "...it was seriously proposed to spread a layer of concrete over the Peel Grove burial ground at Bethnal Green, believed to contain some 30,000 bodies and to build ... dwellings for some several hundred artisan families". Spreading concrete over burial grounds may have been common, as that happened at Cross Bones.

The article states that, "any persons who (owned) a disused ... burial ground", which was not legally consecrated, had been able to, "remove every memorial ... pare off the surface of the ground, replace it with concrete and on this ghastly foundation, erect homes for the living". That was seen as an offence to "feelings of decency and reverence".

An earlier edition of The Times had commented on, "The graphic report of the medical officer ... as to the condition of such a ... mass of coffins packed shoulder to shoulder, without a semblance of intervening earth", adding that the vestry was willing to use its powers, "to prevent the threatened scandal" of covering the ground in concrete. It was thought that, "a by-law, framed by the Metropolitan Board under the Building Acts" could be used. A builder had been "summoned to appear before a magistrate" but unspecified "technical difficulties were ... raised". Whatever those were, the outcome was "ridiculous" according to The Times and so, "The demand for legislation (had become) unanswerable.

The article asserted that, "the House of Commons must be unanimous" for a Private Member's Bill to become law. "Happily, ... there were no ... unwise advocates of private interests to suggest that compensation should be provided for those who were prevented from outraging decency ... ". The Bill was dealt with in the last few days of Parliament, "and it received Royal Assent on the day of the prorogation". That appears to have been the 14 August 1884.

"The Act thus passed will effectually prevent (the concreting) catastrophe ... which was imminent at Bethnal-green. It provides ... that it shall not in future be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church,

chapel, meeting-house, or other place of worship. Not only is building over human remains thus forbidden, but building on a burial ground from which such remains have been removed. There will in future be no inducement to interfere with the graveyard in order to convert it into a building site, and the Home Secretary will be relieved from the task of refusing his licence for such a purpose".

"If we recollect rightly the Society of Friends not long since incurred public odium by the wholesale removal of bodies from their grounds in Bunhill Fields, with a view to a profitable building speculation. There will no longer be any temptation to such a disregard of good manners".

"The inability to turn the land into gold will in future be the best protection for a spot which should have been sufficiently guarded by pious sentiment. It is curious indeed what tricks self-interest plays with feelings which are generally treated as instinctive".

"The little burial ground at the back of Foundling Hospital, which was this summer opened to the public as a garden by her Royal Highness the Princess Louise, might have been doubled in size had not the clergymen of the neighbouring cemetery of St. George the Martyr let a portion of the ground under his care to a medical tutor for the purpose of erecting a private dissecting room. It is not a pleasant site to witness the gathering of this gentleman's class of students on a damp autumn evening in the midst of mouldering tombs and rank graveyard vegetation ...".

"As Lord Brabazon pointed out, the Act must be read with Mr. Walter James's Open Spaces Act of 1881. Facilities were given by that measure for the preservation and management of churchyards by local authorities as gardens and open spaces. The present Act, by removing the temptation to turn such spots to profit, gives the opportunity for the application of Mr. James's Act. When there is no longer any chance of an offer from a not too particular builder, it cannot be an object to anyone to keep a burial ground in disorder ... as a rubbish (tip and) inaccessible to the public in any lawful way ...".

"Hence the efforts of the Kyrle Society and the Playground Association may be expected to receive an impetus from the passing of the recent Act. ... (Quiet) nooks and corners for a rest or a stroll, may we hope, speedily ... (multiply)".

"Letters have already appeared in *The Times* with reference to a burial ground in the neighbourhood of Farringdon-street. Another ground, (Cross Bones) belonging to the Parish of St. Saviour's, Southwark, and situated in the crowded quarter of Union-street, Borough, has often been quoted as much needing care and promising to be of great benefit to a very poor population".

Those who doubted the benefits of transforming disused burial grounds into gardens, were urged to visit, "the two grounds by the Foundling Hospital ... (and) St. Paul's Churchyard

(which had been) opened to the public. London has at times suffered much from the presence of its burying grounds in the midst of its houses. It will be some recompense if the town becomes dotted over with small gardens, pleasant to look upon, and each contributing its mite of grass, tree and flower to play a modest part in the purification of the exhausted air", [*Disused Burial Grounds*, *Times (London, England)*, *Saturday, Sep 06, 1884*: 4. *The Times Digital Archive*. Web. 7 Jan. 2012].

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