

Privy Council Appeal No. 11 of 1928.

The Rector and Churchwardens of the Parish of St. Nicholas
Acons - - - - - *Appellants*

v.

The London County Council - - - - - *Respondents*

FROM

THE ARCHES COURT OF CANTERBURY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 25TH JUNE, 1928.

Present at the Hearing :

THE LORD CHANCELLOR.
LORD BLANESBURGH.
LORD ATKIN.

Ecclesiastical Assessors :

THE ARCHBISHOP OF CANTERBURY.
THE BISHOP OF ROCHESTER.
THE BISHOP OF NORWICH.
THE BISHOP OF CHICHESTER.

[*Delivered by* THE LORD CHANCELLOR.]

This is an appeal by the Rector and Churchwardens of the Parish of St. Nicholas Acons, in the City of London, against an order made on the 24th January, 1928, by the Dean of the Arches, dismissing an appeal from an order made by the Chancellor of the Consistory Court of London, and refusing to decree a faculty authorising the appellants to enter into an agreement with the City of London Electric Lighting Company, Limited, for the construction of a transformer chamber in the churchyard of the parish. There was no opposition to the application upon its merits, but the respondents, the London County Council, objected to the grant of the faculty in pursuance of their statutory duty on the ground that the proposed transformer chamber would infringe the provisions of section 3 of the Disused Burial Grounds

Act, 1884, and that on that ground there was no jurisdiction to grant it.

From the evidence it appears that the Parish Church of St. Nicholas Acons was destroyed in the Great Fire, and has never been rebuilt; and that the churchyard was closed for burials by Order in Council in the year 1854 and has since that date been kept as a private open space enclosed by railings. It further appears that the City of London Electric Lighting Company, Limited, is an electricity undertaking supplying electricity for lighting and other purposes to a large number of persons in the City. For the purpose of its undertaking the Company had erected a transformer chamber in Nicholas Lane; and in the year 1892 the Company was granted a licence to use a portion of the churchyard for the building of an entrance to the said transformer chamber, and for railing off the entrance from the rest of the churchyard. This licence was granted for a period of twenty-one years by virtue of a faculty decreed by Chancellor Tristram on the 6th April, 1892, and was renewed for a further period of twenty-one years by virtue of a faculty granted in March, 1914. Since the grant of the licence the use of electricity has very largely increased; and evidence was called to prove that it was essential in order to supply the public need that the transformer chamber should be enlarged and that there was no site available for the enlargement except the churchyard. The transformer chamber which it is proposed to place in the churchyard is described in the judgment of the learned Chancellor as:—

“A brick-built structure with a roof of asphalt supported by wrought steel girders and by reinforced concrete. That roof is under the surface of the churchyard and the only parts of the transformer chamber which will, so to speak, emerge in the churchyard are two ventilators, which, I think, are something like nine inches above the surface of the churchyard, and they will be practically concealed from sight by certain beds of flowers which the Company undertake to place there.

“So far as noise is concerned, there will be no noise connected with the machines which are used in the transformer chamber. They are, in fact, as I understand, motionless machines. . . . So what is contemplated is a chamber mainly under the churchyard, but with two ventilator lights just above the surface, and containing noiseless machinery, machinery which is simply used for transforming current.”

The relevant section of the Disused Burial Grounds Act, 1884, is in these terms:—

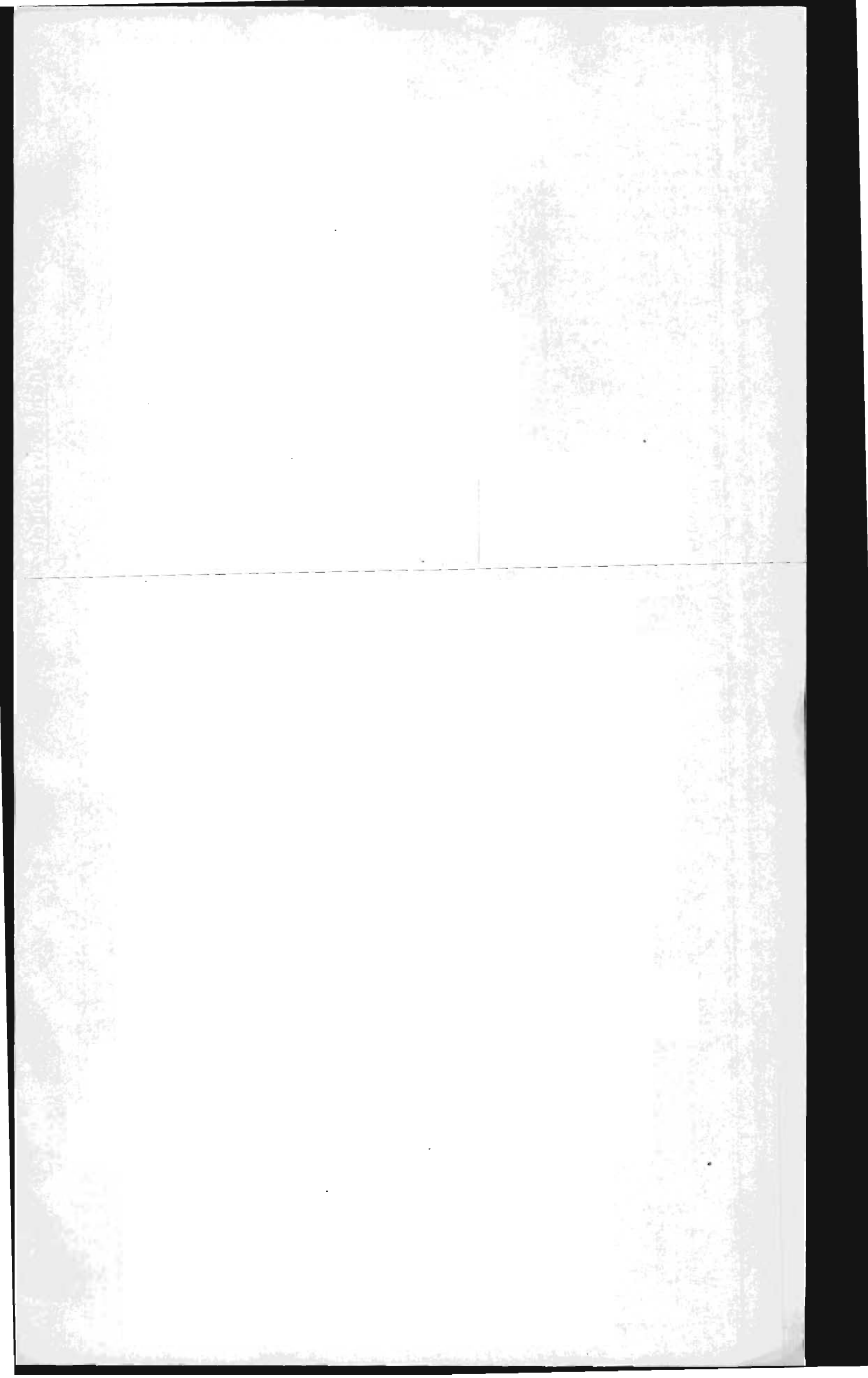
“Section 3: After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground except, for the purpose of enlarging a church, chapel, meeting house, or other places of worship.”

It was not disputed that the churchyard in question is a disused burial ground within the meaning of the Act. For the appellants it was contended that the construction of this transformer chamber would be of great public advantage; that it was so designed as not to interfere with the use of the churchyard

as an open space ; that the grant of the licence would add materially to the revenue of the church ; and that a necessary consequence of the decision appealed against, if upheld, would be that the faculties already granted in this and other cases were *ultra vires*, a conclusion which might lead to much public inconvenience. Many of these considerations are matters eminently proper to be considered by Parliament upon an application to amend the law ; but they can have very little relevance to the question of law which their Lordships have to determine. The first question which has to be considered is whether the proposed transformer chamber is a building. Having regard to the nature of the structure as described above, their Lordships can entertain no doubt that that question must be answered in the affirmative, and, indeed, this was not seriously contested on behalf of the appellants. But the appellants' counsel contended that even if the chamber were a building it would not be a " building erected upon " the churchyard. It was argued that this expression must be limited to buildings raised substantially above the ground level and interfering with the use of the churchyard for the purposes of an open space. In their Lordships' view the language of the statute cannot be so limited. The erection of the building is commenced as soon as the foundation has been excavated, and a building is erected upon the site upon which it is built none the less because no part of it is raised above the ground level as existing at the date of its erection. It was argued that this view was inconsistent with the decision of the House of Lords in the case of *Paddington Corporation v. The Attorney-General* [1906], A.C. 1. In that case the Borough Council sought to erect a screen in a disused burial ground in order to prevent adjoining houses from acquiring an easement of light. The House of Lords held that a screen erected for such a purpose would not necessarily be a building ; but their Lordships find nothing in the language of the judgments to support the limited construction sought to be put upon the statute by the appellants in the present case. It was further contended for the appellants that, since faculties had been granted in the year 1892 in this and other cases, their Lordships ought to treat the law as settled by these decisions and ought not now to disturb them. The cases in which faculties were granted are reported in the Law Reports under the heading *Re St. Nicholas Cole Abbey* [1893], P. 58, and in the note to that case on p. 66. These were all unopposed petitions and in none of them was the Disused Burial Grounds Act, 1884, referred to, either in argument or in the judgment. The learned Chancellor appears to have treated the grant of the licence in the case of St. Nicholas Acons as being equivalent only to the grant of an easement of a right of way, and to have held that on that ground there was jurisdiction to make the order. The question whether the entrance to the transformer chamber then sanctioned constituted a building erected on the churchyard was never discussed or decided. Their Lordships are quite

unable to treat a decision given in an unopposed case without any reference to the Act of Parliament authorising the grant of a licence for a limited period as a decision which determines the construction to be put upon the Act of Parliament or as a factor which should in any way affect their Lordships' judgment upon the question of construction now that it is before them.

It follows that, in their Lordships' opinion, this appeal fails and should be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.



In the Privy Council.

THE RECTOR AND CHURCHWARDENS OF THE
PARISH OF ST. NICHOLAS ACONS

21.

THE LONDON COUNTY COUNCIL.

DELIVERED BY THE LORD CHANCELLOR.

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