

IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWELL AND NOTTINGHAM

Before: The Chancellor

IN THE MATTER OF ORDSALL CHURCHYARD

and

IN THE MATTER OF THE PETITION OF EDITH SADLER

JUDGMENT

INTRODUCTION AND PROCEDURE

1. The Petition before me is dated 1 April 2019 and is by Mrs Edith Sadler for the exhumation of the cremated remains of her late husband Ronald Sadler, who died on 7 April 1999, from consecrated ground in the churchyard of All Hallows, Ordsall. The Petition is in fact for a confirmatory Faculty, because the exhumation took place, supervised by a Funeral Director, on 11 March.
2. The Petitioner and the parish had indicated at an early stage that they were content that the Petition should be determined on the basis of written representations only. The Ministry of Justice, which, for reasons that will appear, is to an extent concerned in these proceedings (but not as a party) had given me relevant information at my request and by email dated 4 October 2019 has indicated that it too is content for me to proceed to determine the Petition on the material I have. In my judgment this Petition is suitable for determination without a hearing and I proceed so to determine it.

THE LAW

(i) What authority is required for an exhumation?

3. Exhumations are governed by both ecclesiastical and secular law.
4. If the place where the remains are buried is consecrated ground, “the site is under the exclusive control of the Ecclesiastical Courts, and no body there buried can be removed from its place of interment without the sanction of a Faculty” (Re Dixon [1892] P 386 at 393 per Tristram Ch). For these purposes there is no difference between a body and cremated remains: both are entitled to the same dignity and the same protection (Re Atkins [1989] 1 All ER 14).
5. All exhumations are governed by the Burial Act 1857, one of a series of Acts of Parliament intended to promote public health by the regulation of burial grounds. The relevant section is

s 25, which makes it a criminal offence to exhume a body or the remains of a body without the proper authority. Because of the circumstances of the present Petition, I need to set out some of its history. As originally enacted it read as follows:

“XXV Bodies not to be removed from Burial Grounds, save under Faculty, without Licence of Secretary of State.

Except in the Cases where a Body is removed from one consecrated Place of Burial to another by Faculty granted by the Ordinary for that Purpose, it shall not be lawful to remove any Body, or the Remains of any Body, which may have been interred in any Place of Burial, without Licence under the Hand of One of Her Majesty's Principal Secretaries of State, and with such Precautions as such Secretary of State may prescribe as the Condition of such Licence; and any Person who shall remove any such Body or Remains, contrary to this Enactment, or who shall neglect to observe the Precautions prescribed as the Condition of the Licence for Removal, shall, on summary Conviction before any Two Justices of the Peace, forfeit and pay for every such Offence a Sum not exceeding Ten Pounds.”

6. With effect from 1 January 2015, however, the wording was entirely replaced by s 2 of the Church of England (Miscellaneous Provisions), Measure 2014 and following some further minor changes in 2018 it now reads as follows:

“25 Offence of removal of body from burial ground

(1) It is an offence for a body or any human remains which have been interred in a place of burial to be removed unless one of the conditions listed in subsection (2) is complied with.

(2) The conditions referred to in subsection (1) are—

(a) the body or remains is or are removed in accordance with a Faculty granted by the court;

(b) the body or remains is or are removed in accordance with the approval of a proposal under the Care of Cathedrals Measure 2011 (No. 1) by the Cathedrals Fabric Commission for England or a fabric advisory committee;

(c) unless the body or remains is or are interred in land which is subject to the jurisdiction of the court or its or their removal requires or require the approval of a proposal under the Care of Cathedrals Measure 2011, the body or remains is or are removed under a licence from the Secretary of State and in accordance with any conditions attached to the licence.

(3) A person who removes a body or remains in contravention of subsections (1) and (2) is liable, on summary conviction, to a fine not exceeding level 1 on the standard scale.

(4) In subsection (2)(a) and (c) “court” means

(a) the consistory court of the diocese or, in the diocese of Canterbury, the commissary court of that diocese, or

(b) any other court or body referred to in section 9, 16, 19 or 21 of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (Arches and Chancery Courts, Court of Ecclesiastical Causes Reserved, Commission of Review, Privy Council) and having jurisdiction to determine the matter.”

7. The change made by the 2014 Measure is of importance. Previously a Licence was required in every case where what was intended was other than the removal of remains “from one consecrated place of burial to another by Faculty”. As a result, the removal of remains from consecrated ground without their being put in another consecrated place of burial required both a Faculty (because the removal was from consecrated ground) and a Licence (because the single exception in s 25 did not apply).
8. This is no longer the law. The 2014 wording makes it clear that if the remains are at present in consecrated ground, the authority required is that of the ecclesiastical authorities, normally a

Faculty, but, as s 25(2)(b) shows, there are special arrangements for cathedrals. If (but only if) the remains are not in consecrated ground a Licence is required. The Licence procedure has no application to an exhumation from consecrated ground.

(ii) Under what circumstances will a Faculty or Licence be granted?

9. Whether a Faculty for an exhumation from consecrated ground should be granted is a matter for the discretion of the Chancellor. The leading authorities on the general question of how the discretion should be exercised are Re Blagdon Cemetery [2002] Fam 299 and Re Christ Church Alsager [1999] Fam 142, each of which, by virtue of s 14A of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018, now falls to be treated as though a decision of the Archbishop's court of each Province.
10. The starting-point is that Christian burial is to be seen as permanent, because it is the act of committing the remains or the ashes of the departed into the hands of God. There is therefore a presumption against exhumation. That is the clear consensus of all the English cases, of whatever age and of both Provinces. It follows that where there has been a burial in consecrated ground, accompanied as it will have been by the rites of the Church with the words of commendation of the departed to God and committal of the person's remains to burial or cremation, permission for exhumation is not given by the Court on demand. That has never been the case: see Blagdon at [20] and Re Smith [1994] 1 All ER 90 at 93. Rather, it is for the Petitioner in each case to establish some special circumstances that merit an exception from the general rule of the finality of Christian burial. Listing the sorts of facts or circumstances that may establish exceptionality may be misleading and unhelpful, as I pointed out in Re Bingham Cemetery [2018] ECC S&N 1. Each case will depend on its facts. Nevertheless, it is probably fair to say that many recent reported decisions are concerned with either an asserted mistake at the time of the original burial, or a proposal to make a family grave, or both.
11. In Re Dixon (above), Dr Tristram went on after the dictum cited above to say that a Faculty would be granted only if the intention was to re-inter the remains in consecrated ground, but in a later case, Re Talbot [1901] P 1, he acknowledged that, by providing protection to human remains buried in unconsecrated ground, the 1857 Act had removed the rationale for that rule. That the purpose of exhumation is to allow reburial in unconsecrated ground is now certainly not of itself a factor counting against the grant of a Faculty. On the other hand, the court will require to be satisfied that the remains will be treated with reverence and dignity and that the new place of burial will be a place of real permanence: see, for example, the judgment of Bursell Ch in the Consistory Court of the Diocese of Oxford in Re the Royal Burial Ground, Frogmore, Windsor (2013).
12. The principles under which a Licence for exhumation will be granted are very much more relaxed. As there has been no committal, there is no strong presumption against exhumation; and if in secular law there remains any duty of respect to human remains it does not appear to be promoted by the operation of the Licence system. For the most part, exhumation is permitted on (proper) demand. As the Ministry of Justice says on the application form, each application will be considered on its merits, but 'applications made for private family reasons on behalf of the next of kin will, subject to any other necessary consents, normally be considered sympathetically'. The form, which is considered in more detail below, asks no question about the reason why the Licence is sought.

THE HISTORY OF THE PRESENT CASE

13. Mr Ronald Sadler died in April 1999. His body was cremated and the remains were buried in Ordsall churchyard. I am told by his son that his widow, the Petitioner Mrs Edith Sadler, some time later “realised she had made a mistake”. Although she herself is a Christian, “it began to dawn on her that because of what [he] had been through in his life and the experiences he had, coupled with the fact he hated churchyards she began to regret having him interred in a churchyard and always said and believe he was unhappy there”. As she herself gets older, she wanted to have her husband exhumed so that, when her time comes, his ashes can be scattered with hers.
14. Enquiries were made, and in due course an application was made not for a Faculty but for a Licence. The relevant form was completed. The Petitioner was not asked whether the remains were currently in consecrated ground. The incumbent, the Revd Sue Caddy, was asked, and she replied that the ground was consecrated. I have examined the form and I cannot see that any incorrect information was given.
15. A Licence was granted on 30 January 2019. The operative words are:

“The Secretary of State, in exercise of the power vested in his [sic] by Section 25 of the Burial Act 1857 (20 & 21 Vic., cap.81) grants a licence for the removal of the remains of Ronald Sadler from the place in which they are now interred in All Hallows Churchyard, Retford.”
16. There is a note as follows:

“3. This licence merely exempts those from the penalties, [sic] which would be incurred if the removal took place without a licence. It does not in any way alter civil rights. It does not confer the right to bury the remains in any place where such right does not already exist.”
17. A covering letter sent with the Licence draws attention to the condition (paragraph 2 of the Licence) requiring the removal to be undertaken discreetly, away from public gaze, and with due care and attention to decency, but nothing else. There is no suggestion in either the Licence itself or in the covering letter that any other authority might be required.
18. On the strength of the Licence, the remains were exhumed by E Hurton and Sons, Funeral Director, and were delivered without ceremony or condition to the Petitioner. The incumbent had been told by the funeral Director that there was “authority” to exhume, but did not enquire what authority that would be (she presumably knew that she had completed an application for a Licence and had not supported any Petition for a Faculty). She was, I understand, unaware that the exhumation had taken place until she saw the disturbance in the ground. She then contacted the Registrar, who contacted me and I directed that this Petition be issued.
19. So far as I am aware, Mr Sadler’s ashes are in the custody of the family. Although Ms Caddy says, in a letter dated 20 March 2019, that Mrs Sadler “requested exhumation in order to take Mr Sadler’s ashes to be reburied in a double plot in Derby where her son lives. When she dies her ashes will be interred in the plot too”, that is clearly not what Mrs Sadler’s son says about her wishes (see paragraph 13 above) and it is not consistent with what Mrs Sadler had said on the application form for the Licence, which Ms Caddy had seen and signed. There it was specifically stated that the intention was to “scatter or retain” the ashes. The present Petition overrides the wording inviting a Petitioner to say where the ashes are to be reinterred with the words “wishes ashes to be spread with my own”.

20. The Ministry of Justice accepts that issuing a Licence was a mistake in this case. It recognises that it had no jurisdiction to issue a Licence to remove remains from consecrated ground.

THE MINISTRY OF JUSTICE'S PROCEDURE

21. The form that was completed is the same as that available on the Ministry of Justice website as this judgment is being written. This part of the website is said to have been "Published 2 February 2012", which does not give confidence that it will fully reflect changes in the law in 2015.
22. The form has two parts; guidance follows the second part. In part A, as well as details of the deceased and any surviving relatives, there is "Q4", question 4, posing, with rather uncertain grammar, a number of questions, each of which is to be answered "yes" or "no" by ticking boxes:

"Q4 Following the exhumation of the remains, is the intention to:

[a] Return the remains to the same grave?
or another grave in the same cemetery?

[b] Remove non-cremated remains to another cemetery in England or Wales?
outside England or Wales?
for cremation?

If you have answered Yes to any of the boxes in [b], please provide written confirmation from the person in charge of the cemetery, churchyard or crematorium where the remains are to be re-buried or cremated. For remains going abroad, please provide written confirmation from the airline or shipping agents that they are prepared to transport them.

[c] Please indicate whether the remains will be re-interred in ground consecrated in accordance with the rites of the Church of England?

[d] To scatter or retain remains that are already cremated?

[e] To examine the remains or contents of the coffin/other container?"

23. Part A of the form does not contain any question about where the remains currently are. After the applicant has completed it and signed and dated it, the instruction is to send it 'to the manager of the cemetery, crematorium or churchyard [sic] where the deceased is presently interred to complete PART B'. Part B does contain that question, again requiring a "yes" or "no" answer, with a note:

"B4. Is the ground in which the remains are presently interred consecrated according to the rites of the Church of England?

This question refers only to interments in England. Please note that if the answer to questions Q4[c] and B4 are Yes then a MoJ licence is not required provided the remains are to be re-interred in a different grave in ground consecrated according to the rites of the Church of England. In this case, the appropriate authority is a faculty."

24. There are guidance notes. The first page of them (it is page 6 of 12 pages of the whole form) opens with this:

"The current law relating to the removal of individual buried human remains is contained in Section 25 of the Burial Act 1857 which states that it is not lawful to remove any body or the remains of any body, which have been interred in any place of burial, without a licence from the Secretary of State or, in certain circumstances, the Church of England.

Unless the grave in which the deceased is buried is in ground consecrated according to the rites of the Church of England, and is to be reburied in consecrated ground (see guidance on

Question 4[c] below), any person who wishes to exhume buried remains will need to apply to the Ministry of Justice (MoJ) for an appropriate licence.”

25. A little further down, in what may be intended to be a partial glossary, is the following entry:

“Church of England: If the remains are buried in consecrated ground then authority (known as a faculty) from the Church of England will also be required (see Question 4[c]). If a faculty has been issued, it would be helpful to attach a copy to the application form.”

26. Further on, on page 9 of 12, there is a further commentary on Question 4[c] with a table, as follows:

“4[c] Ground consecrated in accordance with the rites of the Church of England

Meaning:

Consecrated means a burial ground that has been sanctified or made holy in accordance with the rites of the Church of England. It does not mean ground blessed during the funeral service.

Other religious denominations

Ground consecrated by the Roman Catholic Church, the Church in Wales or any other religious denomination does not have the same legal effect as ground consecrated by the Church of England

Confirmation of consecration

The burial authority will be able to advise as to whether the ground the remains are interred in is consecrated or not

Diocesan Office

If the grave from which the deceased is to be removed is within consecrated ground you will need to apply for a faculty. The burial authority will be able to advise you of the contact details of the local Diocesan Office if necessary

Guide to when a faculty and/or MoJ licence is required

The table below sets out the circumstances in which an exhumation licence alone, a faculty alone, or both [sic], will be required:

From	To	Authority required
Removal of remains from consecrated ground	To a different grave plot that is also consecrated	Faculty
Removal of remains from consecrated ground	Re-interring in exactly the same grave	Faculty
Removal of remains from consecrated ground	To unconsecrated ground	Faculty
Removal of remains from unconsecrated ground	To consecrated or unconsecrated ground, or reinterment in the same grave	MOJ licence

27. There is no doubt that both form and guidance are out of date. They do not reflect the changes made by the 2014 Measure. Question 4(c) in Part A and the note to question B4 reflect the old law, not the current law. Nowhere in the form is there any hint that the Licence procedure does not, since 1 January 2015 apply at all to the exhumation of remains from consecrated ground. The opening of the guidance is a clear statement of the old, not the new, law.

28. Despite the fact that the website does not announce any updating since 2012, the Table, copied above, shows some signs of an appreciation of the present law. But even this table is wrong. Its heading is wrong, because it does not (now) show any instances where both a Faculty and a

Licence are required. It is wrong in design, because the difference between the destinations set out in the first three rows is irrelevant. And it is wrong in law, because it fails to take account of the fact that the consecrated ground may be subject to cathedral jurisdiction, in which case the “Authority Required” is not a Faculty. Besides, this guidance is tied firmly to the answer to Q4(c), and so is likely to be read only in connexion with a proposal to re-inter the remains in consecrated ground.

29. The forms and the guidance are seriously misleading. In this case they seem to have misled everybody involved. Updating is urgently needed. It needs to be made clear that if the remains are currently in ground in England consecrated in accordance with the rites of the Church of England the Licence system does not apply to any exhumation, and the form should therefore not be completed. Each of the parts of the form needs to require the person completing that part, whether the applicant or the burial authority, to certify that the ground is not consecrated. The questions and notes directed to ascertaining the applicability of s 25 before it was amended need to be expunged. If, apart from the exhumation itself, the Ministry of Justice needs to control the destination of exhumed remains (for example if they are to be sent beyond the seas) there should be separate forms for that purpose.

DISCUSSION AND DECISION

30. None of the professionals in this story come out well. The Ministry of Justice has failed to keep its website and forms up to date, and in particular has failed to implement an important change in the law nearly five years ago: as a result the forms are unhelpful and do not ask the right questions. The official who issued the Licence did so when he had in front of him the information that he had no jurisdiction to do so. The incumbent apparently did not read the form she was asked to endorse and sign, did not raise any question about why a Licence, not a Faculty was being applied for, and did not make any further enquiries when she was told of the impending exhumation, for which there had been no Faculty that she had supported or of which she was aware. The funeral directors apparently did not suspect that a churchyard was consecrated, or did not ask whether it was, or did not know that an exhumation from consecrated land requires a Faculty. Of these I think the last are least to blame, because of the absolute terms of the Licence, which, however inappropriate in this case, does purport to give the authority that ought to have needed a Faculty, and does so under colour of a signature on behalf of the Secretary of State. But because of the terms of s 25 it is the funeral director who may have committed a criminal offence.
31. I return to the position as set out in the first paragraph of this judgment. I have to decide whether to grant a Faculty for the exhumation that has already taken place.
32. Applying the principles to which I made reference in paragraphs 9-11 above, I am confident that this is not a case where the authorities point towards the grant of a Faculty. The Petitioner’s account of the reason for seeking the exhumation amount, in my judgment, simply to a change of mind on her part. Besides which, a Faculty would not be granted for exhumation if the intention was for the ashes to be retained by the Petitioner, or for them to be scattered, or for the first of those followed by the second. In other words, neither the exhumation itself nor the future treatment of the remains accord with the Church’s view about the permanence of Christian burial and the respect due to human remains.

33. The fact is, however, that the exhumation has already taken place. Although naturally I hope that on reflection the Petitioner may decide that Mr Sadler's ashes should be reverently reinterred in an established cemetery (whether consecrated or not), there is realistically no way of enforcing that, now that she has been given possession of the ashes. The exhumation was an offence against secular and ecclesiastical law (both of which are aspects of the law of the land) and will remain so unless the exhumation is retrospectively authorised.
34. I have concluded that, largely because of the series of mistakes made by others apart from the Petitioner, the ordinary rules have a rather limited application to this case. Rather, it is a case calling for a larger view of the Chancellor's discretion to grant a Faculty. Refusing a Faculty would certainly be justified in principle but would serve no useful purpose, and would cause and maintain offence. Granting a Faculty would render lawful what has so far been unlawful; and would regularise the present situation, which there is in any event no practical possibility of changing.
35. In these circumstances I shall exercise my discretion in favour of the Petitioner and grant a confirmatory Faculty, with no conditions, for the exhumation of the remains of Ronald Sadler.

The Worshipful Mark Ockelton MA BD
Chancellor of the Diocese of Southwell and Nottingham
25 October 2019