

**ST. ANDREW THORNHAUGH
DIOCESE OF PETERBOROUGH
CONSISTORY COURT**

THE RUSSELL HELMET

JUDGMENT of Chancellor T.R. FITZWALTER BUTLER

The Petitioners are the Rector and Churchwardens of the Parish of St. Andrew Thornhaugh in this Diocese and they ask by their Petition a Faculty for the sale of a helmet which for many years has hung above the tomb of Sir William Russell (described in the Petition as Baron Russell of Thornhaugh, First Duke of Bedford) in the south transept of the Church. The Objectors are the Venerable the Archdeacon of Oakham (on behalf of the Diocesan Advisory Committee), Mr. A.R. Dufty, C.B.E., F.S.A., Master of the Armouries in Her Majesty's Tower of London, Mrs. Dorothy Ellison, a Parishioner resident in the Parish of Thornhaugh, and The Very Reverend the Dean of Peterborough (on behalf of the Church of England Council for Places of Worship). The case for the Petitioners was presented by Mr. D. O. Powell, a Parishioner of Thornhaugh, who gave evidence himself and called in support of the Petition the Rector, The Reverend G.H. Bradshaw. All the objectors gave evidence in support of their objections.

Thornhaugh is a small village situated about eight miles from Peterborough and about half a mile from the Great North Road. It has a small church of considerable architectural merit and historical interest. The church consists of a small but broad chancel, a high nave, a north aisle and vestry, a south transept, south porch and western tower. Both the nave and the chancel (though the latter was much altered in the 15th century) contain interesting features of Transitional or Early English work. It seems probable that at some time about the 15th century the tower fell and crushed the south arcade of the nave, with the result that the present south wall (which contains a fine Perpendicular window) and the present transept and porch were built. An extensive restoration of the church took place between 1884 and 1889. The church at the time of the last quinquennial survey and to-day is in very good condition and when I visited it I was impressed by the care that is obviously bestowed on its maintenance and appearance, and this I venture to hope will

always be continued. The outstanding object of interest is the Russell tomb in the south transept.

Sir William Russell's recumbent effigy in armour lies on the tomb between four obelisks at the corners. At his foot kneels his page and behind his head is a cartouche bearing his coats of arms. The kneeling figures of his three sons and three daughters are on opposite sides of the tomb. Until recently removed the helmet hung some twelve feet above the tomb. Sir William was a distinguished soldier of the Elizabethan age. When the Duke of Alençon came to this county as a suitor for the hand of the queen, he challenged a number of English Knights to combat in a tourney with French Knights. Sir William was one of the first pair of Knights chosen to uphold the English honour. On that occasion the helmet which is the subject of the present proceeding, was displayed before his pavilion. It almost certainly is of earlier date than the time of Sir William, and it seems tolerably certain that it was preserved by him to form part of the accoutrements of his tomb. He died in 1613 and the tomb dates from a period soon after his death. Not very much is known about his character and personality, except that he was a comrade-in-arms and close friend of Sir Philip Sidney, who left him a valuable suit of gilt armour, which did not include the helmet which is the subject of these proceedings. The poet Shelley has well described Sir Philip Sidney as "sublimely mild, a spirit without spot", and it is fair to assume, therefore, that his close friend Sir William Russell, too, must have been a noble and upright man, whom posterity should delight to honour. The tomb fortunately escaped the ravages of the Civil War and, despite some slight damage to some of the effigies, remains today in good condition. It was cleaned and restored at the expense of the Bedford family comparatively recently. Early in 1974 the helmet was taken down from its place without any legal authority, placed in a carrying box and conveyed to Messrs. Sotherby's in London for the purpose of an estimate of its value being obtained. A little time before the hearing it was brought back to Peterborough and was displayed in Court during the hearing. For the time being it is in a secure place of custody.

Mr. Powell, in presenting the case for the Petitioners, emphasized, that their motives were not wanton nor based on thoughtless fund raising, but on a determination carefully to husband all the resources committed to the charge of the Rector and Churchwardens of Thornhaugh Church. I entirely accept their bona fides and am of opinion that forethought and care were devoted to the preparation of their case, and that the presentation of it displayed lucidity, moderation and fairness. Mr. Powell called my attention to the fact that in 1974 for the first time the Parish of Thornhaugh (the benefice of which is united to that of Wansford) failed to find its diocesan quota and that the budget forecast for 1975 indicated a substantial deficit. He estimated that the sale of the helmet through the medium of Messrs. Sotheby might be expected

to realise from £700 to £1000. He quite rightly, in my view, emphasized the danger to which an object of this kind must always be exposed when left in a church which is normally kept unlocked - as one would wish that all churches should be during the day. He himself suggested that, if I saw fit to grant this application, the Petitioners would be willing that the following conditions should be attached to the faculty: (i) that a worthy replica of the helmet should be provided out of the proceeds of the sale; (ii) that the balance should be used to create a fabric fund, the capital of which would not be used; (iii) that before disposal of the helmet took place, a parish meeting should be called at which the intention of the Petitioners would be explained and (iv) that interested parties should be informed of the proposed sale and given the opportunity of taking steps for the helmet to be preserved for the national heritage.

The Venerable the Archdeacon of Oakham, in presenting the objection of the Diocesan Advisory Committee, called my attention to the Committee's general policy with regard to the sale of "national treasures" and contended that the church should be considered as the custodian rather than the owner of such. While agreeing that in an extreme case, when a poor parish was suddenly faced with a serious, urgent and expensive problem of repair for its church, it might be necessary to support the sale of a treasure such as this helmet, he contended that the facts of the present case were very different in that Thornhaugh Church was in a good state of repair and was not threatened with any emergency. He stressed the aesthetic and historical considerations which arose in this case, that the helmet was part of the whole memorial, forming a kind of crown to the setting; and that there was a real danger that the helmet might easily, if sold, disappear into some private collection and its place as part of the national heritage be lost forever. While appreciating the security risk, he thought that the helmet, if secured by a chain and sited 12-15 feet above ground, would not be easy to steal.

Mr. Dufty stated that his views were supported by the Society of Antiquaries of London and the Victoria and Albert Museum. He said that no application for assistance in the maintenance of the tomb had been received by the Armouries of the Tower. In his view, the tomb and its accoutrements should be regarded as "belonging together, as both must have been together accepted by the Church". The helmet, which was the subject of these proceedings dated from about 1520-30, was complete and a very fine specimen. It was quite normal for helmets to be of earlier date than the monument of which they formed part. The security of the helmet in question did not present any unusually difficult problems. He knew only of three applications for the sale of helmets, only one of which - the Broadwater case of last year, to which I shall refer later in this Judgment - was successful.

Mrs, Dorothy Ellison said that at the meeting of the Parochial Church Council when the question of the sale of the helmet was discussed she had voted against the proposal. She emphasised the fact that there were no immediate structural requirements of the church and that the helmet should be regarded as part of the heritage of the community of Thornhaugh.

The Very Reverend the Dean of Peterborough also dealt with the question of security. His Council would resist the suggestion of replacing the helmet, where it hung in the church, with a fibre glass or other replica. Even if the difference would be difficult to detect from ground level, there would be something fraudulent in the deliberate action of replacing the genuine by a substitute; and, only if the genuine article were lost through theft, should a substitute replace it. In the view of his Committee, articles placed in the church constituted a trust. Whoever erected the monument and placed the helmet above it did so in the confident expectation that both would remain there undisturbed. The helmet and the monument below it now formed part of our national cultural heritage.

Having summarised the evidence and the arguments presented to me, I must now indicate the issues which I have to decide. They appear to me to be twofold. The first is whether I have jurisdiction to grant the Faculty sought by the Petitioners. The second is whether, if I have jurisdiction, I ought on the merits of the case to make an order in favour of the Petitioners. In order to decide the first question, it is necessary that I should come to a firm conclusion on the ownership of the helmet.

There appears to be no modern authority relating to church monuments and their accoutrements and my researches into the law have carried me back many centuries. I do derive valuable assistance from Lord Coke's observations in the case of *Cowen v. Pym* in 1613. The case is reported in several places but it will be sufficient if I quote from 12 Co. Rep. The relevant observations are set out also in Phillimore's *Ecclesiastical Law*, 2nd (1895) edition, pages 692-3. Lord Coke says, "concerning the building or erecting of tombs, sepulchres and monuments for the deceased in church and in a convenient manner, it is lawful, for it is the last work of charity that can be done for the deceased, who while (he) lived was a lively temple of the Holy Ghost with a reverend regard and Christian hope of a joyful resurrection" (words which, I trust may appropriately be related to Sir William Russell). The passage continues: "and the defacing of them is punishable by common law, as appeareth in the book of 9 Edw. 4c.14 (Lady Wiche's case) and so it was agreed by the whole Court (Michaelmas 10 JAC 1) in the Common Pleas between *Cowen v Pym*. And for the defacing thereof, they that build or erect the same shall have their action

during their lives, as the lady Wiche had in the case of 9 Edw, 4c-14 and after their decease the heir of the deceased shall have the action". The report of Lady Wiche's case in the Year Book tells us: "the lady brought a bill in the King's Bench against a person, *quare unam tunicam vocetam* a coat-armour and pennons with the arms of the late Sir Hugh Wiche her husband and a sword in a chapel where he was buried. And the parson claimed them as oblations, and that therefore they did belong to him; and there it is holden... the parson cannot claim them as oblations, neither ought he to have said things, for that they were hanged there in honour of the deceased and therefore for the same reason, although a gravestone, a coat of armour, tomb etc. are annexed to the freehold of the parson, yet in regard the church is free to all the inhabitants for burying, the parson cannot take them. And the Chief Justice said that this lady might have a good action during her life because she herself caused the said things to be set up there and after her death the heir to the deceased shall also have his action because that (as the book says) they were hanged there for the honour of his ancestor. Therefore they are in the nature of heirlooms, which by the common law belong to the heir, as being the principal of the family". To the report in Co. Rep 105 and also in Phillimore's Ecclesiastical Law, page 691, there is appended a useful note indicating the opinion of Dr. Gibson, a luminary of former days in matters of ecclesiastical law, which is to the same effect. He states: "Monuments, coat armour and other signs of honour set up in memory of the deceased may not be removed at the pleasure of the ordinary or Incumbent. On the contrary, if either they or any other person shall take away or deface them, the person who set them up shall have an action against them during his life and after his death the heir of the deceased shall have the same, who, as they say, is inheritable to arms etc. as to heirlooms; and it avails not that they are annexed to the freehold, though that is in the parson (Gibson pp 455, 454)". In my view the legal position with regard to rights in a monument is concisely and correctly summarised in the most recent (3rd) edition of Halsbury's Laws of England, Vol. 10, page 872: "Under modern law rights in a monument presumably pass to the person entitled under the will or intestacy of the person who set it up". During- the hearing the Very Reverend the Dean of Peterborough called my attention to a recent opinion of the Legal Advisory Commission of the General Synod that a monument in a church is the property of the person erecting it and thereafter of the heir or heirs at law of the person commemorated, and cited Elphinstone, Parish Property, page 6, and the definition of "owner" in section 3(4) of the Faculty Jurisdiction Measure 1964, to which I must further refer in a moment, which provides: "'Owner" means the person who erected the monument in question and, after his death, the heir or heirs at law of the person or persons in whose memory the monument was created'. The only indication -which I have been able to find of a contrary view with regard to the ownership of a church monument or its accoutrements is in the Judgment of Chancellor Buckle in

case of the Broadwater helmet decided by him last year and, I believe, reported only in the Times newspaper.

In that case the heir at law appears to have been identified and consulted and it was generally accepted that he was completely disinterested in the helmet of his ancestor. I have had the advantage of seeing the transcript of Chancellor Buckle's Judgment, in which he granted the Petition for a Faculty for the sale of the helmet in the open market. He does not appear to have based his decision on an "implied consent" to the sale having been given by the heir at law, but rather on the basis that, as the heir at law had abjured all interest in the helmet, the ownership of it had devolved on the churchwardens as customary owners of the moveable goods and ornaments in a church. I find the assimilation of the accoutrements of a monument to an article such as church plate a little difficult to follow, but I hesitate to criticise any expression of opinion by the very experienced Chancellor in the absence of a full report of the case. I have, however, no hesitation in holding as a matter of law that the ownership of the monument in Thornhaugh Church to Lord William Russell and of all its accoutrements remains in the heir at law to Lord William. I am satisfied that at common law I accordingly would have no jurisdiction to grant the Petition by the Rector and Churchwardens for the sale of the helmet, but I must now turn my attention to my powers under the Faculty Jurisdiction Measure 1964. Section 3 provides: "A Court may grant a Faculty to which this section applies (1) although the owner of the monument withholds his consent thereto or cannot be found after reasonable efforts to find him have been made... (3) no faculty to which this section applies shall be granted if the owner of the monument in question withholds his consent thereto, but satisfies the court that he is within a reasonable time willing and able to remove the monument ... and to exercise such works as the Court may require to repair any damage to the fabric". Before I could exercise jurisdiction under this section, the Petitioners would have to satisfy me either that the owner of the monument could not be found after reasonable efforts to find him had been made - a burden I feel could not in any event have been discharged by them - or in the alternative that the owner of the monument had withheld his consent to the removal. No evidence was adduced before me as to who is the heir at law to Sir William Russell. I have seen a letter addressed to the Registrar suggesting that the present Duke of Bedford claims to be the heir at law. This may well be the case, but I cannot assume this without any kind of evidence having been adduced at the hearing. If the present Duke is the heir at law, it may well be that he would oust my jurisdiction to order a sale of the helmet in the open market by evidence that he was prepared to move it to his Collection at Woburn Abbey. These are, however, matters of conjecture; and as no evidence has been given at the hearing on which I could exercise jurisdiction

under Section 3 of the Measure, I hold that on that ground also I have no jurisdiction in the present case to grant the Faculty which is sought.

I do not think, however, that I ought to leave the matter there and it would, in my opinion, be more satisfactory if I were to state the principles that I would apply in deciding the Petition on the merits and on the assumption (contrary to what I have already held) that I have jurisdiction to deal with it. I accept the general submission made on behalf of the Diocesan Advisory Committee that a court should be extremely cautious in directing the sale of anything in the nature of a national treasure, particularly if the article (as in this case) is of high intrinsic quality and perhaps almost unique in its design. I bear in mind the submission made by Mr. Powell on behalf of the Petitioners in his final speech that regard must be had to the worship, mission and ministerial needs of the church from which it is desired to remove the treasure. Indeed the Archdeacon of Oakham on behalf of the Diocesan Advisory Committee conceded that the high artistic or historical value of the object concerned can never be a conclusive basis for the decision of a court and that there may be cases where a parish which was paying its way but has very little to spare is suddenly faced with an urgent and expensive requirement for the repair of its church and where it would be proper in those circumstances to order the sale of a valued artistic or historical treasure. That principle I hold to be right and one properly to be applied in deciding an application of this kind. In the case of *St Mary's Westwell* (1968) *IWLR* 513, Lord Dunboyne, Commissary General, in granting a faculty for the sale of two ivory pots formerly used as communion vessels, said at page 517, "I am persuaded that nothing but the sale of the flagons will save the church from deteriorating beyond repair". In the case of *St. Gregory's Tredington* (1972) *Fam. D.*, p.236, where the Deputy Dean of Arches overruled the decision of Chancellor Gage and allowed the sale of two silver flagons formerly used as Communion vessels, the evidence was that the church was in a serious state of disrepair and was faced with a financial emergency caused by the condition of the fabric, I believe that nothing in this present judgment conflicts with any general principle laid down by the learned Deputy Dean in giving the decision of the Court of Arches, but I distinguish on their facts both of the cases which I have just mentioned from the present case in which the undisputed evidence is that no need for serious, urgent or expensive repairs has arisen and that the church is in good general condition.

Further, in both cases to which I have just referred, stress was laid on the fact that the objects which it was desired to sell, though in the distant past they had been used as Communion vessels, had long ceased to be used as such and had for many years been removed from the church and placed in a bank or other surroundings for safe deposit and that there was no proposal that they should be brought back to the church or restored to their original use. In the

present case the helmet has for centuries until very recently occupied the same place in the church and will be returned to that place if I refuse to grant a Faculty for its sale. This consideration too distinguishes the present case from the cases I have cited.

As I have already indicated, apart from the Broadwater case, I can discover no case in which the sale of a monument or an accoutrement of a monument has been ordered. I hold, that as a matter of principle a monument and its accoutrements should be regarded as one entity and that a case in which justification could be found for their separation by an order for the sale of an accoutrement would be exceptional indeed. In the present application I can find no consideration which would justify so unusual a course.

My attention has rightly been directed from several quarters to the question of security. I realise that to allow an artistic or historical treasure to be on display in a church always involves the element of risk. I do not regard the element in the present case as particularly high - certainly no higher than in the case of *St. Helen's Brant Broughton* (1973) 3 All E.R. 386, where the Dean of Arches upheld the decision of Chancellor Goodman refusing a faculty for the sale of a 15th century German painting of the Ascension which had been installed in the church in 1887 above the altar in the centre of the reredos. The Dean also emphasised the fact that the donor's intention was that the picture should be the centre of an architectural scheme which was still being fulfilled. These considerations, in my view, apply *mutatis mutandis* to Sir William Russell's helmet. It appears to me that in the present case reasonable measures have already been taken to secure the safety of the helmet and that without any substantial expense being incurred these safety precautions can be strengthened. I reject the suggestion that the helmet might properly be replaced by a replica in fibre glass or other similar material. The Dean of Peterborough in his evidence regarded such a substitution as savouring of fraud. I will confine myself to saying that, in my view, it would not be proper in the circumstances of the present case.

For these reasons, I have come to the conclusion that, despite the care and fairness with which the case for the Petitioners has been presented, they have failed to establish a case which would justify an order for the sale of so valuable a treasure which has so long been associated with Thornhaugh Church. I am of opinion that, assuming that I have jurisdiction, I ought to refuse this application on the merits.

4th June 1975

**ST. ANDREW THORNHAUGH
DIOCESE OF PETERBOROUGH
CONSISTORY COURT**

**In the Matter of
THE RUSSELL HELMET**

ORDER

UPON HEARING a Petition by the Rector and Churchwardens of the Parish of Thornhaugh for a faculty for the sale of the Russell Helmet

IT WAS ORDERED by Chancellor T.R. Fitzwalter Butler, sitting in the Knight's Chamber, Minster Precincts, Peterborough, as follows:

THAT the Helmet be returned to the position in Thornhaugh Church above the Russell tomb from which it was taken, on a date to be agreed between the Diocesan Advisory Committee and the Rector and Churchwardens of Thornhaugh; if they fail to reach agreement, either party shall have liberty to apply to the Chancellor, who will then fix a date for the return of the helmet

DATED the Fourth day of June One Thousand Nine Hundred and Seventy-five

R. Hemingray
Diocesan Registrar