



Faculty – Exhumation – Churchyard – Remains of great-great-grandparents of petitioner – Site of grave near entrance to new church building – Re-interment within churchyard – Faculty granted

IN THE CONSISTORY COURT
OF THE DIOCESE OF OXFORD

Date: 27 June 2019

Before:

THE WORSHIPFUL DAVID HODGE QC, CHANCELLOR

In the matter of:

ALL SAINTS, SUTTON COURTENAY
THE PETITION OF WILLIAM HANKS

Determined on paper

The following cases are referred to in the Judgment:

Re All Saints, West Bromwich [2019] ECC Lic 1

Re Blagdon Cemetery [2002] Fam 299

Re Holy Trinity, Headington Quarry [2018] Ecc Oxf 1

Re St Mary the Virgin, Hurley [2001] 1 WLR 831

Re St Nicholas, Charlwood [2019] Ecc Swk 2

Re: The Petition of Kathrine Tollis [2016] Ecc Oxf 2

JUDGMENT

Chancellor Hodge QC:

1. On 10 April 2019 solicitors (Knights Plc) acting for Mr William Hanks, a long-standing resident of the village of Sutton Courtenay, lodged a petition seeking the disinterment of the remains of his great-great-grandparents, Mr Robert Hanks (who died on 6 April 1879 aged 63) and his wife, Mrs Mary Hanks (who died on 13 March 1910 aged 80), from a double grave in the churchyard of All Saints, Sutton Courtenay (marked by an inscribed stone cross on top of an inscribed plinth) and their re-interment in another available grave in the same churchyard. The existing grave lies to the north of the former church porch (now converted into a vestry). On 6 October 2017 the local planning authority granted permission for an extension on the north side of the church to provide a new kitchen, office, toilets and meeting room for the church, to be joined to the church building by way of a link from the eastern side of the existing vestry to the south-western corner of the new extension. The new facilities are intended to meet the needs of both the church and the local community. Faculty approval was granted (subject to conditions) on 7 September 2018. In a document uploaded to the online faculty system in support of the original faculty application and detailing the graves affected by the building project, the grave of the petitioner's great-great-grandparents (designated M2) is identified as "the only grave for which we are aware of any live family members". The petitioner did not object to any of the proposed works during the public consultation period, and he has been supportive of the building project, whilst expressing concerns from the outset about the impact on his ancestors' family grave. Works of excavation and construction are currently in progress.

2. According to *Pevsner: The Buildings of England: Berkshire* (ed. Geoffrey Tyack, Simon Bradley & Nikolaus Pevsner), 2010) at page 549 the village of Sutton Courtenay is "a large spread-out Thames side village, one of the most attractive in the county ...". Its grade I listed medieval church is said to exhibit work from every period from the 12th to the 15th centuries. All Saints Church was one of only a very few churches accredited as a 'Place of Interest' by Visit England; and following the demise of that specific scheme, the church became an accredited Quality Assured Visitor Attraction from 2017. The churchyard contains a handsome chest tomb to the former Prime-Minister Herbert Henry Asquith and another to the writer Eric Blair (George Orwell). The church's visitor book provides evidence of people travelling from all over the world to see George Orwell's grave. The location also features in many published walks since the Thames National Path is nearby. On visiting the churchyard, the writer Bill Bryson commented, at page 123 of his book *Notes from a Small Island*, 1995: "How remarkable it is that in a single village churchyard you find the graves of two men of global stature". The existence of George Orwell's grave in particular attracts many international visitors to the location; and the new facilities will include display areas for local history/village memorabilia and George Orwell material.

3. The grave of Robert and Mary Hanks is situated a short distance from the western wall of the extension in an area of the churchyard which has been little-used for burials for much of the last century. During the building works the grave and its memorial stone will be temporarily fenced-off and protected from the building works. However, the petitioner is concerned that at the conclusion of the works the grave will be situated on an 'island' within the churchyard, with paths on three sides and the wall of the new extension on the fourth. Moreover, the grave will lie

on the route of a 'short-cut' between the external entrance to the new extension and the path to the north; and the petitioner no doubt fears that this will become a 'desire line'. In view of the popularity of the church and its churchyard with visitors, the petitioner's concerns cannot be discounted. Against that background, the petitioner wishes the grave of his great-great-grandparents to be moved to another available double grave space within the churchyard next to the existing grave F10. The petitioner has contacted all of his relatives with whom he is in touch, including some in America and Australia. They are all in agreement with his petition. The petitioner recognises that there may be other descendants of his great-great-grandparents with whom he is not in touch, but this is only to be expected given that he is four generations removed from his great-great-grandparents.

4. The petitioner is said to be aware of the guidance of the Court of Arches in *Re Blagdon Cemetery* that permanence is the norm for Christian burial and that permission for exhumation is only granted exceptionally. In this context, the petitioner emphasises that his petition comes about because of changes that are being made within the churchyard by the church itself, without which there would be no need for the grave of his great-great-grandparents to be disturbed. Moreover, although the petitioner's proposal necessarily involves the exhumation of the remains of his great-great-grandparents and their re-interment elsewhere, in substance what is being proposed is the re-location of a grave within the same area of consecrated grounds in which it is currently located. It does not involve moving the remains from outside the area of consecrated ground wherein they currently rest and are protected. After the completion of the building extension, the setting of the grave will be permanently altered, being closely juxtaposed to the new extension. It is submitted that this in itself would form a reasonable basis for a petition to relocate the grave; but the petitioner's particular concern is the likelihood that people will walk across the grave to get to and from the extension. The petition is supported by the rector of the church and the PCC, and this is said to reflect its inherent reasonableness. It is submitted that a petition that is inherently reasonable and for which there is justification is one which should be granted by the court on the basis that it demonstrates circumstances which readily outweigh the general presumption against exhumation; and it is further submitted that the court should so order. The petitioner undertakes that the disinterment and subsequent re-interment of the remains will be conducted with due reverence and decency; and the petitioner recognises that it is appropriate for any faculty to be appropriately conditioned and, in particular, to require the grave to be re-located to the grave space next to F10, as indicated on the plan of Area F of the churchyard.

5. At a meeting held on 11 March 2019 the PCC unanimously agreed that the rector of the DAMASCUS benefice (who is also the Area Dean of Abingdon) should write to the Diocesan Registry in support of the petition. The rector's letter in support is dated 25 March 2019. In the course of addressing the background to the petition, the rector states that:

"... there is no doubt that the removal of the grave and headstone would facilitate access to the main entrance door to the extension".

The letter continues:

"I do not believe that this is a frivolous application but has been thought through seriously by Mr Hanks and his other relatives. I do not believe that it will have an unsettling effect on people living in the immediate neighbourhood of the churchyard as

the current location of the grave is not overlooked by any neighbouring property, unless they were to peer through the hedge, and that is also true for the vacant plot.”

The rector points out that the churchyard has not been closed by Order in Council although new burials ceased in 1999 and only burials of ashes or in existing double plots have been carried out since then. However, there is one vacant burial plot in the churchyard (in area F, designated 10a) and the PCC would support the petition to use this vacant plot. The letter concludes:

“The Hanks family has a long connection with Sutton Courtenay through several generations and Mr Bill Hanks has a very strong emotional attachment to the churchyard as the resting place for many of his ancestors. He maintains several graves in the churchyard, including the one for Mr Robert and Mrs Mary Hanks. I have no doubt that the same care will be ongoing in the proposed new location. I also believe that supporting the application is in the best pastoral interests of Mr Hanks and the parish.”

6. The petition was originally referred to my predecessor as Chancellor. On 17 April 2019 he commented that it was not obvious that the petition satisfied the test in *Re Blagdon Cemetery*, particularly in the light of his own judgment in *Re Holy Trinity, Headington Quarry*. McGregor Ch therefore did not consider the petition to be suitable for disposal by summarily granting a faculty; and he left it to me, as his successor, to decide what directions to give or how otherwise to dispose of the petition.

7. When the matter was referred to me, I requested (through the Registry) the following further information from the petitioner and the rector:

(1) How did the funeral care company that would undertake the exhumation and re-interment of the bodies of the petitioner’s great-great-grandparents propose to carry out this task? Could the exhumation and re-interment be conducted in a dignified and seemly manner given that the coffins would presumably have disintegrated with the passing of the years?

(2) There were apparently ten other graves that were similarly affected? How old were they? Were any of them actively tended by relatives of those buried there? If this petition were to be granted, might it be likely to provoke any similar petitions? Would the removal of this one grave and its memorial stone enable the church to improve the arrangements for access to the new meeting room or confer any other tangible benefits on the parish?

8. In response, the Registry was informed by the petitioner’s solicitors that the remains would be dug up by the parish’s usual grave digger under the supervision of the rector and reputable local funeral directors who would supply a new coffin for the remains prior to their re-interment in the new burial plot in area F at a funeral service to be conducted in a seemly and dignified manner by the rector at which family members would be present. The rector informed the Registry that only a few of the other graves affected by the building works were under 100 years old, with the most recent burial having been in 1937, and that none of the graves was actively tended by relatives of the relevant deceased. The rector did not think that the grant of a faculty would be likely to provoke any similar petitions. The building works had been widely talked about across the community for many years and as part of the faculty process notices had been placed in the local press. No other family had come forward to express concern about any of the affected graves. The rector considered that the removal of this one grave and its memorial

stone would definitely enable the church to improve the arrangements for access to the new meeting room and to the church path alongside the building to access the east end of the churchyard. In terms of other tangible benefits, the grant of a faculty would enhance the church's relationship with the wider village community of which the petitioner was a very active member. The rector considered that it would definitely help the pastoral relationship between the church and the community and avoid any adverse publicity.

9. I am satisfied that I now have sufficient material before me to enable me to determine this petition. Pursuant to r 6.6 (3) (a) of the Faculty Jurisdiction Rules 2015 (as amended) I dispense with the giving of public notice of the petition because I am satisfied that after so many years since they were laid to rest, there are no near relatives of either of the deceased still living and that the petitioner is the only person who can reasonably be regarded as being concerned with the proposed exhumations of their human remains.

10. Against that background, I turn to consider the merits of the petition. I deal first with the case of *Re Holy Trinity, Headington Quarry* [2018] Ecc Oxf 1, a decision of this court (McGregor Ch). The case concerned the extensive reordering of a grade II listed church and the building of an extension in the churchyard to accommodate toilets, a kitchen, a store room, a meeting room and a refurbished choir vestry, vicar's vestry and toilet. The extension would be built over one known grave of a married couple, who had died in 1975 and 1980 respectively. The Chancellor was satisfied that, because the church extension would be built on piles, the grave would not be disturbed. A parishioner had come forward objecting to the extension being built over the grave. She did not state her relationship to the deceased beyond saying that they "are a branch of our family tree". Objections to building over the grave were also raised in some of the other letters of objection but not by any person claiming a family relationship with them. At paragraph 16 the Chancellor said that he understood the concerns that some people had about building over places where burials had taken place, but he made it clear that this was not uncommon. Very many churches had been extended, both in past centuries and in more recent times; and it was not infrequently the case that the only viable means of extending a church was to build over the places where burials had taken place. There had never been any general rule or principle that such building was forbidden. Having considered the Disused Burial Grounds Act 1884 and Section 18A of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991, the Chancellor concluded that even if this were a case in which the strict provisions of the 1884 Act and section 18A of the 1991 Measure had applied (which it was not), the court would have been able to grant a faculty to permit the extension to be built. McGregor Ch did not accept – as some of the objectors had suggested – that building an extension to a church over a known burial place amounted to a 'desecration'. At paragraph 22, the Chancellor added that the result of an extension such as that proposed in the instant case was that a burial which was formerly outside the church building became a burial within the church building. If anything, being located within the church building was a more honoured place of burial than in the churchyard. It was certainly not a desecration. At paragraph 24 the Chancellor addressed objections relating to other known burials in the churchyard. He accepted that two other known graves were very close to walls of the proposed extension. He noted that the petitioners accepted the need to protect those graves during the building works, if necessary by temporarily removing memorials or parts of memorials to ensure that they were not at risk of being damaged. He considered that to be an entirely reasonable approach on the part of the petitioners; and he did not consider that the proximity of the two burials in question to the extension amounted to a reason for not permitting it if other factors indicated that it should, in the court's discretion, be permitted.

11. In my judgment, *Re Holy Trinity, Headington Quarry* [2018] Ecc Oxf 1 is authority for the proposition that the existence of a burial place under a proposed building to be constructed on consecrated land is not necessarily a ground for refusing a faculty permitting the building works to take place. However, McGregor Ch was not considering an application to exhume any human remains affected by such building works nor, apparently, was this suggested as a condition of the grant of any faculty permitting the works. Whilst the decision is clearly of relevance to the present petition, it is not directly determinative of it.

12. I therefore turn to the approach which the Consistory Court is required to take when considering a petition for the exhumation of human remains, as laid down by the Court of Arches (Cameron QC, Dean of the Arches, Clark QC Ch and George QC Ch) in *Re Blagdon Cemetery* [2002] Fam 299. The court has a discretion but the starting-point in exercising that discretion is the presumption that Christian burial is permanent, that human remains should not be portable, and that a faculty for exhumation should only exceptionally be granted. The presumption of the permanence of Christian burial flows from the theological understanding that burial (or the interment of cremated remains) is to be seen as the act of committing the mortal remains of the departed into the hands of God, as represented by His Holy Church. Exhumation is to be ‘exceptional’, and the Consistory Court must determine whether there are special circumstances justifying the taking of that exceptional course in the particular case (the burden of establishing the existence of such circumstances being on the petitioner in the particular case in question). According to the Court of Arches (at paragraph 33):

“Exceptional means ‘forming an exception’ (*Concise Oxford Dictionary*, 8th ed (1990)) and guidelines can assist in identifying various categories of exception. Whether the facts of a particular case warrant a finding that the case is to be treated as an exception is for the chancellor to determine on the balance of probabilities.”

It is for the petitioner to satisfy the court on the balance of probabilities that there are special circumstances which constitute good and proper reason for making an exception to the norm that Christian burial in ground which has been permanently set aside as sacred by the act of consecration of a bishop of the Church of England is final.

13. At paragraph 13 of his judgment in *Re: The Petition of Kathrine Tollis* [2016] Ecc Oxf 2 McGregor Ch summarised the guidelines provided by the Court of Arches as follows:

“a. Advancing years, deteriorating health and moving to a new area are not in themselves adequate reasons for permitting exhumation. Any medical reasons relied upon by a petitioner have to be very powerful indeed to create an exception to the norm of permanence, for example, serious psychiatric or psychological problems where medical evidence demonstrates a link between that medical condition and the question of location of the grave of a deceased person to whom the petitioner had a special attachment.

b. The passage of a substantial period of time since burial will not in itself be fatal to a petition, although it might be potentially relevant in assessing the genuineness of the petitioner's case.

c. Since double and triple graves in which the remains of members of the same family could be buried together were to be encouraged, the bringing together of family members' remains in a single grave can provide special reasons for permitting

exhumation despite the lapse of a long period of time since burial. But where no burial had yet occurred in a family grave clear evidence as to the existence of a legal right to such a grave would be required to justify exhumation.

d. Although mistake as to the location of the grave or, in certain circumstances, as to the significance of burial in consecrated ground could be a good and proper reason, mere change of mind as to the place of burial by those responsible for the interment could not.

e. Although the views of close relatives were a very significant factor, the amount of local support for the petition would normally be irrelevant.

f. In view of the desirability of securing equality of treatment between petitioners so far as circumstances permitted, the court has to take into account the impact its decision is likely to have on other similar petitions. The Court of Arches referred to ‘the desirability of securing equality of treatment, so far as circumstances permit it, as between petitioners’.”

14. These guidelines are helpful but of limited assistance on the facts of this particular petition. Guideline (a) is not relevant. I am in no doubt about the genuineness of this petition; and am I satisfied that *Blagdon* guideline (b) is no reason to refuse it. Although the two burials took place 140 and 109 years ago, the passage of a substantial period of time since burial will not in itself be fatal to a petition. In *Re St Mary the Virgin, Hurley* [2001] 1 WLR 831 Boydell QC Ch (sitting in this Court) allowed the remains of a Brazilian national hero to be removed for re-interment in consecrated ground in Brazil after the passage of 177 years. Moreover, the petitioner has acted promptly in presenting this petition (on 10 April 2019) following the grant of the relevant faculty for the building works (on 7 September 2018). Guideline (c) is not relevant. As to Guideline (d), this petition is not presented as a case of ‘mistake’; and it is certainly not a case of ‘mere change of mind’. Guideline (e) is satisfied, although this is not determinative. However, it does seem to me that the pastoral and practical benefits identified by the rector are relevant considerations which lend some support to the petition. As for guideline (f), the circumstances of this particular grave are exceptional: none of the other affected graves are actively tended by relatives of the deceased and the rector does not think that the grant of a faculty will be likely to provoke any similar petitions. I do not consider that any decision to direct a faculty to issue as asked will create any kind of precedent; and it would certainly not be my intention to do so.

15. In *Re St Nicholas, Charlwood* [2019] Ecc Swk 2 Morag Ellis QC Dep Ch allowed a petition to exhume the body of the petitioner’s mother for cremation and the scattering of the ashes elsewhere. She did so because the petitioner’s father had been in such a state of shock following the mother’s death in a motor accident that he had left it to a family friend to arrange the funeral; and, despite the fact that the father and his three daughters were all atheists, the family friend had arranged for burial in a consecrated churchyard. Each member of the family had never been happy with this and had only recently found it possible to discuss the matter together. The Deputy Chancellor concluded that this was an exceptional case where exhumation should be allowed because she was persuaded that there had been a fundamental mistake of intention: for a family of conscientious atheists, Christian burial had not been the right choice. In the course of her judgment, the Deputy Chancellor considered Mrs Tollis’s case and McGregor Ch’s summary of the *Blagdon* guidelines. At paragraph 23 she rightly acknowledged that his decision in that case to refuse the petition because he was unable to hold that the petitioner had demonstrated

exceptional circumstances was not binding on her, although she mentioned it as an example of the application of *Blagdon* in practice, particularly bearing in mind guideline (f). There were other Consistory Court decisions in which petitioners had succeeded. The Deputy Chancellor emphasised that each case must be decided on its own facts in the light of the stringent principles laid down in *Blagdon*. At paragraph 25 the Deputy Chancellor made the point that whilst the guidance in *Blagdon* on particular arguments was valuable, there was no suggestion that the scope of possible exceptions was limited to these categories. The facts of the petition she was considering were said not to fall exactly within all or any of the circumstances specifically addressed in *Blagdon*. At paragraph 26 the facts of the *Charlwood* case were said to be tragic and remarkable. Whilst not a ‘mistake’ case of the sort which the courts had sometimes considered, such as burial in consecrated, as opposed to un-consecrated, ground as a result of administrative error, the Deputy Chancellor was persuaded that there had been a fundamental mistake of intention in the case before her. In granting the petition, she made it clear that the facts of the case were so extraordinary that she did not consider that her decision would create any kind of precedent; and it certainly was not intended to do so. That decision emphasises the obvious points that whilst the guidance in *Blagdon* on particular arguments is valuable, the scope of possible exceptions is not limited to the categories specifically identified in the judgment in that case; and that each case must be decided on its own facts in the light of the stringent principles laid down in *Blagdon*.

16. That analysis and approach are consistent with the earlier judgment of Eyre QC Ch in *Re All Saints, West Bromwich* [2019] ECC Lic 1. There, unbeknown to the incumbent of the church, some cremated remains had been buried very close to a sewer running through the churchyard. This fact only came to light when repair work needed to be carried out on the sewer, which might cause damage to the memorial and disturb the remains. The deceased's widow requested a faculty to exhume the remains and re-inter them in the same churchyard about 30 feet from their current position. The Chancellor was satisfied that the circumstances were sufficiently exceptional to justify the grant of a faculty for exhumation and re-interment. At paragraphs 7 to 9 of his judgment Eyre QC Ch said this:

“7 The location of this grave was not suitable at the time of the interment. This was because its proximity to the sewer meant that there was a risk that at some future time the memorial would be at risk of damage and the remains at risk of disturbance when works had to be performed on the sewer. That risk has now eventuated. *In Re Christ Church, Alsager* [1999] Fam 42 the Chancery Court of York identified a mistake as to locality by an incumbent as a matter which ‘may be persuasive’ in support of allowing exhumation. The Court of Arches in *Re Blagdon Cemetery* explained that exceptional circumstances were needed before exhumation could be authorised. In so doing it departed from the approach set out in *Re Christ Church, Alsager* of requiring a ‘good and proper reason for exhumation that reason being likely to be regarded as acceptable by right thinking members of the Church at large?’. Nonetheless, at [36 iii], the Court of Arches did agree with the Chancery Court saying that ‘a mistake as to the location of a grave can be a ground upon which a faculty for exhumation may be granted’.

8 It would be possible to engage in a sterile academic analysis as to the nature of the mistake which was made in this case and whether it was a mistake as to the location of the grave. That would not be appropriate. The Court of Arches was giving examples of matters which might amount to exceptional circumstances justifying exhumation and not

saying that there was a closed set of cases in which exhumation was justifiable. The position here is that Derek's Smith's remains are in a location which is unsuitable. That location is unsuitable because there is a significant risk of the remains being disturbed accidentally in the course of necessary works. The risk of such disturbance is incompatible with the safe and seemly preservation of the remains which is one of the purposes of Christian burial. The remains came to be in that location because of a misunderstanding at the time of interment. At that time the location was thought to be suitable because of the misunderstanding about the route of the sewer. Knowledge of the true route of the sewer has revealed that the remains are in an unsuitable location.

9 I am satisfied that the circumstances here are exceptional and that exhumation is potentially permissible. I am also satisfied that the proposed course of re-interment in the same churchyard is appropriate. Accordingly, I direct that the faculty sought be granted."

17. The *West Bromwich* case is clearly distinguishable from the present case since in that case the location of the grave was unsuitable at the time of the original interment because of a misunderstanding about the route of the sewer at that time and the consequent significant risk of the remains being disturbed accidentally in the course of any necessary works to that existing sewer. Here, the location of the grave has, on the petitioner's case, only become unsuitable because of the recently approved and instituted building works in the immediate vicinity of the grave. Nevertheless, the *West Bromwich* case supports the proposition that the fact that human remains are in an unsuitable location may constitute exceptional circumstances which may justify the grant of a faculty permitting the exhumation of human remains notwithstanding the strong presumption in favour of the permanence of Christian burial.

18. On the unusual facts of the present case, I hold that the petitioner has satisfied the court, on the balance of probabilities, that there are special circumstances which constitute good and proper reason for making an exception to the norm that Christian burial in consecrated ground is final. Those reasons are:

- (1) that the location of the existing grave is no longer a suitable resting-place for the petitioner's ancestors;
- (2) that this situation has come about through no change of mind or physical or mental infirmity on the part of the petitioner or other family members but rather through the decision of the church to embark upon building works in close proximity to the grave for the benefit of both the church and the wider village community;
- (3) the petitioner's reasons and case are genuine, his petition is said to reflect the wishes of the known descendants of the two deceased, and the petition was lodged promptly following the grant of the relevant faculty for the building works;
- (4) not merely is the petition supported by the PCC and the incumbent but there are valid pastoral reasons, and also good practical reasons (in terms of facilitating access to the main entrance to the extension), in support of the grant of a faculty;
- (5) it is proposed to re-locate the grave within the same churchyard in which it is currently located and not to move the remains outside the churchyard's curtilage or to re-bury them elsewhere, still less in unconsecrated ground;

(6) the exhumation and re-interment should not have an unsettling effect on people living in the immediate neighbourhood of the churchyard; and

(7) the decision to grant a faculty as asked will not create any kind of precedent, and it is certainly not my intention to do so.

19. I will therefore direct that a faculty shall issue as asked, subject to the usual conditions for the protection of human remains. The faculty will require the exhumation and subsequent re-interment of the remains to be conducted with all due reverence and decency under the supervision of the rector of the DAMASCUS benefice and Tonks Brothers Funeral Directors Limited (or some other reputable and experienced funeral directors); and for the re-interment to take place in, and the existing memorial to be re-located to, the grave space next to F10 (as indicated on the plan of Area F of the churchyard).

20. The order for costs will be that the Petitioner pays the Diocesan Registry's correspondence and other ancillary costs. I do not propose to charge separately for preparing my Judgment for pastoral reasons given that the need for the petition was brought about by the works instituted by the church and I do not consider that it would be right for them to fall on the Petitioner in this particular instance.