DIGGING UP EXHUMATION

RUPERT BURSELL
Chancellor of the Dioceses of Durham and St Albans

Good friend, for Jesus's sake forbeare
To dig the dust enclosed here
Blest lie the man that spares these stones
And curst be he that moves my bones

These lines from Shakespeare's grave in the parish church of Stratford-on-Avon perhaps reflect the earthly feelings of many mortals.[1] On the other hand, it seems that another poet, Rossetti, having had second thoughts about burying certain poems with the body of his wife, may have obtained a faculty for their recovery.[2] What, however, is the law?

Gibson records in his *Codex Iuris Ecclesiastici Anglicani* that 'a corps, once buried, cannot be taken up, or removed, without licence from the Ordinary';[3] he had seen three such licences dating from before the Reformation and two thereafter. This in itself underlines that from early times exhumation required regulation and Coke in his *Institutes* stated that, although a carcase belongs to no-one, it is subject to ecclesiastical cognisance 'if abused or removed'.[4]

Moreover, it is now clear that any disturbance, even without there being an actual disinterment, requires a faculty. In *R v Tristram*[5] a faculty had been granted *inter alia* to:

> '... open the lid of the coffin ... to inspect the contents thereof, in order to ascertain whether the coffin contained the remains of T. C. Druce or any human remains ....'

In considering whether prohibition should issue, Channell J said:

> 'Interfering without proper authority with a body that had been interred in consecrated ground was an ecclesiastical offence; it was probably also a common law misdemeanour.'[6]

It follows that the opening of a grave to discover the sex of a body, to recover an item of jewellery or to take a DNA sample are each embraced by the need for a faculty if within the jurisdiction of the consistory court.[7] Similarly, the removal of a body from a

---

1 I understand, nevertheless, that the grave has been opened at least once.

2 Fellows, *The Law of Burial* (Haddon, Best & Co., Ltd. 1940), p. 125. *Quaere* which poems — and whose? What was the motive: sentiment or commerce? Unfortunately neither of the two recent biographies mention the possibility: see Marsh, *Christina Rossetti, A Literary Biography* (Pimlico, 1994) and Thomas, *Christina Rossetti* (Virago, 1996).

3 Gibson, *Codex Iuris Ecclesiastici Anglicani* (3rd edn. London, 1713), p. 544.

4 Coke, 3 *Institutes* 203.

5 *R v Tristram* (1899) 15 TLR 214.

6 15 TLR 214 at 215. See also *R v Sharpe* (1857) 7 Cox CC 214, CCR, where Erle J, at 216, spoke of '... the protection of the grave at common law, as contradistinguished from ecclesiastical protection to consecrated ground ...'.

7 The ordinary faculty jurisdiction does not apply to a cathedral: see Phillimore, *Ecclesiastical Law* (Sweet & Maxwell, 2nd edn 1895), vol II, p. 1420. However, a grave within a cathedral is nonetheless caught by the provisions of the Burial Act 1857 (20 & 21 Vict. c. 81), s. 25. It is at the least arguable that a faculty must still be granted by the relevant Ordinary. In the nineteenth century there were two exhumations of St Cuthbert in Durham Cathedral. The first, in 1827, apparently raised some disquiet, although there seems to be no substantive information relating to any permission sought or granted. The second was in 1898. On this occasion a letter was received by the Dean and Chapter from the Home Office. It was referred to the Dean for an answer. It seems that little permission, if any, had been sought prior to exhumation. (I am indebted to Roger Norris of the Dean and Chapter Library and Philip Wills of the Diocesan Registry for this information.) Unfortunately, some archaeologists and historians seem to feel that a different approach may be taken to ancient remains as compared to more modern ones. In law the same formalities must, of course, be complied with.

https://doi.org/10.1017/S0956618X00003215 Published online by Cambridge University Press

mausoleum falls within the jurisdiction.[8]

In fact, any such disturbance tends to excite high emotions. In *Haynes' Case*[9] it was decided that a winding sheet 'bestowed on the body for the reverence towards it, to express the hope of resurrection' remains the property of its provider; this is because there may not be a gift to a dead person 'being but a lump of earth'. At the Leicester assize Haynes was first whipped for petty larceny of one winding sheet; however, on a separate indictment in relation to three more winding sheets he claimed benefit of clergy,

> 'and so escaped death, which he well deserved,[10] for this inhuman and barbarous felony.'

It seems that, even though the corpse was like 'imperious Caesar, dead and turned to clay',[11] any interference with it was an uncivilised act. However, the views of society may change. In 1788 in the case of *R v Lynn*[12] disinterment for dissection of a corpse was described by the court as:

> 'being highly indecent, and *contra bonos mores*; at the bare idea alone of which nature revolted. [Moreover] the purpose of taking up the body for dissection did not make it less an indictable offence.'

On the other hand, only some seventy years later Mr Justice Erle in the judgment of the court in *R v Sharpe* could express the view that exhumation 'for the purposes of anatomical science' might be an act deserving approbation.[13]

In fact it seems that in the middle of the nineteenth century faculties for exhumation were common, as in *Re Pope*[14] Dr Lushington ('a man not the least disposed to extend the legitimate limits of his jurisdiction'[15]) said:

> 'Faculties for the removal of bodies are of very frequent occurrence, and are decreed to gratify the wishes of relations.'

Moreover, by the end of the century in *Re Dixon* Dr Tristram was to point out that:

> 'Where the deceased has left no testamentary or clear directions as to the place of his burial, the practice of the Court is to grant a faculty to proper parties, on reasonable grounds shewn and subject to proper precautions, to remove the remains to another grave or vault in the same or another churchyard; but where the deceased has himself expressed a wish to be buried in that or in any other churchyard, the invariable practice of the Court is by a faculty to give effect to such wish.'[16]

This 'invariable practice' seems to imply that such applications were at the least not infrequently granted; that there were sufficient cases to build up a respectable case law on the subject seems also to be borne out by *R v Tristram*.[17] It may therefore be

---

[8] *Re Dixon* [1892] P 386, Cons Ct.

[9] *Haynes'* Case (1613) 12 Co Rep 113.

[10] In Watson's *Clergyman's Law* (3rd edn, Savoy 1725) at p. 391 Haynes is described as an 'evil person', but it is unclear whether this is because of the disturbance of the body, because of the theft, because he was a clerk, or because of a combination of these factors.

[11] *Hamlet*, Act V, Scene 1, line 235.

[12] *R v Lynn* (1788) 2 Term Rep 733.

[13] *R v Sharpe* (1857) 7 Cox CC 214 at 215, CCR.

[14] *Re Pope* (1857) 15 Jur 614, Cons Ct, a case of exhumation for the purpose of identification.

[15] *R v Tristram* [1898] 2 QB 371 at 374, per Wills J.

[16] *Re Dixon* [1892] P 386 at 391, Cons Ct.

[17] *R v Tristram* [1898] 2 QB 371 at 377, per Wills J. when he describes the consistory court as 'a competent authority, which certainly is not disposed rashly, improperly, or irreverently to sanction the removal of dead bodies from a consecrated place of burial for the purposes of idle curiosity or any unworthy or improper reason'. See also *Druce v Young* [1899] P 84, out of which the case flowed.

https://doi.org/10.1017/S0956618X00003215 Published online by Cambridge University Press

unwise[18] to rely merely on reported decisions to ascertain the frequency with which such faculties were granted. Cases involving exhumation seem in fact to have been common over a very long period of time.

In *Re Dixon* the application was for the removal of remains from a mausoleum after their burial so that they might be cremated; the ashes were thereafter to be placed in an urn which was then to be placed in the same mausoleum. A faculty was, however, refused as the widow had changed her mind as to the choice of disposal given to her by the deceased; the court was not satisfied that the proposed action was in accordance with the deceased's wishes; and that cremation ought to precede burial. The Chancellor, Dr Tristram, stated:

> 'Lastly, one result of being buried in consecrated ground is, that the site is under the exclusive control of the Ecclesiastical Courts, and no body there buried can be moved from its place of interment without sanction of a faculty to be granted upon application of the executors or members of the family, for reasons approved of by the Court, or upon the application of other parties upon the ground of necessity or of proved public convenience, and then only for reinterment in other consecrated ground.'[19]

On the other hand, in *Re Talbot*[20] a body that had been buried for 110 years was permitted to be exhumed so that it could be buried with other past superiors of a Roman Catholic theological college. The legal grounds for such an exhumation are not set out but presumably the passage of time meant that there would be less likelihood of distress to the living; moreover, at the time of the death there was presumably no practice of burying past superiors within the college. Certainly there is no indication that any stress was placed on a presumption against removal and the case seems to a further example of the ease with which such applications were then granted.

Indeed, in *Re Matheson*[21] Chancellor Steel stated:

> 'From the earliest times it has been the natural desire of most men that after death their bodies should be decently and reverently interred and should remain undisturbed. Burial in consecrated ground secured this natural desire, because no body so buried could lawfully be disturbed except in accordance with a faculty obtained from the church court. As all sorts of circumstances which cannot be foreseen may arise which make it desirable or imperative that a body should be disinterred, I feel that the court should be slow to place any fetter on its discretionary power or to hold that such fetter already exists. In my view there is no such fetter, each case must be considered on its merits and the chancellor must decide, as a matter of judicial discretion, whether a particular application should be granted or refused.'[22]

In the circumstances the learned Chancellor did not feel bound by the decision in *Re Dixon* as he permitted exhumation in order that the body might thereafter be cremated.[23] It may, however, be of importance that the petition was not presented by the

---

[18] Cf *Re Church Norton Churchyard* [1989] Fam 37 at 40, 41, *sub nom Re Atkins* [1989] 1 All ER 14 at 17, Cons Ct, per Chancellor Quentin Edwards QC.

[19] *Re Dixon* [1892] P 386 at 393, 394, Cons Ct.

[20] *Re Talbot* [1901] P 1, Cons Ct. In *Re St James' Churchyard, Hampton Hill* (1982) 2 Ecc LJ 253, Cons Ct, Chancellor Newsom QC granted a faculty for the removal of remains from the churchyard to a Presbyterian cemetery in Canada.

[21] *Re Matheson* [1958] 1 All ER 202, [1958] 1 WLR 246, Cons Ct.

[22] [1958] 1 All ER 202 at 203, [1958] 1 WLR 246 at 248. It should be noted that the view expressed in the first sentence is not universal, as burial and exhumation practices in the Middle East and in parts of South America make clear. Moreover, social practices and views change as the growth in cremation and the scattering of ashes testify.

[23] However, he ascertained that he was following the practice in the dioceses of Carlisle, Winchester and Bath and Wells: see *Re Matheson* [1958] 1 All ER 202 at 203, [1958] 1 WLR 246 at 247, 248.

https://doi.org/10.1017/S0956618X00003215 Published online by Cambridge University Press

widow, as she had originally intended, because of her own demise; in fact it was by the son who would be 'considerably distressed' if his mother's wishes were not carried out.[24] There was no suggestion that the deceased had wished to be cremated, and the petition was prompted by the widow's desire to have her ashes placed with those of her husband; nor was there any suggestion that anyone would be upset by the proposed exhumation. In fact it is clear that the decision was based on purely pastoral grounds.

It is against this background that we come to the well-known case of *Re Church Norton Churchyard*.[25] In that case a husband's ashes had been buried in a casket in Church Norton churchyard in 1975. The widow had made that decision 'under the stress of bereavement and without due reflection'.[26] By 1987 the relevant part of the churchyard was becoming neglected, and through age and increasing infirmity she was no longer able to cope with the one and a half hour walk both there and back to tend it. The widow now intended to move back to Twickenham where she intended her own ashes ultimately to be buried in a family grave. She therefore wished to re-inter her husband's ashes in Twickenham.

Having set out the relevant authorities,[27] the Chancellor set out the guiding principles in the exercise of his jurisdiction:

> 'The discretion has undoubtedly been expressed to be quite unfettered. It is to be exercised reasonably, according to the circumstances of each case, taking into account changes in human affairs and ways of thought but always mindful that consecrated ground and human remains committed to it should, in principle, remain undisturbed. The court then should begin with the presumption that, since the body or ashes have been interred in consecrated ground and are therefore in the court's protection or "safe custody", there should be no disturbance of that ground except for good reason. There is a burden on the petitioner to show that the presumed intention of those who committed the body or ashes to a last resting place is to be disregarded or overborne. The finality of Christian burial must be respected even though it may not be absolutely maintained in all cases. The court should make no distinction in this between a body and ashes and should be careful not to give undue weight to the undoubted fact that where ashes have been buried in a casket their disinterment and removal is simpler and less expensive than the disinterment and removal of a body and is unlikely to give rise to any risk of health. The court must take account of changes in the incidence of cremation in the last two generations. More than two-thirds of those dying in England are now cremated. There are also grounds for believing that society has become more mobile. The court should resist a possible trend towards regarding the remains of loved relatives and spouses as portable; to be taken from place to place so that the grave or place on interment of ashes may be the more easily visited.
>
> Notwithstanding these general principles cases occur in which the discretion to grant a faculty should be exercised. It is impossible, and I should be wrong in attempting, to give, or even foreshadow, a list of classes into which such cases may fall. Some instances may, nevertheless, be mentioned. Errors occur and bodies and ashes are placed in the wrong grave. Interment of both bodies and

[24] [1958] 1 All ER 202 at 203, [1958] 1 WLR 246 at 247. The father had been buried for eleven years.

[25] *Re Church Norton Churchyard* [1989] Fam 37, sub nom *Re Atkins* [1989] 1 All ER 14, Cons Ct.

[26] [1989] Fam 37 at 44, [1989] 1 All ER 14 at 20.

[27] In addition to the cases of *Re Pope* (1857) 15 Jur 614, Cons Ct, Re Dixon [1892] P 386, Cons Ct, and *Re Talbot* [1901] P 1, Cons Ct, the Chancellor set out the relevant cases on church extensions, road widening, public health and town development, namely *St Botolph without Aldgate Vicar and Churchwardens v Parishioners* [1892] P 161, Cons Ct; *St Helen's, Bishopsgate Rector and Churchwardens v Parishioners* [1892] P 259, Cons Ct; *St Mary-at-Hill Rector and Churchwardens v Parishioners* [1892] P 394, Cons Ct; and *St Michael, Bassishaw Rector and Churchwardens v Parishioners* [1893] P 233, Cons Ct.

https://doi.org/10.1017/S0956618X00003215 Published online by Cambridge University Press

ashes are sometimes, for understandable reasons, conducted before all relevant considerations are weighed. A family mausoleum or group of graves may be overlooked; the wishes of the deceased may not be known at the time of burial or fully taken into account. In all such cases the length of time which has elapsed since the interment is a matter to be considered; a prompt application must be stronger than one which seeks leave to disinter remains which have remained undisturbed for many months or years. The wish of the personal representatives or next of kin of the deceased to remove the body or ashes from one part of a churchyard to another or from one churchyard to another for reasons which appear to the court to be well-founded and sufficient is, on the authorities, a ground for the grant of a faculty. So is public necessity or even convenience, as for example the extension of a church, provision of heating facilities for church or parish room, the widening of a hazardous road. In a proper case even the laying out afresh of the churchyard to enable it to be better maintained may be a ground. In every case the arguments for the grant of a faculty must be weighed against the general principles already mentioned and the desirability of maintaining a churchyard, or a place set aside for the interment of cremated remains, undisturbed, as a place of peace, for prayer and for the recollection of the departed. Deep offence may be given to those who cherish the memory of a loved one buried in a churchyard, or tend a grave there, if disinterments are lightly or frequently allowed.'[28]

In the particular case there was no opposition to the grant of the faculty and the incumbent and parochial church council supported the petition; moreover the remains could be removed and transported without difficulty because of the stout casket.[29]

The legal question is, of course, as to the strength of the presumption against exhumation: what must the petitioner prove in order to meet the burden upon him? In this regard it is worth noting what prompted a hearing in *Re Church Norton Churchyard*. The Chancellor said:

'There has, in my experience, and, I understand, in the experiences of other chancellors, been an increase in the number of petitions of this nature in recent years. By petitions of this nature I mean petitions for the disinterment of bodies and cremated remains and their reinterment in other places, whether near to, or far from, the first place of sepultre.[30] I have in this diocese [Chichester] and in the Diocese of Blackburn, of which I am also chancellor, refused to grant the faculties sought under some of the petitions of this nature which have been presented to me. I have learnt that these refusals have caused distress, not only because of the frustration of sincerely held hopes, but also because, in some instances, the petitioners have been led to believe, wittingly or unwittingly, that the grant is no more than a formality; that the faculty is, if all is in order, a licence to which a petitioner is entitled as a matter of right. For this reason and as the petition of Mrs Gladys Atkins appeared to me, on first examination, to be a petition which I should not grant, on grounds which appear below, I directed that it should be heard in open court.'[31]

This no doubt is the background to the 'principle' that the Chancellor later enunci-

---

[28] *Re Church Norton Churchyard* [1989] Fam 37 at 43, 44, sub nom Re Atkins [1989] 1 All ER 14 at 19, 20.

[29] [1989] Fam 37 at 46, [1989] 1 All ER 14 at 21.

[30] One such case is *Re Cheddar Churchyard* (1988) 1 Ecc LJ (4) 7, Cons Ct, where a son petitioned for a faculty to exhume his mother's coffin so that she might be reburied with her husband in Epsom. The deceased's parents opposed the petition. Although the husband had wished to be buried with his wife he had not so directed in his will; on the evidence, she had expected to be buried in Cheddar and was content that that should be so. In the circumstances Chancellor Newsom QC refused a faculty.

[31] *Re Church Norton Churchyard* [1989] Fam 37 at 38, *sub nom Re Atkins* [1989] 1 All ER 14 at 15.

https://doi.org/10.1017/S0956618X00003215 Published online by Cambridge University Press

ated,[32] namely, that:

> 'The court should resist a possible trend towards regarding the remains of loved relatives and spouses as portable; to be taken from place to place so that the grave or place on interment of ashes may be the more easily visited'.

However, this seems rather to be an application of the general principles already enunciated rather than an actual principle itself.[33] Indeed, if this were not so, it would surely be necessary to set out the arguments in the unreported cases that had been heard in the Chancellor's two dioceses, especially in the light of the *dictum* of Dr Lushington in *Re Pope* and as the 'principle' does not seem elsewhere to be adumbrated upon in the reported cases.[34] In effect therefore the statement is merely the negative of the basic presumption against exhumation.

Against this backcloth it may at first sight be surprising that the faculty was ultimately granted, even though the Chancellor, of course, recognised that pastoral concerns are very relevant and that each case must be treated on its own merits. In the result the Chancellor explained:

> 'The strongest feature of the case, however, is the likely future of the plot in which Mr Atkins's ashes presently lie. There are serious difficulties in maintaining it as it is; it is no longer in use for the interment of cremated remains; the parochial church council will be able to present a strong case should it file a petition for clearing and returfing it. Should such a petition be presented Mrs Atkins would, on the authorities, have an equally strong case for objecting to the grant unless the petition contained provisions authorising her to remove her husband's ashes and memorial stone to another part of the churchyard or to another consecrated burial ground.'[35]

Nevertheless, such a petition was not apparently even in the offing and, indeed, may have had to have been suggested to the incumbent. As the Chancellor stated:

> 'He agreed that the old plot was rather neglected, that the arrangement there of small plaques recording the interment of ashes made maintenance difficult and that it was likely that within a generation a petition would be presented for a faculty to authorise, after due notice to all concerned, the clearing of memorials from, and the returfing of, the old plot.'[36]

---

[32] [1989] Fam 37 at 43, [1989] 1 All ER 14 at 19. It is interesting to note that the theological commentary quoted by the Chancellor at [1987] Fam 37 at 40, [1989] 1 All ER 14 at 17 from *Wheatley on the Book of Common Prayer* (1858 edn) p. 586 in relation to the 'critical words' of the burial service, 'We . . . commit his body to the ground', seem to be based on a theology of the resurrection of the physical body: 'The phrase of "commit his body to the ground" implies that we deliver it into safe custody and into such hands as will *safely restore it again*' (emphasis supplied). Compare, too, the words of committal in the Forms of Prayer to be used at Sea — At the Burial of their Dead at Sea. However, *Wheatley* goes on to make it clear that "It is not his resurrection, but *the* resurrection that is here expressed; nor do we go on to mention the change of his body, in the singular number, but of *our* vile body, which comprehends the bodies of Christians in general". See also Daniel, *The Prayer-Book, Its History, Language and Contents* (20th edn, Wells Gardiner Darton & Co 1901) at p. 510.

[33] In *Re St Mary Magdalene, Lyminster* (1990) 2 Ecc LJ 127, Cons Ct, Chancellor Edwards QC, following the principles in *Re Church Norton Churchyard*, declined to grant a faculty to a widow to exhume her husband's ashes so that she might re-inter them where she then lived, although she was unable to visit the grave by reason of infirmity.

[34] Indeed, the Chancellor thereafter went on to state (*Re Church Norton Churchyard* [1989] Fam 37 at 44, sub nom *Re Atkins* [1989] 1 All ER 14 at 20): 'The wish of the personal representatives or next of kin of the deceased to remove the body or ashes from one part of a churchyard to another or from one churchyard to another for reasons which appear to the court to be well-founded and sufficient is, on the authorities, a ground for the grant of a faculty'. The question is: What reasons would the court regard as 'well-founded and sufficient'? Surely the natural distress of a petitioner, for example, at being no longer able after many years to tend the grave of a still-born infant would be well-founded and in all probability sufficient?

[35] [1989] Fam 37 at 46, [1989] 1 All ER 14 at 21.

[36] [1989] Fam 37 at 45, [1989] 1 All ER 14 at 20.

https://doi.org/10.1017/S0956618X00003215 Published online by Cambridge University Press

Thus, some may think, the pastoral concerns were ultimately met and the overturning of the basic presumption not as difficult as might at first have been thought.

The next ecclesiastical case[37] of exhumation reported in the law reports is *Re St Luke's, Holbeach Hurn.*[38] There a body had been buried in a grave space reserved for another person next to her husband and the petition to exhume was opposed by the relatives of the deceased. Chancellor Goodman fully appreciated the distress caused to the relatives who were entirely innocent in the matter but nevertheless granted the petition as falling within the principle enunciated in *Re Church Norton Churchyard* that 'Errors occur and bodies and ashes are placed in the wrong grave'.[39] Indeed, he could not see that the petitioner was acting unreasonably in opposing cremation nor in being unwilling to accept the suggestion that she might be buried in the row at her husband's feet.[40] The reservation of a grave space gave her a right recognised by law and one that should not be frustrated; she had therefore satisfied the burden of proof that rested upon her.[41]

In *Re St Peter's Churchyard, Oughtrington*[42] there was an unopposed petition to exhume a body buried in 1984 and to re-inter it in a different diocese; there was, however, a letter from the funeral director stating that he 'would imagine that the coffin would have suffered some quite considerable decay'. Chancellor Lomas stated:

> 'Whilst . . . this court clearly has a discretion to authorise the exhumation of human remains, it is equally clear that the court should only exercise its discretion in special circumstances and that the grant of a faculty for such purposes should be the exception rather than the rule. In taking this view I gain support from the decisions of Judge Quentin Edwards Q.C. in *Re Church Norton Churchyard*[43] . . . and Judge Michael Goodman Ch in *Re St Luke's, Holbeach Hurn,*[44] . . .
>
> In my judgment it is clear that most men and women desire and hope that when after their death their remains have been decently and reverently interred they should remain undisturbed. Where the burial has taken place in ground consecrated in accordance with the rites of the Church of England it is clear that the intention of all those taking part is that the earthly remains of the deceased are to be finally laid at rest. Having reread the forms of service for the burial of the dead authorised for use in the Church of England I am satisfied that there is nothing provisional in those forms of service and that the whole intention and purpose is that the remains of the deceased should be laid at rest once and for all.
>
> It is, of course, the case that the situation and affairs of men are such that little if anything done by man is immutable. Situations will arise where even something intended to be as final as burial may have to be reviewed in the light of new circumstances. It is out of this that the court's discretion to authorise the exhumation of human remains has grown. Plainly, however, the exercise of the discretion

[37] For a secular case, see *Reed v Madon* [1989] Ch 408, [1989] 2 All ER 431.

[38] *Re St Luke's, Holbeach Hurn, Watson v Howard* [1990] 2 All ER 749, [1991] 1 WLR 16, Cons Ct.

[39] *Re Church Norton Churchyard* [1989] Fam 37 at 44, sub nom *Re Atkins* [1989] 1 All ER 14 at 19.

[40] *Re St Luke's, Holbeach Hurn, Watson v Howard* [1990] 2 All ER 749 at 757, [1991] 1 WLR 16 at 26. If she were to be cremated she might have been buried in her husband's grave; her body could not be buried there because of the water table: see pp 753, 754 and p 21. The undertaker apparently felt that a wife should be buried on her husband's left, commenting that 'As they were married, so are they buried' (p. 753 and p. 21): the petitioner would not accept the alternative location as 'her husband had never bullied her or trampled on her in life and ... she did not like the idea of being under his feet' (see p. 754 and p. 21).

[41] [1990] 2 All ER 749 at 758, [1991] 1 WLR 16 at 26. Frequently in such cases the petition is by the undertaker or the incumbent whose error it was, but the same principles clearly apply. In *Re St Mary's Churchyard, Speldhurst* (1990) 2 Ecc LJ 131, Cons Ct, Chancellor Goodman refused a faculty where an innocent mistake had been made but the remains had been buried for four years. There had been no reservation of a grave space.

[42] *Re St Peter's Churchyard, Oughtrington* [1993] 1 WLR 1440, *sub nom Re Smith* [1994] 1 All ER 90.

[43] *Re Church Norton Churchyard* [1989] Fam 37, *sub nom Re Atkins* [1989] 1 All ER 14.

[44] *Re St Luke's, Holbeach Hurn, Watson v Howard* [1990] 2 All ER 749, [1991] 1 WLR 16.

https://doi.org/10.1017/S0956618X00003215 Published online by Cambridge University Press

> to grant a faculty for this purpose is something which ought to be done sparingly and only in special circumstances.'[45]

In the instant case the petitioner, a licensed reader, was attempting to comply with his deceased wife's wish as to where she should be buried; he was apparently unable to do so before because of the then unavailability of grave space. He also found it difficult to visit the present grave. In addition he put forward a theological argument that, owing to the millions of people in heaven, to be buried in close proximity to one's relatives and friends would give the best chance of remaining with them in heaven.[46] However, without discussing the actual merits of this theological argument, the Chancellor took into account the practical problems which would arise in the consequentially frequent exhumations if the argument were acceded to. He concluded:

> 'In my judgment such a situation would be insupportable in the light of the law as it stands and I ought not to countenance it. It would lead to an unseemly procession of disintegrating corpses and ashes between burial grounds.'

Finally, he referred to the funeral director's letter and continued:

> 'Thus the deceased was buried over 8 years ago. In my judgment the passage of such a period of time since the burial places a particularly heavy onus on the petitioner in a case of this kind.[47] In such circumstances for the court to exercise its discretion to grant a faculty for the exhumation of the deceased's remains rather than to uphold the principle that its primary duty is to protect the remains of the deceased person buried in consecrated ground in accordance with the rites of the Church of England, will require strong and compelling circumstances. I do not find such circumstances in the present case.'[48]

It is unclear in the context of the case whether the argument as to time arose from the mere necessity to act timeously or from the likely state of the coffin or from a combination of the two. In any event it is unsurprising that the faculty was refused; indeed it seems that any distress felt by the petitioner was likely to have been at the time of the original burial rather than at the time of the petition[49] and therefore compelling pastoral arguments were lacking.

In *Re St Mary's Churchyard, Alderley*[50] there was a petition to exhume and reinter ashes in a different part of the same churchyard; the deceased had died in 1987. The petitioner had always been unhappy as to the choice of location by the incumbent and brought the petition when the area became neglected; the latter state, however, was thereafter rectified. The original interment had been accompanied by a 'short

---

[45] *Re St Peter's Churchyard, Oughtrington* [1993] 1 WLR 1440 at 1442, *sub nom Re Smith* [1994] 1 All ER 90 at 93, 94, Cons Ct. It seems likely that these words were not intended to increase the burden of proof upon the petitioner as in *Re Knight* (1993) 3 Ecc LJ 257. *The Times* 27 January 1994, Cons Ct, Chancellor Lomas granted a faculty for exhumation where the deceased had intended to return to his home county, his widow had promptly instructed the undertaker to arrange the exhumation and an acceptable explanation for any delay in the making of the application had been found. 'Each case was different and the facts of each case had to be considered by the court separately and carefully'. See, too, *Re Johnstone* (1996) 4 Ecc LJ 685, Cons Ct. In *Re Holy Trinity, Freckleton* (1995) 3 Ecc LJ 429, Cons Ct, Chancellor Spafford spoke of 'a strong presumption' against exhumation.

[46] *Re St Peter's Churchyard, Oughtrington* [1993] 1 WLR 1440 at 1443, *sub nom Re Smith* [1994] 1 All ER 90 at 94.

[47] In *Re Knowle Churchyard* (1994) 3 Ecc LJ 259, Chancellor Aglionby refused a petition to exhume a person's ashes after eleven years so that they might be buried with his wife's remains. There was doubt as to whether they could be removed; there had been no mistake; and the desire to record both names on the wife's memorial could be met by devising a suitable form of words.

[48] *Re St Peter's Churchyard, Oughtrington* [1993] 1 WLR 1440 at 1444, *sub nom Re Smith* [1994] 1 All ER 90 at 95.

[49] [1993] 1 WLR 1440 at 1443, [1994] 1 All ER 90 at 94, 95.

[50] *Re St Mary's Churchyard, Alderley* [1994] 1 WLR 1478, *sub nom Re Sydney Wilson Marks, deceased* 3 Ecc LJ 352, Cons Ct.

https://doi.org/10.1017/S0956618X00003215 Published online by Cambridge University Press

service' but, it seems, the main burial service would have taken place at the time of the cremation.[51] Chancellor Lomas, having briefly reiterated the arguments in his *Oughtrington* judgment, found that there were no special circumstances, alternatively no strong and compelling circumstances,[52] to support the grant of the faculty and the petition was dismissed on these and other grounds. Once again there is nothing surprising in the result on the facts before the court.

Similarly, in *Re St Thomas' Church, High Lane*[53] Chancellor Lomas refused a petition for the removal of ashes buried in 1989 to a churchyard 65 miles away so that they would be more accessible to the widower petitioner. He stated:

> 'I have to bear in mind that if I accede to the submission that it would be proper to grant an order for exhumation where the only ground is that the deceased's spouse or other close relative has moved away from the area and is, because of advancing age, finding it increasingly difficult to tend the grave I should be sanctioning a considerable weakening and relaxation of the proposition which I have held to represent the law namely, that the exercise of my discretion to grant a faculty for this purpose is something which ought to be done sparingly and only in special circumstances. At a time when it is commonplace for people to change their residence from one part of the country to another such a relaxation would result in many more applications of this kind which could hardly be refused in view of the precedent which had been set. . . . It is entirely possible that his daughter will move again. If [the petitioner] then moves again in order to continue to be near his daughter would that result in a further application?'[54]

There is no suggestion that there were any added pastoral reasons for the petition and the case seems to be another example of the portable remains cases that were referred to by Chancellor Edwards in *Re Church Norton Churchyard*.[55] It is thus not surprising that the petition failed.

As has been suggested, there is a danger in drawing too many conclusions from a lack of reported cases and this is particularly so in the sphere of ecclesiastical law where it may be more difficult to have such cases reported. In addition I am myself aware of a number of exhumation cases in the dioceses of Durham and St Albans where faculties have been granted, or petitions have been withdrawn, without there being any written judgment. Cases that are reported are likely to reflect the more difficult cases; moreover, judging from the unreported cases in the Middle Temple library, it is probable that particular chancellors find such cases more troublesome than do others. With these caveats in mind I now turn to some of these cases.

The facts in *Re St Paul, Hanging Heaton*[56] were, as Chancellor Collier QC observed, particularly tragic. The widow was a Chilean who had come to this country with her sailor husband. Their last child had died aged only 9 months and was buried in a grave deep enough that in due course his parents might be buried with him. When the father died a mistake arose as a result of which it was believed there was only room for two in the grave and in the height of the immediate bereavement it was therefore decided to bury the father in a different churchyard. Thereupon the mother petitioned for a faculty to exhume their child that he might be reinterred with his father and where she might in due time also be buried. The petition was opposed by the incumbent *inter alia* on the grounds that he wished to keep the integrity of the churchyard; that he could not accept any principle that members of the same family need to be buried together; and that he believed that families in the parish would be

---

[51] See [1994] 1 WLR 1478 at 1480.
[52] See [1994] 1 WLR 1478 at 1483, 1484.
[53] *Re St Thomas' Church, High Lane* (1995) 4 Ecc LJ 605, Cons Ct.
[54] 4 Ecc LJ 605 at 606.
[55] *Re Church Norton Churchyard* [1989] Fam 37, *sub nom Re Atkins* [1989] 1 All ER 14, Cons Ct.
[56] *Re St Paul, Hanging Heaton* (1994) 3 Ecc LJ 261, Cons Ct.

https://doi.org/10.1017/S0956618X00003215 Published online by Cambridge University Press

distressed at the idea of an exhumation.[57] Apparently it was only in the course of the hearing[58] that the mistake about the depth of the grave came to light. The Chancellor concluded:

> 'This is an unusual case. The families have clearly always had an intention that John who died so tragically young should be buried together with his mother and father. They thought that they had made the appropriate arrangements once; they believed that they were frustrated in that purpose through no fault of theirs. They wish now to fulfil that purpose. They are realistic about what is involved. They have this desire, which does not arise from any superstition or false belief, to be together in death as in life. It is part of their family history and culture.
>
> As this is always a discretionary matter, each case must be decided on its own merits, and I must not fall into the trap of fearing that if I allow this petition others may regard it as a precedent.
>
> Finally I have already said that in *Re Atkins*[59] it was stated that his discretion is to be exercised reasonably, according to the circumstances of each case, taking into account changes in human affairs and ways of thought.
>
> In recent years there has been a significant growth in understanding the process of grieving. The Christian Church has played a part in this development.'

On these pastoral grounds a faculty was therefore granted, although the incumbent was excused any responsibility in relation to the exhumation.

Similarly, in *Re St Luke's, Whaley Thorns*[60] there were strong pastoral considerations. A husband had been stabbed to death by his wife who was subsequently given a suspended sentence of imprisonment for his manslaughter. As his next of kin she selected where he was to be buried. However, after the burial his parents petitioned to exhume his remains and rebury him where they lived; the wife, who had remarried, opposed the grant of a faculty. Chancellor Bullimore, however, granted a faculty as the grave was a constant reminder of the manner of the deceased's death; the widow had moved away and would not be buried in the same grave; the widow bore some degree of guilt for the death; the family would grieve more easily if the remains were moved nearer, and more conveniently, to their homes; and it was impossible to know the deceased's wishes as to where he should be buried, especially as he would not have contemplated dying violently at his wife's hands. As to arguments as to convenience the Chancellor stated:

> 'In the ordinary case such arguments . . . would weigh little, but the force and weight of feeling about the site of the grave were almost palpable, arising from the circumstances in which [the deceased] came to be buried there at [his wife's] insistence.'

The new grave was to be a single grave as otherwise nothing but trouble would be likely to arise; any inscription on the memorial should be approved by the incumbent.

Re Holy Trinity, Freckleton[61] was also a most unusual case. Chancellor Spafford allowed the exhumation of a coffin from a churchyard where the consistory court

---

[57] In this particular context it is interesting to note that there is power in particular circumstances to dispense with citation in cases of exhumation: Faculty Jurisdiction Rules 1992, SI 1992/2882, r 12(9). If pastoral concerns are relevant to the exercise of the jurisdiction, this must include the sensibilities, for example, of someone whose house overlooks the grave. How is the householder to learn of the proposed exhumation if there is no citation? See, too, the next footnote.

[58] The hearing was held in chambers as it was 'essentially a private matter'.

[59] *Re Church Norton Churchyard* [1989] Fam 37, *sub nom Re Atkins* [1989] 1 All ER 14, Cons Ct.

[60] *Re St Luke's, Whaley Thorns* (1994) 3 Ecc LJ 350, Cons Ct. For another case where an objection was entered, see *Re Cheddar Churchyard* (1988) 1 Ecc LJ (4) 7, Cons Ct, and note 30 above.

[61] *Re Holy Trinity, Freckleton* (1995) 3 Ecc LJ 429, Cons Ct.

https://doi.org/10.1017/S0956618X00003215 Published online by Cambridge University Press

had earlier refused to permit a particular form of words on the memorial[62] so that there might be reinterment in a municipal cemetery[63] where the form of words was acceptable. The Chancellor did not regard the wish to have a particular form of words as sufficient to rebut 'the strong presumption' against exhumation. However, when a petitioner had been inadvertently misled as a result of the action (or inaction) by the Church of England or by one or more of its members, as had happened in the instant case over the wording of the memorial; when such misleading has caused the petitioner to act (or not to act) to his or her detriment, as had happened over choice of the place of burial; and when there was not likely to be adverse 'pastoral damage' if the petition were allowed,[64] the court should attempt to correct or mitigate the results of that situation.

In *Re Stocks, deceased*[65] the petitioner sought to exhume his father's ashes after thirteen years so that they might be scattered in the Derbyshire hills in accordance with his known wishes. Chancellor McClean QC pointed out that the lapse of time was 'a most material consideration' as:

> 'delay makes it harder for the petitioner to discharge the onus resting upon him.'

Moreover,

> 'It is appropriate in certain cases to exercise discretion so as to permit the removal of human remains to another secure place, there to be re-interred. It is not essential that this new place of interment be in consecrated ground, though that is certainly desirable. To allow disinterment in order that the ashes be scattered would, however, strike at the root or the principles of security and safe custody.[66] Given that the jurisdiction I am exercising is a discretionary one, I must always leave room for wholly exceptional circumstances. Unless they present themselves (and they do not in the present case), I cannot believe it right to permit, for such a purpose, the disinterment of remains once committed to consecrated ground.'

These last two sentences seem, however, solely to refer to exhumation for the purpose of scattering, rather than to exhumation generally.

Another Sheffield case is *Re Ryles, deceased*[67] where a faculty was refused to move ashes from one Rotherham cemetery to another. The husband's ashes had been buried in his parents' grave in 1985; when his wife died in 1995 she did not wish to be buried in that cemetery because of its state and she was therefore buried elsewhere. Although the family longed to see them together, even if they had known that a faculty might be refused the wife's ashes would still not have been buried with her husband. As Chancellor McClean commented:

> 'In the absence of any mistake and of other special circumstances, the petitioner's wishes cannot prevail over the principle that remains committed to consecrated ground should rest undisturbed.'

In the particular circumstances it is not surprising that a faculty was refused but the

---

[62] *Re Holy Trinity Churchyard, Freckleton* [1994] 1 WLR 1588, 3 Ecc LJ 350, Cons Ct.

[63] In *Re Cosgrove* (1996) 4 Ecc LJ 607, Cons Ct, Chancellor Coningsby adjourned the hearing of a petition in relation to exhumation in a local authority cemetery until the parties had sought their remedy in the secular courts as to a disputed contractual reservation of the plot.

[64] The incumbent had opposed the particular form of words on the memorial but not the exhumation.

[65] *Re Stocks*, deceased (1995) 4 Ecc LJ 527, *The Times* 5 September 1995, Cons Ct.

[66] The Chancellor had referred to the provisions of Canon B38, para 4(b), which provides that ashes should be 'reverently disposed of by a minister in a churchyard or other burial ground ... or on an area of land designated by the bishop ... or at sea'. In his view they expressed 'something of the mind of the Church in a way that reinforces the considerations of security and safe custody'. However, the words 'on an area of land' would seem to embrace the scattering of ashes, especially in the light of the chosen preposition; moreover, there seems to be little difference between that and a disposal at sea. For a similar view, see Leeder, *Ecclesiastical Law Handbook* (Sweet & Maxwell, 1997) at para. 10.61.

[67] *Re Ryles, deceased* (1995) 24 October, Cons Ct (unreported).

https://doi.org/10.1017/S0956618X00003215 Published online by Cambridge University Press

Chancellor also gave a useful summary of the principles examined or developed in the case of *Re Stocks, deceased*, namely:

1. Once a body or ashes have been interred in consecrated ground, there should be no disturbance of the remains save for good reason.
2. Where a mistake has been made in effecting the burial, for example the burial is in the wrong grave, the court is likely to find that a good reason exists, especially when the petition is presented promptly after the discovery of the facts.
3. In other cases it will not normally be sufficient to show a change of mind on the part of the relatives of the deceased, or that the spouse or another close relative of the deceased has subsequently been buried elsewhere. Some other special circumstances must be shown.
4. The passage of time, especially when this runs into a number of years, makes it less likely that a faculty will be granted.
5. It is most unlikely that a faculty will be granted for the exhumation of cremated remains with a view to their being scattered as opposed to being re-interred.
6. No distinction is to be drawn between a body and cremated remains, except in so far as the processes of decay may affect a coffin more than a casket containing ashes.
7. It is immaterial to the exercise of the court's discretion whether or not a Home Office licence has already been obtained.

In *Re Johnstone*[68] a 16 year old child had been killed in a car accident in 1978 and buried in a local authority cemetery. The father very soon afterwards had a heart attack from which he never completely recovered, although he did not die until 1995; the family believed that the heart attack was brought on by his son's tragic death. The family had thought that the father would be able to be buried next to his son; when this was not possible he was buried in the same cemetery and an application was immediately made to exhume the son so that he might be reburied next to his father. Chancellor Collier granted a faculty, remarking that it was 'a far cry from the "portable remains" cases' and that he was satisfied not only that the circumstances of the case outweighed the presumption against interference but that 'the pastoral circumstances' required a faculty to issue. He commented:

> 'Clearly at the end of the day there is a balancing exercise to be carried out. It seems to me that it has to be carried out in the light of the mission of the Church and in the knowledge that that mission is taking place in a society where the doctrine and practice of the Church are foreign to many of those who may be the petitioners or those closely associated with the petitioners in such cases. That is not to say that there can be any compromise with those doctrines or practices, but the manner of their proclamation and enforcement must surely be conducted with a sensitivity to the mission and pastoral presence of the Church.'

Pastoral considerations similarly persuaded Chancellor Goodman in *Re Watling Street Cemetery*.[69] A rift had occurred between the deceased's sister and his widow. The deceased had been buried in the family grave but there was concern whether there would be agreement to the widow being buried there in due course. She therefore acquired a grave space in a different cemetery and petitioned for the exhumation of her husband's remains so that he might be buried in that plot. The Chancellor stated:

[68] *Re Johnstone* (1996) 4 Ecc LJ 685, Cons Ct. In *Re Jason Arthur Stedman* (1997) 15 March, Cons Ct (unreported). Chancellor Collier found that it was a 'wholly exceptional case' by reason of the petitioners' inability to come to terms with the loss of their son. This permitted him to grant a faculty in what might otherwise be regarded as a 'portable remains case'.

[69] *Re Watling Street Cemetery* (1996) 8 October, Cons Ct (unreported).

https://doi.org/10.1017/S0956618X00003215 Published online by Cambridge University Press

'In the knowledge that my decision will give peace of mind to the petitioner and, I hope, lead to some reconciliation between different members of the family, I am willing to grant a faculty in this particular case, making it clear that my decision in no way constitutes a precedent so far as petitions for exhumation in this diocese is concerned. The general principle must remain unaffected.'

In *Re St Peter's Churchyard, Humberston*[70] the petitioner had been inadvertently misled as to the permitted placing of flowers on his deceased wife's grave; thereafter misunderstandings arose between the church authorities and the petitioner leaving him very upset and angry. In these 'exceptional' circumstances Chancellor Goodman granted a faculty. He stated:

'I consider that further conflict over this matter will do no good to anyone.'

Thus it seems the faculty was granted on the same basis[71] as in *Re Holy Trinity, Freckleton* and *Re Watling Street Cemetery*.[72] On the other hand, in *Re Chiddingfold Churchyard*[73] the great unhappiness of the petitioner at no longer himself being able to visit and tend his wife's grave, was insufficient to overturn the presumption against exhumation in a 'portable remains case'. As Chancellor Goodman stated:

'I cannot agree with those who feel that difficulty in visiting a grave or place where cremated remains are interred is itself sufficient reason from departing from establishing customs of the Church.'

However, he reached a contrary conclusion in *Re Marshchapel Reginald Dale, deceased*.[74] This, too, was a 'portable remains case' but, according to Chancellor Goodman, the circumstances could be 'regarded as exceptional'. This was because the decision to inter the cremated remains in 1990 was taken in haste and without full thought; it was not practicable in 1996 to bury his wife's remains in the same plot, although she clearly desired that they should be buried together; if they had both been buried in the same churchyard a faculty would probably been granted for the exhumation of the ashes and their reburial with the widow; the length of time between the burial and the petition was 'reasonably short'; and neither the parochial church council nor the incumbent objected.

In *Re Haslemere Churchyard*[75], where the deceased had died some sixteen years before his wife and some seventeen years before the petition, Chancellor Goodman seems to have gone further, although he made it plain that his decision did not con-

[70] *Re St Peter's Churchyard, Humberston* (1996) 25 October, Cons Ct (unreported). Although concerning the placing of a memorial, rather than flowers, *Re Scopwick Albert Pearson, deceased* (1996) August, Cons Ct (unreported), was a similar case in which Chancellor Goodman reached a similar decision.

[71] See too *Re Tealby Churchyard* (1997) 14 August, Cons Ct (unreported). This is the only case of a confirmatory faculty in relation to exhumation. Although a 'portable remains case', the casket was exhumed with the permission of the parish council which looked after the closed churchyard: the Garden of Remembrance, however, was in any event excluded from local authority maintenance. The undertaker only became aware of the need for a faculty after the exhumation had taken place. The widow was entirely without fault, and Chancellor Goodman concluded that 'it would be entirely inappropriate to direct ... reinterment' in the original location, even when it was far from certain that he would have granted a faculty if there had not already been an exhumation. An order for costs was made against the undertaker including an indemnity to the petitioner against her payment of faculty fees.

[72] See notes 61 and 69 above.

[73] *Re Chiddingfold Churchyard* (1996) 8 July, *sub nom Re Pamela Violet Eaton, deceased* (1996) 4 Ecc LJ 689, Cons Ct. For a similar decision, see *Re Victoria Road Cemetery, Farnborough* (1997) 4 Ecc LJ 768, Cons Ct (Chancellor Goodman). Apparently a similar decision was reached by Chancellor Anglionby in *Re David James Boyce* (1997) 20 February, Cons Ct (unreported): see the note at (1997) 4 Ecc LJ 769.

[74] *Re Marshchapel Reginald Dale, deceased* (1997) 30 May, Cons Ct (unreported). See report at p. 67.

[75] *Re Haslemere Churchyard* (1997) 6 August, Cons Ct (unreported).

https://doi.org/10.1017/S0956618X00003215 Published online by Cambridge University Press

stitute a precedent and that the exercise of his discretion was made 'in the light of the very particular circumstances' of the case.[76] Having referred to his decisions in *Re Chiddingfold Churchyard* and *Re Victoria Road Cemetery, Farnborough*,[77] the Chancellor said:

> '... I have come to the clear conclusion in this unusual case that there are good grounds for departing from the presumption that remains, once interred, should be left to lie at rest. It is clear to me that Mrs Buchanan had always intended that her husband's remains and her own when she eventually died should be interred in the family plot at Dinder and that Colonel Buchanan's remains were only interred in Haslemere because that was what the then Rector quite understandably suggested at the time, Haslemere then being the family home. However it is also clear that from very shortly after interment there [the Rector] had been assuring Mrs Buchanan that there would be no difficulty, following her own death, in arranging for both lots of ashes to be united together at Dinder.'

The Rector may have made a mistake in creating the expectation that exhumation would be permitted but that was subsequent to the husband's actual burial. The judgment does not refer expressly to any pastoral reasons embracing the petitioners, the sons of the deceased.

In *Re Sutton on the Forest*[78] two separate petitions were brought in relation to two deceased persons buried in the same grave. The arrangements for the first deceased's burial were made by a friend, Mrs Crosby, who did not inform the first deceased's family that she had arranged for a double depth grave. His father, the second deceased, was buried in the same grave shortly afterwards at the behest of the same person but without the knowledge of the first deceased's next-of-kin; the next-of-kin of the second deceased were not informed that the burial was in the same grave as the first deceased. The son of the first deceased petitioned for the reopening of his father's grave, whereas the brothers of the second deceased petitioned for his exhumation and his reburial at the foot of the first deceased in the next row of graves. The petitions were objected to by Mrs Crosby and by her friend, an executrix of the second deceased. Chancellor Coningsby found that the two men had wished to be buried in adjacent graves. In his judgment he said:

> 'The Consistory Court always scrutinises an application to open a grave (or to exhume and re-inter remains) with great care because of the basic principle that once a person is laid to rest he should not be disturbed: see *Re Church Norton Churchyard*.[79] But in an appropriate case, as where a mistake has been made in burying a coffin in the reserved grave space of another person, the Court has jurisdiction to allow exhumation and re-interment: see *Re Matheson*.[80] In the present case the interment of [the second deceased] occurred relatively recently and a petition was presented in December 1995, within some eight months of that event. This is not a case where the interment took place many years ago or the grounds for seeking exhumation are weak. The Chancellor accepts the evidence of ... members of the family that they find the concept of the two burials in one grave unacceptable. The Chancellor should give recognition to the way

---

[76] Of course, it is only the *ratio decidendi* of any particular case that creates a precedent. Nevertheless, a decision on a particular set of facts will raise expectations in the minds of other petitioners if their own cases are founded on identical facts. It may be argued that such an expectation in itself should be sufficient pastoral reason for granting a faculty. In *Re Church Norton Churchyard* [1989] Fam 37 at 43, *sub nom Re Atkins* [1989] 1 All ER 14 at 19, Cons Ct, Chancellor Quentin Edwards said that, although it has to be exercised reasonably, 'the discretion has ... been expressed to be quite unfettered'. Nevertheless, if there is a legal presumption against exhumation, that is in itself a fetter.

[77] See note 73 above.

[78] *Re Sutton on the Forest* (1997) 9 July, Cons Ct (unreported).

[79] *Re Church Norton Churchyard* [1989] Fam 37, *sub nom Re Atkins* [1989] 1 All ER 14, Cons Ct.

[80] *Re Matheson* [1958] 1 All ER 202, [1958] 1 WLR 246, Cons Ct.

https://doi.org/10.1017/S0956618X00003215 Published online by Cambridge University Press

> ordinary people feel about an important and significant matter of the proper interment of a loved relative. The Chancellor is satisfied that an error was made here in burying [the second deceased] in the same grave as [the first deceased]. That should not have occurred. It was against the wishes of the next-of-kin. It was done by a person who did not have legal authority. It was without consultation. It should have been obvious that when discovered it might lead to distress and opposition.'

He therefore allowed both petitions;[81] in so far as any of the four executors might not be in agreement with the exhumation and re-interment the Chancellor dispensed with their consent 'since the petitioners have established their case to the satisfaction of the court'.

Finally, in *Re Christ Church, Alsager*[82] the deceased was buried in 1981. When his widow died in 1995 she was cremated and the ashes were interred in the same churchyard; their son sought in the same year to apply for the exhumation and reburial of his father in the same plot as his mother but the petition, through no apparent fault of his, was not brought until 1997. He appreciated that the removal of human remains was a serious matter but the undertakers had assured him that there should be no problem and that the length of the time since the burial of the ashes was not an issue.[83] The petitioner stated that he would 'carry regret' if the petition were not granted; in the archdeacon's view there were stronger pastoral reasons than in many cases for the exhumation. In his judgment Chancellor Lomas quoted from *Re St Peter's Churchyard, Oughtrington*,[84] and continued:

> 'In my judgment . . . the exercise of the discretion to grant a faculty is something which ought to be done sparingly and only in special circumstances.'

The passage of sixteen years since the burial of the ashes placed 'a particularly heavy burden' on the petitioner as in such circumstances the court required 'strong and compelling circumstances indeed'. In the result the Chancellor did not find such compelling circumstances proved and refused the petition.[85] He also bore in mind that the authorisation of such a faculty would be seen as a precedent.

It may be surmised from the fact that particular chancellors seem to have written more judgments on exhumation than have others that their jurisdiction in exhumation cases causes them special concern. In spite of this it might be thought from a perusal of the cases that most of the principles upon which a faculty for exhumation may be granted are clear and that Chancellor McClean's summary in *Re Stocks, deceased*[86] is a useful *aide memoire*. However, it seems unclear how strong the presumption against exhumation may in fact be, although it may also be thought that this might not matter so much in practice—especially as any such faculty is granted on its particular facts and should never be regarded as a precedent. From this point of view the most difficult question would seem to be what may amount to 'good reasons' for departing from the presumption in 'portable remains cases'; it seems that a good pastoral reason may usually be sufficient and that this may include an inability to come to terms with grief, for example over the death of a child, and the effects of

[81] The faculties were both 'until further order' in case some additional direction were needed. The timing was to be agreed with the incumbent 'so that fresh words of committal may be said'. The petitioners were ordered to pay all the court and registry fees and expenses before a faculty was issued. No order was made against the objectors save that Mrs Crosby was ordered to indemnify the petitioners in full as she was 'wholly responsible'.

[82] *Re Christ Church, Alsager* (1997) 3 September, Cons Ct (unreported).

[83] Presumably in relation to the practicalities of exhumation.

[84] *Re St Peter's Churchyard, Oughtrington* [1993] 1 WLR 1440 at 1442, *sub nom Re Smith* [1994] 1 All ER 90 at 93, 94, Cons Ct: see the text to note 45 above.

[85] The petitioner was ordered to pay the costs, including the costs of the attendance of the incumbent and archdeacon.

[86] See the text following the reference to note 67 above.

https://doi.org/10.1017/S0956618X00003215 Published online by Cambridge University Press

a refusal on the mission of the Church. In practice, however, the position may not be anywhere so clear. In private discussions with some diocesan chancellors it appears that some may grant faculties for exhumation in rare and exceptional cases whereas others feel no such inhibition. Bearing in mind that in strict precedence a judgment of an individual chancellor such as *Re Church Norton Churchyard*[87] is not binding on chancellors of other dioceses it may even be the case that in some dioceses there is no particular factual presumption even in 'portable remains cases'. If this is indeed so the result is unfortunate: it cannot be a satisfactory state of affairs if different approaches appertain in different parts of the country or from diocese to diocese. A definitive decision from the Court of Arches and Provincial Court may, therefore, seem to be called for unless a consensus among chancellors can be found by other means. On the other hand, in some cases it would be quite possible to make the decision either way without infringing any legal principle.[88]

In the result, whether a chancellor today would grant a faculty to Rossetti for the recovery of poems from his wife's grave is difficult to say.[89] Even if a faculty were to be granted, whether the exhumation would have revealed the poem Christina Rossetti herself had written for her then fiancée, James Collinson, we will never know. She broke off the engagement when he returned to the Roman Catholic faith. It would certainly have been a pity if it had been lost.

When I am dead, my dearest,
Sing no sad songs for me
Plant thou no roses at my head
Nor shady cypress tree:
Be the green grass above me
With showers and dewdrops wet;
And if thou wilt, remember,
And if thou wilt, forget.

I shall not see the shadows,
I shall not feel the rain;
I shall not hear the nightingale
Sing on, as if in pain:
And dreaming through the twilight
That doth not rise nor set,
Haply I may remember,
And haply may forget.

[87] *Re Church Norton Churchyard* [1989] Fam 37, *sub nom Re Atkins* [1989] 1 All ER 14, Cons Ct.

[88] Sometimes the most difficult decision that the chancellor has to make is as to who should pay the registry fees and expenses: see note 85 above.

[89] In the Diocese of Durham I granted a faculty to recover the deceased's wedding ring promised to one of her daughters but inadvertently buried with her. Citation was dispensed with and the faculty was granted within seven days of the burial. Recently, too, I granted a faculty to correct the deceased's name on the glass coffin plate as the crror was causing increasing distress to the relatives.

https://doi.org/10.1017/S0956618X00003215 Published online by Cambridge University Press