

Consecrated ground: whose vault is it?

Who retains ownership of a private burial vault on church grounds?

Charles Auld & Kate Harrington examine a novel case



IN BRIEF

- ▶ Gaining title to land otherwise excluded from the title documents: an ecclesiastical law perspective.
- ▶ Gaining ownership of a burial vault by way of adverse possession.

In the 21st century, can ecclesiastical law concepts be used to gain title to land otherwise excluded from the title documents, and can a church gain ownership of a burial vault by adverse possession? In *King and Blair v The Incumbent of the Benefice of Newburn and the Newcastle Diocesan Board of Finance* [2019] UKUT 0176 (LC) the Upper Tribunal (UT) had to grapple with these issues, remarking at [18] that 'there is no recorded authority which is directly determinative of the principal issue raised'. The vault in question lies within the church of Holy Trinity, Dalton, Northumberland, which had been built on land belonging to the local landowner, Edward Collingwood, taking advantage of the Church Building Acts 1818 to 1884. On 1 October 1837 it was conveyed to the church building commissioners, and duly consecrated by the Bishop of Durham eight days later.

Keeping the faith

By the Church Building Act 1818 (the first of a number of such Acts), Parliament granted the sum of £1m (in excess of £75m today) to fund the construction of new churches which were then to be conveyed

to the commissioners. A further grant of £500,000 was voted for the scheme in 1824. The need for new churches was in part a result of the resurgence of Christian faith consequent upon the public preaching of the likes of John Wesley and George Whitefield, and in part a pastoral desire to provide more space for worship for the middle and lower classes. That the government was prepared to commit such significant sums to the project was perhaps coloured by an additional ingredient: it was less than 30 years since the French Revolution and Christian teaching was seen, in some quarters, as an antidote to insurrection. Between 1818 and 1856 some 600 new churches were commissioned as a result of this major initiative, significantly promoting the Church of England, not to mention also the work of contemporary architects.

At the time, much land was subject to trusts or held on entailed fees or strict settlements which could substantially complicate the conveyancing process. The 1818 Act cut through all of this, providing by s 37 that all conveyances to the church building commissioners should be 'made in the Form following, or as near thereto as the Circumstances of the Case will admit'; then setting out a short form of conveyance and concluding that conveyances made in that form should be: 'valid and effectual in the Law to all Intents and Purposes and shall be a Complete Bar to all Estates Tail and other Estates, Rights, Titles, Trusts and Interests, and Incumbrances

whatsoever'. Perhaps conveyancers of that era struggled with this simplification of their art, for s 29 of the third Church Building Act, passed in 1822, reinforced the position by providing that five years after land had been conveyed to the commissioners, even if no church had by then been built upon it, the land would be 'free from all Demands or Claims of any Body Politic or Corporate or Person or Persons whatever, and without being thereafter subject to any Question as to any Right Title or Claim thereto or in any Manner affecting the same'.

The new building at Dalton was constructed with an arched brick vault underneath the nave. The 1837 conveyance followed precisely the 1818 Act form, but also made specific provision for the vault: 'Save and except out of the conveyance hereby made the Vault or Burying Place in the interior of the same Chapel lately made by the said Edward Collingwood with full power for me the said Edward Collingwood my heirs and assigns to open such Vault as aforesaid and use and repair the same at all reasonable times.'

By 1868, Edward Collingwood, his wife Arabella and their son had been buried in the vault, in substantial lead coffins. Their grandson was buried there in 1940. In 1867, a brass memorial was set into the stone floor of the church (though strangely not directly above the vault), recording that: 'Here rest the bodies of Edward Collingwood and Arabella his wife'.

Adverse possession

In 2004, the by now Grade II listed building was closed for public worship and the doors were locked. Under the relevant ecclesiastical legislation, it became subject to a pastoral scheme and was transferred to the Newcastle Diocesan Board of Finance (DBF). Under the pastoral scheme, the church commissioners are obliged to find an alternative use for the church, otherwise it may have to be demolished. The church authorities therefore made contact with the descendants of Edward Collingwood: a Mrs King, who lives in New Zealand, and who had fond memories of her grandfather (the last person to be buried in the vault), and her brother Ian Blair, who farms in Gloucestershire. Following a series of meetings, including some at the church itself, the church commissioners proposed that the coffins should be exhumed and reburied elsewhere, with the building becoming a house. While Mrs King and Mr Blair were open to alternative uses for the church which would benefit the community, they, and many of those living locally, were adamantly opposed to it becoming a private house.

With the church commissioners unable to reach agreement with the descendants, the DBF applied to the Land Registry to register their title not merely to the church, but also to the vault. Not surprisingly Mrs King and Mr Blair objected, and the matter was transferred to the First-tier Tribunal (FTT) for determination.

At the FTT, the DBF argued that since *Rugg v Kingsmill* (1867) 16 ER 445 had decided consecration extended to structures under a consecrated building, accordingly the consecration of the church had had the effect of annexing the vault to the freehold of the church. Alternatively, the last part of s 37 of the 1818 Act, together with, if necessary, s 29 of the 1822 Act, overrode the words of exception in the 1837 conveyance, so that the 1837 conveyance had, despite its wording, conveyed the vault as well.

The principal judge of the Land Registration Division, Judge Elizabeth Cooke, rejected these arguments holding that 'consecration does not convey land'. Further the provisions of the two Church Building Acts were 'to clean up titles in an era when conveyancing was notoriously complex', but that those sections did not 'convey land that was excluded from a conveyance'. However, Judge Cooke then decided that the DBF had nevertheless gained title to the vault by adverse possession.

To gain title by adverse possession to

unregistered land, a squatter needs to prove two things. First, that he has, for at least 12 years, been in factual possession of the land; and, second, that throughout this time he has had the requisite intention to possess that land. Whether he has factual possession depends in particular on the nature of the land and the manner in which land of that nature is commonly used or enjoyed. What the squatter needs to prove is that he has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so. In her decision, Judge Cooke considered how an occupying owner might be expected to deal with a burial vault, saying: 'So how would an owner's possession of the vault be demonstrated? The one thing the owner is not going to do is enter it. The whole point of a vault is to keep its contents well away from the rest of the world. The very least that an owner in possession of a vault must have is the ability to access it, not in the sense of getting inside it, but in the sense of being able physically to approach it and look at the external evidence of its presence... an owner who cannot even do that without permission cannot, in my judgment, be said to be in possession of the vault.'

Accordingly, she decided that the locking of the church meant that 'no-one other than the DBF and its representatives has been able to get into the church without permission since 2004'. As a result, the DBF had been in possession of the vault for over twelve years and the title of Edward Collingwood's descendants had been extinguished by 2016. The visits to the church since 2004 by the Collingwood descendants had been irrelevant because they had been with the permission of the DBF.

Resting in peace

Mrs King and Mr Blair appealed to the UT against the finding of adverse possession, arguing that a burial vault is, in law, no different from any other underground vault used for storage (for example, one used for the long-term storage of maturing whisky). Furthermore, although there was no property in a deceased human body, a coffin, particularly a substantial lead coffin, was an asset of the estate which was being stored in the vault such that the Collingwood family had remained in possession of it (in support of the contention that a coffin is an asset of the estate, they cited the macabre *Haynes's Case* (1615) 12 Co Rep 11 where the defendant had dug up a number of recently buried bodies and taken the winding sheets

wrapped around them. It was held that he could be convicted of theft of those winding sheets).

Judge Hodge QC, sitting in the UT on 17 June 2019, allowed the appeal. While he questioned the analogy of a burial vault with a vault used for general storage, he determined that the DBF had not established actual possession of the vault. Disagreeing with the analysis of the FTT, he held that it was not sufficient merely to control access. To obtain possession it was necessary to deal with the land as an occupying owner, yet there was no evidence that anyone representing the DBF had ever even entered the vault. Therefore: 'it cannot properly be said that the descendants of Edward Collingwood, as the persons with the paper title to the vault, have ever been dispossessed, or discontinued or abandoned their possession of the vault; nor can it properly be said that the respondents have ever taken adverse possession of the vault' [22].

Judge Hodge was equally unimpressed with the locking of the church doors which he considered to be equivocal, since it was done to exclude the public in general and not the descendants of Edward Collingwood. He held that the right reserved in the 1837 conveyance to 'use and repair' the vault necessarily included the ancillary right to have access to the vault. Therefore, it would only be if the Collingwood descendants had asked for access and this had been refused that they would have been in a position to bring legal proceedings to enforce their rights. However, whenever the Collingwood descendants had asked to visit the church, arrangements had been made for this to happen.

Judge Hodge recognised that who has title to a long-disused burial vault may well be relevant in other cases. So while he remarked that any such vault owner's paper title would be put at risk if the mere locking of the church doors was sufficient to start time running, nevertheless: 'On other facts, church authorities might successfully be able to assert possessory title to a burial vault, as where they have denied the right of the paper title owners to inter further human remains within the vault and/or where they have removed the human remains already interred within the vault to some other place of burial' [25].

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