When Dirt and Death Collide

Legal and Property Interests in Burial Places

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Burial places are real property, but they are a special kind of real property. Thus, while the law with respect to land perpetually dedicated to the disposition of human remains is rooted in the general common law of property, there are unique doctrines that apply only to burial places. Moreover, although disputes occur with alarming frequency and the doctrines are rich and fascinating, the law of burial places has long been neglected by practicing attorneys and legal scholars. As a result, this unique niche of the law is not well understood, and it is a difficult area for the uninitiated to navigate. The purpose of this article is therefore to illuminate and explain the doctrinal framework of legal and property interests in burial places so readers are better prepared to confront these issues when they arise.

There are two major sources of the law of burial places in the United States: the common law and state statutory law. Very little federal statutory law is relevant. Until the 20th century, the law of burial places was almost exclusively common law. In the first half of the 20th century, the establishment of large, nondenominational, privately owned burial grounds by for-profit and nonprofit corporations prompted most states to enact statutory regimes to govern the creation and perpetual care of these "cemeteries." These statutes are often highly fragmented, however, and scattered throughout state codes. Although they often address topics that are not the subject of common law doctrines, state statutes are strongly informed by principles found in that common law.

Although we may refer to any real property containing human remains as a "burial place," it is not correct to refer to all burial places as "cemeteries." Instead, "cemeteries" are creatures of and defined by state statutes that vary significantly. Statutory definitions of cemeteries often specifically exclude individual marked and unmarked graves and burial places owned by restricted groups such as families, religious organizations, or fraternal organizations. The common law is much more important with respect to those types of burial places. Unless otherwise noted, this article will use the term "burial places" to refer to all real property that holds human remains.

The Common Law

The common law establishes the framework of legal and property interests in burial places. To understand the unique complexities of the common law of burial places, it is necessary to reconstruct briefly the story of how this niche of the common law developed.

In general, the common law of the United States is derived from the common law of England. But the common law was not the only source of law in 18th century England and did not cover all subjects. Since almost the time Christianity was introduced to the island of Britain, the Church of England has had the legal authority to create rules and adjudicate disputes regarding human remains. The law of burial places in England at the time of the American Revolution was therefore largely contained in ecclesiastical law. The Church's authority over human remains, particularly after interment, was justified based both on theology (the Church was the spiritual guardian of human remains until the Second Coming of Jesus Christ and the resurrection of the dead) and practical considerations (the Church owned the consecrated real property in which the remains were interred or entombed and therefore had physical control over them).

Three fundamental assumptions therefore supported the English law of burial places: (1) the existence of an established Christian church; (2) the ownership by that church of all burial places; and (3) the adoption of ecclesiastical law. By rejecting the establishment of a single church, the United States undermined all three assumptions. As a result, the United States was born with a sizeable legal void—it had no law regarding the disposition of human remains or burial places. Congress or the state legislatures could have easily addressed this issue but, as previously noted, they did not. Instead, disputes in the 18th and 19th centuries were litigated, primarily in courts of equity, and early American jurists were charged with resolving them under common law rules. Courts lamented they had little precedent to follow. As a New York chancery court judge complained in 1820: "Are the principles of natural law, and of Christian duty, to be left unheeded, and inoperative, because we have no ecclesiastical Courts recognized by law?" *Wightman v. Wightman*, 4 Johns. Ch. 343, 347 (N.Y. Ch. 1820).

General Principles of the Common Law of Burial Places

The principles of Christian duty were not to be left unheeded. Although ecclesiastical law was not explicitly adopted, the worldview of 19th century Protestants is clearly reflected in the common law of burial places that evolved in the United States. As discussed in the next section, the primary inventor of this common law is somewhat surprising. A New York attorney named Samuel B. Ruggles was called on by the Surrogates' Court of New York in 1856 to provide a memorandum of law regarding the legal and property interests in burial places to help the court allocate eminent domain proceeds following the taking of a portion of a churchyard by the city of New York. The learned Ruggles took his assignment seriously, and his resulting report is the most influential document in the history of the common law of burial places.

In his report, Ruggles argued that the Surrogates' Court ought to recognize that a decedent's next of kin have a natural and fundamental right to possess human remains and protect them after interment. He argued that such a "fundamental" and "self-evident right of humanity" was "so sacred and precious" that it "ought not to need any judicial precedent" and was "entitled to legal protection, by every consideration of feeling, decency, and Christian duty." 4 Bradford's Sur. Ct. 503 (1856). As discussed in the next section, Ruggles's arguments were persuasive to the surrogates' court and beyond. They also are illustrative of the reasoning implemented by many 19th century courts: they were not permitted to adopt ecclesiastical law, but they could, and believed that they should, adopt what they understood to be principles of ancient, natural law. In many cases, courts justified the "ancient" nature of Christian prin-

ciples by citing the Old Testament, particularly the story of Abraham's family's tomb. But in other cases, courts adopted doctrines that would have been equally familiar to 19th century Protestants and pre-Christian Romans.

The first principle of the common law of burial places is that human remains, places of human interment and entombment, and memorials to the dead are sacred and should be protected. This principle is simultaneously explicitly Christian and legitimately universal. Attorney and politician Daniel D. Barnard dedicated Albany Rural Cemetery in 1846 with these words:

> We have sought out a pleasant habitation for the dead . . . we come now to dedicate and devote it solemnly to their use forever. With appropriate ceremonies, with religious rites, with consecrating prayer, we come now to set apart this ground to be their separate dwelling-place as long as time shall last. The purchase is ours, the inheritance belongs to them. The living make the acquisition, but only as a sacred trust; the dead shall possess it altogether. . . . [B]eneath the spreading canopy of the listening Heavens and in the awful presence of God, we declare and pronounce . . . that henceforward, and for all time to come, this ground belongs not to the living, but to the dead!

The most legally significant expression of this principle was articulated by the Supreme Court of the United States in *Beatty v. Kurtz*, 27 U.S. 566 (1829). In 1769, Beatty and Hawkins platted an addition to Georgetown, indicating on the plat that a particular parcel was for the use of the German Lutheran Church. A group of Lutherans built a church and an adjoining churchyard for burials. After decades of use, the church fell into disrepair. Claiming that the grant of land in the 1769 plat was a defeasible fee, the condition of which failed when the church fell down and was not replaced, the heirs of Beatty and Hawkins entered the churchyard in the late 1820s and tore down fences and tombstones to prepare it for redevelopment. The Lutherans filed a quiet title action that ended up in the Supreme Court.

Justice Joseph Story wrote on behalf of the unanimous court. He described the actions of the heirs of Beatty and Hawkins not as "mere private trespass" but as "a public nuisance, going to the irreparable injury of the Georgetown congregation of Lutherans." The congregation's interest in the churchyard had been "consecrated to their use by perpetual servitude or easement." By trespass into the burial ground, Justice Story wrote:

> [T]he sepulchres of the dead are to be violated; the feelings of religion, and the sentiment of natural affection of the kindred and friends of the deceased are to be wounded; and the memorials erected by piety or love, to the memory of the good, are to be removed so as to leave no trace of the last home of their ancestry to those who may visit the spot in future generations. It cannot be that such acts are to be redressed by the ordinary process of law. The remedy must be sought, if at all, in the protecting power of a court of chancery; operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living.

Id. at 584–85.

The *Beatty v. Kurtz* decision is significant for several reasons. It emphasizes the importance of burial grounds by characterizing intrusion "not as mere private trespass" but as "a public nuisance" that results in "irreparable injury." Justice Story also emphasized that in the absence of an established church and ecclesiastical courts, burial grounds in the United States fall under the "protecting power of a court of chancery," that is, a court of equity. By referencing "irreparable injury," Justice Story signaled that the appropriate remedy was equitable relief, not money damages. Justice Story also suggested that courts would protect burial places for two reasons—to preserve the "repose of the ashes of the dead" and to protect the living who remember the dead because of "piety or love." In *Beatty v. Kurtz*, Justice Story foreshadowed Ruggles by identifying several parties with potential interests in burial places—the next of kin, the owner of the burial ground, and the dead themselves.

The second principle of the common law of burial places is closely tied to the first: real property used for burial or entombment purposes shall be perpetually dedicated to that use. The American social norm of the dedication of a single grave to an individual in perpetuity is a marked departure from modern and historical European Christian norms, but it is deeply entrenched in U.S. law. Barnard's speech is grounded in this idea. "[The] inheritance belongs to [the dead]," according to Barnard, and the "acquisition" of land by the living is "only as a sacred trust" for the dead who "shall possess it altogether." The same idea is expressed by Justice Story in *Beatty v. Kurtz*. The irreparable injury caused by the trespass in the Lutheran churchyard, he implicitly argues, was not only to the living Lutherans but to the interred dead themselves. The churchyard had been dedicated to and therefore in some sense belonged to them.

Although typically justified in the 19th century with Biblical references, perpetual dedication of burial places is not an exclusively Christian idea. In pre-Christian Rome, real property used for the disposition of human remains was automatically converted from *humani juris* (regular real property) to *divini juris* (property used for religious or sacred purposes). The Roman jurist Gaius (130–180 A.D.) wrote that "we make ground religious of our own free will by conveying a corpse into a place which is our own property." Dedicated to divine purposes, such land had no owner. Once given to the gods, no human actor could revoke its divine status. In the United States, burial places have human and corporate owners. Even religious organizations are required to designate legal representatives on earth. Nevertheless, the ancient principle that burial places are perpetually dedicated to sacred purposes continues to inform modern common and statutory law.

The third principle of the U.S. common law of burial places flows naturally from the first two: human remains, once interred, shall not be disturbed. The removal of human remains from a place of burial or entombment is referred to as "disinterment." Unauthorized disinterment was an offense under both ecclesiastical and English common law. It is now punished by criminal codes in the United States.

Justice Cardozo, then a member of the New York Court of Appeals, treated rules discouraging disinterment as self-evident: "The dead are to rest where they have been laid unless reason of substance is brought forward for disturbing their repose." *Yome v. Gorman*, 152 N.E. 126, 129 (N.Y. 1926). Other courts have justified the rules by invoking ancient warnings.

> The fact that the accident of death struck not once but twice if, indeed, not thrice, in quick succession the ranks of those disturbing the tomb of Tut-Ankh-Amen could afford only proof certain to the superstitious that an evil fate awaited those who dared disturb the sleep of the dead. While not sharing their tortured ideas, yet strongly bound by judicial precedent, as we are, we decline to enter an order which would unseal the tomb of this sleeping body. Let it sleep on wholly oblivious to the turmoil that rages above it. *Requiescat in pace*! Let the tomb remain sealed and the judgment which so directs stand affirmed.

Theodore v. Theodore, 259 P.2d 795, 798 (N.M. 1953).

The three principles of the common law of burial places noted above are stated in absolute terms. Burial places, human remains, and memorials to the dead are sacred. Burial places shall be perpetually dedicated. Human remains, once interred, shall not be disturbed. The fourth principle of the U.S. common law of burial places mediates the rigidity of the first three: the needs of the living trump the interests of the dead. The reality is that burial places are disturbed all the time; cemeteries are de-established and un-dedicated; graves are uncovered. The courts of equity must constantly balance the competing interests of the living and the dead in light of these general principles.

The principle that the needs of the living outweigh the interests of the dead was also a principle of English law, but it was of little practical importance because the Church of England had nearly unfettered control over burial places. The Church was the fee simple owner of the churchyard and charged with protecting the souls of the dead. No one else had a recognized legal or property interest in the churchyard or its inhabitants. Before the U.S. courts of equity could fulfill their charge by *Beatty v. Kurtz* to "preserve the repose of the ashes of the dead, and the religious sensibilities of the living," they required a framework to establish relative legal and property interests in burial places. That framework was provided by Samuel B. Ruggles.

An American Framework

In the 1850s, the city of New York widened and straightened many downtown streets. The 15-foot widening of Beekman Street (near City Hall and Ground Zero) disturbed 13 vaults in the churchyard of the Brick Presbyterian Church. The vaults contained the remains of approximately 100 people. The sum of $28,000 was determined as just compensation for the taking, and the Surrogates' Court was tasked with dividing that sum between the church and the vault owners. Finding no applicable statutes or precedent, the court appointed Ruggles, a New York attorney best known for writing the restrictive covenants that still keep Gramercy Park in Manhattan private, to provide a summary of the relevant legal principles.

English law, Ruggles explained, presumed family members would convey the corpse to the parish church, where it would be buried in the consecrated churchyard or, for an additional fee, entombed within the church or a vault. There was no role for the common law courts or family members following interment because the Church had theological and temporal custody of the remains. The Brick Presbyterian Church apparently appealed to this precedent to support its position that it should receive all of the eminent domain proceeds as well as responsibility for disinterment and reinterment. The vault own-

ers, Ruggles, and ultimately the court disagreed. Instead, Ruggles appealed to principles of natural and ancient law to establish that the next of kin of the deceased have a common law "legal right" to control and dispose of human remains. That right, which is now referred to as the "Right of Sepulture" (sometimes spelled "Sepulcher"), included the right to select the place of burial and to "change it at pleasure." If the place of burial "be taken for public use," Ruggles concluded, the next of kin and not the church or secular owner of the burial place should receive eminent domain proceeds sufficient to allow reinterment in a place of their choice.

In *Beatty v. Kurtz*, Justice Story identified multiple interests in burial places but did not declare that any of those interests were enforceable. Instead, he simply transferred the protector role formerly held by the Church of England to the courts of equity. Ruggles reinforced the authority of the courts of equity but also elevated the status of the private interests identified by Justice Story by proposing a formal framework that recognizes four separate legal and property interests in burial places: (1) the rights of the deceased; (2) the Right of Sepulture; (3) the Right of Interment; and (4) the rights of the owner of the burial place.

The first interest is the right of the dead to a decent burial and an undisturbed repose. Although it seems odd to talk about rights surviving after death, it is a principle strongly rooted in Roman law and explicitly recognized in U.S. common law. For example, in an oft-cited 1880 decision, the New York Superior Court held that "the dead themselves now have rights, which are committed to the living to protect." *Thompson v. Hickey*, 8 Abb. N. Cas. 159 (N.Y. Sup. Ct. 1880). Courts protect the rights of the dead by typically placing a high value on evidence regarding the expressed wishes of the deceased.

The second interest is the "Right of Sepulture," which consists of two phases. Before interment, it grants the next of kin the right to control human remains and to choose the place and manner of disposition. This common law right has been codified in most states. After interment, the courts continue to recognize the interests of the holder of the Right of Sepulture, particularly to prevent the grave from being disturbed. Consistent with the Ruggles Report, the common law awards the Right of Sepulture to the individual or group of individuals identified as the next of kin. Typically, the spouse has first priority, then children, parents, and so on in degrees of kinship. This common-law priority list has been codified by most states with little variation.

The third interest is the "Right of Interment." The Right of Sepulture attaches to human remains, but the Right of Interment attaches to the burial place. The Right of Interment also consists of two phases. The first phase occurs before disposition—the purchaser of a lot, grave, tomb, or niche acquires a property interest subject only to the rules established by the owner of the broader burial ground or cemetery (although the cemetery rules need not be servitudes, they are treated as such). After disposition, the holder of the Right of Interment continues to have a property interest distinct from the legal interest of the holder of the Right of Sepulture. Both rights may be held by the same person, but they are often held by different people. Because the Right of Interment is a property interest, it continues in perpetuity. But the Right of Interment has one fascinating and unique characteristic. Unlike other property interests, most common law courts have held that the Right of Interment is not devisable or alienable and passes only by inheritance.

The Right of Sepulture, which was invented to compensate for the lack of an established church acting as the guardian for the dead, attaches to all human remains in the United States. The Right of Interment, which arose in the common law to compensate for the lack of a single owner of burying grounds in the United States, is more limited in its application. It is used only with reference to specific graves or lots purchased from a third party that owns the surrounding land. The Right of Interment does not attach to remains buried on one's own land or in a churchyard, Potter's Field, or other burying ground if the right to a particular grave was not purchased.

If the Right of Interment is a property right, what kind of property right is it? That is an unresolved question in the common law that is often debated but ultimately irrelevant to the outcome of most disputes. In the eminent domain dispute that gave rise to the Ruggles Report, the parties hotly contested the nature of the property interest held by the families in the disturbed vaults. The families claimed that "the grants from the church were intended to convey, and did legally convey, the fee of the land occupied by the vaults and their steps: [and] that the church retained no legal estate or interest in the land so conveyed." Conversely, the church claimed that "the grants of the vaults were not intended to convey, and did not convey, any portion of the legal fee, but only a privilege or easement in the land to bury the dead; [and] that the whole legal estate in the land remained in the church, subject only to such privilege or easement; and that the possession of such of the vault-owners." In that dispute, the resolution of the nature of the property right conveyed to the families affected the distribution of eminent domain proceeds. Ruggles acknowledged that in that case, and more broadly, the nature of the property right may be a distinction without a difference. In either event, the owners of the property interest are subject to both the dedication of the land for burial purposes and the rules and regulations adopted by the owner of the cemetery. The property interest is therefore so restricted that even if it were technically a fee simple, it is practically indistinguishable from a servitude. The land cannot be used for any other purpose and is subject to the rules of the cemetery owner. That same discussion can be found in numerous reported cases in the United States.

The fourth interest is that of the owner of the burial place in which the lot, grave, or tomb is located. The law generally grants great deference to the owners of burial places, particularly if they are religious organizations, to establish rules and regulations that govern the use of individual places of interment and vaults. At the same time, the rights of the owners of burial places are mediated by the interests of the deceased, the holder of the Right of Sepulture, and the holder of the Right of Interment.

Conclusion

The legal and property interests in burial places are described by antiquated language and seem archaic, but the framework invented by Justice Joseph Story and Samuel B. Ruggles is alive and well in common and statutory law. The U.S. common law of burial places has significantly progressed from the blank legal slate after the American Revolution, but it is often difficult to discover and use. It is hoped that this article will provide some assistance. n