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Property Rights in Dead Bodies

Thomas McKendree Chattin Jr.
West Virginia University College of Law

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will ripen into ownership in fee simple absolute of the property in question on the occurrence of the event on which the fee simple determinable is limited.\textsuperscript{57} This circumstance should be carefully distinguished from an instance in which a fee simple subject to a condition subsequent is granted with a limitation over to a third person which is void as in violation against the rule against perpetuities. In such a case the preceding estate stands as a fee simple absolute unaffected by the void limitation over with no right of reentry for condition broken in the grantor or the heirs of the grantor or restator.\textsuperscript{58}

\textit{James Alan Harris}

\section*{Property Rights in Dead Bodies}

Until the nineteenth century, English Canon Law recognized no property rights in a human corpse. Throughout this early period a dead body was considered solely the subject of "ecclesiastical cognizance." Thus, all matters relating to the dead were governed by the rules and canons of the church. Both surviving relatives and the common law courts were powerless to disinter or tamper with a dead body once it had been buried.\textsuperscript{6}

The theory that there are no property rights in a cadaver is based on the idea that the body after its interment is \textit{nullius in bonis} (the property of no person).\textsuperscript{6} This early rule was strengthened by decisions in two leading English cases on the subject. In \textit{Haynes Case},\textsuperscript{4} William Haynes dug up the graves of three men and one woman and stole their winding sheets. The court held that the sheets were the property of the person who owned them when placed on the bodies since (1) a dead body had no capacity to accept a chattel and (2)

\begin{itemize}
\item \textsuperscript{58} Proprietors of the Church in Brattle Square v. Grant, 3 Gray (Mass.) 142 (1855); Leonard v. Burr, 18 N.Y. (4 Smith) 99 (1838).
\item \textsuperscript{6} Kemp v. Wickes, 161 Eng. Rep. 1320 (1809).
\item \textsuperscript{2} Foster v. Dodd, L.R. 1 Q.B. 475 (1866).
\item \textsuperscript{3} In every sepulcher, that hath a monument, two things are to be considered, viz. the monument, and the sepulchre or burial of the dead. The burial of the cadaver is . . nullius in bonis, and belongs to ecclesiastical cognizance. 3 E. COKE, INSTITUTES 203 (1809 ed.).
\item \textsuperscript{4} 77 Eng. Rep. 1389 (1913).
\end{itemize}
one could not relinquish property to one who has no power to accept. But, the case only discussed the inability of a corpse to possess property and mentioned nothing of the possibility of a party having a property interest in a dead body. The significance of the case lies in what it neglected to say, although the court held that it was a felony to rob the dead of their winding sheets, nothing was mentioned about it being a felony to take a corpse itself. Consequently, Blackstone reasoned that since a corpse has no owner, no crime could be committed by stealing one. Thus, Blackstone's interpretation of the Rule in Haynes Case helped lay the groundwork for the law of property in dead bodies. He succinctly stated this proposition to be, that "the heir has property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or aches."

However, in spite of this rule a right to attach a body for debt appears to have existed prior to 1804. This occurred in the case of the poet John Dryden and in that of Sir Bernard Taylor whose body was taken from his funeral cortege. The practice was carried out through an abuse of the writ of capios ad satisfortendum which directed the sheriff to bring the "body" of the debtor before the court. Consequently, the body of the dead person was attached and held until some person or relative would satisfy the debt. In 1804, Lord Ellenborough declared that such practices were unlawful as being contra bonis mores. Such practices were inconsistent with the law as declared by Blackstone, for if there could be no "property" in the dead then it would follow that there could be no property attachment of the dead.

With the development of medical research in the eighteenth century, the importance of cadavers for anatomical purposes increased. Thus, the law concerning the legal status of dead bodies correspondingly began to develop. While the courts were still not ready to hold that one other than the church could have a property interest in the dead, they did begin to prescribe penalties for disinterment, theft and mutilation of dead bodies. In 1788 the common law courts of England declared it to be a misdemeanor to steal a corpse.

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5 4 W. BLACKSTONE, COMMENTARIES *236.
6 Kuzenski, Property in Dead Bodies, 9 MARQ. L. REV. 17, 22 (1925).
7 4 W. BLACKSTONE, COMMENTARIES *236.
9 Kuzenski, supra note 6, at 18.
10 Id. at 18.
In *Rex v. Cunlick*, the court went a step further and declared that it was a misdemeanor for a jailer to sell the body of a deceased convict for dissection. In another case a jailor attempted to assert a lien against the body of a dead prisoner. The court held that a writ of mandamus on behalf of the deceased convict's executors would properly lie so as to insure the return of the body.

The first sharp departure from the strict rule laid down by Blackstone came in the case of *Williams v. Williams*. In that case the deceased wrote in a codicil to his will that he desired his body to be placed in the custody of his mistress so that she could have him cremated. Ignoring these directions, his executors buried him in a location they had chosen. Upon hearing of this, his mistress had his body removed from its resting place and had it cremated. She then sued the executors for the expenses involved. In holding for the executors, the court stated that while it was true that the executors could have no property interest in the body, they did have a right of possession until the time of burial. This holding is in direct contrast to the older rule that only the church could maintain possession of the dead before burial. The idea that the executors had a right to the possession of their decedent before burial was derived from the case of *Tugwell v. Heyman* which held that the executors had a duty to see that their dead testator had a proper funeral. Thus, from the recognition of a duty in the *Tugwell* case the courts found a corresponding right in the *Williams* case.

Although the stricter English Rule has found support in a few American cases, most courts in this country hold that there is a quasi-property right in the body which arises out of a duty to bury the dead. The origin of American Law on the subject was

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14 The Queen v. Fox, 114 Eng. Rep. 95 (1841).
15 20 Ch. D. 659 (1882).
16 The law in this country is clear that after the death of a man, his executors have a right to the custody and possession of his body until it is properly buried. *Id.* at 665.
18 *Id.* at 1389.
19 Meagher v. Driscoll, 99 Mass. 281 (1868), held that upon its burial a body becomes a part of the earth in which it is interred and the only action which can be brought for removing the body is that of *quære clausum fregit*.
20 Orr v. Dayton & Muncie Traction Co., 178 Ind. 40, 96 N.E. 462 (1911); Anderson v. Atcheson, 132 Iowa 744, 110 N.W. 335 (1907); Burney v. Children's Hospital, 169 Mass. 57, 47 N.E. 401 (1897); Barela v. Frank A. Hubbell Co., 67 N.M. 319, 355 P.2d 133 (1960); Sanford v. Ware, 191 Va. 43, 60 S.E.2d 10 (1950); England v. Central Pocahontas Coal Co., 86 W. Va. 575, 104 S.E.2d 46 (1920).
formulated in *Widing Beekman Street.* In this case, a street was being excavated and it was necessary to disinter several bodies in a nearby churchyard. A descendent of one of the people buried there demanded that her ancestor be reinterred in another place at the expense of the city. Among the questions propounded to the court were: who is legally and primarily entitled to the custody of a dead body? Who is legally bound to bury it? If the body be ejected from its place of burial, who is entitled to its custody and who has the duty to rebury it?

The court, while not holding that a dead body was property in a strict or commercial sense, did however establish five principles which have had substantial influence throughout the law relating to dead bodies:

1. That neither a corpse, nor its burial, is legally subject, in any way, to ecclasiastical cognizance, nor sacredotal power of any kind.
2. That the right to bury a corpse and to preserve its remains, is a legal right, which the courts of law will recognize and protect.
3. That such a right, in the absence of any testamentary disposition, belongs exclusively to the next of kin.
4. That the right to protect the remains includes the right to preserve them by separate burial, to select the place of sepulcher and to change it at pleasure.
5. That if the place of burial be taken for public use, the next of kin may claim to be indemnified for the expense of removing and suitably re-interring the remains.

Discussion next centered on the right and nature of the property interest in the dead body. The court argued that the repose of a grave, although intangible, is nonetheless a property right. It pointed out that in early English history it was true that no person could have dominion over a corpse because such protection was within the exclusive province of the church and its ecclesiastical courts. However, with the decline of the ecclesiastical courts in England and the total non-recognition of such authority in America, the bodies of the dead were being left without protection and were

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22 *Id.* at 516.
23 *Id.* at 532.
vulnerable to all forms of abuse. Without some protection by the civil courts the bodies of America's most honored statesmen could be exhumed and put on public display with neither the civil courts nor their descendents being able to arrest such practices.\textsuperscript{24}

Careful analysis of this important case, which is the basis of all American law on the subject, leads to several conclusions. Since the dead must be afforded protection in an ordered society, their burial and post-burial maintenance are duties which are incumbent where possible upon the next of kin. Thus, while there are actually no property rights in the dead body itself, there are nevertheless certain rights of dominion over a body so as to insure that the mandatory duties concerning burial can be performed. These rights are sometimes described as "quasi-property" rights to dead bodies.\textsuperscript{25}

This limited group of rights known as quasi-property rights was first characterized as such in an 1872 Rhode Island case\textsuperscript{26} There the court said:

There is a duty, imposed by the universal feeling of mankind, to be discharged by someone towards the dead and we may also say a right, to protect from violation; and it may therefore be considered as a right of quasi-property, and it would be discreditible in any system of law not to provide a remedy in such as case.\textsuperscript{27}

This quasi-right to the body of the dead is still recognized today. It is a qualified right of custody control and disposition of the res that itself is not material property.\textsuperscript{28}

Since it is not an absolute property right there are many limitations on its use. For example, a party cannot dispose of a body in any manner he chooses simply because he has a quasi-property right in the corpse and the corresponding duty to inter it. Courts have held it a crime to throw a body into a river\textsuperscript{29} or to subject it to home cremation.\textsuperscript{30} Thus, the law at this time considers the person

\textsuperscript{24} Id. at 521-22.  
\textsuperscript{25} 22 Am. Jur. 2d Dead Bodies, §4 (1965).  
\textsuperscript{26} Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227 (1872).  
\textsuperscript{27} Id. at 238.  
\textsuperscript{28} 22 Am. Jur. 2d Dead Bodies § 4 (1965).  
\textsuperscript{29} Kanvon's Case, 1 Me. 226, (1821).  
\textsuperscript{30} State v. Bradbury, 136 Me. 347, 9 A.2d 657 (1939).