

## Book Review

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# Book Review

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**THE LAW OF CADAVERS AND OF BURIAL AND BURIAL PLACES.** Second Edition. By Percival E. Jackson. New York. Prentice-Hall, Inc., 1950. Pp. lxxxvii, 734. \$12.50.

We hear told, in (too) many funeral sermons, that "In the midst of life, we are in death." This theological thought should make it easier for one to read and review a book with the title of the one under consideration and thus make that grim and morbid task much simpler. The author, who has now published the second edition of this book, has written other books of general interest, one of which has already been reviewed in the REVIEW.<sup>1</sup> When we, as lawyers, remember that a considerable part of the emoluments of the profession is found in business involving the distribution of wealth once belonging to a fellow member of the human race who has died, we should not be suspicious of a book about this branch of the law.<sup>2</sup>

Beyond this emphasis on the administration of estates, the particular type of law that this book presents can also be of concern to the general practitioner. It is proposed to survey the topics treated in the book and then to remark about matters of interest, incidental to the subject matter, which have come to the reviewer's attention either from general reading, or his experience in teaching certain law school courses, or in connection with casual advisory practice.

A survey of the book itself shows that it starts with a chapter on the evolution of burial practices and then goes into one on the development of the law of sepulture, followed by the first of two chapters on burial. Then comes a treatment of the problem of disinterment, not an easy one, followed by a discussion of actions and proceedings respecting dead bodies. A good portion of the book is then devoted to a treatment of the law of the cemetery, covering (1) its nature and regulation, (2) the law governing the creation of one, (3) a treatment of the rights, powers and obligations

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<sup>1</sup> Unsigned Book Review of JACKSON, *LOOK AT THE LAW* (1940), 4 Md. L. Rev. 436 (1940). References in following footnotes to the book under present review will be to JACKSON, then giving the page number or numbers involved.

<sup>2</sup> The reviewer was interested to notice, several years ago on a motor trip through the mid-West, that in a certain small town the local lawyer and the local undertaker shared office space in a small one-story building in the center of the "business district".

as to the lands, and (4) subsequent development, including a tabulation of statutes.<sup>3</sup> Then the emphasis shifts to the nature of the burial right and the rights of the owner thereof, followed by the problem of the abandonment of the cemetery, miscellaneous considerations, and the law of undertakers and embalmers.

Following this, inasmuch as the book seems aimed primarily at the New York practice, there are several chapters on cemetery corporations and the incidents thereof under New York law. Finally, in an appendix there is found a series of forms, including the inevitable ones about public health regulations for the interment, disinterment and transportation of dead bodies.

It should be noted that perhaps one-fourth of the book is devoted to the general law of the subject, and the remaining three-fourths to the law of cemeteries, the New York detail, the prefatory material and the appendices and indices at the end, so that the general law here to be commented on occupies but a small part of the book. However, the book probably serves a useful general purpose.

Certain problems treated by the book have for one reason or another, as indicated above, caught the interest of this reviewer. In making such commentary on the book against the background of the reviewer's own information at the local level, it might be remarked that in at least three instances of giving free advice for practical purposes, the types of problems which have been dealt with in this book have presented themselves to this reviewer.

The first such instance involved the request of a grandson of an original purchaser who had inherited the rights to an eight-grave lot in a local cemetery, where only one grave had been used. He wished to disinter the one relative and remove him to join his family elsewhere, and to sell the space. The cemetery asserted the right to prevent that, but eventually offered a compromise of not permitting the disinterment but of permitting the sale of six of the eight graves to strangers, as constituting a separate space.<sup>4</sup>

Then there was the case of the deceased who by an egregious error on the part of the undertaker and the grave digger was buried on the wrong side of the line of the family grave lot. The owner of the neighboring lot took umbrage, and insisted on some change in the matter. This was solved

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<sup>3</sup> JACKSON, 299 cites Md. Code (1939), Art. 23, Sec. 172, as to the nature of cemetery companies. The excellent index, JACKSON, 720, tabulates all references to Maryland statutes.

<sup>4</sup> JACKSON, 365-6, 384.

by the estate of the deceased paying the expenses for the transfer of the remains to the proper side of the fence, with the expectation of fighting it out with the undertaker as to reimbursement for the expenses thereunto appertaining.<sup>5</sup>

Another question presented was whether a female infant, the mother of a deceased illegitimate child, could give a valid consent for an autopsy to be performed on the body of the child. This of course poses broad questions of the law of infancy and of the law of autopsies, the latter being directly in focus in the book under review.<sup>6</sup> The answer was: "*Quaere?*"

Within the recent year, the newspapers have presented problems that apply to the subject of this book, for that we see that in a mid-western state a cemetery corporation denied to a white wife the privilege of burying her Indian husband, killed in the Korean War, in a cemetery which had racial restrictions on such interment.<sup>7</sup> This led to immediate action by President Truman to guarantee interment in Arlington National Cemetery, and raised questions of the validity of such restrictions under recent Supreme Court law about racial covenants in real estate cases.

Then we have recently seen the controversy between a service organization of Cowpens, South Carolina and the analogous one of Winchester, Virginia over the removal of the remains of a Revolutionary hero from the latter place to the former place, on the theory that it would be more appropriate for him to be buried near the scene of his military triumph. The answer to that question seems to have been given by the manager of the graveyard in Winchester, Virginia to the effect that there would not be much left of the late lamented general to be removed in the event, as unlikely, that proper authority should order it.

Then, too, in recent newspaper reports we have seen remarks that the English authorities are recommending the increasing use of cremation, because space for ordinary grave burial on that tight little island seems to be getting scarce (as is the case in many European countries), and there is concern for the future unless cremation is used more frequently than otherwise. This of course is not a recent English problem, for the famous "iron coffin" case<sup>8</sup> from the English Reports reminds us that it has long been the English practice to use the same space over and over again for

<sup>5</sup> *Ibid.*, 177, 252, n. 43a.

<sup>6</sup> *Ibid.*, 169 *et seq.*

<sup>7</sup> *Ibid.*, 378, 380, 384.

<sup>8</sup> *Gilbert v. Buzzard*, 3 Phillim. 335, 161 Eng. Repr. 1342, 2 Hagg. Cons. 333, App. 167, 161 Eng. Repr. 761, 887 (1820). Discussed JACKSON, 354-5.

grave burial after a decent interval has elapsed for the previous incumbent to have obeyed the instructions of "dust to dust". We must only remember that Shakespeare certainly had this in mind in his famous passage about "alas poor Yorick", when the grave digger must have been preparing a grave for a new incumbent<sup>9</sup> from space previously used by at least one earlier person<sup>10</sup> whose skull<sup>11</sup> was spoken about in that famous passage from literature.<sup>12</sup>

Space is an important problem elsewhere than in Europe, for that it must be remembered that 75 years and more ago in a part of the city of Baltimore not far removed from the seat of the University of Maryland Law School, it seemed necessary to build a church over and above an existent graveyard, where, in a corner not covered by the building, repose the remains of the poet, Edgar Allen Poe. This is the Westminster Church, at Fayette and Greene Streets, which is unique in that it is superimposed on a graveyard that had been there before, so that many graves of prominent Baltimoreans are found in what would otherwise be regarded as the cellar of the church.

In the course of teaching law school courses the undersigned has had occasion to encounter some aspects of the law of cadavers, as witness the basic rule that one is not guilty of larceny at common law for stealing a dead body, although he might be guilty for stealing the clothing, jewelry and the like.<sup>13</sup> This was because there was no property right in a dead body. However, it is also customarily taught that one who does steal a dead body may commit the separate common law misdemeanor<sup>14</sup> of the improper treatment of a corpse and be guilty therefor, as was the citizen of Maine, who thrifty-like, decided to conduct an informal cremation of his late aged sister in the cellar furnace, and was convicted and the conviction was affirmed for violating that law.<sup>15</sup>

Incidental to this common law crime, which put a wet-blanket on the practice of dissection and retarded the development of medical schools, we must consider the legis-

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<sup>9</sup> Ophelia.

<sup>10</sup> Yorick.

<sup>11</sup> Spelled "scull" in some editions of *The Bard*.

<sup>12</sup> SHAKESPEARE, WILLIAM, *PLAYS*, Hamlet, Act V, Sc. 1. This famous passage relates in subject matter to the "iron coffin" case, and also includes a passage on the contents of the skull (scull) of a lawyer. While the scene of the Yorick incident is supposedly Denmark, yet The Bard apparently incorporated his well known knowledge of English laws and customs. *Cf.* Book Review, 7 Md. L. Rev. 173 (1943).

<sup>13</sup> CLARK AND MARSHALL, *LAW OF CRIMES* (4th Ed. 1940) Sec. 306.

<sup>14</sup> *Ibid.*, Sec. 475.

<sup>15</sup> *State v. Bradbury*, 136 Maine 347, 9 A. 2d 657 (1939).

lation which authorizes the dissection of dead bodies in medical schools for the advancement of science, by legalizing and providing a procedure for procuring cadavers for medical schools. This legislation, in Maryland once limited to Baltimore City, and applicable only to subjects brought from the local morgue, has recently been amended<sup>16</sup> to become statewide in application so as to enable the two medical schools of the state to procure subjects from all around Maryland, instead of merely from Baltimore City. It has been the subject of some controversy as to how far it should be extended. This controversy may perhaps be analogized to the one over the procurement of dogs and cats for medical purposes which led to some litigation and electoral dispute recently in Baltimore City, when an unsuccessful attempt was made to procure the passage of legislation which would have been detrimental to medical science's using such subjects.

In the separate law school subject of Evidence two or three "cadaverous" problems arise. For instance, with reference to the introduction of real evidence we have the famous New York case of *People v. Gillette*,<sup>17</sup> on the basis of which Theodore Dreiser wrote his "An American Tragedy". Since then, one or two motion pictures have been based thereon. There was involved the minor point of producing in evidence the preserved foetus taken from the body of the unfortunately pregnant girl in order to prove that she had been pregnant. Likewise there is a District of Columbia case<sup>18</sup> that allowed the introduction in evidence of a fragment of the skull of the murder victim in the face of a contention that a local statute denouncing the indecent exhibition of human bodies or parts thereof should have forbidden so doing. Both points are interesting, in that they allow the use of parts of human bodies within limits in order to accomplish the ends of justice.

Also, there is a Maryland case having to do with the topic of discovery, and incidentally involving exhumation, the *Tsaracklis* case,<sup>19</sup> in which the Court of Appeals affirmed an Orphans' Court ruling refusing to order the exhumation of the body of the deceased to support a contention that the undertaker had overcharged the estate for the expenses of the interment. The Court put it on the basis that there was no statutory authority for ordering exhumation or other

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<sup>16</sup> Md. Laws (1949) Ch. 669, adding Md. Code Supp. (1947) Art. 43, Secs. 161, A, B, C, D.

<sup>17</sup> 191 N. Y. 107, 83 N. E. 680 (1908).

<sup>18</sup> *Hart v. U. S.*, 130 F. 2d 456 (U. S. C. A. D. C. 1942).

<sup>19</sup> *Tsaracklis v. Characklis*, 176 Md. 28, 3 A. 2d 725 (1939).

discovery in Orphans' Court cases, and at common law there was no such authority either. Furthermore, granting the order is discretionary. Consequently, petitioners seeking to reduce the undertaker's bill were denied that form of proof.

In the separate topic of Domestic Relations there is the question of the duty of the husband or father (perhaps now also the mother) to provide a decent burial for the predeceasing wife or child. This has been the subject of legislation,<sup>20</sup> primarily in favor of the undertakers, which had permitted the estate of the wealthier wife to advance the expenses of reasonable interment, subject to reimbursement from the husband who has the ultimate duty so to provide.

Other Court of Appeals litigation in Maryland involves the right to condemn cemeteries. Thus, in the Friendship Cemetery case,<sup>21</sup> the Court of Appeals decided that the City of Baltimore did not have to condemn a small cemetery in the middle of the area occupied by the new International Airport, but could leave it there with permission for access by those interested, and thus avoid paying the enormous expense of removal of the bodies to another cemetery in order to have the entire area used by the airport.

There is also the Maryland case<sup>22</sup> about the stone lions, where a complainant who had a town house in down-town Baltimore, with two stone lions on the doorstep, wished to transfer the stone lions to the family grave plot in Greenmount Cemetery. This was resisted by the cemetery authorities, and the Court of Appeals sustained their position.

Then, too, there has been at least one Maryland case<sup>23</sup> on the problem of who may dictate the initial interment of a body in a given site or who may authorize the removal thereof to another site. This involved a typical inter-family dispute where it was desired to eventually bury husband and wife in the same grave lot, where they had once been buried in different ones. It can well be a problem, particularly when there have been remarriages and a given husband has had two wives or a given wife has had two husbands, or branches of the family disagree as to the ultimate disposition of relatives.

In general literature certain problems of the law of cadavers have appeared. For instance, there is the classic

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<sup>20</sup> Md. Code (1939), Art. 93, Sec. 6.

<sup>21</sup> Friendship Cemetery v. City of Baltimore, 81 A. 2d 57 (Md. 1951).

<sup>22</sup> Abell v. Greenmount Cemetery, 56 A. 2d 24 (Md. 1947).

<sup>23</sup> Unterstutzung Verein v. Posner, 176 Md. 332, 4 A. 2d 743 (1939).

O. Henry story<sup>24</sup> about the dissolute country lawyer in the hill country who had already sold his family estate to a newly rich countryman, reserving the graveyard. Having squandered those proceeds in unfortunate poker and on whiskey, he was approached by the purchaser later and requested to convey the graveyard also and to permit the changing of the names on the tombstones, so that the newly rich purchaser might acquire some artificial "ancestors". The lawyer rebelled at the idea, and as part of the story was later killed by the countryman in the course of an attempt to kill somebody else. The story, while it has little significance in the law of cadavers, other than pointing up the many legal problems that might arise from selling one's ancestors, is one of O. Henry's better ones, at least to a reader who is interested in country law practice.

One final point is perhaps a timely one in view of recent American military experience. It might have been well for the book to emphasize more the legislation and administrative regulations that apply to the interment, in Arlington and other National cemeteries, of military casualties, veterans, and their relatives. As a great proportion of our American citizenry may be thus entitled, it would be helpful in a book of this scope to include such information, for the benefit of citizens in any portion of our country.

The book serves a useful purpose, and while that is in a very specialized field, yet it is one in which it is necessary, in view of the fact that lawyer and layman alike have to face the inevitable fact of death and the handling of the legalistic details that appertain thereto.

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<sup>24</sup> A Blackjack Bargainer.

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