

Legal Dilemmas

J. Thomas Mikell, Law Office of J. Thomas Mikell, PC,
Beaufort, SC

Tombstone Quotes

Here lies John Steere
Who, when living, brewed good beer.
Turn to the right, go down the hill.
His son keeps up the business still.

**To the memory of
Major James Brush
Who was killed by the accidental
Discharge of a pistol by his orderly.
Well done good and faithful servant.**

**Seven wives I've buried
With many a fervent prayer.
If we should all meet in heaven
Won't there be trouble there?**

**Erected to the memory of
Alexander Gray**

**Some time farmer in Mill of Burnes,
Who died in the 96th year of his age,
Having had 32 legitimate children
by two wives.**

The background of the slide features abstract, overlapping green geometric shapes, primarily triangles and polygons, in various shades of green, creating a modern, layered effect on the right side.

Milt MacPhail

A victim of fast women and slow horses.

Definition of a Cemetery:

The burial of the dead in grounds set aside for such purpose is a rite recognized and upheld by all nations from the most refined to the most barbarous. Such burial grounds, defined as cemeteries, are deemed consecrated and will be protected from interference, depredation and trespass.

Public and Private Cemeteries:

Public cemeteries are businesses, providing burial plots, maintenance and care to the general public. Public cemeteries cannot be established or operated unless licensed by the South Carolina Cemetery Board.

Government and church cemeteries and family burial grounds are deemed private cemeteries and are not subject to the provisions of the Act.

Adjoining Landowners, Objections, and Nuisance:

The use of land as a cemetery shall not comprise a nuisance per se. The mere annoyance arising out of the presence of a cemetery in close proximity does not in itself give a complaining landowner grounds to prosecute successfully an action in private nuisance. A cemetery is a necessity and must be located adjoining the property of someone. However, should funeral or related activities be intrusive of the adjoining landowners' rights as to substantially interfere with their enjoyment of their own property, injunctive relief may issue. Such determinations must be made on a case-by-case basis, requiring the balancing of the correlative rights of the parties. A party may not complain who obtains property near a cemetery already established.

Maintenance of Grounds and Monuments:

Public cemeteries must ensure that grounds are properly groomed and maintained.

While the owners of private lands have no duty to maintain graveyards thereon, active interference or desecration of such graveyards will not be tolerated, and relatives and friends may properly seek injunctive relief.

Nature of Title of a Cemetery Plot:

While one who purchases or otherwise acquires a cemetery plot has been described as “owner of the soil,” he does not acquire fee simple title. The interest has been variously described as a license, an easement, a trust or a dedication. While courts disagree as to the nature of the interest, all agree that the interest, however described, permits the owner, so long as the ground is maintained as a cemetery, to bury his dead therein, and to recover damages for desecration.

Right of Access and Upkeep:

The survivors and descendants of the dead buried in a particular plot retain the right to enter the grounds and to maintain the graves of their deceased relations.

ABANDONMENT OF CEMETERIES

Generally:

A cemetery remains dedicated and protected ground so long as the dead remain interred there.

Removal of Remains:

While neither the dead nor their descendants hold any fee title to the ground in which they are buried, it is no light thing to disturb the resting place of the dead and removal should only be countenanced in exceptional circumstances.

Sections 27-43-10 to 27-43-40 of the South Carolina Code provide a process by which the owner of land where there is located an “abandoned cemetery” may “remove” the graves and tombstones to another “suitable plot” in another “suitable location”. The process takes place by the owner of the land applying for the removal to the governing body of the county or municipality. There is notice to known relatives and by publication in the newspaper. The governing body then conducts a hearing to hear evidence. The removal is to be supervised by a licensed funeral director. Expenses are paid by the land owner seeking the removal.

Issues in this Statutory Removal Process:

1. There is no definition of an “abandoned cemetery” in the code sections.
2. What are the criteria upon which the governing body should make the decision to remove?
3. What is a “suitable plot” or “suitable location” where the burial plots are to be removed?
4. What if there is a “forgotten and neglected” cemetery and no land owner is there to seek a removal by the governing body?

Reversion to Previous Owner:

Cemeteries remain dedicated ground to the previous owner until the dead are removed, even though the graves may be forgotten and neglected.

PROTECTION OF CEMETERIES

Action for Interference or Desecration:

The courts are quick to provide relief against those persons who intentionally disturb or destroy a burial ground. Survivors and descendants may maintain an action at trespass for acts committed.

Injunction:

Injunctive relief will be granted for a threatened disturbance or desecration of any burial ground. A cemetery plot is unique because it is hallowed land, occupying an entirely different status from any other parcel of ground.

Damages:

As in an action for trespass, a party may also recover for actual monetary damages to a grave or crypt.

Damages for mental anguish are also recoverable.

Criminal Offenses: S.C. Code 16-17-600

Any person who willfully disturbs or desecrates human remains is guilty of a felony and will be imprisoned for not less than one nor more than ten years and fined not less than \$2,000.

Any person who injures or removes a gravestone or monument or vandalizes or desecrates any burial ground, to include fencing, plants, trees, shrubs or flowers, is guilty of a misdemeanor. To be convicted of the latter offense, it is not necessary that party enter or disturb any actual gravesite.

SECTION 5-39-10. Acquisition and operation of cemeteries authorized; police powers outside municipality.

The city or town council of every incorporated city or town in this State may purchase or otherwise acquire, own, hold, operate, subdivide and develop cemeteries or burial grounds in or near such city or town and lands for cemeteries or burial grounds and lots or portions of such lands under such terms and conditions as the city or town council may prescribe. All police powers of any such municipality shall extend to any cemetery or burial ground owned, operated or controlled by the municipality which lies outside the incorporated limits thereof.

SECTION 6-1-35.

Preservation and protection of cemeteries.

- (A) Counties and municipalities are authorized to preserve and protect any cemetery located within its jurisdiction which the county or municipality determines has been abandoned or is not being maintained and are further authorized to expend public funds and use county or municipal inmate labor, in the manner authorized by law, in connection with the cemetery.**
- (B) As used in this section, the term “preserve and protect” means to keep safe from destruction, peril, or other adversity and may include the placement of signs, markers, fencing, or other appropriate features so as to identify the site as a cemetery and so as to aid in the preservation and protection of the abandoned cemetery.**

This type of clause in governmental law circles is known as an “expansion” clause versus a “granting” clause.

A “granting clause” grants specific powers. For example, Article 1 Section 8 Subsection 13 of the US Constitution grants Congress the power “... to provide and maintain a Navy ...”. That is a specific grant of power.

An “expansion clause” is not specific but grants the power for the body to expand on specific grant clauses. For example, Article 1 Section 8 Subsection 3 grants Congress the power “... to regulate commerce ... among the several states ...”. Article 1 Section 8 Subsection 7 grants Congress the power “... to establish post offices and post roads ...”. Article 1 Section 8 Subsection 18 grants Congress the power to “... make all laws which shall be necessary and proper for carrying into execution the foregoing powers ...”.

Based on this “necessary and proper” expansion clause, we now have Interstate Highways to regulate commerce and establish post roads among the states.

ABANDONMENT

Personal property is abandoned when the owner has voluntarily relinquished all right, title, claim and possession with the intention of terminating ownership without the intention to vest ownership in another person and with the intention of not claiming any future rights in the same property.

The law of abandonment of cemeteries (which is real property) differs from state to state. Most states adhere to the concept of abandonment of a cemetery that is the same concept as for personal property. It is a matter based in intent. The question of intent is different from cemetery to cemetery, and that intent is determined from the acts of many persons as to the use of the cemetery. All of the surrounding circumstances are examined.

- **Is the cemetery and/or are the burial plots being maintained?**
- **Do persons visit the cemetery or burial plots?**
- **How long in time has it been since the cemetery/burial plots have been maintained or visited?**
- **How long has it been since a new burial was placed there?**

To determine an abandonment is not something that can be assumed by anyone. It takes a Court Decree after a trial where facts based on the above issues are presented and ruled on by a Judge. This is the exercise of the police power of government.

Following the law of real estate transactions, when a person creates a cemetery on their land and does not deed away their ownership by a general warranty deed, they remain the owner of the cemetery subject to the use of it as a cemetery/burial plots.

When it is determined that the cemetery has been abandoned, the title reverts to the original grantor and/or their heirs/successors in title.

Thus, there are many legal issues involved in determining a legal abandonment based on the language of the original grant, if any, and then the use of the cemetery for many years.

For example, a deed “for use as a cemetery” is a conditional grant with a reverter attached.

South Carolina Law on Abandoned Cemeteries

- 1. No legislative nor court definition of the term “abandoned cemetery” can be found.**
- 2. There is a statute (Code Section 27-43-40) that refers to one of the elements to be considered in an abandonment, but it is not a plenary definition. This statute is the result of a 1924 case.**

Members of a family sold a tract of land to a business who cleared the land to construct a building. In the process of clearing the foliage, workmen found bones and reported it. A family member brought a suit claiming it was a family cemetery, so the buyer clearing the land was a trespasser. The facts revealed there was no obvious method the buyer could determine there was a cemetery or burial plots, so there was not trespass. The court held that the abandonment of a burial place is accomplished by the removal of the remains there to a more suitable place.

Frost -v- Columbia Clay Company 130 SC 72, 124 SE 767 (1924)

SECTION 27-43-40. Evidence of abandonment.

The conveyance of the land upon which the cemetery or burying ground is situated without reservation of the cemetery or burying ground shall be evidence of abandonment for the purposes of this chapter.

SC Code Section 27-43-40, in my view, was adopted by the Legislature to prevent a seller or their family members from coming back after a sale and claiming there was a cemetery/burial plot on the land. So, that statute does not protect the owner from the descendants of the persons buried there.

3. The decision in the Frost case that an abandonment depends on the removal of the body remains buried there versus the intention of the descendants of the persons buried there which is the law elsewhere seems to put South Carolina at odds with the rest of the country???

SUGGESTION: The legislature should adopt a definition of what constitutes an “abandoned cemetery” rather than leave that decision up to each of the 46 county councils and the multiple municipalities across the state.

Question: If there is an abandoned cemetery (or forgotten and neglected) so there is no one that applies for removal, what happens to the bodies buried there?

Question: To whom does the ownership revert? How do you ascertain when the cemetery began and who was the landowner at that time?

Question: What is the difference between “forgotten and neglected” and “abandoned”?

STATE OF SOUTH CAROLINA)

)

LAST WILL AND TESTAMENT

COUNTY OF BEAUFORT)

I, _____, being of sound mind and memory, do hereby ordain, publish and declare this document as my last will and testament.

1. It is my desire that my body be interred according to the rites of the Episcopal Church in the cemetery of St. Helena Church in Beaufort, SC and that the Masonic Order, to which I belong, be requested to perform the Masonic burial service. My Lodge is #_____ in Savannah, GA.
2. To my son, _____, Jr., I leave my gun, my automobile, my boat, my tools, my World War sword, my father's sword which was awarded to him by special act of Congress, and such books of my library as he may choose, together with the bookcases he may want.
3. To my daughter Mary _____, I leave my piano and all of my music; all the books of fiction, history, science and references not chosen by my son; and my Mittenwald violin. This violin was made in 1702 in Mittenwald, Germany.

4. To my daughter Lenora _____, I leave one double iron bedstand with spring and mattress and a pair of blankets; the bed to be the one in which I usually sleep; also a green iron cot and mattress with three pillows and a bureau.
5. To my daughter Lillian _____, I give all my furniture in the apartments on the lower floor of my house to include chairs, tables, beds, stoves, safe, dishes, pots, pans, and tableware.
6. To _____, my dear friend who is like my daughter, I give the typewriter on which I write this Will and the desk and chair that go with it.
7. To my wife, Eleanor _____, I leave my best wishes, if she should survive me, and so much of my estate to which she may be entitled by law. My failure to achieve any of my ambitions is due entirely to the hindrances and stumbling blocks she placed in my way. I leave her my best wishes that she may enjoy her success in that line.

_____, 1912

Signed