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Protections Afforded to Massachusetts' Ancient Burial Grounds

BY CHARLES E. ROUNDS, JR.



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Massachusetts have been reported extensively in the press; one such controversy involves a burial ground in the Town of Paxton and another a Quaker burial ground in the Town of Norwell. In the State of New York relatives of persons interred in a 200-year-old Nassau County burial ground are seeking \$20,000,000 in damages from a condominium developer for his allegedly disturbing their ancestors' gravesites.⁶ This article reviews both the civil common law and civil statutory protections afforded ancient burial grounds in Massachusetts. The author concludes that the majority of ancient burial grounds in the Commonwealth are held in public charitable trusts with the trustees (be they municipalities, religious organizations, or cemetery corporations) holding the land in perpetuity. Although some statutory protection exists,⁷ it is limited in scope, and provides no mechanism for the perpetual stewardship of these historic sites. The article proposes adding to the existing statutory law and in addition establishing an Ancient Burial Ground Preservation Trust designed to properly "house" and protect the ancient burial grounds of the Commonwealth. Even though the legal status of ancient burial grounds is subtle and somewhat ambiguous in that it falls in a no-man's land between the public and the private domain, this land is not "up for grabs." It is a message that needs to get out in this era of ferocious land development. Moreover, this is one preservation battle in which both private and public interests can stand together.

(b) The Congress finds and declares that—

- (1) the spirit and direction of the Nation are founded upon and reflected in its historical heritage;
- (2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;
- (3) historic properties significant to the Nation's heritage are being lost¹ or substantially altered,² often inadvertently, with increasing frequency...

Congressional findings, "National Historic Preservation Act."³

Summary

In recent years, controversies involving non-burial-related development of ancient burial grounds⁵ within

1. By way of an illustration, in the Town of Norwell, Mass. long-term neglect has resulted in the near obliteration of an ancient burial ground "associated with the establishment of the Quaker faith in Massachusetts, Rhode Island, and the nation." See, letter from W.L. Garside, Chairman, Norwell Historical Comm'n to the Norwell Planning Board, published Feb. 11, 1987 in the *Norwell Mariner*. This

burial ground was the subject of the Wanton Suit which is discussed in this article. See Note 51 and accompanying text.

2. This article highlights actions taken by the Town of Paxton, the Massachusetts Legislature, and Governor Michael S. Dukakis to effect a "substantial alteration" of an ancient burial ground.

3. 16 U.S.C.S. §470 (1985).

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I have said since the dark days of a year and a half ago, that if God wanted this building built...no force on earth could prevent it...I have believed that never more than today.

*The words of Pastor Donald D. Whitcomb at a ceremony in the Town of Paxton, Massachusetts, June 8, 1986, inaugurating the construction of a two-story addition to his church over ancient gravesites including that of a Revolutionary War veteran.*⁴

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4. See, the June 12, 1986 edition of *The Landmark*, a newspaper published in Holden, Massachusetts.
 5. The author knows of no inventory of the Commonwealth's ancient burial grounds from which a precise total acreage figure can be extracted.
 6. *Bumstead, et al v. Vim Const. Corp., et al*, Sup. Ct. of the State of N.Y., County of Nassau, Index # 16840-86.
 7. M.G.L. c.272, §§71, 73, 74, & 75 (but see, M.G.L. c.272, §73A); M.G.L. c.9, §26A(6).
 8. See, Minutes of Sept. 1879 Meeting of Massachusetts Historical Society, 17 *Proceedings of the Mass. Historical Society* 126-314 (1880) (available in the Massachusetts Historical Society library).
 9. III *Documents of the City of Boston for the year 1877*, at 18, 19 (City Document No. 67).

I. Introduction

In 1879 the members of the Massachusetts Historical Society became alarmed⁸ when they read this passage in the 1877 Report of the Board of Health of the City of Boston:

We believe the time has already arrived when the cemeteries within the limits of the city proper should be closed against further burials, not only as a sanitary measure, but with the view of eventually removing the remains of the bodies which have been buried therein to some more suitable locality in the suburbs...Sooner or later (it may not be in this or the next generation) the remains of those buried in these cemeteries will be removed, and the ground will be used for other purposes.⁹

In the Report, the Board offered estimates of the then market values of the real estate comprising the King's Chapel Burial Ground (which is said to contain the earthly remains of Governor John Winthrop, among others) and the Old Granary Burying-ground (in which is said to be buried John Hancock and Samuel Adams, among others)¹⁰ and suggested that if the parcels could be sold or be taken by the city for "public use"¹¹ the proceeds from the sale or taking could be applied towards the purchase of a "larger tract"¹² of land in some outlying district or neighboring town, a tract which presumably could comfortably receive the remains of those who had been buried within the city proper.

The Massachusetts Historical Society, considering itself "peculiarly bound...to watch over the ancient historical sites of [Boston], and to make seasonable remonstrance against unnecessary destruction of its old landmarks,"¹³ sponsored and lobbied to enactment a statute which the Society hoped would counter the gathering forces of encroachment and desecration.¹⁴ The statute, the precursor of M.G.L. c.114, §17, was approved by the Governor on March 29, 1880 and took effect thirty days thereafter. It reads as follows:

It shall not be lawful for any city or town in this Commonwealth to alienate, convey, or appropriate to any other use than that of a burial-ground, any tract of land which has been for more than one hundred years used as a place of burial of the dead: nor shall any portion of such burial-ground be taken for any public use, without special authority from the legislature: provided that this act shall not apply in any case where the town has already given its consent to such use, or where special authority therefor has been granted by the legislature.¹⁵

The statute appears to cover three transactions which a municipality might enter into with respect to an an-

10. *Id.*, see, Note 8 at 128 & 132.
 11. *See*, Note 9.
 12. *See*, Note 9.
 13. *See*, Note 8 at 127.
 14. *See*, Note 8 at 136 and 314.
 15. 18 *Proceedings of the Massachusetts Historical Society* at 22, 23 (1881); the statute in its current form is found at M.G.L. c.114, §17, and now reads as follows:
 A town shall not alienate or appropriate to any other use than that of a burial ground, any tract of land which has been for more than one hundred years used as a burial place, and no portion of such burial ground shall be taken for public use without special authority from the general court. "Burial place," as referred to in this section, shall include unmarked burial grounds known or suspected to contain the remains of one or more American Indian.

cient burial ground: (1) the alienation of the land, (2) the taking of the land for a public use by eminent domain, and (3) the use of the land for a public purpose which is unrelated to burial. Under the statute a municipality is prohibited from alienating an ancient burial ground. If the municipality wishes to take an ancient burial ground by eminent domain for a public use, it may do so only with the consent of the legislature. While the statute appears to prohibit a municipality from using an ancient burial ground for a public purpose which is unrelated to burial, presumably this result could still be achieved in the context of an eminent domain proceeding, provided legislative approval is obtained.¹⁶

From time to time through the years, the status of ancient burial grounds in Amherst, Hudson, Braintree, Worcester, Marblehead, Shutesbury, Waltham, Springfield, Danvers, Russell, South Hadley, Cambridge, Peabody, Hingham, Dana, Enfield, Greenwich, Prescott, and Westport have been the subject of special legislative attention¹⁷ but it is probably the exception rather than the rule when the legislature is asked to involve itself in matters relating to the alteration in the use of an ancient burial ground.¹⁸

In 1987, more than a century after the members of the Massachusetts Historical Society pondered the future of the Commonwealth's ancient burial grounds, the Town of Paxton,¹⁹ under authority purportedly granted to it by the Massachusetts legislature in response to a "home rule petition" by the town²⁰—and with the approval of Governor Michael S. Dukakis,²¹ the acquiescence of the Massachusetts Historical Commission²² and the non-involvement of the Attorney General²³—conveyed for nominal consideration to The First

Congregational Church of Paxton²⁴ a portion of an ancient burial ground (the "Paxton Burial Tract"), which was then over two hundred years old, in order that the church might erect on it a two-story parish house. Numerous tombstones²⁵ were removed from the construction site to other parts of the cemetery and a concrete slab poured over the gravesites.

With real estate development accelerating at a rate which the members of the Massachusetts Historical Society in the 1870s could not have contemplated²⁶ the time has come to inventory the common law and statutory protections which the civil side of the law affords to the tracts of land which comprise the Commonwealth's ancient burial grounds and to the gravesites within their boundaries. This article is designed to provide such an inventory. Ancient gravesites undisturbed are an invaluable source of primary historical and genealogical information.²⁷

The concept of a historic monument embraces...the urban or rural setting in which is found the evidence of a particular civilization, a significant development or an historic event. This applies...to...modest works of the past which have acquired cultural significance with the passing of time...A monument is inseparable from the history to which it bears witness and from the setting in which it occurs. The moving of all or part of a monument cannot be allowed except where the safeguarding of that monument demands it or where it is justified by national or international interests of paramount importance.

International Charter for the Conservation and Restoration of Monuments and Sites.
(Articles 1 & 7)

16. See, *Higginson v. Treasurer and School House Commissioners of Boston*, 212 Mass 583 at 591, 99 N.E. 523 at 527 and 528 (1912).

17. Acts, 1985-Chap. 157 (Amherst); Acts, 1977-Chap. 430 (Hudson); Acts, 1973-Chap. 359 (Braintree); Acts, 1967-Chap. 563 (Worcester), an act authorizing the City of Worcester to convey to the Worcester Redevelopment Authority a portion of Worcester Common in said city for redevelopment purposes, such portion containing an ancient burial ground; Acts, 1966-Chap. 50 (Marblehead); Acts 1937-Chap. 187 (Shutesbury); Acts, 1934-Chap. 306 (Waltham); Acts, 1928-Chap. 65 (Danvers); Acts, 1928-Chap. 267 (Springfield); Acts, 1913-Chap. 381 (Russell); Acts, 1897-Chap. 176 (South Hadley); see also, Acts, 1871-Chap. 222 (Attleborough) & Acts, 1865-Chap 40 (Cambridge) which were approved before 1880; Acts, 1924-Chap. 341 (Peabody) involving a Quaker Burial Ground; and Acts, 1932-Chap 149 (Hingham) involving a Cemetery Corporation; see also, Acts, 1927-Chap. 321 (Dana, Enfield, Greenwich, and Prescott) authorizing the Commonwealth's taking of cemeteries to accommodate the Quabbin Reservoir; see also, Acts, 1975-Chap. 280 (Westport) involving a private burial ground.

18. See, for example, Book 2368, pages 1 to 8, Suffolk County (Mass.) Registry of Deeds (suggesting transactions involving the owner of a building located at Beacon Street, Boston and persons having interests in the "Granary Burying Ground").

19. See, "unanimous" vote taken on Article 6 of the Town Warrant at the Special Town Meeting held April 8, 1985 at Paxton Center School.

20. Acts, 1986-Chap. 568; see also, Acts, 1985-Chap. 126.

21. Id.

22. "...State Archaeologist Brona Simon, who works for the Massachusetts Historical Commission, had found fault with the original plans for moving graves. But she said the concrete slab on pilings, proposed in response to her concerns, represents 'a fine solution to the problem'..." *The Boston Globe* (May 3, 1985) at 21 and 84; see also, letter from Brona Simon, State Archaeologist, Mass. Historical Comm'n, to Norma E. Perry who is a relative of persons buried in the Paxton Burial Tract (March 15, 1985) suggesting that "the laws in Massachusetts do protect historic cemeteries, but do allow for another use of a burial ground if the State Legislature approves it."

23. See, letter from Judith S. Yogman, Assist. Att'y Gen. (Mass.), to Edward H. Duane (Jan. 30, 1985) in which she declined to render an opinion on the legality of the proposed transfer of a segment of the Paxton Burial Tract because the Attorney General "is not authorized to render legal advice or opinions to private citizens"; see also, letter from Robt. D. Wetmore, Senator, Mass. Legislature, to Edward H. Duane (Feb. 13, 1985) in which Mr. Duane is referred to the Paxton Town Counsel for a legal opinion on the legality of the legislation purporting to authorize the transfer of the Paxton Burial Tract.

24. See, Book 10464, page 227 and Plan Book 576, Plan 28-Worcester District Registry of Deeds (Mass.).

25. See, Worcester Telegram (Sept. 25, 1986) at 6.

26. See, Note 28 and accompanying text.

27. See, letter from Shirley M. Barnes, Director of Civil Records, Mass. Genealogical Council, to Valerie A. Talmage, Exec. Director, Mass. Historical Comm'n (June 4, 1985) expressing opposition to the transfer of the Paxton Burial Tract.

Moreover, the reasons for protecting these tracts are as much ecological as they are sentimental in that they constitute "open land".²⁸

Open land lost [in the Commonwealth] to residential and commercial development since 1981 totaled 103,000 acres. When land lost to roadways and other transportation is included, over 112,000 acres were lost in the last six years. In 1986 alone, over 30,000 acres were lost, or nearly 600 acres every week. This amounts to losing the equivalent of 12 Boston Commons every week, or one area the size of Forest Park in Springfield... Even if one assumes that the experience of the past six years is unusual, and that growth in land development will slow over the next 40 years (from 2% per year today, to 1.5% per year in 2020), a total of 2,044,000 acres will likely be developed by the year 2030. This amounts to a loss of an area nearly three times the size of the state of Rhode Island.

Losing Ground: The Case for Land Conservation in Massachusetts, Massachusetts Audubon Society, Oct., 1987

The focus of this article will be on the burial-related personal and property rights of relatives of the persons who are interred in ancient burial tracts and on the individuals and organizations who have enforceable duties to accommodate these interests. The theme of the article is *not* that all ancient burial tracts and their gravesites must forever remain undisturbed but that there must be some order and civil accountability in matters relating to the administration and disposition of these historic properties. Many of New England's ancient burial tracts are for all intents and purposes forgotten, neglected, or abandoned; and there is a view shared at least by some that they are derelict properties available for non-burial exploitation. It is suggested that judicial supervision with the involvement of guardians ad litem and the Attorney General is the only effective way to accommodate the interests of relatives of decedents long forgotten in matters relating to the non-burial exploitation of these properties. It is left to another article however to suggest guidelines which the courts might follow in determining whether a particular ancient burial tract may be the subject of non-burial exploitation or its gravesites disturbed. This article also will not consider the health-related regulation of cemeteries pursuant to the Commonwealth's police power,²⁹ it will not examine property rights associated with graves which have never been occupied,³⁰ and it will not examine criminal statutes such as M.G.L. c.272, §73, which are designed to

protect ancient burial grounds and gravesites within their boundaries.³¹

II. Definitions

A. *Ancient Burial Ground*: For purposes of this article, the term "Ancient Burial Ground" means any burial ground in the Commonwealth of Massachusetts which one hundred years before the present or earlier was dedicated informally by practice³² or formally by a writing to the burial of the human dead and which has boundaries which are definable and identifiable.³³ Because the Commonwealth's ancient American Indian burial grounds tend *not* to have "readily identifiable" boundaries,³⁴ property issues³⁵ associated with these grounds are outside the scope of this article.

B. *Ancient Burial Tract*: The land which comprises an Ancient Burial Ground will hereinafter be referred to as "the Ancient Burial Tract."

C. *Relatives*: The term "relatives" is employed throughout the article. It is intended as an expansive term describing persons dead and alive who *at any given time* are reasonably related collaterally or lineally to one another by consanguinity, adoption, marriage, or affinity.

D. *Next of Kin, Heirs at Law, and Descendants*: The terms "next of kin," "heirs at law" and "descendants" are more limited in scope than the term "relatives." For purposes of this article the term "next of kin" shall mean those persons who are most closely related to a decedent by consanguinity *at the time of the decedent's death*; the term "heirs at law" shall mean those persons who, under applicable laws of intestacy, take that portion of the property of a decedent's probate estate which is not disposed of by his will. A decedent's heirs at law are determined *at the time of the decedent's death*. (The Massachusetts intestacy statutes which provide the formulae for determining the heirs at law of a particular decedent may be found in M.G.L. c.190.) The term "descendants" describes those who *at any given time* are issue of a decedent. An after-born great, great grandson of a decedent would be a relative and descendant of the decedent but would not be the decedent's next of kin. A sister of a decedent would be a relative of the decedent but not his descendant; and if the decedent were survived by children, his sister would also not be his heir under Massachusetts law. It is not

28. Greenbaum & O'Donnell, *Losing Ground: The Case for Land Conservation in Massachusetts*, Massachusetts Audubon Society, (October, 1987) at i., iii.; see also Lehrer, "Cemetery Land Use and the Urban Planner," 7 *Urban Law Annual* 181 at 197 (1974).

29. See, M.G.L. c.114.

30. See, M.G.L. c.114, §10A; Acts, 1977-c.272 and *Trefry v. Younger*, 226 Mass. 5; 114 N.E. 1033 (1917).

31. M.G.L. c.272, §§71, 73, 74, & 75; but see M.G.L. c.272, §73A.

32. Dedication... is the act of devoting or giving property for some proper object, and in such manner as to conclude the owner.... A dedication may be made without writing, by act in pais, as well as by deed. It is not at all necessary that the owner should part with the title which he has; for dedication has respect to

the possession, and not the permanent estate. Its effect is not to deprive a party of title to his land, but to estop him, while the dedication continues in force, from asserting that right of exclusive possession and enjoyment which the owner of property ordinarily has.

Jackson, *The Law of Cadavers* (Prentice-Hall 2nd ed. 1950) at 221.

See also, *Trefry v. Younger*, 226 Mass. 5 at 8, 9; 114 N.E. 1033 at 1034 (1917) and *Locke v. Lester*, 78 So.2d 14, at 15, 16 (La. 1955).

33. See, *Sudbury v. Department of Public Utilities*, 351 Mass. 214 at 226; 218 N.E.2d 415 at 424 (1966).

34. Id.

35. See, Coulter & Tullberg, "Indian Land Rights," 3 *Antioch Law Journal* 153 (1985).

unusual, William Shakespeare, Isaac Newton, George Washington, and Abraham Lincoln being four notable examples, for a decedent to have currently living relatives but no currently living descendants. Persons who have died in battle tend to fall into that category. The outer limits of the class of persons who can reasonably claim to be the relatives of a decedent lie somewhere between the decedent's heirs at law and the billions of descendants of the single female to whom, according to some geneticists, the entire current population of the planet owes its origins.³⁶

III. The gravesite

A. Nature of Interest

The person who owns an interest in a grave which has never been occupied has an interest which is in the nature of an easement.³⁷ The easement is a limited use for purposes of interment.³⁸ The grant of a burial easement is said to be analogous to the grant of a pew in a church.³⁹ A certificate or deed to the purchaser of a burial easement conveys the privilege of interment in the host tract, a privilege in the nature of an irrevocable license of burial⁴⁰ so long as the host tract continues to be used for burial purposes; it is not, however, the grant of a title interest in the host tract.⁴¹

A dead body after burial becomes a part of the ground to which it has been committed⁴² and whatever personal or property rights that are associated with the occupied gravesite vests by operation of law in the decedent's relatives as a perpetual class.

B. Rights of Relatives

What then is the nature of the personal or property rights of the class of relatives living from time to time of a deceased person to that person's gravesite? It has been suggested that they have an interest in the proper use of the gravesite⁴³ and the right to legal protection from unnecessary disturbance and wanton violation or invasion⁴⁴ or desecration⁴⁵ of the gravesite; that they have a

right to visit⁴⁶ the gravesite; a right to repair, beautify, and protect the gravesite;⁴⁷ and for these purposes they have a right of ingress and egress from the public road nearest the host tract, which right may be exercised at seasonable times and in a reasonable manner.⁴⁸ These legal interests which emanate from the gravesite are said to be in the nature of "incorporeal hereditaments"⁴⁹ or "usufructory rights"⁵⁰

As the years pass after the decedent's interment, the class of persons entitled to the incorporeal hereditaments or usufructory rights associated with his gravesite will undergo episodes of expansion and contraction as the decedent's relatives from time to time are born and die. It is likely, however, barring catastrophe, that the class of a decedent's relatives living from time to time will experience a net expansion:

Historians say that 26 of the 102 people who crossed the Atlantic on the Mayflower in 1620 and later celebrated the first Thanksgiving had children who had children who had children. Today, approximately 12 generations later, the Mayflower passengers may well have 25 million descendants. "It could be one out of every 10 people on the street," says Cay Lanham, the governor general of the General Society of Mayflower Descendants.

The Wall Street Journal, Wed., Nov. 25, 1987, page 1, Col. 4

On June 27, 1988 the thesis that a broadly defined class of relatives has standing in the courts of the Commonwealth to protect occupied gravesites was called into question when a motion for Summary Judgment for the defendants in *Sally Sanford vs. Planning Board of the Town of Norwell & others*, (the "Wanton Suit")⁵¹ was allowed by the Plymouth Superior Court. In allowing the defendants' Motion for Summary Judgment, a decision which the plaintiff is appealing (Mass. App. Ct. No. 88-P896), the court ruled that only heirs at law, rather than merely descendants, may assert rights regarding burial grounds.⁵² The matter involved an attempt by an eighth generation granddaughter of Edward Wanton,⁵³ a noted shipbuilder, Quaker, and father of two

36. See, "The Search for Adam and Eve," CXI *Newsweek* No.2 (Jan. 11, 1988) at 46; see also, *Locke v. Lester*, 78 So.2d 14 at 16 (La. 1955). See also, *Carney v. Knollwood* 514 N.E.2d 430 at 435 (Ohio App. 1986). The *Carney Case* involved an action by the descendants of a deceased for the negligent infliction of emotional distress occasioned by the disinterment of the remains of their ancestor. The court held that "[i]t is unnecessary, however, at this time to define the entire class of family members who are, or are not, eligible to bring such an action, except as pertains to the appellees herein. As to them, we hold that all four appellees, as direct blood descendants of [the deceased] had standing to press their claim for the outrageous disturbance of her remains."

37. *Trefry v. Younger*, 226 Mass. 5; 114 N.E. 1033 (1917).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Meagher v. Driscoll*, 99 Mass. 281 at 284 (1868).

43. See *Sohier v. Trinity Church*, 109 Mass. 1 at 23 (1871).

44. See *Wilson v. Read*, 68 A 37 at 39 [N.H. 1907].

45. See *Hines v. State*, 149 S.W. 1058 (Tenn. 1911).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Walker v. Georgia Power Co.*, 339 S.E.2d 728 (Ga. 1986); see generally, Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 *Yale Law Journal* 16, 23-24 (1913).

50. *Sohier v. Trinity Church*, 109 Mass. 1 at 23 (1871).

51. See, Civil Action No. 88-0936, Superior Court, Dept. of the Trial Court, Plymouth County (Mass) Civil Action No. 88-0936, particularly the "Memorandum of Decision and Order on Defendants' Motion for Summary Judgment."

52. *Id.* (the Memorandum) at 14, 15.

53. Edward Wanton of Scituate aged about 87 years. He departed this life at his own house in Sittuat ye 16 day of ye 10 month in ye year 1716 and was burried there. He was among the first who embraced Friends Principles in New England, was a sheriff in Boston when Mary Dyre was hanged. He convinced while under the gallows with her and afterwards became a minister in the Society. And suffered much for the testimony of truth.

Excerpt from the *Minutes of the Rhode Island Monthly Meeting* (of the Quakers) now in the possession of the Newport, R.I., Historical Society.

Rhode Island governors, through the assertion of the incorporeal hereditaments or usufructory rights associated with Wanton's gravesite, to determine the boundaries of the burial ground in which the gravesite, as well as numerous other gravesites, is thought to be located (the "Quaker Burial Ground") and to put in place mechanisms which would insure the perpetual stewardship of the historic site.

The Wanton Suit was commenced in response to a perceived threat to the gravesites occasioned by commencement of the development project. In a 1942 land court proceeding, the title to the land thought to contain the Quaker Burial Ground was registered and confirmed as belonging to one Emma J. Bailey, the developer's predecessor in title.⁵⁴ All parties to the Wanton Suit have admitted that the Quaker Burial Ground once existed on or in the vicinity of the development tract. The defendants denied Edward Wanton's eighth granddaughter access to the development tract for purposes of conducting at her expense certain non-invasive archaeological tests, tests which she hoped would locate the precise boundaries of the Quaker Burial Ground.⁵⁵ The plaintiff's parents were alive at the time the Motion for Summary Judgment was allowed.

If the term "heir at law" as employed in the Superior Court opinion in the Wanton Suit means a person who took the *property* of Edward Wanton *at the time of his death* under the law of intestacy,⁵⁶ then the consequences of such a narrow circumscription of the class of eligible plaintiffs, if such a circumscription is in accord with the law of the Commonwealth, would be dire for the Commonwealth's Ancient Burial Grounds because the heirs at law of all persons who died intestate in the seventeenth and the eighteenth centuries are themselves now dead.⁵⁷ Moreover, if Edward Wanton, for example, were to have died intestate in this decade sur-

vived by a child and by a parent but not by his wife, then it would be Wanton's child who would be his heir at law.⁵⁸ Wanton's father, not being his heir at law, would arguably not be entitled to visit, honor, and protect his son's gravesite. Moreover, if Wanton were to die with a valid will which disposed of all of his property, then it is arguable that no one is entitled to visit, honor, and protect his gravesite because he left devisees and legatees, but no heirs at law.

It is hoped that the term heir at law as employed in the court's opinion in the Wanton Suit has some broader meaning than the *immediate* heir at law of a decedent. When the Massachusetts legislature, for example, authorized the taking of certain burial grounds by eminent domain in anticipation of the construction of the Quabbin Reservoir, it had occasion to express its opinion as to whose interests are affected by the disinterment of remains. Statutory provision was made for accommodating the perceived interests of the "next of kin," the "descendants," and the "relatives" of the deceased. No statutory provision, however, was made for the "heirs at law" of the deceased.⁵⁹ Just as rights with respect to the custody and disposition of a dead body are not determined in accordance with the usual principles of property law,⁶⁰ the right to visit, honor, and protect an *occupied* gravesite, whoever has title to the host tract, also ought not to be considered strictly in property terms. A broadly defined class of relatives ought to have the personal right if not the property right to visit, honor, and protect the gravesites of a broadly defined class of deceased relatives.⁶¹ Moreover, extreme diffusion of burial-related incorporeal hereditaments or usufructory rights occasioned by the expansion of a class of living relatives ought not to extinguish their right of access to the gravesite of a deceased relative and their right to protect it

54. Can the registration of land which contains within its boundaries an Ancient Burial Ground cleanse the land of the incorporeal hereditaments or usufructory rights of the relatives of persons interred therein? It is suggested that the rights of the relatives ought to survive the registration unless the interests of relatives unborn and unascertained are represented by a guardian ad litem during the registration proceedings.

55. See, letter, Sally Sanford to Editor, *Norwell Mariner*, published in June 29, 1988 edition of the *Norwell Mariner* at 11 & 16; *Edwards v. Sims*, 24 S.W. 2d 619 (Ky-1930).

56. *Heir at Law*: At common law, he who, after his ancestor dies intestate, has a right to all lands, tenements, and hereditaments which belong to him or of which he was seised. *Black's Law Dictionary*, 5th Ed., at 650 (West) 1979; see also, 2 G. Newhall, *Settlement of Estates*, §219.

57. Perhaps the estates of Edward Wanton's heirs at law, assuming he died intestate, would have standing to continue the Wanton Suit. Perhaps the term "heirs at law" can be construed to mean those who would be Edward Wanton's heirs at law if he had died intestate at the time of the commencement of the Wanton Suit. See generally, *National Shawmut Bank of Boston v. Joy*, 315 Mass 457 at 463-469; 53 N.E.2d 113 at 117-121 (1944) where the use of the subjunctive is discussed in the context of providing for post-mortem property dispositions; but see, *Mitchell v. Thorne*, 134 N.Y. Reports 536 at 541, 542 (1892). In the Wanton Suit the plaintiff moved to have her mother

added as a party plaintiff. On July 25, 1988, the Court denied the motion and gave no reason for its denial.

58. M.G.L. c.190, §3.

59. See, Acts 1927-Chap 321 (involving the Quabbin Taking) and DEL. CODE ANN. tit. 7, Sect. 5408 (Supp. 1987) (acknowledging the interests of next-of-kin of decedents in matters relating to excavations of human skeletal remains); in *Hines v. State*, 149 S.W. 1058 at 1059 (Tenn. 1911) and *Carney v. Knollwood Cemetery Assn.*, 514 N.E.2d 430 at 436 (Ohio App. 1986): "descendants" were held to have standing in matters relating to ancestral gravesites. In *Wilson v. Read*, 68 A. 37 at 39 (N.H.-1907) and *Ritter v. Couch*, 76 S.E. 428 at 430 (W.Va.-1912) there is the suggestion that the "relatives" of decedents have standing to protect ancestral gravesites. In *Sohier v. Trinity Church*, 109 Mass 1 at 23 (1871) there is even the suggestion that "friends" of a deceased have an interest in the "proper use" of his gravesite. See also, *St. Peter's Evangelical Lutheran Church et al. v. Kleinfelter*, 8 D & C 612 at 614 (Penn-1926) (Suggesting that any church, patriotic organization or person of the community can ask for an injunction against desecration of the graves of the dead.

60. See, 1 G. Newhall, *Settlement of Estates*, §9; see also *Wilson v. Read*, 68 A. 37 at 39 (N.H. 1907) where it is suggested that relatives have quasi-property interests in ancestral gravesites; but see, *Carney v. Knollwood Cem. Assn.*, 514 N.E. 2d 430 at 435 (Ohio App. 1986).

61. See, *Locke v. Lester*, 78 So. 2d 14 at 16 (LA 1955).

from being inappropriately disturbed;⁶² and any abandonment of these rights by the living relatives ought not to extinguish the interests of relatives yet unborn.

With respect to the Paxton Burial Tract there appears to have been no adequate notice, actual or by publication, given to all of the relatives of the persons buried in the vicinity of the parish house construction site that their interests in their ancestral gravesites might be affected by the construction.⁶³ Moreover, a judicial forum is where the issues of proper notice to (and the appropriate accommodation of the incorporeal hereditaments or usufructory rights of) the unascertainable relatives then living and the relatives then yet unborn should have been resolved, perhaps with the involvement of a guardian ad litem.⁶⁴

C. Protection of Rights

Looking to the future, how then can the interests of the relatives of persons interred in Ancient Burial Grounds be effectively and efficiently accommodated in the face of onslaughts by determined developers and persistent abutters? How can the inventory of the Commonwealth's ancient gravesites be safeguarded? It would seem there are two possible avenues: (1) the Class Action suit and (2) the active ongoing involvement of the Attorney General.

1. The Class Action.

A relative of a person buried underneath or nearby the concrete slab which was poured over a segment of the Paxton Burial Tract might bring an action on behalf of himself and the other relatives of the decedent against the Town of Paxton, the Commonwealth of Massachusetts, and the governing body of The First Congregational Church of Paxton seeking appropriate injunctive relief and perhaps damages on account of injury to the incorporeal hereditaments or usufructory rights of the relatives, an injury occasioned by the disturbing of the ancestor's gravesite and the relative's right of access

thereto. All the prerequisites of a Class Action are arguably present: (1) the class of relatives is so numerous that joinder of all members is impracticable;⁶⁵ (2) there are questions of law or fact common to the class,⁶⁶ (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;⁶⁷ and (4) the representative parties will fairly and adequately protect the interests of the class.⁶⁸

Although a Class Action suit may lie, it has its practical limitations. Such a suit would be expensive, time-consuming and disruptive; it is likely to be politically unpalatable, particularly in a small community; any relief which it might provide might be limited to the particular Ancient Burial Tract which was the subject of the action; and there likely would be no practical mechanism for insuring compliance in perpetuity with the injunctive orders which might issue. The situation cries out for the active, ongoing involvement of the Attorney General's Division of Public Charities.

2. Involvement of Attorney General.

"The duty of maintaining the rights of the public, and of a number of persons too indefinite to vindicate their own, has vested in the Commonwealth, and is exercised here, as in England, through the Attorney General."⁶⁹ Those who possess an interest in the incorporeal hereditaments or usufructory rights associated with a decedent's grave with time become so numerous and "indefinite" as to be virtually indistinguishable from the "public". At some point in time, the protection of ancient gravesites ought to become more than just a private personal or proprietary matter; it ought to become as well a charitable matter which relates to the stewardship of the relics of the nation's cultural and historical origins.⁷⁰ In the words of Aristotle, "...that which is common to the greatest number has the least care bestowed upon it."⁷¹ Who else but the Attorney General has the enforcement authority *and* the perpetual existence to adequately assume this stewardship function?

62. See, generally, *Hodel v. Irving*, 107 S. Ct. 2076 (West-1987).

63. In contrast, the Massachusetts legislature, in authorizing by special act the City of Cambridge to remove the remains of the dead from the burial ground between Broadway and Harvard Street, required that notice first be given "to all persons interested, by publication [of the special act] twelve successive weeks in the *Cambridge Chronicle*, and in at least two newspapers published in the city of Boston, and by notice in writing to the owners of said tombs." See, Acts 1865 c.40.

64. See, M.G.L. c.201, §34 (the Massachusetts guardian ad litem statute); see also, *Trustees of the First Presbyterian Church of Caldwell, N.J. v. Ruth Shepard*, et al, Sup. Ct. of N.J., Essex County, Chancery Div., Docket # C-5120-84, involving the proposed laying out of a parking lot within the boundaries of an Ancient Burial Ground in New Jersey. A guardian ad litem was appointed to represent the interests of decedents' relatives who were unborn and unascertained and the Attorney General was joined as a party to represent the interests of the Public; see also, *Georgia Power Co. v. Walker*, 339 S.E.2d 728 (Ga. 1986) where a "special master" was appointed in a matter involving the "condemnation" of the burial-related incorporeal hereditaments of unascertained parties.

65. Mass. R. Civ. P. 23(a)(1).

66. Mass. R. Civ. P. 23(a)(2).

67. Mass. R. Civ. P. 23(a)(3).

68. Mass. R. Civ. P. 23(a)(4).

69. *Jackson v. Phillips*, 96 Mass (14 Allen) 539 at 579 (1867).

70. A cemetery which derives its primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events is eligible for the National Register of Historic Places.

36 C.F.R. §60.4(d); see, IV *Scott on Trusts*, §374.9.

See also, *Eliot v. Trinity Church*, 232 Mass. 517 at 521; 122 N.E. 648 at 649 (1919) where it was held that "[t]he erection of a noble work of art as a monument or memorial to a great spiritual leader is a public charity" and the *Wanton Suit* at Note 51 and Note 53 and accompanying texts. In neither *Eliot* nor the *Wanton Suit* did the Attorney General appear.

71. Aristotle, *Politics*, ii, 3.

Although the Attorney General's Division of Public Charities was kept informed of the progress of the Wanton Suit, it chose to take no part in it.⁷² At this time it would appear then that Edward Wanton's gravesite, even if it were located with certainty somewhere in the host development tract, for all intents and purposes, would belong to the land developer. To be sure criminal gravesite protection statutes such as M.G.L. c.272, §73, remain on the books. They however are of little practical use in those situations where a relative of a decedent would have to trespass upon a host tract in order to determine whether or not the decedent's gravesite had been disturbed.

IV. The Tract

A. Title-holders

It is suggested that under Massachusetts law a gravesite may not be tampered with without notice to the relatives of the decedent and without some accommodation to the incorporeal hereditaments or usufructory rights which accrue to the relatives on account of their shared kinship with the decedent.⁷³ But what restrictions does the law place on the use and alienability of the host tract which is burdened with these interests? To some extent restrictions on the use and alienability of an Ancient Burial Tract will depend upon who has title to it.

Ancient Burial Tract title-holders fall into four general categories: (1) the private individual; (2) the religious organization; (3) the municipality; (4) the Cemetery Corporation.⁷⁴ It is self-evident that before one can determine whether an entity purporting to hold title to an Ancient Burial Tract possesses a right to alter its use or alienate a portion or all of it, a determination must be made that the entity does in fact have the lawful title to the land. It is suggested that it is against public policy for an entity to acquire the beneficial interest in an Ancient Burial Tract by adverse possession, the dead being in no position to voice protest.⁷⁵ It is suggested that it is also against public policy for an Ancient Burial Ground to

fall into private hands through abandonment or neglect as evidenced by M.G.L. c.114, §18, which provides as follows:

Any town having within its limits an abandoned or neglected burying ground may take charge of the same and keep it in good order, and may appropriate money therefor, but no property rights shall be violated and no body shall be disinterred. No fence, tomb, monument or other structure shall be removed or destroyed, but the same may be repaired or restored.

If the municipality cannot acquire rights through abandonment or neglect, other entities ought not to be able to do so as well. Unless an entity has acquired title to the land by a lawful transfer, for example by gift, by purchase, by will, by intestate succession, or through a taking by eminent domain, the entity will have no rights whatsoever to alter the use of the Ancient Burial Tract or to effect its alienation.

B. Duties of Title-holders.

1. The Private Individual.

An individual who has lawful title to an Ancient Burial Tract may transfer his interests in it; but the transferee would take the title subject to the overriding interests of the relatives of the decedents who are buried in graves located within the boundaries of the tract.⁷⁶ Burial-related incorporeal hereditaments or usufructory rights ought to survive all title transfers relating to the host tract. If the Ancient Burial Tract is subject to a trust⁷⁷ or enforceable condition⁷⁸ imposed on it prior to its most recent transfer, the last transferee of the Ancient Burial Tract takes title to it subject to the provisions of the trust or the terms of the condition.

May an individual who holds title to an Ancient Burial Tract use the land for purposes other than for cemetery purposes? May he erect a swimming pool, for example, within the boundaries of the Ancient Burial Tract? To the extent that the construction of a swimming pool will not result in an interference with the incorporeal hereditaments or usufructory rights of the relatives of the decedents buried in the Ancient Burial

72. The plaintiff in the Wanton Suit filed with the court a "Motion to Add the Attorney General of the Commonwealth of Massachusetts as a Necessary party." Charles K. Mone, the Plaintiff's counsel, orally has informed the author that he never pressed for the motion to be heard because, in telephone conversations with members of the Attorney General's staff, Mr. Mone was given to understand that the Attorney General would oppose the motion. Suzanne M. Bump, Representative, Mass. Legislature, has a recollection, based on her conversations with members of the Attorney General's staff, that the Assist. Att'y Gen. in charge of the Division of Public Charities "declined to allow the Public Charities Division to enter the case based on his opinion that descendants have no rights with regard to their ancestors' graves, that only the deceased, whose remains are interred there, have enforceable rights with regard to the gravesites." See, letter from Rep. S. Bump to the author (July 7, 1988). [There is a suggestion in *Meagher v. Driscoll*, 99 Mass. 281 at 284 (1868) that the English common law takes a similar ultra-narrow view as to who has an interest in a gravesite; but see, *Ritter v. Couch*, 76 S.E. 428 at 430 (W. Va.1912); see also, letter from Assist. Att'y Gen. Judith S. Yogman

to Edward H. Duane (Jan. 30, 1985) referred to in Note 23 and accompanying text and letter from Edward J. McCormick, Att'y Gen. (Mass.) to all Cemetery Corporations, and others (Jan. 9, 1961) "determining" that "[f]unds of cemeteries maintaining separate perpetual care funds for each lot and perpetual care funds of private cemeteries not selling lots to the public at large are not for public charitable purposes"; but see, letter from Assist. Att'y Gen. McCarty to John P. Donovan (July 14, 1987) referred to at Note 112 and Note 123.

73. See, Note 63 and 127 and accompanying text.

74. See, M.G.L. c.114.

75. See, *Locke v. Lester*, 78 So. 2d 14 at 17 (La. 1955); *Hines v. State*, 149 S.W. 1058 at 1060 (Tenn. 1911).

76. See, *Trefry v. Younger*, 226 Mass 5 at 10; 114 N.E. 1033 at 1034 (1917); *Hines v. State*, 149 S.W. 1058 at 1059 (Tenn. 1911).

77. See, *Hines v. State*, 149 S.W. 1058 at 1059 (Tenn. 1911).

78. See, M.G.L. c.184, §§26, 28; M.G.L. c.260, 31A; *Dunphy v. Commonwealth*, 368 Mass. 376; 331 N.E. 2d 883 (1975); *Opinion of the Justices*, 369 Mass. 979, 338 N.E. 2d 806 (1975); *Ritter v. Couch*, 76 S.E. 428 (W. Va.1912).

Tract and violate the terms of any trust or enforceable condition associated with the land, perhaps he can. On the other hand, if the construction of the swimming pool requires some municipal action such as the approval of a Planning Board or the issuance of a Building Permit, then the construction of a swimming pool within the boundaries of the Ancient Burial Tract may be illegal without approval of the legislature.⁷⁹

2. *The Religious Organization.*

It is often the case that title to an Ancient Burial Tract is held by a religious organization, with the tract itself being in close geographical proximity to an associated religious structure such as a church. As in the case of a private individual, the religious organization's right to alter the use of or alienate the Ancient Burial Tract is subject to the overriding interests of the relatives of the decedents who are buried within its boundaries;⁸⁰ subject to the provisions of any trust or enforceable conditions relating to the Ancient Burial Tract;⁸¹ and perhaps also subject to restrictions on municipal involvement in any non-burial development of Ancient Burial Tracts, restrictions which are inherent in the anti-alienation provisions of M.G.L. c. 114, §17.⁸²

The religious organization is also a charity whose governing body would have the fiduciary responsibilities of a Board of Trustees with respect to all the property

to which the religious organization has title. Moreover the Ancient Burial Tract by virtue of its quasi-secular function ought to be administered by the religious organization independently of the other property of the religious organization⁸³ and subject to its own separate public charitable trust. If the Ancient Burial Tract is held by the religious organization upon a public charitable trust, any alteration of its use, including its alienation, will require the bringing of a *cy pres* action⁸⁴ in a court having jurisdiction over the matter, an action to which the Attorney General must be made a party.⁸⁵ The religious organization must then convince the court that it would be impossible or impracticable for any entity to continue to have the land at issue maintained as an Ancient Burial Tract.

3. *The Municipality*

It has long been settled that a governmental entity may take an Ancient Burial Tract and the gravesites within its boundaries for a public use, provided the persons or entities possessing the beneficial interest in the tract and the gravesites are justly compensated therefor.⁸⁶ Other than through a taking by eminent domain, when the municipality acquires lawful title to an Ancient Burial Tract, it does so subject to the overriding interests of decedents' relatives⁸⁷ and to all trusts and enforceable conditions arising out of prior transfers of the

79. M.G.L. c.114, §17.

80. See, *Humphreys v. Bennett Oil Corp.*, 197 So. 222 at 227 (La. 1940); see also, Note 119 and Note 32.

81. *Congregational Church v. Attorney General*, 290 Mass. 1; 194 N.E. 820 (1935).

82. See, Note 15 and accompanying text.

83. See, *Humphreys v. Bennett Oil Corp.*, 197 So. 222 at 227 (La. 1940).

84. A good definition of the doctrine of *cy pres* is found in *Jackson v. Phillips*, 96 Mass (14 Allen) 539 at 580 (1867):

It is accordingly well settled by decision of the highest authority, that when a gift is made to trustees for a charitable purpose, the general nature of which is

pointed out, and which is lawful and valid at the time of the death of the [settlor], and no intention is expressed to limit it to a particular institution or mode of application, and afterwards, either by change of circumstances the scheme of the [settlor] become impracticable, or by change of law becomes illegal, the fund, having once vested in the charity, does not go to the heirs at law as a resulting trust, but is to be applied by the court of chancery, in the exercise of its jurisdiction in equity, as near the [settlor's] particular directions as possible, to carry out his general charitable intent.

85. See, Note 69 and accompanying text.

86. See, for example, Acts, 1929-Chap. 321 authorizing the Metropolitan District Water Supply Commission to take cemeteries by eminent domain in order to accommodate the Quabbin Reservoir.

87. See, Note 49 and Note 50 and accompanying texts.

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land.⁸⁸ To the extent the municipality takes charge of an abandoned Ancient Burial Tract, it does so as a trustee and not as the holder of the beneficial interests in the land.⁸⁹ Thus ten taxpayers of the municipality,⁹⁰ relatives of persons buried in the tract (by virtue of the relatives' gravesite-related incorporeal hereditaments or usufructory rights), and the Attorney General ought to have standing to seek judicial redress for breaches of trust on the part of the municipality in connection with its stewardship of the Ancient Burial Tract.

The Massachusetts legislature, when it enacted the precursor of M.G.L. c.114, Section 17,⁹¹ declared that the status of an Ancient Burial Tract was no longer a matter solely of local concern. Section 17 in its current form provides that "a town⁹² shall not alienate or appropriate to any other use than that of a burial ground, any tract of land which has been for more than one hundred years used as a burial place" and further provides that "no portion of such burial ground shall be taken for public use without special authority from the general court." If it can be assumed that the Town of Paxton in fact held lawful title to the Paxton Burial Tract, whether in trust, "quasi-trust,"⁹³ or otherwise, the two special acts of the legislature⁹⁴ which ostensibly gave the Town of Paxton the authority to alienate a segment of the Paxton Burial Tract have nothing to do with Section 17. The special acts purported to authorize an "alienation" by a "town" of a segment of a "tract of land which ha[d] been for more than one hundred years used as a burial place" for a "use" which was *not* related to the burial of the dead and which was *not* "public." The two special acts must stand on their own, separate and apart from Section 17.

Even if one grants that the legislature has the inherent power by special legislation in response to "home-

rule petitions" to carve out exceptions to its own general laws,⁹⁵ the Paxton Burial Tract transfer likely runs afoul of the taking by eminent domain provisions of the Federal constitution and the separation of church and state provisions of the Federal and Massachusetts constitutions. The Town of Paxton may very well hold title to the Paxton burial ground as a trustee for the purposes of maintaining the land as a burial ground forever.⁹⁶ Whether or not the tract is held upon a trust, a strong argument can be made that a transfer of the segment of the Paxton Burial Tract to a religious organization was constitutionally impermissible because it was tantamount to a municipal "taking" of the burial-related incorporeal hereditaments or usufructory rights of the relatives of persons buried within the tract—and if a trust is involved, then perhaps also a "taking" of land from the trust—, each "taking" being (1) without just compensation,⁹⁷ and (2) for a non-public purpose, namely to benefit a "particular class of identifiable individuals."⁹⁸

Whether or not the Town of Paxton held title to the land as a trustee, such a gift of what is essentially public land, even with legislative approval, likely violates the separation of church and state provisions of the Federal and Massachusetts constitutions⁹⁹ in that the special legislation authorizing the transfer of the Paxton Burial Tract (1) had no "secular legislative purpose"¹⁰⁰ and (2) had the primary effect of "advancing" religion.¹⁰¹

In any case, the language of M.G.L. c.114, §17, for what it is worth raises a number of technical questions which need to be resolved either by further legislation or by the courts. Does the word "tract" encompass a portion of an Ancient Burial Tract no matter how small?¹⁰² Does the word "alienate" encompass transfers of less than the entire interest in a portion or all of an Ancient

88. See, Note 78.

89. M.G.L. c.114, §18; *but see*, M.G.L. c.114, §10A which allows a town to take over the *ownership* of a grave which has not been used for a period of fifty years. It is the author's opinion that this statute does *not* apply to *occupied* graves. This opinion is apparently shared by Richard A. Rogers, a former Massachusetts state representative, who was the sponsor of the §10A legislation. See, *Cambridge Chronicle* (July 21, 1988) at 4a; *see also*, *Duffy v. The City of Cambridge and Conrad Fagone*, Superior Court Civil #75-6453 (Middlesex County), dismissed on procedural grounds Oct. 29, 1979, which involved allegations by a relative of certain decedents buried in the Cambridge Cemetery that the cemetery management had caused the decedents' *occupied* gravesites to be disturbed.

90. M.G.L. c.214, §3(10).

91. See, Note 15 and accompanying text.

92. The author is unsure why the word "city" does not appear in the current version of the statute as it did in 1880 when the statute was first enacted.

93. See, *Codman v. Crocker*, 203 Mass 146 at 150; 89 N.E. 177 at 178 (1909).

94. See, Note 20.

95. See, "Massachusetts Home Rule Amendment", Amended. Art 89 of the Mass. Const.

96. See, Note 120 and accompanying text.

97. U.S. Const. amend. V.

98. *Hawaii Housing Auth. v. Midkiff*, 104 S. Ct. 2321 at 2331 (West-1984); *Pheasant Ridge Ltd. Partnership v. Burlington*, 399 Mass 771 at 775; 506 N.E.2d 1152 at 1155 (1987).

99. U.S. Const., amend. I & amend. XIV, §1; Mass. Declaration of Rights, Articles 2 & 3; Articles of Amendment to the Mass. Const., Art. 18, §2.

100. *Colo. v. Treasurer and Receiver General*, 378 Mass. 550; 392 N.E.2d 1195 (1979).

101. *Id.*

102. The history of M.G.L. c.114, §17, suggests that the term "tract" was intended to encompass any segment of an Ancient Burial Tract no matter how small. If, for example, through the years those abutting an Ancient Burial Tract were from time to time permitted to acquire relatively small incremental nibbles out of the Ancient Burial Tract, it is likely that all the nibbles taken together would eventually constitute a bite-size encroachment that would adversely affect the historical integrity and character of the Ancient Burial Tract. A "de minimis" approach to each small encroachment into an Ancient Burial Tract would mock the Massachusetts Historical Society's prayer to the legislature in the final sentence of its January 7, 1880 petition, namely that it enact "such further legislation as shall effectively secure these burial grounds from encroachments, and preserve them to future generations." Moreover the term tract would seem broad enough to include all rights of ingress and egress associated with a particular Ancient Burial Ground.

Burial Tract?¹⁰³ May a municipality transfer an Ancient Burial Tract to a Cemetery Corporation without legislative approval?¹⁰⁴ Do the words "one hundred years" refer to a period of one hundred years before each prospective transfer or does it refer to burial grounds established on approximately April 28, 1780 or earlier, that date being one hundred years before April 28, 1880, the approximate effective date of the precursor of Section 17?¹⁰⁵

4. *The Cemetery Corporation.*

a. *Fiduciary Responsibility.*

The governing body of a Cemetery Corporation acts as a Board of Trustees with respect to the real property, fixtures, and personal property which comprise the assets of the Corporation.¹⁰⁶ If a Cemetery Corporation somehow receives lawful title to an Ancient Burial Tract from a private individual, a religious organization, or a municipality it is suggested that it takes the title in a fiduciary capacity, the implicit purpose of the trust being the preservation of the land as a burial ground.¹⁰⁷ The governing body has a duty to act solely in the interest of the relatives of decedents buried within the boundaries of the Ancient Burial Tract and cannot engage in acts of self-dealing with respect to the tract.¹⁰⁸ The Cemetery Corporation also takes title to the Ancient Burial Tract subject to all enforceable conditions and statutory restrictions which bound the transferor.¹⁰⁹

103. The M.G.L. c.114, §17, prohibition against the municipal alienation of Ancient Burial Tracts ought to encompass transfers by gift and by sale. A sale would include transfers of a portion or all of an Ancient Burial Tract in exchange for land located outside the boundaries of the Ancient Burial Tract. The term alienation, however, is a broader term than sale. As the term is employed in Section 17, it would encompass the granting of easements, other than burial easements, over the burial ground and the leasing of portions or all of the Ancient Burial Tract for purposes unrelated to the maintenance and preservation of its Ancient Burial Ground and the gravesites situated within its boundaries.

104. M.G.L. c.114, §17, provides that a municipality "shall not ... appropriate" an Ancient Burial Tract "to any other use than that of burial ground." By implication the municipality ought to be able to make appropriate disposition of an Ancient Burial Tract in furtherance of the preservation purposes of the statute without legislative approval. The municipality might transfer the tract into a preservation trust designed to maintain and protect the Ancient Burial Tract. The use of the Cemetery Corporation as a preservation receptacle, however, has its potential for abuse. The title-holder of an Ancient Burial Tract, for example, might attempt to cleanse the tract of any Section 17 alienation and use-taking prohibitions, as well as any limitations on its use imposed by trust or condition, by washing it through a Cemetery Corporation, it being unlikely that the world would look through the corporation in matters relating to the Ancient Burial Tract. In any case, the transfer by the Town of Paxton of a segment of the Paxton Burial Tract to a religious corporation for purposes of erecting on the tract a building is in no way analogous to a transfer of an Ancient Burial Tract into a Cemetery Corporation for preservation purposes.

105. M.G.L. c.114, §17, limits its alienation restrictions to each "tract of land which has been used for more than one hundred years as a burial place." Presumably the period of one hundred years is a

If the Cemetery Corporation's governing body fails to carry out its fiduciary obligations with respect to its stewardship of the Ancient Burial Tract, breaches any enforceable conditions imposed on the use and alienation of the Ancient Burial Tract, or fails to abide by the statutory restrictions governing the use and alienation of the Ancient Burial Tract, then the members of the governing board may be enjoined from further such activities and held personally liable¹¹⁰ for any injury to the Ancient Burial Tract. Moreover even "passive" members of the Cemetery Corporation's governing body may be subject to co-fiduciary liability in the face of a breach of trust on the part of the governing body itself.¹¹¹ It is the duty of each officer and trustee of a Cemetery Corporation charged with the stewardship of an Ancient Burial Tract to use reasonable care to prevent the others from committing a breach of trust with respect to the management of the tract; and if one of the officers or trustees commits a breach of trust, it is the duty of the others to compel him to redress it.¹¹² Acquiescence by a fiduciary to the perpetration of a breach of trust by his co-fiduciaries is in itself a breach of trust.

b. *Standing to Redress Breach.*

When a municipality acting in a fiduciary capacity transfers an Ancient Burial Tract to a Cemetery Corporation then the municipality itself, ten taxpayers of the

"rolling" one in that it is anchored to the time of each proposed transfer and not to the effective date of Section 17 which was approximately thirty days after March 29, 1880. If the one hundred year period is anchored to the effective date of the statute, then it applies only to Ancient Burial Tracts which hosted interments on or before approximately the twenty-ninth of April, 1780. It should be noted that under the "rolling" interpretation, it will not be long before burial tracts which in the Twentieth Century began receiving the dead will qualify as Ancient Burial Tracts and become subject to the Section 17 use and alienation restrictions.

106. See, Gillerman, *The Corporate Fiduciary in Massachusetts*, 65 Mass. L. Rev. No. 3 at 113 (1980); M.G.L. c.114, §1.

107. See, Note 78; *Packard v. Old Colony Railroad*, 168 Mass. 92 at 96 (1897).

108. IV *Scott on Trusts* (3rd Ed.), §379; *Kansas City v. Scarritt*, 69 S.W. 283 (1902).

109. See, Note 78; see, letter from Valerie A. Talmage, Executive Director, Mass. Historical Comm'n to William Visser, President, Church Hill Cemetery Corp., Norwell, Mass. (Oct. 1, 1986) referring to a matter involving attempts by a Cemetery Corporation trustee to acquire Cemetery Corporation land for the trustee's personal use, land which had at one time ostensibly belonged to the Town of Norwell and suggesting that the restriction imposed by M.G.L. c.114, §17, on a municipality's right to alienate an Ancient Burial Tract survives the transfer of the tract into a Cemetery Corporation.

110. IV *Scott on Trusts* (3rd Ed.), §386.

111. II *Scott on Trusts* (3rd Ed.), §184.

112. *Id.* and see generally, Note 123 and accompanying text making reference to a letter from Assist. Att'y Gen. (Mass.) McCartney to John P. Donovan (July 14, 1987) which letter suggests in part that a trustee of the Church Hill Cemetery Corporation, Norwell, Mass., may not engage in acts of self-dealing with respect to the cemetery land.

municipality, relatives of persons buried in the tract, and the Attorney General would have standing¹¹³ to seek judicial redress for breaches of trust on the part of the governing body of the Cemetery Corporation in connection with its stewardship of the Ancient Burial Tract. Moreover, the municipality itself may have a residual affirmative duty to seek such redress.¹¹⁴ When a religious organization transfers the Ancient Burial Tract to the Cemetery Corporation, then the standing to seek judicial redress for any breaches of condition or trust would reside with the religious organization, relatives of persons buried in the tract, and the Attorney General.¹¹⁵ When the transferor is a private individual, perhaps the individual, if alive, or those persons or entities having an interest in the deceased individual's estate, and certainly the Attorney General and relatives of persons bur-

ied in the tract would have standing to undertake such an action.¹¹⁶ In all cases the relatives of the persons buried in the tract and the Attorney General would have standing to maintain an action against the Cemetery Corporation's governing body for those acts which impair the incorporeal hereditaments or usufructory rights associated with the gravesites located within the boundaries of the Ancient Burial Tract.¹¹⁷

V. Conclusion

It is suggested that the majority of Ancient Burial Tracts in the Commonwealth held by religious organizations, municipalities, and cemetery corporations are held in public charitable trusts,¹¹⁸ each of these institutions, in theory, existing in perpetuity. When lawful title to an Ancient Burial Tract is held by a private individual, the

113. See generally, IV *Scott on Trusts* (3rd Ed.), §391; the municipality may have residual liability as a co-fiduciary for improper delegation of the management of the Ancient Burial Tract to the Cemetery Corporation, see, *City of Bangor v. Beal*, 26 A 1112 (1892); see, M.G.L. c.214, §3(10), allowing 10 taxpayers to seek judicial enforcement of municipal trusts.

114. See, Note 112 and accompanying text.

115. Id.

116. Id.

117. See, Note 49 and 50 and accompanying texts; see generally, IV *Scott on Trusts* (3rd Ed.), §391.

118. See, Jackson, *The Law of Cadavers* (Prentice-Hall 2nd ed. 1950) 241-258; *Ritter v. Couch*, 76 S.E. 428 at 429 (W. Va. 1912); *Hines v. State*, 149 S.W. 1058 at 1059 (Tenn. 1911); *Walker v. Georgia Power Corp.*, 339 S.E.2d 728 at 730 (Ga. 1986); *Packard v. Old Colony Railroad*, 168 Mass. 92 at 96, 46 N.E. 433 at 434 (1897); *Codman v. Crocker*, 203 Mass 146 at 150, 89 N.E. 177 at 178 (1909); *Salem v. Attorney General*, 344 Mass 626, 183 N.E.2d 859 (1962); *Eliot v. Trinity Church*, 232 Mass. 517; 122 N.E. 648 (1919).

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individual may be holding the title as a trustee of a public charitable trust, particularly if one of the aforementioned institutions is a link in his chain of title or if the Ancient Burial Ground is mentioned in the chain of conveyancing instruments.¹¹⁹ It seems reasonable to presume that when such entities acquired lawful title to Ancient Burial Tracts, either by transfer or gradually by default, they did so fully aware of the implicit understanding and expectation of the society, namely that ground once dedicated to burial was appropriated forever for that purpose.¹²⁰ The tract was "not only the 'domus ultima,' but the 'domus aeterna,' so far as eternal can be applied to man, or terrestrial things."¹²¹ It is a reasonable presumption that institutional title-holders of Ancient Burial Tracts hold the properties in perpetuity as trustees and not temporarily with powers of consumption and disposition. The burden of rebutting this presumption with respect to any particular Ancient Burial Tract ought to be on those who argue otherwise. If the Ancient Burial Tracts which are held by institutions are held in public charitable trusts, then any alteration of the use of a particular tract by a religious organization or a cemetery corporation can only be accomplished through a *cy pres* action;¹²² and any attempt to effect an alteration of the use of an Ancient Burial Ground by a municipality ought to commence either with a *cy pres* action or an eminent domain proceeding, the latter instituted with the approval of the legislature.¹²³ *The legislature however has no power to authorize the taking of an Ancient Burial Tract from a public charitable trust for a private use.*¹²⁴

M.G.L. c. 114, Section 17, does little to supplement the civil protections already afforded by the common law to Ancient Burial Tracts and the gravesites within their boundaries and offers little deterrence to those bent on tampering with the land. The transfer of a segment of the Paxton Burial Tract has demonstrated that (1) the legislature is prepared without much ado to carve out exceptions to Section 17 and (2) a special act of the legislature conforming to the letter of Section 17 would be even easier to come by than the Paxton enabling legislation. Moreover, Section 17, or any general law for that matter, cannot alter the Commonwealth's inherent

right to take property for a public use, provided the beneficial owners of the property are justly compensated.¹²⁵ The precursor of Section 17 was in many respects little more than a preemptive blocking action which was taken by the members of the Massachusetts Historical Society in order to force the City of Boston to turn to the legislature should it ever decide to tamper with Ancient Burial Tracts.¹²⁶ The members of the Society must have harbored no illusions that the statute would have the effect of binding future legislatures or eroding in any way the Commonwealth's right to take property for a public use.

Finally, whether an Ancient Burial Ground is the subject of a *cy pres* action or an eminent domain proceeding, the incorporeal hereditaments or usufructory rights accruing to the relatives¹²⁷ of those buried within its boundaries must be accommodated. At a minimum, procedural due process requires that there be adequate notice, actual and by publication, to the relatives of any action or proceeding involving an Ancient Burial Ground and that relatives who are unborn or unascertained be represented by a guardian ad litem. With respect to gravesites within an Ancient Burial Tract which tract is *not* held upon a public charitable trust (a situation which could exist if the land has no institution in its chain of title or if no burial-related trust can be inferred from the recorded instruments of title conveyance)¹²⁸ any attempt by the title-holder of the host tract (1) to prevent relatives from visiting, honoring, and protecting the gravesites, the Wanton Suit notwithstanding, (2) to relocate the gravesites, or (3) to otherwise disturb the gravesites ought to be made only after proper notice of the tract-holder's intentions is given to the relatives of decedents buried within the tract and representation by a guardian ad litem of the interests of those relatives unborn and unascertained has been secured. Moreover in the face of strong criminal gravesite protective statutes such as M.G.L. c.272, §73, (providing for imprisonment for up to five years in the state prison for wilful injury to or removal of gravesites) legislative involvement may be required as well before the gravesites may be disturbed.¹²⁹

119. The Quaker Burial Ground, the subject of the Wanton Suit, is mentioned in two conveyancing instruments, *see*, Plymouth County (Mass.) Registry of Deeds, Book 25, Page 105 (1807/8) & Book 53, Page 34 (1745). By 1836 there is a public perception that the burial ground belongs to "Friends in the town of Scituate," *see*, minutes (Dec. 29, 1836) of Pembroke (Mass.) Monthly Meeting of Friends; *see*, Note 32 and accompanying text.

120. *Brendle et al v. The German Reformed Cong.*, 33 Penn. 415 at 422 (1859).

121. *Id.*

122. *See*, Note 84 and accompanying text.

123. *See*, letter from Assist. Att'y Gen. (Mass.) McCartney to John P. Donovan (July 14, 1987) regarding the Church Hill Cemetery, Norwell, Mass., in which the opinion is expressed that land comprising the cemetery is held in a public charitable trust and "that the only legal method for selling land impressed with a charitable trust is to file a complaint for *cy pres*"; *Codman v. Crocker*, 203 Mass 146, 89

N.E. 177 (1909); M.G.L. c.114, §17; *Town of Somerset v. Dighton Water Dist.*, 347 Mass. 738, 200 N.E. 2d 237 (1964).

124. No State shall...pass any...Law impairing the Obligation of Contracts..." U.S. const., art. I, §10, cl. 1; *but see*, Note 22.

125. *See*, Note 97 and accompanying text.

126. *See*, Note 8 at 127.

127. *See*, Note 49 and Note 50 and accompanying texts.

128. *See*, Note 78 and accompanying text; *see also*, Note 119.

129. In the Wanton Suit, the defendants argued in their Supplemental Brief in support of their Motion for Summary Judgment, a motion which was ultimately allowed, that "Count III of the complaint seeks to enjoin violation of a criminal statute and is therefore improper." It is suggested however that criminal gravesite protection statutes (*see*, Note 7) acknowledge the existence of the incorporeal hereditaments or usufructory rights of the relatives of deceased; they are not in lieu of such rights. *But see*, dissent in *Ritter v. Couch*, 76 S.E. 428 at 434 (W. Va.1912).

VI. Recommendations.

A. NEAR-TERM: *Burial Ground Protective Legislation.*

In the face of inappropriate tampering with an Ancient Burial Tract, a statute has its limitations. It cannot prevent inaction on the part of the Attorney General¹³⁰ or apathy on the part of relatives of those buried in the tract. It cannot erode the Commonwealth's "taking" power. It can however require that all interested parties, including the relatives, receive notice of any proposed alteration in the use of an Ancient Burial Tract. The following is offered as a first draft of a statute designed to introduce some order and civil accountability in matters relating to the administration and disposition of Ancient Burial Tracts:

CHAPTER 114. CEMETERIES AND BURIALS

§17A. *Preservation of ancient burial places* (Proposed)

No individual, municipality, corporation, trust, unincorporated organization or other entity capable of holding title to property and having title to, a legal or equitable interest in, or custody or control of an Ancient Burial Tract shall transfer title to; alienate by gift, sale, or exchange; grant a non-burial license or easement with respect to; lease; encumber; alter the use of; or erect a structure upon any square foot of land within the boundaries of the Ancient Burial Tract without a judicial order or decree authorizing such action. No court shall issue such an order or decree without a prior hearing in which the interests of unborn and unascertained relatives of decedents buried within the tract are represented by a guardian ad litem and in which the interests of the public are represented by the Attorney General. For purposes of this section, "Ancient Burial Tract" shall mean a tract of land (and any land or interest in land associated with the tract without regard to when such land or interest in land became associated with the tract) which was used as a cemetery or burial ground for the human dead on December 31, 1869 or earlier and which has boundaries which are definable and identifiable.

With the enactment of the precursor of M.G.L. c.114, §17, a municipality for all intents and purposes was relieved of any right it may have had to acquire, convey, or alter the use of an Ancient Burial Tract without the involvement of the legislature. Proposed §17A would coexist with and complement M.G.L. c.114, §17, in that it would acknowledge that there are private and public interests associated with Ancient Burial Tracts.¹³¹ It would also coexist with any criminal statutes designed to protect ancient gravesites. The proposed legislation applies to non-municipal as well as municipal

title-holders and should therefore help prevent the inappropriate "washing" of Ancient Burial Tracts through religious organizations and Cemetery Corporations. The term "alienation" includes almost any disposition and alteration of use; the term "tract" includes land associated with a tract such as access roads.¹³² By making the statute applicable to "any square foot" of an Ancient Burial Tract, it is intended that the statute would cover situations where an Ancient Burial Tract is being "nibbled at"¹³³ by abutting landowners.

The reference to a fixed date, December 31, 1869, is somewhat arbitrary. It is intended to establish once and for all what burial grounds are covered by the statute. Moreover it seemed that the statute's preservation purposes would be blurred and its very existence eventually placed in political jeopardy if its reach were permitted to extend to those cemeteries established in the Twentieth Century. The year 1869 was selected because it was likely to pick up most cemeteries which contain the remains of American Civil War participants who died in battle.

B. LONG-TERM: *The Ancient Burial Ground Preservation Trust*

It is suggested that those interested in the appropriate perpetual stewardship of the Commonwealth's collection of Ancient Burial Grounds consider exploring the feasibility of establishing and properly staffing an "Ancient Burial Ground Preservation Trust" designed to properly "house" in perpetuity the burdensome, abused and abandoned Ancient Burial Grounds of the Commonwealth. The title-holder of such an Ancient Burial Ground, with legislative authority and judicial approval,¹³⁴ could then place the land under the protection of the "Ancient Burial Ground Preservation Trust" whose Board of Trustees would be committed to the long-term goal of safeguarding the Commonwealth's entire collection of Ancient Burial Grounds. While the "Ancient Burial Ground Preservation Trust" could not protect an Ancient Burial Ground from a legislatively approved governmental "taking" for a public use, the Board of Trustees would presumably be insulated from the parochial¹³⁵ economic and political forces that tend to subvert the natural inclination of persons to respect burial grounds. The Board of Trustees could provide the voice and muscle for an Ancient Burial Ground's fragile and ephemeral preservation constituency, a constitu-

130. See, IV *Scott on Trusts* (3rd Ed.), §391; see also, Note 23, Note 64, Note 70, and Note 72.

131. Id.; see, IV *Scott on Trusts* (3rd ed.), §391.

132. See, Note 102.

133. See, Note 102.

134. See, IV *Scott on Trusts* (3rd ed.), §388.

135. Mr. Garside said that the Planning Board had to approve the Form A plan because it met the statutory requirements and that any issue of legality was between the Corporation and the Mass. Commission, not the Norwell Commission. Mr. Garside stated that the Mass. Commission had indicated that they

might take court action if any deeds were recorded, but that in his opinion state agencies often did not bother to follow through on their concerns.

See, memo from Pauline M. Harrington, Duxbury, Mass., to Church Hill Cemetery Lot Holders (Oct. 7, 1986), reporting on the testimony of W. L. Garside, Chairman, Norwell Historical Comm'n (Mass), before an Oct. 6, 1986 meeting of the Norwell Planning Board. Before the Board was the proposed transfer of a part of the Church Hill Cemetery land to a cemetery trustee for the trustee's personal use, the land having ostensibly been transferred at an earlier time to the Cemetery Corporation by the Town of Norwell; see, *Packard v. Old Colony Railroad*, 168 Mass. 92 at 96; 46 N.E. 433 at 434 (1897).

ency whose members tend to be residing in other states, unborn, unascertainable, unorganized, impecunious, aged or dead.

Economic self-interest and historic preservation are not always in conflict, however. It is not without some irony that economic considerations in part motivated the Massachusetts Historical Society in 1880 to lobby for Ancient Burial Tract preservation legislation, the Society's headquarters having been in close proximity to the "King's Chapel Burial Ground":

"In the first place, as the owners of this building, in which almost all our funds are invested, we cannot fail to perceive that any shutting out of our light and air on our long south-western or southern side would be of the most serious detriment to our estate, and would involve losses which we are quite unable to bear. On this point, however, it is not for me to enlarge. It will be for our Finance Committees, from time to time, to see to it that no encroachment is made on our rights, and no injury done to our property."

Minutes of Sept. 1879 Meeting of the Massachusetts Historical Society.

The "Ancient Burial Ground Preservation Trust" would offer economies of scale, particularly in the area

of legal, accounting, archaeological, surveying, security, and clerical costs, as more and more Ancient Burial Grounds gathered under its protection. Moreover the services of the Commonwealth's limited number of Ancient Burial Ground preservation experts—some of whom might become employees of the trust—could be allocated by the Board of Trustees in a way that efficiently and effectively accommodated the needs of the collection as a whole.

Each transfer of an Ancient Burial Ground into the "Ancient Burial Ground Preservation Trust," however, would require the funding of the trust, or an associated "perpetual care" sub-trust, with sufficient funds to indefinitely support the care and maintenance of the particular tract. Whether enough money could be raised to make a particular Ancient Burial Ground eligible for transfer into the "Ancient Burial Ground Preservation Trust" might well depend upon how sensitive to the plight of Ancient Burial Grounds were the persons living in the community in which the tract was located and the relatives of the persons buried within its boundaries.

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