Chapter 1

The Common Law of Human Remains

Synopsis

1.1 Christian Influences
1.2 The English Law of Human Remains
1.3 The Early Common Law in the United States
1.4 The Old Brick Church and the Ruggles Report
1.5 General Principles of the Law of Human Remains
   A. Principle #1 – The courts of equity have jurisdiction over the dead, particularly after burial.
   B. Principle #2 – The preferences and religious beliefs of the decedent should be honored.
   C. Principle #3 – The rights of the next of kin to control the disposition of the dead should be respected.
   D. Principle #4 – Individualized human remains are more worthy of protection than de-individualized remains.
   E. Principle #5 – An individual decedent shall be committed to a single, memorialized grave in perpetuity.
   F. Principle #6 – The interests of the dead shall not trump the needs of the living.
   G. Principle #7 – There is no property in human remains.

1.1 Christian Influences

Thou only art immortal, the creator and maker of mankind; and we are mortal, formed of the earth, and unto earth shall we return. For so thou didst ordain when thou createdst me, saying: “Dust thou art, and unto dust shalt thou return.” … In sure and certain hope of the resurrection to eternal life through our Lord Jesus Christ, we commend to Almighty God our brother; and we commit his body to the ground; earth to earth, ashes to ashes, dust to dust. The Lord bless him and keep him, the Lord make his face to shine upon him and be gracious unto him, the Lord lift up his countenance upon him and give him peace. Amen.¹

In The Common Law, Oliver Wendell Holmes wrote:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. … In order to know what the law is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.

These observations are particularly true with respect to the law of human remains. To discover what the law is, we must first know what it has been and why.

1.1 Christian Influences

In order to understand the origins of the U.S. common law of human remains, we must begin with an understanding of the beliefs and practices of the Church of England in the seventeenth and eighteenth centuries, the period in which English law and culture were most influential on the development of U.S. common law. To understand those beliefs and practices, we must begin even farther back in history. The main influences on English funerary rites in that period were pre-Christian customs in Britain, practical considerations, and the customs and beliefs of the Christian Church, which were in turn informed by Israelite and Roman practices.

In the twentieth century, we learned about the actual funerary practices of the Israelites through archaeological...