Property Rights in a Burial Plot

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INTRODUCTION:
With its root in English jurisprudence *Egbe v. Onogun*¹ provides an interesting comparative context for re-thinking the property interests that exist in a grave space. It is quite unusual to comment on a case three decades or more after the judgment. But where, as in *Egbe v. Onogun*, (a) it is the only reported case in Nigeria on the law relating to dead bodies, and burial plot in particular, (b) it is the judgment of the Supreme Court of Nigeria, and (c) there is no academic commentary on the case, then time ceases to be of the essence. As it were, the issue raised in *Egbe v. Onogun* still retains its novelty and resonates in the jurisprudence of comparable common law jurisdictions. Most western legal systems still grapple with the juridical nature of rights in a burial plot.² Are they statutory, contractual, or proprietary? Young J. of the Supreme Court of New South Wales lamented in *Smith v. Tamworth City Council*³ that the “law in this area (right of burial) is complicated by a number of factors” and that it “is probably not unexpected that there is little academic writing on this aspect of the law.” The dearth of academic commentary on this subject contrasts starkly with its legal and sentimental significance. Sentiments towards departed loved ones are the tenderest of human emotions and cut across cultures and political boundaries.

Although no legal system would tolerate the desecration of an ancestor’s grave, the basis of civil intervention is often not stated with clarity. Accordingly, this essay

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¹ *Egbe v. Onogun* [1972] 1 All N.L.R. (Part 1) 95 (Nig. Sup. Ct.)
³ *Smith v. Tamworth City Council* [1997] 41 NSWLR 680 at 685.
seeks to explore the legal framework for judicial intervention in disputes relating to burial plots in Nigeria, U.K., Australia, and U.S.A. Specifically it seeks to ascertain whether these legal systems accept the existence of any proprietary interest in a grave space. For Nigeria, the issue is much more complicated. It is not only a question of whether it accepts a property rule but whether it should. Knowledge of the rule operable in other jurisdictions only brings insights into the construction of relevant Nigerian statutes and transcendental sepulchral beliefs. It will be suggested that Nigerian traditional mortuary practice and statutes favour a property-based rule and this makes American decisions most compelling.

Setting the Stage: *Egbe and Onogun*.

At the time of instituting a trespass suit relating to his father’s grave, the plaintiff in *Egbe and Onogun* filed a motion for an interlocutory injunction restraining the defendant and his agents from further acts of trespass upon the said grave. The plaintiff alleged that the defendant and his agents unlawfully entered upon the plot of land in Warri Cemetery where the plaintiff’s father was buried and thereupon destroyed the tombstone marking the grave of the plaintiff’s father. Many affidavits and counter-affidavits were filed both in support and opposition of the motion, but no witnesses were invited nor cross-examined on the conflicting affidavit evidence. Nevertheless, Ovie-Whisky J. (as he then was) of the former High Court of Mid-Western Nigeria, at Warri, proceeded to hear the application for injunction, the crux

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4 It is pertinent to mention that monuments and tombstones affixed to the ground belong to the owner of the cemetery ground. Thus in *In Re West Norwood Cemetery* [1994] Fam. 210 at 218 Chancellor Gray of Southwark Consistory Court observed that: “The ownership of the tombstones clearly also passed to the owners of the realty…The monuments are all fixed to the ground, and intended by those who paid for their erection to be permanently affixed: the contrast with Madame de Falbe’s tapestries at Luton Hoo is an obvious one. Mr. Biden argued the contrary only very faintly. They, like the rest of the land, are held by the council subject to the rights of the licensees, who are in a similar position to the grantee of any faculty to place a monument in the burial ground attached to a church.”
of which he postulated to be whether the plaintiff had shown that “the cemetery or at least that portion of it where his late father’s grave is situated is his property or that he is in possession or in occupation of it, and therefore the defendant’s trespass on the land is trespass on the land in his possession and occupation.”

Eventually, Ovie-Whisky J., relying both on Burials Law, Cap. 15 (Laws of Western Nigeria) and the English case of Hoskins-Abrahall v. Paignton U.D.C., dismissed the plaintiff’s application for an interlocutory injunction, holding that as the law recognised no proprietary interests in a grave space the plaintiff failed to establish a possessory right necessary to support the grant of an interlocutory injunction.

On appeal to the Supreme Court of Nigeria, Ovie-Whiskey J.’s judgment was unanimously overturned for breach of the practice and procedure relating to the grant of an interlocutory injunction. Simply put, the Supreme Court held that the nature or character of right attaching to a burial plot was not ripe for determination and that the trial judge ought to have limited himself to finding whether a substantial issue arose on the facts. The Supreme Court held that the trial judge, by the way he formulated the issue before the lower court, had already impliedly determined that there was substantial issue for trial. That, according to the apex court, was sufficient to dispose of the injunctive application in favour of the plaintiff. The Supreme Court frowned at the practice of deciding issues raised in a suit at the interlocutory stage of an application for an injunction and regretted that “the trial judge proceeded to try the substantial issue that may arise between the parties without having had the benefit of the pleadings and the evidence to be adduced by either parties.”

With this attitude, it was not open to the Supreme Court to fall into the same error for which it berated

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5 Egbe, supra, note 1, at 99.
7 Egbe, supra, note 1, at 99
8 Ibid., at 99. Of course, this also assumes that the balance of convenience was in the plaintiff’s favour.
9 Ibid., at 98
Ovie-Whiskey J. by considering the legal character of the right obtained by a purchaser of a burial plot. The Supreme Court, however, referred to the English case cited by Ovie-Whiskey J., denying the existence of a proprietary interest in a burial plot, and observed that Ovie-Whisky J.’s quotation from *Hoskins-Abrahall v. Paington U.D.C.* was “quoted out of context,”\(^{10}\) because the *Hoskins-Abrahall’s* decision was based on two English statutes which were neither applicable in the then Mid-Western Nigeria nor identical with statutes applicable in the Nigerian region.\(^{11}\) Finally, the Supreme Court granted the plaintiff the injunction that he had originally sought at the lower court.

Although Ovie-Whiskey J. formulated the issue raised by the plaintiff’s application for an interlocutory injunction as requiring a showing of right of property or possession over a burial plot, a matter which is better left to be determined on the merits after trial, it is arguable that his finding that the plaintiff did not have a right of possession over his father’s burial plot was simply a convoluted way of saying that the plaintiff did not have a substantial issue to be tried which would have warranted the grant of an injunction. In other words, that proprietary right over a burial plot is so non-existent that interlocutory applications based on them would certainly not give rise to any substantial issue for trial. Reformulated in this way, the learned trial judge would not only have escaped the criticism of the Supreme Court but would have created a window of analysis for the Supreme Court to comment, however succinctly, on the nature of grave rights. Be that as it may, it is apparent from Ovie-Whisky J.’s ruling that he took the non-existence of a proprietary right in a burial plot as a settled and unarguable legal proposition. It is on this basis that he could be said to have contemplated that the plaintiff’s application did not raise any triable issue, though the

\(^{10}\) Ibid., at 100.

\(^{11}\) Ibid., at 101.
ultimate linguistic formulation employed in couching his decision made him vulnerable to the strictures of the Supreme Court. To the extent that in dismissing the plaintiff’s application Ovie-Whisky J. contemplated the non-substantiality of a property claim to a burial plot, he must have been influenced by the English authorities on the point, including Hoskins-Abrahall’s case cited in his ruling. It is therefore necessary to explore the English position, however briefly.

The English Position

A mix of common law and statutory provisions govern rights attached to a burial plot in England. At common law, every parishioner has a right to be buried at the churchyard of his or her parish. This is commonly referred to as a “right of burial” and only vests upon death.\(^\text{12}\) Although common law does not prescribe any fee for the exercise of a burial right, it may become payable by customary usages.\(^\text{13}\) The content of a parishioner’s burial right is now settled. It is simply a right of decent burial: to be decently covered when carried to the grave and lowered therein for dissolution.\(^\text{14}\) It does not include a right to perpetual or exclusive appropriation of a burial spot. This means that after the complete dissolution of a corpse, a parish could order another burial in the same burial spot. Also, a parishioner is not entitled to be buried in a particular spot of the churchyard or to a particular mode of burial. Thus, in the Iron Coffin’s case (Gilbert v. Buzzard), the plaintiff claimed to be entitled to bury his deceased wife, a parishioner of St. Andrews, Holborn, in an iron coffin to protect her from the depredations of grave robbers, a common feature of the eighteenth and nineteenth centuries, propelled by the emerging art of surgery in medical education.

\(^{13}\) Andrews v Cawthorne [1744] Willes 536; Gilbert v. Buzzard [1820] 3 Phill Ecc 1342 at 1351 (The Iron Coffin’s case)
\(^{14}\) Ibid., at 1348
and practice. The authorities of St Andrews’ parish refused to permit burial of the plaintiff’s wife in an iron coffin except on payment of extra fees, which took account of the longer duration of iron caskets compared to wooden ones. The plaintiff therefore brought a charge against the defendants for obstructing the burial of his wife. Sir William Scott dismissed the plaintiff’s action, holding that his wife’s common law right of burial at the churchyard of St. Andrews did not include burial in an unusual mode, such as an iron coffin. By common law, a parishioner who wants to enjoy enhanced privileges, such as burial in a particular spot of the churchyard or in a particular mode, for instance, the use of iron coffin, construction of a vault or erection of a monument, must obtain the consent of the parish priest or incumbent upon the payment of extra fees, or obtain a faculty or licence from the ecclesiastical courts. Generally, a non-parishioner is not entitled to be buried in the churchyard of a parish except he or she died in that parish. But the incumbent could permit persons who were not parishioners, and who neither lived nor died in the parish, to be buried in the churchyard or on a particular spot of it, though this is usually subject to payment of fees beyond the customary burial fees. Although an ecclesiastical court would not grant a faculty for the reservation of a burial spot for a non-parishioner without the consent of an incumbent, it can issue a confirmatory faculty where such consent was obtained. The point, then, is that under common law, a right of burial, strictly construed, is a bare right of interment and did not carry any proprietary or possessory interest. Bryan v Whistler characterisation of such right as an easement was rejected in later cases, especially London Cemetery Co. Ltd. v Cundey, for want of a

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15 Winstanley v North Manchester Overseers [1910] A.C. 7 at 15-16 (H.L.)
16 In re St Nicholas’, Baddesley Ensor (1982) 3 W.L.R. 631.
17 Ibid.
18 The Perivale Faculty: De Romana v. Roberts [1906] Probate Division 332.
dominant tenement. This outcome results from the fact that the freehold of the church, including the churchyard, its occupation, and possession vest in the rector or incumbent; consequently, the law allows the rector to maintain an action for trespass in respect of the church or its cemetery.

In the nineteenth century, however, some statutes were passed (such as the Burial Acts, 1852-1857, Cemeteries Clauses Act, 1847, London Cemetery Act, 1836, and Public Health (Interments) Act, 1879) to provide for cemeteries outside churchyards, managed and controlled by statutory bodies, boards, or private companies. Though not identical, the provisions of these statutes were similar and generally authorised the concerned authority to provide cemeteries and sell burial plots to people. For instance, section 33 of the Burial Act, 1852 provided:

Any burial board, under such restrictions and conditions as they think proper, may sell the exclusive right of burial, either in perpetuity or for a limited period, in any part of any burial-ground provided by such board, and also the right of constructing any vault or place of burial with the exclusive right of burial therein in perpetuity or for a limited period, and also the right of erecting and placing any monument, gravestone, tablet or monumental inscription in such burial ground.

Questions soon arose as to the nature of the right obtained by a purchaser of a burial plot. Was any proprietary or possessory right conferred upon purchase? In McGough v The Lancaster Burial Ground, the plaintiff purchased from the defendant a permanent exclusive right of burial in a grave space for the purpose of burying his daughter. He also obtained a right to erect a gravestone on the daughter’s grave. Subsequently, the plaintiff placed a wreath on the grave, with a protective glass shade and wire frame, contrary to the regulations of the defendant. The plaintiff sued the defendant for removing the glass shade and wire frame without his consent. In other words, the plaintiff’s suit sounded in trespass and required him to demonstrate some proprietary right to the daughter’s grave space. In no uncertain terms Lord Esher

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disagreed with the County Court judge who had “spoken of the right of property belonging to the plaintiff in the grave beyond the mere right of burial” and added that: “It seems to me that the plaintiff had only statutory rights in this grave.” After enumerating the statutory rights which the board was authorised to convey to the plaintiff (contained in s. 33 of Burial Act, 1852, quoted above), Lord Esher observed that the plaintiff “had no legal right granted to him to do anything more than to bury his dead in that place, and to put up a gravestone, and that he had no right given him to put up any other structure in addition thereto.” Lindley, L.J. agreed that possession of the burial ground was in the defendant burial board, and that the effect of the statute was “not only to give to the board the right, but to impose upon them the duty of exercising a general control over the burial-ground and acting as custodians of it.” In his own contribution Bowen L.J. took the view that a comparison of the plaintiff’s statutory right and a parishioner’s right of burial under the common law would advance the construction of the Burial Act of 1852:

Therefore it is to be observed that the law does not give the parishioner power to decide what shall be placed on the grave, but the ultimate control over that is at common law reserved to the ordinary. That being so, one would expect to find that the legislature, in passing the Burial Acts, under which cemeteries were to be created to take the place of churchyards, would reserve to some authority a control analogous to that exercised by the ecclesiastical authorities at common law over churchyards.

Bowen L.J. further held that what the plaintiff obtained by purchase was only a statutory right, which did not include a right to place a glass shade and wire frame on the grave, and that “the matter appears to me to be only complicated by considering whether it can be called a freehold or not.”

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24 Ibid., at 325.
25 Ibid., at 326.
26 Ibid., at 326-327.
27 Ibid., at 328
28 Ibid., at 328
Subsequent decisions have largely followed the ratio of McGough’s case. In Hoskins-Abrahall v. Paignton Urban District Council, a case relied upon by Ovie-Whiskey J. in Egbe v. Onogun, the plaintiff bought four burial spaces under the Cemeteries Clauses Act, 1847, and a right to construct a vault on them. Plaintiff’s mother was interred in the vault. On the footing that property in the vault belonged to her, the plaintiff claimed to have a right to visit, open and enter the vault whenever she pleased and, therefore, sued the defendants for preventing her from going into the vault except for purposes of interment or repair. Plaintiff direly needed an uninhibited entry into the vault for the purpose of performing annual ceremonials rites upon the mother’s grave, an allegedly pious activity obstructed by the defendant’s refusal.

Accordingly, the plaintiff sought a declaration of title to the vault. In a passage quoted by Ovie-Whisky J. in the Nigerian case of Egbe v Onogun, Scrutton L.J. observed:

I think it is quite clear that the grant of the exclusive right of burial does not confer any freehold interest in the land, and the payment for the erection of a vault does not confer any property in the vault erected in the land. It may be that if the materials are severed they could then become the property of the person who erected them, but the cemetery authority remain the owners and occupiers of the cemetery with the graves in it including the vaults in it.

Greer L.J. gravely doubted whether cemeteries governed by statutory provisions had any right “to do anything more than to bury from time to time those whom the person having been given the right desires to have buried in the vault.” For Sankey L.J. the “real question was what rights did the appellant acquire? It cannot in my view be said that she acquired any right of property in the cemetery. She had merely an exclusive right of burial, subject to the rules and regulations laid down by the respondents.”

The plaintiff’s action was therefore dismissed. In London Cemetery Co. Ltd. v

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30 Ibid., at 383.
31 Ibid., at 386.
32 Ibid., at 388-389.
Cundey, the plaintiff, an incorporated cemetery company, sought to recover from the defendant the expenses it incurred when an elm tree standing on the defendant’s burial space fell and damaged neighbouring gravestones. The defendants resisted the claim on the ground that not being in possession or occupation of the burial space, no duty fell on them to maintain the elm tree. McNair J. agreed that the plaintiff’s counsel was right to admit that it was impossible for him to succeed by “arguing that any property in the land or right or possession in the land comprised in the plot had passed to the grave owners or their successors so as to impose on them the duties of possessors or occupiers of land.” Counsel for the plaintiff, however, argued that it was an implied term of the contract of purchase of the grave space that the defendants would have the duty of maintaining the elm tree. In excluding the implication of any term into the covenant for the purchase of the burial plot, McNair J. observed:

Once it is admitted or established that what passed to the grantee under the statute was not an interest in the land or any estate in the land, then it would seem to me, on well-settled principles, that no covenant of this nature imposing the positive burden on the grantee could pass in law to the assignees of the grantees, because it would not be a covenant in any way running with the land, but would be a mere personal covenant, the burden of which can only be passed to subsequent assignees in invitum, within very narrow limits. That is an additional reason for excluding this implied term.

It is suggested that more recent English cases have not made any major in-road into the principles adumbrated by the above cases. Although Wynn-Parry J. implied in Re the Nottingham General Cemetery Co. that covenants relating to an exclusive right of burial burden the land to which they relate, he was only dealing with a liquidator’s right to disclaim under the Companies Act, 1948, and the cases explored above were not mentioned in the judgment. More recently in Reed v Madon the plaintiffs

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34 Ibid., at 789
35 Ibid., at 792
36 In Re the Nottingham General Cemetery Co. [1955] Ch. 683.
claimed that burial of the first defendant’s wife in one of the plots reserved for the plaintiffs for 30 years contravened their statutory exclusive rights of burial or their property interest in the reserved plots. The plaintiffs sought various remedies including disinterment, injunction and damages. Morritt J. agreed that infringement of plaintiffs’ exclusive right of burial in the purchased plots gave rise to a cause of action enforceable not only against the first defendant but also against the owners of the cemetery involved. Accordingly, he held that plaintiffs were entitled to damages for loss of burial rights in the grave where the first defendant’s wife was buried. Having taken this view of the case, Morritt J. opined that the “second issue, whether an exclusive right of burial is an interest in land, is of academic interest only”38 and, therefore, refused to consider it. Morritt J., however, observed that an exclusive right of burial “is equated with a right of property. In principle the owner of such a right can protect it by action against any infringer.”39 This was in response to the first defendant’s argument that a right of burial avails only against a cemetery authority which alone could sue a third party for trespass. By conceding that the holder of a right of burial could sue a third party for trespass, Morritt J. impliedly accepted that a right of burial is capable of giving rise to some proprietary interest in a grave space. But this construction of the judgment is not compelling for two reasons. First, the learned judge clearly stated that he was not concerned with the issue of whether a right of burial conferred a property interest on its holder. Accordingly, he did not find it necessary to consider prior authorities on the point which were cited to him in argument. Second, if Morritt J. were to accept the existence of some property interest in a burial plot that would be contrary to the decisions of the Court of Appeal in McGough and Hoskins-Abrahall cases, decisions which were arguably binding on the

38 Ibid., at 419
39 Ibid., at 419.
learned Chancery judge. This interpretation of Reed’s case is bolstered by the observation of Chancellor Gray in In Re West Norwood Cemetery⁴⁰ that: “What the purchaser of a (burial) plot did not acquire was any interest at all in the land as real property. Any real property remained throughout vested in the company.” The splinter litigation in In re West Norwood Cemetery (No. 2),⁴¹ left the integrity of this principle completely unimpaired. A similar approach appears to be followed in Scotland. Paterson, Petitioner (No. 2)⁴² was a case of mistaken burial in a plot belonging to the petitioner as holder of an exclusive right of burial for sixty years. Although Lord Carloway ordered the exhumation requested by the petitioner, it was only on the basis that the petitioner had a “legally enforceable exclusive contractual right of burial in lair 906.”⁴³ The order for exhumation responded not to the petitioner’s property interest in the burial plot but to the cemetery proprietor’s undoubted property rights. Accordingly “where a proprietor has conveyed a right of exclusive burial to a third party…I would expect that third party to be able to enforce his right against the proprietor, in that case a contractual right.”⁴⁴ The only problem was Lord Carloway’s observation that in a case of mistaken burial, in a plot belonging to a claimant, a court has no discretion other than to grant disinterment as a matter of right.⁴⁵ This attitude is more appropriate for questions relating to the enforcement of a property right.⁴⁶ Could Lord Carloway be favouring a right to exhumation? To the extent that he does, English and Scottish sepulchral laws parted ways at that point. Consistent with its no-property approach to burial plots, English law regards the exercise of disinterment

⁴⁰ In Re West Norwood Cemetery [1994] Fam. 210 at 218
⁴¹ In re West Norwood Cemetery (No. 2) [1998] 3 W.L.R. 128
⁴³ Ibid., at 179
⁴⁴ Ibid., at 178.
⁴⁵ Ibid., at 177-179.
⁴⁶ As Lord Browne-Wilkinson observed in Foskett v. McKeown [2001] 1 A.C. 102 at 108 (HL): “The crucial factor in this case is to appreciate that the purchasers are claiming a proprietary interest in the policy moneys and that such proprietary interest is not dependent on any discretion vested in the court.”
jurisdiction as completely discretionary, even in cases of mistaken burial. More discordant tunes appeared in *In re West Norwood Cemetery*, delivered by Southwark Consistory Court. This latest case replays the unfortunate crisis that sometimes beset the burial of a family member loved by some, but not all, members of a family.

In the above case, Sylvia died in 1992 and arrangement for her burial was made as a family affair, by her seven children and husband. Sylvia’s son, Paul, and her brother paid for the cremation plot in which Sylvia’s ashes were interred (plot 177) and the deed was made in Paul’s name. Chancellor George found that the cost of the cremation plot was just one part of the total expense incurred in the burial of Sylvia, which included the interment fee, cost of wooden casket and memorial, to which all family members contributed. He also found that at the time of Sylvia’s burial, it was the common intention of all members of her family that Dennis, her surviving husband, would share the same grave on his death. Dennis died in December 2002 but Paul opposed the interment of his ashes in plot 177 in obedience to his mother’s alleged wish, known only to Paul, that Dennis should not share the same grave with her. Five of Paul’s siblings (the sixth not being interested in the litigation), or one of them at least, falsified a burial order purporting to be Paul’s authorisation to the interment of Dennis in plot 177. Despite Paul’s entry in the register that no burial in plot 177 should take place without his personal permission, Dennis’ ashes were interred therein in January 2003 on the strength of the forged documents. Paul discovered the fraud four months later. Obviously devastated, Paul remonstrated with the cemetery authorities for flouting his instructions and got them

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49 Paul alleged during the trial that his parents were estranged in the last days of Sylvia’s life. Paul’s siblings denied this but there was no finding on that point.
to apply for a disinterment faculty to which he was joined as an interested party. Based upon a review of some ecclesiastical jurisprudence on exhumation, Chancellor George opined that there was a need to determine the precise juridical character of Paul’s right. In this connection, he agreed with Chancellor Gray in _In re West Norwood Cemetery_ that a purchaser of a grave space does not acquire a property right, which remains vested in the proprietor of a cemetery subject to statutory inalienability and burial licences granted by it. He further observed that since a cremation plot was not “an interest in land, the requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 do not apply.” If the case had turned solely upon the exercise of a disinterment jurisdiction, apart from any question of human rights, Chancellor George would have exercised his discretion against exhumation, having regard to the entire circumstances of the case, especially the good years Sylvia and Dennis had spent together, and Paul’s conduct in 1992 which led Dennis to believe that he would be interred in plot 177. Although such exercise of discretion would have furnished a sufficient basis for his decision, Chancellor George appeared to have yielded to the pressures of the petitioner’s human rights argument by delving into the law of trust and proprietary estoppel. Counsel for the petitioner argued that even if Paul’s interest did not qualify as an interest in land, it still amounted to “a legitimate expectation relating to property” protected by article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, and incorporated into Schedule 1, Part 11 of the Human Rights Act 1998. The learned Chancellor approached this argument in ways that are

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50 _In re West Norwood_, supra, note 40.
51 _In re West Norwood_, supra, note 48, at 2188.
52 Ibid., at 2190 and 2193.
53 Article 1 of First Protocol of the Convention provides: “Every natural or legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of
not easy to reconcile. It would seem that article 1 of the First Protocol of the Convention clearly protects rights of property. If so, it is doubtful whether its provisions encompass rights acquired by the purchaser of a cremation plot, such rights being merely contractual. It is a matter of argument whether burial rights need constitutional or Convention protections as a property, or other, interest. One thing that is clear, however, is that the recognition of a property interest in a grave space, whether under the Convention or otherwise, is bound to conflict with the undoubted discretion that English ecclesiastical judges exercise over exhumation.\footnote{In re Holy Trinity, Bosham [2004] 4 W.L.R. 833.} Anticipating that the petitioner’s application was fraught with this type of difficulty, Chancellor George observed that “if an exclusive proprietary right is involved, and with the added protection of 1998 Act, the controlling discretion of the court – readily acknowledged in In re St Luke’s, Holbeach Hurn – would be much, if not entirely, diminished.”\footnote{In re West Norwood, supra, note 48, at 2191.} Any suggestion that this was a dismissal of the human rights argument was frustrated by an immediate and sudden proprietary inquiry: “But is the grant of 31 October 1992 (to Paul) definitive as to the ownership of exclusive rights of burial in plot 177? Undoubtedly Paul has the legal title but did he thereby acquire sole control over the occupancy of the plot?”\footnote{Ibid., at 2191} This proprietary inquiry hardly reconciles with the observation in the preceding paragraph that the court would have exercised its discretion against Paul “even though this involved interference with the contractual rights of Paul.”\footnote{Ibid., at 2190.} While the shift from “contractual rights” of Paul to “ownership” and “legal title” in Paul is one of contract to property, it does not appear to be one which was intended by the learned Chancellor. If so, it was bereft of any explanation and

\footnote{international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”\footnote{In re Holy Trinity, Bosham [2004] 4 W.L.R. 833.} \footnote{In re West Norwood, supra, note 48, at 2191.} \footnote{Ibid., at 2191} \footnote{Ibid., at 2190.}}
contradicts the Chancellor’s earlier observation that there was no property right in a grave space. The matter was not helped by his subsequent deployment of trust and proprietary estoppel, concepts that are clearly associated with property rights. For instance, he asked whether the conduct of Paul was sufficient to create “a constructive trust, which in this case would mean that Paul’s legal title was held on trust for the family, at least to the extent that Dennis also had a right of interment in plot 177,”\(^{58}\) and that the “same result is also achieved, perhaps more appositely, by the law of proprietary estoppel.”\(^{59}\) All the cases cited by Chancellor George in this connection were concerned with property and not contractual rights.\(^{60}\) Believing that constructive trust and proprietary estoppel were available on the facts, Chancellor George held that Paul’s consent was not required for interment of Dennis in plot 177 and that the falsification of documents, though regrettable, were an unnecessary waste of time. But in concluding that there was no interference with “Paul’s property rights, whether at common law or under the 1998 Act,”\(^{61}\) the Chancellor could be mistaken for affirming the existence of a property interest in a cremation plot, in contradistinction to his earlier contractual characterisation of such rights. Could it not be said that, but for the application of the principles of trust and estoppel, Paul would have been held as both the legal and beneficial owner of plot 177? It bears little argument that if a property right was intended, the learned Chancellor would be upsetting older and, probably, binding Court of Appeal precedent on the issue. Moreover, it seems unlikely that such a landmark change in the law would have been introduced in vague terms.

\(^{58}\) Ibid., at 2191
\(^{59}\) Ibid., at 2192
\(^{60}\) For instance, *Grant v. Edwards* [1986] Ch 638 at 656; *Yaxley v Gotts* [2000] Ch 162 at 176.
\(^{61}\) *In re West Norwood*, supra, note 48, at 2193.
Although the law of trust has potentially beneficial application to various issues raised by dead bodies’ jurisprudence, a connection that is worth studying and intended to be explored in another piece, the facts of *Norwood*, however, do not justify the deployment of trust law. This is a case that could fairly be disposed of on discretionary grounds alone, without recourse to property concepts. Much of this is acknowledge by the learned Chancellor towards the end of his judgment. Indeed, it was made an alternative basis for his judgment. Apparently, Chancellor George accepted the human rights argument based on the protection of possessions under article 1 of the First Protocol to the Convention but felt that the principles of trust and estoppel effectively dislodged it. In doing so, he gave the impression that exclusive burial rights confer a right of property. But is the Convention or Human Rights Act applicable in this area of law? It is very tempting to say: not so! It is suggested that since burial rights are merely contractual, they do not come within the definition of possessory rights of property. This view accords with existing jurisprudence on the subject. Moreover, Paul’s human rights argument based on the protection of legitimate expectations relating to property anticipates the existence of a right to exhumation. As a property right it is surely a hairy snake. The existence of a right to exhumation is contradicted by the prevailing discretions that hedge the exercise of a disinterment jurisdiction. Recent judicial indications equally point to the opposite direction. Delivering the judgment of the Arches Court of Canterbury in *Re Blagdon Cemetery*, 62 Dean Sheila Cameron QC observed that the principle of inviolability of the grave and presumption in favour of the permanence of a Christian burial assail any contention relating to a right of exhumation whether under English Law, the Human Rights Act 1998 or the European Convention for the Protection of Human Rights and

Fundamental Freedoms 1950. While the Arches Court of Canterbury held that there was no interference with the petitioner’s right under article 8 of the Convention, it emphasized that exhumation cases are better treated as matters concerned with the exercise of judicial discretion than issues relating to human rights. Similarly, in the *Case of Elli Poluhas Dödsbo v Sweden*, the European Court of Human Rights had to consider an argument by a Swedish national that refusal of the relevant authorities to grant her permission to remove her husband’s urn from Fagersta to a family burial plot in Stockholm violated her rights under article 8 of the Convention. Although the court accepted the elasticity of the concepts of “private and family life” under the Convention, it observed that the Swedish government’s admission of an interference with the applicant’s article 8 right made it unnecessary for the court to determine whether a refusal to disinter remains is caught within the meaning of “private and family life.” It was therefore assumed without argument that there was a breach of article 8 of the Convention; a breach that the government had to justify in order to escape adverse judgment. Because exhumation involves discretionary factors and balancing of conflicting interests, the European Court of Human Rights held that States are entitled to a wide margin of appreciation. On the facts, the majority held that the applicant’s application for exhumation was refused for legitimate and necessary reasons and that there was no violation of the applicant’s right under article 8 of the Convention. A more acute rejection of the human rights’ framework is seen in *In re St Nicholas, Sevenoaks*. There, the petitioner wanted exhumation of his grandfather’s remains in other to extract some bone sample for DNA analysis. The purpose was to prove that the petitioner’s grandfather was the illegitimate son of Princess Louise, a daughter of Queen Victoria. This hypothesis, however, was based

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63 *Case of Elli Poluhas Dödsbo v Sweden* (Application no. 61564/00), judgment delivered on 17 January 2006
64 *In re St Nicholas, Sevenoaks* [2005] 1 W.L.R. 1011.
on evidence which the Arches Court found to be speculative and exploratory.
Observing that English law neither gives the petitioner a right to exhumation nor
ownership interest in human remains, the Arches Court had to consider whether such
a right was implicated by the provisions of article 8 of the Convention. It firmly
concluded that “article 8 is not engaged in this case.”65 This conclusion not only
makes good sense, it is consistent with the discretion which ecclesiastical judges
exercise over the disinterment of human remains.

It seems, therefore, that both under the common law and statutes in England, a
parishioner or purchaser of a burial plot does not acquire any proprietary or
possessory interest necessary to maintain an action for trespass.66 It is also unlikely
that human rights argument would prevail in this area of English law. Accordingly, if
English position were to be the sole criterion for determining the issues in Egbe v.
Onogun, then Ovie-Whisky J. would have been right to hold that burial in a cemetery
does not give rise to any property right and that the plaintiff’s application for an
interlocutory injunction raised no substantial issue for trial. Consequently, there is a
need to explore whether statutory provisions in Nigeria or its customary mortuary law
evince differences that make the English position inapplicable. This would be
explored after a brief examination of the positions in Australia and U.S.A.

**Australian Irrevocable Licence Approach.**

In 1997, the Supreme Court of New South Wales in *Smith v Tamworth City Council*67
seemed to have rejected the English “statutory rights” approach to a grave space; an
approach which, as Bowen L.J. highlighted in *McGough’s* case, incorporated common
law’s jurisprudence on the right of burial, and operated to deny a proprietary interest

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65 Ibid., at 1021.
66 Although there could be an action for breach of a statutory duty as in *Reed v. Madon*.
67 *Smith v Tamworth City Council* [1997] 41 N.S.W.L.R. 680.
in a grave space. Before rushing to this conclusion on Smith’s case, some caveats that limit the reach of its ratio are necessary. It was a dispute between biological parents (plaintiffs) and adoptive parents (defendants) as to which of them were entitled to control the disposition of their deceased son, David. It was not therefore a dispute in the trespassory contexts of McGough and Hoskins-Abrahall cases. Absent this context there was no necessity for a direct examination of the nature of rights conferred on the purchaser of a grave space. Again, quite unlike the English cases examined above, the cemetery authority in Smith’s case did not participate in the proceedings but merely submitted to the decision of the court. This denied the Supreme Court of New South Wales of the direct grave-space-purchaser versus cemetery authority conflictual or adversarial situation that animated the statutory rights approach of the English courts. By mentioning the case of Hoskins-Abrahall in Smith’s case, however, Young J. certainly knew of the English no-property approach to a grave space. Nevertheless, he relied on Hoskins-Abrahall’s case only for the proposition that relatives of a deceased person are guaranteed reasonable access to his or her grave. With these considerations in mind, one can now approach the facts of Smith’s case.

In Smith v Tamworth, the defendants/adoptive parents arranged with an undertaker for the burial of their son David who died in March 1996. On behalf of the defendants, the undertaker obtained a grave space from the first defendant Council. David was buried and his grave was marked with headstone inscribed according to the directions of the defendants. Subsequent to the burial, the plaintiffs/biological parents paid for the expenses of burial including the cost of the burial plot. By this payment, plaintiffs claimed that title to the burial plot, which was formally conveyed to the adoptive parents, should be transferred to the plaintiffs, or alternatively that the adoptive parents should be ordered to permit plaintiffs to exercise the right of burial,
such as right to install a gravestone in substitution to that erected on behalf of the defendants. Young J. approached the case on the basis that the Local Government Act 1919, s446 was still applicable though as at that time the statute had been repealed but without any comparable provision in the replacement Local Government Act 1993. Like the English Burial Acts, Ordinance 68, Clause 19(1) of the Local Government Act 1919 granted the purchaser of a burial plot an exclusive right of burial. Under Ordinance 68, the Council had the right to approve monuments, tombs, tablets, and gravestones. One would have thought that these similarities accentuated the opportunity for application of English precedents on the point. Young J., however, approached the issue before the court as raising a question of priority between adopting and biological parents. He reviewed many American and Australian cases that determine how disputes between living relatives of a deceased person are to be settled. Based on the adoption statute in force in New South Wales, Young J. held that the defendant adoptive parents had the right of burial, which included the right to determine the place, time, and manner of burial of their son David.

If the decision in Smith’s case had stopped on the question of priority, then it would have had little relevance on the question of property rights over a grave space. But Young J. had to determine the plaintiffs’ claim that the defendants had in the circumstances assigned their right of burial to the plaintiffs. Plaintiffs’ assignment argument was based on oral conversation between them and the undertaker employed by the defendants. Young J. held that, on the facts, no assignment had taken place. Moreover, he took the view that since purchase of a burial plot confers a proprietary interest in the grave space, any assignment of the purchaser’s right must, by statute, be in writing. Accordingly, absence of writing was fatal to the plaintiffs’ claim:

There is a nice question as to whether any assignment of the Right of Burial would be an assignment of an interest in land. I rather think it would be because the irrevocable licence
brought about by the interment of David in the ground makes the licence more than a contractual licence, it is really a licence coupled with a grant. As I said in 39 ALJ 50 at 52, although there is no profit a render, the licence is not a naked one and may be protected as a right of property…As an interest in the land is involved, there would need to be some writing to deal with the assignment for it to be recognized pursuant to s23C of the Conveyancing Act.

The passage above is a clear recognition, at least in New South Wales, that there is some property right, over and above the English statutory rights, obtained by a purchaser of a grave space. To put this proprietary right beyond cavil, Young J. observed that the “right that was obtained (by the defendants) was an irrevocable licence to have David’s body remain in the plot together with ancillary rights to have the body remain undisturbed and the right to care for the grave.” Moreover, he noted the recognition by the defendants that “there may be a lien over the grave in favour of the plaintiffs to secure the money they paid out for the funeral.” This lien can only be on the basis of an existence of some proprietary interest in a grave space. To that extent, Smith v. Tamworth charts a legal course that is significantly different from the English statutory rights approach.

In addition to the caveats already made at the beginning of this section, some comments seem to be in order. First, in holding that a purchaser of a burial plot obtained a property interest in the grave space, Young J. relied on the fact that the “American cases all class the right as an interest in real property.” This is not entirely accurate. The nomenclature of quasi-property, employed in some American cases to denote rights in dead bodies, is not generally accepted by all American jurisdictions. Because of the potential for conflation of “quasi-property” with property rights in a dead body, some American jurisdictions, like the state of Ohio, have

68 Ibid., at 694-695.
69 Ibid., at 696.
70 Ibid., at 695.
expressly rejected the existence of a quasi-property right in a corpse.\textsuperscript{71} Even the states in America that accept the existence of a quasi-property interest in a corpse have not gone to the extent of representing that it signifies property in any real sense of the term.\textsuperscript{72} The concept of quasi-property is nothing more than the next-of-kin’s right to possession of corpse for the sole purpose of burial and right to determine the place, time and manner of burial.\textsuperscript{73} These are non-proprietary rights that are vindicated by an action in tort.\textsuperscript{74} In \textit{Perry v. St Francis Hosp. & Medical Centre},\textsuperscript{75} a Kansas court laid bare the legal nature of quasi-property in a corpse:

Kansas law considers Marry Ann Perry (plaintiff) to be the exclusive owner of a quasi-property right in the body, namely, the right to possess it for the limited purpose of preserving and burying it…Kansas common law on this matter is no different from the position universally held by other states which recognizes no property right, commercial or material, in the corpse itself but only a right of possession in order to dispose of the corpse appropriately.

Second, Young J.’s implied proposition that burial rights in their generalisation are assignable is doubtful. While a purchaser of a burial plot can transfer the mere right of interment acquired by the purchase to another person, as confirmed by the Local Government Act 1919, it does not appear that the totality of burial rights are capable of assignment. As highlighted in \textit{Smith’s} case, burial rights include right to determine the place, time, and manner of burial; right to erect a gravestone (with necessary permission); and right to determine the inscriptions on a gravestone. As such, burial rights are non-assignable personal rights, a violation of which attracts the remedy of tort law.\textsuperscript{76} Thus, just as one cannot assign his or her right of action in battery, one

\begin{footnotesize}
\textsuperscript{72} \textit{Whitehair v. Highland Memorial Gardens}, 327 S.E. 2d 438 (1985)
\textsuperscript{74} Nwabueze, supra, note 73, at 278-283.
\textsuperscript{76} \textit{Stewart v Schwartz Brothers-Jeffer}, 606 N.Y.S.2d 965 (Sup. Ct. 1993).
\end{footnotesize}
cannot assign personal rights exercisable over a dead body. The right simply devolves according to established rules of sepulchral priority employed by any particular legal system. Third, for the proposition that purchase of a burial plot confers an irrevocable licence coupled with a grant (i.e., gives a property interest in the grave space), Young J. relied on his article\textsuperscript{77} and the case of \textit{Beard v Baulkham Hills Shire Council.}\textsuperscript{78} Due to the mistake of the first defendant in \textit{Beard’s} case, the plaintiff’s wife was buried in a plot to which the second defendant was beneficially entitled. The second defendant’s cross-claim sought a declaration of title to the burial plot and an order permitting the disinterment of plaintiff’s deceased wife. Young J. examined the nature of right obtained by the second defendant and opined that it was nothing “more than a contractual right;”\textsuperscript{79} in order words, a “contractual right against the first defendant to have buried any person that she may nominate, subject to the terms and conditions of the cemetery.”\textsuperscript{80} He further held that the first defendant was free to repudiate this contractual right by permitting burial in the grave space without the second defendant’s consent, and that the second defendant’s remedy would, if circumstances permit, sound only in damages for breach of contract.\textsuperscript{81} Both the formulation in contract and absence of a property remedy (for the second defendant) would lead one to surmise that Young J. did not contemplate the existence of some property interest in a burial space. But this assumption is wrong. After referring to his interesting article on the subject, the learned judge concluded that “once an interment took place in a grave site with the permission of the cemetery authority then there was irrevocable licence, so far as that body was concerned, for it to remain, at least until

\textsuperscript{77} P.W. Young “The Exclusive Right to Burial” (1965) 39 Australian L.J. 50-57
\textsuperscript{78} \textit{Beard v Baulkham Hills Shire Council} [1986] 7 NSWLR 273.
\textsuperscript{79} Ibid., at 279
\textsuperscript{80} Ibid., at 279
\textsuperscript{81} Ibid., at 280-281.
the natural process of dissolution.”82 This leap from a mere contractual right (no-property) to irrevocable licence (some property right) is a giant one which, unfortunately, is not lucidly stated. It is also not easy to understand how a right of burial which is non-proprietary at the time of acquisition transmogrifies into an irrevocable licence at the point of interment. Young J.’s quotation above may be a complex way of stating that, quite unlike American jurisdictions, Australian law does not permit disinterment except in very narrowly defined circumstances.83 If that was intended, then the employment of the terminology of “irrevocable licence” only serves to confuse. Another difficulty is to ascertain the beneficiary of the irrevocable licence. The quotation above suggests that it is the deceased person, although this presents difficulties in itself. If it is not the deceased person, then it would be a contradiction to both say that the right is merely contractual (remediable in damages only) and, at the same time, that it confers an irrevocable licence coupled with a grant (proprietary). In Smith’s case, however, Young J. held that the irrevocable licence vested not in the deceased but in the adoptive parents who were the defendants in that case.84 Accordingly, it seems that despite the contract-talk in Beard’s case, Young J. actually contemplated the existence of some proprietary interest in a grave space. In addition to Smith’s case, the tenor of his article makes this even clearer, especially his preference for the American approach which generally recognises some proprietary interest in a grave space (easement), and permits the purchaser to bring an action for trespass. Thus after asking “what is the position with cemeteries in Australia,” he answered that though there were “no binding authorities on the point…it is quite conceivable that the American view will be followed in the unlikely event of the point

82 Ibid., at 278.
83 Ibid., at 280, where he analysed disinterment jurisdiction.
84 Smith, supra, note 67, at 694-695
ever arising for decision.” The point, therefore, is that despite the criticism of Smith’s case, it is apparent that Australia recognises some proprietary interest in a burial plot. This sharply contrasts with the English position and orients more towards American jurisprudence.

Burial Right in the U.S.A.

The American burial regime is elegant in its formulation but beguiling in its simplicity. American courts consistently apply the rule that a purchaser of a burial plot “acquired an easement or licence to make internments” and that this “right of sepulture is a property right subject to reasonable regulations by the cemetery and by the state.” Some American writers observed that an “easement is an interest in land which entitles its holder to some limited use or enjoyment of land possessed by another.” An easement appurtenant to a land runs with it and is enjoyable by the subsequent owner, except expressly excluded. But while an easement in a burial plot clearly confers a proprietary right in the U.S.A., it is an unusual type of easement. For instance, there is no dominant tenement. The easement could be transferred by writing without the execution of a deed. It might also not be amenable to the commercialisation that characterises other forms of property rights. In Fraser v. Lee title to a burial plot and the vault constructed on it was transferred to the defendants’ predecessor-in-title many years after some bodies had already been interred in the vault. Based on the easement inherited by the defendants, they planned to disinter

85 Young, supra, note 77, at 54.
88 Charles M. Haar & Lance Liebman, Property and Law (Boston: Little, Brown and Co., 1977), at 706
89 Cushman Virginia Corp. v Barnes, 129 S.E.2d 633 (1963).
90 Fraser v. Lee, 1917 WL 1041 (Ohio App. 8 Dist.)
bodies in the vault and to sell the emptied grave spaces to a willing buyer. Without
disinterment, the monetary value of the vault would be less. The relatives of the
deceased sought to enjoin the defendants’ proposed action. Lieghley J. accepted that a
conveyance of a burial plot conveys only “an easement of burial, of ornamentation, of
construction and maintenance of monuments,”\textsuperscript{91} but held that the defendants’ title was
limited to the unoccupied space in the vault. With regard to the validity of the transfer
to Mrs. Taylor, the defendants’ predecessor-in-title, Leighley J opined that the “paper
writing transferred to Mrs. Taylor whatever interest Mrs. Potter at the time had in said
vault and land in respect to the right of burial. Whether it be called an easement, a
privilege or a licence, under the circumstances a formal deed was not required to
transfer whatever interest she had.” He also deprecated defendants’ plans to
commercialise the vault, holding that it is contrary to public policy that a stranger
“should be permitted to acquire a certificate of title to a burial lot and then found upon
it the right to disturb the remains of the dead and thereafter commercialize the
easement of burial so obtained.”\textsuperscript{92}

The most significant implication of the American easement approach is that,
quite unlike England, the purchaser of a grave space can bring an action in trespass
against a stranger who trespassed upon the burial plot. More importantly, a trespass
action can even be brought against the owner of the cemetery or its management
authority. Since trespass is principally a wrong to possession or right of possession, its
availability to a purchaser of a grave space leaves little doubt as to his or her
proprietary interest in a burial plot. As in other areas, a claim in trespass relating to a
burial plot can be based on title or actual possession. American cases have held that
an easement of burial sufficiently gives rise to a right of possession or constructive

\textsuperscript{91} Ibid., at 2.
\textsuperscript{92} Ibid., at 5.
possessing a particular burial space. Actual possession could be established by evidence of burial in a grave space. In *Matthews v. Forest*, the plaintiff claimed in trespass and alleged that soon after the burial of his wife in a cemetery plot belonging to him, the defendant removed, without plaintiff’s consent, 56 beautiful floral designs placed on the grave of the plaintiff’s wife. The defendant objected that the plaintiff’s claim did not disclose any reasonable cause of action. With regards to the plaintiff’s claim in trespass, Ervin J. held that both actual possession and right to possession were sufficiently averred. Thus, the assertion that property involved in the suit was plaintiff’s burial plot was “tantamount to an allegation that at the time at issue the plaintiff had title to the property, and by reason thereof was in its constructive possession.” Ervin J., following the Supreme Court of South Carolina in *Kelly v. Tiner*, observed that one “who has been permitted to bury his dead in a cemetery acquires such possession in the spot of ground in which the bodies are buried as will entitle him to maintain trespass against the owners of the fee or strangers who, without his consent, negligently or wantonly disturb it.” Similarly, in *West View Corp v. Alexander*, the plaintiff bought four grave spaces from the defendant and buried her mother and brother in two of the four spaces. She sued the defendant in trespass when, without her consent, the defendant destroyed flowers and shrubbery on the plaintiff’s burial plot. Felton, J. of Georgia Court of Appeals held that the facts alleged were “sufficient to show a cause of action for trespass to the land in favour of one who owns it in fee simple or one who has a burial easement therein.” As already noted, possession can be established both on the basis of an easement or actual use of

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94 *Matthews v. Forest*, 69 S.E.2d 553 (Sup. Ct. N. Carolina 1952)
95 Ibid., at 556.
96 *Kelly v. Tiner*, 91 S.C. 41.
97 *Matthews*, supra, note 94, at 556.
a burial plot for burial. Thus, a defect in the plaintiff’s title or easement is not
determinative provided acts of possession can be shown.

In Holder v. Elmwood Corporation,\(^9\) the plaintiff brought an action for a
trespass to his burial plot based on a deed of conveyance to his predecessor-in-title,
one James F. Holder. Since the original conveyance was to the “estate of James F.
Holder” rather than James F. Holder (he was alive at the material time), the court held
that the conveyance was not sufficient to pass title “for want of a grantee in being and
capable of taking the estate conveyed.”\(^10\) The plaintiff, therefore, had to rely on acts
of possession to establish a trespass to his burial plot. Accordingly, he averred that
“since June, 1916, plaintiff, her brothers, sister, and mother have had continuous
possession, and exercised ownership over said lot, installing grave markers, planting
and replacing shrubs on the plot, placing flowers on the grave…”\(^11\) The Supreme
Court of Alabama held that these averments were sufficient to show actual possession
by the plaintiff, entitling him to bring an action for trespass. Finally, an action in
trespass will lie where a stranger is buried in a grave space belonging to a plaintiff.\(^12\)
In such cases, the court may, in addition to the remedy of damages, order
disinterment.\(^13\)

**Nigerian Statutory Regime and Cultural Practice.**

It is pertinent to recall that the statutory rights approach in England is anchored on
statutory provisions (such as Burial Acts, 1852-1857 and Cemeteries Clauses Act,
1847) which (1) specified the rights that a burial board or cemetery authority could

\(^10\) Ibid., at 236.
\(^11\) Ibid., at 237
\(^12\) *Augeri v. Roman Catholic Diocese of Brooklyn and St. John’s Cemetery*, 639 N.Y.S.2d 640 (1996);
\(^13\) *Augeri v. Roman Catholic Diocese of Brooklyn*, supra, note 102.
grant, and (2) vested the control and management of burial grounds in a person or authority other than a purchaser of a grave space. This core characterisation of burial statutes in England determines the correctness of any Nigerian decision that follows English precedents on the right of burial. In other words, English decisions are most compelling when local Nigerian statutes exhibit similar characteristics. With that, we can now return to Egbe v. Onogun. The case was decided under Burial Laws of then Western Nigeria, cap 15. At the lower court, Ovie-Whisky J. had referred to sections 9(a) and 10 and to regulations 2, 4, 5, and 6 of that law. Like the English burial statutes, section 10 of Burial Law, cap 15 vests the control and management of a cemetery in an appointed authority: “Every public burial ground shall be under the control or management of such person or body of persons as the Governor may direct.” Similar provisions are to be found in more modern burial laws. The vesting of control and management of a cemetery in a specified authority often signifies that possession of a burial plot is not vested in the purchaser of a grave space. But apart from control and management of a cemetery, there are fewer similarities between Nigerian and English burial statutes. Section 9(a) of the Burial Law, cap 15 entitles a Governor to declare any burial ground as a public burial ground for any particular area. Regulation 2 and 3 provide for the delineation and plotting of grave spaces on a plan to be kept by a person in charge of a cemetery and the keeping of a register showing the name of a grantee of a grave space, number of the grave space on the plan, date of grant, and the name of a person buried in the space. Regulation 5 provides for the amount of space to be granted for the construction of a vault, while the fees payable are stipulated in Regulation 6. What is immediately apparent from

104 For instance, Births, Deaths and Burials Laws, cap. 13, Laws of Lagos State, 1994, section 38: “Every public burial ground shall be under the control or management of such person or body of persons as the State Commissioner may direct.” Identical provisions are also contained in: Burials Law, Laws of Ogun State of Nigeria, 1978, cap. 14.
the Burial Law, cap 15 is that while it provides for the grant of a legal interest to a purchaser of a grave space, it does not specify the nature of the legal interest to be granted. In contrast to English burial statutes, Burial Law, cap 15 does not in terms exclude the grant of a freehold estate in a grave space.105 No limitation is imposed on the type of legal interest that could be created and the law leaves a wide range of discretion for cemetery authorities. This seems to be a material point of departure from England. Relevant statutory provisions in England specify that a purchaser of a grave space shall be entitled to be granted no more than a permanent or temporary exclusive right of burial, a right of constructing a vault on the grave space, and a right to erect and place any monument, gravestone, tablet, or monumental inscription in such grave space. The Nigerian statutory framework does not embody similar limitations; and a purchaser of a grave space in Nigeria could well acquire a right of property or title in a burial plot necessary to maintain an action for trespass.

The Supreme Court of Nigeria was, therefore, right in *Egbe v Onogun* when it observed that there “is nothing to show that the provisions of the English statutes relied upon in the case cited (Hoskins-Abrahall case) are in pari materia with the Burial Law (Cap 15).”106 By granting the injunction sought by the plaintiff to enjoin further trespass by the defendant, the Supreme Court accepted, at least impliedly, that the plaintiff had some proprietary right in his father’s grave space. This is in tune with the position in the U.S.A., Canada and, possibly, Australia.107 The Supreme Court’s position is amply supported by general mortuary expectations in Nigeria. Nigerians share very tender sentiments towards departed relatives, partly demonstrated by the

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105 This is the approach adopted by some Canadian decisions: *Re Elmwood Cemetery Co. [1970] 10 DLR (3d) 338; Hubbs v Black [1918] 46 DLR 583.*

106 *Egbe,* supra, note 1, at 101.

107 Although it remains to be seen how Nigerian courts would fix the exact nature of this right of property; for instance, whether it confers title to the land or fee simple interest, easement, irrevocable licence, long lease, or *sui generis.*
continued practice of burial in residential premises. Traditional religious beliefs in Nigeria also posit a relationship with the dead that continues even after interment. This transcendental post-mortem relationship surely renders obnoxious any rule or principle of law that inhibits a living person’s communion with a dead relative: whether by unnecessary restriction of access to a grave, placing symbolic objects on the grave, or by denial of a right to vindicate the sanctity of a grave by an action in trespass. Moreover, the English statutory rights’ approach works best in a system where the relevant cemetery authority implements and enforces a zero tolerance approach to desecration or trespass on grave spaces. The fact that the cemetery authority in *Egbe v. Onogun* neither brought the action in trespass nor applied to be joined as a party gives little confidence that a statutory non-proprietary approach to burial plots would work satisfactorily in Nigeria. The plaintiff in *Egbe v. Onogun* and, indeed, an average Nigerian would have been terribly shocked to learn that a living relative could not judicially protest a trespassory desecration of his or her ancestor’s grave. Nigerians were spared this shock in *Egbe v Onogun*. The decision accords both with a rational interpretation of burial statutes in Nigeria and societal expectations based on traditional mortuary beliefs. Accordingly, it is likely that future Nigerian cases on the point would find American, rather than English decisions, to be more persuasive.

**CONCLUSION:**

Analysis of the nature of rights acquired by the purchaser of a grave space is of enormous academic and practical significance. It contributes to intellectual debate in an area of law that is shrouded in obscurity and only infrequently litigated in the

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108 Burial in residential premises is generally prohibited by burial laws in Nigeria.
courts. It provides guidance to practitioners, academics and litigants as to forms and causes of actions available to remedy an interference with a grave space. Unfortunately, identification of the legal interest that exists in a grave space is far from easy and varies from one jurisdiction to another. At the risk of over-simplification, it is suggested that current English law adopts a contractual and statutory right approach that eschews the existence of a property interest in a burial plot. This is so notwithstanding the attempt in Reed v Madon to grant remedies for interference with a grave space that sound in property. Recent English cases also indicate that human rights’ framework is unlikely to play any significant role in this area of law. In Australia, the irrevocable license approach enunciated in Smith v. Tamworth clearly signifies that a property interest is intended. The clearest formulation is in the U.S.A. where the various states consistently adopt a property rule in the nature of an easement. Exposition of this easement is, however, more complicated than it appears. The Nigerian approach is still evolving, though initial signals from Egbe v Onogun are in the direction of proprietary interest. Future cases would have to determine the exact nature of this right of property, whether it is an estate or freehold interest in a grave space, a statutory lease, an easement, a licence coupled with a grant, fee simple, long lease or a sui generis right. Development in the property direction is strongly applauded and is underpinned by Nigerian mortuary tradition and practice. Analytical guidance could fruitfully be sought from American decisions.