No. 5.

AN EXAMINATION

OF

THE LAW OF BURIAL,

IN A

REPORT TO THE SUPREME COURT OF NEW-YORK,

BY

SAMUEL B. RUGGLES,

REFEREE.

In the matter of taking a portion of the Cemetery of the Brick Presbyterian Church, in widening Beekman-street, in the city of New-York.

Supreme Court.

In the matter of the application of the Mayor, Aldermen, and Commonalty of the City of New-York, for widening Beekman-street, from Pearl-street to Park Row.

REPORT

OF

SAMUEL B. RUGGLES,

REFEREE,

On the Claims of the City Corporation, the Vault-owners, the Occupants of Graves, and the Brick Presbyterian Church.

NEW-YORK:

D. Fanshaw, Printer, 35 Ann-street, corner of Nassau.

.....

1856.

New-York Supreme Court.

In the matter of the application of the Mayor, Aldermen, and Commonalty of the City of New-York, relative to the widening of Beekman-street from Pearl street to Park Row, in the City of New-York.

TO THE SUPREME COURT OF THE STATE OF NEW-YORK.

The undersigned, SAMUEL B. RUGGLES, Referee, appointed in the matter above entitled, by order of said Court, on the fourth day of February, in the year one thousand eight hundred and fifty-four, respectfully presents this his

REPORT.

The order of reference was granted on the prayer of the Corporation of the Brick Presbyterian Church in the City of New-York, which stated, among other things, that the Commissioners of estimate and assessment in the above entitled proceeding for widening Beekman-street, had awarded the sum of twenty-eight thousand dollars for the loss and damage to the owners, proprietors, and parties interested in a certain piece of land described in said petition, and necessary to be taken for widening said street; that the said owners, proprietors, and parties interested in said piece of land, being unknown or not fully known to said Commis-

sioners, the said amount of twenty-eight thousand dollars had been paid to the Chamberlain of the City of New-York, to abide the order of this Court in the premises; that in the piece of land so taken, there were embraced certain "vaults for the burial of the "dead, in which various individuals claimed rights of "interment, and the use thereof, as vaults, for the burial "of the dead;" and that, subject to the rights of the said vault-holders, the said Corporation of the Brick Presbyterian Church are entitled to the whole of said sum of twenty-eight thousand dollars awarded as aforesaid.

The order of the Court upon said petition, directed the undersigned "to take proof of the facts contained "in the said petition, and to ascertain the parties inte- "rested in the said fund, and the proportions thereof to "which they are entitled respectively, and to report "thereon, with the substance of the proofs, and his "opinion."

It further directed, that "before proceeding with "said reference, the vault-owners interested in the pre- "mises have notice of such reference, either by per- "sonal service of a summons, or by publication in one "or more public newspapers of the City of New-York, "as such Referee may direct;" and that he "comply "with the rule of this Court made at the General "Term, 31 December, 1853, in relation to moneys of "unknown owners."

The undersigned, before proceeding with said reference, caused notice to be given, in obedience to said order, to all persons claiming any interest in said premises, whether as vault-owners or otherwise, to appear before him at a time specified in said notice, and produce proof of such interest; which notice was given by publishing the same for twice a week for eight suc-

cessive weeks, in the two daily newspapers published in the City of New-York, known as "The New-York Daily Times" and the "New-York Commercial Advertiser." A copy of said notice, with affidavits proving such publication thereof, are hereto subjoined.

Pursuant to the notice so given, the undersigned has been duly attended on said reference by the petitioners, the Corporation of the Brick Presbyterian Church; by the Counsel of the Mayor, Aldermen and Commonalty of the City of New-York; by numerous parties, claiming interests in the vaults mentioned in said petition; and also by a party claiming an interest in a certain grave, embraced within the piece of land taken as aforesaid.

The order of the Court requires the undersigned to state the substance of the proofs. They establish the following facts:

The land in question was taken on the petition of the Mayor, Aldermen and Commonalty of the City of New-York for widening Beekman-street. It was part of a larger tract bounded by Beekman street, Park Row, Spruce-street and Nassau-street, which belonged, on the 19th of February, 1766, to the Corporation of the City of New-York.

On that day, John Rodgers and others, Ministers, Elders, Deacons, Trustees and Communicants of the English Presbyterian Church of said City, presented their petition to said City Corporation for a grant of said land "for the erection of a new church, with "an additional lot suitable for a cemetery." On the 25th of February, 1766, the Common Council of the City passed a resolution to grant to the petitioners the land so prayed for, "according to the prayer of "the said petition;" and the same was accordingly conveyed on that day to said John Rodgers and others in fee.

A copy of the conveyance marked **A** is hereto annexed. It recites the petition and the resolution, and after duly granting the land, it reserves the following condition, to wit: That the said grantees, their heirs or assigns, "shall and do, within ten years "from the date of these presents, enclose the said "tract or parcel of ground above mentioned and here- "by granted, within a good and sufficient fence, and "either erect an edifice or church thereon, or *on part* "*thereof*, for the worship of Almighty God, or use the "same, or *a part thereof*, for a cemetery or church- "yard for the burial or interment of the dead; and "shall not appropriate, apply nor convert the same at "any time thereafter to PRIVATE *secular* uses;" with a right of re-entry by the grantors in case of the breach of said condition.

The fact is not disputed, that the grantees, within the ten years, duly enclosed the land in fence, and erected on a part of it a church for the worship of Almighty God, and used another part of it for a cemetery and church-yard for the burial and interment of the dead. The church is still standing, and is generally known as the "Brick Presbyterian Church," and was surrounded on its four sides, by portions of the said land used by the church as a cemetery. The whole was uninterruptedly possessed by said grantees and their hereinafter mentioned assigns, from the said year 1766 until the year 1853, when a portion of the land, fifteen feet in depth, was taken from its south-westerly side for widening Beekman-street, in the proceedings above entitled.

It appears, from the ancient records of said church, that on the 31st of May, 1769, its trustees passed a resolution to grant "the privilege of purchasing ground "for burying vaults in the new church-yard," (mean-

ing the cemetery in question,) "to such persons as "should apply for them, on the same terms and of "the same dimensions as such are granted by the Dutch "Consistory;" and that on the 5th of June next following, a report being made that the Dutch Consistory granted "vaults 13½ feet by 10½ in the clear, with "room for the steps, *in fee for ever*, for fifteen pounds, "subject to all the usual charges of burial, except "paying for the ground," the said trustees thereupon resolved, that they would "grant the privilege of vaults in the new church on the aforesaid terms."

Numerous vaults for the interment of the dead were thereupon constructed in said cemetery, between the years 1769 and 1791, thirteen of which were embraced within the strip of fifteen feet taken for widening Beekman-street. One of the thirteen, called "The Minister's vault," belonged to the church. The other twelve belonged to various individuals, whose descendants and representatives appear on the present reference.

On the 31st of August, 1784, the said grantees having become legally incorporated, under the name of "The Corporation of the First Presbyterian Church "of the City of New-York," a portion of them executed a deed, a copy of which is hereto annexed, marked **B**, by which said premises were duly conveyed in fee, to the said religious corporation. The deed recites, that the title had become vested by survivorship, in the parties then granting.

By an act of the Legislature, passed February 17, 1809, that corporation was empowered to divide itself into two separate corporate bodies; and accordingly, by a conveyance dated May 9th, 1809, a copy of which is hereto annexed, marked **C**, the proper authorities of the said First Presbyterian Church duly

conveyed the said premises in fee, to one of said corporate bodies therein designated as "The Corporation "of the Brick Presbyterian Church of the City of New-"York," being the petitioners in the matter now in reference.

On the 23d of September, 1785, the City Corporation, by a sufficient instrument of that date, reduced the annual ground-rent of forty pounds, reserved in said conveyance **A**, to the annual amount of twenty-one pounds and five shillings, being fifty-three dollars and twelve cents, at which rate it has since remained.

The relative position of the church edifice and of the twelve vaults, is shown upon the map **F** hereto annexed. The edifice covered no part of the fifteen feet taken for widening the street, but a space including that portion of the land, was left open between the front of the edifice and the north line of Beekman-street. Over that vacant space, a broad entrance or passage-way led from the street to the front door of the church, the windows of which also commanded an uninterrupted view across it to the street. No monument or other structure was ever erected over any of the vaults. They were built entirely under ground, and were covered by horizontal stone tablets lying even with the surface. The inscriptions on those tablets are represented in *fac simile* on said map. The vaults were never used for any purpose, but the interment of the dead.

The persons now claiming to own said vaults have made diligent search to find grants, or other written evidences of title to the same, but none have been found, except for two of them, marked No. 11 and No. 7 on said map. The claimants have shown uninterrupted possession of the vaults, in their ancestors and

their descendants for upwards of sixty years, claiming title thereto in fee.

Copies of the grants of the vaults No. 11 and No. 7 are hereto annexed, and marked **D** and **E.** The grant **D** is of the vault numbered 11 on the map, covered by the tablet inscribed "John Quackenbos' "vault." It was made on the 23d of November, 1771, by the Ministers, Elders and Trustees of the church, before its incorporation, and is, in form, a conveyance in fee of said vault to John De Witt and John Quackenbos, describing it as " all that small parcel of GROUND " *under the earth*, being part of the *land*" of the gran- " tors, with " a way, or liberty, to pass and repass to " and from the same, and to open the ground for the " purpose of making interments," and " also free lib- " erty to cover the passage or entry into the same " vault with a stone or stones, *even with the surface* " *of the ground.*" It describes the premises as being " already converted into a vault for the interment of " the dead," and bounds them by other vaults, but gives no other dimensions.

The grant **E** is of the vault numbered 7 on the map, covered by the tablet inscribed, " William Ir- 'ving, family vault." It was made on the 21st of April, 1790, by the church after its incorporation, and is, in form, a lease to William Irving, (therein called "Irvin") and his *heirs* and assigns, for 999 years, at a nominal rent, of premises described as " a piece and parcel of ground, $13\frac{1}{2}$ feet in length and " $10\frac{1}{2}$ feet in breadth, *for the purpose of constructing* a " vault for the interment of the dead, being part of " the cemetery or burial-ground belonging to the " Presbyterian Church and adjoining to Beekman- " street," and it contains the express proviso, " that " neither the said party of the second part, his heirs or " assigns, shall apply or appropriate the piece or par-

" cel of ground above described, or any part thereof, to " *any use or purpose whatever*, other than the inter- " ment of the dead."

The claimants of the ten vaults for which no paper title is produced, contend that grants must legally be presumed, similar in form and effect to the one or the other of the two, which are now produced.

The dimensions of the vaults are not proved, except that said vault No. 11 is described in said grant **E**, as being $13\frac{1}{2}$ feet in length and $10\frac{1}{2}$ feet in breadth, being the same dimensions specified in the resolution of the 5th of June, 1769. The map represents steps leading to the vaults, but the area covered by them is not shown. The vaults were surrounded by a substantial iron fence on a stone coping, which included the church and the cemetery in one common enclosure. Ten of the vaults were immediately in front of the church. The other two were in the spaces at the two ends, which also contained about eighty graves.

The ownership of the twelve vaults in question has generally been shown, by proving their descent to the claimants from the ancestors, whose names are inscribed on the respective tablets. In some instances, the ownership has become very minutely subdivided, by descent through numerous children, grand-children and great-grand-children, occasioning much delay and difficulty in ascertaining their names and places of abode. Some of them have not yet been fully ascertained; and in one instance, the ownership of an undivided eighth of a vault, is contested between the descendants of two separate branches of a family, respectively numbering twenty-three on one side and fifteen on the other. The conflicting claims in that case will be embraced in a separate report, in order not to delay other claimants, whose proofs are completed, and whose rights are not in contest.

On the 27th of October, 1823, the Common Council of the city passed an ordinance, prohibiting any interments, either in vaults or graves, south of Grand-street, under the penalty of two hundred and fifty dollars for each offence. On the 23d of April, 1839, the ordinance was so far repealed as to permit interments "in any private vault, of the members of the "family of the owners of said private vaults;" but before such repeal, several of the owners of the vaults in question continued to make interments therein, paying the penalty of two hundred and fifty dollars for each interment. Three such penalties were paid by the families of Messrs. Quackenbos and De Witt, for interments in vault No. 11, and one by Mr. Adams for an interment in vault No. 5.

No proof has been made of the cost of building the vaults. It is shown that the cost of a new vault in Greenwood Cemetery, 9 feet by 15, is from one hundred and ninety to two hundred and twenty dollars; of the plot of land, one hundred and ten dollars; and of the iron railing around it, from one hundred and thirty to two hundred and thirty-nine dollars. The expense of removing and re-interring the bodies, has varied from forty-eight to one hundred and fifty dollars.

The average amount expended in these items has been: for the new vault, $200; the plot of land, $110; the iron railing, $180; and for removing and re-interring the bodies, $100—in all, $590. This was the precise amount paid by one of the proprietors; another expended $669; and another, $972,62. In the latter case, the railing enclosed a larger plot of land, and cost $501,75.

It appears in proof, that vaults can now be purchased in several of the church-yards in the city, for

sums varying from one hundred to one hundred and fifty dollars, viz: in Trinity church-yard, for $100; in *St. Thomas' church-yard, for $150; and in St. Marks'* church-yard, for $100; and in the Marble Cemetery, in Second Avenue, between Second and Third-streets, *for $100. Several vaults in the grounds adjoining the* Middle Dutch Church, (now converted into a post-*office,) have been recently re-purchased by that church* for $250 each; the church agreeing also to pay the expense of removing and re-interring the bodies.

It is also shown, that the custom of interment in vaults in the city church-yards has nearly fallen into *disuse. During the last year, the interments in* vaults in Trinity church-yard have not exceeded 25 in number; in vaults in St. Thomas' church-yard not exceeding 20; in vaults in St. Marks' church-yard not exceeding 25.

Within the last seven years, the average number of interments in vaults in the North Dutch church-yard, and in the grounds adjoining said Middle Dutch Church, (now the post-office,) which vaults are within a short distance of the Brick Church-yard in Beekman-street, has been only two annually.

The interments in Greenwood Cemetery, in the year 1854, were 8,084; in 1853, 7,189; 1852, 5,933; 1851, 5,254; 1850, 3,456; 1849, 3,291; 1848, 2,025; 1847, 1,297; 1846, 812; 1845, 607; 1844, 354; 1843, 199.

That cemetery was legally incorporated in 1838. The interments up to and including the year 1842, were 166. The total number to the 29th of December, 1855, was 45,515. The cemetery is distant $2\frac{1}{2}$ miles from the ferry on the Brooklyn side, adding about fifteen dollars to the item of carriage hire, for each interment. A high fence protects the cemetery from

intrusion, and no instance has yet been known of any violation of its vaults or graves, or of any attempt to *invade them in any way.*

The proofs have established the ownership of the twelve vaults, in question, in the following persons :

Vault No. 1, inscribed "Rev. John Matlock," in the descendants of his daughter Elizabeth Matlock, who married Thomas *Derrick ; viz, in six surviving children of the said Elizabeth,* and in the descendants of her two other children who have died.

The six surviving children are:

1. *Elizabeth Brower, of the City of New-York, widow.*
2. Sarah Evans of the City of Brooklyn, widow.
3. Ann Davison, (and her husband William Davison in *her right,) of the City of Brooklyn.*
4. Jane Groves, (and her husband Richard Groves in her right,) of Newtown, in Queen's County.
5. *George Derrick, of the City of Brooklyn.*
6. Richard Derrick, of the City of New-York.

Each of said six being entitled to an equal eighth.

The two remaining eighths belong to the children of Thomas Derrick and of William Derrick, who live in foreign countries, and whose names are not yet ascertained.

Vault No. 2, inscribed "*Minister's vault,*" belongs to the church.

Vault No. 3, inscribed "John Tuiner Junior," in Maria E. Kirby, his sole surviving child and devisee.

Vault No. 4, inscribed "Alexander Hosack," in the heirs of said Hosack, to wit :

1. One third in the children of David Hosack, to wit: Mary Harvey, of New-York, widow, Alexander E. Hosack, M. D., Nathaniel P. Hosack, Eliza B. Hosack, and Emily H. Rodgers, of New-York, widow; each taking one-fifth of said third.
2. Another third in the said Alexander E. Hosack, to wit : three-fourths thereof in his own right, and one-fourth as committee of the person and estate of Edward Hosack, an idiot.
3. The remaining third in the children of Jane Millen, in equal shares, to wit: Jane Ford, (and her husband Henry A. Ford, in her right,) one half, and Louisa A. Griffith, of Hyde Park, in Dutchess County, the other half.

Vault No. 5, inscribed "John G. Glover," in John Glover Adams, and William Adams, sole acting and qualified executors of John Adams, deceased; said deceased having had sole and undisputed possession of such vault for twenty years.

Vault No. 6, inscribed "Thomas and William Ash," in the descendants of said William Ash, who inherited the share of said Thomas Ash, viz:

1. Seventeen thirty-second parts in Elizabeth A. Lansing, granddaughter of Thomas Ash, the younger, subject to the right of dower of his widow Eliza B. Ash.

2. Five thirty-second parts in Sarah Ham, of the City of New-York, widow.

3. Five thirty-second parts in the two children and heirs of William Ash the second, being Isabella Ash, and Catharine Ash, both of the City of New-York.

4. The remaining five thirty-second parts in the three children and heirs of Eliza Ash, being Katharine Heard, (and her husband John S. Heard, in her right,) Maria Louisa Strong, (and her husband James H. Strong, in her right,) and Margaret Kouenhoven, all of the City of New-York.

Mrs. Eliza B. Ash, above-named, has purchased for account of the family above specified, a plot of land in the Episcopal church-yard at Westchester, to which she has removed all the remains from said vault No. 6. She has defrayed the cost of an iron fence around said plot, and of a family monument covering said remains. She is guardian of the person of her granddaughter, Elizabeth A. Lansing, and entitled, as such, to the profits of her real estate.

The other heirs have consented in writing, that she receive the amount to be awarded for said vault No. 6.

Vault No. 7, inscribed "William Irving," in his two sons and heirs, Washington Irving, and Ebenezer Irving, of Westchester County.

Vault No. 8, inscribed "A. Stewart," (being Alexander Stewart,) in the descendants of his two grandsons William James Stewart, and John James Stewart, viz:

1. One half in the children and heirs of the said William James Stewart, being William James Stewart, and Walter Livingston Stewart, of the City of New-York, Julia Devoe, (and her

husband Frederick A. Devoe, in her right,) of Sullivan County; and Hannah C. Eldredge, (and her husband Edward Eldredge, in her right,) of Chemung County.

2. One half in Sarah Royce, (and her husband Solomon Royce, in her right,) of Sullivan County; the said Sarah being sole devisee of said half from the said John James Stewart.

Vault No. 9, inscribed "Richard and Samuel Ray," in Elsie Lott, of the City of New-York, the only surviving child and heir of John Ray, who was the only heir of said Richard and Samuel Ray.

Vault No. 10, inscribed "Thomas Arden," in the heirs of said Arden, but whose names and respective proportions of interest are not yet ascertained.

Vault No. 11, inscribed "John Quackenbos."

1. There are conflicting claims between the heirs of John Quackenbos, and the heirs of William De Witt, to one undivided eighth of this vault, which are reserved for a separate report.

2. Another eighth belongs to the heirs of a daughter of John De Witt, whose names are not yet ascertained.

3. The ownership of one eighth is proved 1, in Anna Proudfit, widow; 2, in William Ogilvie; 3, in Maria Halsey (and her husband William Halsey, in her right,) each entitled to one fourth of said eighth; and 4, in William Ogilvie, and Maria L. Ewen, (and her husband John Ewen, in her right,) each entitled to one half of one fourth of one eighth.

4. The ownership of the remaining five eighths is proved in the following descendants of John Quackenbos, and Catharine his wife who was a daughter of the first proprietor, John De Witt, and took from him one fourth by devise.

1. One seventh of said five eighths in the five children of Margaret Wynkoop, (deceased,) and their descendants. viz:
    1. Sarah Packard,
    2. Harriet Downing,
    3. Jefferson Wynkoop,
    4. Julia Campbell, wife of — Campbell,
    5. The four children of Richard Wynkoop, whose names are not yet ascertained.
2. Another seventh of said five eighths in the children of Sarah Packard, to wit:

1. Oscar Packard,
2. John Packard,
3. Wynkoop Packard,
4. Lafayette Packard,
5. Mrs. Shear,
6. An unmarried daughter, whose name is unknown.

3. Another seventh of said five eighths in the four childern of Anna Greenleaf, (deceased,) to wit:
   1. Joseph Greenleaf,
   2. Catharine Greenleaf, insane.
   3. Eliza Smith, (and her husband Peter Smith, in her right.)
   4. Anna Greenleaf.
4. Another seventh of said five eighths in Catharine Gansevoort, and her husband Herman Gansevoort, in her right.
5. Another seventh of said five eighths in Gertrude Leggett, widow.
6. Another seventh of said five eighths in the five children of Nicholas Quackenbos, (deceased,) to wit:
   1. Eliza Sterling, (and her husband Arthur G. Sterling in her right.)
   2. Henry Quackenbos,
   3. George Quackenbos,
   4. John Quackenbos,
   5. Nicholas J. Quackenbos.
7. Another seventh of said five eighths in Mangle M. Quackenbos.

Vault No. 12, inscribed "John Stephens, John Brown, and Thomas Grant." The ownership is proved in the devisees of the two sons of said John Stephens, to wit: John Stephens, Junior, aud Stephen Stephens; said devisees being respectively

1. Of said John Stephens, Junior, as follows:—John J. Stephens, Daniel L. Stephens, and Anna Eliza Stephens, each entitled to one third of one half.

2. Of said Stephen Stephens, as follows:—Garret Stephens, John Stephens, Stephen Stephens, William Stephens, James Stephens, Thomas Stephens, and Ebenezer Stephens, executors of said Stephen Stephens, deceased; and as such entitled to the remaining one half.

Vault No. 13, inscribed "John McComb," in his two children and devisees to wit: John McComb, one half, and Matilda M. Peters, (and her husband William R. Peters, in her right,) the other half.

The report in the above entitled matter for widening the street, was confirmed by this Court on the 31st day of December, 1852. The actual widening of the street by order of the City Corporation, took place on the 1st of May, 1853. All the bodies remaining in the vaults were then removed, except those in vault No. 1, which were deposited under the church, where they yet remain. The church paid the following sums towards the expense of removal: For Vault No. 3, $25 00; Vault No. 4, $37 00; Vault No. 6, $72 00; Vault No. 9, $25 50; Vault No. 12, $24 50; Vault No. 13, $25 25. The bodies were re-interred in vaults and graves in other cemeteries, at Greenwood and elsewhere.

The area of the land taken for widening the street is 2,161 feet. The area of each vault, at $13\frac{1}{2}$ feet by $10\frac{1}{2}$ feet, exclusive of the steps, is not quite 142 feet. The area embraced in the steps did not probably exceed 18 feet. The amount awarded by the Commissioners of Estimate and Assessment for the land taken, was $28,000, being $12 83 per square foot. The same rate assumed for an area of 160 feet covered by each vault with its steps, would produce $2,052,80, and amount in the aggregate, for the twelve vaults, to $24,633,60.

The bodies in the eighty graves, about one hundred in number, were all removed by the church. The graves generally contained but a single body; but five or six held two. One held three, another four, and one held six.

The individuals buried in the eighty graves were identified in only five instances; three of whom were

re-buried elsewhere by the church, with the consent of their relatives. Another, lying in a grave covered with a tomb-stone inscribed "Pierson," was deposited under the church, where it yet remains unclaimed; and the fifth was Moses Sherwood, whose remains lay in a separate grave, indicated by a marble head-stone bearing the name of "Sherwood." No claim has been made for disturbing any of the eighty graves, except the one last mentioned. The remains of the hundred bodies found in the other graves, were enclosed in ten large boxes, and temporarily placed under the church.

The remains of Moses Sherwood were identified by his daughter, Maria Smith, by a ribbon by which his hair was tied in a *queue*, found lying with his skull and bones. These relics have been kept separate, and deposited under the church, until it shall be legally ascertained who has the legal right to re-inter them, and whose duty it is to defray the necessary expense.

The daughter, Maria Smith, acting for herself and her sister, and for the descendants of her brothers and sisters, five in all, who have died, now claims that they be re-interred in a separate grave, in such suitable locality as she may select; that the existing monument be erected over such grave, and that the necessary expense be defrayed out of the present fund in Court. The authorities of the church interpose no objection to this claim; they desire only the decent and legal re-interment of all the bodies disturbed by the widening of the street; but in view of the importance of the principle involved, they desire the direction of the Court.

There is no proof that any burial fee, or other equivalent, was ever paid to the church, for permitting said Moses Sherwood to be buried in their cemetery. It appears only, that he was buried there in 1801; that

the tomb-stone was erected at the time to mark his grave, and quietly stood, there, over his remains until they were thrust aside by the City Corporation, to give place to the cart-ways and foot-walks of Beekman-street as widened.

The Commissioners of Estimate and Assessment for widening Beekman-street, assessed the residue of the land, embraced in the conveyance **A**, belonging to the church, and remaining after taking the fifteen feet, as being benefited $15,875, but in consequence of the claim interposed by the City Corporation to a contingent reversionary interest in said land, the Commissioners, under the advice of their counsel, reported that the owners of the land thus assessed, were unknown or not sufficiently known. It appears by the testimony of Mr. George B. Smith, one of the said Commissioners, that both in awarding said amount of $28,000 for damage, and in assessing said amount of $15,875 for benefit, they regarded the land, without respect to the peculiar character of its occupation and use, as a church or as a cemetery, but in all respects, as if belonging to any other proprietor, and subject to his absolute and uncontroled disposal.

A written proposition made by the church to the City Corporation, dated April 6th, 1853, was produced in evidence on the present reference, in behalf of said City Corporation, in the following words :—

> At a meeting of the Board of Trustees of the Brick Presbyterian Church held this day, the following resolutions were adopted :—
>
> *Resolved*, In view of the contemplated change of location of the Brick Church, and in order that their church grounds in the Second Ward which may remain, after the widening of Beekman-street, *may be sold to the best advantage*, that it be proposed to the Corporation of the City of New-York, to unite with the Trustees of the Church in a sale of the church grounds at public auction, the proceeds of sale to be divided as follows :—Twenty-five per

cent. to the City Corporation, and the remaining seventy-five per cent. to the Brick Church.

Resolved, That in agreeing upon such sale, it be provided as one of the terms of sale, and of this proposition, that the said plot of ground be put up for sale, at the sum of two hundred and twenty-five thousand dollars, as the *minimum* price, and that the same be sold, without reserve, to the highest bidder over and above that sum.

Resolved, That in making this proposal to the Corporation, and also in the terms of sale, it be understood and expressly provided, that the church reserves to itself the privilege and right of taking the bell and the bell-rigging, and all the moveable property connected with the church edifice.

Resolved, That the church, by the above proposal, reserves *the right to the award* made by the Commissioners of Estimate and Assessment for the widening of Beekman street, with which it is understood the church is to satisfy the claims of all the vault-owners.

Resolved, That by the terms of any sale that may be made, *respect be had to the remains of those bodies* which are interred in the church grounds, and that proper provision be made by the Trustees for their removal to a suitable place, in some convenient public cemetery, and that sufficient time be allowed for that purpose.

It was also shown that a report was made, dated on said 6th of April, 1853, by Messrs. Flagg and others, the Commissioners of the Sinking Fund of the City, stating that the Trustees of said Brick Presbyterian Church "are desirous of selling the present site, for "the purpose of *erecting other church edifices in the* "*upper part of the City;* that they, a long time since, "applied to the Corporation for such modification, as "would enable them to sell the land to be occupied "*for business purposes;*" and recommending that the Corporation accept their said proposal,—but that the Common Council had not accepted the same.

The facts above stated present all the questions, in which the parties appearing on the present reference, have a common interest. Those questions are, as follows:

1. What legal interest, if any, has the Corporation of the City of New-York in the fund of $28,000 in question?

2. What are the respective rights of the Brick Presbyterian Church, and of the vault-owners in said fund?

3. Is the claimant, Maria Smith, entitled to payment out of the said fund, for the expense of re-intering the remains of her father, whose grave was taken away in widening the street? or to damages, for disturbing said grave?

Upon these questions, the order of the Court requires the undersigned to report his opinion. It is therefore subjoined, as follows:

OPINION.

1st. What legal interest has the Corporation of the City of New-York in the fund in question?

It is claimed in their behalf, that the conveyance A of February 25th, 1766, was intended to convey, and did convey the lands therein mentioned to the grantees, to be used only as a church and cemetery; and that the portion fifteen feet in depth, which has been taken for a public street, having ceased to be used for the purposes authorised by said conveyance, the title thereto has consequently reverted in fee to the Corporation of the City as grantors, and that they are therefore entitled to the whole of the $28,000 awarded as its value, and now in Court.

In opposition to this claim, the Brick Presbyterian Church contend,—

1st. That the said conveyance **A** having granted the lands in fee, any provision limiting the mode of use, or any condition in restraint of alienation, is repugnant to the grant and void.

2d. That the grantees took the land for religious and charitable uses, and may rightfully convert it to any other purpose, or sell it free from restriction, so that they apply the proceeds to the religious and charitable uses, for which it was first intended.

3d. That even if the condition reserved is valid, it does not confine the use of the land by the grantees to religious purposes, nor prohibit them from converting it to any secular use which is public;—that the only secular uses prohibited, are those which are private;—that the secular use to which the portion of the land in question is now devoted, is not a private use, and therefore is no breach of the condition,—and that consequently the grantors, the Corporation of the City, have no right of re-entry, nor legal estate or interest in the premises.

The questions thus presented have been attentively examined, but only the last has been decided, as that has seemed to be conclusive.

The recitals in the conveyance, which state certain reasons why the grantees desired to purchase the land, cannot be allowed to narrow the express words of the grant, nor to enlarge those of the condition which it reserves. They state only that the grantees at that time (February, 1766,) desired the premises for religious purposes, and were willing "to erect such an edi-
"fice as will contribute to public ornament." This they did;—and the edifice stands there yet, where it has stood for nearly a century. Nothing in those recitals requires the grantees perpetually to keep it there, or to keep the land, or any part of it for ever, for reli-

gious purposes. On the contrary, the condition plainly implies, that the church might desire, at some future time, to devote the land to secular use, and the only restriction was, that it should not be a private, secular use. The provision of the condition precisely is, that the grantees shall not "appropriate, apply or con- "vert the same to PRIVATE, *secular* uses," plainly permitting them to convert it to any private use, not secular, or any secular use, not private. Until its uses shall be both private and secular, there can be no breach of the condition.

Now, what is the use to which it is, in fact, appropriated? A part of it, fifteen feet in depth, has been taken by the public, and converted into one of the public streets of the City of New-York; the residue remains occupied as a church and cemetery. The portion thus taken for the street, is converted to a secular use; but that is not a private use: it is emphatically and wholly public. Indeed, it must be public, for if it were not, the land could not have been constitutionally taken from the church. It was private property, and could not have been compulsorily taken for private use, or any but a public use. If the use be not public, no title to the land taken has legally passed; the City Corporation, in widening the street, are trespassers: the land still belongs to the church, and they have done no act, to convert it to any secular use whatever.

If the conveyance in question had been made by an individual, and not by the City corporation, it would have been no breach of the condition, for the church voluntarily to convey the land to the City Corporation, for any public purpose—for a street, or a market, or a square, or a court house, or a prison, or a reservoir, or a hospital,—or to convey it to the government of the State, or of the United States, for

any purpose purely public, however secular; and still less would it be a breach of the condition, for the land to be compulsorily taken from the church, by either of those governments for any such public purpose.

The grantor of an estate in fee, upon condition, has no legal estate or interest in the land, in possession, remainder or reversion, until the condition be broken. Technically, he has not even a "possibility of a reverter," but only a naked possibility of a forfeiture. But in the present case, even the naked possibility of a forfeiture has been extinguished, for the land to which it could attach, is now indefeasibly vested in the City Corporation, to be used for ever as a public street, rendering its conversion to private use, and a consequent breach of the condition, for ever impossible. Nor was it the act of the grantees, but wholly the act of the grantors, which thus converted the land to its present use. It was the City Corporation that prosecuted the compulsory proceedings which wrested from the church the land, it was quietly using for religious purposes; and the claim they now advance to the $28,000, awarded to the legitimate owners, for damages for the loss of the land so taken, has no foundation, either in law or equity.

The proposition made by the church to the City Corporation, to give a quarter of the proceeds of sale of the remaining portion of the land for relieving it from all restriction, so that it might be converted not only to public, but to private, secular uses, in no way enlarged the rights of the City Corporation, nor lessened those of the church, to the award in question. It was made by way of compromise, and was not accepted by the City Corporation, and it moreover expressly reserved to the church the whole of the award.

The legal interest held by the church in the lands,

was what is technically denominated a "fee farm" estate, out of which the Corporation of the city had reserved a perpetual annual ground-rent, originally of forty pounds, but subsequently reduced to twenty-one pounds five shillings, or $53.12. Under the 181st section of the act of April 9th, 1813, for opening streets, &c., a rateable proportion of that ground-rent has been extinguished, and to that extent the Corporation of the city is entitled to indemnity, out of the fund in court. The whole of the land charged by the ground-rent, embraced in superficial area a little more than eight city lots, of which the portion taken is a little less than one. It will be sufficiently accurate to estimate, that one-eighth of the land was taken and one-eighth of the ground-rent consequently extinguished, being six dollars and sixty-five cents. That sum is the interest at five per cent. annually, on one hundred and thirty-three dollars. To that principal sum the Mayor, Aldermen and Commonalty are now legally entitled, and it is the only amount they can properly claim from the fund in question.

2. What are the respective rights of the Brick Presbyterian Church, and of the vault-owners, in the said fund?

It is claimed in behalf of the vault-owners, that the grants from the church were intended to convey, and did legally convey, the fee of the land occupied by the vaults and their steps:—that the church retained no legal estate or interest in the land so conveyed, and cannot rightfully claim any portion of the sum awarded as its value: but that said vault-owners are entitled each to their rateable proportion of the sum awarded, to wit, in the ratio borne by the area of the land occupied by said vaults and steps, to the area of the whole of the land taken, being, as shown by the proofs, $2,052.80 for each vault.

This claim is contested by the church, on the ground that the grants of the vaults were not intended to convey, and did not convey, any portion of the legal fee, but only a privilege or easement in the land to bury the dead;—that the whole legal estate in the land remained in the church, subject only to such privilege or easement; and that the possession of such of the vault-owners, who produce no grant or paper title, proves only that as occupants, they were enjoying a similar privilege or easement.

The undersigned does not feel at liberty to inquire how far this legal view of the grants is correct, for the reason that the question has been distinctly and authoritatively settled by his Honor Vice-Chancellor McCoun, in the case reported in 3 Edwards' Chancery Reports, p. 155, involving the legal construction of these very grants. The judgment in that case was, that the grants "conferred a *title* to the *land*, and not a mere "easement or privilege to inter the dead." The Vice-Chancellor, however, expressed his opinion that the grants conveyed a "base fee," and not a fee simple absolute; and it is therefore necessary to determine practically the pecuniary value of the interest so defined to be a base-fee, by ascertaining how far it falls short of a fee simple absolute. The one is necessarily less than the other. The unqualified estate in fee simple absolute is shown, as above, to be $ 2,052 80. How much is abstracted from that value, by the qualification of its mode of enjoyment? What is the extent of that qualification? How much, and how far does it "debase" the fee?

The qualification does not debase or impair the fee, by any limitation of time. The *habendum* of the grant **D** of the vault No. 11, is to the grantees, their heirs and assigns for ever. The lease **E** of the vault

No. 7, is for 999 years, which for all practical purposes is equivalent to a grant in perpetuity. The usufruct being thus perpetual, it is practically unimportant whether the grant which secures it, operates technically to convey a "fee," or only an "easement." The proprietor of a perpetual easement to bury the dead, virtually possesses a right, in all pecuniary respects as valuable, as a technical fee in the land restricted to that single use. The mode of enjoyment, the power of enjoyment, and the perpetuity of enjoyment, are precisely alike in both. But a perpetuity of enjoyment of land does not necessarily comprise its whole pecuniary value. A "fee" in land means nothing but an estate of inheritance therein, and not necessarily its whole usufruct. It may embrace, as in the present case it does embrace, only a portion of the usufruct. The word measures only the duration of the estate. It defines its quantity, but not its quality. A fee is rendered "base," by debasing not the quantity, but the quality of the estate—by limiting not the duration, but the mode of enjoyment. It is "qualified," and thereby debased, by narrowing, by abridging, by defining, the otherwise unlimited power of enjoyment—by singling out the "*qualis*" *modo*, the specific mode of usufruct, and thereby excluding all other modes.

The only pecuniary value of land is in its usufruct; and the whole pecuniary value of a fee in land can therefore only be found, in the absolutely unrestricted right to every possible mode of usufruct. If any mode whatever be subtracted or withheld, the pecuniary value is reduced precisely to that extent. In the case above cited, his Honor the Vice-Chancellor, in stating that the vault-owners took "a base fee, *such as had been conveyed to the church*," evidently intended to assert only, that the two estates were of the same legal

species, not that they were equal or equivalent in a pecuniary sense. They were both "base" fees, but they differed most essentially in the extent of the qualification of their modes of enjoyment, and consequently in their comparative degrees of debasement. The restrictions on the usufructuary right of the church, debarred it only from uses which should be both private and secular, leaving open, without stint or limit, the whole field of public usufruct, whether religious or secular; while the vault-owners were absolutely cut off from every possible or imaginable mode of use, except the one, single, solitary office of interring the dead.

Nor must we unduly enlarge the legal comprehensiveness of the word "*land*," as used in these grants, or of "*ground*," if taken to be synonymous with it. The remarkably comprehensive definitions of "land" by legal writers, cannot be taken in the present case without due restriction. Blackstone declares that it includes "not only the face of the earth, but every-"thing under it or over it": that "by the name of "land, which is *nomen generalissimum*, every thing "terrestrial will pass"! 2 *Comm.* 19. Sir Edward Coke, in the First Institute, 4 *a*, in an animated eulogy of "land," as the "habitation and resting-place "of man," and "the best of the four elements," expatiates glowingly on its various uses. "Out of it," says he, "cometh man's food, and bread that strength-"ens man's heart, and wine that gladdeth the heart "of man, and oyle that maketh him a cheerful coun-"tenance;"—"it is replenished with hidden treasures, "metals and precious stones, and many other things, "for profit, ornament and pleasure;" and in a still higher strain, concludes, that "the earth hath *in law* "a great extent upwards, not only of water, as hath "been said, but of ayre and all other things even

"*up to heaven:* for *cujus est solum, ejus est usque* "*ad cœlum*,"—to which legal definition, some of the older writers, either penetrating more deeply into the subject, or regarding it from a different point of view, have subjoined, "*usque ad inferos!*"

If these, then, are the proper boundaries, and attributes, and properties of "land," when conveyed in fee simple absolute, which of them can legally be assigned to the "land" or ground now under consideration? Does it, in truth, embrace "everything terrestrial?" Does it, in fact, include "not only "the face of the earth, but everything under it and "over it?" If it include the whole of the "*solum*," does it indeed extend upwards, "*usque ad cœlum?*" Does it extend, a single hair's breadth, above the surface of the earth? The grant expressly describes and defines it, as a "piece of ground *under* the earth." No monument, or memorial or structure of any kind could be erected upon the land, or over the land, for the stone which was to cover it, was to be "*even with the surface* of the ground." That stone was, in fact, a landmark and a boundary. It defined the upper limit of the land conveyed. It distinctly established the dividing line, the horizontal plane, bisecting the fee simple of the "land," and separating the underlying "*solum*" from all above it. The superincumbent portion was appropriately retained by the church, *usque ad cœlum*, subject only to a right of passage through it, attached as an easement to the subterranean portion conveyed.

The reservation of the portion of the "land" above the surface, resulting from the boundary line confining below the surface the portion of the land granted, necessarily left in the church, a present estate in fee in the part reserved—and the fact is important, because it distinguishes their right in the land, as a present

existing estate in possession, from that mere, naked, contingent possibility of a forfeiture, reserved by the City Corporation in the land conveyed by them to the church. A separate estate of inheritance in real property above the surface, physically surmounting an underlying estate at and below the surface, is familiar to the law, and was recognized as recently as the case of Miss Coutts' box in Drury Lane Theatre, reported in 2 Gale and D. 426. Through their own upper *stratum* or division of the "land," extending from the surface "*usque ad cœlum*," the church indisputably had the right of way into their edifice, and the right of view from its front windows out to the street. Nay, more; they might have erected over these very vaults any addition to the edifice, so that they left the proprietors a sufficient and proper access, and that addition, by enclosing the vaults within the walls of the sanctuary, so far from injuring, would have enhanced their proper value.

The usufructuary interest, then, of the vault-owners was wholly subterranean—not on the earth, but wholly under the earth. The usufruct restricted by the very force of the term "interment," was wholly *within* the earth. It lay in utter darkness, cut off from every imaginable purpose of "business, profit, or ornament." It derived no advantage from contact with the living world, but in its own single, peculiar and narrow office, was impaired rather than benefited by the human activity, which enhanced the usufructuary value of all above it.

In estimating then the pecuniary value of "land," thus deprived of all its ordinary attributes and capacities, we cannot properly measure it by land in the vicinity, unrestrictedly devoted to traffic, or any other active mode of usufruct. In truth, it should not be estimated or regarded at all, as lying within a commer-

cial city, but only as forming part of a "*cemetery*,"—by its very appellation a "sleeping-place," a dormitory of the dead—and in that true sense, deriving its primary and principal, if not its only value from its repose and security from disturbance.

The proper pecuniary value of a cemetery may, however, be enhanced by its religious accessories, and particularly by its position in a church-yard, whether the ground be consecrated in form, by ecclesiastical solemnities, or in feeling, by proper religious associations. Anything, whether real or imaginary, which renders land more desirable, as a place of interment, necessarily adds to its pecuniary value. In this sense, the vaults of the Brick Presbyterian Church might derive, and doubtless did derive a superadded money value, from their proximity to the venerable edifice, casting its shadow over the successive generations, going out from its honored walls to their last repose. But even this element was subject to contingency. The continuance of the church edifice, by a religious denomination whose creed attaches no inherent, immutable sanctity to their place of worship, was by no means certain. Considerations of duty might well carry the edifice to portions of the city, opening a broader field of usefulness. Indeed, it appears in evidence, that a sale of the church, even for private, secular purposes, had been actively agitated by its trustees, which, if effected, would wholly extinguish everything like sentimental value in the vaults, derived from religious association, and virtually compel the owners to remove their dead to some more suitable locality. The conversion of the Middle Dutch Church into a Post-Office, as shown by the proofs, strikingly shows the pecuniary effect upon the vaults of a church, produced by secularizing the edifice to which they were attached.

A vault in a city church-yard may also possess a peculiar element of value, in its greater security from violation; counterbalanced, however, by the hazard, that it may be invaded, as in the present case, under the form of legal proceedings, by the overpowering demands of commerce. The vaults in question were surrounded by a substantial iron fence, including them and the church in one common enclosure. Equal security appears, however, to be furnished by the enclosures of the vaults in the other city church-yards, and in the Marble Cemetery in the Second Avenue, and which may now be purchased for $100 or $150. It appears, also, that the dead are practically secure in Greenwood Cemetery, the enclosure of which has fully protected from disturbance, the remains of the 45,349 individuals that have been buried there, in the twelve years from 1842 to 1854.

A vault in a city church-yard may also possess an element of value, in its cheap and easy accessibility, saving, as it appears, about $15 in carriage hire for each interment. But it does not exceed, in this respect, the vaults above referred to in the other city church-yards—worth only $150.

It further appears, that the proprietors of the vaults in question, paid several penalties of $250 each, for several interments during the period between the years 1823 and 1839, when city vaults were subjected to that burthen. The fact does not, however, prove that the same penalties would now be paid. The general change of sentiment in the last few years, produced by the establishment and embellishment of rural cemeteries at Greenwood and elsewhere in the vicinity of the city, would undoubtedly lead the proprietors of city vaults to select those cemeteries as places of interment, rather than pay such penalties. The

proofs also show the extent to which interments in city vaults has fallen into disuse, being in the last year, only 25 in Trinity church-yard, 20 in St. Thomas', and 25 in St. Marks'; and in the two Dutch church yards only two.

It appears, then, from this analysis of the usufructuary value of the vaults in question, that its elements consist all but exclusively, of security, accessibility, and repose. If this be true, their pecuniary value might be justly measured, by assuming the price of vaults in other city church-yards, possessing the same elements in the same degree—and this would not exceed $150. It seems quite apparent, that a vault in Greenwood Cemetery, notwithstanding the additional expense of carriage hire, would afford, in its superior attractions in many other respects, an ample equivalent—and the undersigned has therefore adopted it, to make sure of doing no injustice to the proprietors of a property, the taking of which against their consent, has naturally excited peculiar sensibilities. If public opinion may be taken as a guide, a vault in Greenwood surrounded by a proper iron railing, is very far preferable to any of the vaults in question. In fact, the action of the vault-owners themselves, has manifested quite distinctly their preference for places of interment out of the city. The remains removed from the twelve vaults, have been deposited in only two instances, in any other city church-yard or city cemetery. In several cases, they were removed to Greenwood—in one, to New-Jersey—in another, to a church-yard in Westchester—while Mr. Washington Irving has selected a permanent resting-place for his ancestors and himself, amid "the tranquil solitudes of Sleepy-Hollow," a locality consecrated by those ever-living elements of genius, taste, and feeling, which

will preserve it from profanation, through every mutation of human creeds or human laws. In truth, it is more the office of the moralist and the poet, than of the lawyer or the conveyancer, to weigh these delicate equivalents in the sleep of the grave. It is Gray and Goldsmith, and not Coke or Blackstone, who can best decide whether the calm repose of the rural cemetery, the "solemn stillness" of the country churchyard, be not preferable, in every element of proper value, to any "easement," or place of deposit however perpetual, amid the din, and dust and turmoil of a crowded, trading city.

The cost of a vault in Greenwood Cemetery, 9 feet by 15, including the land and the iron railing, and the expense of removing and re-interring the bodies, is proved to be $590. The remains were removed from the vaults in question in the year 1853, and generally as early as the 1st of May. The undersigned therefore respectfully reports, that in his opinion, the sum of $590 should be allowed to the owners of each of said twelve vaults, with interest from the 1st of May, 1853, to the 15th of January, 1856, being $113.57, in all $703.57,—and amounting, for the twelve, to $8,482.84.

There should, however, be deducted from said twelve sums of $703.57, respectively, such amounts as are shown by the proofs, to have been expended by the church in removing the remains. Those expenditures are in the aggregate $209.25, and reduce to $8,233.59 the total amount payable for the vaults, by the fund in court.

The names of the present owners of said vaults, so far as yet discovered, are particularly specified in the body of the proofs. In view of the very minute subdivision of the ownership of many of them,

reducing the fractional value in some instances as low as ten dollars, the undersigned has felt justified in postponing, until the further order of the Court, any search for incumbrances, the expense of which would consume so large a portion of the whole value.

3. Is the claimant Maria Smith entitled to payment out of the said fund, for the expense of re-interring the remains of her father, Moses Sherwood, whose grave was taken away in widening the street, or to damages for disturbing the grave?

The proper disposal of this question by this Court will be important, not so much in the pecuniary amount involved in the present instance, as in furnishing a rule for other cases where cemeteries may be disturbed, either by their proprietors or by public authority. It broadly presents the general question, which does not appear to be distinctly settled in this State:—Who is legally and primarily entitled to the custody of a dead body? and as a necessary result, Who is legally bound to bury it? and further, if a body be ejected from its place of burial, Who then is legally and primarily entitled to its custody, and who is bound to re-bury it?

The widening of Beekman-street by the Corporation of New-York, removed every building and other impediment which stood in its way. Among them was the grave, the "*domus ultima*" of Moses Sherwood, over which a marble tomb-stone, inscribed with his name, had been standing more than fifty years. His skull and bones, and portions of his grave-clothing, were found lying in his grave. Had any one any legal interest in that grave, or any right to preserve the repose of its occupant? or any legal interest in the monument, or right to preserve its repose? Do these rights come within the legal denomination of "private pro-

perty," which the Constitution forbids to be taken for public use without just compensation?

Property has been concisely defined to be, "the "highest right a man can have to a thing." Blackstone spreads out the definition, into the "sole and "exclusive dominion which one man claims and exer- "cises over the external things of the world, in total "exclusion of the right of any other individual in the "universe." 2 *Black. Comm.* 2.

The things which may thus be exclusively appropriated, and thereby made "private property," are not confined to tangible or visible objects, for light and air are "property," and belong exclusively to the occupant so long as he has possession. The right to the mere repose of a grave, although intangible or invisible, may none the less be property. The dividing line between "property" as a thing objectively appropriated *by* a person, and a "personal right" as subjectively belonging *to* a person, is not always entirely distinct. The proprietary right to a grave-stone, and the personal right to its undisturbed repose, may measurably partake of both. In a certain sense, even a purely personal right may be said to be appropriated. Nor is the distinction very essential; for if there be a right in a grave or its contents, or appendages, which the law will recognize, it matters little whether the right is appropriated by, or belongs to its possessor. Is there, then, a right of which a court of justice will take cognizance?

In resorting to England for light on this subject, we encounter a body of law grown up under circumstances differing widely from our own. The jurisprudence of that country is peculiarly compounded, embracing largely the ecclesiastical element, from which ours is exempt; and it has given birth to

anomalies which we are hardly required to adopt. This is strikingly manifest in the matter of the dead, in which the partition of juridical authority between the Church and the State, forming one composite system, has materially narrowed the powers and the action of the courts of common law. It is believed that an attentive examination of the history of this division of judicial power, will show that it is wholly peculiar to England, and that the decisions and *dicta* of their courts and legal writers on this subject, ought not to exert any controling influence over our legal tribunals.

In surveying the various changes in the organization and powers of the British courts of justice, produced successively by the Roman, Saxon, and Norman conquests, it is difficult to fix with precision, the period when the judicial authority began to be divided between the State and the Church. Christianity had made some progress in Britain while yet remaining under the Roman power, but does not appear to have mingled itself materially with the governmental administration. The Saxon conquerors, who succeeded the Roman in the fifth century, brought in Paganism for about one hundred and fifty years; but it was extirpated about the close of the sixth century by the vigor of St. Augustine, under the pontificate of Gregory the Great. It is quite apparent, that the clear-sighted incumbents of the Holy See, by that time had perceived in the burial of the dead, a very important and desirable element of spiritual dominion. It was the sagacity, not less than the piety of that distinguished pontiff, which led him to introduce the custom of burial in churches, to the end, as he declared, that the relatives and friends of the dead might be induced, more frequently to pray for their repose. Occasional interments, in places of worship or their immediate vicinity,

had indeed been made by the early Christians, as far back as the reign of Constantine; but it was not until after the pontificate of Gregory, and the rapid increase by his successors of the temporal power of the Church, that burial-grounds were generally attached to places of worship, and subjected by formal consecration to ecclesiastical authority.

The juridical history of the Romish Church in England, from the sixth century to the thirteenth, exhibits its earnest efforts and its steady and all but uninterrupted progress, not only in strengthening its proper spiritual power, but in obtaining the exclusive temporal, judicial cognizance of all matters touching the ecclesiastical edifices and their appendages, and especially their places of burial. During that period, the office of sepulture, originally only a secular duty, came to be regarded as a spiritual function—so much so, that the secular courts, in the cases as early as the 20th and 21st, Edward I. cited in 2 Inst. 363, in determining whether or not a building was a church, inquired only whether it had sacraments *and sepulture.*

It is generally stated, that burial in church-yards was introduced into England by Cuthbert, Archbishop of Canterbury, in the year 750. The form of their consecration is even yet preserved, in some of its essential features, by the Established Church. The invocation, as given by Burns in his Ecclesiastical Law, 1 vol. p. 334, after declaring that the duty has been taught by God, "through his holy servants, in all "ages, to assign places where the bodies of the saints "may rest in peace and be preserved from all indigni-"ties," asks the Divine acceptance "of the charitable "work, in separating the portion of ground to that "good purpose."

The sagacious policy of the Romish ecclesiastics,

in attaching the place of interment to the church, was duly strengthened by the stringent provision of the canon law, which prohibited heretics from Christian burial. To repose in any but consecrated earth, soon came to be ignominious; and thus the church-yard became a vital portion of the material machinery, for enforcing spiritual obedience and theological conformity. Nor was the power neglected. It governed Europe for several hundred years, and it was but shortly before the Protestant Reformation in England, that one Tracy, being publicly accused, in convocation, of having expressed heretical sentiments *in his will*, and being found guilty, a commission was issued to dig up his body, which was done accordingly. 1 Burns, Eccl. Law, 266.

During the early portion of the Anglo-Saxon period, the power of the clergy over the dead was kept in check, by uniting the lay with the clerical order in the ecclesiastical tribunals; but their jurisdictions were separated soon after the Norman conquest, and the effect upon the dead is plainly discernable. The exclusive power of the ecclesiastics denominated, in legal phrase, "ecclesiastical cognizance," became not only executive, but judicial. It was executive, in taking the body into their actual, corporeal possession, and practically guarding its repose in their consecrated grounds; and it was judicial, as well in deciding all controversies involving the possession or the use of holy places, or the pecuniary emoluments which they yielded, as in a broader field, in adjudicating who should be allowed to lie in consecrated earth, and, in fact, who should be allowed to be interred at all.

The deplorable superstition that could induce a people, to entrust such a power to any but its civil government and civil courts, is amazing, and yet we

find the sturdy English nation, under the government of William of Normandy, stripping their cherished Anglo-Saxon courts of all power to protect the dead, and yielding them up blindfold to priestly cognizance. As Sir William Blackstone well says, it was a "fatal encroachment" on the ancient liberties of England. Eight centuries have not sufficed to repair the mischief. Anselm and Becket, in modern garb, live even yet.

The deep-seated, fundamental idea of human burial, lies in the mingling our remains with the mother earth. The "dust to dust! earth to earth! ashes to "ashes!" of the Church,—echoing, in deeper solemnity, the "*ter pulvere*" of Horace, and hallowing the dying wish of Cyrus,—finds a universal response, in the holiest instincts of man in every age. Here, then, was the tender spot, for subtle power to touch. Logically pursuing this idea, the ecclesiastical process of excommunication prohibited burial in the earth at all, whether consecrated or not. The precise words of the *formula*, as used in the tenth century, gave over the body of the contumacious offender, for food to the fowls of the air and the beasts of the field. "Sint cadavera eorum, "in escam volatilibus cœli, et bestiis terræ." In some instances, the sentence was more definite and specific, confining the corpse to the hollow trunk of a tree, "in "concavo trunco repositum." The essence of the idea being to keep the body out of the earth and on the surface, it was sometimes figuratively expressed, in monkish rhetoric, by "the burial of an ass,"—or by a stronger and more characteristic image, as "a dunghill."—"Sepultura *asini* sepeliantur, et in *sterquilin-*"*ium* super faciem terræ sint." The afflicted but sinful laity, to hide the horror of the spectacle, were wont, at times, to cover the festering dead with a pile of stones, thereby rearing a *tumulus*, or "*bloc*;" so

that the process came to be commonly known, in mediæval Latin, as "*imblocare corpus.*" *Du Cange Glossary*, "*Imblocare.*"

The same dominant idea of the unfitness of spiritual offenders to pollute the earth, can be distinctly traced through the judicial, ecclesiastical condemnations for several centuries. John Huss and Jerome of Prague, being burned at the stake for heresy, early in the fifteenth century, under the ecclesiastical order of the Council of Constance, their ashes were not allowed to mingle with the earth, but were cast into the Rhine.

The legal process of scattering the ashes of the heretic, was evidently a very significant and cherished feature, in the ecclesiastical code of procedure; and it was executed in the different portions of Christendom, with all attainable uniformity and precision. Within its comprehensive range, it embraced not only the ashes of the heretic freshly burnt, but the mouldering remains of any who had been suffered, through mistake or inadvertency, to slip into their graves. Wickliffe, the first English translator of the Scriptures, had ventured, in life, to question certain points of dogmatic theology; but dying in his bed, in the year 1384, had been allowed to sleep, for forty-one years, in a church-yard in Leicestershire. The assembled dignitaries in the Council of Constance, after duly disposing of the ashes of Huss and Jerome, judicially declared the heresy of Wickliffe; and his bones were accordingly dug up and burnt, and the ashes thrown into the river Avon, in the due exercise of the executive branch of ecclesiastical cognizance, in the year 1425 of the Christian era.

Nor was the ecclesiastical cognizance of the dead confined to delinquents of low degree, or in the plainer walks of life. The Emperor of Germany, Henry the

Fourth, the victor of more than sixty battles, dying under papal excommunication by Hildebrand, the seventh Gregory, was compelled to lie for five years unburied, in the very sight of the majestic cathedral of Spires, which his father had commenced and he had completed.

But the high and transcendant energy of ecclesiastical cognizance was completely developed in England, in the thirteenth century, when it reached its culminating point, with the whole kingdom as the defendant. From the year 1207 to the year 1213, the Interdict of Innocent the Third, kept out of their lawful graves all the dead, from the Channel to the Tweed. No funeral bell in the kingdom was permitted to toll; the corpses were thrown into ditches, without prayer or hallowed observance; and the last drop of priestly malice and vengeance was exhausted, in compelling all who wished to marry, to solemnize the ceremony in the church-yard.

It was during this unbridled career of papal aggrandizement through these dark and dismal ages, that the ancient, civil courts of England gradually lost their original, legitimate authority over places of interment, as private property, and their proper and necessary control over the repose of the dead. The clergy monopolizing the judicial power over the subject, burial was committed solely to ecclesiastical cognizance, while the secular courts, stripped of all authority over the dead, were left to confine themselves to the protection of the monument and other external emblems of grief, erected by the living. But these they guarded, with singular solicitude. The tomb-stone, the armorial escutcheons, even the coat and pennons, and ensigns of honor, whether attached to the church edifice or elsewhere, were raised, as "heir-looms," to

the dignity of inheritable estates, and descended from heir to heir, who could hold even the parson liable, for taking them down or defacing them.

The reverent regard of the common law for these memorials, is curiously manifested by Coke in the Third Institute, p. 203, where he expatiates upon a monumental stone, in his time more than four hundred years old, inscribed with the name of a Jewish rabbi, and inlaid in the ancient wall of London—as if to intimate, that the law would protect from injury that venerable piece of antiquity.

But at this point the courts of the common law stopped, and held, in humble deference to the ecclesiastical tribunals, that the heir could maintain no civil action for indecently or even impiously disturbing the remains of his buried ancestor, declaring the only remedy to belong to the parson, who, having the freehold of the soil, could maintain trespass against such as should dig or disturb it. The line of legal demarcation established in this subject, between the ecclesiastical and the common law courts, is thus defined by Coke: "If a nobleman, knight, esquire, etc., "be buried in a church, and have his coat-armour and "pennons, with his armes, and such other insigns of "honour as belong to his degree or order, set up in the "church, or *if a grave-stone be laid or made for memo-*"*ry of him*, albeit the freehold of the church be in the "parson, and that these be annexed to the freehold, yet "cannot the parson, or any, take or deface them, but he "is subject to an action to the *heire and his heires*, in "the honour and memory of whose ancestor they were "set up." 1st Inst. 4, 18 *b*. In the Third Institute, page 203, he asserts the authority of the Church, as follows: "It is to be observed," says he, "that in "every *sepulchre* that hath a monument, two things

" are to be considered; viz: the monument, and the " *sepulture* or buriall of the dead. The *buriall* of the " *cadaver*, that is *caro data vermibus*," (flesh given to worms,) " is *nullius in bonis*, and belongs to " ecclesiastical cognizance; but as to the monument, " action is given, as hath been said, at the common " law for the defacing thereof."

With all proper respect for the legal learning of this celebrated judge, we may possibly question both the wisdom and the etymology of this verbal conceit, this fantastic and imaginary gift, or outstanding grant to the worms. In the English jurisprudence, a corpse was not given or granted to the worms, but it was taken and appropriated by the Church. In Latin, it was a "*cadaver*" only because it was something *fallen*, (*à cadendo*,) even as the remains of fallen cities, in the letter of Sulpicius to Cicero, (Lit. Fam. 7,) are denominated "*cadavera oppidorum*."

The learned lexicographers and philologists Martinius and the elder Vossius, both of them contemporaries of Coke, wholly dissent from his whimsical derivation. Martinius derives "cadaver" from "*cadendo, quia stare non potest*," Lexicon Philologicum Martinii, 1720;—while Vossius unequivocally reproves the derivation in question, as an act of pleasant but inflated trifling. "*Suaviter nugantur*," says he, " qui " cadaver *conflatum aiunt*, ex tribus vocibus, caro data " vermibus." Etymologicon Linguæ Latinæ, Amsterdam, 1662. And yet this inflated Latin trifle, the offspring only of Coke's characteristic and inordinate love of epigram, has come down through the last three hundred years, copied and re-copied, and repeated again and again by judges and legal writers, until it has imparted its tincture to the law of the dead, throughout every portion of the earth which listens to the English tongue.

But even the *dictum* itself, if closely examined, will not be found to assert, that no individual can have any legal interest in a corpse. It does not at all assert that the corpse, but only that the "*buriall*" is "nullius in bonis;" and this assertion was legally true in England where it was made, for the peculiar reason above stated, that the temporal office of burial had been brought within the exclusive, legal cognizance of the Church, who could and would enforce all necessary rules for the proper sepulture and custody of the body, thus rendering any individual action in that respect unnecessary. The power thus exercised by the ecclesiastical tribunals was not spiritual in its nature, but merely temporal and juridical. It was a legal, secular authority, which they had gradually abstracted from the ancient civil courts, to which it had originally belonged; and that authority, from the very necessity of the case, in the State of New-York, must now be vested in its secular courts of justice.

The necessity for the exercise of such authority, not only over the burial, but over the corpse itself, by some competent legal tribunal, will appear at once if we consider the consequences of its abandonment. If no one has any legal interest in a corpse, no one can legally determine the place of its interment, nor exclusively retain its custody. A son will have no legal right to retain the remains of his father, nor a husband of his wife, one moment after death. A father cannot legally protect his daughter's remains from exposure or insult, however indecent or outrageous, nor demand their re-burial if dragged from the grave. The dead deprived of the legal guardianship, however partial, which the Church so long had thrown around them, and left unprotected by the civil courts, will become, in law, nothing—but public nuisances, and their

custody will belong only to the guardians of the public health, to remove and destroy the offending matter, with all practicable economy and despatch. The criminal courts may punish the body-snatcher who invades the grave, but will be powerless to restore its contents. The honored remains of ALEXANDER HAMILTON, reposing in our oldest church-yard, wrapped in the very bosom of the community, built up to greatness by his consummate genius, will become "*nullius in bonis*," and belong to that community no longer. The sacred relics of Mount Vernon may be torn from their "mansion of rest," and exhibited for hire in our very midst, and no civil authority can remand them to the tomb.

Applied to the case now under examination, the doctrine will deny to a daughter, whose filial love had followed her father to the grave, and reared a monument to his memory, all right to ask that his remains, uprooted by the City authorities and cast into the street, shall again be decently interred. In England, with judicial functions divided between the State and the Church, the secular tribunals would protect the monument, the winding-sheet, the grave-clothes, even down to the ribbon (now extant) which tied the *queue*; but the Church would guard the skull and bones. Which of these relics, best deserves the legal protection of the Supreme Court of law and equity of the State of New-York? Does not every dictate of common sense and common decency demand a common protection, for the grave and all its contents and appendages? Is a tribunal like this, under any legal necessity for measuring its judicial and remedial action, by the narrow rule and fettered movement of the common law of England, crippled by ecclesiastical interference? but may it not put forth its larger powers and nobler attributes, as a court of enlightened equity and reason?

The due protection of the dead, engaged the earnest attention of the great lawgivers of the polished nations of antiquity. The laws of the Greeks carefully guarded the private rights of individuals in their places of interment; and a similar spirit shines forth, in the clear intelligence and high refinement of the Roman jurisprudence. In the Digest of the Civil Law, pl. 47, tit. 12, we find the beneficent and salutary provision, which gave a civil remedy, by the "*Sepulchri violati actio*," to every one interested, for any wanton disturbance of a sepulchre, and where "ULPIAN, prætor, ait,—"Cujus dolo malo sepulchrum violatum esse dicetur in "eum in factum judicium dabo ut *ei ad quem pertineat*, "quanti ob eam rem æquum, videbatur condamnetur. "Si nemo erit at quem pertineat, sive agere nolet; qui-"cunque agere volet, ei centum aureorum, *actionem* "*dabo*;"—a sepulchre being comprehensively defined, by another clause, to be, any place in which the body or bones of a man were deposited—"*Sepulchrum est, ubi corpus ossave hominis, condita sunt.*" Dig. pl. 7, § 2.

Nor does the *dictum* of Coke, now under consideration, assert—for historically it would not be true—that no individual right to protect the repose of the dead had ever existed, under the common law of England. So far from that, we see in the provision above extracted from the Digest, that the individual right did exist, during the greater part of the four hundred years when England, then called Britain, formed part of the Roman empire. In the six centuries of Saxon rule which succeeded, as is forcibly observed by Chancellor Kent, "the Roman civilization, laws, usages, "arts and manners must have left a deep impression, "and have become intermixed and incorporated with "Saxon laws and usages, and *constituted the body*

"*of the ancient English common law.*" 1 *Kent Comm.* 547.

The provision in question had been introduced into the Roman jurisprudence, long before its systematic codification by Justinian. It bears on its face the name of Ulpian, the great Roman jurist, who not only lived as early as the second century of the Christian era, but actually assisted, (as Selden states in his Appendix to Fleta,) in the judicial administration of Britain. He was the contemporary and doubtless the personal and professional friend of the celebrated prætorian-prefect Papinian, himself the most distinguished lawyer of his age, and chief administrator, in the year 210, of the Roman government at York. Selden glowingly depicts the judicial illumination of that early British age, as flourishing alike under the "*Jus Cæsareum*," the imperial law, and its able administration by those two most accomplished and illustrious Romans, "viri peritissimi, illustrissimique è Romanos." *Selden App. to Fleta*, 478.

Nor is there any reason to believe that the Romanized British, when released, in the fifth century, from their political allegiance to the Empire, abandoned the civilization, or abrogated the laws or usages which they had so long enjoyed; still less that they would seek or desire, in any way, to withdraw from their sepulchres and graves, the protection which those laws had so fully secured. There is not a shadow of historical evidence, that under the Saxon invaders, who succeeded the Roman governors, any less respect was shown for the buried dead. On the contrary, it is distinctly shown by the Scandinavian historians, that these partially civilized Saxons had been specially taught to reverence their places of burial by their great leader Odin, the father of Scandinavian letters,

distinguished for his eloquence and persuasive power, and especially commemorated as being the first to introduce the custom of erecting grave-stones, in honor of the dead.

In the dim and flickering light, by which we trace the laws of these long-buried ages, the fact is significant and instructive, that of the several founders of the seven little Saxon kingdoms constituting the Heptarchy, nearly all deduced their descent, more or less remotely, from Odin himself. Hengist, who led the Saxon forces into Britain, and became first King of Kent, claimed with peculiar pride to be his great-grandson—rendering it quite improbable that during the rule of himself or his race, or that of his kindred sovereigns, which lasted from three to four hundred years, Saxonized Britain learned to abandon its buried ancestors, or hold them, in law, "*nullius in bonis.*"

Nor do we find in the occasional inroads of the Danes, temporarily disturbing the Saxon governments of England, any evidence that they obliterated, in the slightest degree, the reverential usages in the matter of the dead, coming down from Odin. The early laws of that rude people, carefully collected in the twelfth century by the learned antiquary Saxo Grammaticus, speak with abhorrence of those who insult the ashes of the dead, not only denouncing death upon the "alieni corruptor cineris," but condemning the body of the offender to lie for ever unburied and unhonored. *Law of Frotho*, Saxo Grammaticus, Lib. 5.

The law of the Franks, near neighbors of the Saxons, cited by Montesquieu, (Spirit of Laws, Lib. 30, ch. 19,) not only banished from society him who dug up a dead body for plunder, but prohibited any one from relieving his wants, until *the relatives of the de-*

ceased consented to his re-admission—thus legally and distinctly recognizing the peculiar and personal interest of the relatives in the remains.

We are, indeed, so surrounded by proof of the universal reverence of the Gothic nations for their buried ancestors, that we are justified in assuming it to be historically certain, that the barbarous idea of leaving the dead without legal protection, never originated with them; that the enlightened provision of the Roman jurisprudence, which protected in Britain the individual right to their undisturbed repose, not only remained unaffected by the Saxon invasion, but was implanted by that event, still more deeply in the ancient common law of England; and that it must have been vigorously enforced, as well by the earliest secular courts of the Anglo-Saxons, as in that transition period of their judicial history, when the sheriff and the bishop, sitting side by side on the bench, united the lay and the ecclesiastical authority in a single tribunal.

Nor was the right to protect the dead, eradicated by the Norman conquest. It is true, that the swarm of Romish ecclesiastics which poured into England with the Conqueror, exerted themselves actively and indefatigably to monopolize for the Church the temporal authority over the dead; but that by no means proves, that they were left unprotected. On the contrary, it was a concentration in the ecclesiastical body, of every right which any individual had previously possessed, to secure their repose. The individual right was not extinguished, it was only absorbed by the Church, and held in suspense, until some political revolution or religious reformation should overthrow the ecclesiastical power, which had thus secured its possession.

The ecclesiastical element was not eradicated from the framework of the English government, either by the Reformation of Luther, or the Act of Parliament establishing the Protestant Succession, but in the portion of the world which we inhabit, the work has been more thoroughly accomplished. The English emigration to America—the most momentous event in political history—commenced in the very age, when Chief-Justice Coke was proclaiming, as a legal dogma, the exclusive authority of the Church over the dead. The liberty-loving, God-fearing Englishmen, who founded these American States, had seen enough and felt enough of "ecclesiastical cognizance," and they crossed a broad and stormy ocean to a new and untrodden continent, to escape from it for ever.

It may well be, that some of the legislative enactments of these weather-beaten men, in the early morning of their political life, while yet unused to the meridian light of religious freedom, are disfigured by the same intolerance they had left behind them. They may have even mingled in their general scheme of civil polity, an ecclesiastical element sterner and more searching than that of the Church from which they dissented. The curious historian may analyse, if he will, the earnest puritanism of early New-England, or even the sturdy bigotry of early New-Netherland; it is enough for the commonwealth of New-York, "by the grace of God, free and independent," to know, that its first written constitution, born in 1777, in the very depths of the revolutionary struggle, extirpated from the body politic, every lingering element of ecclesiastical cognizance or spiritual authority. On all its features, it bears the unextinguishable love of religious freedom, brought to our shores by the refugees from ecclesiastical tyranny, not only in England, but in Hol-

land and France. Its ever memorable declaration of religious independence,—offspring of the lofty intellect and noble heart of JOHN JAY, and glowing bright with his Huguenot blood,—proclaims to the world the fundamental resolve, "not only to expel civil tyranny, but "also to guard against that spiritual oppression and "intolerance, wherewith the bigotry and ambition of "weak and wicked priests and princes, have scourged "mankind."

Following up this fixed determination, and yet with wise regard and unaffected reverence for the Christian Church in its purity, the illustrious authors of this Magna Charta of our religious liberty, prohibit any "minister of the Gospel, or priest of any denomination," from holding any office, civil or military, within the State,—inscribing in the organic law, thus unmistakeably, their settled purpose to deliver both dead and living from ecclesiastical cognizance, to emancipate the courts of justice from every priestly or mediæval fetter, and to allow them to breathe, through all coming time, the invigorating air of ancient, Anglo-Saxon freedom.

It is a striking proof of the inveterate attachment, even of the most enlightened nations, to prescriptive authority, that the monkish idea of the church-yard as an engine of spiritual power, not only lingers in England, but is boldly proclaimed in its very metropolis. Within the last two years, the Archdeacon of London, in an official address to the clergy of the Established Church within his district, openly complains of modern legislation in the British Parliament, in establishing extra-mural cemeteries around their crowded cities; for, says he, "the church and the *church-*
"*yard* of the parish have hitherto been one of the "strongest ties, to *bind the people* at large, to the

"communion of the Church." And again, "Burial "*bound*, I say, *the people*, in the metropolis, to the "Established Church."

It certainly is not for us, to interfere with the ecclesiastical law of England, nor needlessly to criticise its claims to the respect of the people whom it binds. We only ask to banish its maxims, doctrines, and practices from our jurisprudence, and to prevent them from guiding, in any way, our judicial action. The fungous excrescence which required centuries for its growth, may need an efflux of ages to remove. Burial, in the British Islands, may possibly remain, for many generations, subject exclusively to "ecclesiastical cognizance;" but in the new, transplanted England of the Western continent, the dead will find protection, if at all, in the secular tribunals, succeeding, by fair inheritance, to the primeval authority of the ancient, uncorrupted common law.

It is gratifying, however, to perceive that, even in the English courts, traces are becoming discernable of a disposition to recognise the ancient right of burial at common law. In the year 1820, a legal claim was made by one *Gilbert*, to bury, in a London church-yard, the body of his wife in an iron coffin, but it was resisted by the Churchwardens, *Buzzard* and *Boyer*, on the ground that it would injuriously prolong the period, when the natural decay of the body and of a wooden enclosure, would make room in the grave for another occupant. An application had been previously made in the same matter, to the King's Bench, for a *mandamus*, (reported in 2 Barn. and Ald. 806,) on which occasion the distinguished counsel, Mr. Scarlett and Mr. Chitty, claimed that the right of interment existed at common law. In refusing the application, Chief-Justice Abbott said, "It may be admitted, for the

" purpose of the present question, that the right of " sepulture is *a common law right*, but I am of opin- " ion, that the *mode of burial* is a subject of eccle- " siastical cognizance." Mr. Justice Holroyd, after duly reproducing Coke's " *caro data vermibus*," declared, that " burial is as much a matter of ecclesiastical " cognizance, as the prayers that are to be used, or the " ceremonies that are to be performed at the funeral."

The matter, which had caused some public disturbance in London, was thereupon carried into the ecclesiastical Court, then adorned by the learning and talents of Sir William Scott, (since Lord STOWELL.) In the very elaborate and eloquent opinion, delivered by the accomplished judge on that occasion, (reported in 3 Phillimore, p. 335,) he reviews the whole history of burial, from the remotest antiquity, philosophically tracing the progress of interment through the heathen and the Christian ages. Drawing a distinction between the coffined and uncoffined funerals of early times, he admits that many authoritative writers assert the right of a parishioner to be buried in his own parish church-yard, but he denies that it necessarily includes the right to bury a " trunk or chest " with the body. " *The right*," says he, " *strictly taken*, is, to " be returned to the parent earth for dissolution, and " to be carried there in a decent and inoffensive man- " ner." The honest sense and feeling of the judge were evidently struggling with ecclesiastical law and usage, but he came to the conclusion, that no mode of burial could be permitted, which would prolong the natural decay of the body, or needlessly preserve its identity—that the lapse of a single generation is practically sufficient, for mingling human remains with the earth, and destroying their identity—that the dead having no legal right to crowd the living, each buried

generation must give way to its successor—and that, therefore, an iron coffin, which would unduly and unlawfully prolong the period for identifying the remains, was ecclesiastically inadmissible,—unless an extra fee were paid to the church.

The Court will perceive, by the proofs in the case now under examination, that the remains of the exhumed body, are identified beyond doubt or question. The skeleton of the "posthumous man" is now legally "standing in court," distinctly individualised,—with his daughter, next and nearest of kin, at his side, to ask, that the tribunal whose order for widening the street ejected him from the grave, will also direct his decent re-interment.

It was the pride of Diogenes, and his disciples of the ancient school of cynics, to regard burial with contempt, and to hold it utterly unimportant, whether their bodies should be burned by fire, or devoured by beasts, birds or worms; and a French philosopher of modern days, in a somewhat kindred spirit, descants upon the "glorious nothingness" of the grave, and that "nameless thing"—a dead body. The secular jurisprudence of France holds it, in higher and better regard. In the interesting case reported in *Merlin's Répertoire*, Tit. *Sépulture*, where a large tract of land near Marseilles, had necessarily been taken for the burial of several thousand bodies, after the great plague of 1720, it was adjudicated by the secular court, that the land should not be profaned by culture even of its surface, until the buried dead had mouldered into dust. The eloquent *plaidoyer* of the *avocat-général* upon that occasion, dwells with emphasis, on the veneration which all nations, in all ages, have shown for the grave—adding, however, with some little tinge of national irreverence, "C'est une *vénération*

toujours révocable! et toujours subordonnée au bien public."

In portions of Europe, during the semi-barbarous state of society in the middle ages, the law permitted a creditor to seize the dead body of his debtor; and in ancient Egypt, a son could borrow money, by hypothecating his father's corpse; but no evidence appears to exist, in modern jurisprudence, of a legal right to convert a dead body to any purpose of pecuniary profit.

It will be seen that much of the apparent difficulty of this subject, arises from a false and needless assumption, in holding that nothing is property that has not a pecuniary value. The real question is not of the disposable, marketable value of a corpse, or its remains, as an article of traffic, but it is of the sacred and inherent right to its custody, in order decently to bury it and secure its undisturbed repose. The insolent dogma of the English ecclesiastical law, that a child has no such claim, no such exclusive power, no peculiar interest in the dead body of its parent, is so utterly inconsistent with every enlightened perception of personal right, so inexpressibly repulsive to every proper moral sense, that its adoption would be an eternal disgrace to American jurisprudence. The establishment of a right so sacred and precious, ought not to need any judicial precedent. Our courts of justice should place it, at once, where it should fundamentally rest for ever, on the deepest and most unerring instincts of human nature; and hold it to be a self-evident right of humanity, entitled to legal protection, by every consideration of feeling, decency, and Christian duty. The world does not contain a tribunal, that would punish a son who should resist, even unto death, any attempt to mutilate his father's corpse, or tear it from the grave for sale or dissection; but where would he find the

legal right to resist, except in his peculiar and exclusive interest in the body ?

The right to the repose of the grave, necessarily implies the right to its exclusive possession. The doctrine of the legal right to open a grave in a cemetery, after a certain lapse of time, to receive another tenant, however it may be sanctioned by custom in the English church-yards, or by continental usage at Père-La-Chaise, and elsewhere, will hardly become acceptable to the American mind, still less the Italian practice of hastening the decomposition of the dead by corrosive elements. The right to the individuality of a grave, if it exist at all, evidently must continue, so long as the remains of the occupant can be identified, —and the means of identifying, can only be secured and preserved by separate burial. The due and decent preservation of human remains by separate burial, is pre-eminently due to Christian civilization, which, bringing in the coffin and the sarcophagus, superseded the heathen custom of burning, and " gave," in Lord Stowell's vivid phrase, " final extinction to the sepul- " chral bonfires."

The monument erected over a grave is expressly intended to individualize its occupant ; and it would be a most singular mockery, to protect the monument, and leave the grave itself to be filled with other tenants. The church, in the present case, as keeper of the cemetery, by permitting the erection of the monument, virtually consented that it should stand, to perform its appropriate, individualizing office. Such a monument could not be disturbed in England, even by the Established Church : for the daughter, as the lawful heir, could at once arrest the sacrilege, or obtain ample indemnity. By every principle of enlightened reason, she is equally entitled as next of kin, to pro-

tect her father's remains. No one will deny, that the moral if not the legal duty of re-burying them, first devolves on her, and it is because their ejection from the grave thus burthens her with the duty, that she is plainly entitled to claim, that the expense shall be defrayed by the fund awarded to indemnify the parties damaged. The father, identified by the monument, had lain separate for more than fifty years. The church could not have lawfully mingled any other remains with his, nor can the daughter now be required, either in justice or decency, to destroy their individuality, still less to permit them to be cast into any common receptacle of undistinguishable rubbish.

To throw a dead body into a river, was held by the Supreme Court of Maine, to be an indictable offence, 1 *Greenl.* 226, and it would not be less indecent and criminal, to empty into the streets of the city, or into the waters which wash its shores, the bones and ashes of an ancient cemetery. The criminality of the act, as of any other violation of the grave, is not, as is erroneously asserted, in invading the imaginary rights of the dead, but in outraging the Christian sensibilities of the living. The "conditio sepul-"turæ," in the expressive language of St. Augustine, is, "magis *vivorum solatia* quam subsidia mortuorum." It was the special punishment, not of the buried dead, but of the living sinners of unhappy Jerusalem, that spread the bones of her inhabitants, "before the sun, "and the moon, and all the host of heaven." It is not the buried Moses Sherwood, but his living daughter, Maria Smith, who now claims the right to his quiet repose, in the grave where she laid him. That repose has been disturbed, under the forms of law, against her will. As the only reparation the case admits, she asks for the re-interment of the remains in a sepa-

rate grave, to be individualized by the monument which, as her lawful "heir-loom," the law preserves, from generation to generation, for that very purpose. The cemetery which contained them was expressly taken by the church, to perform this very office of sepulture. As a cemetery, its use was a charitable as well as a religious use—a trust which this Court, in the exercise of its undisputed equity powers, and wholly irrespective of any assumption or resumption of authority ever possessed by any ecclesiastical body, may now duly control and regulate.

The claimant, after fifty years' occupancy by her father of the grave, may rightfully be held to be one of the beneficiaries, for whom the charitable use was created, and for whose benefit and protection it should be carried into full effect. The fund representing a part of the very land thus devoted to the charitable use, is now in the possession of the Court, its legitimate guardian, and subject to its equitable direction.

In obedience to its order, requiring the undersigned to state his opinion on the proofs, he therefore respectfully reports, that upon the grounds above stated, it is competent for the Court, to retain from said fund, a sum sufficient to cover the expense of re-interring the remains of Moses Sherwood in a separate grave, in such reasonable locality as the said Maria Smith may select. One hundred dollars will suffice for the purpose, and such part of it as may be needed, should either be paid to the said Maria Smith, or expended by the church under her direction.

The proofs taken on the present reference, and hereto annexed, show that eighty graves, in all, were disturbed by the widening of the street,—but no claim for damages, or for re-interment, has yet been present-

ed, except in the case above stated. The remains of the bodies in the other graves have been temporarily deposited under the church in Beekman street, to be properly re-interred elsewhere, in case of its sale. It is due to the upright and intelligent gentlemen who constitute the Board of Trustees of the church, to state, that they earnestly desire the decent and lawful re-interment of all the remains removed from their cemetery, by the widening of the street,—but that, in view of their proper responsibilities, and the general importance of the principle involved, they deem it necessary to act in the matter, under the direction and authority of the Court.

It is respectfully submitted, that the following legal principles necessarily result from the fundamental truth, that no ecclesiastical element exists in the jurisprudence of this State, or in the frame-work of its government; and that they may be properly taken as a guide for judicial action in the present case:

1. That neither a corpse, nor its burial, is legally subject, in any way, to ecclesiastical cognizance, nor to sacerdotal power of any kind.

2. That the right to bury a corpse and to preserve its remains, is a legal right, which the courts of law will recognize and protect.

3. That such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin.

4. That the right to protect the remains includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure.

5. That if the place of burial be taken for public use, the next of kin may claim to be indemnified for

the expense of removing and suitably re-interring the remains.

SUMMARY.

Upon the proofs now presented, and the principles above stated, the fund in Court of $28,000, with its accrued interest, should be distributed as follows:

$133 to the City Corporation, for extinguishment of ground-rent; $8,233.59 to the vault-owners; $100 for the re-interment of Moses Sherwood; and the residue, amounting to $19,533.41, together with the interest accrued on the $28,000 since its deposit in Court, deducting the proper costs and expenses of the present reference, to the Trustees of the Brick Presbyterian Church, according to the prayer of their petition. They should be required to assume the expense of separately re-interring the remains of any of the bodies in the other graves, whenever duly identified by the next of kin. The certificate, from the Register's office, required by the rule of court, and hereto annexed, shows the interest of the Church in the land, to be free from incumbrance.

Respectfully submitted, by

SAMUEL B. RUGGLES,

REFEREE.

NEW-YORK, January 15th, 1856.