Opinion No. 87-31

July 15, 1987

OPINION OF: HAL STRATTON, Attorney General

BY: Alicia Mason, Assistant Attorney General

TO: Tom Livesay, Director, Museum of New Mexico

QUESTIONS

Is private property discovered to contain human remains presumed to be soldiers killed in the battle of Glorieta on March 28, 1862, a cemetery within the meaning of Section 30-12-12 NMSA 1978 so as to require the Museum Division of the Office of Cultural Affairs to petition the district prior to excavating the site and disinterring the remains pursuant to the Cultural Properties Act, Sections 18-6-1 through 18-6-7 NMSA 1978 (Cum. Supp. 1986).

CONCLUSIONS

No.

ANALYSIS

Section 30-12-12 states that anyone who knowingly disturbs or removes "the remains or any part thereof of any person permanently interred in any church, churchyard or cemetery, other than pursuant to an order of the district court," commits a misdemeanor. The battlefield is neither a church nor a churchyard. The issue is whether the battlefield mass grave could be considered a cemetery.

The legislature enacted Section 32-12-12, supra by the Laws of 1963, ch. 303, § 12-2 as part of the revised criminal code. The act did not define the term "cemetery." The Endowed Care Cemetery Act of 1961, Sections 58-17-1 to 58-17-17 NMSA 1978, defines the term "cemetery" to mean:

A place dedicated to and intended to be used for the permanent interment of the human dead. It may be either a burial park, for earth interments, a mausoleum for vault or crypt interments, a crematory or crematory and columbarium, for cinerary interments, or a combination of one or more of these.

Section 58-17-3 NMSA 1978.

The meaning of the term "cemetery" in Section 58-17-3, supra is not restricted to its use in the Endowed Care Cemetery Act of 1961. Both the 1961 act and Section 30-12-12, supra regulate cemeteries to protect the public's expectation that interments remain

perpetually undisturbed. "[S]tatutes which relate to the same class of things are considered to be in pari materia." State Park and Recreation Commission v. New Mexico State Authority, 76 N.M. 1, 18, 411 P.2d 984, 996 (1966). "It is a generally accepted tenet of statutory construction that the same words used in different statutes that are in pari materia are to be given the same meaning." People v. Hill, 103 Cal. App.3d 525, 533, 163 Cal. Rptr. 99, 104 n.4 (Ct. App. 1980). Further, "[a]ll statutes are presumed to be enacted by the legislature with full knowledge of all other statutes in pari materia and with reference thereto." Livingston v. Ewing, 98 N.M. 685, 689, 652 P.2d 235, 239 (1982). Accord Quintana v. New Mexico Department of Corrections, 100 N.M. 224, 227, 668 P.2d 1101, 1104 (1983). Consequently, Section 30-12-12, supra is in pari materia with Section 58-17-3, supra and should be construed with reference to the definition supplied by Section 58-17-3, supra.

The battlefield grave is not a cemetery, because it is not a place that was dedicated to and used, and intended to be used for the permanent interment of the human dead. The distinction between the gravesite and a "cemetery" is better understood by reference to California Health and Safety Code Section 7003 (West 1970), which provides the following definition:

Cemetery means any one or a combination of more than one of the following, in a place used or intended to be used and dedicated, for cemetery purposes:

(a) a burial park for earth interments.

(b) a mausoleum for crypt or vault interments.

(c) a crematory, or a crematory columbarium for cinerary interments.

Section 58-17-3, supra adopts essentially verbatim the California definition enacted in 1939. Because Section 58-17-3, supra appears to have been patterned after the California act, that act may be referred to for interpretation. Friends of Mammoth v. Board of Supervisors of Mono County, 8 Cal.3d 247, 260, 104 Cal. Rept. 761, 769 (1972). See Benally v. Hundred Arrows Press, Inc., 614 F. Supp. 969, 974 n.3 (D.N.M. 1985) (another state court's interpretation of that state's statute is instructive where New Mexico adopted that statute). Consequently, the California courts' interpretation of its statute is persuasive in the interpretation of our statute. Hunter-Hayes Elevator Co. v. Petroleum Club Inn Co., 77 N.M. 92, 419 P.2d 465 (1966); cf. Wellborn Paint Manufacturing Company v. New Mexico Employment Security Department, 101 N.M. 534, 538, 685 P.2d 389, 393 (Ct. App. 1984) (when construing statutes adopted from other countries, courts should look to the source for definitions and interpretation).

In Wana the Bear v. Community Construction Co., 128 Cal App. 3d 536, 180 Cal. Rptr. 423 (Ct. App. 1982), the California Court of Appeals held that private property, where the remains of over 200 Miwok Indians buried between 1850 and 1870 were disinterred, was not a cemetery. The court in dicta established that the mere interment of human remains in a certain place does not render that place a cemetery. Id. at 426 n. 10.

Rather, the place of interment must be dedicated or prescriptively used as a cemetery. Id. "Dedication is a land-use planning concept, used in other contexts as well." Id. at 425 n.7. Similarly, "dedication" in the context of § 58-17-3 refers to a land-use planning concept. See New Mexico Subdivisions Act, Section 47-6-5 NMSA 1978 (Repl. Pamp. 1982) (dedication renders land public property). Thus, for the battlefield to be a cemetery, there must have been a dedication of the land for permanent interment, and actual and intentional use of the land for this specific purpose.

Section 58-17-3, supra embraces the well-established notion that land must be set apart as a cemetery to qualify as a cemetery by definition. "There is no inflexible test by which it may be determined categorically what does or what does not constitute a cemetery. If it is land, the essential requirement is that it must have been 'set apart' for the burial of the dead." Abrams v. Lakewood Park Cemetery Association, 196 S.W.2d 278, 283 (Mo. 1946). "The word "cemetery' comprehends a place where burials have been made and will continue to be made in the future." State v. Ritschel, 20 N.W.2d 673, 678 (Minn. 1945). "The word "cemetery' is defined by Webster to be 'a place or ground set apart for the burial of the dead.' What creates the cemetery is the act of setting the ground apart for the burial of the dead...." Concordia Cemetery Association v. Minnesota North and Western Railroad Co., 12 N.E. 536, 541 (Ill. 1887). Accord Town of Blooming Grove v. Roselawn Memorial Park Co., 286 N.W. 43, 45 (Wisc. 1939) (platting of twenty-five acres was dedication of land for cemetery purposes).

Since the battlefield was never dedicated or used for any length of time as a cemetery, the gravesite was never established as a cemetery pursuant to Section 58-17-3, supra. Consequently, Section 32-12-12, supra cannot apply to require a court order to disinter. See Winters v. The State, 9 Ind. 172 (Ind. 1857). In Winters, the court refused to apply the misdemeanor of "desecrating a cemetery" to private property which fell within the broadest meaning of the word "cemetery" when defined according to Webster as "a place where the dead bodies of human beings are buried." Id. at 173. Rather, the court looked to the definition of "cemetery" in statutes that provided for the establishment of cemeteries to determine whether the offense applied to the facts. "It is not an unfair conclusion that the section in which this prosection is based was not intended to apply to burial places other than those dedicated in the mode pointed out by statutes." Id. at 173.

Section 30-12-12, supra only applies to disinterments at cemeteries, churches and churchyards. The statute must be given effect as written. Wittkowski v. Corrections Department of the State of New Mexico, 103 N.M. 526, 530, 710 P.2d 93, 97 (Ct. App. 1985). Because the gravesite is not a cemetery, the statute does not apply.

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