

Disinterment

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it has developed, has been upheld and even lauded by the courts. To those who seek to have the depletion deduction abolished, it can be said that if the government has seen fit to give the oil and gas industries a tax benefit in the form of the depletion deduction, then that benefit has also inured to the government itself through increased oil reserves which are so vital to the economy and the defense of the nation, and to the general public in the form of lower prices on oil and gas products and in the abundance of these products. Any benefit that the government might derive from increased revenues through the decreasing or abolishing of the depletion deduction allowance seems to be greatly outweighed by the existence of a thriving and expanding oil and gas industry.

DISINTERMENT

The basis for disinterment is fairness, human emotion and reasonableness. Hence, as is apparent, the issue of exhumation is relegated for determination to courts of equity.¹ By early English law ecclesiastical courts had jurisdiction over questions relating to the disposition of a dead body.² This view, however, has never been accepted in the United States, where equity jurisdiction prevails over questions of this type. Ecclesiastical law neither governs nor determines equitable rights.³ The court will not order a body to be disinterred without a very strong showing by the petitioner that disinterment is necessary and required for the furtherance and in the interests of justice.⁴

¹ *Slifman v. Polotzker Workingmen's Benevolent Assn.*, 198 Misc. 373, 101 N.Y.S. 2d 826 (1950); *Koon v. Doan*, 300 Mich. 662, 2 N.W. 2d 878 (1942); *Uram v. St. Mary's Russian Orthodox Church*, 207 Minn. 569, 292 N.W. 200 (1940); *King v. Frame*, 204 Iowa 1074, 216 N.W. 360 (1926).

² *Slifman v. Polotzker Workingmen's Benevolent Assn.*, 198 Misc. 373, 101 N.Y.S. 2d 826 (1950).

³ *Yome v. Gorman*, 242 N.Y. 345, 152 N.E. 110 (1926); *In re Donn*, 14 N.Y.S. Supp. 189 (1891): "While we grant to all religious organizations the largest and broadest latitude and liberty to adopt all or any proper rules or regulations, to the end that their votaries may worship God according to the dictates of their conscience, we have jealously watched and resented any and all attempts on their part to usurp powers or authority outside or beyond their legitimate functions of caring for and administering spiritual affairs. While it cannot be said that a corpse is property in the sense that it is subject to barter and sale, the courts of this country have recognized the right and authority of the next of kin, in proper cases, to control and possess it; and when an ecclesiastical body assumes jurisdiction and control over a corpse its acts are of a temporal and judicial character, and not in any sense spiritual and, under our laws and institutions, when it attempts so to do it is acting outside its proper jurisdiction and domain."

⁴ *Goodman v. Ind. Order Bickur Cholem Ukadishu*, 326 Ill. App. 25, 60 N.E. 2d 892 (1945): "Jewish law as such is no more to be followed in Illinois than is Chinese law"; *Goldman v. Mollen*, 168 Va. 345, 191 S.E. 627 (1937); *Cabe v. Parker-Graham-Sexton, Inc.*, 202 N.C. 176, 162 S.E. 223 (1932).

It may be stated as the universal rule of law in civilized countries that it is an indictable offense to disinter and remove dead bodies wantonly or for the sake of gain, and by the old common law even the fact that the motive of the person removing the body is laudable is no defense. In most of the states of the Union the violation of sepulchre is made a specific offense by statute. But these statutes are not directed against and do not apply to exhumations by public officials, with a view to ascertaining whether a crime has been committed; nor do they apply to a person who having obtained the necessary permit from the constituted authorities removes the dead body of a relative or friend for reinterment.⁵

It is necessary to distinguish between rights existing in a corpse before burial and those existing subsequent to burial, because the body is in the custody of the law after interment, and the disturbance of the body is subject to the control and discretion of a court of equity in any case properly before it.⁶ The right to have a dead body remain unmolested is not an absolute one and it must give way where it conflicts with public good or where the demands of justice make necessary such subordination.⁷ The unauthorized disinterment of the body of a deceased person, however, is an indictable offense by both common law and statute, regardless of the motive or purpose of the person who violates the sepulchre.⁸

Because courts of equity are reluctant to disturb the repose of the dead, the burden of proof ordinarily falls on the person seeking disinterment to present to the court just and reasonable causes which make disinterment a necessity.⁹ The very important rule, "Disinterment is not accorded as a matter of right," is very clearly and convincingly laid down by Justice Cardozo in the leading case of *Yome v. Gorman*.¹⁰

Many factors are ordinarily taken into consideration when a petition for disinterment is before the court. Where the intent of the deceased as to his place of burial can be clearly demonstrated, the court will make every endeavor to further said intent. In *Thompson v. Deeds*,¹¹ the de-

⁵ 3 Cyc. 276.

⁶ *Thompson v. Deeds* 93 Iowa 278, 61 N.W. 842 (1895); *Hackett v. Hackett*, 18 R.I. 155, 26 Atl. 42 (1893).

⁷ *Choppin v. LaBranche*, 48 La. Ann. 1217, 28 So. 681 (1896): "To disturb the mortal remains of those endeared to us in life sometimes becomes the sad duty of the living, but except in cases of necessity or for laudable purposes, the sanctity of the grave should be maintained and preventive aid of courts may be invoked for that object."

⁸ *State v. McLean*, 121 N.C. 589, 28 S.E. 140 (1897); *Humphrey v. Board of Trustees*, 109 N.C. 132, 13 S.E. 793 (1891); *People v. Fitzgerald*, 105 N.Y. 146. 11 N.E. 378 (1887).

⁹ *Goldman v. Mollen*, 168 Va. 345, 191 S.E. 627 (1937); *Pettigrew v. Pettigrew*, 207 Pa. 313, 56 Atl. 878 (1904).

¹⁰ 242 N.Y. 345, 152 N.E. 110 (1926).

¹¹ 93 Iowa 278, 61 N.W. 842 (1895). Similar holdings, giving great weight to the wishes of the deceased are found in: *In re Herskovits*, 48 N.Y.S. 2d 906 (1944); *Koon v. Doan*, 300 Mich. 662, 2 N.W. 2d 878 (1942); *Curlin v. Curlin* 228 S.W. 602 (Tex., 1921).

ceased was buried in a lot owned by his daughter. Subsequently, the widow and daughter quarreled and the widow wished to disinter her deceased husband. Upon arriving at its decision the court said:

It always has been, and will ever continue to be, the duty of courts to see to it that the expressed wish of one, as to his final resting place, should as far as it is possible, be carried out.¹²

The case of *Fidelity Union Trust Co. v. Heller*¹³ decided that where the testator after executing his will changed his mind about interment in a particular cemetery and negotiated for a burial lot in a different cemetery, it was proper to remove the body from a vault in the former and bury it in the latter.

Where there is no lucid intent as to place of burial indicated by the deceased, the wishes of the surviving spouse and/or the next of kin will be given due consideration by the court when deciding upon the question of disinterment.¹⁴

Under ordinary circumstances, it seems that express contracts prohibiting the disinterment of dead bodies are not executed at time of burial. If such contracts were made, it is likely that much litigation could be avoided.¹⁵ In this area there is a definite split in the various jurisdictions as to whether or not a deed stating that the holder thereof will abide by rules and regulations of bylaws in force in the cemetery is to be construed as part of the contract between the cemetery and the purchaser of a lot.

A number of cases have held that a contract against disinterment cannot be implied from the mere fact that the deceased was buried in a cemetery lot, the deed to which recited that the holder shall be bound by the bylaws of the cemetery prohibiting disinterment.¹⁶ In almost an equal number of cases the court has decided that a deed which recites the bylaws of the cemetery impliedly subjects the purchaser of a lot therein to these bylaws on the basis that they are incorporated into his contract.¹⁷

¹² *Thompson v. Deeds*, 93 Iowa 278, 278, 61 N.W. 842, 842 (1895).

¹³ 16 N.J. Super. 285, 84 A. 2d 485 (1951).

¹⁴ *Goodman v. Ind. Order Bickur Cholem Ukadishu*, 326 Ill. App. 25, 60 N.E. 2d 892 (1945); *Pettigrew v. Pettigrew*, 207 Pa. 313, 56 Atl. 878 (1904).

¹⁵ *Cohen v. Congregation Shearith Israel*, 99 N.Y. Supp. 732, 734 (1906): "It may be that if an agreement were made with a cemetery association that remains there interred could not thereafter be disinterred, a court of equity would enforce the agreement."

¹⁶ *Yome v. Gorman*, 242 N.Y. 345, 152 N.E. 110 (1926): "We do not interpret the terms of this certificate of purchase as importing a contract between the cemetery and the owners of the plot that there shall be no disinterment at any time if forbidden by the tenets of the church or the orders of the Bishop." *Cohen v. Congregation Shearith Israel*, 99 N.Y. Supp. 732 (1906). In re *Donn*, 14 N.Y. Supp. 189 (1891).

¹⁷ *Steen v. Modern Woodman of America*, 296 Ill. 104, 129 N.E. 546 (1920); *Fullenwider v. Supreme Council of the Royal League*, 180 Ill. 621, 54 N.E. 485 (1899): "The Constitution and the Bylaws of the Congregation and the deed accepted by the plaintiffs are to be construed as one contract."

This very question was raised in the 1953 case of *Friedman v. Agudath Achim North Shore Congregation*.¹⁸ In his case plaintiffs were the children of two deceased parents, both of whom were buried in a cemetery owned by the defendant. An uncle of the plaintiffs was also buried in defendant's cemetery. After interment of all deceased parties involved, the plaintiffs acquired a large family plot, in a different cemetery, which would accommodate the entire family, to which they wished to remove the remains. The defendant was a religious corporation organized to conduct a Jewish House of Worship and to maintain a cemetery for the burial of people of the Jewish faith. Defendant's cemetery was in poor condition, while the cemetery to which the plaintiffs wished to remove the remains was kept in excellent condition. The deed to the lots in which the deceased were buried recited that the holder thereof would abide by and observe the laws, rules and regulations of the Congregation then in force or subsequently to be adopted. Included in these rules was a prohibition against disinterment.

Hence, the question arose as to whether the plaintiffs were bound to abide by the prohibition against disinterment as part of their contract. The court, cited *Cohen v. Congregation Shearith Israel and City of New York*,¹⁹ which held that they "saw no reason why interment may not be a matter of contract and, if so, a contract was made here which prohibited the plaintiffs from disinterring their relatives, as contrary to rules of the church."²⁰

The courts are ordinarily more lenient in permitting disinterment if it can be proved that the first interment was only intended to be temporary. The claim of intent as to the temporary burial of a deceased will be given more credence by the courts if previous notice of such intent has been presented to the court.²¹

Exhumation is sometimes ordered by the court strictly for evidentiary purposes, where circumstances make such action a necessity. The court, however, will not order these disinterments arbitrarily; there must be a strong showing of facts to warrant such an order.²²

¹⁸ 115 N.E. 2d 553 (Ill., 1953).

¹⁹ 189 N.Y. 528, 82 N.E. 1125 (1907): ". . . the provisions in the deed and by-laws referred to gave the Society the right, as a matter of contract, to determine in good faith whether to allow or refuse disinterment."

²⁰ *Cohen v. Congregation Shearith Israel*, 114 App. Div. 117, 119, 99 N.Y. Supp. 732, 734 (1906).

²¹ *McMillan v. Gentry*, 96 Okla. 235, 222 Pac. 717 (1923); *Johnston v. Marinus*, 18 Abb. N.C. 72 (N.Y., 1886).

²² *Drake v. Bowles*, 97 N.H. 471, 92 A. 2d 161 (1952); *State ex rel. Meyer v. Clifford*, 81 Wash. 324, 142 Pac. 472 (1914): "Where the paternity of children was in issue, the body of the supposed father should not, more than two years after burial, be

Although courts are not bound to consider religious aspects in deciding whether disinterment will be permitted, they will usually give them some consideration in ascertaining what the wishes of the party buried would have been.²³ In the case of *Serfer v. Schwimmer*,²⁴ the court repeated its view that it was not bound to follow the ecclesiastical law, but stated that its belief was that the shock to the religious feelings of those orthodox Jews who felt that their cemetery would be defiled by an exhumation was a factor to be considered by the court in reaching a decision. The decision of the court in another New York case²⁵ refused the petition of children to remove their mother, a Catholic, from a Catholic cemetery to a non-Catholic cemetery where their father was interred. The court reasoned that, if she had to choose between the two, the mother would have chosen to stay where she was. Another New York case, however, held that the removal of a body from a cemetery on application of the wife of a deceased, in order to permit burial in a plot in which the wife would be buried, was proper as upholding the bond of marriage, notwithstanding the fact that removal would be contrary to the law of the decedent's religion.²⁶

In spite of the fact that courts will often cite ecclesiastical law, such law will not prevail against the expressed wishes of the deceased party and the desires of the close surviving relatives of the deceased.²⁷

Because of the respect held for final resting places of the dead and since there exists so little reason or desire to disturb their repose, there have rarely been such disturbances as have become the subject of litigation. There have, however, been some adjudications, and these seem to indicate that a person allowed to bury his dead in a public cemetery has such an interest in the plot of ground that he is entitled to bring an action against owners of the fee or strangers who disturb the plot without

ordered exhumed for examination to determine his capacity, where it was questionable whether the examination would reveal anything, and the showing as to whether he was castrated was conflicting." *Gray v. State*, 55 Tex. Crim. R. 90, 114 S.W. 635 (1908): "Right of interment and the right to disinterment are subordinate to public health, and that the disinterment may be compelled by public authorities whenever conditions become such as that the public health is threatened."

²³ *Serfer v. Schwimmer*, 166 Misc. 329, 1 N.Y.S. 2d 730 (1937); *Sacred Heart of Jesus P.N.C. Church v. Sokolowski*, 159 Minn 331, 199 N.W. 81 (1924); *In re Donn*, 14 N.Y. Supp. 189 (1891).

²⁴ 166 Misc. 329, 1 N.Y.S. 2d 730 (1937).

²⁵ *In re Donn*, 14 N.Y. Supp. 189 (1891).

²⁶ *Application of Sherman*, 304 N.Y. 745, 108 N.E. 2d 613 (1952).

²⁷ *Application of Rosewasser*, 120 N.Y.S. 2d 287 (1953); *Goldman v. Mollen*, 168 Va. 345, 191 S.E. 627 (1937).

authority to so act.²⁸ Such a right of action is transferred to heirs of the party in possession upon his death.²⁹ The owner of a cemetery lot may also maintain an action in equity to enjoin disinterment of a body buried therein.³⁰

The interest of a party in a plot of burial ground and his commensurate right of action for disturbance thereof are subject to the police power of the state. Circumstances may arise which would make the cemetery a nuisance. If such a set of conditions were to come into being the state, under its police power, could require removal of the cemetery and reinterment of the bodies at some other place.³¹ The fact that further interment within a cemetery becomes an impossibility does not interfere with the rights of parties in possession of burial plots therein. The reasoning here is that the cemetery does not lose its characteristics as such, so long as any bodies remain buried therein.³²

In an action of ejectment for recovery of a cemetery lot and for damages against persons who removed certain dead bodies from the graves in which they rested and reburied them in another lot, it was held that the defendants could not use as a defense to the action the fact that the bodies of deceased, having been re-interred, should not be disturbed.³³

The law as to disinterment has not as yet achieved a substantial degree of uniformity. The equity courts seem to consider the facts in each case and make their decisions on the basis of justice and fair play. The matter of disinterment is not one which can be dealt with lightly, since it involves disturbing the repose of the dead, an act often incongruous with religious convictions, sentimental reasons, and respect for the dead. Each

²⁸ *Bessemer Land & Improvement Co. v. Jenkins*, 111 Ala. 135, 18 So. 565 (1895); *Hook v. Joyce*, 94 Ky. 450, 22 S.W. 651 (1893): When one is permitted to bury his dead in a public cemetery, by the express or implied consent of those in control of it, he acquires such a possession in the spot of ground in which the bodies are buried as will entitle him to an action against the owners of the fee or strangers who, without his consent, negligently or wantonly disturb it. This right of possession will continue as long as the cemetery continues to be used.

²⁹ *Anderson v. Acheson*, 132 Iowa 744, 110 N.W. 335 (1907); *Gardner v. Swan Point Cemetery*, 20 R.I. 646, 40 Atl. 871 (1898).

³⁰ *Sacred Heart of Jesus P.N.C. Church v. Sokolowski*, 159 Minn. 331, 199 N.W. 81 (1924); *Cohen v. Congregation Shearith Israel*, 99 N.Y. Supp. 732, 734 (1906): "One who is the owner of the easement of burial in a cemetery lot, or who is rightfully in possession of the same is entitled to recover damages from anyone who wrongfully enters upon such lot and disinters the remains of persons buried therein."

³¹ *Sherrard v. Henry*, 88 W. Va. 315, 106 S.E. 705 (1921); *Grinnan v. Fredericksburg Lodge*, 118 Va. 588, 88 S.E. 79 (1916); *Roanoke Cemetery Co. v. Goodwin*, 101 Va. 605, 44 S.E. 769 (1903).

³² *Barker v. Hazel-Fain Oil Co.*, 219 S.W. 874 (Tex., 1920).

³³ *Anderson v. Acheson*, 132 Iowa 744, 110 N.W. 335 (1907).

new case presents a problem which must be decided on its own merits and equities.

Exhumation is an area in which deep human emotions are involved. Thus, there would be much difficulty and hardship if the court were to apply strictly objective standards in reaching its decisions.

Because of the nature of disinterment, there has not been a great deal of litigation in this field. It is probable, however, that the litigation will increase greatly in the future. Cemeteries are growing older and some are commensurately more decrepit. In all likelihood many people will ultimately desire to remove their loved ones from their present places of repose.

If the courts could decide on a set of more objective standards for universal use in determining disinterment cases, much confusion, uncertainty, and litigation would be eliminated in this particular phase of the law. At this writing, however, the probability seems to be that the status of the law as to disinterment will unfortunately remain unchanged until farsighted administrators, legislators, and attorneys take positive steps forward, even as they have done in other phases of the law.

PRENATAL INJURIES AND THE NONVIABLE INFANT

In recent years, American courts have been repudiating a long entrenched doctrine whereby infants *en ventre sa mere*,¹ both viable and nonviable,² are denied a cause of action and right of recovery against those who wrongfully inflict prenatal injuries.³ The modern trend has

¹ "A child is said to be *en ventre sa mere* before it is born; while it is a foetus." Black's Law Dictionary (4th ed., 1951).

² "Viability—Livable, having the appearance of being able to live . . . capable of life. This term is applied to a newly-born infant, and especially to one prematurely born, which is not only born alive, but in such a state of organic development as to make possible the continuance of its life." Black's Law Dictionary, (4th ed., 1951); "Viable—Capable of living; born alive and with such form and development of organs as to be normally capable of living. . . ." Webster's New International Dictionary (2d ed., unabridged, 1951); "It is to be noted that there is a medical distinction between the term 'embryo' and a 'viable foetus.' The embryo is the foetus in its earliest stages of development, especially before the end of the third month, but the term 'viable' means that the foetus has reached such a stage of development that it can live outside the uterus. American Illustrated Medical Dictionary, 19 Ed. Dorland, pp. 483, 1605." *Bonbrest v. Kotz*, 65 F. Supp. 138, 140 n. 8 (D.C. D.C., 1946); "A viable foetus has been defined as one sufficiently developed for extra-uterine survival, normally a foetus of seven months or older. (Stedman, Medical Dictionary, 1234 (16th Ed. Taylor, 1946).) 'All authorities agree that at some time during the period of gestation, the infant, yet unborn, reaches a stage of development where it can live outside of the mother.' Taylor, Principles and Practice of Medical Jurisprudence, 34 (10th Ed.). See: Dorland, The American Illustrated Medical Dictionary, 1625 (20th Ed. 1945)." *Amann v. Faigy*, 415 Ill. 422, 427, 114 N.E. 2d 412, 417 (1953).

³ ". . . that in the absence of a statutory provision requiring a different result, a pre-natal injury affords no basis for an action in damages in favor of the child. The