6-20-1895

The Disposition of Dead Bodies and Rights Attendant Thereto

Wilber Kinzie
Cornell Law School

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THE DISPOSITION OF DEAD BODIES

AND RIGHTS ATTENDANT THERETO.

by

WILBER KINZIE

Candidate for the Degree of Bachelor of Laws,

June 20 1895.

Ithaca New York.
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In choosing this subject for a legal discussion, I recognize at once that although it is one which interests the deepest feelings of mankind, even to a much greater degree than many matters of actual property, yet it is not one commonly or often before our civil courts for adjudication.

The reason for this plainly is, because of the universal reverence for the dead body in all civilized nations and countries. Indeed it has become a most sacred sentiment, but the sacredness of it has not and will not prevent, at times, the setting aside of sentiment and the assertion of opposing claims, and the calling upon either ecclesiastical cognizance, or upon judicial tribunals, for their settlement.

Indeed in this age when jurisprudence is extending its arm in recognition of every possible right and duty, we may foresee that the dead body may claim from the courts vastly more attention in the future than it has in the past.

The sepulture of the dead has generally, in all ages and countries been regarded as a religious rite; and the moral or ecclesiastical view has always been to regard the place where friends have been deposited as consecrated ground.

Cemeteries or specified plots of ground for burial purposes existed as far back as history relates. The Hebrews had their public burial fields, and the Greeks, before they
adopted the custom of burning their bodies, had their sleeping grounds for the sepulture of the dead. But even in these early periods individual rights were recognized in that private rights of individuals in their places of interment were zealously guarded, and private places of burial were in vogue. In the Bible in the time of Abraham it is recorded that he purchased the field of Machpelah in the cave of which he buried his wife Sarah.

Although the Church of Rome claimed jurisdiction in all matters relating to burial, yet at this early period we find there were judicial decisions defining the places where the dead might be deposited. Early in Roman jurisprudence there is a holding that the dead must be buried without the city walls, at first indefinitely by the wayside and later in some designated enclosure set apart for the purpose. This remained the rule until the time of Gregory the Great, when the law was changed allowing burial in the churchyards.

Burns's Ecclesiastical Law 8th. ed. 51

The reason for the change as given by Gregory the Great was that the mode of burial was thereby made easier.
and that the sinner going to the church for prayers might be impressed by the knowledge of the presence of the dead and thus be led to lead a holier life.

In Europe generally the law of burial in its relations to the place of interment and the protection of the dead body has been considered as belonging to that class of topics falling under the consideration of ecclesiastical courts. However the right of burial in the parish church yard was far from being an ecclesiastical privilege; although it was intimately bound up with the church establishment.

The burial right is a common law right, but it is controlled in many points by the ecclesiastical law. Every man according to the common law has a right to be buried in the churchyard of his own parish.

In the early canon law we find many rules regulating sepulture. Every one, criminals excepted, was to be buried in the parish church, or in his ancestral tomb (if any), or in such place as he might direct. The ecclesiastical law also excepted traitors from churchyard burial.

In Kempe v. Wickes (3 Philimore 264) it was held, that the manner of burial was exclusively under the direction of the church ordinary, and that the body once buried could not be
removed without the consent of the ordinary. To this there was one exception which remains to the present day, although now generally statutory; to wit—the right of removal by a coroner in case of violent death.

In another early English case, King v Coleridge 2 B & Ald. 806, it was held that a mandamus would issue if burial was refused by the ordinary; but that the court could not direct the manner of such burial.

It appears that the living had no further interest or right in the churchyard than merely to be buried therein. It amounted to a merely temporary appropriation to last only so long as was necessary for the body to return to earth from whence it came.

Another ecclesiastical rule was that the wife was to be buried with her last husband, if she had more than one.

In Jennings v Tucker (1 H. Black. 90) we find a holding that the husband was bound to bury his deceased wife, and the wife her deceased husband.

Ambrose v Kenison 10 C. B. 776

We have said that the mode of burial was generally ecclesiastical, but occasionally some statutory rule varied this custom. For example a statute known as the 'woolen statute'...
was passed which provided that in preparing a dead body for burial it should be wrapped only in woolen cloth.

30 Car. 2st. I cIII sec. III.

The object of such statute was to encourage the wool industry by providing a further market or use for woolen cloth.

An historical fiction is found in the old Roman law, whereby dead bodies could be arrested for debts contracted by the deceased while living. It was the law that the person should be brought into court on the return day, in order to have body execution, to satisfy the debt to the plaintiff. The law did not say whether the body should be alive or dead, and consequently, in this age of legal fiction, it became the custom to arrest the dead body. Not that it could in any manner be a satisfaction of debt, but that by its detention from burial, payment, or promises of payment, might be induced from the relatives of the deceased.

This custom originating in the Roman law spread throughout the European countries. In the year 1700, in England, the body of Dryden, the poet, was arrested.

In the case of Quick v. Copleton (1 Kebble 866) a woman was
held liable on a promise to pay, in consideration that creditors forbear from arresting the dead body of her son.

The practice of making such arrests even became prevalent in the United States, continuing until abolished by statutory enactment. The abolition of imprisonment for debt tended in a great measure to put an end to the practice. But in Mass., in 1811, a direct statute was passed prohibiting such arrests and imposing a fine as a punishment.

Mass. Stat. P. 613 sec. 2

In Maine we find a similar statute.

Me. R. S. p907 sec 26

In England, in 1804, in the case of Jones v Ashburnham (4 East. 460) the court overruled the authority of Quick v Copleton (supra), and held that promises thus obtained were invalid, on the ground of its being "an extortion on the relatives and that it was an act revolting to humanity and in violation of every principle of law and moral feeling".

It is plain the only object of such arrests was to induce the relatives of the deceased to pay the debts, rather than to be exposed to the publicity of a delayed funeral. This is the
only result that could have been accomplished, as the creditor could not in any manner have disposed of the body, except by burial. The common law did not recognize the body as property; consequently it could not have been sold on execution, and also, according to the common law, it must be buried.

Presumably the arrest of the dead body occurred only when the creditor could not reach property in satisfaction of his debt, and as body arrest has now been abandoned, we have remaining the law, that if a defendant is held on execution preliminary to final judgment, such judgment can be sued out only on his remaining property. The dead body is not now in any instance in the United States, or in England at the disposal of or under the control of, the creditor, or of the officer holding process in a civil action, except in certain cases to be hereinafter noted, where such officer is bound to bury the body of a person dying while imprisoned.

So far we have confined ourselves mainly to a historical or general sketch, and we will now undertake to follow out some of the principal divisions of our subject, that have a present bearing on our laws and customs, and tracing out
their origin and development as practically ascendant.

amount of authority at hand will permit.

We will then divide our subject into two classes, namely—

I. Duties toward a dead body, and II. Rights in, or pertaining to, a dead body. Each of these classes with its subdivisions will be discussed in order.

Nature by its peculiar intricacies builds up a physical structure and implants therein a germ of life, which acts as a motive power for the body. This motive power is sufficient for a time to protect the structure from disintegration, but soon life departs and, like all other bodies in accordance with the laws of nature, dissolution quickly follows, and the body returns to its parent-earth. Following this is a duty, imposed by the universal feelings and reverence of mankind for the dead, and in recognition of the health and morality of the living. A duty not only to return the body to earth, but to do so in an inoffensive and decent manner. Our natures, trained as they are by civilization, would revolt at the suggestion of anything but a decent and orderly burial or disposition of a dead body. It is true that history shows us the customs of barbarous nations having but little respect for the corpse, and we see the idea advanced—
by a late school of sociologists of France, that a dead
body is nothing more than so much clay to be disposed of in
the easiest possible manner. But notwithstanding these inst-
ances, we see with the advancement of christianity, a
like advancement in the reverence and respect for the bod-
es of the dead, and we find in most jurisdictions, laws regulat-
ing their interment.

Under the ecclesiastical law the ordinary was in duty
bound to bury those dying within the parish.

A nearly rule of the common law, and one enacted in
the most of our state statutes, was that the body should be
carried to the grave covered and not be exposed in an indecent
manner.

In Rex. v Stewart (12 A. & E. 773) an application for a
mandamus was made to compel overseers of the poor to bury a
certain person. The court said "It should seem that the
individual under whose roof a poor person dies is bound to
carry the body decently covered to the place of burial; he
cannot keep him unburied or do any thing which prevents
christian burial. He cannot therefore cast him out so as to
expose the body to violation, or to offend the feelings, or
endanger the health of the living; or for the same reason, he
cannot carry him uncovered to the grave."

Againin I Greenleaf 226, it was held that throwing a dead body into a river was an indictable offence. In this case the question raised was whether under the common law such offense was indictable. The court said: "We have no doubt upon this subject. If a dead body can be thrown into a river it can be cast into the street. Good morals, decency, our best feelings, & the law of the land, all forbid such proceedings"

see code Tenn. sec. 5658.

Stat. Ter. Ok. 1893 sec. 2189

Thus we see that duties toward a dead body may be natural arising out of the affection or regard of the living; or they may be legal duties, imposed by statute, or by rule of law growing out of custom. Those of the first class, which I have termed, natural duties, devolve upon persons who have had the closest intimacy, friendship, and relationship, with the deceased while he was yet living. It is but natural and just that those who honored and loved the man while he lived should deem it their first duty to care for the body when life has departed. Yet there is no authority to compel performance. It is a moral duty and enforceable only by moral...
Those duties which I have termed legal have much the same foundation as has been given to the natural duties. It is simply a statutory or court recognition of the natural duty and by enactment or holding makes that duty compulsory, and determines the particular individual, or individuals, upon whom it falls. It seems inconsistent with human nature that any one should be so debased as to avoid such natural duty as is cast upon him, in decently caring for a body after a life has departed. But in view of the fact that men are not always even humane, it is but proper and just, that we should be made to feel reasonably certain that that which remains of us after life has passed away, shall be decently interred or disposed of. Accordingly our legislators have seen fit in many of our states, and in Europe to enact laws defining the duties of the living towards the dead.

In the early judicial records of the common and civil law are rules governing this duty. By the civil law of ancient Rome the charge of burial was 1st, upon the person to whom it was delegated by the deceased, and the heirs could be compelled to comply with the provisions of the will as to the burial of the testator—Corpus Juris, digest lib. II title 7.
2nd-, upon the devisee of the property, and if none, then, 3rd-, upon the legitimate heirs in order.

Corpus Juris. digest lib. II title 7 L. I2 sec. 4

By the ecclesiastical law it was made the duty of the ordinary to bury the dead; but funeral expenses, in payment of the services so rendered, were to be allowed of the goods of the deceased, the amount to be determined by the social and political standing of such deceased. This claim became a first charge upon such property, and was to be paid before any debt or duty whatsoever.

Philimore's Ecclesiastical Law


But this resolved itself more into a direction than a duty. The near relatives being generally bound to bury their dead.

Under the early common law we find the rule that the person under whose roof the death occurs is bound to give the body a decent burial. By the term "roof" here, we think is meant the property fee or holding; consequently in case of an accidental death in a public highway, the duty of burial would fall on the public to be performed by its official functions, unless such dead body be claimed and given a burial by private parties interested in its disposition.
Later under the common law was shown by numerous cases, and as set forth by the leading text writers, both in England and in this country the legal duty of burial devolves upon the executor or proposed administrator. Redfield (Will's II, 227 sec 10) says it is the duty of the executor or some one in behalf of the estate, to see to the funeral rites; and Williams (Executors II, 829) says the executor must bury the deceased.

This was by no means a new rule of law, as the burial of the dead and the distribution of the estate were both under the ecclesiastical law lodged in the ordinary of the church. But we think this true only in case no other person is bound.

In Hapgood v Houghton (10 Pick. 154) the supreme court of Mass. held the estate in the hands of the executor bound for the funeral expenses, and further that the law raised an implied promise to pay those who supplied the necessary expenses, so far as he had assets in his hands. But the court also stated as a matter of opinion that the particular circumstances of the case would determine whether the expense of such burial could be recovered by those lawfully bound to perform such duty. This case does not determine
the executors duty of burial, but that the estate is bound for such burial.

In the early laws of Greece and Rome the strictest adherence to the will of the deceased was enforced. It was deemed the duty of those upon whom it was placed by the deceased, to carry out his wishes as to the disposition of his body. Under the ecclesiastical and common law the will of the testator regarding the disposition of his "corpus delicti" was not regarded as imposing a legal duty and even such right of direction was at common law denied by the courts.

Nevertheless history furnishes us many instances where the most whimsical and capricious desires of the deceased were carried out by those having charge of his body. Democritus wished to be embalmed in honey, and it was done. Plutarch relates that the body of Muna was not burned, as was the usual custom, because he himself forbade it.

A noted case was that disposition made by Jeremy Bentham of his body, as a dried specimen in a medical college.

Generally our statutes do not recognize the right of the testator to impose any duty on relatives or others by his
will, regarding the manner in which his body shall be disposed of. However by a late statute in New York the will of the testator in this regard is recognized, and allows a person by will or contract to impose such duty or disposition of his body, or any part thereof as he may see fit.

New York Penal Code sec. 305
Stat. Ter. Ok. 1893 sec 2188

Also under the decisions of Indiana, where a property right is recognized in a dead body, it would seem that the testator might by his will impose a duty by directing the disposition of his body the same as he might any other property.

Here we think it well to point out how closely connected are the two main divisions of our subject—duties and rights. Indeed the terms are almost inseparable, for where there is a duty imposed there is a right to have such duty performed. A distinction that can be shown is, that generally, the two are separately lodged in different persons or bodies. Thus the duty of burial may fall on one individual, and may not even exist until the right to be buried has ceased, for surely in a strict sense a dead body
cannot continue in possession of the rights of the person held while living, and the duty does not arise until the death occurs. Yet the right to have the body returned to earth by interment has been and is universally recognised.

It is one of the accepted natural laws, and its recognition as a right is justified by its long continued usage.

But it is not always true that the duties repose in one person and the rights in another, for it may be that one person may hold the natural or legal right to the possession and disposal of a body, and yet have connected with this the duty, natural or legal, of its proper and decent burial.

But this is sufficient to point out the relative nature of the two divisions, and we will now examine and exemplify our second division—therights in or pertaining to, a dead body.

Here again we might enter into historical research, for ever since the creation or the evolution of man, such rights have existed; but we think sufficient has been said historically in a general way in our former pages, and we will now confine our treatise to a collection of examples, leading cases, and statutes, from which we will undertake to ascertain the law and point out its development.
But first let us inquire as to the nature and extent of this right. The common law does not recognize a dead body as being property, and indeed the amount of authority for calling it such is very limited. The idea of placing it on the list of inventory of the executor is repulsive. Blackstone in his commentaries says—"there is no property right in a dead body, but the right to care for it, watch over it, and to bury it, will be protected by the law".—2 Bl. Com. 429.

The right is a mere trust relation to be guarded and enforced by law. The dead body in the sense of objective property belongs to no one, but must be given up to its mother—earth, and be protected by the general public.

Thus arises the trust relation as alluded to, and the question becomes one not of property but of trusteeship.

It would seem probable that the above reason was applied in the old English law in placing the charge of burial along with the administration of estates, in the church or ecclesiastical courts. However the law stood ready to enforce its trust thus created if necessary, and to aid its appointee in carrying out the trust by indicting offenders.
against its provisions.

In 40 Eng. Law and Eq. Rep. 581, the courts admit that under the English law the only protection of a grave independent of ecclesiastical authority was by indictment.

Also in Reg v Sharpe (7 Cox Crim. cases 214), a son was indicted for removing the body of his mother from the burial ground of a dissenting church in order to bury it with the body of his father. The court held that although his motive was good, yet his act was a trespass and amounted to a misdemeanor, inasmuch as he had removed it without the consent of the congregation or trustee. The court further said that "there is no authority for saying that relationship can justify the taking of a corpse from a grave where it has been laid."

We might here give many examples in support of this trust relation, but prefer to retain the same for illustration of individual rights to the office of trustee.

Naturally it would seem but just and right that each person should be given the first and final disposition of that which holds his life and spirit during his sojourn here upon earth. This would be the just result from both a moral and an equitable point of view. Under the Roman law
and early common law the right of the testator
to dispose, by will or otherwise, of his own body was
recognized by the courts; but by the later common law such
right was explicitly denied on the ground that a testator
could dispose of nothing of which he did not hold a property
right, and as, by the common law, there could be no property
right in a dead body, its disposition could not be willed,
or its interment directed, in a manner which could be enforced
by the courts.


It would not and hardly could be denied, that a severed hand
or arm could be disposed of by its living owner, so long
as he did not by such disposal endanger the health or wrong
the sensibilities of the community. Why then the same
privilege should not be extended so as to include the body
is not easily seen; and the late statutes of New York and
Oklahoma Ter. recognizing this right but in accordance
with justice and equity.

Penal Code N.Y. sec. 305.


Under these statutes the legal trustee of the body
would be the appointee of the testator, or the court executor.
But indeed the cases are few in which these statutes are, or can be, taken advantage of and we must make further inquiry as to who shall become the legal and proper trustee in case of intestacy of the body, or in another state from those named. Outside of statute the executor of administrator has no legal authority over the body, as it does not belong to the enumerated classes of property of which they are given control.

Sup. ct. of South Carolina Am. Law Reg. 24 p. 586

There is a rule of law which originated in the early ecclesiastical courts, and was later established in the common law, and is now in the most of our states statutes, to the effect that the administrator or executor must pay the funeral expenses of the deceased in advance of all other debts. The most of our courts recognize the claim for funeral expenses, but hold that the amount thus expended shall be in a reasonable proportion to the decedents estate.

5 Pa. County ct. 579.

5 Pa. County ct. 19.

26 Cent. Law J. 554 n.

As to who is the proper and rightful custodian of a dead body, the courts are mall at variance.
Some few acknowledge the claim of the administrator, others give the exclusive right to the next of kin, while again the right of the wife or husband are recognized.

Where the deceased is a married woman the right of the husband is almost uniformly acknowledged both by courts and by custom. From our earliest data down to the present time the husband has sustained this right. We find it recorded that Abraham refused the proffers of the next of kin of his wife to bury her in their sepulchre, and buried her in a separate cave where he himself was afterwards laid.---Genesis c 23.

And as says Mr. Corwin, in 39 Alb. Law Journal p 197 "so have men continued to bury their wives and to be buried with them ever since.---so that the memory of man runneth not to the contrary of such a custom". The case in which Mr. Corwin used the above statement---18 Abb. New Cases72-was one in which the next of kin brought an action to prevent the husband from removing the body of his wife from a receiving vault in one cemetery to his own lot in another cemetery.

The action was held not maintainable. Thus establishing not only the husbands right of burial, but his right of removal and reinterment.
In 1881 the equity court of Mass. (130 Mass. 422) gave a husband permission to remove the body of his wife, with coffin, stones, and monuments, from the lot of the next of kin and also restrained the defendants from interfering with such removal. The court said—"neither the husband nor the next of kin have, strictly speaking, any right of property in a dead body, but controversies between them as to the place of its burial, are in this country, within the jurisdiction of a court of equity."

99 Mass. 281.

4 Bradford 503.

10 Rhode Island 227—"It is the husband's right and duty to bury his deceased wife"—9 Gray 248—

10 Cushing 198.

98 Mass. 538.

But the court denied the right of any person to remove a body once buried without the consent of the owner of the grave, leave of the proper municipal or judicial authority.

7 Cox C.C. 214: 42 Pa.St. 293.

In the case—130 Mass. 422, the husband alleged that his consent to the burial in the lot of the next of kin had been
obtained while he was in great distress of mind, and that he had yielded to their importunities much against his own wishes and desires. Also that he had no authority to care for or adorn her grave, or to bury others of her family there, or to be himself buried by her side. The court decided that the husband had not in reality given his consent to her burial with the next of kin, as a permanent resting place, and permitted him to remove her body to his own lot.

The first right of the husband is recognized by statute in a number of our states.

Penal Code of Cal. sec 292.


In Mass. by the laws of 1887 c. 310. sec. I, the first right of the husband or wife is recognized. Also see—

10 Cent. L. J. p 325. — and

Alb. L. J. 10 p 70.

But generally the wife is not recognized as having any right in the interment of her husband, or in the protection of his remains. There is no equitable reason why her rights in this respect should not be equal to those of the husband.
In Pierce v Priestors Swan Point Cemetery and Mrs. Metcalf (10 R.I. 227 (1872)), where the deceased had been buried as by his own wishes, in a family cemetery lot, which lot descended to the plaintiff, as next of kin and heir at law. Afterwards the widow of the deceased forcibly removed the body of her dead husband, and the plaintiff brings the action for the restoration of the body, and the perpetual enjoinderment of the widow from interference. The court sustained the action, on the ground that a trust relation had been invaded wrongfully. The court did not deny the interest of the widow, but said the person having charge of it, held it as a sacred trust for the benefit of all who might from family or friendship have an interest in it.

In California and Oklahoma Territory the rights of the widow are entirely excluded by statutes expressly naming those persons upon whom the rights and duties of burial devolve.

Penal Code Cal. sec. 292

Tyler, in his Am. Eccl. Law c. 71.-says, "In the
absence of testamentary disposition, the right of burial belongs exclusively to the next of kin." But this statement is to be criticised as too general to be sanctioned as a rule of law. There are a few jurisdictions which sustain the doctrine, as in 42 Pa. 293.,—where the court argues as follows: "suppose a woman had half a dozen husbands all dead, is she to be burdened with the duty and vested with the charge of their bodies as against the expressed wishes of the blood relatives or the next of kin, of each". However the court gives no good reason why she should not be.

In Guthrie v Weaver (I Mo. App. Rep. 136) in an action of replevin by the husband against the father of the deceased for permission to disinter the remains, and remove to the burial lot of the husband, the court denied the right, and held that whatever right the husband may have had, it terminated with the burial, and that the father's right as trustee was exclusive. The court further stated that "the only right remaining after interment is to protect the body from insult". But in this case the plaintiff had consented to the first burial, and
so the case does not decide the first right of the next of kin.

But by the statutes of Ohio (Laws 1894 p231.) the trustees or board of any cemetery are directed to disinter, and deliver any body now or afterwards buried, on the application of the next of kin of the deceased, of full age, and sound mind, and on permission of the board of health.

This statute also provides that the trustee may be compelled so to deliver, by mandamus from the court of common pleas of the county.

Outside of the right acquired through the marriage relation the right of the next of kin, unless through statute, cannot be questioned; and the right would acquire in the same line, as relates to the distribution of personal property.

We find but one instance in which statutes deny the above claim. By the statutes of Mass. p II34 sec. 8— the body of a murderer may, by the court, be ordered dissected after execution.

But our legislators, in recognition of the fact that there are not always husband, wife, or next of kin, and that even where there is one or the other of these, they
do not always claim their right, have seen fit to enact many laws designed to protect the dead body.

Thus we find statutes in the most of our states, that coroners must take possession of the body of any person to ascertain the cause of an unnatural death, and after autopsy, if not claimed by relatives, the coroner, or the overseer of the poor shall bury the same, either at public expense, or at the expense of those legally charged with such burial.

New York Penal Code sec. 308.

Laws of Mass. 1887 c. 310 sec. I.

New York 146.

The statutes of probably all of our states provide for the disposition of paupers, and all persons to be buried at public expense.

See state statutes on subject of coroners rights and duties.

In some states they are required to be buried, while in others they are to be delivered to medical physicians for anatomical purposes.

Again: we find a like provision as to the disposal of persons dying in state, county or city, prisons. In New York by statute convicts who die in state prison, if not
claimed by relatives in twenty four hours after death, shall
be delivered to certain medical colleges for dissection.

In the disposal of the bodies of convicts and suicides
a decided advance has been made when considered from a
humane or a moral point of view.

An English statute (4 Geo. IV c. 52) prohibits
the practice of burying suicides on a public highway with
a stake driven through the body, as was the custom, and pro-
vides that the coroner shall privately bury the same.

Also under the canon law executed persons were not
allowed a Christian burial, on the ground of example to
others.

Burns Ecclesiastical Law

From the ancient law of Rome down to the present time
the sepulchre of the dead has been zealously guarded.

The civil law gave a remedy to anyone interested
for any wanton disturbance of a grave, or mutilation of a
body.

By the common law disturbing a dead body, as has been
previously stated, was an indictable crime.

2 T. R. 733.

In 40 Eng. Law and Eq. Rep. 58T. a man was indicted
for removing his mother's body in order to bury it with that of his father.

In the most of our states the common law in this respect has been superseded by statutes defining and regulating disinterment.

In Mass. by statute of 1814 c. 175 and as amended in 1830 c. 57, a dead body may be removed under licence from the proper judicial authority.

10 Pickering 37.

Under this statute a case arose in 19 Pickering 304, in the nature of an indictment for the removal of a body, but as the removal took place before burial, and as the indictment did not state the purpose of the removal it was held not within the meaning of the statute.

The indictment should have averred an intent to use, or to dispose of the body for dissection.

The statutes of Indiana, sec 2286&7, provide that a grave can be disturbed only on due process of law, or consent of surviving husband or wife, or next of kin, or person having legal control; and subscribes that any person convicted shall be guilty of a felony.
The penal code of California, (sec. 290) prescribes the same punishment; but states that the statute does not apply to the removal by near relatives who remove the body for reinterment.

The supreme court of South Carolina in the case of Griffiths—Ad. v. Charlotte, Columbia, & Augusta, R.R. Co. (24 Am. Law Reg. 586) held that the plaintiff administrator could not sustain an action for the mutilation of a dead body. The court does not decide the question as to the next of kin; but intimates that such action would lie.

In 4 Bradf. Rep. 503, where it became necessary to take the place of burial for public use, the rights of the next of kin to claim indemnity for removing and suitably reinterring the same remains were sustained. The referee, as sustained by the court, further held that the right to the individuality of a grave continued as long as the remains could be identified. The court also held that the monuments, coffin, and burial clothes, remained the property of the person furnishing them, or the descendant or representative; and we think this can be accepted as a general rule of law. In the above South Carolina case the court, although denying the right of suit as to the dead body,
held the action maintainable as to the clothing and watch of decedant. See 13 Pick. 402.

We have found but one authority to the contrary of this doctrine — in I Missouri Appeals Rep. 136 the court held the casket, and shroud were irrevocably consigned to earth and all property in them was at an end; and that they were mere adjuncts to the body which they inclose. But the court founded its decision on the fact that the action for the coffin and clothes was a mere guise to gain possession of the body.

We are willing to admit that the rulings under the common law as to the disinterment were in some instances severe and rather unjust; but we believe that every possible rule of law should be put in force in affecting ajust guardianship over the bodies of the dead. Only in extreme cases of exigency should the sacredness of the tomb be invaded or the public health endangered by the disinterment of a body once resigned to earth.

We have noted many exceptions and variances, but in conclusion we will make the following general deductions:

1. Under the canon and ecclesiastical law sepulture was regarded as a religious rite.
2-The right to be buried was a rule of the common law.

3-By the common law there is no property right in a dead body.

4-Duties towards a dead body may be natural or legal.

5-Under the ecclesiastical law the burial of the dead and the distribution of estates were in the church ordinary.

6-Under the laws of Greece and Rome the will of the deceased was strictly enforced; but the right was denied by the common law. By statute in New York and in Oklahoma Territory and by judicial reasoning in Indiana the right is sustained.

7-The right to bury a dead body is a mere trust relation.

8-Under the common law the only protection of a grave is by indictment.

9-Under the will of the testator in New York, Indiana, and in Oklahoma Terr., the right of burial devolves on the executor.

10-The estate is bound for reasonable funeral expenses and they are a first charge.

11-The husbands right and duty is to bury his deceased wife.

12-In a few states, but not generally, the right of the wife to bury her husband is recognized.
13-Outside of the marriage relation the right of the next of kin, in the order of inheritance of personal property is recognized.

14-If no husband, wife, or next of kin, then the right and duty of burial devolve on the coroner or overseer of the poor.

15-The owner or custodian of the grave has a right of action in protecting the grave from disturbance.

16-The monuments, coffin, and shroud, remain the property of the donor and an action will lie for their theft.

17-Where the land is taken for public use the owner of the grave or remains has a right to indemnity for the expense of reinterment.

18-The individuality of a grave continues as long as the remains can be identified.