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LOWRY ET AL. V. PLITT ET AL.

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by his wife's consent. The court, therefore, only decided that a widow who consented to her husband's burial in a certain place, could not, against the wishes of his family, be allowed to remove his remains. It appears to leave undecided the question as to what voice a surviving husband or wife has in deciding where the deceased wife's or husband's remains shall be interred in the first place.

It has been decided that a husband has control over the remains of his wife: See the Ohio case, *infra*. It is reasonable that a widow, administering to her husband's estate, should, as against his heirs, choose his final resting-place, though this has never been decided. If she waives her right to administer, it would appear from the cases that the remains are under the control of the next of kin: See 4 Bradf. 503, *supra*. The reason given for depriving the widow of what would seem to be a natural right does not seem altogether satisfactory: it is that a widow may marry again and the custody of her husband's remains may thus pass into the hands of strangers. But in most cases burials descend as real estate, and would commonly remain in the family of the husband, if originally his property. Arguments drawn from the civil law or even the English law would not avail in America, as the perpetuation of families, in the male branches, had in the early Roman system and has always had in England an importance which it does not possess in this country, and an essential part of this idea lay in the preservation in the line of the family of the tombs and monuments of the dead and of all the heirlooms and relics of the race.

It has been said that the expressed wishes of a testator as to the disposition of his remains will prevail over the wishes of his family: 4 Bradf. 503, *supra*.

Bogert v. Indianapolis, 13 Ind. 138, was an action by Indianapolis against Bogert, charging him with violation of a "cemetery ordinance." The court (per Perkins, J.) said *arguendo*: "We lay down the proposition, that the bodies of the dead belong to the surviving relatives, in the order of inheritance, as property, and that they have the right to dispose of them as such, within restrictions analogous to those by which the disposition of other property may be regulated. They cannot be permitted to create a nuisance by them. Hence a by-law might be reasonable where population was dense, requiring those buried to be sunk to a certain depth, or to be buried outside of where population was or was likely to become dense, and within a reasonable time after death, &c., but we doubt

if the burial of the dead can, as a general proposition, be taken out of the hands of the relatives thereof, they being able and willing to bury the same."

A remarkable case that arose in Cleveland, Ohio, is reported (not very carefully) in Am. Law Times, July, 1871. The body of the plaintiff's wife was delivered to the defendants, who were physicians, for the purpose of dissecting its throat, in order, in the interest of science, to discover the cause of death. The defendants promised to perform the operation in the presence of the friends of the deceased, and to give the body a decent burial. By statements of the dangers of infection the defendants deterred the friends from attempting to see the remains at the medical college and held a pretended funeral on the day before the time appointed. It appeared afterwards that they had retained the body for general dissection and performed the funeral ceremonies over a coffin filled with rubbish. Upon a discovery of this fraud and upon threats of criminal prosecution the defendants sent the body in a rough box to the relatives of the deceased. The husband, who had been absent from home, upon his return brought suit for damages for laceration of feelings, expense of recovering the body, &c., and for the fraud. PRENTISS, J., in overruling a demurrer filed by defendants, said: "A corpse is not in itself so far property that it could be made an article of merchandise. A court would not enforce a contract for the sale of a dead human body. The same reasons which forbid the enforcing of such a contract, require that somebody shall have the right to the care and custody of a body for the purpose of securing it a decent burial. For this purpose the law gives a husband the custody of the dead body of his wife, a parent of a child and a child of a parent. The remedy (for infringing this right of custody) must be by civil action. * * * A body itself may not be property; but this right may be called perhaps a *quasi* property. At any rate it is a right which the law will enforce, and for an infringement of which an action will lie."

Pierce and Wife v. Proprietors of Swan Point Cemetery and Almira T. Metcalf, 10 R. I. 227, was the reverse of *Wynkoop v. Wynkoop*, *supra*. There the deceased, Metcalf, had died in 1856 and been buried in his own lot in Swan Point Cemetery, with the consent of his widow and in accordance with his own wishes. At his death this lot became the property of his only child, Mrs. Pierce. In 1869, against the consent of this daughter, and in violation of the by-laws of the defendant corporation, his re-