

NOTES OF RECENT DECISIONS.

much against his own wishes and feelings, "fearing that they would make trouble for him if he did not consent," and "which he should not have done had his mind been in condition to realize the situation;" that he has no right or authority to take care of or adorn her grave in that lot, or to bury other of his or her family or friends there, or to be buried himself by her side; that he owns jointly with his co-heirs a lot in the Mount Hope Cemetery, in which his father and mother are buried, and in which he wishes that his late wife, and himself at his death, may be laid; that he desires to remove to this lot her remains, with the coffin containing them, and the stones and monuments placed by him at her grave; and has obtained a permit in due form from the proper board of health for that purpose; that he has requested of the defendants permission to do so in a careful and proper manner, doing no damage to the lot in which she is now deposited, and leaving that lot in good condition; and that they have refused such permission. *Held*, that upon these allegations, if supported by evidence, it was within the authority of the justice before whom the hearing was had, to decide that the plaintiff never freely consented to the burial of his wife in the lot of the defendants' cemetery, with the intention and understanding that it should be her final resting-place; and that a Court of Chancery might order the defendants to permit him to remove her body, coffin, and tombstones to his own lot. The doctrine of ownership of a dead human body was learnedly discussed and adjudged in *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227; S. C., 14 Am. Rep. 667, and it was held that a widow, having consented to the burial of her late husband in a lot purchased by him, could not afterward, against the wishes of his only child, remove the remains to another cemetery.—*Ib.*

On the subject of a widow's right to appoint the burial place of her husband, attention is called to the recent decision by Justice Macomber, of the New York Supreme Court, in *Southworth v. Southworth*, which may be read in connection with *Weld v. Walker, ante*. The plaintiff and her husband were residents of this State, as was the husband's father, the defendant. The husband died February 15, 1880, and his remains were placed in a receiving vault at Geneva in this State, at the suggestion of the defendant. Before his death the plaintiff

had expressed a desire to remove his remains, after his death, to Louisville, Kentucky, the residence of her parents, and to bury them there, in her father's lot, to which her father had consented. On the husband's death, the plaintiff removed to Louisville, where she remained till May, 1880, when she returned to this State, where she now resides. About the first of April, 1880, without her knowledge or consent, the defendant caused the remains to be buried in his own lot at Geneva. The plaintiff, wishing to carry out her purpose to inter the remains at Louisville, brought this action to restrain the defendant from interfering with the disinterment of the remains, and the removal of them to Louisville. Justice Macomber upon these facts decides as follows: 1. That presumptively, and in the absence of circumstances and facts overcoming such presumption, and in the absence of a lawful request made by the deceased in his life-time, the plaintiff as wife of the deceased has the right of controlling the place of burial of the deceased. 2. That such right is not absolute, but conditional, and must yield to considerations which make the assertion of such right unreasonable or inequitable. 3. That under the facts established in this case, the plaintiff had not and has not the right to remove the remains to the State of Kentucky, nor to disturb them in their repose. That the plaintiff's complaint be dismissed upon the merits, but not with costs. This is an interesting, and so far as we know, a novel question, and we shall probably hear more of it.—*Albany Law Journal*.

CONTRACT.

It has been held by the Supreme Court of the United States in *Congress and Empire Spring Co. v. Knowlton* that where a contract is illegal (being *malum prohibitum* and not *malum in se*) money paid by one party in part performance can be recovered back when the other party has performed no part of the contract and both parties abandoned such contract before it was consummated.

A New York corporation, in violation of the laws of that State, provided for an increase in its capital stock. This increased stock was subscribed for and an assessment paid thereon.