

Dead Bodies--Disinterment--Damages (Gostkowski v. Roman Catholic Church, 262 N.Y. 320 (1933))

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DEAD BODIES—DISINTERMENT—DAMAGES.—Defendant was the owner of a cemetery in which plaintiff had bought a lot so as to bury his deceased wife. Subsequent to the burial, plaintiff discovered that the body had been moved without his knowledge or consent and reinterred, with due care, in a neighboring plot. Upon inquiry as to the cause therefor, the plaintiff, after suffering abuse from the curate, was informed that the wrong plot had been sold to him, having been previously purchased by another. On appeal, from a modified verdict,¹ held, the next of kin² has such rights in the dead body as to entitle him to damages for injured feelings in an action for the disturbance thereof. *Gostkowski v. Roman Catholic Church*, 262 N. Y. 320, 186 N. E. 798 (1933).

By allowing an action for damages for the wrongful disturbance of a dead body to be maintained by the surviving spouse or the next of kin, the case does not follow the general rule.³ The holding necessarily recognizes a right of property in the body contrary to the English common law,⁴ where it was held that no action could be maintained⁵ for property, if any, was not in the heir⁶ but, rather, in the Church.⁷ The repudiation of the ecclesiastical law, by this country, left our temporal courts the sole protectors of this right⁸ and recognition of the change was slow.⁹ Thus, the first actions allowed were predicated on trespass *quare clausum*¹⁰ maintainable by either the next of kin or the owner of the plot.¹¹ Under this rule, substantial damages are allowed, provided that the trespass is wanton and malicious,¹² in which event the injury to the plaintiff's feelings

¹ 237 App. Div. 640, 262 N. Y. Supp. 104 (2d Dept. 1933).

² *Gostkowski v. Roman Catholic Church*, where, in accordance with the practically universal rule, suit by the son was dismissed on the ground that the action is maintainable only by the surviving spouse or next of kin; *Darcy v. Presbyterian Hospital*, 202 N. Y. 259, 95 N. E. 249 (1911); *Pettigrew v. Pettigrew*, 207 Pa. 313, 56 Atl. 878 (1904); 1 COOLEY, TORTS (3rd ed. 1906) 501; 2 BL. COMM. 429.

³ *Infra* note 10.

⁴ See *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227 (1872); 2 BL. COMM. 429.

⁵ See *In re Brick Presbyterian Church*, 3 Edw. Ch. 168 (N. Y. 1838); *Pierce v. Proprietors of Swan Point Cemetery*, *supra* note 4; 2 BL. COMM. 429.

⁶ *Ibid.*; *Meagher v. Driscoll*, 99 Mass. 281 (1868).

⁷ *Ibid.* See also *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238 (1891).

⁸ See *Larson v. Chase*, *supra* note 7.

⁹ *Ibid.*

¹⁰ *Re Beekman Street*, 4 Bradf. 503 (N. Y. 1857); *Shipman v. Baxter*, 21 Ala. 456 (1852); *Bessemer Land & Improv. Co. v. Jenkins*, 111 Ala. 135, 18 So. 565 (1895); *Hamilton v. New Albany*, 30 Ind. 482 (1868); *Pulsifer v. Douglass*, 94 Me. 556, 48 Atl. 118 (1901); *Partridge v. First Independent Church*, 39 Md. 631 (1873); *Smith v. Thompson*, 55 Md. 5 (1880); *Meagher v. Driscoll*, *supra* note 6; *Weld v. Walker*, 130 Mass. 422 (1881); *Thirkfield v. Mountain View Cemetery Assn.*, 12 Utah 76, 41 Pac. 564 (1895); *cf. Bonham v. Loeb*, 107 Ala. 604, 18 So. 300 (1895), in which the action for wrongful disturbance was dismissed for lack of ownership of the land by plaintiff.

¹¹ *Supra* notes 2 and 10.

¹² *Meagher v. Driscoll*, *supra* note 6; *Pulsifer v. Douglass*, *Thirkfield v. Mountain View Cemetery Assn.*, both *supra* note 10.

may be given due consideration.¹³ The theory on which this type of action was allowed was first repudiated in *Larson v. Chase*.¹⁴ At present, the recognition of a quasi-right of property is the practically universal attitude.¹⁵ This right will extend far enough to give a right of action to the next of kin against one who mutilates the body,¹⁶ unlawfully dissects it¹⁷ or interferes with the burial thereof,¹⁸ but wrongful disinterment seems only to give a right of action for trespass *quare clausum* in the majority of jurisdictions.¹⁹ While there is authority to the effect that pecuniary damages should only be allowed in cases in which there is a mutilation of the body²⁰ it would seem that, in the interests of public health and decency,²¹ the rule followed is the better one.

W. E. S.

EVIDENCE—BURDEN OF PROOF—DAMAGES FOR WRONGFUL SUSPENSION FROM LABOR UNION.—Plaintiff brought action against a local labor union to have himself reinstated therein, to have declared void the imposition of a fine, and for damages for wrongful suspension. Plaintiff had been a member in good standing when he was wrong-

¹³ *Ibid.*; *Jacobus v. Congregation of Children of Israel*, 107 Ga. 518, 33 S. E. 583 (1899); *Hamilton v. New Albany*, *supra* note 10 (nominal damages only were awarded as there was no proof of special damages).

¹⁴ *Supra* note 7.

¹⁵ *Re Beekman Street*, *supra* note 10; *Darcy v. Presbyterian Hospital*, *supra* note 2; *Finlay v. Atlantic Transport Co.*, 220 N. Y. 249, 115 N. E. 715 (1917); *Larson v. Chase*, *supra* note 7; *Pettigrew v. Pettigrew*, *supra* note 2; *England v. Central Pocahontas Coal Co.*, 86 W. Va. 575, 104 S. E. 46 (1920); *cf. Bogert v. City of Indianapolis*, 13 Ind. 134 (1859), the Court said (p. 138): " * * * we lay down the proposition that the bodies of the dead belong to the surviving relations * * * as property * * *." *Contra: Griffith v. Charlotte*, 23 S. C. 25 (1885) (there being no property, there can be no action for damages).

¹⁶ 1 COOLEY, TORTS (3rd ed. 1906) 501; 17 C. J. 1144.

¹⁷ *Darcy v. Presbyterian Hospital*, *supra* note 2; *Foley v. Phelps*, 1 App. Div. 551, 37 N. Y. Supp. 471 (1st Dept. 1896); *Hassard v. Lehane*, 143 App. Div. 424, 728 N. Y. Supp. 161 (1st Dept. 1911); *Burke v. New York University*, 196 App. Div. 491, 188 N. Y. Supp. 123 (1st Dept. 1921); *Streipe v. Liberty Mutual Ins. Co.*, 243 Ky. 15, 47 S. W. (2d) 1004 (1932); *Young v. College of Physicians & Surgeons*, 81 Md. 358, 32 Atl. 177 (1894).

¹⁸ 1 COOLEY, TORTS (3d ed. 1906) 498; 17 C. J. 1144; N. Y. L. J., June 19, 1933, at 3664.

¹⁹ *Supra* note 10.

²⁰ See *Henry v. Vintschger*, 234 App. Div. 593, 256 N. Y. Supp. 581 (1st Dept. 1932), the Court said (p. 595): " * * * only in cases where a body has been mutilated or destroyed has there been a recovery for money damages."

²¹ *Pettigrew v. Pettigrew*, *supra* note 2, at —, 56 Atl. at 880: "'Curst be he that moves my bones * * *' expresses the universal sentiment of humanity, not only against profanation, but even disturbance."