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PROPERTY IN DEAD BODIES

BY WALTER F. KUZENSKI

THERE are few questions in the entire field of law that are so prolific a source of interest as whether or not there exists a property right in a dead body. It is certain under the modern conception of the law applicable that there can be no *commercial* property in a dead body. The wide divergence of opinion lies in whether there is that right to possession which apparently is an incident of an absolute or qualified property interest.

Most of the discussion of the law of dead bodies, such as the very learned one of R. S. Guerneý in 10 *Cent. L. J.*, 303-325 treats the subject principally from the duty that lies on the nearest relative to bury his dead. Indeed, Mr. Guerneý reasons that there can be no property in a dead body, but his assertion is not fortified by any authorities. The learned treatise concludes that the duty to bury is on the next of kin in the order of administration.

The law of dead bodies has had a most singular history. The earliest American case on the subject of the interest that relatives have in the remains of their deceased, is *In re Widening of Beekman Street*, (4 Bradf. (N. Y.) 503), where the history of the law applicable was fully considered and which settled the law that the relative had an interest sufficient to entitle him to the reinterment and settling the propositions:

1. That neither the corpse, nor its burial, is legally subject, in any way, to ecclesiastical cognizance nor to sacerdotal power of any kind.
2. That the right to bury a corpse and to preserve its remains, is a legal right, which the courts of law will recognize and protect.
3. That such right in the absence of any testamentary disposition, belongs to the next of kin.
4. That the right to protect the remains includes the right to preserve them by separate burial, to select the place of sepulture and change it at pleasure.
5. That if the place of burial be taken for public use, the next of kin may claim to be indemnified for the expense of removing and suitably reintering their remains.

The foregoing is the premier American case on the right to burial of a dead body, and the holding therein, though criticized by Mr. Guerneý, (10 *Cent. Law. Journal* 303-325) has been generally followed.

HISTORY OF THE LAW IN ENGLAND

It appears that in England, after the time of the Norman Conquest, the church claimed exclusive authority over the dead, doing this for the threefold purpose: to prevent sacrilege thereto, because the burial grounds belonged to the churches, and because, after death, the church had probate jurisdiction. (*In re Beekman Street*, 4 Bradf. (N. Y.) 503; *Essays in Anglo-American Legal History*, Vol. 1, page 248; Same Vol. 2, page 255.) The exclusive jurisdiction of the Ecclesiastical Courts over the dead became in time, so exclusive that Lord Coke (3 Coke's Inst. 202) declares

The burial of the cadaver, that is *caro data vermibus* (flesh given to worms) is *nullius in bonis* and belongs to ecclesiastical cognizance; but as to the monument, action is given, as has been said, at the common law for the defacing thereof.

That the Ecclesiastical Courts had practically exclusive jurisdiction was acknowledged (*Carvini's Jus Canonicum*; *Voet ad Pandectas*, ed. 1731, Vol. 1, p. 602; *Burn's Ecc. Law*, 8th Ed. Vol. 1, 251, 271, 372.) Blackstone dismisses the rights of the relatives with the words: "Though the heir has property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes."

However, in spite of the well defined rule heretofore expressed and declared by both court and commentator, there appears to have existed, prior to 1804, a right to arrest a dead body for debt. In 1700 the body of the poet Dryden was so arrested and in 1784 the body of Sir Bernard Taylor was arrested from his funeral cortège. In 1804, Lord Ellenborough declared such arrest illegal as *contra bonos mores*. (*Redfield's Surr. Rep.* Vol. 4, p. 527.) It is hard to justify the right to arrest, if the doctrine of Lord Coke controlled for if there could be no property in the dead, and no value, how could there be an arrest, which is legally but an attachment of the body.

Even in America, as in Massachusetts before 1811, and in Rhode Island until some time thereafter, when the right was taken away by statute, the creditors had a right to arrest his dead body. (*Redfield's Surr. Rep.* Vol. 4, p. 527.) Such proceedings are now universally abolished, as revolting to public feelings.

Though it is now quite generally settled that the next of kin are entitled to bury their dead, and that it is their duty, yet such is merely an empty privilege unless such right is enforceable. If the law holds that there can be no property in a dead body either general or special, but that there might be recovery in trespass for interference with family rights, there is no way of recovering possession from an interloper unless there is ordinarily some pecuniary right violated. Presum-

ing that an interloper obtained possession of a corpse and refused to surrender the same on demand, what would be the remedy? Would replevin lie? Such was precisely the question before the Wisconsin Supreme Court in *LeMay v. Renier*, (N. W.) but the court declined to decide whether anyone had a property interest sufficient to maintain replevin on the ground that the question was moot. Michigan has held, (*Keyes v. Konkel*, 119 Mich. 550, 78 N. W. 649) that there can be no property in a dead body, and that replevin cannot be maintained.

NATURE OF INTEREST IN A CORPSE

To determine whether a property interest exists in a corpse it is necessary to determine what the term "property" embraces. There is very general confusion in regarding property—the right to a thing—and the subject of property—the *res*—as identical. Property, says Bouvier, is the right and interest that a man has in lands and chattels to the exclusion of all others. A vested right of action, an intangible thing is as clearly property as a tangible object. The subject of property, the *res*, is merely one of the incidents of property, and whatever physical interference annuls the right of user takes property, (22 R. C. L. Prop. 37). The property in a dead body may be absolute, if any exists, or it may be limited to a mere right of present possession. Is there such a sole right of user to the corpse, belonging to the next of kin, to the exclusion of all others, as would permit the interest of such relative to be considered a property interest? In the opinion of this writer, there exists in the next of kin of a deceased person a qualified property interest in trust for burial. This opinion is founded on a consideration of the authorities hereafter discussed.

Most of the American cases wherein the question is considered hold that for an interference with the corpse, the relatives have a cause of action for trespass against the intermeddler, but as to what is the basis of the right, the courts are divided. Some courts found the action on an interference with the family relationship analogous to a cause for aliénation of affections, while others place it upon other and different and varied grounds.

In all the American cases except possibly in Michigan (*Keyes v. Konkel*, 78 N. W. 649) it is recognized that, because, having for their foundation the system of Ecclesiastical law unknown in the United States, the English cases, and the commentaries thereon can be of but slight authority (*Renchar v. Wright*, 125 Ind. 536, 25 N. E. 822; *Larsen v. Chase*, 47 Minn. 307, 50 N. W. 238.) One of the leading American cases on the rights of the relatives to an interest in the bodies of their dead is *Koerber v. Patek*, (123 Wis. 453, 102 N. W. 40) where

an action was brought by the parent for the mutilation of a corpse. The court held that the right of the relatives to bury their dead inviolate and without interference is one of the clearest in the gamut of civil liberty, and one most important of preservation from the point of public welfare and decency. The learned court finds the law very unsettled, stating:

The whole subject is only obscured and confused by discussing the question whether a corpse is property in the ordinary *commercial* sense or whether it has any value as an article of traffic,

though it states that it finds it unnecessary to decide whether a property exists, it nevertheless allows recovery of damages. It is however, in reason, difficult to see how the court could hold that no property existed, for how could it permit the recovery of damages for the wrongful detention of that to which no one has a property right. For what is property but the absolute or qualified right to have possession and disposition of a thing?

The supreme court of Michigan (*Keyes v. Konkel*, 78 N. W. 649) held that no property exists in a corpse, but most of the later decisions in many of the states, as Minnesota (*Larsen v. Chase*, 50 N. W. 238) and Pennsylvania (*Pettigrew v. Pettigrew*, 56 Atl. 878) and in South Carolina (*Osten v. Southern Ry. Co.*, 142 S. E. 50) indicate that the rule is otherwise. In the Pennsylvania case, decided in 1904, the court rationally declares that inasmuch as there is a legally recognized right of custody, control and disposition, the essential attributes of ownership, it may be said that there is property in a corpse. Its reasoning appears to be irresistible, especially when it holds that the relatives hold such property subject to a legal trust in conformity with the right and duty of burial.

There can be no valid objection on the ground of public policy if the rule above expressed is adhered to, for the property is subject to a public trust to bury, and cannot be made the subject of a revolting commerce. On the contrary, to hold that there is no property, and consequently no enforceable right to present possession but only the nebulous and possibly consolatory future action for damages for unwarranted interference, manifest evils must result. Then what is there to prevent an interloper from burying the body, for how can he be restrained, except by a mandatory injunction to deliver, which, unless the identical *property* rights are proven, the court must refuse to issue. (*Ryan v. Williams*, 100 Fed. 177; 32 C. J. *Injunctions*, pp. 23, 25, 120, *Gimbel v. Boston Store*, 161 Wis. 489; *Cobb v. Smith*, 16 Wis. 661; *Wolf R. Co. v. Pelican Co.* 83 Wis. 427; *Chi. Yacht Club v. Marks*, 97 Ill. A. 406; *Wearin v. Munson*, 17 N. W. 746, (Ia.); *Carley v. Gitchell*, 62 N. W. 1003 (Mich.); *New Jersey R. Co. v. Woodward*, 47 A. 273 (N. J.); *Country Club v. Loh-*

bauer, 67 N. Y. S. 909.) Equity is apparently helpless to prevent the wrong, especially in view of the rule that equity will not decree temporary relief that must necessarily result in a final disposition of the case unless the right is undisputed. (32 C. J. *Injunctions*, 23, 25.) And would equity entertain jurisdiction if an adequate remedy at law, to recover the property, exists? The rules of law would not permit it. Public policy demands that a property right in the body, limited or entire, be recognized in the nearest relative. It would appear that the doctrine of the Pennsylvania courts would be the logical one to follow.

The commentaries on the American law, such as *Ruling Case Law* (8 R. C. L. Dead Body, Sec. 3) and *Corpus Juris*, (17 Dead Bodies 1137) state the rule to be that there can be no property in a dead body in the ordinary sense, relying mainly on the English cases, which are warped by the English Ecclesiastical law, and on *Keyes v. Konkel* (119 Mich. 550. 78 N. W. 649). Yet it is doubtful if such can be the actual rule, especially in view of the very meager consideration given the question in the Michigan case, and the necessary limitation of the case to the Michigan statute which it construes. The case evidently bases its rule on the English doctrine. The authority of the Michigan case is very materially lessened because of the fact that it was cited and urged in the leading case of *Koerber v. Patek*, 123 Wis. 453, 102 N. W. 40) and disregarded, and from the fact that all of the later cases are not influenced by its determination.

It must be agreed that all of the later cases give either an entire, or qualified property interest in a dead body. In Minnesota (*Larsen v. Chase*, 50 N. W. 238) the very able opinion of the court concludes that an entire property exists, determining that the principles of the English common law are inapplicable, since the common law courts refused to assume jurisdiction because jurisdiction in such matters was accorded exclusively to the ecclesiastical courts, and the corpse was treated as belonging to no one unless to the church; and that such principles were inapplicable here. It doubts the foundation of the common law doctrine, in this connection saying:

The doctrine that a corpse is not property seems to have its origin in the dictum of Lord Coke, 3 Co. Inst. 203, where in asserting the authority of the church, he says; "It is to be observed that in every sepulture, that hath a monument two things are to be considered: viz., The monument, and the burial of the dead. The burial of the cadaver is *caro data vermibus* (flesh given to worms) is *nullius in bonis*, and belongs to ecclesiastical cognizance" . . . "If the proposition that a dead body is not property rests on no better foundation than the etymology of the word 'cadores' its correctness would be more than doubtful."

The learned court then reaches the following conclusion :

But whatever may have been the rule in England under the Ecclesiastical law, and while it may be true still that a dead body is not property in a commercial sense of that term, yet in this country it is, so far as we know, universally held that those who are entitled to the possession and custody of it for purposes of decent burial have certain legal rights to and in it which the law will protect. Indeed the mere fact that a person has exclusive rights over a body for the purposes of burial, necessarily leads to the conclusion that it is property in the broadest sense of the term, viz., something over which the law accords him exclusive control.

Though the above case accords to the right of custody and burial, the dignity of a property right, and though the law in Indiana appears to be that such right is unequivocally a property right (*Bogart v. Indianapolis*, 13 Ind. 134) the greater majority of states where the subject has been litigated hold that there is a special or *quasi* property in a dead body. Such is the rule in Missouri (*Litteral v. Litteral*, 130 Mo. App. 30), in Rhode Island, (*Pierce v. Swan Point Cemetery*, 10 R. I. 227), in Indiana (*Orr v. Dayton Tractor Co.* 96 N. E. 462) and in New York, (*Danaby v. Kellogg*, 126 N. Y. S. 444). The Canadian cases similarly hold that the right to the dead body is a property right, the appellate court in *Miner v. Canadian Pac. Ry.* (15 Western L. R. (Can.) 161, 2 A. R. C. 1169) after declining to follow the case of *Keyes v. Konkel* (Mich.) succinctly reviews the law as follows :

Taking then the English decisions, we find the proposition that there can be no property in a corpse laid down without exception ; that the foundation of this seems to be a statement in Blackstone (Bk. 4 p. 236) for which Hayne's case is given as authority ; that it is in fact no authority for that proposition ; that the first known reported case which seems to be such authority is the very unsatisfactory note of Handasyde's case (2 East P. C. 652) ; that on the strength of Hayne's case, Blackstone, and Handasyde's case, the courts subsequently accepted the proposition as settled law ; that in most instances the statement of the proposition is obiter dictum.

The appellant court of Quebec reached a similar conclusion (*Phillips v. Montreal, Gen. Hospital*, 33 Que. S. C. 483).

From the authorities above quoted it would seem that the law recognizes a right over the dead body, of the dignity of a property right, which according to the better reasoning, is a special property in trust for burial. Indeed, it cannot well be doubted that a property right exists, for all authorities are agreed that there may be a recovery of damages for interference with the right of burial. This right cannot be in tort for interference with the family relationship, as in case of alienation of affections, or criminal conversation, because in those cases the loss of conjugal society and affection of the wife are the foundation

of the recovery; or as in case of seduction where loss of services must be proved. In case of death, none of the above can be proved, nor is there any basis of recovery, unless indeed there is property in the corpse. On an analysis of the basis of recovery, can it logically be said that damages can be had for the withholding of something in which an interest in the res thereof can never be acquired? If A takes something to which no one, including B, has no right to ever acquire an interest in, can there be damages for the withholding from B, that which B could never acquire?

THE REMEDY OF ONE DEPRIVED OF RIGHT TO BURY

If there is any property right existent in a dead body, as the authorities seem to indicate, then replevin for the body may be maintained. Indeed a bailee, or anyone entitled to a mere right of present possession may ordinarily maintain replevin under the laws of most states, including Wisconsin (Wis. Stats. 2718-2722) for sole ownership is not necessary to maintain replevin against a stranger having neither title nor right of possession, (*Swensen v. Wells*, 140 Wis. 316) and the wrongful detention and plaintiff's right of possession constitute the *gist* of the action of replevin (*Cronce v. Coombs*, 144 N. W. 251 (Neb.)). In Wisconsin the statute itself (Sec. 2718 Wis. Stat.) permits recovery so long as there is a special property in the res.

The matter of the right to maintain an action in replevin for a dead body was recently considered by the Wisconsin Supreme Court in *LeMay v. Renier*,—N. W.—, but the court found the determination of the maintainability of such an action unnecessary, inasmuch as the question was moot, presumably since the defendant, from whom the body was replevined could not under any circumstances, have any defense or relief. Indeed, if the body is incapable of becoming the subject of property, and the plaintiff obtains peaceable possession by replevin or otherwise, why should he not avail himself of this nature of self-help, so long as he does not breach the peace, and so long as the defendant has also no right? Then, theoretically, be the recovery of the body by consent, by surreptitious removal, by legal writ, or by equitable aid, so long as the defendant is not harmed, the claimant merely avails himself of that which can belong to no one, but to which he, at least, has some legal right, and in view of the gradual abolition of distinctions between law and equity, a recovery at law rather than in equity (if any there exists by mandatory injunction) is to be preferred, for the replevin action is expedient, appropriate and certain, and therein the defendant may reclaim the property by giving bond.

As has been heretofore intimated equity could, in this case, have acted only by mandatory injunction commanding the defendant to deliver the

corpse, or else have remained inactive. Equity will, however, not interfere unless there is positive proof of damage (*U. S. v. Isaac*, 257 Fed. 709, *Wolf R. v. Pelican Co.* 83 Wis. 427). In *Laird v. Boyle*, (2 Wis. 431) the Wisconsin Court held that where complainants themselves could show no right, title or interest, it would be a prostitution of the powers of a court of equity to interfere. Then it is difficult to see how equity could lend any aid whatever.

No rule is more fully established than that injunction rests on the discretion of the chancellor (*High. Injunction*, 2). Then to compel plaintiff to request equity to interfere would be to compel him to relinquish that to which at law he has the absolute right, the right to bury his dead, and place it on a discretionary basis. Can the plaintiff be compelled to abandon a certain remedy at law, which he has under the cases, to proceed in equity in the chancellor's discretion? In Wisconsin the writ of injunction has been by statute abolished, and the injunction provided by statute is a command to *refrain* from a particular act. (Wis. Stat. 2773) and though mandatory injunctions have been granted, (*Gimbel v. Boston Store*, 161 Wis. 489) such power is sparingly used and never for past injuries (*Cobb v. Smith*, 16 Wis. 661) and hence could not be applicable to recover a dead body, since its primary function is to maintain the status quo. (*Consolidated Vinegar Co. v. Brew*, 112 Wis. 610) and must not only be a case not adequately provided for at law, but of strong equity and imperious necessity in which a *vested right* of the plaintiff is likely to be irreparably affected. (*Janesville v. Stoughton*, 1. Pin. 667) and they will never be issued in doubtful cases. (32 C. J. *Injunctions* 23-25). Applying the rule of the above cases, if plaintiff goes in equity, no injunction can issue because the case is doubtful if the question of the adequacy of the remedy at law is raised, and because if no property right is affected, then no remedy is necessary, for damages in trespass are recoverable thereafter. In fact, to permit equity to interfere, the same property interest must have been found, that would have entitled law to entertain jurisdiction. Once a property interest is established, there does exist an adequate remedy at law.

It would seem, from a consideration of the nature of the equitable relief available, that equity would be unable to act by mandatory injunction, and unless replevin might be maintained for the recovery of that for which the law allows damages for the withholding, we have the anomalous position of a litigant having a right without a remedy. Furthermore, because of the merger of the legal and equitable reliefs under the modern codes, recovery ought to be allowed, regardless of the form of action brought. The right undeniably exists, whether the remedy is through the form of law or equity.