

## RECENT ENGLISH DECISIONS.

*High Court of Justice, Chancery Division*

## WILLIAMS v. WILLIAMS.

A man cannot dispose of his body by will ; it is the executors' duty to bury it, and they have the right to possession of it in the meantime.

Testator gave his body to the plaintiff, who was not an executrix, and gave her directions for cremating it. The relatives would not permit this, and with the consent of the executors buried the deceased, he being a Roman Catholic, in the unconsecrated part of a cemetery. Afterwards the plaintiff applied to the Home Secretary for a license to remove the body, which was given on the understanding, implied from the plaintiff's letters, that the body was not to be cremated, but was to be buried in consecrated ground. The plaintiff took up the body, burnt it, and then brought an action against the executors to recover the costs of so doing: *Held*, that she could not recover ; as (1) the gift of the body was bad in law and void ; (2) the removal of the body, being done under a license which was given for a purpose other than that for which it was used, was illegal ; and (3), even if it were not an illegal act, it was, at all events, a fraud upon the license, and a court of equity would not entertain a claim arising out of it.

THIS was an action against the executors and residuary legatees of one Cookenden, to recover costs incurred by the plaintiff in cremating the body of the testator.

The testator made his will in December 1868 ; and in May 1874, he, by a third codicil, appointed the defendants, Williams and Davenport, executors and trustees.

By a fourth codicil, dated April 12th 1875, he directed that three days after his death, or as soon as convenient, his body should be given to the plaintiff, to be dealt with by her as he had directed in a letter to her. He then gave her a Wedgwood vase, to be used for the purpose directed by the letter, and directed that the costs incurred by her in performing the instructions contained in the letter should be paid by his executors, on production of account and vouchers, within three months after his death.

The letter was written on the 28th of March 1875, and contained instructions as to the burning of his body and the disposal of the ashes.

The testator died on the 21st of December 1875 ; on the 23d he was buried by his nearest relatives, of whom the plaintiff was not one, but only a friend. The executors concurred in and were present at the funeral. The plaintiff protested against it, but to no purpose, and she was present at it. The testator, being a Roman Catholic, was buried in the unconsecrated part of the Brompton

Cemetery, but the grave was consecrated according to the rites of that church. On the 3d of March 1876, the plaintiff wrote to the Home Secretary, telling him of the codicil and letter, and asking for leave to remove the body for the purpose of having it burnt or placed in consecrated ground. In answer to this she was told that permission to remove the body for cremation at that time after burial could not be given, but was asked to what burial-ground she proposed to remove it. In answer to that she wrote, saying nothing more about cremation, that she intended to take the body to a certain churchyard in Wales. The plaintiff then got a license, under 20 & 21 Vict. c. 81, to remove the body "from the grave in which it is interred in the unconsecrated portion of the Brompton Cemetery." She informed the executors that she intended to cremate the body as soon as she could; but she did not actually exhume it till March 1878, when she sent it to Milan, and had it burnt. The ashes were sent back and buried in consecrated ground. She then demanded payment of the costs of thus dealing with the body, 321*l.*, and, on being refused, brought this action.

*Higgins*, Q. C., and *Laing*, for the plaintiff.—The codicil and the letter between them made a complete<sup>o</sup> disposition, although the letter was not admitted to probate: *Quihampton v. Going*, 24 W. R. 917; *Bizzey v. Flight*, Id. 957; L. R., 3 Ch. D. 269. [KAY, J.—Is this bequest of a body valid? In *Reg. v. Sharpe*, 5 W. R. 318, 7 Cox C. C. 214, Mr. Justice ERLE says that our law recognises no property in a body.] It seems that the person who has possession of the body has the duty of burying it: *Reg. v. Stewart*, 12 Ad. & E. 773. The plaintiff had possession by virtue of the license; you cannot go behind that. [KAY, J.—It is the duty of the executors to bury the deceased: *Williams on Executors*, 8th ed., p. 972. I want authority to show that a contrary disposition can be made.] The plaintiff was executrix for this purpose. The directions were not against public law.

*W. S. Owens*, for the defendant, Williams, took no active part in the action.

*Rigby* Q. C., and *Popham*, for the other defendants.—The executors are the only persons who have any right to the possession of the body: *Reg. v. Fox*, 2 Q. B. 246. These directions are like

directions to keep up a tombstone, which are not void: *Lloyd v. Lloyd*, 2 Sim. (N. S.) 255; but are honorary trusts only: *Dawson v. Small*, 22 W. R. 514, L. R., 18 Eq. 114. There is no positive law as to the illegality of cremating, but it is against our general law. It is an indictable offence to take up a body: *Rex v. Lynn*, 2 T. R. 733. The license was not given for the purpose for which it was used.

*Higgins*, in reply.—Cremation cannot be said to be indecent or offensive to morals, as in Cripps' Laws of the Church and Clergy, 5th ed., p. 776, it is spoken of as an ancient and widely diffused mode of burial. The class of cases referred to were all directed against "body snatching:" Russell on Crimes, 5th ed., vol. 1, pp. 611-620. The sum spent in carrying out the testator's wishes, as we considered ourselves bound to do, is not too much, considering what was to be done, and the value of the estate: *Stag v. Punter*, 3 Atk. 119. Your lordship has relieved me from considering the question of the three months' limit in which the expenses were to be demanded.

KAY, J.—It is clear that there can be no property in a human corpse. In *Reg. v. Sharpe*, which was a case of an indictment for digging open a grave and removing a corpse from it, the defendant's family were Dissenters, and his mother was buried in a burial ground of that sect, but his father being recently dead, he wished to remove his mother's remains to the place where he intended to inter his father; he then got leave to open the grave, under pretence of wishing to see whether it would hold his father's coffin, took out his mother's remains and carried them away. The court, though it gave him credit for having acted with good motives, affirmed the conviction. Mr. Justice ERLE, who delivered the judgment, said that the defendant had wrongfully opened the grave, as the license he had was given him for a different purpose from that for which he had used it; and, also, "that our law recognises no property in a body."

The next question is, What is the duty of the executors as to burial? In Williams on Executors, at p. 972, it is stated that it is their duty to bury the dead body in a manner suitable to the estate which the testator left behind him. It is said that that only means that they are responsible as to the expenses, but it seems to

me to mean that the persons who are responsible for the actual burial of the body are *prima facie* the executors.

It is, moreover, shown by *Reg. v. Fox*, following *Reg. v. Scott*, reported in a note to it, where a peremptory *mandamus* was issued to a gaoler, who sought to retain the body of a prisoner until certain claims he had against him were satisfied, ordering him to deliver the body to the executors, that the executors have the right of possession and custody of the corpse until burial.

It follows from these cases that a man cannot dispose of his body by will. I asked whether there was any authority contrary to that, and I have been referred to none. Accordingly, the direction in the codicil that the testator's body was to be delivered to the plaintiff, who is not an executrix, is bad in law and void. She had no property in the body, and could not have enforced delivery of it to her.

The purpose named in the letter cannot make the gift either better or worse, but it was confessedly for cremation, and a question might arise whether that was legal according to the law of this country. That question, however, I shall not now decide.

There are still two other questions, the answers to which are equally fatal to this claim. I preface my remarks upon this part of the case by saying that I have no doubt that the plaintiff thought she was bound to carry out the testator's wishes, and I absolve her from any intention to act illegally or *contra bonos mores*. But it seems to me evident from the letters between her and the Home Office, that the license was given, not for the purpose of cremation, but on the understanding conveyed by the plaintiff's letter, that it was to be used for the purpose of removing the body to consecrated ground. Yet, notwithstanding that representation, the plaintiff expressed to the executors her intention of carrying out, and did carry out, her original design of cremation. I have no hesitation in saying that that act was illegal, and if the Home Secretary had known sooner of the plaintiff's intention he would have prevented it by revoking his license, as he did when it was too late. Moreover, the court would have restrained it by an injunction, if the executors had applied to it to do so. It has also been argued that it was a misdemeanor, but I need not decide that now.

If that was the only question, it would prevent the plaintiff from recovering the money. But even supposing the act was not an illegal one, could any one come to a court of equity to recover ex-

penses incurred about such an act as this, an act which was, in fact, a fraud on the license? Such a claim could not be entertained for a moment.

This action, in my opinion, fails entirely from any one of the reasons which I have given, and I, therefore, dismiss it with costs.

Action dismissed.

The questions involved in this case are both novel and interesting. The case, so far as relates to the right of a person to direct the disposal of his body after death, appears to be one of first impression. Cases relating to conflicting claims of the rights of custody between different relations, after burial, are not uncommon. There are also some *dicta* in this country which would seem to recognise the right of a person to provide by will for the disposition of his body, but the point does not appear to have directly arisen in any case, and no authorities are cited to sustain such *dicta*. Even those *dicta* do not afford any countenance to the doctrine that the body can be otherwise disposed of than by burial. See *Pierce v. Swan Point Cemetery*, 10 R. I. 227, per POTTER, J.; Report of Hon. Samuel B. Ruggles, 3d conclusion, 4 Bradf. Sur. 503. And see *Lowry v. Plitt*, 16 Am. Law Reg. N. S. 155 and note. Almost without exception the authorities lay down the rule, as stated in the principal case, that there can, at the common law, be no property in a dead body: 2 Black. Com. 429; 2 East Pl. Cr., ch. 16, sect. 89; *Guthrie v. Weaver*, 1 Mo. App. 141, 143; *Meagher v. Driscoll*, 99 Mass. 284; *The Matter of the Brick Presbyterian Church*, 3 Edw. Ch. 155, 178; *Reg. v. Sharpe*, 1 Dears. & Bell 167; s. c. 7 Cox C. C. 214. There can be no property in a corpse; and, therefore, stealing it is no felony, but a very high misdemeanor. In the case of Dr. Handyside, where trover was brought against him for two children that grew together, Lord Chief Justice WILLES held that

the action could not lie, as no person had any property in corpses: 2 East Pl. Cr., ch. 16, sect. 89.

In *Pierce v. Swan Point Cemetery*, 10 R. I. 227, POTTER, J., said: "That there is no right of property in a dead body, using the word in its ordinary sense, may well be admitted. Yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty imposed by the universal feeling of mankind to be discharged by some one towards the dead; a duty, and we may also say a right, to protect from violation; and a duty on the part of others to abstain from violation; it may, therefore, be considered as a sort of *quasi* property, and it would be discreditable to any system of law not to provide a remedy in such a case. \* \* \* *But the person having charge of it cannot be considered as the owner of it in any sense whatever*; he holds it as a sacred trust for the benefit of all who may from family or friendship have an interest in it, and we think that a court of equity may well regulate it as such, and change the custody, if improperly managed. So, in the case of custody of children, certain persons are *prima facie* entitled to their custody, yet the court will interfere to regulate it.

"We think these analogies furnish a rule for such a case, and one which will probably do most complete justice, as the court could always interfere in case of improper conduct, *e. g.*, preventing other relatives from visiting the place for the purpose of indulgence of feeling, or tes-

tifying their respect or affection for the deceased."

With reference to the same subject the Hon. Samuel B. Ruggles, referee, in the Matter of the Widening of Beckman street, 4 Bradf. Sur. 503, 529, said: "It will be seen that much of the apparent difficulty of this subject arises from a false and needless assumption in holding that nothing is property that has not a pecuniary value. The real question is not of the disposable market value of a corpse, or its remains, as an article of traffic, but it is of *the sacred and inherent right to its custody, in order decently to bury it, and secure its undisturbed repose.*" In the same matter, among other conclusions, he laid down the rules, "that the right to bury a corpse and to preserve its remains, is a legal right which the courts of law will recognise and protect;" and "that the right to protect the remains includes the right to preserve them by separate burial, and to select the place of sepulture, and to change it at pleasure."

In the case of *Bogert v. The City of Indianapolis*, 13 Ind. 134, 138, PERKINS, J. (without citing any authority, and not speaking for the court, and the point not being necessary to the decision of the case), laid 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." This dictum is, however, so contrary to the natural sentiments of human nature, and so entirely opposed to the current of judicial opinion upon the subject, as to be without any weight whatever. In *Guthrie v. Weaver*, *supra*, the much more rational rule is laid down that the relatives have in regard to the dead body only the right of interment.

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A creditor cannot legally arrest or detain and prevent the burial of the dead body of his debtor until his debt is paid: *Matthews on Executors* 72; *Jones v. Ashburnham*, 4 East 465, per ELLENBOROUGH, C. J.; *Reg. v. Fox*, 2 Q. B. 246, cited by the court in the principal case.

It is the duty of the executor or expected administrator to bury the deceased: *Hood on Exr's* 34; *Wynkoop v. Wynkoop*, 42 Penn. St. 300. And a conspiracy to prevent a burial is indictable at common law: *Hood on Exr's* 35; *Matthews on Exr's* 72; *Rex v. Young*, cited in 2 Term R. 734. The absolute duty of an administrator to bury terminates, however, with the burial, and no subsequent expenses would be a legal charge upon the estate of the decedent, whether solvent or insolvent: *Wynkoop v. Wynkoop*, 42 Penn. St. 293. So universal is the right of sepulture, that the common law, as it seems, casts the duty of providing it, and of carrying to the grave the dead body, decently covered, of any person dying in such a state of indigence as to leave no funds for that purpose, upon the person under whose roof the death takes place; for such person cannot keep the body unburied, nor do anything which prevents Christian burial; he can not, therefore, cast it out, so as to expose the body to violation, or to offend the feelings or endanger the health of the living; and for the same reason, he cannot carry the dead body uncovered to the grave: *Reg. v. Stewart*, 12 Ad. & El. 773, per DENMAN, C. J.; *Wynkoop v. Wynkoop*, 42 Penn. St. 300, per READ, J.

It being conceded that there can, at the common law, be no property in a dead body, in the ordinary sense of the term, but only a *quasi* property; or more definitely, a "sound and inherent right to its custody in order decently to bury it, and secure its undisturbed repose," the question arises how is this