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Published Monthly for the Department of Law by DON M. LARRABEE, at S. W. Cor. Thirty-fourth and Chestnut Streets, Philadelphia, Pa. Address all literary communications to the EDITOR-IN-CHIEF; all business communications to the BUSINESS MANAGER.

DEAD BODIES—RIGHT TO BURY—RIGHT OF REMOVAL AFTER BURIAL.—*Pulsifer* v. *Douglass*, 48 Atl. Rep. 118 (Maine, 1901). From the earliest times the law has been careful to protect dead bodies from insult. This was true even in Egypt, Greece and Rome, although the harsh rules relating to debtors and their creditor allowed the latter to seize the dead body of their debtor. Without any specific comment on this, however, let us examine the common-law rule on the subject.

Blackstone is our authority for the following (2 Bl. Com., * 429): "But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not

impiously, violate and disturb their remains when dead and buried. The parson, indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it; and if anyone in taking up a dead body steals the shroud or other apparel, it will be felony; for the property thereof remains in the executor or whoever was at the charge of the funeral."

It was later held that, though a civil action for stealing dead bodies would not lie, it is an indictable offence as a misdemeanor; the practice is, to say the least, contrary to common decency: Stevens, "Dig. of Crim. Law," Art. 292.

The English rule that a dead body is not property has been adhered to by the courts even to the present day (*Williams* v. *Williams*, L. R., 20 Ch. Div. 659, 1882), yet the decisions handed down are not helpful to us. And this because at a very early date the ecclesiastical courts assumed sole jurisdiction of such matters. The common-law courts refused therefore to recognize a dead body as property, and treated it as belonging to none except, perhaps, the church. In this country, although no ecclesiastical courts ever existed, the common-law judges were at first inclined to agree with their English brethren; and decisions to the same effect are not wanting to-day: *Enos* v. *Snyder*, 67 Pac. Rep. 170 (1900). That case not only decided that a dead body is not property, but went further and said that no one has a right of testamentary disposition over his body.

It is submitted that such a decision is questionable. While there is technically no ground for calling a dead body property, yet equity has in this country long regarded it as quasi-property (*Re Widening Beekman Street*, 4 Bradf. 503, 1857), and to-day the right to bury a corpse and preserve its remains is a right which courts of law recognize and protect. See *Renihan* v. *Wright*, 125 Ind. 536 (1890); *Larson* v. *Chase*, 47 Minn. 307 (1891), and *Pierce* v. *Swan Point Cemetery*, 10 R. I. 227 (1872). In Indiana even the common-law courts recognize a dead body as property: *Renihan* v. *Wright, supra.*

As to the second point, that no man has a right of testamentary disposition over his own body, there are not wanting authorities to the contrary. The expressed wishes of the testator as to the disposition of his remains will prevail over the wishes of his family. See *Weld* v. *Walker*, 130 Mass. 422 (1881), and *In re Donn*, 14 N. Y. Suppl. 189 (1891); also the cases last cited. And this rule is so even if the testator's wishes have been expressed orally: *Scott* v. *Riley*, 16 Phila. 106 (1863).

In England it has been held that an executor has the right to the custody and posession of the body of his decedent until it is properly buried: *Williams* v. *Williams, supra.* But this doctrine has no support in the United States: *Griffith* v. *Charlotte, etc., R. Co.*, 23 So. Car. 25, Am. Law Reg. N. S., 586 (1885). Where nothing is said in the will as to the disposition of the body, the right of disposition rests in the next of kin: *In re Donn, supra.* But where the decedent is a married woman her husband has the right to control, rather than the next of kin, *Weld* v. *Walker, supra.*

It was on this latter point that *Pulsifer* v. *Douglass* turned. This was an action of trespass against the defendant for entering the plaintiff's lot in a cemetery and taking away therefrom her sister's remains. The defendant had done this at the request of the dead woman's husband; so the case really turned on the husband's right of control over the body of his deceased wife.

As a rule, the right of burial includes the right to change the place of burial. But the disturbance of the remains of the dead is not encouraged. In 8 Am. and Eng. Encl. of Law, 2d ed., p. 837, it is further said: "And after burial, if all the parties interested have consented thereto, neither husband, wife, nor next of kin will be permitted to remove the remains merely because a quarrel has arisen in the family or among the near relations of the deceased." There were cases which turned on the fact that the husband's consent was not freely given: *Weld* v. *Walker*, *supra*. But the facts of the cases cited in accord with the proposition taken from the encyclopædia are so strong that the proposition is hardly a general one. In *Fox* v. *Gordon*, 16 Phila. 185 (1883), for example, the husband brought suit to compel removal after his wife's body had been interred in her father's lot for three years, the latter having paid all the burial expenses, etc. Obviously the husband's consent was to be inferred in such a case. In the principal case, however, the body had been interred for one month only, and the husband's actions pointed to the fact that his consent had been withheld, and that by him the interment of the body in the sister's lot was regarded as temporary only.

The court properly held that, though the husband had a right to dispose of his wife's body, yet he could not remove it from its burial place, where it had been interred with some evidence of consent on his part (for he made no protest, at least), without being liable in trespass.

The decision is unquestionably correct. If we allow the husband's right to dispose of his wife's body, we must allow him to remove it from the place where it was first interred, though it has been interred with his full consent. Such removal, of course, must be done decently and properly. While the husband is technically liable in trespass for nominal damages, no damages can be awarded in such a case as *Pulsifer* v. *Douglass* for the wounded feelings of the next of kin. The disinterment seems to have been conducted with decency and propriety. If the husband's feelings are not wounded, how can the next of kin complain?

J. M. D.

VOLUNTEER ASSISTING SERVANT—PROTECTION—NEGLIGENCE. —*Cleveland T. & V. R. Co.* v. *Marsh*, 58 N. E. (Ohio) 821 (1900). This action was for the recovery of damages for personal injury suffered by Marsh, aged ten years, by reason of the explosion of a signal torpedo on the track of the railroad. It was the duty of the station agent employed by the railroad company to light and place

upon the switch stands each evening certain lights and to bring the lanterns in each morning. The agent, without authority and without the knowledge of the company, employed Marsh to attend to the lamps, and when on his way to a switch stand with them, Marsh found a signal torpedo along the track, which he exploded by pounding it with a stone—the explosion seriously injuring him. One of the crew of a local freight train, about noon of the same day, had obtained a signal torpedo from the station agent and proceeded with it toward the train. This was the only evidence as to how the torpedo came to be on the track. The railroad company endeavored to prove that Marsh was a mere volunteer. It was said by Burket, J.: "Where a person at the request of a servant of a corporation assists such servant in the performance of his work, without any purpose or benefit of his own to be served by such assistance, he is a mere volunteer. A trespasser and a volunteer stand upon substantially the same footing, and can recover only for such negligence as occurs after the servants of the company discover their perilous situation. But there is a class between volunteers and trespassers, namely, where the person assists the servant at his request, for a purpose and benefit of his own. In such cases he is not wrongfully upon the premises—he is regarded as being there by sufferance of the master. Such a person is not a servant of the master, because the servant inviting such assistance has no power to employ other servants. Such an assistant is not a trespasser nor a fellow-servant, and not a mere volunteer. He is regarded as being upon the premises of another by the sufferance of such other, performing labor for his own benefit, and is entitled to be protected against the negligence of the owner of the premises or his servants. As the boy in this case, by his engagement with the station agent, was to perform a service beneficial to the company on the one hand and to himself on the other, he was on the railroad at the time of the injury by the sufferance of the company—not as a servant, nor as a trespasser, nor as a mere volunteer—but as only performing a service for his own benefit, and entitled of right to be protected against the negligence of the servants of the company": *Railway Company* v. *Bolton*, 43 Ohio, 224 (1885); *Eason* v. *Railway Company*, 65 Texas, 577 (1886).

One who has no interest in the performance of certain work for a railroad, but volunteers to assist in such work, assumes all risks incident to his position, and cannot recover for injuries caused by the negligence of his fellow-servants: *Moyton* v. *R. R. Co.*, 63 Texas, 77 (1885); *Flower* v. *Pennsylvania R. R. Co.*, 69 Pa. 210 (1871); *Railroad Co.* v. *Harrison*, 48 Miss. 112 (1873).

Where the injured party was acting in the furtherance of his own or his master's business the case is different. When the owner of freight transported by a railway company was allowed to assist in its delivery, and in so doing was injured through the carelessness of the company's servants, it was held that he could recover damages of the company: *Homes* v. *Railway Co.*, L. R., 4 Exch. 254 (1869); *Wright* v. *London Railwag Co.*, 1 Q. B. Div. 252 (1876). So when a passenger on a street-car voluntarily assisted the driver in backing

the car upon a switch, so that another car coming in an opposite direction could pass, and was injured through the negligence of the driver of the latter car, he was allowed to recover damages of the street-car company: *McIntyre Ry. Co.* v. *Bolton*, 21 A. & E. R. Cases (Ohio), 501 (1885).

It has been held that one's youth might possibly excuse concurrent negligence where there is clear negligence on the part of the defendant: *Smith* v. *O'Connor*, 48 Pa. 218 (1864); *Lynch* v. *Nurdin*, 1 A. & E. N. S. 29 (1841); but see *Ry. Co.* v. *Fielding*, 12 Wright, 320 (1864).

In the application of the doctrine of contributory negligence to children, in actions by them, or in their behalf, for injuries occasioned by the negligence of others, their conduct should not be judged by the same rule which governs that of adults; and while it is their duty to exercise ordinary care to avoid the injuries of which they complain, ordinary care for them is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under similar circumstances: *Rolling Mill Co.* v. *Corrigan*, 46 Ohio, 283 (1889). It is the duty of the master to give such warning, advice and "instructions to a youthful and inexperienced employe as would enable him, with the exercise of ordinary care, to perform the duties of his employment with safety to himself": *Whitelaw* v. *R. Co.*, 16 Tenn. 391 (1886); *Jones* v. *Mining Co.*, 66 Wis. 268 (1886).

Rhodes v. *Banking Co.*, 84 Ga. 320 (1889), decided that where a child under the age of discretion, in this case thirteen years of age, assists, upon request, the servant of a railroad company in the performance of his duties, without any purpose or benefit of his own to be subserved thereby, and therefore a mere volunteer, and is injured by the negligence of such servant while in the act of assisting him, the company is liable to such child in damages. This case must be regarded as going to the verge of the law, and it is not likely that it could be followed in other jurisdictions.

A person who voluntarily assists the servant of another in a particular emergency cannot recover from the master for an injury caused by the negligence or misconduct of such servant. A servant cannot recover for an injury incurred in assisting a fellow-servant, either voluntarily or upon the request of such servant: *Osborne* v. *Railroad*, 68 Me. 49 (1877); *Lawler* v. *Railroad*, 62 Me. 463 (1873); *Hodgkins* v. *Eastern Railroad*, 119 Mass. 419 (1876) *Sammon* v. *Railroad*, 62 N. Y. 251 (1875).

Servants must be supposed to have the risk of the service in their contemplation when they voluntarily undertake to agree to accept the stipulated remuneration: *Gibson* v. *Erie, Ry.*, 63 N. Y. 449 (1875).

If a stranger joins in the service in which he was injured, at the request of one of the servants of the master, he is in no better position than a mere volunteer: *Potter* v. *Faulkner*, 1 B. & S. 800 (1861); *Flower* v. *Railroad*, 69 Pa. 210 (1871).

One who at the request of the man in charge temporarily assists in defendant's work, not expecting any pay, is for the time being a serv-

ant of the defendant and entitled to the same protection as any other servant, and probably subject to the same risks of injury from the negligence of his fellow-servants; *Johnson* v. *Ashland Water Co.*, 71 Wis. 553 (1888).

If a person undertakes voluntarily to perform service for a corporation, and an agent of the corporation assents to his performing such service, he stands in the relation of a servant of the corporation while so engaged; and the rule that a master is not liable to his servant for an injury occasioned by the neglience of a fellow-servant, in the course of their common employment, applies to such volunteer: 143 Mass. 535 (1887).

The lower court, on the trial of the principal case, refused to make the following charge, and on this was reversed by the Supreme Court; "If you find that at the time the plaintiff received his injury he was on the property of the railroad company for no purpose except to place the north switch in position, pursuant to the request of the station agent, then the fact that the railroad company had permitted the public to travel over this part of its property without objection would not entitle plaintiff to receive, at the time of his injury, that degree of protection he would have been entitled to receive had he been upon the property as one of the public."

To defendant's contention that, admitting negligence, there could be no recovery because the boy was a fellow-servant of the employe whose negligence caused the injury, the court held that he was not such a servant, and that he was entitled to protection against the negligence of the servants of the company.

M. L. V.

Life Insurance—Cause of Death—Execution for Crime—Verdict in Criminal Case as Evidence in a Civil Action. —*Burt et al.* v. *Union Central Life Insurance Company*, 105 Fed. 419. —This case, upon which decision was rendered December 4, 1900, was brought into the Circuit Court of Appeals, Fifth Circuit, upon a writ of error from the Circuit Court of the United States for the Western District of Texas. The suit is on an insurance policy for five thousand dollars ($5,000), issued by the defendant corporation upon the life of Wm. E. Burt, payable at his death to his wife Anna M. Burt, if living, and otherwise to the executors, administrators or assigns of the insured. The policy contained no provision for forfeiture in the event that the insured should be executed under sentence of the law.

The wife dying first, the policy was assigned to plaintiffs, as heirs and next of kin to the insured. William E. Burt was indicted for the murder of Anna M. Burt, and was tried on November 27, 1896. In addition to the plea of not guilty, he pleaded insanity. He was found guilty of murder in the first degree, was duly sentenced, and on May 27, 1898, he was executed by the sheriff. The petition of the plaintiff averred that Burt was in fact innocent of the crime of which he was convicted. The defendant demurred to the petition, because it appeared that the insured died at the hands of the law

the Circuit Court sustained the demurrer, and the case was dismissed. From this decision the appeal was taken.

The appeal was argued before circuit judges Pardee, McCormick and Shelby, and the opinion of the court was rendered by J. Shelby, affirming the judgment of the Circuit Court. The decision refers to the fact that but one case has been found in which a suit was brought on a life insurance policy when the insured had been tried and executed for the commission of crime. That case was *Amicable Society, etc., App.* v. *Bolland Res.*, 4 Bligh (N. R.), 194, an English case which was appealed to the House of Lords in 1830. It was an action by assignees to collect a policy of insurance on the life of Fauntleroy, who had afterwards been convicted of forgery and executed. The counsel for the Amicable Society argued that insurance was a contract in which the insurer guaranteed against probable perils and losses, but uncertain as to the period of occurrence. If the insured, therefore, can at any time, by his own act determine the event, it is against the essence of the contract. Lord Lyndhurst gave his opinion that the plaintiff could not recover, on the broad ground of public policy; that a contract whereby the assignees of the insured were to receive a sum of money in the event of his committing a capital felony, would take away one of the restraints operating on the minds of men against the commission of crimes. The doctrine has been affirmed in the Supreme Court of the United States (Justice Harlan in *Ritter* v. *Mutual Life Insurance Company*, 169 U. S. 139), and is accepted by the leading authorities on the subject (*May on Insurance*, Sec. 326; *Joyce on Insurance*, Sec. 2611; *Bliss on Life Insurance*, Sec. 223).

There was no difficulty, therefore, as to the principle upon which this case depended. Fauntleroy's case was quoted approvingly by the counsel for both parties to this suit. There was, however, a material difference between the facts of Fauntleroy's case and that of the case at bar. In the latter the petitioners averred that the insured was guiltless; that if he had actually killed his wife, he was insane when he had committed the act; and that there had been a miscarriage of justice. To decide the problem which this case presented, J. Shelby followed the same reasoning that had been employed by Lord Lyndhurst in the earlier case. "Would the policy sued on have been valid if it had provided, in the event of the insured's being tried, convicted and executed for murder, when in fact he was innocent, that the amount of the policy should be paid to his heirs, administrators or assigns? . . . Can there be a legal life insurance against the miscarriage of justice? If one policy, so written, be valid, the business of insuring against the fatal mistakes of juries and courts would be legitimate." Such contracts would stir up a want of confidence in the courts of justice. They would encourage litigation and bring reproach upon the state, and hence are against public policy and void. Therefore, "if a policy with such a form of condition inserted in it in express terms cannot on grounds of public policy be sustained, a policy without such a condition cannot be supported on the averment of facts, which, if

embraced in the written contract, would have made the policy to that extent void."

Circuit Judge McCormick dissents, in a strong opinion, stating that in his judgment the question does not come under the Fauntleroy case or Ritter case. "The demurrer which was sustained in the Circuit Court must assume either that the death of the assured by a judicial sentence for crime, though, in fact, he was wholly innocent, . . . avoids the policy, or that the judgment of conviction in the criminal case is not only admissible to prove both the sanity and guilt of the accused, but that it is conclusive evidence of both." The first question has never been decided. If the second position be assumed, it is at variance with a general rule of evidence, to the effect that "A verdict and judgment in a criminal case, though admissible to establish the fact of the mere rendition of the judgment, cannot be given in evidence in a civil action to establish the facts on which it was rendered" (*Greenleaf on Evidence*, Sec. 537–538). On the grounds of public policy, also, J. McCormick concludes that it would be well to require the courts of justice to make new inquiry at the suit of proper parties as to the guilt of one who had been criminally charged and convicted.

It is interesting to notice that the problem involved in this case had been discussed in earlier decisions as a hypothetical question. In *Borrodaile* v. *Hunter*, 5 M. & G. 639 (1843), Tindal, C. J., in a minority opinion, says: "The dying by the hands of justice is dying in consequence of a felony previously committed by him," and in a note it is said, "Suppose the attainder to be reversed upon error brought by the heir or executor of the party executed, the party would still have died by the hands of justice, but it would hardly be contended that through this wrongful act, *in invitissimum*, his family were also to be deprived of the benefit of a contract entered into by him for their behalf." The opposite point of view is expressed in *Clift* v. *Schawbe*, 3 Man. G. & S. 437 (1846), where there was also a difference of opinion among the judges. Patteson, J., says, in an opinion which reached the same conclusion as the majority of the judges, "I apprehend that the actual felony is no part of the cause of exception from liability. If it were, it would be competent to the plaintiff to prove that the deceased, although dying by the hands of justice, was, in truth, innocent of the crime for which he suffered. . . . Such defences would surely be excluded, for the words of the exception are express, 'by the hands of justice,' whether justly or not." In the discussion of the subject in *Bliss on Life Insurance*, Sec. 224, the author dismisses the question as "hardly of practical importance." Joyce accepts the decision of J. Patteson given above. "The question might arise whether if after the insured had been executed it could be, perhaps, shown by newly-discovered evidence that the insured was innocent of the crime for which he was convicted. We do not believe that such a defence could be introduced. The insured died by the hands of justice, having been duly convicted and sentenced. The manner of death which the policy has excepted has occurred. It does not seem that

the question of his innocence is in any way material. It may seem a hardship for the persons to whom the policy is made payable, who have been dependent on the insured for support, and for whose protection the policy was procured, yet the insurer is entitled to the benefit of every provision of the policy, when it is clear and definite" (*Joyce on Insurance*, Sec. 2611). It is to be noticed that this opinion, as well as that of J. Patteson, in *Clift* v. *Schawbe*, is based on an express exception in the policy, and this feature is absent from the case of *Burt* v. *Union Central Life Insurance Co.* On the other hand, in Fauntleroy's case, before the insurers had developed the custom of inserting the express exception, Lord Lyndhurst derived a general rule to the same effect from the common law.

As to the question of evidence presented in the dissenting opinion, the authorities cited, in both opinions, to establish the effect of a judgment in a criminal case when cited in a subsequent civil suit, are: *Coffey* v. *U. S.*, 116 U. S. 436; *Roberts* v. *The State*, 160 N. Y. 217. J. Shelby states that the authorities are conflicting. *Freeman on Judgments*, Sec. 319, gives a complete analysis of the subject, stating that "the record of a conviction or of an acquittal is not, according to the decided preponderance of authority, conclusive of the facts on which it is based in any civil action"; but he also concludes that the precedents are not consistent with one another. The reasons for this theory are: First, because the parties to a criminal and civil proceeding are different, hence one should not be barred of his right of action by any failure of the other; and, second, because to procure a conviction in a criminal proceeding the jury must be convinced beyond a reasonable doubt, while in a civil action it is their duty to find according to the preponderance of evidence.

F. S. E.