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Article 24

Evidence--Burden of Proof--Damages for Wrongful Suspension from Labor Union (Blek v. Wilson, 262 N.Y. 253 (1933))

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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 it [17] 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 body [20] 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-

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[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."

fully fined and suspended for a period of sixty weeks. Plaintiff argued that, by showing that the union rate of wages during the sixty weeks of his suspension was $66 per week, and that he could not have obtained employment without a union card, he had established, *prima facie,* his right to a judgment of $3,960. The Appellate Division affirmed his contention, and defendant appealed. *Held,* plaintiff cannot recover substantial compensatory damages where he has not offered any evidence as to his average earnings prior to the illegal suspension or facts from which an inference could be drawn, that even with a union card he could have obtained employment for all or even part of the time of suspension. *Blek* v. *Wilson,* 262 N. Y. 253, 186 N. E. 692 (1933).

Although a presumption of damages follows proof of legal wrong,[1] the amount presumed is only nominal.[2] Where the loss is pecuniary and is present and actual and can be measured, but no evidence is given showing its extent or from which it can be inferred, the jury can allow nominal damages only.[3] Plaintiff has not proved, *prima facie,* his right to damages at the union rate of wages for the entire time of suspension by merely showing what the rate was during that time and that he would not have been able to obtain employment without a union card. The burden is upon him to give evidence which would show the extent of his actual pecuniary loss.[4] The jury have no arbitrary power, but must be governed by the weight of evidence.[5] Facts showing plaintiff's average income before suspension,[6] or the fact that others had been steadily at work during this time [7] would have afforded an inference for the jury as to the extent of the loss. In the instant case,[8] no such proof being offered, the Court took judicial notice of the fact that unemployment had been rife throughout the land, from which could be inferred the improbability of plaintiff's being employed for the entire period of suspension or any large part of it.

J. R. O'D.

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[1] Chamberlain v. Parker, 45 N. Y. 569 (1871); Baker v. Manhattan R. Co., 118 N. Y. 533, 23 N. E. 885 (1890); New York Rubber Co. v. Rothery, 132 N. Y. 293, 30 N. E. 841 (1892); Finley v. Atlantic Transport Co., 220 N. Y. 249, 115 N. E. 715 (1917).

[2] Ihl v. Forty-second St. Ry., 47 N. Y. 317 (1872); Horton v. Bauer, 129 N. Y. 148, 29 N. E. 1 (1891); Barnes v. Brown, 130 N. Y. 372, 29 N. E. 760 (1892).

[3] N. Y. Dry Dock Co. v. McIntosh, 5 Hill 290 (N. Y. 1843).

[4] Bagley v. Smith, 10 N. Y. 489 (1853); Leeds v. Met. Gas Co., 90 N. Y. 26 (1882); Tonawanda Valley, etc. R. Co. v. The N. Y., etc., R. Co., 123 N. Y. 641, 25 N. E. 503 (1890); Vooth v. McEachen, 181 N. Y. 28, 73 N. E. 488 (1905); Merscheim v. Mus. Mut. Prot. Union, 55 Hun 608, 8 N. Y. Supp. 702 (N. Y. 1890).

[5] McIntyre v. N. Y. Cent. R. Co., 37 N. Y. 289 (1867).

[6] Metcalf v. Baker, 57 N. Y. 662 (1874).

[7] Polin v. Kaplan, 257 N. Y. 277, 177 N. E. 833 (1931).

[8] Instant case.