

Death's Trustee v Death's Trustee

During their annual visit to their late father's grave in rural Aberdeenshire, Johnny and Barbara Death were attacked by a strange man stumbling through the cemetery. They attempted to flee in Barbara's car but the vehicle went off the road and Johnny was thrown through the windshield into a tree, completely crushing his skull. Barbara was impaled on the car's steering column and suffered exsanguination when her carotid artery was torn open by a tree branch - she also died instantly. As a result of radioactive contamination from the Venus space probe that had earlier the same morning exploded in the Earth's upper atmosphere, Barbara was resurrected as a flesh eating ghoul, but the damage to Johnny's head prevented his coming back to walk the earth in search of fresh brains.

Johnny and Barbara were orphans and had no other close family – their father had died in 2005, a decade after their mother's death. Neither Johnny nor Barbara had left a will. Johnny had made his fortune developing large out-of-town retail malls – he owned 99% of the shares in his real estate development company, Argento Ltd (valued at £100,000,000). Barbara had done less well in life, and her helicopter rental business, RomeroCo, had just, the day before her death, become insolvent with debts of £8,000,000. Although Barbara had obtained a degree of LLB with Honours (First Class) at Aberdeen University in 2005, she had not paid attention during Dr Tom Burns' Commercial Organisations & Insolvency lectures, and had elected to conduct her business as a sole trader rather than adopting corporate form.

Johnny's executor (the defender), on the basis of there being no clear evidence that either one of the siblings had survived the other, concluded that the two had died simultaneously, in consequence of which there was no survivorship, and Johnny's estate should go to the nearest living relative, a cousin, Rick Grimes of Cynthinia, Kentucky USA.

Barbara's trustee in sequestration (the pursuer) challenged Johnny's executor. Her argument was that *living* death is quite distinct from death in an absolute sense inasmuch as death, as commonly conceived, is a terminal state whereas living death was simply a continuation of life by other means, as evidenced by the perambulation of the deceased, its craving for warm human flesh, and certain social characteristics such as assembling in groups around vehicles and buildings occupied by warm-blooded breathing members of the species *homo sapien*. She pointed to a large number of distinguished judges and legal academics who have served diligently in the courts and lecture rooms for many years following their (clinical) deaths, until the process of decomposition had made it impossible for them to write judgments or articles or operate PowerPoint slideshows. Significantly, she argued, none of Barbara's extremities had as yet dropped off, and, with some preparation, she could easily lecture to year 1 law students, especially on Roman Law.

The pursuer and appellant (Barbara's executor) submitted that the definition of 'death' for the purposes of succession is far from certain. The modern approach is to regard death as a process, the precise start and end points in which are unclear, but in general evidence of brain stem death has been considered sufficient to establish death. In the case of the living dead, though there is no heartbeat, circulation of blood or respiration, there is clear evidence of brain stem activity (as demonstrated in the cases of Bub in George A Romero's *Day of the Dead* and Big Daddy in *Land of the Dead*). Thus, and having regard to Article 2 in the European Convention of Human Rights (Right to Life) – a convention right under the Human Rights Act 1998 and the Scotland Act 1998 – it was incumbent to interpret death as narrowly as possible. As Barbara was capable of shambling, attacking, biting and chewing, and could articulate the words 'brainsss', 'graaagh' and 'spuilzie', there should be a presumption in favour of life so as to give maximum protection to her Convention-backed right to life, in which case she should

be held to have survived the death of her brother, and is accordingly entitled to succeed to her late brother's estate under the Scots law rules of intestate succession. The appellant's case was briefly stated as "there is no human right to death, only life, therefore in construing 'living dead' the courts must err in favour of life over death".

Secondly, the pursuer and appellant submitted that 'legal personality' is quite distinct from 'life' or 'death'. Corporations are legal persons, and as legal persons are accorded ECHR rights. The executor represents a deceased person *eadem persona com defuncto*, as the same person with the deceased. Therefore, *mutatis mutandis*, Barbara also having an executor, Barbara also had a living person who was legally the same person as her.

Johnny's executor (the defender), responded, more succinctly, that the argument in respect of Barbara having an executor could only proceed on the basis of Barbara being dead, as, had any vestiges of life been mooted the appropriate course of action would have been to seek the appointment of a guardian under the Adults with Incapacity legislation. As a simple matter of fact, Barbara was no longer breathing, had no blood in her veins, had had her tripe removed by a medical examiner at a post mortem, and was currently padlocked in a hefty fridge in the court witness room, and if that was not *res ipsa loquitur* then what was?

The case called before Lord M'Laren (1831-1919), sitting, unusually, in the Outer House of the Court of Session. Finding for the pursuer, Lord M'Laren said "mmmmmmmm
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mmmmmmmmmmghbhbmmmm..."

The defender having appealed Lord M'Laren's judgment, the case now calls in the First Division of Inner House of the Court of Session before Lord President Stair (1619-1695), Lord Mondboddo (1714-1799) and Lord Gordon (still hingin' in).