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# Dead Bodies -- Autopsies -- Authority to Use Parts Removed in Treatment of the Living

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agency, and made a false statement under oath before that agency. His effort was frustrated only by the fact that for some reason the agency was either unauthorized to receive his testimony or by the fact that the official administering the oath was unauthorized to administer it. The defendant's acts, though not constituting perjury, nevertheless seem to be within the scope of the rationale of the substantive crime.

To permit such actions to go unpunished because of "legal impossibility" would not only condone planned and deliberate contempt of legal proceedings, but would make criminality turn on rules which have no functional relevance to the determination of whether the defendant's behavior should be punished. It would seem under such circumstances that a court should be justified in punishing the defendant's actions as a criminal attempt.

J. THOMAS MANN.

### Dead Bodies—Autopsies—Authority to Use Parts Removed in Treatment of the Living

Medical science has made great progress in the use of tissue, bone, and other matter removed from deceased persons in the treatment of living patients,<sup>1</sup> but in North Carolina the sources of supply of such matter are limited because of areas of uncertainty in the law with regard to property and disposition rights in dead bodies.<sup>2</sup>

North Carolina seems to be in accord with the general rule that a dead body is not property, in the ordinary sense.<sup>3</sup> However, a right of testamentary disposition is recognized by the court,<sup>4</sup> and provided for by statute.<sup>5</sup> In the absence of such disposition, there is a right to pos-

<sup>1</sup> "It is becoming increasingly easy to use organs and tissues from deceased persons (cadavers) in treating and sometimes curing, otherwise fatal diseases in living patients. There is a good possibility that within 10 years it will be possible to transplant complex organs from a cadaver to a living person." Letter from John B. Graham, M.D., Department of Pathology, University of North Carolina School of Medicine, to Richard A. Myren, Assistant Director, Institute of Government, University of North Carolina, March 7, 1955. The Raleigh Times, March 28, 1955, p. 9, col. 6, reported the successful transplantation of four ribs, a collarbone, and a breastbone from the body of a deceased person to that of a living person. Colliers, April 25, 1953, pp. 74-77.

<sup>2</sup> Although medical schools obtain cadavers for use in the study of anatomy under the authority of N. C. GEN. STAT. §§ 90-211, *et seq.* (1950), these sections do not authorize the use of parts of such bodies in the treatment of patients.

<sup>3</sup> *Travelers' Insurance Co. v. Welch*, 82 F. 2d 799 (5th Cir. 1936); *Gray v. Southern Pacific Co.*, 21 Cal. App. 2d 240, 68 P. 2d 1011 (1937); *Pierce v. Proprietors*, 10 R. I. 227 (1872); *Koerber v. Patek*, 123 Wis. 453, 102 N. W. 40 (1905). *Accord*, *Kyles v. Southern Ry. Co.*, 147 N. C. 394, 61 S. E. 278 (1908). *But see* *Bonaparte v. Fraternal Funeral Home*, 206 N. C. 652, 175 S. E. 137 (1934).

<sup>4</sup> *Kyles v. Southern Ry. Co.*, *supra* note 3. 25 C. J. S., *Dead Bodies* § 9 (1941).

<sup>5</sup> ". . . nothing in §§ 90-211 through 90-216, inclusive, shall prevent a person from making testamentary disposition of his or her body after death." N. C. GEN. STAT. § 90-213 (1950). N. C. GEN. STAT. §§ 90-216.1, *et seq.* (Supp. 1953) provides for the testamentary donation of one's body to certain institutions for the rehabilitation of the maimed.

session in the surviving spouse, if any, and then in the next of kin, for purposes of preservation and burial.<sup>6</sup> Nowhere does the North Carolina court intimate that the right of possession exists for any other purpose, and no North Carolina statute specifically provides for sale, donation, or other disposition of a dead body by the surviving spouse or next of kin.

If there were legal authority to do so, parts removed during the course of an authorized autopsy could be preserved and later used in the treatment of patients.<sup>7</sup> The right to perform an autopsy in North Carolina is limited "to cases specially provided by statute. . . ."<sup>8</sup> The statutes which so provide define certain conditions under which an autopsy may be ordered under governmental authority without the consent of the person entitled to possession of the body,<sup>9</sup> and other circumstances under which the consent of such person specifically is required.<sup>10</sup> None of these statutes, however, authorizes the retention of parts removed or their use in the treatment of patients.

In other jurisdictions, where authority to perform an autopsy is given in general terms, without specific limitations, it has been held that there is included by implication the right to remove such parts of the body for any further microscopic examination as is necessary and proper to accomplish the purpose of the autopsy.<sup>11</sup> However, in all cases examined, the attitude of the court was clearly opposed to the idea that a general authorization to perform an autopsy might include the right to retain parts removed for any purpose other than examination for a reasonable time.<sup>12</sup> It is apparent from a study of these cases that those

<sup>6</sup> *Lamm v. Shingleton*, 231 N. C. 10, 55 S. E. 2d 810 (1949); *Gurganious v. Simpson*, 213 N. C. 613, 197 S. E. 163 (1938); *Bonaparte v. Fraternal Funeral Home*, 206 N. C. 652, 175 S. E. 137 (1934); *Kyles v. Southern Ry. Co.*, 147 N. C. 394, 61 S. E. 278 (1908); Note, 30 N. C. L. REV. 299 (1952); 15 AM. JUR., *Dead Bodies* § 9 (1938).

<sup>7</sup> After six days in storage, a six inch long piece of aorta was successfully transplanted to the body of a living person. *Science News Letter*, Jan. 30, 1954, p. 71, col. 3.

<sup>8</sup> N. C. GEN. STAT. § 90-217 (1950) (This section also provides the right to perform an autopsy "by direction or will of the deceased . . . and [in] cases where the husband or wife or one of the next of kin or nearest known relative or other person charged by law with the duty of burial, in the order named and as known, shall authorize such examination or autopsy.").

<sup>9</sup> N. C. GEN. STAT. § 15-7 (1953) (Officer prosecuting for the state in cases of homicide); N. C. GEN. STAT. § 90-213 (1950) (Chairman of N. C. Board of Anatomy); N. C. GEN. STAT. § 90-217 (1950) (Coroner or majority of coroner's jury); N. C. GEN. STAT. § 152-7 (6) (1952) (Coroner, coroner's jury, or solicitor).

<sup>10</sup> N. C. GEN. STAT. § 90-220 (1950) requires "the written consent of the deceased person's husband or wife, or one of the next of kin, or nearest known relative or other person charged by law with the duty of burial, in the order named and as known" before the administrative head of a public institution for the care of the sick, insane, etc. may authorize a post mortem examination upon the body of a person dying while an inmate of such institution.

<sup>11</sup> *Palmquist v. Standard Acc. Ins. Co.*, 3 F. Supp. 358 (S. D. Cal. 1933); *Winkler v. Hawkes*, 126 Iowa 474, 102 N. W. 418 (1905).

<sup>12</sup> *Palmquist v. Standard Acc. Ins. Co.*, 3 F. Supp. 358, 359 (S. D. Cal. 1933),

performing an autopsy, even when properly authorized, are under a clear duty to replace in the body before burial all parts removed,<sup>13</sup> and that the next of kin of the deceased have a cause of action against such persons for any violation of this duty.<sup>14</sup> North Carolina has imposed liability upon those performing an autopsy at the order of a coroner when the order is later found to have been improperly issued,<sup>15</sup> and it seems clear that liability would also accrue in such a case for retention of parts removed.

It remains to be considered whether consent to the performance of an autopsy may lawfully include permission to retain and use removed parts in the treatment of patients. If a dead body is not property, and the property right, or quasi property right, in the surviving spouse or next of kin is solely for the purpose of preservation and burial, it would seem to follow that the person entitled to possession of the body has no power to grant such permission. Since consent to have an autopsy performed is based upon statutory provision in North Carolina,<sup>16</sup> and since that statutory provision is for consent only to the performance of an autopsy, it would seem that there is no basis for consent to retention and later use of parts removed.<sup>17</sup>

"No right was possessed by the insurance company other than to make an autopsy. This included acts and operations necessarily involved therein. It contemplated removal of the internal organs, but did not contemplate their retention." *Robertson v. Mutual Life Ins. Co.*, 232 Iowa 743, 6 N. W. 2d 153 (1942) (The court deemed the demand of the insurance company for an autopsy to be unreasonable because it included the authority to retain parts of the body removed, whereas the policy gave only a general right to have an autopsy performed.)

<sup>13</sup> *In re Disinterment of Body of Jarvis*, 244 Iowa 1025, 1032, 58 N. W. 2d 24, 28 (1953). A court order granting an application to have an autopsy performed included authority to remove such "organs from the body . . . as may be required to effectively perform such autopsy, provided, however, such organs or parts of organs so removed, *except only such portions thereof as may be necessary to be subjected to microscopic examination*, shall be restored to their normal place in the body prior to reburial." On appeal, the italicized portion was modified to read, "except only shavings or such slivers of tissue as may be necessary to subject to microscopic examination," and the order was approved.

<sup>14</sup> *Palmquist v. Standard Acc. Ins. Co.*, 3 F. Supp. 358 (S. D. Cal. 1933); *Gould v. State*, 181 Misc. 884, 46 N. Y. S. 2d 313 (Sup. Ct. 1944) *semble*; *Koerber v. Patek*, 123 Wis. 453, 102 N. W. 40 (1905). *But cf.* *Gray v. Southern Pacific Co.*, 21 Cal. App. 2d 240, 68 P. 2d 1011 (1937).

<sup>15</sup> *Gurganious v. Simpson*, 213 N. C. 613, 197 S. E. 163 (1938).

<sup>16</sup> N. C. GEN. STAT. § 90-217 (1950); N. C. GEN. STAT. § 152-7 (6) (1952) (It is the duty of the coroner to have a post-mortem examination performed "upon the request of . . . any member of the family of the deceased. . .").

<sup>17</sup> The effect of consent to the use of parts removed for purposes of treatment of patients apparently has not been decided in this jurisdiction. The question raises a number of problems beyond the scope of this note. For example, would such consent be an absolute defense to a suit for mutilation of the body if the court held that the person giving the consent was not authorized to do so? Even if consent were a good defense in such a case, would the agency retaining the parts removed be protected by the consent of only the person entitled to possession, or would it be necessary for complete protection to get the written consent of all of the next of kin entitled to sue for mutilation of the body? The difficulty of determining with certainty the identity of such person or persons is apparent, *e.g.*, where the deceased was living apart from his wife at the time of his death and the next of kin lived

A desirable solution of the problem might be obtained by means of several slight statutory modifications, *viz.*:

(1) The statutes providing for testamentary disposition of one's body to certain institutions for the rehabilitation of the maimed<sup>18</sup> could be reworded so as to give a present right of disposition for similar purposes to the surviving spouse or next of kin, in the absence of such testamentary disposition.

(2) The statutes providing for the distribution of cadavers to medical schools<sup>19</sup> could be modified so as to include a specific grant of such bodies to medical schools for the additional purpose of obtaining material to be used in the treatment of the living.

(3) The autopsy statutes<sup>20</sup> could be reworded to authorize the delivery to public institutions for the rehabilitation of the maimed of all parts and other material removed, upon completion of the examination, with the written consent of the person entitled to possession of the body, if known.

It is submitted that the enactment of such amendments would serve not only to enhance the development of medical science in the field of transplantation in North Carolina, but would also serve to clarify in some measure the uncertainty in the law of this state with regard to the rights of others in the bodies of deceased persons.

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### Criminal Law—Insanity as a Defense—New Test for Determining

In the important case of *Durham v. United States* defendant had been discharged from the United States Navy in 1945 at the age of seventeen, after a psychiatric examination showed that he was mentally unfit for Naval service because of a personality disorder.<sup>1</sup> During the succeeding eight years he attempted suicide, was convicted of stealing cars and passing bad checks, and was committed three different times to mental hospitals. Two months after his third release from a mental hospital, he was caught breaking into a house. Again he was committed to a mental hospital. Finally, in February of 1953, he was brought to trial in the United States District Court in the District of Columbia

in other sections of the country. From whom would the performing agency obtain the consent where the deceased was survived by several children by two marriages when neither wife survived him? Since consent to retention is, in effect, a donation, the statutes providing for consent to the performance of an autopsy do not provide the answers to these questions.

<sup>18</sup> N. C. GEN. STAT. §§ 90-216.1 *et seq.* (Supp. 1953).

<sup>19</sup> N. C. GEN. STAT. §§ 90-211 *et seq.* (1950).

<sup>20</sup> N. C. GEN. STAT. § 15-7 (1953); N. C. GEN. STAT. §§ 90-217 *et seq.* (1950); N. C. GEN. STAT. § 152-7 (6) (1952). See also N. C. GEN. STAT. § 90-216.1 (Supp. 1953).

<sup>1</sup> *Durham v. United States*, 214 F. 2d 862 (D. C. Cir. 1954).