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asking the court to direct the jailer to perform his ministerial duty as an officer of the court and surrender the prisoner to the state authorities. Combined with this request would have to be a prayer for an order directing the state authorities to take him into custody.

Should the prisoner already be in a state prison when he realizes the consequences of the delay in transfer, he may petition for a writ of habeas corpus when the time spent in the state prison plus the period of detention in the county jail after trial equals the total sentence imposed, less good conduct allowances, on the ground that he has completed service of his sentence.²⁷ And, although there is no authority for such a course, no good reason appears why he could not petition the court for a writ of mandamus directing his release.

Two steps could be taken immediately without legislative or judicial action, which would effect a partial remedy to this problem of wasted time. The prison department could arrange for more frequent trips to jails from which it gets road camp prisoners, or it could arrange to be called when prisoners are awaiting transfer.²⁸ And, with careful preservation of prisoners' rights, a system of prompt waiver of appeal rights in proper cases would serve to eliminate time wasted while the prisoner is waiting for the expiration of the appeal period. A general tightening up of all of the procedures involved between arrest and commencement of sentence would immediately effect a saving of time for state prisoners too often delayed en route from arrest to punishment, and would pay for itself in the resulting decrease in county penal expenditures.

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Dead Bodies—Recovery for Wrongful Interference with or Neglect

North Carolina is in accord¹ with most jurisdictions in holding that there is a quasi-property right in the body of a dead person for purposes of interment. The surviving spouse has the paramount right to the body; if there is no surviving spouse, the right goes to the next of kin. An interference with the right to possess the body and bury it is a breach of duty which may make the wrongdoer liable for damages including mental anguish.² Generally, only the person having the right of burial may maintain action for wrongs to the body.³

²⁷ N. C. GEN. STAT. §17-3 (1943); *Clark v. Surprenant*, 94 F. 2d 969 (9th Cir. 1938); *Alexander v. Posey*, 32 Ala. App. 494, 27 So. 2d 237 (1946); *Johnson v. Lindsey*, 89 Fla. 143, 103 So. 419 (1925); *Whalen v. Cristell*, 161 Kan. 747, 173 P. 2d 252 (1946); *State ex rel. Murphy v. Wolfer*, 127 Minn. 102, 148 N. W. 896 (1914).

²⁸ The assumption is made, of course, that the saving to the prisoners would justify the added expense.

¹ *Kyles v. Southern Ry.*, 147 N. C. 394, 61 S. E. 278 (1908).

² *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238 (1891); *Kyles v. Southern Ry.* *supra* note 1; *Koerber v. Patek*, 123 Wis. 453, 102 N. W. 40 (1905); 25 C. J. S., *Dead Bodies* §§2-3, 8 (1941).

³ *Stephenson v. Duke University*, 202 N. C. 624, 163 S. E. 598 (1932). See Note 19 CORN. L. Q. 108, 111 (1933).

While North Carolina has consistently held this right to be a property right, the cases have not been in accord as to the reasons for conferring such right nor as to the party possessing the right. The mother of a son whose body had been mutilated has been denied the right to sue for damage suffered as a direct result of the wrongful mutilation.⁴ In *Stephenson v. Duke University*,⁵ the Court held that the statute of distributions no longer determined who possesses the right to the body,⁶ and spelled out its adherence to the majority theory: that the right to possess the body, and therefore, to maintain action for injuries thereto, grows out of the duty to bury the body.⁷ Yet, in *Morrow v. Cline*,⁸ without any discussion of the burial duty theory, the right to sue for mutilation of their father's body was conferred upon minor children.⁹

In several respects the use of the duty to bury as the theoretical basis for the right to maintain action for wrongs to the body leads to confused reasoning and undesirable results. If the wrongdoer's act makes burial impossible, so that there is no duty of burial on the plaintiff normally having such duty, may the plaintiff nevertheless maintain an action against the wrong doer?¹⁰ When a person without the duty to do so buries a mutilated body, he is legally entitled to recover of the estate of the deceased for expenses incurred in performing the burial,¹¹ thereby diminishing the property available for distribution. Should not the distributees, therefore, be entitled to sue the wrongdoer whose injury to the body made interment more expensive?

If the right to maintain action for wrongs to the body is made to rest upon the theory that the right grows out of the duty of burial, the es-

⁴ *Stephenson v. Duke University*, *supra* note 3; *Floyd v. Atlantic Coast Line Ry.*, 167 N. C. 55, 83 S. E. 12 (1914).

⁵ 202 N. C. 624, 163 S. E. 598 (1932).

⁶ In *Floyd v. Atlantic Coast Line Ry.*, 167 N. C. 55, 83 S. E. 12 (1914), it was held that there could be no question as to the father's exclusive right as he by the statute of distributions was entitled to all of the personal property of the deceased. The *Stephenson* case clearly reversed this holding—the statute does not apply.

⁷ The established rule is that the right in the dead body grows out of the duty of burial. *Stephenson v. Duke University*, 202 N. C. 624, 163 S. E. 598 (1932); 15 AM. JUR. 831 (1938).

Quaere: Do next of kin, as such, have a legal duty to bury their dead? The common law casts the duty of burial on the person under whose roof death occurred. 17 C. J. 1142 (1919). The estate of the deceased is liable for funeral expenses. *Ray v. Honeycutt*, 119 N. C. 510, 26 S. E. 127 (1896). A search of the authorities has revealed no legal duty of burial on next of kin other than spouses and parents.

⁸ 211 N. C. 254, 190 S. E. 207 (1937).

⁹ Quaere: Do minors have a legal duty to bury their dead?

¹⁰ See *Finley v. Atlantic Transport Co.*, 220 N. Y. 249, 115 N. E. 715 (1917). Where plaintiff's father died at sea and defendant's employees embalmed the body so that it could have been kept without danger to the living, and the deceased had ample funds to defray the expense of shipment home, his address being known, but defendant's employee had the body thrown overboard, plaintiff was entitled to recover. There was a duty on defendant to deliver the body. See *Bonaparte v. Fraternal Funeral Home*, 206 N. C. 652, 175 S. E. 137 (1934) where a widow recovered punitive damages for the wrongful withholding of her husband's body.

¹¹ See *Ray v. Honeycutt*, 119 N. C. 510, 26 S. E. 127 (1896).

sential injury involved which is the outrage to the sensibilities of close kin is ignored and the person most hurt may be denied recovery¹²—having no right because he has no duty of burial. In fact, the right to possess the body may not grow out of the duty to bury it,¹³ but the converse may be true.¹⁴ It is natural that someone should—by virtue of intimate relationship or for other good reason—have a preferential right to the body. But why should a preferential right in one survivor clothe wrongdoers with immunity to action for mental anguish caused other survivors? It is submitted that the better theory upon which to base these cases is this: There is in the surviving spouse, children, parents and other close kin¹⁵ a right to have the body of the deceased treated with due respect; an interference with that right is a breach of duty and the wrongdoer may be held liable to any or all of them who suffer injury.¹⁶ Such a rationale avoids the technical difficulties inherent in the quasi property-burial duty theory and is more in accord with the ends of justice.¹⁷

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¹² "Obviously, in cases of this character, any pecuniary loss to plaintiff must usually be merely trifling. The great injury done consists in the outrage upon the sensibilities. . . ." *Koerber v. Patek*, 123 Wis. 453, 464, 102 N. W. 40, 44 (1905).

In a dissenting opinion in *Floyd v. Atlantic Coast Line Ry.*, 167 N. C. 55, 62, 83 S. E. 12, 15 (1914), Clark, C. J., said: "This is a tort pure and simple, and the wife is entitled to recover for it just as she has recovered in actions for failure to deliver a telegram whereby she as well as her husband has suffered mental anguish." He noted that by the very nature of the situation the mother is the person who most naturally would suffer mental anguish in mutilation cases.

¹³ "The right had its origin in sentiment, in affection for the dead, in religious belief in some future life," *O'Donnell v. Slack*, 123 Cal. 285, 289, 55 Pac. 906, 907 (1899).

¹⁴ Where the deceased's wife was absent and failed to assume the trust incident to her right, a waiver was implied; the right of custody descended immediately to the next of kin—the father of the deceased—and he, having the custody of the body, had the duty of burial. *Southern Life and Health Ins. Co. v. Morgan*, 21 Ala. App. 5, 105 So. 161 (1925).

¹⁵ In *Boyle v. Chandler*, 3 Harr. 323, 138 Atl. 273 (Del. 1927), the husband and children of the deceased were permitted to maintain action. See Note, 19 CORN. L. Q. 108, 112 (1933) which suggests that the immediate family be allowed a right of action. In *Koerber v. Patek*, 123 Wis. 453, 458, 102 N. W. 40, 42 (1905), speaking of the right in the dead body, the court said: "The person having charge of it cannot be considered as the owner. . . . He holds it only as a sacred trust. . . . a court of equity might control the exercise of those rights by one relative with due regard to the interest of others. . . ."

¹⁶ In *Koerber v. Patek*, *supra* note 15, it was said that there is no right more sacred to the individual than the right to bury the dead, none where the court need less hesitate to impose upon a willful violator the uttermost consequences of his act. In *Larson v. Chase*, 47 Minn. 307, 312, 50 N. W. 238, 240 (1891) the court, commenting on a case in which defendant had dug up the body of plaintiff's child, noted that the recovery was made to rest upon the trespass to the land and said: "It would be a reproach to law if a plaintiff's right to recover for mental anguish resulting from the mutilation or other disturbance of the remains of his dead should be made to depend upon whether in committing the act the defendant also committed a technical trespass upon plaintiff's premises, while everybody's common sense would tell him that the real and substantial wrong was not the trespass on land but the indignity to the dead." It would seem equally a reproach to law if recovery is made to depend upon whether plaintiff was under a duty to bury the body.

¹⁷ In *Matthews v. Forrest*, 235 N. C. 281, 285, 69 S. E. 2d 553, 556 (1952),