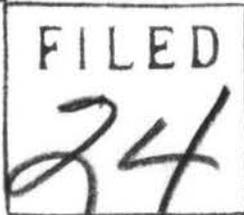


CRIMINAL LAW: ASSAULT
AND BATTERY: NOT GUILTY
OF: WHEN:

A surgeon performing emergency operation upon a dead woman for the purpose of saving the life of her unborn child and no permission was given from any person who could legally give same, is not guilty of assault or battery, or any other offense under the criminal laws of Missouri.

~~JOHN M. DALTON~~



February 6, 1953

Mr. Thomas E. Dowling
Circuit Attorney
City of St. Louis
St. Louis, Missouri

XXXXXXXXXX

J. C. Johnsen

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department based upon facts given in correspondence attached to your letter, which reads in part as follows:

"The case in question is this. A woman on the delivery table in labor suddenly dies, the baby in her womb is still living. The baby cannot possibly remain alive for more than three minutes without being delivered so that it may get oxygen into its brain. The only way this can be accomplished is by an immediate Cesarean Section. It is impossible to get permission for the operation from the mother as she is dead. It is impossible to get permission from the father in time to get that baby out of the womb into the air inside of three minutes. If the surgeon on his own initiative does a Cesarean operation on the dead woman for the purpose of saving the life of the unborn child, is there any criminal or civil liability in his action? We are primarily interested in the criminal phase, but secondarily interested in the civil liability."

Section 27.040, RSMo. 1949, provides that the attorney general shall upon request give his written opinion, free of charge, to the officers mentioned upon any question of law relative to the offices, or the discharge of the duties of same. It is the duty of the circuit attorney to enforce the criminal laws of the state within his city, and under the circumstances related above the question

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of criminal liability of the surgeon might involve some of the duties of the circuit attorney, although it does not appear that the civil liability of the surgeon would involve, or pertain to any question of law relating to the office, or the performance of the duties of same. It is believed that it would be improper to discuss the civil liability of the surgeon, consequently our opinion will be strictly confined to the criminal aspect of the question presented.

We are unable to find any section of the criminal laws of Missouri, which specifically makes it an offense for a surgeon to operate upon the body of a dead woman under above mentioned circumstances, so we turn to the decisions of other states to aid us in determining whether or not the surgeon would be guilty of any criminal offense, and if so the kind of such offense.

In the case of *Hively v. Higgs*, 253 Pac. 363, it was held that an unauthorized operation amounted to a technical assault and battery by the surgeon upon the body of his patient. The court in this case said:

"* * *It is very doubtful that plaintiff should ever be limited to nominal damages where he has been subjected to an operation without his consent. Such an operation constitutes technical assault and battery. * * *"

Assault and battery has been defined in the case of *Stark v. Epler*, 117 Pac. 276, at l.c. 278, as follows:

"* * *It is text-book learning that an assault is an intentional attempt by force to do violence to the person of another; and that a battery is the actual application to such person of the attempted force and violence."

In this connection we wish to remind the reader that assault and battery, like other crimes must consist of a criminal intent coupled with criminal action, or necessary force to carry the intent into action.

From the facts given above it does not appear that the surgeon had any criminal intentions coupled with any criminal action, but if it were assumed that both of these elements were present at the time of the alleged wrongful act, the surgeon would still not be guilty of assault and battery under Missouri statutes.

Sections 559.180, 559.190 and 559.220, RSMo. 1949, define the various kinds of assaults that may be committed upon a person.

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Section 559.180, reads as follows:

"Every person who shall, on purpose and malice aforethought, shoot at or stab another, or assault or beat another with a deadly weapon, or by any other means or force likely to produce death or great bodily harm, with intent to kill, maim, ravish or rob such person, or in the attempt to commit any burglary or other felony, or in resisting the execution of legal process, shall be punished by imprisonment in the penitentiary not less than two years."

(Underscoring ours.)

Section 559.190, reads as follows:

"Every person who shall be convicted of an assault with intent to kill, or to do great bodily harm, or to commit any robbery, rape, burglary, manslaughter or other felony, the punishment for which assault is not hereinbefore prescribed, shall be punished by imprisonment in the penitentiary not exceeding five years, or in the county jail not less than six months, or by a fine not less than one hundred dollars and imprisonment in the county jail not less than three months, or by a fine of not less than one hundred dollars."

Section 559.220, reads as follows:

"Any person who shall assault or beat or wound another, under such circumstances as not to constitute any other offense herein defined, shall, upon conviction, be punished by a fine not exceeding one hundred dollars, or imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

In each of the above quoted sections, it is noted that the word "person" as used therein, constitutes a very important element in the definitions of assault, or assault and battery. From such definitions it is apparent that such crimes can only be committed by a person in or upon the body of another person. It is also apparent that the word "person" as used in these statutes is used in its common or ordinary sense, and since no different or other meaning has been ascribed, the word must be so interpreted.

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It has long been a rule of statutory construction in Missouri that words used in a statute are to be given their common or ordinary meaning unless it appears from the words thus used that it was the intention of the legislature in the passage of the statute that such words were to be given a meaning other than the ordinary or commonly accepted meaning.

It appears that no statutes or court decisions of Missouri, insofar as we are able to ascertain, define the word "person" and it is necessary that we look to the decisions of other states for a satisfactory definition of the word, as used in its common, or ordinary sense.

In the case of *Commonwealth v. Wolosky*, 177 N.E. 656, it was held that the natural and obvious meaning of the word "person" is a living human being.

Again in the case of *United States v. Crook*, 25 Fed. Cases, 695, in discussing the meaning of the word "person" the court said at l.c. 697:

"The most natural, and therefore most reasonable, way is to attach the same meaning to words and phrases when found in a statute that is attached to them when found in general use. If we do so in this instance, then the question cannot be open to serious doubt. Webster describes a person as 'a living soul, a self-conscious being; a moral agent; especially a living being; a man, woman, or child; an individual of the human race.' * * * (Underscoring ours.)

From the facts given in the opinion request, it is apparent that the criminal offense, if any, the surgeon might be guilty of would be that of an assault and battery upon the dead body of his woman patient. However, the sections of the Missouri statutes defining assaults quoted above, frequently refer to the word "person" and has no reference to assaults, or assaults and battery upon the dead bodies of human beings. The word "person" refers to living human beings and has no reference to dead human bodies, since a dead body is not a person within the commonly accepted, or ordinary meaning of the word.

In this connection we call attention to the case of *BROOKS v. BOSTON & N. ST. RY. CO.*, 97 N.E. 760, in which the court said at l.c. 760:

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"An action at law implies, by its very terms, the existence of a person who has the right to bring the action. * * * It is axiomatic that a corpse is not a person. That which constitutes a person is separated from the body by death and that which remains is 'dust and ashes,' sacred to kin and friends, whose feelings and rights in this regard receive the protection of the law, but having no inherent capacity. * * *"
(Underscoring ours.)

While that portion of the opinion quoted above was a civil case it is our belief that the principle of law laid down therein is equally applicable to facts involving a criminal case, and to sustain our position in this respect, we call attention to the criminal case of Lawson et al. v. State, 23 S.E.(2d) 326. In this case the victim of a larceny, named in the indictment was a person who had died, and the court held the indictment to be insufficient for the reason that a corpse was not a "person" and could not own property.

At l.c. 328, the court said:

"In the present case the indictment expressly alleged that the property stolen was the property of Eaton, and that it was stolen from the person of Eaton, but the evidence showed that Eaton was dead at the time of the finding of the indictment. A corpse is not a person and if Eaton was dead at the time of the finding of the indictment the latter was not supported by the evidence. A corpse is not a person nor can a corpse own property. * * *"
(Underscoring ours.)

In view of the foregoing it is our thought that a corpse is not a "person" within the meaning of the Missouri criminal statutes, and that a surgeon who operates upon the dead body of a woman patient for the purpose of saving the life of her unborn child, without first obtaining permission from any person from whom such permission could be lawfully given, is not guilty of any assault or battery upon the body of such dead woman, since an assault or battery can only be committed in or upon the body of a living human being.

It is our further thought that the operating surgeon would not be guilty of any other criminal offense since no statutes in Missouri make it a crime for a surgeon to perform an emergency

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operation upon the body of a dead woman in order to save the life of her unborn child.

CONCLUSION

It is, therefore, the opinion of this department that when a surgeon performs an emergency operation upon the dead body of a woman patient for the purpose of saving the life of her unborn child, and no permission was first obtained from any person who could legally give permission to perform the operation, the surgeon is not guilty of assault or battery or any other offense under the criminal statutes of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General