

'Sacred Wherever They Are Interred': The Status of Cremated Human Remains in Scots Law

Jonathan Brown *

A. Introduction

When a dead body is buried it is thought that, as a matter of law, it ought to remain buried. Hence, if an individual or body corporate wishes to see a cadaver disinterred for whatever reason, they must apply to the Sheriff Court for the grant of a licence to exhume. The application must state the reason for the proposed disinterment and indicate where, precisely, the body is to be re-buried. Ordinarily, authority from the next of kin must be sought and obtained, if the person who is next of kin is not themselves one of the applicants for the licence.¹ The detail of the current law regulating this matter is liable to change in the near future, since s.27 of the Burial and Cremation (Scotland) Act 2016 makes provisions for the Scottish Ministers to introduce regulations concerning the exhumation of human remains. No such regulations have, as yet, been made. As such, it is worth commenting on the issues that arose in one recent decision of Glasgow's Sheriff Court.² The particular facts of that case are themselves worthy of note, since they are quite obviously relevant to any discussion concerning the law of exhumation, and so they are set out in detail below. The present law pertaining to the exhumation of human remains will then also be considered. Having commented on the facts of this recent case and the background law, the present case note will conclude by highlighting the issues which the Scottish Ministers should bear in mind when the Scottish Government does come to enact new regulations pertaining to exhumation.

B. Comment: The Holy Cross Church Case

Church attendance has been in decline, in Scotland as in many other Western nations, for a considerable number of years now³ and the Scottish Episcopal Church has felt the effects of this decline as much as, if not necessarily more than, other Christian denominations.⁴ As a result of its decreasing congregation, a number of Episcopal Church buildings have closed. Among this number was the former Holy Cross Church in Knightswood, which held its final service on 14 December 2013 and was sold to a children's nursery in 2017.⁵ As a part of the sale of the church building, the adjacent memorial garden was also conveyed to the children's nursery. The contract of sale stipulated that the sellers (the Diocese of Glasgow and Galloway

* Lecturer in Scots Private Law, University of Strathclyde

¹ *Paterson, Petitioner*, 2002 SLT 1006, at para.51 *per* Lord Carloway.

² Note by Sheriff A. M. Cubie in the Application by the Diocese of Glasgow and Galloway of the Scottish Episcopal Church for the Disinterment of Cremated Remains at the former Holy Cross Church [2019] SC GLA 33.

³ The report on the fourth Scottish Church Census noted that though the rate at which church attendance has been found to be declining has slowed, this is in no small part because 'there are gradually fewer people left to leave [organised churchgoing religion]': Peter Brierly, *The Fourth Scottish Church Census (2016)*, published February 2017 by Brierly Consulting, at 16.

⁴ Episcopal church attendance fell by 29% between 2002 and 2016, compared with a 40% and 33% decline, in the same period, for Church of Scotland and Roman Catholic church attendance respectively: See Peter Brierly, *The Fourth Scottish Church Census (2016)*, published February 2017 by Brierly Consulting, Table 2.4.

⁵ See Stuart MacDonald, *Scottish Church Given Go-Ahead to move Cremated Remains from Memorial Garden*, (The Scotsman, 29/04/2019).

of the Scottish Episcopal Church) were to remove the human remains which had been interred in the memorial garden, and make good all damage done to the garden at their own cost, by 25 June 2022.⁶ This raised a novel issue before the Scottish courts since the remains interred in the garden were not interred human cadavers, but rather were ‘cremains’ – that is, the ashes of human beings who had been cremated.⁷

The issue was novel because – prior to this case – there existed (it was said) no Scottish authority which addressed the subject of cremains.⁸ This issue was compounded since it has been said to be ‘a very well established fact, leading to a rule of law, that after a certain period human remains resolve into their original dust, and it is by no means necessary to maintain the ground, in which they are buried, intact’.⁹ This opinion of Lord President Kinross was recognised, by Sheriff Cubie,¹⁰ as holding its basis in a passage from Erskine which maintains that burial grounds which have ceased to be used as such nevertheless remain outwith the bounds of ordinary property law until ‘the remains of the bodies there interred shall have returned to their original dust’.¹¹ Erskine’s view correlates with Gordon’s observation, drawing on the case of *Coutts v HM Advocate*,¹² that ‘there comes a time when a body is so far gone in dissolution that its removal no longer constitutes violating sepulchres’,¹³ the crime of violation of sepulchres being the primary mode by which the integrity of grave-sites and memorial gardens are protected in law.¹⁴ Given that the law ceases to afford protection to grave-sites after the remains there interred have ‘returned to their original dust’, the question of interred cremains presents a problem to the law: cremains, as a matter of fact, contain no organic material¹⁵ and so it may well be the case that once a body has been cremated, ‘there is no further process of disintegration to occur’, even after the interment of the ashes.¹⁶

For that reason, in their first crave the applicant in *Holy Cross Church* sought a declarator to the effect that ‘no warrant to disinter cremated remains is required’, on the basis that cremains are, by their very nature, fully disintegrated even prior to interment. Sheriff Cubie declined to grant this declarator and instead granted warrant for the applicant to serve proceedings on the Lord Advocate as a matter of public interest. The applicant, in light of this,

⁶ [2019] SC GLA 33, para.2.

⁷ See [2019] SC GLA 33, fn.1.

⁸ See [2019] SC GLA 33, para.20 and Douglas Cuisine and Roderick R. M. Paisley, *Unreported Property Cases from the Sheriff Court*, (W. Green, 2000), p.70.

⁹ *Steel v Kirk Session of St Cuthbert’s Parish* 1891 18 R 911, at 918.

¹⁰ [2019] SC GLA 33, para.5.

¹¹ Erskine, *Institute*, ii, 1, 8.

¹² (1899) 3 Adam 50.

¹³ G H Gordon, *The Criminal Law of Scotland* Vol II, 4th edn. (2017) by J Chalmers and F Leverick para 51.01. *Per* Lord M’Laren in *Coutts*, ‘the crime is committed by the act of disturbing a body which is in a condition to be regarded as an object of reverential treatment’ (at 61).

¹⁴ Even a mild or minor disturbance of a grave-site (or, by analogy, a memorial garden) may amount to the crime of violation of sepulchre in Scotland: J. H. A. MacDonald, *A Practical Treatise on the Criminal Law of Scotland*, 5th edn. (1948) by Lord Walker and D. J. Stevenson, 52. For the application of the law relating to the crime of violation of sepulchres to cremains, see *Dewar v HM Advocate* 1945 JC 5, at 11.

¹⁵ See the discussion in John J. Schultz, Michael W. Warren and John S. Krigbaum, ‘Analysis Of Human Cremains: Gross and Chemical Methods’, in Christopher W. Schmidt and Steven A. Symes (Eds.), *The Analysis of Burned Human Remains* (Elsevier, 2008), p.94.

¹⁶ [2019] SC GLA 33, paras.7, 9.

ceased to insist upon that crave and the case thus proceeded on the basis of the applicant's second crave, which asked that the Sheriff grant warrant to disinter the cremains in the same form as if cremains were no different from any other species of human remains. No respondent opposed the application, nor did anyone object to the second crave (the Lord Advocate having indicated that he had no intention to intervene given the lack of insistence on crave one);¹⁷ accordingly – the applicant having ‘taken appropriate reasonable and practical steps to publicise the intention to disinter’¹⁸ – Sheriff Cubie duly granted a warrant to disinter the cremains.

In granting this warrant, however, the learned Sheriff emphasised his conclusion that ‘[human] remains including cremains are sacred wherever they are interred. The memorial garden and the cremains therein are protected against disturbance’.¹⁹ Though it is certainly correct to suggest that legal protection is afforded to memorial gardens in the same way that protection is afforded to other forms of sepulchre,²⁰ it cannot conclusively be said that human cadavers, remains or cremains are ‘sacred’ as a matter of law. ‘Sacred things’ (*res sacrae*) are a very particular class of property in the Civil law tradition (and Scots property law manifestly adheres to this tradition).²¹ Human remains (including cremains) do not readily fit into this designation of *res sacrae* since, for an object to be rendered such (and so taken out of the sphere of private patrimony altogether),²² it must be consecrated as a sacred thing by an individual or body corporate with the requisite legal authority to do so.²³ The human body, whether after death, cremation or interment, is not (necessarily) consecrated in this manner, yet in all cases a grave-site is afforded protection by the law proscribing violation of sepulchres.²⁴ This suggests that the protection that the law affords to sepulchres and memorial gardens is not rooted in the ‘sacredness’ of the human body, or human remains in whatever physical form they might take, but rather in the status of the location in which the remains are interred as a *res religiosa* (a religious, or ‘superstitious’²⁵ object).²⁶

¹⁷ [2019] SC GLA 33, para.13.

¹⁸ [2019] SC GLA 33, para.16.

¹⁹ [2019] SC GLA 33, para.20.

²⁰ *Dewar v HM Advocate* 1945 JC 5, p.11: where ‘ashes are interred or disposed of in accordance with the wishes of the relatives... the crime of violation of sepulchres can take place’ (*per* Lord Justice-General Normand).

²¹ The law of property in mixed jurisdictions, as Professor Reid observed in commenting upon the first edition of Palmer’s *Mixed Jurisdictions Worldwide*, is always Civilian in character: See Kenneth G. C. Reid, ‘Patrimony not Equity: The Trust in Scotland’, in Remus Valsan (Ed.) *Trusts and Patrimonies* (Edinburgh University Press, 2005), p.111.

²² *Res sacrae*, as a species of *res divini iuris* (things of divine law) are *extra nostrum patrimonium*: See Gaius, *Institutes* 2.1-2.9; J Chisholm (Ed), *Green's Encyclopaedia of the Law of Scotland* (W. Green, 1898) at 309-311.

²³ Insofar as Roman law was concerned, *res sacrae* were things ‘*ex auctoritate populi Romani consecratum est*’ (‘consecrated as such by the authority of the Roman people’) - Gaius, *Institutes* 2.5; Justinian, *Institutes*, 2.1.9. In Canon law and English ecclesiastical law, *res sacrae* were also deemed to be things such as ‘consecrated grounds’: See *Gilbert v Buzzard* (1820) 3 Phil. 335, p.360.

²⁴ Prior to the interment of the body or cremains, the human remains may be the object of theft in like manner to any other object recognised as ‘property’ for the purposes of law – marking a contrast with the prevailing position of the Common law tradition, wherein it is ordinarily held that human remains – buried or unburied – cannot be the subject of proprietary rights: See Jonathan Brown, *Res Religiosae and the Roman Roots of the Crime of Violation of Sepulchres*, [2018] Edin. L. R. 347, p.348.

²⁵ See J. B. Moyle (Trs.), *The Institutes of Justinian*, 5th Edn. (Clarendon Press, 1913), Book II, Tit. I, 7-9.

²⁶ See Jonathan Brown, *Res Religiosae and the Roman Roots of the Crime of Violation of Sepulchres*, [2018] Edin. L. R. 347, *passim*.

In law, a *res religiosa* is any land in which ‘the principal part’ – which might be ‘the head, bones or ashes’ – of any human body is interred.²⁷ The ground in which the remains are interred, as a *locus religiosus* (‘religious [or superstitious] location’), is afforded protection by law, rather than the human remains themselves.²⁸ Unauthorised interference with a *locus religiosus* amounts to violation of sepulchre. In spite of Sheriff Cubie’s use of the term ‘sacred’ to describe interred human remains and cremains, it appears that the term ‘religious’ would then be the more accurate descriptor for interred remains and cremains as a matter of law. Though other commentators on Scots law have previously conflated *res sacrae* and *res religiosae* (along with the third category of *res divini iuris* – ‘sanctified things’, or *res sanctae*),²⁹ *res religiosae* are altogether distinct from other things which are regarded as beyond private patrimony since the law continues to penalise interference with such by means of the criminal law.³⁰ This is of practical significance, since the categorisation of an interred human body as a *res religiosa* suggests that in Scotland one cannot say, as holds true in England and the wider Common law world, that ‘there is no property in a corpse’ (whether buried or unburied).³¹ In Scotland, there is authority which suggests that a dead body can be stolen before it is interred;³² corpses (and, it may be postulated, cremains) would thus appear to be ordinary objects of property until buried. Since it is the simple act of respectful burial that changes the character of the body (or cremains), it appears that grave-sites in Scotland ought to be recognised and categorised as *res religiosae*, not as ‘sacred’ or ‘sanctified’ objects. Classification of a thing as ‘sacred’ requires an act of consecration which is not (necessarily) present when human remains or cremains are interred.

Describing a sepulchre or a memorial garden as a ‘religious thing’ may be more correct as a matter of law, but this descriptor does not appear in keeping with the temper of modern *mores*. The memorial garden in the Holy Cross Church case may have been historically connected with a Christian church, thus suggesting that the appellation ‘religious’ is appropriate here, but such ‘religious things’ might nevertheless be created by the secular interment of the remains (or cremains) of an atheist.³³ It does not seem particularly fitting for one who has eschewed or

²⁷ See Thomas Wood, *The New Institute of Imperial of Civil Law, Shewing in Some Principal Cases Amongst Other Observations, How the Canon Law, the Laws of England and the Laws and Customs of Other Nations Differs From It*, Book II (1704) 86. Wood, here, is discussing the Civil law tradition, rather than that of the Common law, and so his views can be deemed somewhat authoritative in this regard. Erskine, for his part, notes that while Scotland does not strictly adhere to the position of Civil law, being that private burial place remain, in Scotland, *intra commercium*, the law recognises that grave-sites should nonetheless ‘be sequestered from the ordinary uses of property’ in like fashion to the *res religiosae* of Roman law: Erskine, *Institutes*, ii, 1, 9.

²⁸ See the discussion in Jonathan Brown, *Res Religiosae and the Roman Roots of the Crime of Violation of Sepulchres*, [2018] Edin. L. R. 347, *passim*.

²⁹ See the discussion in Jonathan Brown, *Res Religiosae and the Roman Roots of the Crime of Violation of Sepulchres*, [2018] Edin. L. R. 347, 358.

³⁰ That is, by way of the crime of violation of sepulchres: Jonathan Brown, *Res Religiosae and the Roman Roots of the Crime of Violation of Sepulchres*, [2018] Edin. L. R. 347, *passim*.

³¹ *R v Kelly* [1999] QB 621 at 630-631 *per* Rose LJ.

³² M’Kenzie (1899) 3 Adam 57n; *Dewar v HM Advocate* 1945 J.C 5; James Chalmers and Fiona Leverick, *Gordon’s Criminal Law*, Vol. II (4th Edn.) (W. Green, 2017), para.21.26.

³³ A *res religiosa* is created whenever *any* human body is ‘reverentially’ buried – the use of the term ‘reverential’ should not mislead, here, as there is no requirement for any particular or religious funerary rites to accompany the burial. The mere fact that the burial is not clandestine (e.g., to hide the evidence of a murder) is sufficient to create a *res religiosa*: Jonathan Brown, *Res Religiosae and the Roman Roots of the Crime of Violation of Sepulchres*, [2018] Edin. L. R. 347, 358.

repudiated religion in life and in death to become, in law, a constituent part of a ‘religious thing’ when their remains are laid to rest and so it is suggested that the language of the law must be revised to better reflect the reality of life and death in 21st century Scotland. One means of revising the language of the law in this area, without the need for legislative intervention, would be for practitioners and the courts to adopt and clarify the Latin terms *res sacrae*, *religiosae* and *sanctae*. That this should happen regardless is obvious; it would have been more historically and legally accurate for the court, in the Holy Cross Church case, to have concluded that the memorial garden was *res religiosa* than for it (and others before it) to have found, as it did, that the ashes themselves are ‘sacred’ after they have been interred. In any case, the use of the Latin in preference to the English would have had the advantage of giving religious and irreligious persons alike the comfort of being able to translate the term ‘*religiosae*’ as ‘religious’ or ‘superstitious’, depending on their own personal preference or belief.

C. Reform and ‘Decent Obscurity’

While there exists scope for the common law to develop in this area, and such scope might remain after the creation of Regulations under s.27, the very existence of s.27 of the Burial and Cremation (Scotland) Act 2016 implies that the Scottish Parliament wishes to see the applicable law reformed and clarified.³⁴ The Scottish Ministers must thus consider the extent to which any legislation passed to make provision for the exhumation of human remains ought to alter the Scots common law pertaining to the protection of interred bodies and cremains. Since the law pertaining to the protection of interred remains turns on the recognition of a category of objects consigned to ‘divine law’ and the courts are obliged to take into account considerations of ‘reverence, dignity and respect’ in deciding applications for warrants to disinter,³⁵ it appears that Ministers must consider the interrelation of law and religion in some detail in making regulations under s.27 of the 2016 Act. In an increasingly secular³⁶ nation such as Scotland, in which the some established religious orders have nevertheless recently resolved to take on a ‘more proactive’ role in Scottish politics,³⁷ this is an unenviable task.

Consideration of the extent to which the law and religion should continue to remain entwined in this area raises questions of policy, but the present reality of this entanglement remains is a matter of legal and historical fact. Since the Scottish Ministers intend to hand over the responsibility for authorising (or refusing) exhumation to ‘Inspectors of Burial’ at first

³⁴ The policy memorandum which accompanied the introduction of the Burial and Cremation (Scotland) Bill (SP Bill 80) noted that, at that time, there existed ‘no legislation covering the exhumation of human remains’: Burial and Cremation (Scotland) Bill, Policy Memorandum, para.60.

³⁵ [2019] SC GLA 33, para.9.

³⁶ And statistically non-religious: the Scottish Social Attitudes Survey found, in 2016, that 58% of Scots regarded themselves as belonging to no religion, with 74% of those aged between 18-34 identifying as irreligious: See ScotCen Scottish Social Attitudes survey 2016 – Religious identification tables (accessible at http://www.scotcen.org.uk/media/1452846/55A_R311g10n_T4ble5_2016.pdf).

³⁷ See Andrew Learmonth, *Catholic Church to take ‘more proactive’ role in Scottish politics*, (06/01/2020, the National) (accessible at <https://www.thenational.scot/news/18138893.catholic-church-take-more-proactive-role-scottish-politics/>). In the context of this case note, it should of course be noted that the Holy Cross Church was itself Episcopal and the Scottish Episcopal Church has not expressly indicated any concurrent desire to become more ‘proactive’ in Scottish political life.

instance,³⁸ minimising the role of the courts,³⁹ it is clear that the Regulations passed must ensure that such inspectors must be, as Sheriffs are at present, bound to take into account considerations of ‘reverence, dignity and respect’ in deciding whether or not to permit exhumation.⁴⁰ The policy objective underpinning s.27 of the legislation is not to reform the substance of the law in this area, but rather to ‘improve [the present] cumbersome, costly and time-consuming procedure, and provide a clear legal process for applying for an exhumation’,⁴¹ yet to do so effectively the regulations must engage, to at least some extent, with the rational reasons for affording protection and special status to burial sites in law. Hence, in considering what criteria any Inspector must weigh their decision against in determining whether to grant an application to disinter, the Scottish Ministers must consider how burial-sites themselves are to be categorised in law.

In view of the potential ethical and moral minefield which is opened up by contemplating reform of a complex and emotive area of law, such as the law of burial and exhumation, the Scottish Ministers may well wish to avail themselves of the ‘decent obscurity of a learned language’,⁴² as did Westminster in passing the Prescription and Limitation (Scotland) Act 1973,⁴³ to avoid the peculiar complexities of making this determination. Such a course of action ought not to be available to them, however. As Professor Paisley observed, ‘lawyers have recourse to [Latin] for its precision’;⁴⁴ in the absence of juridical development of (or, indeed, recognition of the significance of) the language of *res divini iuris* in the Scottish courts, the use of the Latin language in any regulations pertaining to burial or exhumation would serve only to obfuscate, rather than clarify. The Scottish Ministers must, then, grapple with the complexities of this area of law, and the fact of the law’s close association with religion and the ‘divine’ in this area, head-on. To do otherwise would be to introduce incoherence in place of clarity, which is axiomatically the opposite of what was intended with the passing of s.27.

D. Conclusion

The Holy Cross Church case brings to light a number of significant factors which concern the present law pertaining to exhumation in Scotland, as well as the matters which the Scottish Ministers ought to bear in mind when creating regulations under since s.27 of the 2016 Act. On the face of it, the case clarifies that human cremains, like human cadavers, are afforded specific protection in law after they have been interred and that a warrant to disinter such is necessary to alter the *status quo* after the fact of reverential burial. Implicitly, too, the case

³⁸ Burial and Cremation (Scotland) Act 2016, s.89; it is thought, though, that a decision made by an Inspector of Burial might be appealed to the Sheriff: Burial and Cremation (Scotland) Bill, Policy Memorandum, para.63.

³⁹ Burial and Cremation (Scotland) Bill, Policy Memorandum, para.63.

⁴⁰ If they do not, the oversight function of the Sheriff may introduce such as requirement through the back door in any case, but when the express purpose of the legislation and Regulations is to clarify, such things, it is thought, should be spelled out.

⁴¹ Burial and Cremation (Scotland) Bill, Policy Memorandum, para.60.

⁴² See David Johnston, ‘*Res Merae Facultatis*: The Decent Obscurity of a Learned Language’, in Douglas Bain, Roderick R. M. Paisley, Andrew R. C. Simpson and Nikola J. M. Tait (Eds.), *Northern Lights: Essays in Private Law in Honour of David Carey Miller* (Aberdeen: AUP, 2018), p.141.

⁴³ Schedule 3 to the Prescription and Limitation (Scotland) Act 1973 employs the Latin language, making reference to property which is *extra commercium* as well as to ‘any right exercisable as a *res merae facultatis*’.

⁴⁴ See Roderick R. M. Paisley, ‘Servitudes: Extinction by Non-Use’, in Vernon V. Palmer and Elspeth Reid, *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh: Edinburgh University Press, 2009), p.77.

recognises the historic significance of the Roman and Canon law concept of *res religiosae*, although Sheriff Cubie did make use of the English term ‘sacred’ as opposed to the more appropriate Latin word ‘*religiosa/religiosus*’ in describing the effect of interment. This notwithstanding, the case is consistent with the common law position that, as a matter of Scots property law, some things are ‘divine’ and others ‘human’ and that things which fall into the former category are removed from the ambit of the ordinary rules of ‘property’.

The language of ‘divine law’ and ‘religious things’ does not appear to be in keeping with modern Scottish societal attitudes, however, no matter the fact that such is ostensibly in keeping with the present letter of Scots law. If the Scottish Ministers are to effectively make regulations under s.27 of the 2016 Act, then they must revise the language of the law so as to either excise or embrace reference to the ‘divine’ or ‘religious things’ explicitly. There is a notable tension here between the increasing irreligiousness of the Scottish populace and the Christian bloc which might wish to see a less secularised Scotland. The nation’s politicians, then, face a particularly thorny debate, as to maintain coherence in the law this tension must be confronted by legislators and lawyers alike. It would not be fitting for regulations to make use of the Latinate terms ‘*res divini iuris*’ or ‘*res religiosa*’, no matter the fact that such language could conceivably be employed in court.

Even if the language of ‘divine law’ in this context is to be ultimately excised, then law reformers must nevertheless be conscious of the letter of the law as it stands, so as to avoid leaving, or indeed creating, ‘gaps’ in other areas of Scots law. Thus, whatever course of action is adopted by the legislature, it remains necessary, even if it is not sufficient, for judges and practitioners to develop and clarify the concepts of *res sacrae*, *religiosae* and *sanctae* in the Scottish courts. It is consequently hoped that this short case-note should serve to afford a starting point of reference to those who deal, in practice, with this complex and morally charged area of law, as well as to warn legislators of the complexities of the challenge which they face in reforming the law as it stands.