

Res Religiosae and the Roman Roots of the Crime of Violation of Sepulchres

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A. INTRODUCTION

Violation of sepulchres is a common law crime in Scotland.¹ The essence of this crime is the occurrence of some unauthorised and irreverent interference with a corpse which has been buried or otherwise entombed.² The crime penalises all unlawful interference with interred cadavers,³ from gross abuse of the body once it has been dug up,⁴ to very mild or slight disturbance of the body while it remains in its grave.⁵ Consequently, the human corpse, while it is buried, is not subject to the ordinary laws of property and does not benefit from the ordinary legal protection offered to the integrity of proprietary rights.⁶ The nature of the crime of violation of sepulchres is such that the unauthorised removal and carrying-off⁷ of a cadaver from its resting place will not amount to the crime of theft,⁸ but will rather be tried as this distinct crime.⁹

Unlike in England, wherein there is a long-established general rule precluding the existence of ‘property’ in corpses¹⁰ (whether buried¹¹ or unburied),¹² there is significant

¹ David Hume, *Commentaries on the Law of Scotland Respecting Crimes*, Vol. I, 4th Edition by B.R Bell (Edinburgh: Bell and Bradfute, 1844), p.85; Archibald J. Alison, *Principles of the Criminal Law of Scotland*, Vol. I, (Edinburgh: Bell and Bradfute, 1832), p.280; *Dewar v H.M Advocate* 1945 J.C 5, p.11. The Burial and Cremation (Scotland) Act 2016 did not alter the common law in regard to this matter.

² Gerald H. Gordon, *The Criminal Law of Scotland*, Vol. II 4th Edition by James Chalmers and Fiona Leverick (Edinburgh: W. Green, 2017) para.51.01

³ *HM Advocate v Coutts* (1899) 3 Adam 50

⁴ See *Youths guilty of ancient grave violation charges*, *The Scotsman*, 27th March 2004

⁵ See John H. A. MacDonald, *A Practical Treatise on the Criminal Law of Scotland*, 5th Edition by Lord Walker and D. J. Stevenson (Edinburgh: Bell and Bradfute, 1948), p.52

⁶ *Dewar v H.M Advocate* 1945 J.C 5, p.11

⁷ In modern terms, the appropriation of: The *mens rea* of theft. For a case involving the carrying-off of a cadaver, see *HM Advocate v Samuel* (1742) MacLaurin Criminal Cases Reports 662

⁸ William Bell, *A Dictionary and Digest of the Law of Scotland: With Short Explanations of the Most Ordinary English Law Terms. To which is Added a Supplement, Containing an Analysis of the Court of Session Act, the Advocation and Suspension Act, the Diligence Act, and the Entail Excambion Act*, (Edinburgh: Bell and Bradfute, 1838), p.254

⁹ Bell, *Dictionary*, p.899

¹⁰ Though it is now recognised that parts of human bodies may be stolen where such body parts have been subjected to ‘human work or skill’: See *R v Kelly* [1999] Q.B. 621

¹¹ *R v Sharpe* [1857] Dearsly and Bell 160

¹² *Williams v Williams* (1882) 20 Ch. D. 659; *R v Kelly*[1999] Q.B. 621

Scottish authority to suggest that, in this jurisdiction, corpses can be the subject of theft,¹³ provided that the corpse is appropriated prior to its burial.¹⁴ As can be inferred from the fact that the courts of England and Wales – and, indeed, the wider Common law world – have been forced to employ ‘creative judicial reasoning’ to escape from some of the more absurd consequences of the ‘no property in a corpse’ rule,¹⁵ the position ostensibly adopted by Scots law is preferable.¹⁶ There are a number of good reasons for treating unburied bodies as capable of being owned, not as an exception, but as a rule, not least to protect the interests of laboratories in respect of tissue samples and museums in respect of exhibits.¹⁷

With this in mind, it is notable that the reason why, precisely, a cadaver ceases to exist within the ambit of property law once interred is presently under-theorised. Indeed, while it now appears settled that a corpse can be stolen prior to burial, but not once it has been interred,¹⁸ it has been noted that the law is silent on the subject of the lawfully exhumed cadaver.¹⁹ It is not yet known if a corpse which had, at one time, been buried but has since been lawfully removed from its grave remains *nullius in bonis*²⁰ and thus incapable of being stolen, or if, in such circumstances, it becomes subject to ordinary property law once more.²¹ Leverick and Chalmers suggest two possibilities: Either the body is completely removed from the auspices

¹³ Hume, *Commentaries*, Vol. I, (4th Edition), p.85; Alison, *Principles*, Vol. I, p.280; John H. A. MacDonald, *A Practical Treatise on the Criminal Law of Scotland*, (Edinburgh: Bell and Bradfute, 1867), p.21; Gordon, *Criminal Law*, Vol. II (4th Edition), para.21.26; *M’Kenzie* (1733) reported in (1899) 3 Adam 57n; *Dewar v HMA* (1945) J.C. 5

¹⁴ See Gordon, *Criminal Law*, Vol. II (4th Edition), para.21.26

¹⁵ See Imogen Goold and Murieann Quigley, *Human Biomaterials: The Case for a Property Approach*, in Imogen Goold, Kate Greasley, Jonathan Herring and Loane Skene, *Persons, Parts and Property: How Should We Regulate Human Tissue in the 21st Century?*, (Hart, 2014), pp.237-245

¹⁶ James Edelman, *Property Rights to our Bodies and to their Products*, Plenary presentation at the Australian Association of Bioethics and Health Law Conference, 3 October 2014, p.17

¹⁷ Gordon, *Criminal Law*, Vol. II (4th Edition), para.21.26; Edelman, *Property Rights to our Bodies*, p.17

¹⁸ *Dewar v H.M Advocate* 1945 J.C 5

¹⁹ Gordon, *Criminal Law*, Vol. II (4th Edition), para.21.26

²⁰ To use the words of the English jurist Coke: See Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes*, (London: Printed by M. Flesher, for W. Lee, and D. Pakeman, 1644), p.203

²¹ Gordon, *Criminal Law*, Vol. II (4th Edition), para.21.26

of ‘property’ after burial, or after burial the ownership of the corpse falls to the Crown due to its earlier ‘abandonment’ in the grave.²² Neither of these two suggestions are satisfactory and so it is submitted that a re-analysis of this area of law is warranted.

This article suggests a third possible explanation for the present state of affairs: It is submitted that a *res religiosa* – an object not subject to the ordinary rules of property – is created, in law, when a body is placed to rest in a grave.²³ This suggestion draws on the historic connection between the contemporary crime of violation of sepulchres and the Roman *crimen violati sepulcri*.²⁴ The article expounds the reason for the Roman law’s treatment of interred cadavers as *res divini iuris* – things consigned to divine law – and posits that, notwithstanding the fact that post-Reformation Scots law was generally reluctant to recognise the existence of consecrated or ‘sacred’ grave-sites,²⁵ the concept of *res religiosae* was nevertheless received into Scotland by dint of the evolution of the *crimen violati sepulcri*. If this is indeed the case, then it follows that a lawfully exhumed cadaver may, again, become the subject of theft, since the constitutive elements of any *res religiosa* return to their profane state in circumstances in which the body is separated from the grave-site.²⁶

²² Gordon, *Criminal Law*, Vol. II (4th Edition), para.21.26

²³ The burial need not necessary be a religious one in order to realise the creation of a *res religiosa*. As discussed *infra*, every citizen has the potential to create a *res religiosa* under certain conditions and there is no need for religious official to set the creation of the *res religiosa* in motion. Thus, in spite of the religious overtone of the term ‘*res religiosae*’, it is submitted that wholly secular (or, indeed, Humanist) funerals in which a body is interred with sufficient solemnity effects the creation of a *res religiosa*, for those reasons which are expounded during the course of this article.

²⁴ See *HM Advocate v Samuel* (1742) MacLaurin Criminal Cases Reports 662, wherein the charge libelled was one of *crimen violati sepulcri*, and *HM Advocate v Coutts* (1899) 3 Adam 50 wherein the phrase *crimen violati sepulcri* was used as a keyword.

²⁵ Peter C. Jupp, Douglas J. Davies, Hilary J. Grainger, Gordon D. Raeburn and Stephen R. G. White, *Cremation in Modern Scotland: History, Architecture and the Law*, (Edinburgh: Birlinn, 2017), p.10

²⁶ James Rives, *Control of the Sacred in Roman Law*, in Olga Tellegen-Couperus (Ed.), *Law and Religion in the Roman Republic*, (BRILL, 2011), p.172

B. ROMAN LAW

(1) The Roman *Crimen Violati Sepulcri*

Roman private law was divided, by Gaius and Justinian, under three distinct headings. In their respective *Institutes*, each jurist stated that ‘*omne autem ius quo utimur vel ad personas pertinet vel ad res vel ad actiones*’²⁷ – all the law that we make use of has reference either to persons or to things or to actions. This tripartite division of law proved extremely influential; the later *ius commune* jurists and Scottish institutional writers employed and expanded upon it,²⁸ ultimately developing the division of private law into four categories of persons, property, actions and obligations.²⁹ This four-way division retains relevance in modern mixed and Civilian legal systems in the present day.³⁰

As might be inferred from the evolution of the original tripartite division into a quadripartite division, and from the nature of that later division itself, the Roman *ius quod ad res pertinet* encompassed not only what would now be termed the law of ‘property’,³¹ but extended to cover what would now be understood as the law of ‘obligations’ as well.³² The Latin word ‘*res*’ itself must consequently be understood as meaning ‘thing’³³ (or, indeed, ‘things’, as *res* is both the nominative singular and the nominative plural) in preference to ‘property’ in translation, in spite of some claims that the word ‘thing’ is too ‘undignified’ a

²⁷ *Gai Institutionum Commentarii Quattuor*, Commentarius I, 8; Justinian, *Institute*, Book I, Title II, para.12

²⁸ Kenneth Reid, *The Law of Property in Scotland*, (Edinburgh: Butterworth, 1993), pp.1-2

²⁹ James Viscount of Stair, *The Institutions of the Law of Scotland: Deduced from its Originals, and Collated with the Civil, Canon, and Feudal Laws, and with the Customs of Neighbouring Nations: In IV Books*, (2nd Edition) (Edinburgh: 1693); see also the order of the lectures of Baron David Hume who, though critical of the Romanistic *divisione*, nevertheless made liberal use of it. The division remains of relevance in the 21st century: s.126 (4) of the Scotland Act 1998 defines ‘private law’ as the law of persons, obligations, property and actions.

³⁰ Reid, *Property*, pp.1-2

³¹ See George Mousourakis, *Fundamentals of Roman Private Law*, (Berlin: Springer, 2012) p.119; Rudolph Sohm, James Crawford Ledlie, Bernhard Erwin Grueber, *The Institutes of Roman Law*, (Gorgias Press, 2002) p.225

³² John Chisholm, *Green’s Encyclopaedia of the Law of Scotland*, (Edinburgh: W. Green, 1898), p.309

³³ William W. Buckland, *The Main Institutions of Roman Private Law*, (Cambridge: Cambridge University Press, 1936) p.91

term to describe such an important area of law.³⁴ Undignified and mercurial though the word may be,³⁵ the use of this term allows for the most apposite interpretation of the Roman law as it pertains to *res* and, indeed, the mercurial nature of the English language understanding of the word ‘things’ reflects the ‘elusive’³⁶ and indefinite nature of the word *res* itself.³⁷

Res were, themselves, divided into two discrete sub-categories; the Roman jurists recognised the import and existence of both *res corporales* – corporeal things – and *res incorporales* – incorporeal things.³⁸ Although some later commentators suggested that the jurists had only corporeal things in mind when considering the *ius quod ad res pertinet*,³⁹ such a suggestion can be shown to be false by reference to the nature of the word ‘*res*’ as it is used in the context of the Gaian and Justinianic division of things.⁴⁰ The *res incorporales* are explicitly listed as types of juristic things created by law to be amenable to ‘ownership’ and thus it can be inferred that just as one might exercise *dominium* in respect of a *res corporalis*, so too might one exercise the same in respect of a *res incorporalis*.⁴¹

The claim that the word ‘*res*, in Roman law, denoted anything that could form part of a person’s property’⁴² can, however, also be shown to be false, again by reference to the original Roman sources. In their respective *Institutes*, the Roman jurists divided the *ius quod*

³⁴ Reid, *Property*, para.3; as Professor Reid notes, the Germans and South Africans explicitly refer to the law of moveable property as ‘thing-law’, speaking of *Sachenrecht* (in German) and *Sakereg* (in Afrikaans) respectively.

³⁵ Indeed, even the narrower term ‘property’ is subject to a ‘bewildering variety of uses’ – see George W. Paton and David P. Derham, *A Text-book of Jurisprudence*, (4th Edition) (Oxford University Press, 1972) p.505

³⁶ To use the words of Professor Nicholas: Barry Nicholas, *An Introduction to Roman Law*, (Oxford: Clarendon Press, 1962) p.98

³⁷ A. M. Prichard, *Leage’s Roman Private Law*, (3rd Edition) (MacMillan and Co., 1961) p.151

³⁸ Gaius, *Institutes*, 2, 8; Justinian, *Institutes*, 2, 2, 12

³⁹ Buckland, *Institutions*, p.91; Sohm *et al*, *Institutes*, p.225.

⁴⁰ Gaius, *Institutes*, 2, 8; Justinian, *Institutes*, 2, 2, 12

⁴¹ *Dominium* itself was not a right, nor a *res incorporalis*; rather, it described the relationship between the *persona* and the *res*: See the discussion in Jonathan Brown, *Plagium: An Archaic and Anomalous Crime*, [2016] *Jur. Rev.* 129, pp.132-133

⁴² *Green’s Encyclopaedia* (1st Ed.), p.309

ad res pertinet into the law as it pertains to *res humani iuris* and *res divini iuris*.⁴³ Only things which fell into the former category could legally form a part of the patrimony of a legal person,⁴⁴ thus the divide is described as being one between *res in nostro patrimonio* – things which may be owned – and *res extra nostrum patrimonium* – those which may not.⁴⁵

Gaius himself considered the separation of *res divini iuris* and *res humani iuris* to be the fundamental division of things, notwithstanding the fact that later jurists would consider his division between the *res corporales* and *res incorporales* to be of greater significance.⁴⁶ At the outset of *Liber II*, the jurist explicitly noted two species of *res divini iuris* – *res sacrae* and *res religiosae*⁴⁷ – before going on to state that certain things – the *res sanctae* – also fell to be considered under this heading due to their important societal function.⁴⁸ *Res Sacrae* were ‘sacred things’ created when an object was *ex auctoritate populi Romani consecratum est* – consecrated as such by the authority of the Roman people.⁴⁹ *Res religiosae* were dead bodies which had been ‘relinquished to the gods’⁵⁰ – that is to say, corpses which had been reverentially buried.⁵¹ Gaius emphasises that *res religiosae* are created by the act of burying the dead in land owned by the burier or land in which the burier was authorised to place the body to rest.⁵² Unlike *res sacrae*, which depended, for their existence, upon an act of

⁴³ Gaius, *Institutes*, 2, 2

⁴⁴ Gaius, *Institutes*, 2, 9

⁴⁵ Gaius, *Institutes*, 2, 1-9

⁴⁶ Indeed, this division has been referred to as the ‘Gaian Schema’ by Gretton and others: George Gretton, *Ownership and its Objects*, [2007] *Rabels Zeitschrift* Vol 71 803, p.805; Francesco Giglio, *Pandectism and the Gaian Classification of Things*, [2012] *University of Toronto Law Journal* 1

⁴⁷ Gaius, *Institutes*, 2, 3

⁴⁸ Gaius, *Institutes*, 2, 8; such things included the city walls and the gates – Justinian notes that the term ‘sanction’ derives from the penalty for interference with such objects, since one who tampered with the *res sanctae* could incur capital punishment: Justinian, *Institute*, Book. II, Title I, para.8

⁴⁹ Gaius, *Institutes*, 2, 5

⁵⁰ *Religiosae, quae diis manibus relictæ sunt*: Gaius, *Institutes*, 2, 4; Rives notes that, ostensibly, ‘the imperial jurists regarded graves as the only type of *res religiosa*’ – see Rives, *Control of the Sacred*, p.172

⁵¹ Gaius, *Institutes*, 2, 6

⁵² Gaius, *Institutes*, 2, 6

consecration from the church or state authority,⁵³ or the *res sanctae*, which were protected by divine sanction due to their secular importance,⁵⁴ the creation of *res religiosae* did not require the presence of a priest or the authority or sanction of the state.⁵⁵

The fact that *res religiosae* could be created by any private citizen⁵⁶ had the potential to undermine the law of private property.⁵⁷ While the Republican jurists did not appear overly concerned with this potential issue,⁵⁸ perhaps because interference with grave-sites carried no secular penalty⁵⁹ and lawyers of that time period were content to leave the gods to take care of their own affairs,⁶⁰ by the time of Justinian, the creation of *res religiosae* was regulated rather more strictly.⁶¹ Justinian maintained that, while anyone could create a *res religiosa*,⁶² the body must either be interred in land owned by the burier, or in land co-owned by the burier with common consent of all co-owners (unless the land was previously used for sepulchre).⁶³ A *res religiosa* could be created if the body was buried in land owned by another, or in land in which another enjoyed *usufructus*, but only in circumstances in which the other owner or holder of *usufructus* consented.⁶⁴

⁵³ Gaius, *Institutes*, 2, 5

⁵⁴ Gaius, *Institutes*, 2, 8

⁵⁵ Rives, *Control of the Sacred*, p.173

⁵⁶ See Justinian, *Institute*, Book. II, Title I, para.9: '*Religiosum locum unusquisque sua voluntate facit, dum mortuum infert in locum suum*' – everyone can make a place religious by their own volition, by interring a dead body in their land.

⁵⁷ See Rives, *Control of the Sacred*, p.172

⁵⁸ Rives, *Control of the Sacred*, p.172

⁵⁹ Aside from a potential *actio in factum*: Dig. 43.6.1; Dig. 47.12.3

⁶⁰ I. M. J. Valeton, *De Templis Romanis*, [1893] Mnemosyne 338, pp.345-349

⁶¹ Justinian, *Institute*, Book. II, Title I, para.9

⁶² Justinian, *Institute*, Book. II, Title I, para.9

⁶³ Justinian, *Institute*, Book. II, Title I, para.9

⁶⁴ Justinian, *Institute*, Book. II, Title I, para.9; the same logic applied in respect of burial in land over which another possessed a servitude – Dig. 11.7.2.7-8 – or a conditional legacy – Dig. 11.7.34

It is notable that, though the distinction between *res mobiles* and *res immobiles* was of limited significance in Roman law,⁶⁵ particularly when one considers the importance of this divide in later legal thought,⁶⁶ *res religiosae* were exclusively *immobilis* in the post-Republican era.⁶⁷ The cadaver was not, itself, a *res religiosa*,⁶⁸ nor was any place in which the corpse was stored prior to or in preparation for burial.⁶⁹ The act of interment initiated the process of the creation of the *res religiosa*; the land itself – the *locus religiosus* – when combined with the presence of the body, became the *res religiosa*.⁷⁰ If the body were removed from the *locus*, the *res religiosa* would cease to exist and the constituent parts of that thing would return to their previously profane state.⁷¹

The process by which the previously profane land and body ceased to exist as distinct objects under the *humani iuris* and became, instead, a single *res religiosa* governed by divine law is not clear. The sources do not offer much in the way of guidance in the event of this specific scenario. It is submitted, however, that, as the general principles of Roman property law do recognise that two (or more) objects may combine to make a new thing,⁷² the ordinary rules of the *ius quod ad res pertinet* may be employed in order to explain the creation of *res religiosae*. Extant *res divini iuris* may be outwith the realm of ordinary property law, but until

⁶⁵ William Gordon, *Roman Law in Scotland*, in Robin Evans-Jones, *The Civil Law Tradition in Scotland*, (The Stair Society: Edinburgh, 1995), p.19

⁶⁶ David L. Carey Miller and David Irvine, *Corporeal Moveables in Scots Law*, (W. Green and Sons, 2005), para.1.03

⁶⁷ Rives, *Control of the Sacred*, p.172

⁶⁸ Naturally in a legal system which condoned slavery, human bodies had the potential to be *res in commercio*: See Brown, *Plagium*, p.133. Both Gaius and Justinian indicate that the human body is a quintessential example of a *res corporalis*: Gaius, *Institutes*, 2, 8; Justinian, *Institutes*, 2, 2, 12

⁶⁹ Cicero, *De Legibus*, 2.57

⁷⁰ As discussed, *infra*, it may be inferred that this change of character is effected by dint of accession.

⁷¹ Dig. 11.7.44

⁷² By way of, for example, *accessio* or *specificatio*: See Cornelius van der Merwe, *Nova Species*, [2004] Roman Legal Tradition

such an object exists juridically, its component parts are nevertheless governed by the *humani iuris*.

The principles of *accessio* may, therefore, provide appropriate guidance as to how, precisely, a *res religiosa* could be said to be created by the act of burying a cadaver. *Accessio* was a mode of original acquisition whereby an object – the accessory – accedes to a larger object – the principal – and so becomes part of that larger object.⁷³ There were a number of ways in which *accessio* could be effected,⁷⁴ most relevant to the present discussion is the process of *inaedificatio*.⁷⁵ The quintessential example of *accessio* by way of *inaedificatio* is the fixture of some moveable property to an immovable piece of land or a building.⁷⁶ As a result of the maxim *omne quod inaedificatio solo cedit* – all that is built on soil accedes to the soil – any *res mobilis* which is affixed to land becomes the property of the owner of the *res immobilis*,⁷⁷ even if the owner of the *res immobilis* had no connection to the party who built on their land.⁷⁸ As the creation of a *res religiosa* necessarily involved the placing of a *res mobilis* into *res immobilis*, and as the *locus religiosus* was, when combined with the interred body, the *res religiosa* itself, it might be inferred that the burial of a corpse stands as an example of *accessio* by way of *inaedificatio* as the corpse, in being interred, accedes to the land in which it is buried.

With the principal and the accessory thus combined, the *res religiosae* is thus created and consequently, in spite of the principle that the owner of the *solum* becomes owner of the

⁷³ Barry Nicholas, *Introduction to Roman Law*, (Oxford: OUP, 1962), p.133; L. P. W. van Vliet, *Accession of Moveables to Land: I*, [2003] Edin. L. R. 67, p.67

⁷⁴ See Robert D. Melville, *A Manual of the Principles of Roman Law Relating to Persons, Property, and Obligations*, (Edinburgh: W. Green, 1915), p.222

⁷⁵ The accession of moveable fixtures to immovable property: Nhlanhla Lucky Sono, *Development of the Law Regarding Inaedificatio: A Constitutional Analysis*, [2014] Stellenbosch University: LLM Thesis, para.2.2

⁷⁶ See Melville, *Manual*, p.223

⁷⁷ William W. Buckland, *A Textbook of Roman Law from Augustus to Justinian*, (Cambridge: CUP, 1921), p.212

⁷⁸ R. W. Lee, *The Elements of Roman Law with a Translation of the Institutes of Justinian*, (4th ed.) (Sweet and Maxwell, 1986), p.133

newly acceded accessory,⁷⁹ the grave-site moves outside of the realm of private property law. The need for the land to be owned by the burier, or for the burial to take place only with the consent of the landowner, in order to create a validly constituted *res religiosa* is thus explained. The principles of *inaedificatio* explain how the character of the corpse and grave-site are changed when they are combine; the consistent requirement for the consent of the landowner to the interment allows for the alienation of the object from the general laws of property.⁸⁰

Just as the conditions under which a *res religiosa* could be created were stricter by Justinian's time, so too were the penalties for interference with such things more severe.⁸¹ In the post-classical period, the *crimen violati sepulcri* outlawed any act which interfered with a properly constituted *res religiosa*;⁸² such things, being *extra nostrum patrimonium*, could not be the object of *furtum*, or 'theft'.⁸³ Indeed, it is notable that while *furtum* was, in Roman law, a *delictum* which conferred a right of action only on the *persona* who suffered loss as a result of the theft,⁸⁴ the *crimen violati sepulcri* was a penal *actio popularis*,⁸⁵ meaning that any Roman citizen could seek to prosecute a purported culprit for their commission of this wrong.⁸⁶ In any event, the individual who exercised *ius sepulcri* – legal authority over the grave-site – could sue a wrongdoer by means of an *actio violati sepulcri*.⁸⁷

The *crimen violati sepulcri* served to protect the grave-site from any unauthorised interference, differentiating between two primary types of interference: *Violati minor* and

⁷⁹ Buckland, *Textbook*, p.212

⁸⁰ It is pertinent that, for Gaius, only the consent of the landowner was needed for the creation of the *res religiosa*; Gaius, *Institutes*, 2, 6; Justinian's requirement for the consent of those with other proprietary interests in the land is a later development: Justinian, Rives, *Control of the Sacred*, p.172

⁸¹ Rives, *Control of the Sacred*, p.172

⁸² Adolf Berger, *Encyclopaedic Dictionary of Roman Law*, Vol.43 (Philadelphia: The American Philosophical Society, 1953), p.767

⁸³ Berger, *Encyclopaedic Dictionary*, p.480

⁸⁴ Berger, *Encyclopaedic Dictionary*, p.480; Rives, *Control of the Sacred*, pp.170-172

⁸⁵ See Dig.47.12, Cod.9.19

⁸⁶ Berger, *Encyclopaedic Dictionary*, p.767

⁸⁷ Berger, *Encyclopaedic Dictionary*, p.767

violati maior (minor and major violations, respectively). The former were such violations which involved tampering with the *locus religiosus*;⁸⁸ these were punishable by fine (of up to 100,000 sesterces) or *infamia*⁸⁹ – the removal of the privileges of Roman citizenship.⁹⁰ Disinterring the cadaver and carrying it off was considered a *violati maior* and punishable by death.⁹¹

The Roman *crimen violati sepulcri* is the progenitor of the modern Scottish crime of violation of sepulchres.⁹² The Roman principles pertinent to the law of *accessio* were similarly received into Scots law.⁹³ For these reasons, it is submitted that, in recognition of the fact that the law of Scotland is silent as to whether or not exhumed cadavers may be ‘stolen’,⁹⁴ reference ought to be made to the fundamental principles of Roman law which justify the existence of the special protection offered in respect of grave-sites and interred dead bodies. It is noted that even Hume, who is otherwise sceptical of the continuing authority of Roman law in Scotland,⁹⁵ recognised that the principles of Civilian jurisprudence may be invoked in instances such as this.⁹⁶

⁸⁸ Berger, *Encyclopaedic Dictionary*, p.767

⁸⁹ Berger, *Encyclopaedic Dictionary*, p.767

⁹⁰ Thomas A. J. McGinn, *Prostitution, Sexuality and the Law in Ancient Rome*, (Oxford: OUP, 1998), p.65

⁹¹ Berger, *Encyclopaedic Dictionary*, p.767

⁹² Sheila Livingstone, *Confess and be Hanged: Scottish Crime and Punishment Through the Ages*, (Edinburgh, Luckin, 2000), p.24

⁹³ Stair Institutions II, I, II. See further Reid, *Property*, paras.11-14

⁹⁴ Gordon, *Criminal Law*, Vol. II (4th Edition), para.21.26

⁹⁵ Grant McLeod, *The Romanization of Property Law*, in Kenneth G. C. Reid and Reinhard Zimmermann, *A History of Private Law in Scotland*, Vol. I (Oxford: OUP, 2000) p.240

⁹⁶ Hume, *Lectures*, Vol. I, p.2

C. SCOTS LAW

(1) Scots Law and the *Crimen Violati Sepulcri*

It is clear that the modern Scottish crime of violation of sepulchres is fundamentally Roman in origin. In those cases which directly concerned charges of the crime, the courts referred directly to the charge as being one of *crimen violati sepulcri*⁹⁷ and those commentators who first deigned to comment on its operation in Scots law described it as such in their textbooks.⁹⁸ Naturally, '*the use of Roman terminology alone does not necessarily indicate the adoption of a Roman institution*',⁹⁹ however '*it is still possible to trace the influence of Roman law on many branches of Scots law*'¹⁰⁰ and it is evident that the crime of violation of sepulchres is one such area in which Roman law acutely affected the development of Scottish jurisprudence. Thus, in spite of the claim that, after the Reformation, the Scottish courts '*refused to recognise any burial space as *res religiosa**',¹⁰¹ it is evident that the grave-site is nevertheless recognised as an object of significance in modern criminal law.

While it is certainly true that Scots law has never treated burial grounds as completely beyond the bounds of property or commerce,¹⁰² as Roman law did,¹⁰³ and so the extent to which the notion of *res religiosae* was received into Scotland may be questioned,¹⁰⁴ it is likewise clear

⁹⁷ *HM Advocate v Weir* (1710) (1899) 3 Adam 55n; *HM Advocate v Samuel* (1742) MacLaurin Criminal Cases Reports 662; *Begg v HM Advocate* (1803) Hume Vol. I sup. 23; *HM Advocate v Pattison* (1814) Hume Vol. I sup. 23; *HM Advocate v Coutts* (1899) 3 Adam 50. The most recent case concerning violation of sepulchres occurred in 2004 (*Youths guilty of ancient grave violation charges*, The Scotsman, 27th March 2004) but this case was not reported: Gordon, *Criminal Law*, Vol. II (4th Edition), para.51.01, note 3.

⁹⁸ John Erskine, *Principles of the Law of Scotland in the Order of Sir George MacKenzie's Institutions of that Law*, (3rd Edition) (Edinburgh: Bell and Bradfute, 1809), p.513; Alison, *Principles*, Vol. I, p.461. It should be noted that MacKenzie did not deign to comment on the crime of violation of sepulchres in his *Matters Criminal*.

⁹⁹ T. D. Fergus, *Sources of Law (General and Historical): The Historical Sources of Scots Law (1) Roman Law*, in *The Stair Memorial Encyclopaedia*, Vol.22 (LexisNexis, 1986) para.556;

¹⁰⁰ Fergus, *Sources*, para.556

¹⁰¹ Jupp *et al*, *Cremation*, p.10

¹⁰² Jupp *et al*, *Cremation*, p.24

¹⁰³ Dig 1.8.6.4; Dig. 11.7.2.7; Dig 11.7.2.8; Dig. 11.7.34

¹⁰⁴ John M. Duncan, *Treatise on the Parochial Ecclesiastical Law of Scotland*, (Edinburgh: Bell and Bradfute, 1864), p.220

that the differentiation of *res extra commercium* and *res in commercio* (things beyond and within the remit of commerce, respectively) has been received into Scots law.¹⁰⁵ Similarly, a discussion of the separation of *res in nostro patrimonio* and *res extra nostrum patrimonium* features extensively in *Green's Encyclopaedia of the Laws of Scotland*¹⁰⁶ and, in addition, it appears that Scots law has consistently recognised two principles '*which operate to exclude churchyards to a great extent from being dealt with as subjects to which the ordinary rights and privileges of proprietorship belong.*'¹⁰⁷ The first such principle is concerned, like the Roman law, with the religious character imparted upon the ground by its having been set aside for an exclusive and hallowed purpose¹⁰⁸ (though, speaking in the context of Scots law, both Duncan and Johnston refers to this as but a '*quasi-religious character*').¹⁰⁹ The second principle is concerned with ensuring that the benefit of the churchyard, in respect of the community that the parish is intended to serve, is secured.¹¹⁰

On a Romanistic analysis, these two distinct principles would appear to indicate that the character of a grave-site, as a sepulchre, is protected as a hybrid of a *res sacrae*, *res religiosae* and a *res sanctae*.¹¹¹ *Res sacrae* received their special character – their status as things excluded from the law of private property – by dint of their having been consecrated by a priest,¹¹² indeed, the *res sacrae* itself was created by the occurrence of such consecration.¹¹³ As emphasised in the previous section, *res religiosae* could be created by anyone – there was no need for the creator of a *res religiosae* to possess any religious character, any legal *persona*

¹⁰⁵ *Presbytery of Edinburgh v University of Edinburgh* 1890, 28 S.L. Rep. 567

¹⁰⁶ John Chisholm, *Green's Encyclopaedia of the Law of Scotland*, (Edinburgh: W. Green, 1898), pp.309-311

¹⁰⁷ Christopher N. Johnston, *The Parochial Ecclesiastical Law of Scotland*, (Edinburgh: Bell and Bradfute, 1903) pp.208-209

¹⁰⁸ Rives, *Control of the Sacred*, p.171-172

¹⁰⁹ Duncan, *Treatise*, p.705; Johnston, *Ecclesiastical Law*, p.209

¹¹⁰ Johnston, *Ecclesiastical Law*, p.209

¹¹¹ Indeed, Duncan notes the similarities between these three concepts: See Duncan, *Treatise*, p.705

¹¹² Justinian, *Institute*, Book. II, Title I, para.8

¹¹³ Justinian, *Institute*, Book. II, Title I, para.8

could create such an object by interring a corpse in land that they owned.¹¹⁴ *Res sanctae* were those objects that held such significance to the community that interference with them was ‘sanctioned’ by capital punishment.¹¹⁵

It is apparent that the burial of a corpse in a churchyard may be said to invoke the characteristics of all three types of those things consigned to the *divini iuris*. The burial of the cadaver indicates that the burial ground, once the corpse is interred, may be considered a *res religiosa*;¹¹⁶ the fact of the burial occurring in consecrated ground suggests that the land is *res sacrae*;¹¹⁷ the importance of the churchyard to the community as a whole ultimately suggests that the land is *res sanctae*.¹¹⁸ While the elements of *res religiosa* and *res sanctae* may be said to operate in respect of private cemeteries and other such graveyards which are situated away from the *locus* of the church, due to the burial of corpses therein and the importance of the service provided to the community as a whole, it is apparent that such cemeteries are not consecrated ground¹¹⁹ and so graves situated in private cemeteries could not be considered *res sacrae* in the absence of official consecration.

In claiming that the law of Scotland refused to recognise the existence of *res religiosa* after the Reformation,¹²⁰ it would appear that Jupp, Douglas, Davies, Grainger, Raeburn and White have erroneously conflated the concept of *res religiosae* with the similar and related, but distinct conceptions of *res sacrae* and *res sanctae*. Indeed, the authors posit that an ‘important aspect of the removal of burial locations from the kirks in the towns and cities was that these new spaces should not be consecrated or considered ‘sacred’.’¹²¹ Thereafter, they go on to

¹¹⁴ Justinian, *Institute*, Book. II, Title I, para.8

¹¹⁵ Justinian, *Institute*, Book. II, Title I, para.8

¹¹⁶ Dig. 11.7.44

¹¹⁷ Consistent with Johnston’s first principle: Johnston, *Ecclesiastical Law*, p.209

¹¹⁸ Consistent with Johnston’s second principle: Johnston, *Ecclesiastical Law*, p.209

¹¹⁹ Jupp *et al*, *Cremation*, p.10

¹²⁰ Jupp *et al*, *Cremation*, p.10

¹²¹ Jupp *et al*, *Cremation*, p.10

note the reluctance of the law to recognise what would be considered *res religiosa*,¹²² citing the work of Houston.¹²³ For his part, Houston makes reference to Duncan's *Treatise of the Parochial Ecclesiastical Law of Scotland*, but Duncan himself confines his discussion to *res sacrae* and *res sanctae*, noting only that '*the phrase res religiosae is frequently employed as a generic term inclusive of both descriptions of subjects, is not unfrequently used as synonymous with either.*'¹²⁴

Duncan's view that '*churchyards do not strictly fall within the definition of property included under either category [res sacrae or res sanctae]*'¹²⁵ consequently has no bearing on the recognition, or otherwise, extended to the *res religiosae* in Scots law. As such, Houston's claim that '*post-Reformation Scots law was different from Roman in refusing to recognize any burial place as res religiosa*',¹²⁶ and the authors of *Cremation in Modern Scotland*'s founding on Houston's claim,¹²⁷ rests on a faulty basis. Duncan makes no such claim and no other authority is cited in support of this proposition. The lack of official sacrosanctity may preclude the existence of *res sacrae*,¹²⁸ and the lack of explicit state sanction may preclude the existence of *res sanctae*,¹²⁹ but as noted in relation to the relevant Roman law, official sanction or consecration is not required to constitute the creation of a *res religiosa*.¹³⁰

The claim that the burial of the cadaver *simpliciter* creates a *res religiosa* is consistent with post-Reformation Canon law, as expressed by the English jurist Thomas Wood:

¹²² Jupp *et al*, *Cremation*, p.10

¹²³ R. A. Houston, *Punishing the Dead?: Suicide, Lordship, and Community in Britain, 1500-1830*, (Oxford: OUP, 2010)

¹²⁴ Duncan, *Treatise*, p.705

¹²⁵ Duncan, *Treatise*, p.705

¹²⁶ R. A. Houston, *Punishing the Dead?: Suicide, Lordship, and Community in Britain, 1500-1830*, (Oxford: OUP, 2010)

¹²⁷ Jupp *et al*, *Cremation*, p.10

¹²⁸ Justinian, *Institute*, Book. II, Title I, para.8

¹²⁹ Justinian, *Institute*, Book. II, Title I, para.10

¹³⁰ Justinian, *Institute*, Book. II, Title I, para.9

*“Res Religiosae, or religious things, are those places into which the body, or principal part of the body such as the head, bones or ashes of a dead man, are brought to be perpetually buried there by him that has a right to bury in that place. Every private person may make a religious place by his own authority, provided he has the whole right of ground in himself, or leave from the lawful owner. ”*¹³¹

It is consequently submitted that the existence, and status, of the crime of violation of sepulchres as a distinct crime is itself evidence that the common law of Scotland recognises the existence of *res religiosae*. As a result of the notable distinction between the criminal treatment of plain theft of an unburied corpse and the rather more serious treatment of criminals who violate sepulchres,¹³² it may be inferred that Scots law acknowledges the importance of the burial of the cadaver¹³³ – the salient element of the creation of any *res religiosa* – even if modern Scots law does not recognise either *res sacrae* or *res sanctae*. By drawing on the Roman *crimen violati sepulcri* to offer this enhanced protection, Scots law has implicitly recognised – and continues to recognise – the existence of *res religiosae*. Just as in Roman law, such Scottish *res religiosae* are not confined to the sanctified grounds of a church, but rather exist in any instance in which a body is properly placed to rest in such a manner so as to create a sepulchre worthy of specific legal protection.¹³⁴

That the law relating to *res religiosa* in the Roman law and Canon law sources is consistent with the operation of Scots law in respect of the crime of violation of sepulchres is evident in the judgement of *H.M Advocate v Coutts*.¹³⁵ Therein, Lord MacLaren held that, at

¹³¹ 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 (London: Richard Sarf, 1704), p.86

¹³² The maximum penalty attached to the crime of violation of sepulchres is presently life imprisonment: BBC News, *Teenagers Deny Violating Corpse*, (24th March 2004)

¹³³ See *Dewar v HM Advocate* 1945 J.C 5, pp.11-14

¹³⁴ Justinian, *Institute*, Book. II, Title I, para.9

¹³⁵ (1899) 3 Adam 50

least insofar as the crime of violation of sepulchres is concerned, *'the law recognises no distinction between public and private cemeteries'*.¹³⁶ The protection offered to sepulchres evidently rests not on the two principles *'which operate to exclude churchyards to a great extent from being dealt with as subjects to which the ordinary rights and privileges of proprietorship belong'*,¹³⁷ but rather on the principles which act to exclude sepulchres *simpliciter* from those rules of property. Although *Dewar v HM Advocate*¹³⁸ was not, itself, concerned with the crime of violation of sepulchres, some *obiter* remarks made therein suggest further consistency between the Romanistic notion of the *crimen violati sepulcri* and the Scots crime of violation of sepulchres. In *Dewar*, Lord Moncrieff noted that it is *'when a step has conclusively been taken to set agoing the process of dissolution of the bodies of the dead that the law ceases to protect the body from acts of theft'*.¹³⁹ Similarly, Lord Normand held that *'it is not until the ashes are interred or disposed of in accordance with the wishes of the relatives that the crime of violation of sepulchres can take place'*.¹⁴⁰ These *dicta* imply that the crime of violation of sepulchres contemporaneously exists to protect the place in which the body is interred – or otherwise laid to rest – rather than the human corpse alone; thus, as such protection is consistent with the protection offered to *res religiosae*, it may be inferred that Scotland recognises *res religiosae* for the purposes of the criminal law.

Although *res religiosae* are *res extra nostrum patrimonium*, and so implicitly 'ownerless', it was held in *HM Advocate v Weir*¹⁴¹ that the 'owner' of the churchyard from which bodies were disinterred could not be convicted of the crime of violation of sepulchres. This is not fatal to the claim that the law of Scotland implicitly recognises *res religiosae*,

¹³⁶ (1899) 3 Adam 50, p.61

¹³⁷ Johnston, *Ecclesiastical Law*, pp.208-209

¹³⁸ 1945 J.C 5

¹³⁹ *Dewar v HM Advocate* 1945 J.C 5, p.14

¹⁴⁰ *Dewar v HM Advocate* 1945 J.C 5, p.11

¹⁴¹ (1710), reported in (1899) 3 Adam 55n

however; as noted above, in Roman law, certain individuals could exercise *ius sepulcri* in respect of grave-sites.¹⁴² Since Weir enjoyed ownership of the ‘*place of the church from which the said dead bodies were lifted*’¹⁴³ – it can be implied that he enjoyed *ius sepulcri* in respect of them.¹⁴⁴ This *ius sepulcri* allowed him to exhume the bodies, on the grounds that the crime of violation of sepulchres applies in respect of the *unauthorised* interference with grave-sites only. Weir’s actions were, thus, implicitly authorised, since he was the sole source of authority in respect of the *res religiosa*.

As in Roman law, the *res religiosa* may be said to come into existence by way of *accessio*. The Scots law of moveable property remains ‘*resolutely Civilian in character*’,¹⁴⁵ although even in this ‘heavily Romanized’ area¹⁴⁶ Roman law was not ‘*received completely unaltered into Scots law*’.¹⁴⁷ The doctrine of *accessio* – anglicised as accession – does, however, operate, in this jurisdiction, in much the same way as the doctrine operated in the Roman law.¹⁴⁸ Just as *inaedificatio* ensured that *omne quod inaedificatio solo cedit* in Roman law, so too is it ‘*well established in Scots law that a corporeal moveable attached to land or buildings becomes annexed to the immovable property and therefore belongs to the owner of the land*’.¹⁴⁹ It is necessary, for the process of accession to occur in Scots law, for the moveable

¹⁴² Berger, *Encyclopaedic Dictionary*, p.767

¹⁴³ (1899) 3 Adam 55n

¹⁴⁴ Indeed, while Weir had a noted interest in the churchyard and the things therein, such things were *extra commercium*: See Johnston, *Ecclesiastical Law*, p.210. Also of note is the fact that Weir himself attained ownership as a result of prescription, not transfer of title: (1899) 3 Adam 55n

¹⁴⁵ D Carey-Miller, M Combe, A Steven and S Wortley, National report on the transfer of movables in Scotland in W Faber and B Lurger (eds.), *National Reports on the Transfer of Movables in Europe Volume 2: England and Wales, Ireland, Scotland, Cyprus*, (Munich: Sellier, 2009), p.311

¹⁴⁶ See Grant McLeod, *The Romanization of Property Law*, in Kenneth G. C. Reid and Reinhard Zimmermann, *A History of Private Law in Scotland*, Vol. I (Oxford: OUP, 2000)

¹⁴⁷ David L. Carey-Miller, *Derivative Acquisition of Moveables*, in Robin Evans-Jones (Ed.) *The Civil Law Tradition in Scotland*, (Edinburgh: The Stair Society, 1995) p.128

¹⁴⁸ Stair II.i.40

¹⁴⁹ David L. Carey Miller and Malcolm M. Combe, *The Boundaries of Property Rights in Scots Law*, [2006] EJCL, p.10 (accessible at <https://www.ejcl.org/103/art103-4.pdf>)

to be physically attached to the heritage¹⁵⁰ and for the moveable to be functionally subordinate to the land.¹⁵¹ As a corpse is placed in a grave in order to fulfil the purpose of the grave-site, the accessory may be said to be subordinate to the heritage; as the body is physically placed within the land, there is evidently sufficient attachment to effect accession.¹⁵²

It is consequently submitted that a corpse accedes to the land in which it is buried in Scots law, just as it did so under the Roman law. This accession leads to the creation of an object akin to a Romanistic *res religiosa*, even if the authorities concerned with the Scottish crime of violation of sepulchres do not make use of this term. Scots law does not require that the annexor or the landowner intended for the accession to be permanent in determining whether or not *inaedificatio* occurred,¹⁵³ although in (almost)¹⁵⁴ all circumstances in which the union is permanent in fact, accession can be said to have operated.¹⁵⁵ In instances involving separable properties which have ostensibly acceded, as in South Africa,¹⁵⁶ in modern Scots law, the question of whether or not *inaedificatio* has occurred depends greatly on the circumstances of each particular case.¹⁵⁷ In general, *inaedificatio* is thought to occur in situations in which the fixture which accedes to the land could be said to have appeared to do so by onlookers.¹⁵⁸ As it is presumed that all citizens are aware of their obligations under the law, and so can be presumed to know that interference with interred cadavers is the crime of

¹⁵⁰ Reid, *Property*, para.580

¹⁵¹ Reid, *Property*, para.581

¹⁵² In the words of Professor Reid, '*minimal attachment is sufficient*': Reid, *Property*, para.580. It is plain that interment is not a minimal form of attachment; it is much more than that.

¹⁵³ *Shetland Islands Council v. BP Petroleum Development* 1990 SLT 82; David L. Carey Miller, *Logical Consistency in Property*, 1990 SLT (News) 197, at 198; Carey Miller and Combe, *The Boundaries of Property Rights*, p.10

¹⁵⁴ Save for a particular instances involving a right of severance enjoyed by agricultural tenants: *Brand's Trustees v Brand's Trustees* 1876 3 R (HL) 16

¹⁵⁵ Carey Miller and Combe, *The Boundaries of Property Rights*, p.11

¹⁵⁶ See *Olivier v Haarhof & Company* 1906 TS 497, p.501

¹⁵⁷ Carey Miller and Combe, *The Boundaries of Property Rights*, p.11

¹⁵⁸ *Scottish Discount Co Ltd v Blin* 1985 SC 216, p.233

violation of sepulchres, it may be inferred that the interment of the body would be regarded as a fixture by any reasonable onlooker.

The fact that the cadaver can be physically separated from the grave-site does not, therefore, negate the possibility of its having acceded to the grave for as long as it is interred. It is apparent that the burial of a corpse in a grave-site is intended to be a permanent arrangement. As the presence of the body in the land is necessary for the continued existence of any *res religiosa*, it can be inferred that the authorised removal of a cadaver caused that body to return to its previously profane state – by which, it is meant, the body may once again be the subject of theft, being that the crime of violation of sepulchres will not extend protection to bodies which are not buried in sepulchres.

This analysis is relevant as '*there is no authority dealing specifically with exhumed remains*'¹⁵⁹ and so it is not clear, in law, whether or not the appropriation of an exhumed cadaver ought to be subject to the law of theft or if the rules relating to the crime of violation of sepulchres irredeemably changed the character of the corpse on its interment. As noted in the introduction, Leverick and Chalmers suggested two possible legal outcomes arising out of the appropriation of an exhumed cadaver.¹⁶⁰ They posit that the reason that the buried body is afforded protection, in law, by the crime of violation of sepulchres is that it has either, by burial, been abandoned, or it has simply become incapable of being owned altogether.¹⁶¹ If the former is to be regarded as the case, then the exhumed cadaver may, once it is no longer subject to protection by the crime of violation of sepulchres, once again be stolen; if the latter is to be

¹⁵⁹ Gordon, *Criminal Law*, Vol. II (4th Edition), para.21.26

¹⁶⁰ Gordon, *Criminal Law*, Vol. II (4th Edition), para.21.26

¹⁶¹ Gordon, *Criminal Law*, Vol. II (4th Edition), para.21.26

regarded as the case then the human body, once buried, is removed from the ambit of property law altogether on burial and so can never again be stolen.¹⁶²

(2) The Appropriation of Exhumed Cadavers

The attempts made by Leverick and Chalmers to explain the reason that the body, once interred, cannot be stolen are neither ethically, legally nor logically satisfactory. The first of their two suggestions – that the body is abandoned once it is buried – is legally and ethically unsatisfactory because nothing about funerary rites suggest abandonment;¹⁶³ indeed, quite the opposite, given that reverential interment in a grave with a memorial stone serves to mark the memory of the deceased.¹⁶⁴ Relying on the authority of *Dewar v HM Advocate*¹⁶⁵ and *Herron v Diack and Newlands*,¹⁶⁶ Leverick and Chalmers themselves note that ‘*property is not abandoned... where a coffin is handed over for cremation or for burial at sea.*’¹⁶⁷ If the coffin is not abandoned as part of the funerary process, it appears incongruent to suggest that the body itself is.

The suggestion that the cadaver is abandoned on burial is also logically and legally unsatisfactory since, if the body is to be regarded as abandoned on interment, then the maxim *quod nullius est fit domini regis*¹⁶⁸ – everything that is ownerless falls to the Crown – would apply and so the body would be ‘owned’ by the Crown and so capable of being the subject of theft.¹⁶⁹ While this suggestion would allow for the prosecution of those who appropriate

¹⁶² Gordon, *Criminal Law*, Vol. II (4th Edition), para.21.26

¹⁶³ With the exception, perhaps, of the Tibetan sky burial, which, naturally, does not involve interment.

¹⁶⁴ See Linda Brant, *Honoring, Contradiction and Chance in American Pet Cemetery Gravestone Image Pairings: Visual Art Meets Human Animal Studies*, (Presentation at Convening Culture 2014: Connecting the Arts with Environmental Conservation, 2014), wherein it is noted that memorial stones are now utilised to mark the memories of deceased animals as well as humans.

¹⁶⁵ 1495 JC 5

¹⁶⁶ 1973 S.L.T (Sh. Ct.) 27

¹⁶⁷ Gordon, *Criminal Law*, Vol. II (4th Edition), para.21.22

¹⁶⁸ See Carey Miller and Irvine, *Corporeal Moveables*, paras.1.03, 2.03

¹⁶⁹ Gordon, *Criminal Law*, Vol. II (4th Edition), para.21.26

exhumed cadavers,¹⁷⁰ it does not explain why the body cannot be stolen during its interment. If the cadaver is abandoned on burial, it would become the property of the Crown on burial and so be capable of being the subject of theft even while buried.

The second of the two suggestions is unsatisfactory on a number of grounds and Leverick and Chalmers plainly posit that their proposition is ‘*not free from difficulties*’.¹⁷¹ If an exhumed cadaver is no longer capable of being owned, then it logically cannot be stolen and so all of the problems faced by English law by dint of its ‘no property’ rule¹⁷² would plague Scotland in respect of exhumed cadavers. In order to prosecute those who appropriate exhumed cadavers in such circumstances, the Scottish courts would be forced, like their English brethren, to make use of ‘creative judicial reasoning’¹⁷³ which is anathema to the principle of legal certainty and the equitable operation of justice.¹⁷⁴ Some additional problems with this proposition are raised when one considers the fact that, again, in any instance in which a body is lawfully exhumed, there will necessarily be persons who enjoy possessory rights to the cadaver.¹⁷⁵ The existence of such possessory rights may, again, serve to allow for the presumption that the possessor is to be recognised as the ‘owner’, *per* Scots law. Even in the absence of this presumption, it would appear illogical to suggest that the body cannot be stolen,

¹⁷⁰ Gordon, *Criminal Law*, Vol. II (4th Edition), para.21.26

¹⁷¹ See Gordon, *Criminal Law*, Vol. II (4th Edition), para.21.26, note 160

¹⁷² See the comments made by Mr Justice Price in *R v Stephen* (1884) 12 QBD 247, at p.252, wherein it was noted that the appropriation of a cadaver ‘*would have been a peculiarly indecent theft if it had not been for the technical legal reason that a dead body is not the subject of property*’ (author’s emphasis). The inability to prosecute such peculiar indecency on grounds of a technicality is, it is submitted, highly problematic.

¹⁷³ Goold and Quigley, *Human Biomaterials*, pp.237-245

¹⁷⁴ In the words of Edelman, the English ‘no property’ rule is ‘*almost inexplicable. Even if it might have been re-rationalised as based upon some policy about the sanctity of the human body, the policy would be self-defeating... it allows the very acts that the policy is designed to prevent*’’: Edelman, *Property Rights to our Bodies*, p.19

¹⁷⁵ Gordon, *Criminal Law*, Vol. II (4th Edition), para.21.26

being that dispossession of those who hold the exhumation warrant would necessarily amount to spuilzie.¹⁷⁶

The submission that interred cadavers are protected by the crime of violation of sepulchres due to an implicit recognition of the grave-site as a *res religiosa* circumvents these issues. The difficulty with the abandonment thesis is avoided since there is a justification as to why the body cannot be ‘stolen’ while it is interred and there is likewise no need to suggest that a reverential funeral may be equated with the simple abandonment of a piece of property. The problems with holding that a body, once buried, is simply and inexplicably removed from the ambit of ‘property law’ are likewise averted. If the grave-site is a *res religiosa*, but the constituent parts of the *res religiosa* are profane and so subject to the laws of property, then it follows that, notwithstanding the fact that the body and grave-site cease to be governed by the ordinary laws of property while a cadaver is interred within, the law must necessarily recognise that exhumed cadavers can be stolen as the removal of a body from a *res religiosa* means that the *locus religiosus* ceases to be a *res religiosa*. Both corpse and grave, in such circumstances, are once again regulated by the ordinary rules of property.

Prior to burial, certain relevant persons are granted the right to possess the corpse to ensure its burial.¹⁷⁷ As cadavers can be stolen before the burial occurs, it may be presumed that the possessor is, until the time of burial, the owner of the body.¹⁷⁸ Once the body is buried,

¹⁷⁶ As the essence of spuilzie is the vitious dispossession of one in lawful possession of a corporeal moveable thing, which the cadaver evidently is: See Carey Miller and Irvine, *Corporeal Moveables*, para.10.24; Reid, *Property*, paras.161-164

¹⁷⁷ See the discussion in *Holdich v Lothian Health Board* [2013] CSOH 197 at para.49

¹⁷⁸ In Scots law, lawful possession gives rise to a presumption of ownership: Bell, *Principles*, (4th Edition), para.1311. Whether or not a corpse is ‘property’ for the purposes of Scottish civil law remains unclear, as there is an absence of binding authority on this point (see *C v M* 2014 SLT (Sh Ct) 109), but it is submitted that since the ‘no property’ rule was received into English civil law on the authority of a criminal case (*R v Sharpe* [1857] Dearsly and Bell 160), if a cadaver is ‘property’ for the purposes of Scots criminal law it may be inferred that it is also ‘property’ in the civil law, particularly given that Scots law recognises possessory interests in corpses. See, however, Niall R. Whitty, *Rights of Personality, Property Rights and the Human Body*, [2005] Edin. L.R 194, p.228

there is no enduring right of possession, although there may be persons with *ius sepulcri* in respect of the grave.¹⁷⁹ Such *ius sepulcri* does not, however, imply either ownership or legal possession; merely the ability to authorise decisions in respect of the grave-site. If a body is lawfully exhumed, then, once again, certain relevant persons will be granted the right to possess the body to ensure its re-burial or cremation elsewhere. Once again, it may be presumed that such persons are the ‘owners’ of the corpse for the purposes of criminal law and thus for the purposes of the law of theft. On this analysis, exhumed cadavers – and those dead bodies which are stored in locales other than grave-sites – can be ‘stolen’, in law as well as in fact, but there exists a justification as to why they cannot be stolen during their interment.

D. CONCLUSION

From the above, it is apparent that the crime of violation of sepulchres – as derived from the Roman *crimen violati sepulcri* – implies the existence of *res religiosae* within Scots law. The *crimen violati sepulcri* existed, in Roman law, to protect the integrity of grave-sites. In that legal system, all grave-sites were regarded as *res religiosae* and so were not subject to the ordinary rules of the *ius quod ad res pertinet*. Such things were consigned to the *divini iuris*, rather than the *humani iuris*. While a body was buried, it was not possible to raise a private action for theft if it were stolen, however the *crimen violati sepulcri* – as an *actio popularis* – allowed any private citizen to accuse an individual who purportedly interfered with a *res religiosa*. Individuals may have enjoyed *ius sepulcri* over the grave-site, but this did not grant *dominium* or imply *ius disponendi*; rather, it simply allowed the holder of the *ius* to lawfully exhume the bodies contained in the graves, or to raise a specific *actio violati sepulcri* in the event of unauthorised interference or removal.

¹⁷⁹ See *HM Advocate v Weir* (1899) 3 Adam 55n and the discussion *supra*.

The Scottish crime of violation of sepulchres evidently derives – in substance and in root – from the Roman *crimen violati sepulcri*. It is notable that the (reported) Scottish cases which deal directly with this crime, and those commentators who deigned to mention the crime throughout the 19th century, made use of the Latin phrase in describing the criminal act. The operation of the Scottish crime of violation of sepulchres remains comparable, in all material respects, to the operation of the Roman *crimen violati sepulcri*. In spite of the reluctance of post-Reformation Scots law to recognise *res sacrae* or *res sanctae*, the nature of the continued existence of the crime of violation of sepulchres implies a recognition of *res religiosae*, as bodies, prior to burial, may be stolen in this jurisdiction – so distinguishing Scots law from English law, wherein a general ‘no property’ rule operates – yet on burial even a very minor interference with the interred cadaver will incur criminal sanction.

Just as the creation of *res religiosae* could be explained by the operation of *accessio* – specifically *inaedificatio* – in Roman law, so too can the creation of a comparable Scottish *res religiosa* be explained by the operation of accession in Scots law. The pertinent Roman rules relating to *accessio* were received into Scots law during the institutional period and, though there are some differences between the Scottish understanding of the doctrine and the Roman law, under both systems it is evident that the moveable cadaver accedes as a fixture to the immoveable grave-site. The removal of the body, in both systems, destroys the *res religiosa*; in such circumstances, the constituent elements of the *res religiosa* return to their previous state, meaning that they are subject to the caprices of the ordinary law of property once more.

This analysis provides a satisfactory explanation as to why a dead body can be the subject of theft prior to burial, but cannot be stolen once it has been buried in Scots law. The analysis is, it is submitted, to be preferred to the other possibilities which have been put forward by other legal commentators. The suggestion that burying a dead body is akin to abandonment is unsatisfactory on both moral and legal grounds; on moral grounds, since most people would

likely be unhappy with the suggestion that they abandoned their relatives in burying them, on legal grounds as the law relating to abandonment does not explain why the corpse cannot be stolen while it is interred. Similarly, to hold that a dead body simply ceases to be an object of 'property' altogether on burial is not rationally satisfactory, since that would give rise to the same problems faced by English law as a result of its operative 'no property' rule. As indicated, the 'no property' rule undermines legal certainty and allows for the commission of '*peculiarly indecent*'¹⁸⁰ thefts to go unpunished on grounds of a simple legal technicality.

In addition, it is submitted that the alternative explanation of the law surrounding *res religiosae* functionally explains the absence of 'property' in buried bodies, thus providing a logical basis for the proposition that an unburied body may be stolen, but a buried body may not. On this basis alone, it may be concluded that the analysis provided in this article is to be preferred to the suggestions of abandonment or a complete lack of 'property' after the discharge of burial duties; when this fact is combined with a recognition of the problems presented by the alternative analyses, the suggestion that the logic of the crime of violation of sepulchres can be explained by reference to its Roman law progenitor garners greater currency still.

With that said, the suggestion that Scots law yet recognises *res religiosae* is not likely to be uncontroversial. The overtly religious overtones of the term and its history may be thought of as incongruent in an increasingly secular – and increasingly irreligious – society. Nevertheless, however unpalatable the acceptance of a phrase like '*res religiosae*' may be to secularists, without an understanding of the history of that term, and the connection that this history enjoys with respect to the operation of contemporary law, the law cannot move forward. Instances of violation of sepulchres – and instances concerning the unlawful appropriation of cadavers – may be (thankfully) rare, but that is no justification for the neglect of the theoretical

¹⁸⁰ See, again, *R v Stephen* (1884) 12 QBD 247, at p.252

framework of this aspect of the criminal law. It is therefore to be hoped that, with the relevant rules of law now having been set out, a debate as to how best to protect dead bodies from unauthorised or unlawful interference may begin in earnest.